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REMOVAL: NECESSARY AND SUFFICIENT FOR PRESIDENTIAL CONTROL

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ABSTRACT

Legal and political uncertainty continues to surround the independent agencies. Courts and scholars have recognized that control over administration usually depends on political realities rather than on legal categories of “independence.” This perspective, however, tends to disregard the constitutional boundaries for administration. Contrary to the conventional view, I explain why Congress’s authority over agency structure must have judicially enforceable limits in order to prevent encroachment on the executive power. In light of the constitutional text and structure, this Article demonstrates that the ability to remove principal officers is necessary and sufficient for presidential control of the executive branch. This means that all agencies, including the so-called independent agencies, must answer to the President. The principle allows Congress and the President to operate within their respective spheres while leaving most questions about actual administrative control to the political process. Limits on the President’s removal authority have always been in tension with the basic constitutional design and in recent years there has been growing dissatisfaction with the meaning, structure, and effects of independence. The precedents and functional justifications for supporting agency independence have largely collapsed. The issue is ripe for reconsideration. The constitutional structure requires presidential control and supervision over administration and the removal power provides the mechanism for the possibility of such control.

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INTRODUCTION	1207
I. CONTROL OVER EXECUTION AND THE PRESIDENT’S DIRECTIVE	
AUTHORITY	1212
<i>A. The Constitutional Framework for Control</i>	1212
<i>B. Executive Power Includes Directive Authority</i>	1217
<i>C. The President Is More Than an “Overseer”</i>	1219
II. REMOVAL NECESSARY AND SUFFICIENT FOR PRESIDENTIAL	
CONTROL	1225
<i>A. Necessity of the Removal Power</i>	1227
<i>B. The Conventional View of “Independence” Is Ripe for</i> <i>Reconsideration</i>	1230
<i>C. Executive Power Does Not Include Additional Mechanisms</i> <i>of Control</i>	1234
<i>D. Removal Is Constitutionally Sufficient</i>	1241
III. APPLICATIONS AND CONSEQUENCES OF RULE OF REMOVAL AT	
WILL 1243	
<i>A. Necessity of Removal</i>	1243
1. <i>Principal Officers Must Be Removable at Will</i>	1244
2. <i>Inferior Officers</i>	1244
3. <i>Adjudicators</i>	1247
4. <i>Interpreting Good Cause</i>	1250
<i>B. Sufficiency: Congress Retains Wide Authority over Agency</i> <i>Structure and Assignment of Duties</i>	1251
1. <i>Multi-Member Commissions or Boards</i>	1251
2. <i>Appointment for a Term of Years</i>	1252
3. <i>Independent Budgeting Sources</i>	1253
4. <i>Separate Litigating Authority</i>	1253
5. <i>Legislative Powers of Control</i>	1254
IV. ENFORCEABILITY AND OTHER BENEFITS	1257
<i>A. Removal Provides an Enforceable Rule for Presidential</i> <i>Control</i>	1257
<i>B. Severance: A Minimal Remedy</i>	1261
<i>C. Clearing the Fog of Independence</i>	1264
<i>D. Benefits to Administration</i>	1266
V. CASE STUDY: PRESIDENT, CONGRESS, AND THE CFPB.....	1269
<i>A. Challenges to the Bureau</i>	1270
<i>B. Removal Provides the Constitutional Remedy</i>	1271
<i>C. Removal May Provide Only Limited Control</i>	1274
CONCLUSION.....	1275

INTRODUCTION

Does the Consumer Financial Protection Bureau (“CFPB”) violate separation of powers? Since its establishment, the CFPB has faced political, administrative, and constitutional attacks.¹ Critics have charged that the Bureau possesses sweeping regulatory authority combined with an unprecedented degree of independence. The Dodd-Frank Act establishes this “independent bureau”² and specifies that the President can remove its director only “for inefficiency, neglect of duty, or malfeasance in office.”³ Moreover, the Bureau draws its budget from a fund within the Federal Reserve outside of Congress’s appropriations process.⁴ The statute also insulates the Bureau from review and control by the President and the Office of Management and Budget.⁵ Several lawsuits have alleged that the Bureau’s combination of features violates separation of powers.⁶

The constitutionality of this “independent bureau” implicates a broader debate about the extent to which the President must control the execution of the laws and the degree of independence that Congress can establish for administrative agencies. Although numerous so-called independent agencies⁷ exist in the federal government, challenges to their constitutionality continue to arise. This Article aims to identify the constitutional minimum for the exercise of presidential control over

1. See, e.g., U.S. CHAMBER OF COMMERCE, U.S. HOUSE SUBCOMMITTEE ON TARP, FINANCIAL SERVICES, AND BAILOUTS OF PUBLIC AND PRIVATE PROGRAMS, (May 24, 2011), *available at* <http://www.centerforcapitalmarkets.com/wp-content/uploads/2010/04/Pincus-testimony-Final.5.23.pdf> (“I am not aware of any other federal agency charged with regulating private sector activity that possesses all of these features. It is a dangerous combination, rendering the CFPB virtually immune from the well-established checks and balances that traditionally have been relied upon to guide and constrain agency action.”).

2. The Dodd-Frank Act establishes within the Federal Reserve “an independent bureau . . . which shall regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws.” 12 U.S.C. § 5491(a) (2012).

3. 12 U.S.C. § 5491(c)(3).

4. 12 U.S.C. § 5497(a)(1) (providing that the Federal Reserve “shall transfer to the Bureau from the combined earnings of the Federal Reserve System, the amount determined by the Director to be reasonably necessary to carry out” the CFPB’s functions); *see also* 12 U.S.C. § 5497(a)(2) (setting forth a cap for transfers to the CFPB).

5. 12 U.S.C. § 5492(c)(4) (“No officer or agency of the United States shall have any authority to require the Director or any other officer of the Bureau to submit legislative recommendations, or testimony or comments on legislation, to any officer or agency of the United States for approval, comments, or review prior to the submission of such recommendations, testimony, or comments to the Congress . . .”).

6. Several banks brought suit, represented by former White House Counsel C. Boydon Gray and the Competitive Enterprise Institute. *See* Brief for Plaintiffs, *State Nat’l Bank of Big Spring v. Lew*, 958 F.Supp.2d 127 (D.D.C. Aug. 1, 2013) (Case No. 1:12-cv-01032).

7. This Article challenges the idea that there can be agencies “independent” of the President and argues that all of the quasi-legislative and quasi-judicial agencies treated as independent are properly understood as executive branch agencies. *See infra* notes 109–116 and accompanying text. Nonetheless, for ease of discussion, I refer to independent agencies to denote the agencies conventionally understood in this way.

administrative agencies. In light of the constitutional text and structure, I demonstrate that the ability to remove at will all principal officers is both necessary and sufficient to ensure presidential control. The full removal power establishes a chain of command between the President and his subordinates that allows the President to direct in whatever way he chooses.

This inquiry is timely because contemporary developments suggest reasons for reconsidering the conventional status of independent agencies. For instance, the Supreme Court has repeatedly recognized that all agencies, including the independent ones, are part of the executive branch,⁸ making it difficult to explain as a constitutional matter why they should not be under the control and supervision of the Chief Executive. In addition, the Supreme Court's decision in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*⁹ could be read to undermine the constitutionality of any removal restriction that prevents the President from controlling or supervising execution of the laws.¹⁰

Moreover, recent scholarship has sought to clarify what precisely follows from the for-cause removal restrictions that are the hallmark of independent agencies.¹¹ Uncertainty remains about how precisely the President can supervise these agencies.¹² An emerging understanding recognizes that not much turns on removal or current labels of "independence." Yet this recognition is often accompanied by a disinterest in constitutional standards or acceptance of virtually unlimited congressional authority to impose limits on presidential control.¹³ Others

8. See *infra* notes 103–109 and accompanying text.

9. 130 S. Ct. 3138, 3163 (2010) (holding two layers of removal restrictions unconstitutional because they impermissibly limit the President's exercise of the executive power and his control of executive officers).

10. I advance this argument in greater detail elsewhere. See Neomi Rao, *A Modest Proposal: Abolishing Agency Independence in Free Enterprise Fund v. PCAOB*, 79 *FORDHAM L. REV.* 2541, 2544 (2011) (explaining why the "Court's logic can lead to the conclusion that even one layer of for-cause removal protection is unconstitutional" and that its arguments can be applied "to the wider battle over agency independence"); see also *In re Aiken Cnty.*, 645 F.3d 428, 439–46 (D.C. Cir. 2011) (Kavanaugh, J., concurring) (arguing that *Free Enterprise Fund* undermines the constitutionality of all independent agencies that operate "free of presidential direction and supervision").

11. See Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 *CORNELL L. REV.* 769 (2013); Adrian Vermeule, *Conventions of Agency Independence*, 113 *COLUM. L. REV.* 1163, 1203 (2013); Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 *VAND. L. REV.* 599 (2010); Elena Kagan, *Presidential Administration*, 114 *HARV. L. REV.* 2245, 2327 (2001); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 *COLUM. L. REV.* 1, 103 (1994).

12. Aziz Z. Huq, *Removal as a Political Question*, 65 *STAN. L. REV.* 1, 5–6 (2013); see also Datla & Revesz, *supra* note 11; Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 *COLUM. L. REV.* 573, 594 (1984).

13. See Datla & Revesz, *supra* note 11, at 775, 839 (noting that the President can require all agencies to submit to OIRA review "because there is no statutory bar prohibiting them from doing so," but that Congress can "exempt agencies from the regulatory review requirement"); Kagan, *supra* note

have argued that agency structures should be left to the political process and constitutional challenges treated as political questions inappropriate for judicial review.¹⁴ Scholars focusing on realist insights about independence have generally proposed functional solutions and remained relatively indifferent to constitutional requirements.

By contrast, I explain why a realistic understanding of administration lends greater urgency to constitutional questions and supports a formal framework of removal as necessary and sufficient for presidential control. The argument proceeds primarily from the text and structure of the Constitution.¹⁵ In particular, I do not provide an originalist or historical defense of this principle.¹⁶ Even with historical background about the meaning of presidential and congressional powers with respect to administration, scholars must still draw logical inferences for how these constitutional powers interact.¹⁷ Despite expansion of the administrative state, Congress's authority over agency structure must have some limits. Presidential control cannot be left to statutory interpretation or politics. The recognition that "independence" has an uncertain and unpredictable connection to presidential control and that administration depends largely

11, at 2325–26 (assuming that statutory assignments do not limit presidential direction unless Congress clearly indicates such a limit); Lessig & Sunstein, *supra* note 11, at 112 (explaining that "courts would allow the President [broad supervisory] power unless Congress has expressly stated its will to the contrary").

14. Huq, *supra* note 12, at 5–6.

15. See generally CHARLES L. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 31 (1969) ("There is . . . a close and perpetual interworking between the textual and the relational and structural modes of reasoning, for the structure and relations concerned are themselves created by the text, and inference drawn from them must surely be controlled by the text."); John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1947–49 (2011) (explaining that there is "no freestanding separation of powers doctrine" but that structural constitutional provisions can be understood "through clause-centered methods of textual interpretation").

16. A number of scholars on both sides of this debate have marshaled impressive historical studies of this topic and reached competing conclusions. Compare STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH (2008); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 592 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1167 (1992), with Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1729 (1996) (utilizing a historical approach based on primary materials as well as historical scholarship in order to "expose[] the presidentialist account—advanced in its most powerful form by Justice Scalia and Professors Stephen Calabresi and Saikrishna Prakash—as incomplete and flawed"); Lessig & Sunstein, *supra* note 11, at 4.

17. See Calabresi & Rhodes, *supra* note 16, at 1167 ("Although unitary executive theorists believe that Article II gives the President broad powers of control over the executive department, they must concede that both the text of Article II and our historical practice are of little help in identifying which of these mechanisms of presidential control, if any, is correct."); Flaherty, *supra* note 16, at 1816 (explaining changed circumstances in the federal government and arguing that "the task of fidelity demands figuring out what current applications best serve the Founding's surviving purposes in this new world"); see also H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 662, 691 (1987) ("History itself will not prove anything nonhistorical" and "never obviates the necessity of choice").

on political factors makes it all the more important to revisit the constitutional framework of administration and to establish the boundaries for presidential control.

I develop the argument of the Article as follows. Part I begins by examining the constitutional framework for control and specifically demonstrating why the executive power includes directive authority over all federal agencies. The President must be able to direct an officer in the exercise of a discretionary duty assigned to that officer by law. I explain why the account of the President as “overseer”¹⁸ claims too much for Congress’s authority and fails to provide a workable legal standard for execution.

In Part II, I demonstrate the central claim that removal provides the necessary and sufficient constitutional mechanism for ensuring presidential control and the possibility of direction. Removal properly places executive officers within the President’s chain of command. Given that so many aspects of actual presidential control are imperceptible, political, and discretionary, the President has constitutionally sufficient control when he can remove all principal executive branch officers, including the heads of the so-called independent agencies. Seeking a rule that avoids encroachments on core legislative powers, I explain why the only required mechanism for enforcing control is the removal power.¹⁹

Part III develops some of the consequences of the rule of removal as necessary and sufficient, examining how it would affect the power of the President over various types of officers. The sufficiency of removal leaves Congress free to promote various administrative values through the use of agency structures, including multi-member commissions or boards; appointment of officers for a term of years; independent budgeting resources; and separate litigating authority.²⁰ Congress retains wide latitude

18. See Peter L. Strauss, *Overseer, or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 704 (2007); see also Heidi Kitrosser, *The Accountable Executive*, 93 MINN. L. REV. 1741 (2009); Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 1011 (2001); Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 295 (2006).

19. Accordingly, I disagree with unitary theorists who have argued that presidential control must also include the ability to act in the place of a subordinate and to nullify actions of subordinates. These additional forms of control claim too much for the President and render meaningless Congress’s ability to assign statutory duties to other officers. See Calabresi & Prakash, *supra* note 16, at 599 (“[T]he President must be able to control subordinate executive officers through the mechanisms of removal, nullification, and execution of the discretion ‘assigned’ to them himself.”); Calabresi & Rhodes, *supra* note 16, at 1166; Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1243 (1994) (explaining why the President must have the power of nullification, but not necessarily the power of removal or the authority to act in the place of a subordinate).

20. There may be other limits on Congress’s ability to structure agencies, for example limits stemming from the President’s authority under the Appointments Clause. See *infra* notes 206–209 and accompanying text. These limits are outside the scope of this Article, which focuses on the policymaking stage of presidential control, as opposed to the stage of institutional design when

to establish administrative agencies and create regulatory duties, and the President, armed with the removal power, can control and direct the execution of those laws as he sees fit. As a practical matter, a principle of removal as necessary and sufficient will leave many questions about *actual* presidential control to the political process, where the constitutional structure fairly leaves it.

Although the argument for removal as necessary and sufficient rests on structural constitutional grounds, Part IV considers some advantages to the principle, including that it provides a judicially manageable constitutional standard for presidential control and for deciding separation of powers challenges to agency independence. Removal also has a number of benefits for administration, including that it resolves lingering uncertainty about the constitutionality of independent agencies and promotes a kind of political accountability through the possibility of presidential control. Finally, Part V considers the constitutional challenges to the CFPB as a case study for examining how a rule of removal as necessary and sufficient would work in practice.

Removal as necessary and sufficient properly accommodates the powers of Congress and the President over administration. An unfettered removal power protects the President's authority to control the execution of the laws while leaving significant scope for Congress to structure agencies. It fits with the constitutional structure, which gives each branch exclusive authority within its own sphere but limits encroachments.²¹ Removal as necessary and sufficient also allows courts to play a role in maintaining separation of powers while accommodating the variety of administrative agencies that have sprung up since the New Deal. Eliminating removal limits would disentangle legal and political questions about independence that have created administrative uncertainty. Control over administration could then be fought, as it usually is, on political grounds.

lawmakers are proposing and designing agency structures. See Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 66 (2008) (dividing up bureaucratic decisionmaking into an "institutional design stage" and a "policymaking stage"). Of course, both stages are relevant to presidential control over administration; yet here I consider only the distinct issues and powers relevant to the policymaking stage.

21. See generally THE FEDERALIST NO. 51 (James Madison) ("[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.").

I. CONTROL OVER EXECUTION AND THE PRESIDENT'S DIRECTIVE AUTHORITY

This Part uses the text and structure of the Constitution to examine some of the essential requirements of presidential control over administration. I propose a framework that accommodates the powers of both the President and Congress and use it to examine the debates over the extent of the President's directive authority. The question of directive authority stands at the boundary between presidential and congressional control over administration—when Congress, by statute, assigns an officer a specific duty, can the President tell the officer how to do his job? I argue that the respective authorities of the President and Congress require that the President be able to direct all principal executive branch officers, even when those subordinates have been assigned specific duties. Moreover, I demonstrate why limiting the President to an “overseer” role gives too much authority to Congress over execution and proves functionally unworkable.

A. *The Constitutional Framework for Control*

In the debate over presidential control and direction, the disagreements occur within a well-understood framework. Congress enjoys far-reaching authority under the Necessary and Proper Clause “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”²² Thus, Congress creates executive offices, specifies their structure, and assigns specific duties to executive branch officers. Similarly, there is agreement that the vesting of the executive power in the President, the creation of a unitary executive, requires some degree of control or oversight of the executive branch by the President.²³ A proper

22. U.S. CONST. art. I, § 8, cl. 18. Scholars who defend the unitary executive also recognize Congress's broad authority to structure executive branch agencies and the administration of law. *See, e.g.,* Calabresi & Prakash, *supra* note 16, at 592 (“Although the Necessary and Proper Clause does not permit Congress to tell the President how he ought to implement his own constitutional powers, it does enable Congress to structure the administration of federal law.”).

23. *See* U.S. CONST. art. II, § 3 (“[The President] shall take care that the Laws be faithfully executed . . .”). Even those who do not accept a strongly unitary executive consider that some level of presidential control follows from the requirements of Article II. *See, e.g.,* Strauss, *supra* note 12, at 605 (observing that the Founders undoubtedly created a strong unitary executive such that “congressional arrangements that threaten the viability of an independent, unitary executive capable of opposing the Congress's own assertions of power are, for that reason, suspect”); *id.* at 600 (noting the choice of a unitary executive in the Constitution and explaining that “however the executive power is defined, it is argued, it must be in ways that respect this quite fundamental structural judgment”); *see also* Heidi Kitrosser, *Accountability and Administrative Structure*, 45 WILLAMETTE L. REV. 607, 616 (2009)

account of presidential control must take into account both the significance of the vesting of executive power in one President as well as the specific grant of power to Congress under the Necessary and Proper Clause.²⁴ I argue here that the best understanding of the respective constitutional powers of Congress and the President provides for a wide measure of presidential control, including the ability to direct subordinates in the exercise of their discretionary statutory duties.

The text and structure of Article II support a conclusion in favor of presidential control over administration. Article II vests all of the “executive Power . . . in a President of the United States”²⁵ and creates a strongly unitary executive. This choice of a single executive was the result of careful deliberation by those who created the Constitution.²⁶ A unitary executive would provide energy, encourage good administration, and ensure an important form of accountability through responsibility for execution in one person.

The Vesting Clause also implies that all administrative powers that are not exercises of the legislative and judicial powers are within the executive branch and therefore must be within the control of the President: “The administrative power, if it exists, must be a subset of the President’s ‘executive Power’ and not of one of the other two traditional powers of government.”²⁷ Execution of the laws involves a wide measure of discretion and that discretion must be within the control of the President, even when exercised by other officials.

In addition to the Vesting Clause, other provisions of Article II clarify the importance of this unitary structure for administration. The Opinion Clause directly addresses the President’s relationship to subordinates: “[H]e may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices.”²⁸ As Akhil Amar has persuasively argued, this Clause is best read in light of the surrounding context and history to establish the President as the “Chief Administrator of the Executive Bureaucracy.”²⁹ The Opinion Clause allows the President to obtain an

(“[W]hile Congress is not categorically required to provide for unity, it cannot remove the President so deeply from law implementation as to functionally defeat his ability to ‘take Care that the Laws be faithfully executed.’”).

24. See Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 23 (1993) (recognizing residual powers in the President, but noting that “under no circumstances does the [residuum] argument allow any strong basis for claiming an implied grant of [executive] powers inconsistent with specific grants to other branches” (internal quotation marks omitted)).

25. U.S. CONST. art. II, § 1.

26. See THE FEDERALIST NO. 70 (Alexander Hamilton).

27. Calabresi & Prakash, *supra* note 16, at 569.

28. U.S. CONST. art. II, § 2, cl. 1.

29. Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 VA. L. REV. 647, 652 (1996).

opinion from a principal officer about his “respective” duties, which “conjures up a hub-and-spoke model, with the President at the hub, each Cabinet officer as a spoke, and no rim connecting the spokes independent of the hub.”³⁰ It confirms that executive agencies are subordinate to the President and that they must report to the President at his request.³¹ As Professors Calabresi and Prakash have explained, the President has the ability to request an opinion in writing “precisely so he will be able to issue binding orders to his subordinates.”³²

Others have argued that the Opinion Clause cuts against the view of the President as the Chief Administrator because it would be largely redundant if one assumed a strongly unitary view of the presidency.³³ Yet redundancies within the Constitution can serve to clarify and exemplify otherwise ambiguous or indeterminate provisions, and the Opinion Clause serves this purpose in Article II by clarifying the role of the President as Chief Administrator.³⁴ The location of the Clause in Article II, Section 2, with the President’s other significant powers reinforces an important relationship of the President as the head of the executive branch. It implies a degree of directive authority when the President can request the “opinion” of his principal officers—but they are “opinions,” which is to say not final decisions, and subject to revision by the President. The President may get multiple opinions and can make a decision between various lawful options. This also suggests that when a statute confers a duty on an officer, the President can get an opinion on the officer’s duties. Congress may place particular duties with executive officers, but the President may direct the exercise of those duties.

The Take Care Clause similarly confirms the President’s control over execution. The President “shall take care that the Laws be faithfully executed.”³⁵ The Clause is phrased as a duty to “take care” of faithful execution, but such a duty must include a grant of executive power that allows for fulfillment of the duty.³⁶ “Faithful” execution might refer to the idea that the President may not suspend statutes,³⁷ and it is well established that the President may not violate a constitutional law or direct his

30. *Id.* at 661.

31. The Opinion Clause also precludes the idea that Congress can limit Officers from reporting to the President. *See id.* at 659.

32. Calabresi & Prakash, *supra* note 16, at 584; *see also* Amar, *supra* note 29, at 673 (observing that the President may obtain an opinion “upon any Subject” and this “captures the breadth of Executive Branch discretion and judgment”).

33. Lessig & Sunstein, *supra* note 11, at 31–38.

34. Amar, *supra* note 29, at 651–52; *see also* Calabresi & Prakash, *supra* note 16, at 585.

35. U.S. CONST. art. II, § 3.

36. *See* Manning, *supra* note 15, at 2036; Calabresi & Prakash, *supra* note 16, at 583.

37. *See* Calabresi & Prakash, *supra* note 16, at 584 & n. 161 (explaining why faithful execution may preclude a general suspending authority).

subordinates to do so.³⁸ To ensure that the laws “be faithfully executed” the President will require the assistance of his subordinates and the ability to command their actions within a range of lawful options.³⁹

The Appointments Clause also supports a view of the President as the Chief Administrator. The Framers debated who would have the power to appoint executive branch officers and they ultimately placed that authority with the President, subject to the advice and consent of the Senate.⁴⁰ Appointment and the possibility of appointment to even higher offices reinforce an officer’s loyalty and the principal–agent relationship between the President and his officers. Although the Senate may block the President’s chosen nominee, the Senate cannot make the appointment. The Senate’s role in confirmation may serve as an important check, but it does not create a relationship of accountability or command between officers and Senators. Even after confirmation by the Senate, the President has the duty and the power to commission officers.⁴¹ A nominee confirmed by the Senate still receives his appointment and commission from the President, reconfirming the relationship between the President and his officers.

The text and structure of Article II provide the President with the power to control subordinates within the executive branch. He stands at the head of the administrative state and can control officers beneath him. The President chooses his subordinates and he must take care that they faithfully execute the laws. Recognizing the President’s control over the executive branch reinforces his responsibility—an important alignment of power and accountability.

While the President acts as the Chief Administrator, this still leaves the question of whether and to what extent the “executive Power” can be conditioned and limited by Congress’s authority under the Necessary and Proper Clause.⁴² This Clause provides a sweeping power for Congress to carry into execution the powers given in Article I and also “all other

38. See *infra* notes 49–51 and accompanying text.

39. U.S. CONST. art. II, § 3.

40. U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . 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.”).

41. U.S. CONST. art. II, § 3 (the President “shall Commission all the Officers of the United States”).

42. See John F. Manning, *supra* note 15, at 1967–68 (“Because [the Necessary and Proper Clause] . . . expressly grants Congress at least some authority to structure the way the executive and judicial powers are ‘carr[ie]d into Execution,’ one cannot establish a constitutional violation simply by showing that Congress has constrained the way ‘[t]he executive Power’ is implemented Thus, to invalidate a legislative regulation of executive power (such as the ‘good cause’ provision at issue in *Morrison*), an interpreter must be able to articulate reasons why the particular constraint shifts from permissible regulation to impermissible intrusion upon [t]he executive Power.”).

Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”⁴³ Congress enacts the laws to be executed and provides for officers to assist the President. The Supreme Court has recognized Congress’s broad authority over executive branch offices—including the assignment of duties and functions—even when upholding strong forms of presidential control.⁴⁴ Unitary theorists similarly acknowledge that Congress retains broad authority to create executive offices to assist the President with execution of the laws.⁴⁵

Importantly, however, Congress has no constitutional power to execute the laws. The Supreme Court has repeatedly held that Congress cannot aggrandize its own powers and impinge on executive power.⁴⁶ In particular, the Court has emphasized this limit with respect to the appointment and removal of executive branch officers, a power that Congress cannot share with the President. The Court has also ensured that the “legislative power” can be exercised only through the “finely wrought” process of bicameralism and presentment, which limits Congress from providing non-legislative checks against the executive branch.⁴⁷ Congress may check the executive, but only by exercising its enumerated powers. These legislative powers provide significant authority to shape and limit what the President can do. Nonetheless, Congress cannot take actions that amount to execution of the laws nor can Congress diminish the President’s control over execution.

43. U.S. CONST. art. I, § 8, cl. 18.

44. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3156 (2010) (“Congress has plenary control over the salary, duties, and even existence of executive offices. Only Presidential oversight can counter its influence. That is why the Constitution vests certain powers in the President that ‘the Legislature has no right to diminish or modify.’”); *Myers v. United States*, 272 U.S. 52, 129 (1926) (“To Congress under its legislative power is given the establishment of offices, the determination of their functions and jurisdiction, the prescribing of reasonable and relevant qualifications and rules of eligibility of appointees, and the fixing of the term for which they are to be appointed and their compensation—all except as otherwise provided by the Constitution.”); see also *Buckley v. Valeo*, 424 U.S. 1, 138–39 (1976) (“Congress may undoubtedly under the Necessary and Proper Clause create ‘offices’ in the generic sense and provide such method of appointment to those ‘offices’ as it chooses. But Congress’ power under that clause is inevitably bounded by the express language of Art. II, § 2, cl. 2, and unless the method it provides comports with the latter, the holders of those offices will not be ‘Officers of the United States.’”).

45. See CALABRESI & YOO, *supra* note 16, at 17 (“The increase in presidential power has been counterbalanced by the expansion of innovative devices through which Congress can exert control over the executive branch, including oversight hearings, investigations, appropriations riders, insertion of directions in legislative history, case work, and the extraction of concessions during confirmation hearings.”); Geoffrey P. Miller, *The Unitary Executive in a Unified Theory of Constitutional Law: The Problem of Interpretation*, 15 CARDOZO L. REV. 201, 205 (1993) (“It is clear, or relatively so, that Congress has the power to establish administrative agencies and to vest decision-making power in those agencies exclusive of other agencies . . . Congress no doubt has substantial control over the organizational structure of the executive branch, control that flows largely from the fact that Congress need not create the powers in question in the first instance.”).

46. See, e.g., *Freytag v. Comm’r*, 501 U.S. 868, 878 (1991).

47. See *INS v. Chadha*, 462 U.S. 919, 951 (1983).

B. *Executive Power Includes Directive Authority*

One specific question about the extent of the President's control over execution relates to his directive authority, which is the President's ability to direct subordinates when Congress has specifically assigned a duty to a particular officer. The extent of the President's directive authority implicates the broader structural question of what it means for the President to execute the laws and how far Congress can limit the President's control over execution. It is important to highlight that the direction question arises only in the context of *discretionary* statutory duties—delegations to executive branch officials to make policy choices in the context of rulemaking or other administrative actions.⁴⁸ Directive authority does not extend to actions inconsistent with a valid statute⁴⁹ or the Constitution.⁵⁰ The President and his subordinates are bound by the procedural and substantive requirements of the law.⁵¹ The breadth of many statutory delegations, however, leaves significant executive branch discretion on many important issues. The directive question is about how the President can control discretionary actions assigned to his subordinates.

The best understanding of the text and structure of the Constitution allows the President to have directive authority. Reading the Vesting Clause with other Article II powers, the Constitution creates “a hierarchical, unified executive department under the direct control of the President. . . . [T]he President alone possesses *all* of the executive power and [] he therefore can direct, control, and supervise inferior officers or agencies who seek to exercise discretionary executive power.”⁵² The

48. “The qualifier ‘discretionary’ is important. If a statute requires a *ministerial* act, such that a writ of mandamus would properly lie to compel its performance, it does not matter in whom the statute vests power.” Lawson, *supra* note 19, at n.65 (citing *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 610–13 (1838)); *accord* Calabresi & Rhodes, *supra* note 16, at 1166 n.53; *see also* Lessig & Sunstein, *supra* note 11, at 103 (noting as a statutory presumption that Congress cannot immunize “from presidential control the activities of officials who exercise discretionary policymaking authority”).

49. The President may, perhaps must, choose not to enforce an unconstitutional statute. *See, e.g.*, Neomi Rao, *The President's Sphere of Action*, 45 WILLAMETTE L. REV. 527, 552–53 (2009); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 262 (1994) (“Taken seriously the President’s oath *requires* that the President exercise full legal review over the lawfulness of other branches’ acts whenever he is called on to employ the executive power in furtherance of those acts.”).

50. *See generally* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 586 (1952); Monaghan, *supra* note 24, at 24, 31 (explaining the well-established principle that the President “lacks authority to act *contra legem*, even in an emergency” and noting that “[w]hether or not any president can live with it, the literary theory of ‘The executive Power’ recognizes no presidential license to disregard otherwise concededly applicable legislation, even in an emergency”).

51. *See* Calabresi & Prakash, *supra* note 16, at 596.

52. Calabresi & Rhodes, *supra* note 16, at 1165.

President as Chief Administrator acts through his principal officers to “take Care that the Laws be faithfully executed.”⁵³

When statutory duties involve a discretionary choice, that choice squarely falls within the execution of the law. Congress can create the statutory duty and assign it to a particular officer; however, the choice of how to execute the law within a range of legally permissible options is part of the executive power, not the legislative power. Discretion is an essential aspect of the executive power and therefore must be amenable to control by the President.

The President’s exclusivity particularly limits Congress’s role, in part because members of Congress cannot serve as Officers of the United States⁵⁴ and so “[i]t is hard to imagine that a document that forbids members of Congress from serving as executive officers would nonetheless allow such members to control indirectly the administration of the laws that they were disabled from controlling more directly.”⁵⁵ Professors Calabresi and Prakash have canvassed historical evidence of the pre- and post-ratification understandings of the “executive power” and concluded that it includes the essential power to execute the law, including with respect to controlling execution by others.⁵⁶

A contrary conclusion would be at odds with the constitutional structure. For instance, without directive authority, Congress could vest executive power in executive officers not under the control of the President. While Congress has the power to create offices and to assign regulatory duties to officers, it does not have the authority to control the manner in which the President exercises the executive power and directs his subordinates. If the assignment of a duty to a particular officer meant the officer had the authority to exercise discretion without direction from the President, execution would not be unitary. Because the directive authority is a constitutional requirement, it cannot depend on statutory construction as Professors Lessig and Sunstein maintain;⁵⁷ nor can Congress limit the President’s directive authority with a clear statement to that effect as then-Professor Kagan has argued.⁵⁸ Leaving this authority

53. U.S. Const. art. II, § 3.

54. U.S. CONST. art. I, § 6, cl. 2 (“[N]o Person holding any Office under the United States, shall be a Member of either House during his continuance in Office.”).

55. Calabresi & Prakash, *supra* note 16, at 582–83.

56. See Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701 (arguing that the President is the “chief executive” meaning the President can control federal law execution by either undertaking specific statutory decisions himself or by directing the law execution of officers); see also Calabresi & Prakash, *supra* note 16, at 595 (providing a textual and originalist argument for the unitary Executive and the President’s power to execute all federal laws).

57. Lessig & Sunstein, *supra* note 11.

58. Kagan, *supra* note 11, at 2326 (“If Congress, in a particular statute, has stated its intent with respect to presidential involvement, then that is the end of the matter.”).

with Congress would allow encroachments on essential aspects of execution of the laws.

The President must be able to control discretionary actions of the executive branch regardless of whether Congress has assigned a discretionary duty to a particular officer. Yet as explained below when a duty has been assigned to a specific officer, the President cannot undertake the duty himself.⁵⁹ Respecting the legislative assignment requires the officer undertake the duty, and respecting executive power requires that the officer follow presidential direction. This conclusion properly accommodates both the President's exclusive control of executive powers and Congress's power to create executive agencies and offices.

C. The President Is More Than an "Overseer"

Others have argued against the constitutional necessity of the President's directive authority, but these approaches do not accommodate essential aspects of the executive power and furthermore fail to provide an enforceable legal standard for the consequences of direction. For example, Professor Strauss suggests an understanding of the President as "overseer"—when Congress assigns a discretionary duty to an executive officer, that officer must implement the duty independently, which is to say without direction from the President.⁶⁰ In this view, "Congress's arrangements of government are a part of the law that the President is to assure will 'be faithfully executed,' and the Constitution's text anticipates that those arrangements will place 'duties' elsewhere in the executive branch, which Congress is given wide scope to define."⁶¹ From these constitutional arguments, Professor Strauss and others argue that although the President may be able to remove at will some executive agency heads, the President does not have directive authority when decisions are entrusted by statute to executive officers.⁶² The President lacks directive authority not only over independent officers (whose removal is restricted for cause) but also over any duty specifically assigned to an executive officer.

According to the "overseer" view, when a statute assigns a duty to an officer, the officer must use "independent" judgment in exercising the discretion conferred by law. Congress can thus insulate officers from presidential direction by the simple assignment of a duty, and the President

59. See *infra* notes 124-131 and accompanying text.

60. See, e.g., Percival, *supra* note 18, at 1011; Stack, *supra* note 18, at 295; Strauss, *supra* note 18, at 704.

61. Strauss, *supra* note 18, at 759.

62. See, e.g., Percival, *supra* note 18, at 1011 ("[T]he president may advise agency heads concerning his views on particular rules, but the president has no authority to dictate regulatory decisions entrusted to them by law."); Strauss, *supra* note 18, at 704.

can try only to persuade the officer to follow his preferred policies.⁶³ Professor Strauss argues for drawing a firm line against direction, a line he claims is necessary for the rule of law.⁶⁴ The President may “oversee,” he may “prod,” and he may have significant influence, but ultimately an officer with the statutory duty must decide for himself.

Independent discretion for executive officers, however, runs contrary to the best understanding of Article II. As explained above, the President’s directive authority follows from the text and structure of the Constitution. Nothing in the Necessary and Proper Clause allows Congress to place executive duties outside the control of the President. The arrangements of Congress—assigning duties to particular officers—can be respected by requiring a particular officer to take the statutory action, but the officer remains subject to presidential direction in course of his decisions.

In addition to constitutional problems, a realistic understanding of execution suggests the difficulty of maintaining the distinction between oversight and direction. As proponents of the “overseer” view acknowledge:

The difference between oversight and decision can be subtle, particularly when the important transactions occur behind closed doors and among political compatriots who value loyalty and understand that the President who selected them is their democratically chosen leader. Still, there is a difference between ordinary respect and political deference, on the one hand, and law-compelled obedience, on the other.⁶⁵

Application of the distinction between “oversight” and “decision” will invariably be tenuous.⁶⁶

The sheer variety of presidential oversight suggests the impossibility of separating influence from direction as a *legal* matter. The President may take, and historically has taken, a range of actions with regard to overseeing, supervising, or directing agency heads. Execution of the laws inherently involves a wide measure of discretion. This reflects the practical

63. Robert V. Percival, *Who’s in Charge? Does the President Have Directive Authority over Agency Regulatory Decisions?*, 79 *FORDHAM L. REV.* 2487, 2540 (2011) (“As a practical matter the absence of presidential directive authority means that Presidents must persuade agency heads when they want to influence regulatory decisions entrusted by law to them.”).

64. See Strauss, *supra* note 18, at 759 (“The size and ambition of contemporary government, in a country dedicated to the rule of law and resolute to defend itself against unchecked individual power, point in the same direction [of the President as ‘overseer’ not ‘decider’].”).

65. Strauss, *supra* note 18, at 704.

66. See *id.* at 714 (“In the real world, one might argue, this is a rather fragile distinction—impered by the tendencies both of some leaders to appoint yes-men, and of other appointees (those not meeting this description) to feel the impulses of political loyalty to a respected superior and of a wish for job continuity.”); see also Percival, *supra* note 63, at 2540.

realities and necessities underlying presidential control over agency decisionmaking. Congress has the authority to structure and to assign duties within an agency. Yet within this structure, the President must decide how to prioritize areas of oversight or control; whether and to what extent to trust his subordinates; and how to exert control for any number of political and administrative purposes. Presidential supervision may sometimes take visible forms, such as executive orders or signing statements. Supervision may occur in the policy process between the White House and agency officials or through clearance by the Office of Management and Budget (OMB). Perhaps most frequently, oversight or direction will occur indirectly or through informal channels.

Another difficulty with drawing a line between direction and oversight is that the form and type of presidential influence can be opaque for a number of reasons. For any particular administrative action, the specific issue, its political importance and visibility, and the individuals involved (and their expertise as well as political connections) can affect political oversight and control. Executive privilege may protect meetings between the President and his advisors. In addition, agencies may experience different levels and forms of White House oversight and sometimes overlapping or conflicting directions.⁶⁷ Agencies rarely mention White House or OMB involvement with rulemaking.⁶⁸ Although some have called for greater transparency of political involvement in agency decisionmaking,⁶⁹ there is no suggestion that the public be made aware of *all* presidential or White House contacts with agencies. Given all of these factors and many others involved with even “oversight” of an expansive bureaucracy, the point at which presidential oversight crosses the line to impermissible direction may be essentially unknowable.

Moreover, proponents of the rule against direction maintain that the President can be restricted from directing even those officers removable at

67. See Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47 (2006).

68. See Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1130, 1155–59 (2010) (offering evidence of “of an apparently significant level of White House influence on agency rules and of silence regarding the content of that influence, from both agencies and the Office of Management and Budget”).

69. Some scholars have called for statutes that promote greater transparency with regard to White House influence over agency decisions, including those that involve scientific or other expertise. See, e.g., Heidi Kitrosser, *Scientific Integrity: The Perils and Promise of White House Administration*, 79 FORDHAM L. REV. 2395, 2419–23 (2011) (detailing statutory proposals for constraining presidential administration and promoting expertise); Mendelson, *supra* note 68, at 1178 (arguing that “[d]isclosing more information regarding executive influence is likely to make agency decisions more candid and to increase the political accountability of the administrative state for decisions that are inevitably value-laden”).

will.⁷⁰ The threat of removal may include “enormous power to influence” agency decisions, but not direction.⁷¹ Separating the removal power from direction creates a difficulty with respect to actual administration. While in the abstract it may be true that an officer can be removable at will and yet also exercise independent judgment on specific issues, in reality officers removable at will generally understand that they answer to the President’s direction.

Furthermore, the restriction on direction applies only when Congress assigns a duty to a specific officer. Yet an officer will have a range of statutory duties—some specifically designated to his care and many other duties generally assigned to his agency. The President as “overseer” would be limited to persuasion for specific duties but could fully direct general duties. Given the relationship between the President and his officers and the way in which statutory responsibilities invariably overlap and interact, it is difficult, if not impossible, to draw a line between persuasion for some statutory duties and direction for others.⁷² Proponents of the “overseer” model do not specify a mechanism by which only certain statutory duties can be insulated from presidential direction. This demonstrates another difficulty with a restriction against presidential direction—it would require compartmentalizing statutory duties in a manner unlikely to bear any resemblance to how an agency head fulfills his myriad duties.

The mechanics of a rule against presidential direction are difficult to fathom, even for the proponents of such a rule. Professor Strauss suggests that executive officers and the President must behave *as if* direction is impermissible when a statute places responsibility with an officer—this is the “psychology of office.”⁷³ Professor Stack argues that providing a statutory basis for an officer’s independent discretion matters because it “influences the relative bargaining positions of the agency and the

70. See Stack, *supra* note 18, at 295 (“The power to remove certainly does not logically require directive authority; it is in principle possible to vest independent legal discretion in an official, even though the official is subject to removal by the President.”).

71. Percival, *supra* note 18, at 966; see also Stack, *supra* note 18, at 296 (“[T]he principled distinction between the power to remove and the power to direct makes a practical difference if we assume that perceived legal allocations influence how officials behave.”).

72. In *Myers v. United States*, the Court noted a similar difficulty of limiting the President’s removal authority to “political” decisions: “There is nothing in the Constitution which permits a distinction between the removal of the head of a department or a bureau, when he discharges a political duty of the President or exercises his discretion, and the removal of executive officers engaged in the discharge of their other normal duties.” 272 U.S. 52, 134 (1926).

73. See Strauss, *supra* note 18, at 712–13 (“This is precisely the difference between the oversight and the decisional presidency. In that difference, one may find an ineffable but central question about the psychology of office. Administrative law straddles the difficult, indistinct, inevitable line between politics and law.”); *id.* at 712 (“Rather, the question is where legal responsibility for the decision lies. In what frame of mind is this presidential prodding received? Does the recipient of such communications receive them as political wishes expressed by the leadership of her administration . . . [o]r does she take it as a command that she has a legal as well as a political obligation to honor . . .”).

President.”⁷⁴ Professor Percival wants to keep open the *possibility* for defiance by executive officials.⁷⁵ Yet the possibility of defiance does not depend on the absence of presidential directive authority. Rather, as Percival’s own examples suggest, defiance of the President depends on executive branch officials having a strong principled disagreement with the President and being willing to resign or be removed from office over the disagreement.⁷⁶ Having a specific statutory duty may give an official more backbone; however, it does not provide legal authority to act contrary to a presidential directive or say anything about whether the President could remove for failure to follow a directive. If the rule of law requires a restriction on presidential direction, then whether direction has occurred would seem to require greater visibility than the independence of an officer’s state of mind.

Finally, it does not appear that any substantive rights or legal consequences turn on whether the President is restricted from direction. “If the agency head is willing to embrace the decision as his or her own, the fact that the decision was the product of OMB or, in a rare case, presidential persuasion is unlikely to affect its chances of surviving judicial review.”⁷⁷ Legal vulnerability will turn on ordinary standards—such as whether the action is arbitrary, capricious, contrary to law, or insufficiently supported by the record—not on whether the White House directed the decision.⁷⁸

The effect of presidential involvement in administrative decisionmaking will rarely be presented for judicial decision. When courts do address this topic, they have generally affirmed political involvement in administration on the grounds that it promotes the legitimacy and

74. Stack, *supra* note 18, at 295.

75. Percival, *supra* note 63, at 2533–34 (explaining that directive authority “matters greatly” in part because “[i]t determines whether agency heads have a legal entitlement to refuse to comply with a presidential directive when it directs them to act in a way they believe is illegal, improper, or unwise”).

76. For example, Percival notes that David Kessler the Commissioner of the Food and Drug Administration disagreed with President George H.W. Bush over nutrition labeling. Percival argues that the fact that Kessler would have resigned rather than follow presidential direction demonstrates that the President does not have directive authority. *See id.* at 2510–11. Yet Kessler explicitly states in his memoirs that “[i]f the decision went against [the FDA], I could not disobey an order from the President. For me as a political appointee, the only response to defeat was to leave.” *Id.* at 2510 (citing DAVID KESSLER, *A QUESTION OF INTENT: A GREAT AMERICAN BATTLE WITH A DEADLY INDUSTRY* 67 (2001)). This strongly suggests, or at least does not foreclose the possibility, that the President has directive authority over discretionary decisions, because Kessler felt bound either to obey the President’s directive or to resign. *See CALABRESI & YOO, supra* note 16, at 388–89 (arguing that the Kessler example fails to show “any substantive restrictions on the president’s authority to execute the law”).

77. Percival, *supra* note 63, at 2534.

78. *Id.* at 2535 (“So long as the agency head insists . . . that the decision is his own, and not that of the White House, the decision is not legally vulnerable unless it is arbitrary, capricious, contrary to law or procedure, or insufficiently supported in the administrative record.”).

accountability of agency decisions. In *Sierra Club v. Costle*,⁷⁹ the D.C. Circuit explicitly contemplated that “Presidential prodding” was permissible and even in fact desirable for political accountability.⁸⁰ So long as an agency’s decision satisfies statutory criteria, there appears to be no constitutional or statutory grounds to support the idea that an action becomes invalid *solely* because of presidential or “political” direction.⁸¹

Indeed, a contrary conclusion would be illogical—it would require maintaining that an executive officer violates his statutory duty only when he disagrees with the President and nonetheless implements the President’s preferred policy. Similarly, the President violates the restriction on presidential direction only when his direction results in a policy at odds with the “independent” judgment of the executive officer. To describe this problem strongly suggests why no legal or constitutional principles can turn on this distinction. Presidential prodding or direction may or may not lead to good decisions—but that remains a factual and normative question, not a constitutional one.

If presidential direction often cannot be identified and no legal rights or consequences follow from the fact of presidential direction, it is difficult to maintain that Congress’s authority to restrict presidential direction is an essential part of separation of powers. Instead, the restriction on direction boils down to a political and prudential preference for how law should be

79. See *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981).

80. *Id.* at 408 (“[U]ndisclosed Presidential prodding may direct an outcome that *is* factually based on the record, but different from the outcome that would have obtained in the absence of Presidential involvement. In such a case, it would be true that the political process did affect the outcome in a way the courts could not police. But we do not believe that Congress intended that the courts convert informal rulemaking into a rarified technocratic process, unaffected by political considerations or the presence of Presidential power.”); cf. *Portland Audobon Soc’y v. Endangered Species Comm.*, 984 F.2d 1534, 1545–46 (9th Cir. 1993) (distinguishing *Costle* as a case about only informal rulemaking and holding that the Endangered Species Committee hearing was a formal adjudicative proceeding and the President and White House were subject to the Administrative Procedure Act’s prohibition on ex parte contacts in this context).

81. In *Massachusetts v. EPA*, the Supreme Court held that the Environmental Protection Agency’s denial of a petition for rulemaking to regulate greenhouse gas emissions under the Clean Water Act was not based on “reasoned explanation” and therefore was arbitrary and capricious. 549 U.S. 497, 534 (2007). In sending the petition for rulemaking back to the EPA, the Court recognized that that it was not reaching the question of how “policy concerns” could inform the EPA’s actions with respect to whether greenhouse gases endangered the public health. *Id.* at 535. As David Barron points out, even when the Court overturns an agency decision, it cannot remove politics from decisionmaking, nor can it force the exercise of “expertise.” Barron, *infra* note 87, at 1140 (judicial review “can ensure that changes to regulatory policy are accomplished only through a decisionmaking process that bears the attributes associated with a decisional process that is recognizably administrative in orientation [I]t does not actually force an agency to bring its expertise to bear.”); see also Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L. J. 2, 32 (2009) (arguing that “arbitrary and capricious review be modified so that certain political influences would be viewed as an appropriate factor in rulemaking”).

administered.⁸² These realities strongly suggest that the type of control, whether direction, oversight, or influence, remains part of the politics of the administrative state and within the President's discretion.

In sum, the President as "overseer," restricted from direction, assumes a problematic understanding of the role of Congress in controlling administration of the laws. The constitutional chain of command between the President and his subordinates cannot operate with statutory carve-outs. It also proves unworkable as a legal standard. Although Congress can create agencies and assign duties, it cannot limit the President's control over execution by assigning duties to other officers. A restriction against direction allows Congress to encroach on the President's execution of the laws by breaking the chain of command essential to executive power. Presidential control includes directive authority, regardless of where Congress assigns a statutory duty.

II. REMOVAL NECESSARY AND SUFFICIENT FOR PRESIDENTIAL CONTROL

For adequate constitutional control of execution, the President must have the possibility of directing discretionary legal duties, even those assigned to other officers. The directive debate highlights why Congress cannot limit the ability of the President to supervise or to control execution of the laws. This Part demonstrates that the ability to remove at will provides the necessary and sufficient constitutional mechanism for ensuring control, including through direction of subordinates. Given that so many aspects of actual presidential control are imperceptible, political, and discretionary, the President has sufficient control when he can remove at will all principal executive branch officers, which as I explain, includes the heads of those agencies treated as "independent." The sufficiency of removal, however, means that the President can remedy failures of direction only through removal. Here I respectfully disagree with other unitary theorists such as Professors Calabresi, Prakash, and Lawson who consider removal either insufficient or irrelevant to control.

It is timely to revisit the constitutional requirements for presidential control in light of growing dissatisfaction with the current division of the administrative state into independent and traditional executive branch agencies. The independent agencies, generally characterized as having heads removable only for cause, are understood to enjoy a certain level of legal insulation from presidential control. By contrast, traditional executive

82. See, e.g., Vermeule, *supra* note 11, at 1203 ("[T]he lens of convention suggests that the stakes of these [directive] debates are low, because in operation conventions will at least sometimes, and perhaps often, structure the relationship between the White House and agencies. Even as to agencies nominally within the executive branch, longstanding restraint by the White House or cabinet officials, in a given domain, can harden into a norm that constrains the directive power.")

branch agencies, whose heads are removable at will, are understood to remain subject to control by the President. In the real world of administration, however, the President exerts varying degrees of control over both types of agencies.⁸³ Discussions of the removal power may seem out of vogue⁸⁴ given the widespread recognition that the extent of *actual* presidential control does not necessarily turn on legal forms.

Scholars have advanced different functional responses to these practical realities. Kirti Datla and Richard Revesz have recently argued for “deconstructing” independence.⁸⁵ Others such as Lessig and Sunstein have supported greater presidential administration for functional reasons,⁸⁶ while some have questioned the desirability and effects of “political” control of agencies.⁸⁷ Adrian Vermeule has suggested that the operation of agency independence should be understood in terms of conventions, not legal forms.⁸⁸ Political scientists have studied the extent and forms of political control over agencies by the President and Congress. Yet much of this scholarship either remains relatively indifferent to the legal and constitutional questions about presidential control,⁸⁹ or assumes that

83. See Strauss, *supra* note 12, at 596 (“[A]ny assumption that executive agencies and independent regulatory commissions differ significantly or systematically in function, internal or external procedures, or relationships with the rest of government is misplaced. Our government is characterized by a profusion of forms, each related in significant ways to Congress, President and Court. The choice of form has little relation to the work they do or the manner in which they perform it.”). See also Anne Joseph O’Connell, *Bureaucracy at the Boundary*, 162 U. PENN. L. REV. 841 (2014) (critiquing the “classic image of the federal administrative state—that of a bureaucracy consisting almost entirely of executive agencies and independent regulatory commissions”).

84. In the 1980s and 90s, a debate over the “unitary executive” played out in the Department of Justice, as well as in law reviews, considering the textual, structural, historical, and normative arguments in favor of and against the view of a unitary executive branch in which the President must control all discretionary executive actions. A key component of this debate was the removal power and whether the President could remove at will all executive branch officers. See, e.g., Calabresi & Prakash, *supra* note 16; Calabresi & Rhodes, *supra* note 16; Flaherty, *supra* note 16; Lessig & Sunstein, *supra* note 11; see also CALABRESI & YOO, *supra* note 16 (tracing the history of the unitary executive).

85. See Datla & Revesz, *supra* note 11.

86. See Lessig & Sunstein, *supra* note 11.

87. See Mendelson, *supra* note 68; Stephenson, *supra* note 20; see also David J. Barron, *Foreword: From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1097 (2008) (noting that the “development [of agency politicization] suggests that—interesting though the legal questions associated with various forms of external White House regulatory control may be—it is critical to examine the consequences of the politicization of the national bureaucracy itself”).

88. See Vermeule, *supra* note 11, at 1167 (“The lens of convention . . . explains the disparity between the written law of independence and the operating rules of independence in the administrative state.”).

89. *Id.* at 1174 (discussing the legal doctrine but explaining how it “does not offer a reliable guide to the body of observed practices and norms that constitute the landscape of agency independence”); Datla & Revesz, *supra* note 11, at 826 (“The President can take any action toward an agency that is within the scope of his Article II powers unless an agency’s enabling statute prohibits such action.”). *But cf.* Datla & Revesz, *supra* note 11, at 826–27 & n.319) (not taking sides in the debate over how much of the President’s Article II powers Congress can limit).

Congress has the authority to significantly restrict presidential control over agencies.⁹⁰

The focus on actual presidential control has led to a neglect of the constitutional framework for administration. Clearing away the misleading labels of independence does not clear away the constitutional concerns about the respective powers of the President and Congress. Reconsidering independence highlights how *actual* presidential control is not the constitutional concern. Instead, the constitutional question of executive power relates to the *possibility* of control and leaving the extent and type of control within the discretion of the President.

The principle of removal as necessary and sufficient provides a constitutional framework for administrative control that better accounts both for the vesting of the executive power in the President and Congress's authority to create offices and assign duties to particular executive branch officials. The removal power may not provide the President with every form of control, yet it satisfies a constitutional minimum for the exercise of executive power.

A. *Necessity of the Removal Power*

For the President to have the possibility of control over execution, he must have the ability to remove all executive branch officers at will. The constitutional text, structure, and history strongly support the necessity of the removal power. A number of scholars have carefully demonstrated the requirement of the removal power for the unitary executive and I rely in part on their thoughtful and thorough work.⁹¹

The full removal power provides the President with the ultimate authority to control the exercise of the executive power. When Congress creates executive branch officers, they must be the agents of the President

90. See, e.g., Kagan, *supra* note 11, at 2325–26 (explaining that Congress “can insulate administrative policymaking from the President” by delegating discretion to a specified agency official and that Congress “could bar the President from directing discretionary action” so long as it imposed limits clearly).

91. See Calabresi & Prakash, *supra* note 16, at 597 (“[S]tructural reasons and a host of historical and textual arguments persuade us that the President must also have a removal power so that he will be able to maintain control over the personnel of the executive branch.”); see also Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 88, 97 (examining the constitutionality of limits on the removal power with consideration of the text, structure, history, function, remedy, and case law and concluding that “the President must have the power to remove policy-making officials of agencies, whether or not denominated as ‘independent,’ when the officials fail to follow a presidential instruction to carry out an action otherwise within their statutory discretion”); David P. Currie, *The Distribution of Powers after Bowsher*, 1986 SUP. CT. REV. 19, 35; cf. Lawson, *supra* note 19, at 1244–45 & n.74 (agreeing with the theory of the unitary Executive but arguing that the removal power is “either constitutionally superfluous or constitutionally inadequate” and “therefore constitutionally nonexistent as well”).

and no one else.⁹² Removal establishes this control and the requisite agency relationship as a structural matter, because it leaves the President with superintendence of his subordinates. The person that controls removal commands the subordinate's loyalty—a simple truth of administration that an officer will seek to please the person that decides whether the officer stays or goes. The removal power ensures the relevant agency relationship that allows the President to execute the laws as the Chief Administrator. Removal also accommodates the discretionary nature of much executive action. Often executive branch officials will need to decide between several lawful options and their choice must be based on their judgment of how best to proceed. Without any action on the President's part, officers subject to removal by the President will be encouraged to exercise their discretion in line with the President's policies. Similarly, armed with the threat of removal, the President can direct his subordinates and remove for failure to follow direction or for any other reason.

The President's control over subordinates constitutes an essential aspect of the independence of the executive branch in the scheme of separation of powers. The President must be able to control the exercise of discretion by his subordinates. The lack of such control, or congressional control of execution, would undermine the separate and coordinate nature of the executive branch. Other grounds for the removal power remain more tenuous.⁹³

Moreover, the Constitution provides the executive power must be exercised within a branch with specific characteristics,⁹⁴ namely as

92. See John Harrison, *Addition by Subtraction*, 92 VA. L. REV. 1853, 1862 (2006) (“The President, and the President alone, is vested with the executive power. That means that subordinate officers who exercise that power must be his agents and agents of no one else. The latter is true because if they were agents of someone else, that someone else would have the executive power, or some share of it. The problem with a congressional removal power over executive officers is that it would create an agency relationship between those officers, and the executive power they exercise, and the legislature. That would defeat separation of powers.”).

93. In addition to the vesting power, Professor Prakash has argued that the removal power could follow from the “disempower power” and the President's power to set the tenure of offices. Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. 1779, 1817 (2006) (“Because the powers the executive officers help exercise are ultimately the President's, he may withdraw his authorization. When the President rescinds his authorization, he disempowers the executive officer and thereby removes her.”). I am skeptical of this principle because the power of subordinate officers to execute the laws comes from both the Chief Executive as well as from the laws enacted by Congress. If a statute assigns a duty to a particular officer, the officer in part draws his power from this assignment and the duty cannot be exercised by the President. See *infra* notes 137–38 and accompanying text.

94. See Manning, *supra* note 15, at 2009 (“Even though the powers vested may themselves be generally worded, constitutionmakers chose to assign those powers to branches that have very specific and carefully chosen characteristics relating to their composition, their modes of selection, their terms of office, and their methods of operation. In other words, while a largely open-ended compromise is reflected in the unspecified content of the Vesting Clauses, the more particular compromise is evident in the decision to associate whatever uniquely identifiable functions each power may connote with its own intricately designed branch of government.”).

discussed, a unitary executive. As Alexander Hamilton famously argued: “Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks: it is not less essential to the steady administration of the laws.”⁹⁵ This characteristic energy in the Executive depends on a single President responsible for execution and accountable to the public. Just as legislation must be enacted through the rigorous process of bicameralism and presentment, execution of the laws must be under the direction or superintendence of the President as provided for in Article II.

Unlike the finely wrought process for enacting legislation, the forms of execution will vary, depending in part on the laws and structure that Congress creates and in part on how the President and his officers choose to exercise the discretion conferred by law. Yet the Constitution importantly specifies that execution must occur under the control of the President. How such control must be maintained is not explicit, yet removal at will provides a mechanism for such control consistent with the constitutional indeterminacy of actual methods of control. Removal leaves the extent and type of control with the President and fits with the text and structure of Article II—it allows him to direct subordinates to ensure faithful execution of the laws.

It follows from the foregoing that the Necessary and Proper Clause does not give Congress the authority to create offices or agencies or particular duties that operate independently of the President.⁹⁶ Although Congress has wide authority to structure the executive branch, the President must execute and administer the laws Congress enacts. It would not be “proper” therefore for Congress to place execution of the laws outside the executive branch and outside the control of the President.⁹⁷ Is an agency whose heads are removable only for cause outside the control of the President? While actual control may be hard to assess and may depend on a variety of political factors, removal establishes the necessary chain of command and provides the hard backstop of accountability for following the direction of the President. If Congress limits the President’s ability to remove, it limits his ability to direct and to control. It severs the dependence and supervision between the President and his subordinates. It upends the Chief Administrator model set forth by Article II.

95. THE FEDERALIST NO. 70 (Alexander Hamilton).

96. See Calabresi & Prakash, *supra* note 16, at 586–88 (“Congress could not ‘carry[] into execution’ any constitutional power by creating an independent officer or agency because such an officer or agency would be unable to exercise executive, legislative, or judicial power under the text of the Constitution, and there are no other powers of government available to be exercised.”).

97. See Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L. J. 267, 271–72 (1993).

I focus in the remainder of this Part on why the conventional view of agency independence should be reconsidered and why removal provides the sufficient mechanism of presidential control over executive branch agencies.

*B. The Conventional View of “Independence” Is Ripe for
Reconsideration*

The foregoing discussion has demonstrated that the constitutional text and structure provide for presidential control over administration and for removal as the constitutional mechanism of that control. Nonetheless, the conventional view supports the constitutionality of agency independence.⁹⁸ In response to those who will be skeptical of my proposal, I explain why the grounds for defending the constitutionality of removal limits have eroded over time, making it ripe for reconsideration of the issue.

First, with respect to precedent, although *Humphrey’s Executor v. United States*⁹⁹ and *Morrison v. Olson*¹⁰⁰ have not been overruled, their reasoning has been undermined by a growing acceptance of a more formal view of separation of powers.¹⁰¹ *Humphrey’s Executor* held that the commissioners of Federal Trade Commission exercised quasi-judicial and quasi-legislative powers and therefore were not part of the executive branch.¹⁰² By contrast, today there is a widespread understanding that every

98. Academic commentary overwhelmingly assumes that Congress can limit the President’s removal power over executive officers in at least some circumstances. See Flaherty, *supra* note 16, at 1835 (explaining that presidential removal is not supported by the constitutional text and that limitations on presidential removal comport with the Founders’ values or at least they “comport with [modern] values” including balance between Congress and the President); Strauss, *supra* note 12, at 615 (recognizing the centrality of the President’s supervisory role over the executive branch but noting that removal limitations could be justified where an agency such as the Federal Trade Commission adjudicates and Congress does not retain any removal authority for itself).

99. 295 U.S. 602 (1935).

100. 487 U.S. 654, 709 (1988).

101. See Currie, *supra* note 91, at 35 (“The Constitution recognizes only three kinds of federal powers: legislative, executive, and judicial. If the power either to ‘fill[] in . . . the details’ of the congressionally prescribed prohibitions or to adjudicate disputes arising under federal law can properly be lodged outside Congress and the courts, it is only on the theory that they pertain to the implementation of law; and this means that they too must be subject to Presidential control.”); Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 228 (proposing a “minimal” conception of separation of powers based not on the functions of government but rather on “a simple rule: there are only three branches of government, and every federal office must be accountable to one of these branches. Thus, an attempt by Congress to create a ‘Fourth Branch’ of the federal government would be unconstitutional. Moreover, because every federal office must be located ‘in’ one of the three branches, each office is subject to whatever specific constitutional limitations apply to action by its branch.”); Miller, *supra* note 91, at 53 (identifying a “neoclassical” or formalist approach “which has recently come to the fore in [Supreme Court cases]”).

102. 295 U.S. at 628 (“To the extent that it exercises any executive function, as distinguished from executive power in the constitutional sense, it does so in the discharge and effectuation of its quasi

federal entity must be accountable to one of the three branches. Agencies that execute the laws exercise the executive power and therefore are part of the executive branch. Regardless of the functions they exercise, these agencies do not constitute a “fourth branch” exercising quasi-powers.

The Supreme Court has largely incorporated the formalist framework, even if not all of its implications. Most recently, in *Free Enterprise Fund*, the Court repeatedly refers to the Public Company Accounting Oversight Board (PCAOB) as having “executive power” and being part of the executive branch, despite its statutory designation as an “independent” agency and its responsibility for adjudication.¹⁰³ Similarly, the Court has identified other independent agencies such as the Securities Exchange Commission and the Federal Election Commission as part of the executive branch because their commissioners exercise the executive power.¹⁰⁴ Justice Scalia has also explained that judges within the executive branch, although adjudicating cases, nonetheless exercise the executive power.¹⁰⁵ Even those justices who maintain the constitutionality of removal restrictions place the independent agencies within the executive branch.¹⁰⁶ The Court has also resisted efforts to reclassify executive officers as congressional—an officer that exercises any executive power cannot answer to Congress.¹⁰⁷ Similarly, scholars do not rely on a fourth-branch rationale of quasi-legislative and quasi-judicial entities to support statutory

legislative or quasi judicial powers, or as an agency of the legislative or judicial departments of the government.”).

103. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3155 (2010) (“By granting the Board executive power without the Executive’s oversight, this Act subverts the President’s ability to ensure that the laws are faithfully executed.”); *id.* at 3159 (“[T]he Sarbanes-Oxley Act is highly unusual in committing substantial executive authority to officers protected by two layers of for-cause removal.”).

104. *Id.* at 3163 (“Because the [SEC] is a freestanding component of the Executive Branch, not subordinate to or contained within any other such component, it constitutes a ‘Department[t]’ for the purposes of the Appointments Clause.”); *Buckley v. Valeo*, 424 U.S. 1, 132–33 (1976) (“No class or type of officer is excluded because of its special functions. The President appoints judicial as well as executive officers. Neither has it been disputed—and apparently it is not now disputed—that the Clause controls the appointment of the members of a typical administrative agency even though its functions, as this Court recognized in *Humphrey’s Executor v. United States* . . . , may be ‘predominantly quasijudicial and quasilegislative,’ rather than executive.”).

105. *See Freytag v. Comm’r*, 501 U.S. 868, 909 (1991) (Scalia, J., concurring in part and concurring in the judgment) (concluding that the Tax Court is a “Department” within the executive branch); *id.* at 912 (“It seems to me entirely obvious that the Tax Court, like the Internal Revenue Service, the FCC, and the NLRB, exercises executive power.”).

106. *See Free Enter. Fund*, 130 S. Ct. at 3165–68 (Breyer, J., dissenting) (adopting a functional approach to separation of powers but discussing members of the PCAOB as “Executive Officers” and examining whether for-cause restrictions limit “the President’s exercise of executive authority”); *see also Mistretta v. United States*, 488 U.S. 361, 423–24 (1989) (Scalia, J., dissenting) (“Over the years . . . *Humphrey’s Executor* has come in general contemplation to stand for something quite different—not an ‘independent agency’ in the sense of an agency independent of all three Branches, but an ‘independent agency’ in the sense of an agency *within* the Executive Branch (and thus authorized to exercise executive powers) independent of the control of the President.”).

107. *See Bowsher v. Synar*, 478 U.S. 714, 750 (1986).

limits on presidential control, instead arguing that such limits are consistent with an exercise of the executive power.¹⁰⁸

As a practical matter, this means that there is now widespread acceptance that most agencies, including those traditionally denominated as independent, exercise the executive power even when they adjudicate and make rules. This conclusion follows inexorably from the Constitution's structure¹⁰⁹ and has now largely displaced the idea of a separate regulatory branch of government exercising quasi-powers. It follows that removal limits cannot be sustained on the *Humphrey's Executor* rationale that a commissioner of the Federal Trade Commission is not an executive officer and does not exercise the executive power.¹¹⁰ As a logical matter it becomes harder to defend "independence" and removal restrictions once these agencies are acknowledged to be executive. Since the heads of these agencies are executive officers, they must be within the control of the Chief Executive.

Second, the functional arguments for limits on removal have also eroded over time. These arguments focused on the benefits of administrative independence, such as freedom from "politics" or the promotion of scientific and other expertise. Many who reject the constitutional arguments for the unitary executive nonetheless argue that administration can be improved by greater presidential control.¹¹¹ In addition, the functional realities of agency structure suggest that there is little practical difference between the independent agencies and other executive branch agencies. Rather, independence occurs on a continuum.¹¹² Independent and executive branch agencies both have structures that can include for-cause removal limits, budget independence, and multi-member commissions.¹¹³ Similarly, a number of scholars have argued that there is little functional difference between the degree of control the President has over the different types of agencies or at least that control does not

108. See Strauss, *supra* note 12, at 590–91.

109. See Currie, *supra* note 91, at 35; Miller, *supra* note 91, at 67; see also Calabresi & Prakash, *supra* note 16, at 559 (providing textual and structural evidence that there exists only a "trinity" of constitutional powers—executive, legislative, and judicial—and that any "administrative" power must be within the executive branch).

110. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 627–28 (1935); see also Morrison v. Olson, 487 U.S. 654, 709 (1988) (Scalia, J., dissenting) (explaining how the majority eviscerates *Humphrey's Executor* when it holds that a purely executive officer, the independent counsel, could be outside of the President's control).

111. See Kagan, *supra* note 11, at 2327–31 (explaining that the President's directive authority turns on interpretive principles and argues that greater presidential control promotes good administration and therefore provides a presumptive reading in favor of directive authority); Lessig & Sunstein, *supra* note 11, at 110 ("If the statutory words allow for considerable presidential removal (and hence supervisory) power, the notion of independent administration of the laws can be solved simply as a matter of statutory construction.")

112. See Datla & Revesz, *supra* note 11, at 825–26.

113. *Id.*

necessarily turn on an agency's denomination as independent or on its particular legal structure.¹¹⁴ These realities further erode functional justifications for removal restrictions that create independence from presidential control.

Another common justification for removal limits has been the need to preserve independence for adjudications. This criterion also fails to distinguish independent agencies, as adjudication regularly occurs in both independent and executive branch agencies. The structure of independent agencies was designed largely in light of adjudication;¹¹⁵ however, independent agencies have for many years also engaged in rulemaking in a manner similar to executive branch agencies. As Paul Verkuil has argued, "Rulemaking challenges the organizational theory behind the independent agency."¹¹⁶ Given that the adjudicatory function of these agencies no longer has primacy or at least is mingled with other functions, the justifications for removal restrictions further recede or perhaps should apply only to adjudicators, but not to officers that combine functions.¹¹⁷

Finally, removal restrictions have not reached the status of an inviolable constitutional rule. Although certain norms have developed around removal limits and conceptions of independence, they have not hardened into firm constitutional rules. The scope of removal authority has always been a point of contention. Throughout our history Presidents have challenged limits on their removal authority.¹¹⁸ The Supreme Court has sent mixed messages.¹¹⁹ Most recently in *Free Enterprise Fund v. PCAOB*, the Supreme Court held two layers of removal protection unconstitutional.¹²⁰ The logic of the decision, however, strongly suggests that even one layer of removal protection may be unconstitutional because

114. See *id.*; Strauss, *supra* note 12, at 592 ("Perhaps the central fact of legislative-executive management of oversight relationships with the agencies is the extent to which behavior is determined by political factors rather than law."); Vermeule, *supra* note 11, at 1166 (noting that agencies that lack for-cause tenure sometimes still enjoy "operative independence" because they are "protected by unwritten conventions that constrain political actors from attempting to bully or influence them").

115. See Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 261 (1988) ("When the three qualities of independence are added in (namely bipartisan appointments, terms of years and for cause removal), it becomes clear the independent agencies emulate our most revered collegial bodies—the courts, or, more precisely, the appellate courts").

116. *Id.* at 265 (arguing that adjudication should be split from other agency functions in both independent and executive branch agencies).

117. See Kevin M. Stack, *Agency Independence after PCAOB*, 32 CARDOZO L. REV. 2391, 2412 (2011) (explaining the Supreme Court's decision in *Free Enterprise Fund v. PCAOB* as adopting a principle that "[s]eparation of powers is violated by good-cause protection for an agency with a combination of functions, but not for an agency that only adjudicates").

118. See generally CALABRESI & YOO, *supra* note 16 (explaining that all presidents "have consistently adhered to a practice of construing the Constitution as creating a unitary executive and giving them the removal power over the past 218 years").

119. Compare *Myers v. United States*, 272 U.S. 52 (1926), with *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

120. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010).

it limits the President's control over execution of the laws.¹²¹ The reasoning of *Free Enterprise Fund* and the recognition that independent agencies exercise the executive power and are part of the executive branch should lead to the conclusion that the heads of all agencies must be subject to control through removal by the Chief Executive.

Limits on removal authority have always been in tension with the basic constitutional design and in recent years there has been growing dissatisfaction with the meaning, structure, and effects of independence. The precedents and functional justifications for supporting agency independence have largely collapsed. The issue is ripe for reconsideration. The constitutional structure requires presidential control and supervision over administration and the removal power provides the necessary mechanism for the possibility of such control.

C. Executive Power Does Not Include Additional Mechanisms of Control

Proposing removal as a necessary component for presidential control will strike many as a radical departure from the current administrative state, which includes countless independent agencies whose heads can be removed only for cause. Removal as sufficient, however, tempers some of the more radical implications of this view. In this respect my proposal, although sharing many assumptions of unitary theorists, disagrees with the mechanisms they have identified for necessary control, including the power of the President to execute any law himself, and/or the power to nullify an action by an executive officer. While having these tools would certainly give the President greater control over law execution, they would encroach on Congress's authority and go beyond what is properly included in execution of the laws.

Proponents of the unitary executive have grappled with what forms of control are required by the vesting of all executive power in the President. Although they have reached some different conclusions, the leading unitary theorists all argue that the President can direct subordinates, but that removal alone does not ensure adequate control. Professors Calabresi and Prakash identify three mechanisms of control, all of which they argue are within the executive power vested in the President. These include (1) removal; (2) "a power to act in [the subordinate's] stead"; and (3) "a power to nullify [a subordinate's] acts when the President disapproves."¹²²

121. See Rao, *supra* note 10; accord *In re Aiken Cnty.*, 645 F.3d 428, 439–46 (D.C. Cir. 2011) (Kavanaugh, J., concurring).

122. Calabresi & Prakash, *supra* note 16, at 595; see also Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 58 (1995) (noting that "all three presidential mechanisms of control are constitutionally mandated").

I agree with Calabresi and Prakash as to the necessity of removal based on the Vesting Clause.¹²³ Yet for Calabresi and Prakash, removal alone does not provide the requisite degree of control required by the “executive Power.”¹²⁴ First, Calabresi and Prakash argue “notwithstanding the text of any given statute, the President must be able to execute that statute, interpreting it and applying it in concrete circumstances,”¹²⁵ which is to say that the President can personally execute all laws. It does not matter whether a statute confers a duty on a specific officer, because an executive officer’s authority derives not from the statutory assignment, but from the President.¹²⁶ For Calabresi and Prakash, the grant of executive power includes a grant to the President to personally execute any and all laws, not just to direct or take care of the faithful execution of the laws.¹²⁷ Because executive officers merely “assist” the President, the President may assume statutory duties himself.

Although my view of the directive power shares many of the assumptions of unitary theorists, I disagree that the President can execute discretionary duties assigned elsewhere by statute. The better understanding of the Necessary and Proper Clause is that “Congress can at least determine *which subordinate officials, if any*, are permitted to exercise delegated executive powers.”¹²⁸ I agree with Professor Gary Lawson that

123. Calabresi & Prakash, *supra* note 16, at 597–98 (“If the President is to have effective control of his constitutionally granted powers, he must be able to remove those who he believes will not follow his administrative agenda and philosophy. We thus reject the idea that the President lacks a textually explicit power of removal, adopting instead the argument that the President may remove executive officers using his Vesting Clause grant of ‘executive Power’ that allows him to superintend the execution of federal law.”).

124. *Id.* at 598 n.217 (“We agree with Professor Lawson that the Clause grants the President the power to control the execution of federal law. That removal authority, by itself, might not be an entirely satisfactory mechanism to achieve that control does not mean that it is not encompassed within the grant of ‘the executive Power.’ Rather, recognizing the limitations of the removal authority only bolsters the notion that there must be other means of control as well, such as the President’s ability to make statutory decisions himself and the ability to countermand. Each of these mechanisms, taken in isolation, does not satisfy the Executive Power Clause. That surely does not mean that none of the mechanisms is derivable from this Clause.”).

125. *Id.* at 595.

126. *Id.* at 595–96; *see also* Prakash, *supra* note 93, at 1817 (discussing the “disempowerment” theory of removal).

127. This follows from the fact that “the Constitution establishes that the President *exclusively* controls the power to execute all federal laws . . . A statute stating that the Secretary of Treasury and other Treasury personnel will execute appropriation and tax laws only establishes that these particular officers will assist the President in carrying those laws into execution.” Calabresi & Prakash, *supra* note 16, at 596.

128. Lawson, *supra* note 19, at 1244 n.72; *see also id.* at 1243 (noting two alternatives for presidential control, “First . . . the President can step into the shoes of any subordinate and directly exercise that subordinate’s statutory powers. Second, one might think that, although the President cannot directly exercise power vested by statute in another official, any action by that subordinate contrary to presidential instructions is void. Either alternative is plausible, though the latter is perhaps more consistent with Congress’s power under the Sweeping Clause to structure the executive department.”); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L.

ensuring “a constitutionally unitary executive” does not require the President be able to step into the shoes of subordinates.¹²⁹ If Congress can validly assign duties under its legislative authority in the Necessary and Proper Clause, then it must have *some* legal effect other than creating an optional tool for the President. For Congress’s assignment to be more than advisory, the designated officer must undertake the statutory duty, even though the President retains the authority to direct the execution of that duty as he sees fit.

This provides a better balance of the competing constitutional authorities than a rule that the President can make the decision himself. Even if the executive power of the subordinate derives from the President, as unitary theorists posit, the substantive legal authority derives from Congress. Congress assigns the regulatory duty to a particular official and the assignment is part of the legal condition of the regulatory power. Faithful execution may require the subordinate to perform the regulatory action, even though such action remains subject to presidential direction. Compliance with the statutory assignment does not deprive the President of constitutional control. The constitutional text supports this reading. The Opinion Clause suggests a command model by which the President can require an opinion and direct officers, but on their “respective duties.”¹³⁰ Reading the Opinion Clause with the Necessary and Proper Clause reinforces that Congress may assign duties to officers. The President may direct such duties, but they are not subject to his personal execution. Thus, a unitary executive likely does not allow personal execution by the President when Congress has created a duty and assigned it to a subordinate.¹³¹

Second, in addition to removal and personal execution, Professors Calabresi and Prakash argue that the President retains authority to nullify actions taken by his subordinates: “If the President may make a decision that a statute purports to reserve for an inferior executive officer, by the same logic, the President must be able to nullify an action taken by an inferior executive officer.”¹³² For example, in their view, when the Treasury Secretary exercises a discretionary duty, he exercises a part of the President’s “executive Power.” If the President disagrees with the Secretary’s decision, “the President must be able, in effect, to reverse or

REV. 1, 25 (1995) (considering it the conventional view that “the President has no authority to make the decision himself, at least if Congress has conferred the relevant authority on an agency head”).

129. Lawson, *supra* note 19, at 1243.

130. U.S. CONST. art. II, § 2, cl. 1.

131. Even if the President can “disempower” a commissioned officer, this withdrawal of power may need to come from removal and not partial disempowerment through undertaking some of the officer’s actions. *Cf.* Prakash, *supra* note 93, at 1843.

132. Calabresi & Prakash, *supra* note 16, at 596.

nullify the Secretary's decision by withdrawing his delegation of the executive power, which the Constitution gives to him alone."¹³³

Professor Lawson similarly argues that when a statute assigns a particular duty to an executive officer, the President can issue specific directions to that officer and must be able to nullify any discretionary action of those officers.¹³⁴ For Professor Lawson the removal power is insufficient to ensure unitariness because after removal, there is still a question about whether an official's act in contravention of presidential direction was legally valid.¹³⁵ If it is not, then the President "necessarily has the power to nullify discretionary actions of subordinates."¹³⁶ If the act is valid, "then the insubordinate ex-official will have effectively exercised executive power contrary to the President's wishes, which contravenes the vesting of that power in the President."¹³⁷ It follows, according to Lawson, that removal is "either constitutionally superfluous or constitutionally inadequate."¹³⁸

The nullification power, however, fits uneasily with the meaning of executive power. This power comes from the root word "to execute." Samuel Johnson's *Dictionary of the English Language* defined "executive" as "active; not deliberative; not legislative; having the power to put in act the laws."¹³⁹ As Prakash explains, "[T]he executive power was the power to execute the laws."¹⁴⁰ Yet nullification requires undoing a subordinate's execution of the laws.¹⁴¹ An officer commissioned by the President has the power to carry out the laws entrusted to him and must do so under the direction of the President. Yet the President's control over execution does not naturally include nullification, which is not executing the laws, but rather invalidating prior execution. Moreover, if nullification was essential to executive power, one might expect some historical practice of

133. *Id.*

134. Lawson, *supra* note 19, at 1244 & n.72.

135. *Id.* at 1244.

136. *Id.*

137. *Id.*

138. *Id.*

139. See 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 683, cited in Prakash, *supra* note 56, at 716.

140. Prakash, *supra* note 56, at 716.

141. Nullification, as I understand Calabresi, Prakash, and Lawson to use it in this context, involves voiding the offending action and therefore refers to something beyond the President changing his policies or otherwise exercising lawful prerogative to shift course within the executive branch. While the President's actions need not be referred to as "nullification," Calabresi and Prakash could use the word "cancel" for example, the concept seems to require invalidating a particular action because *ultra vires*, accomplished without the executive power. The President's power to nullify refers to undoing the action of a subordinate. Yet the hierarchical relationship casts doubt on both the existence and necessity of such a nullification power.

nullification or at least a presidential claim to this power—yet no such evidence has been offered.¹⁴²

Properly understood nullification may be better characterized not as an exercise of executive power, but rather as *a remedy for failure of executive control*. The issue of nullification arises only when the President has failed to direct his preferred action to a subordinate—this could occur for any number of reasons, starting with lack of presidential awareness about a particular action all the way to outright insubordination and including many points of presidential suggestion and subordinate resistance in between. The question of nullification arises only when the President has failed to direct or failed to direct effectively.

Moreover, it is unclear how the remedy of nullification would work as a constitutional principle. If the justification for nullification depends on an action being outside the executive power because in conflict with the President's preferences, at what point can a subordinate's actions be nullified? Does the subordinate's action have to be contrary to a particular directive by the President?¹⁴³ Can the President simply "disagree" with the action? Although they do not discuss nullification in detail, Professors Calabresi and Prakash seem comfortable with the much broader claim that the President has the power to nullify *any* discretionary action by his subordinates.¹⁴⁴

142. I am not aware of any examples of nullification. Presidents have not historically exercised or claimed such a power and proponents have not provided any examples. *See* Lawson, *supra* note 19, at 1245 (noting that "[t]he First Congress, in the so-called Decision of 1789, engaged in one of the most spirited and sophisticated debates on executive power in the nation's history, but did not once focus on a presidential power to make discretionary decisions or to veto actions by subordinates" and even Presidents Reagan and Bush, although defending strong executive powers, did not claim these powers).

Although not defended by unitary theorists on this ground, perhaps presidential nullification could be seen as providing a functional remedy to the reality of a vast and varied bureaucracy across which the President may face substantial difficulty maintaining directive control of administration. It is an innovation, however, that likely goes beyond a proper understanding of executive power. By analogy, the one-house legislative veto was defended in part on functionalist grounds, because it provided a solution to the perceived need for retaining congressional control over broad delegations of discretion to the Executive. Yet the Supreme Court rejected the functional solution and required Congress to comply with the bicameralism and presentment requirements for lawmaking in Article I, Section 7. *See* *INS v. Chadha*, 462 U.S. 919, 945 (1982) ("[P]olicy arguments supporting even useful 'political inventions' are subject to the demands of the Constitution which defines powers and, with respect to this subject, sets out just how those powers are to be exercised."). The analogy to the one-house veto, however, only goes so far, because there are no "[e]xplicit and unambiguous provisions," *id.*, defining the power of the Executive in this regard.

143. Lawson, *supra* note 19, at 1244 (arguing for the importance of the President's power to nullify an action when an "official exercises power contrary to the President's directives").

144. *See* Calabresi, *supra* note 122, at 58 (noting as one of the mechanisms of presidential control "a power to nullify or veto the actions taken by subordinate executive officers with which the President disagrees"); Calabresi & Prakash, *supra* note 16, at 596 (arguing that the President, for example, as the "ultimate empowered and responsible actor" can overturn a discretionary action of the Treasury Secretary).

Yet there do not appear to be any legal or constitutional benchmarks for determining after the fact when a subordinate's actions lie outside of the Article II "executive Power" because of presidential disagreement. A constitutional principle allowing the President to nullify actions would leave regulated entities and private actors without any notice of when the President will withdraw executive power from his officers, officers who have otherwise exercised their assigned statutory duties within the scope of their legal discretion. The ability to nullify for simple disagreement depends too much on the personal prerogative of the President. Both executive branch officers and the public relying on their decisions would have no way of knowing when a discretionary decision was made outside the President's authority. It could undermine stability in the millions of discretionary decisions made by subordinate executive branch officials. Armed with a nullification power, imagine the Office of Information and Regulatory Affairs (OIRA) reviewing already promulgated regulations for the purpose of nullifying those contrary to the President's agenda.¹⁴⁵

Consider just a few serious difficulties that could arise as a consequence of a sweeping nullification power in the President.¹⁴⁶

- *Vested rights.* The Secretary of Interior confers a land grant within her statutory discretion; or the Defense Department signs a contract for the provision of various goods. These property and contract rights would vest so long as they were in accordance with legal requirements. Could the President nullify these vested rights? Professors Calabresi, Prakash, and Lawson might argue that the rights never vest if outside the Article II "executive Power." But then the executive power would depend on an after-the-fact assessment of a property or contract right apparently granted by an executive officer. If such rights, apparently vested, could be revoked or nullified by the President, it would produce tremendous uncertainty and may well violate other constitutional protections such as due process.¹⁴⁷
- *Adjudications.* Adjudications regularly occur within the executive branch. Although these are not exercises of the Article III "judicial Power," they are widely thought to require adherence to due process, whatever this may require in the executive branch

145. Centralized review of regulatory *proposals* seems entirely consistent with the President's duty to take care that the laws be faithfully executed, and a very different matter from nullifying regulatory actions already taken.

146. Calabresi and Prakash recognize that "[u]nder certain circumstances, complications will arise," but they do not consider these to be serious. They provide as an example a statute requiring the issuance of a regulation on a given date, which they say only "might" mean that the President cannot revise the regulation past the deadline. See Calabresi & Prakash, *supra* note 16, at 596 n.211.

147. U.S. CONST. amend. V.

context.¹⁴⁸ Could the President nullify the decisions of administrative law judges or other adjudicators within the executive branch?

- *Timing.* Nothing in the rationale of nullification limits it to a particular time frame, suggesting that the President could nullify at any time he determined some action did not accord with his preferences. Maybe the President could nullify the actions of his predecessors because they no longer accorded with his grant of the “executive Power.” This would leave a serious cloud of uncertainty over all executive branch actions. While some actions are quite obviously within a President’s power to change at will, such as executive orders, other executive branch actions such as regulations may require additional procedures before they may be undone or replaced with other regulations. It may be that unitary theorists do not expect nullification to reach so far; however, the rationale that the President “must always be the ultimate empowered and responsible actor”¹⁴⁹ does not appear to admit of exceptions for the variety of discretionary decisions made by executive officers.

Moreover, even if nullification were limited to some understanding of insubordination, insubordination does not provide a legal standard. Short of outright disobedience, agency administration may and often does occur along a sliding scale of insubordination. As a practical matter, the instances of clear violations of presidential directives will be rare. Some reasons for this include that the President does not usually issue direct orders to administrative officers; an officer’s conflict with presidential direction will more often lead to negotiation with the President or White House; and officers who truly dissent can resign their position thereby drawing public attention to a dispute. More common than outright disregard of a presidential directive, executive officers may act contrary to the President’s general policy preferences. What happens when an officer acts in the face of broader administration goals or policies? Or when a “suggestion” from the President or White House goes ignored? Is the resulting action outside the executive power and open to nullification?

As anyone who has worked in the White House or in the political leadership of an agency can attest, there are many quiet forms of insubordination to the President’s agenda. This situation is common—yet it is rarely thought to pose a *constitutional* problem. Rather, bureaucratic insubordination presents problems of presidential administration, a

148. See *infra* notes 174–175 and accompanying text; see also Vermeule, *supra* note 11, at 1213.

149. Calabresi & Prakash, *supra* note 16, at 596.

practical problem of keeping agencies in line with the President's goals. Every White House has to pick its battles and full compliance with the presidential agenda may be impossible given the size and complexity of the bureaucracy. In this environment, I remain sympathetic to all of the normative reasons for a strongly unitary executive with control over the administrative state, including political coordination of policy objectives. Nullification may further strong presidential control over administration. Nonetheless, the failure of effective administrative control does not create the authority to nullify or to countermand an officer's decision taken pursuant to law.¹⁵⁰

Moreover, the principle that the President can nullify actions that result from a failure of direction lacks a legal or constitutional standard. The President can direct his subordinates and he may remove those who ignore his direction. If his subordinate takes an action with which he disagrees, this can be seen as a failure of presidential control. A wayward officer pursuing his own agenda is the result, at least in part, of the President's failure to nominate wisely, to direct adequately, or to remove expeditiously.

Even without nullification, the President maintains several important levers. He can issue specific directives. He can request an opinion in writing to determine the views of principal officers.¹⁵¹ When he learns of a subordinate's view, he can direct a contrary action. If the subordinate nonetheless follows his own view, the President can remove the official and appoint a replacement to implement policies more in line with his preferences. He has discretion within legal limits over how to enforce regulatory requirements and he can choose not to enforce unconstitutional statutes. No doubt these actions will sometimes be costly for the President. Even if one accepts, as I do, a unitary executive with directive power, the constitutional structure does not require that the President have *every* means of control where Congress has created an agency structure that requires other officials to exercise specific statutory duties.

D. Removal Is Constitutionally Sufficient

Although much uncertainty remains in this area, removal as necessary and sufficient better accommodates the constitutional powers of the President and Congress. As discussed above, part of the challenge is to secure essential aspects of the President's control of executive power while recognizing Congress's authority under the Necessary and Proper Clause to

150. My discussion here focuses on the nullification power in the context of domestic administration. I leave open the possibility that a broader power to reverse or to countermand an official's decision may exist in foreign affairs, where the President potentially draws on both statutory authority and on independent Article II powers.

151. See *supra* notes 28–45 and accompanying text.

carry into execution the powers of the Constitution. Removal provides the constitutional mechanism of presidential control. Under my rule, Congress cannot restrict the President's removal authority. Yet because removal is sufficient, the rule does not otherwise limit Congress's broad authority to create and to structure agencies.¹⁵² Removal as the sufficient means of control means that when a statute assigns a particular duty to another officer, the President can direct, but cannot simply execute the statute himself. In addition, when the President fails, for whatever reason, to direct or to remove a wayward officer, the President does not have the authority to nullify otherwise lawful actions taken by that officer. Removal remains the remedy for unfaithful execution by his subordinates and provides the constitutionally requisite presidential control.

I recognize that removal has an uncertain connection to actual control and that political realities place practical limits on the extent to which removal can secure presidential control. For instance, even with the directive power and removal, the President may find it difficult to fully implement his policies. In the event an officer opposes the President's policies, the President will have to reckon with the political cost of exerting control because the officer may expose the dispute to Congress and the public or because the President, in a rare instance, chooses to remove the officer. This is to say that although the President can direct and remove, Congress's assignment of duties to other officers can have real consequences—forcing the President to negotiate and to compromise when he chooses not to use the blunt tool of removal. Moreover, infrequent use of the removal power may embolden subordinates to resist presidential direction. It may also create opportunities for members of Congress to exert influence over agency decisions. Despite these practical concerns, removal nonetheless provides the President with the *possibility of control*. Removal reinforces the chain of command and the President's accountability for decisions within the executive branch. Removal leaves the President with discretion about the extent and type of control he exercises over administration.

Removal as necessary and sufficient may leave the competing camps unsatisfied—not enough presidential control for some, too much for others. Nonetheless, as a structural matter, removal allows both the President and Congress to exercise their respective powers. Neither branch (and neither

152. As explained below, Congress may use a variety of mechanisms to structure agencies and promote technocratic values such as economic or scientific expertise. *See infra* Part III.B. The logic of my argument, however, affirms the conventional view that Congress cannot remove an officer through a simple removal statute. *Compare* Prakash, *supra* note 93, at 1793 (arguing that Congress has authority under the Necessary and Proper Clause to enact statutes to remove executive branch officers), *with* Harrison, *supra* note 92, at 1864 (“A congressional power to remove executive subordinates would interfere with presidential control . . . For executive subordinates to be loyal to anyone other than the President is bad; for them to be loyal to Congress in particular is doubly so.”).

side of the academic debate) gets everything it would prefer. Congress can specify the structure and assignment of statutory duties, but not limit or control the form or manner of the President's execution of the laws. The President can direct and remove his subordinates—but when he fails to exercise administrative control, he cannot step into the shoes of a subordinate or nullify actions with which he disagrees.

The unsatisfactory nature of this structural principle is perhaps a point in its favor. It leaves Congress with the ability to legislate—*ex ante* creating offices and assigning administrative duties. Removal leaves the President with the execution of those laws—directing and controlling to take care of faithful execution. The actual operation of control and power will depend on myriad political factors. Removal as necessary and sufficient for presidential control over administration establishes a framework in which Congress and the President can press their respective powers.

III. APPLICATIONS AND CONSEQUENCES OF RULE OF REMOVAL AT WILL

Adopting a rule of removal as necessary and sufficient will have a number of practical implications. First, with respect to scope, I examine how the principle of removal as necessary applies to different types of officers within the executive branch. Second, since removal is sufficient, I explain how Congress retains wide authority over agency structure and the assignment of duties within the executive branch.

This Part addresses what follows from the rule of removal as necessary and sufficient; however, I do not presume to predict how the rule will affect actual presidential control or to anticipate the variety of ways in which the President and Congress might seek to accommodate this principle in the modern administrative state. Although I have my normative assumptions about the benefits of presidential control for good administration, I am not at all sure that my proposal will adequately advance such control. Adopting a rule of the removal power as both necessary and sufficient will likely shift the interaction of presidential and congressional control over administration, but it remains difficult to predict how the branches will adjust to the new rule particularly as certain conventions of independence may persist. Having the ability to remove at will allows for the possibility of direction and control, but actual or effective control will depend on myriad political factors.

A. Necessity of Removal

The principle of removal as necessary and sufficient for presidential control of the administrative state raises a question about how far such a

principle extends and to which officers. One possibility would be that all executive branch officers and employees must be removable at will by the President or by another officer removable at will by the President. Neither the constitutional structure nor long-standing practice requires that the principle must reach so far. Here I consider some of the core applications of the principle.¹⁵³

1. *Principal Officers Must Be Removable at Will*

It follows from the necessity of the removal power that the President must be able to remove at will all principal officers. As discussed above, this includes the heads of traditional executive branch agencies, as well as the independent agencies, because properly understood they all exercise the executive power. Although some agencies may have adjudicative and legislative functions, they exercise no part of the judicial or legislative powers of the Constitution. The President must be able to remove these officers at will and Congress cannot limit or regulate this authority. It follows that statutory for-cause removal protections on principal officers would be invalid because they impermissibly constrain presidential control.¹⁵⁴ With the ability to remove at will, the President would have the possibility of directing subordinates who exercise the executive power. The President could for any number of reasons choose to leave these officers with significant operational independence. Nonetheless, he would remain responsible for the policies and performance of all agencies and for his control or lack of control over their duties.

2. *Inferior Officers*

Removal at will provides the rule for principal officers, but it need not apply to inferior officers. The Court has struggled with articulating a test for who can be properly identified as an inferior officer. In *Morrison v. Olson*, the Court applied a functional test based on criteria such as removal, limitations on duties, and limited jurisdiction.¹⁵⁵ More recently, the Court has explained that an inferior officer must have a superior, which is not

153. These arguments are preliminary attempts to sketch applications of the principle of removal as necessary and sufficient. Further exposition of how the principle applies to the diversity of officers within the executive branch must be left for later work.

154. See *supra* Part II.A.

155. Compare *Morrison v. Olson*, 487 U.S. 654, 671–72 (1988) (noting that the “line between ‘inferior’ and ‘principal’ officers is one that is far from clear” but identifying removal, limited duties, and limited jurisdiction as factors leading to the conclusion that the independent counsel is an “inferior” officer); *with id.* at 722 (Scalia, J., dissenting) (explaining that “it is surely a *necessary* condition for inferior officer status that the officer be subordinate to another officer” and arguing that the independent counsel was not inferior because she was not subordinate to the President or any principal officer).

simply a person with formally a higher rank: “[I]n the context of a Clause designed to preserve political accountability relative to important Government assignments, we think it evident that ‘inferior officers’ are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.”¹⁵⁶ This direction and supervision is related, in part, to whether an officer has the final word on a particular issue.¹⁵⁷ The Office of Legal Counsel has offered a similar understanding: “In determining whether an officer may properly be characterized as inferior, we believe that the most important issues are the extent of the officer’s discretion to make autonomous policy choices and the location of the powers to supervise and to remove the officer.”¹⁵⁸

If by definition an inferior officer is under the principal officer’s direction and supervision and lacks the discretion to make autonomous policy choices, then removal at will by the President would not be necessary for control. An officer who cannot make a final decision except by the leave of a “superior” officer is checked by this relationship of inferiority. The requisite degree of control likely exists in the supervisory relationship.

The possibility of a different rule for inferior and principal officers can be gleaned from the text and structure of Article II. Although the President is vested with all of the executive power, neither the Constitution nor practical experience suggests he must *personally* control every executive branch official. Instead, the President administers the law through a chain of command. If inferior officers lack authority to make autonomous policy decisions (through review or revision by a superior), then the President can make sure inferior officers faithfully exercise their authority through principal officers who report to the President.¹⁵⁹ The President can take

156. *Edmund v. United States*, 520 U.S. 651, 663 (1997); *see also* *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3162 (2010) (reaffirming the formulation in *Edmund*).

157. *See Edmund*, 520 U.S. at 665 (“What is significant is that the judges of the Court of Criminal Appeals have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers.”).

158. The Constitutional Separation of Powers Between the President and Congress, 20 Op. Off. Legal Counsel 124 (1996) (memorandum from Assistant Attorney General Walter Dellinger), *reprinted in* 63 LAW & CONTEMP. PROBS. 514 (2000) [hereinafter Dellinger]; *see also* Gary Lawson, *The “Principal” Reason Why the PCAOB Is Unconstitutional*, 62 VAND. L. REV. EN BANC 73, 82–83 (2009) (noting that “an officer is a federal official who is important enough to be an officer” and that the Office of Legal Counsel memorandum does not “differ markedly” from this definition).

159. For the Appointments Clause the significance of the distinction between principal and inferior officers relates to the ability of Congress to vest appointment of inferior officers in someone other than the President. *See* Dellinger, *supra* note 158, at 541 (“While an officer responsible only to the President for the exercise of significant discretion in decision making is probably a principal officer, an officer who is subject to control and removal by an officer other than the President should be deemed presumptively inferior.”); *see also* Matthew C. Stephenson, *Can the President Appoint Principal Executive Officers Without a Senate Confirmation Vote?*, 122 YALE L.J. 940, 974 (2013) (explaining

care that the laws are faithfully executed by directing and controlling his principal officers, who in turn will direct and control their subordinates. The Opinion Clause further supports a reading that the President will supervise directly only principal officers. As Professor Amar explains, the use of “principal Officer” in the Opinion Clause “exemplifies the Founders’ expectation that the President will ordinarily directly pick, act through, and monitor only a handful of personal lieutenants—his inner circle.”¹⁶⁰ This reinforces a chain-of-command model of administration in which “the President is *ultimately* responsible for all that happens in his administration” but need not directly select and oversee all minor officials.¹⁶¹

Relying primarily on the Appointments Clause, longstanding historical practice and the Court’s precedents have suggested that removal restrictions on an inferior officer are constitutional when the appointment of that officer is vested in the head of a department. The President must appoint principal officers with Senate confirmation—reaffirming his more direct responsibility and control over those officers.¹⁶² The Constitution provides a different mechanism for the appointment of inferior officers: “[T]he 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.”¹⁶³ The Supreme Court has consistently held that the power of removal may be restricted for such officers.¹⁶⁴ Even in *Myers v. United States* in which the Court articulates a strong defense of the President’s removal authority over principal officers, the Court recognizes that a different rule applies for inferior officers, because if by law Congress may vest the appointment of such inferior officers in the

distinction between senior executive officers and others based on those who are “indispensable to carrying out the core programs and missions of the executive branch” and therefore implicate most directly the President’s control and duty through the Take Care Clause).

160. Amar, *supra* note 29, at 667; see also THE FEDERALIST NO. 72 (Alexander Hamilton) (explaining that department heads “ought to be considered as the assistants or deputies of the chief magistrate, and on this account, they ought to derive their offices from his appointment, at least from his nomination, and ought to be subject to his superintendence”).

161. Amar, *supra* note 29, at 667.

162. *Id.* at 668.

163. U.S. CONST. art II, § 2, cl. 2.

164. See *United States v. Perkins*, 116 U.S. 483, 485 (1886) (“We have no doubt that when congress, by law, vests the appointment of inferior officers in the heads of departments, it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as congress may enact in relation to the officers so appointed.”); *Morrison v. Olson*, 487 U.S. 654, 724 & n.4 (Scalia, J., dissenting) (concluding that the independent counsel was a principal officer, but recognizing that inferior officers may be removable for cause by heads of departments and denying that every officer must be removable at the pleasure of the President because “that has never been the law and I do not assert otherwise”).

Heads of Departments, it may also “limit and regulate removal of such inferior officers by heads of departments.”¹⁶⁵

The distinction arises in part because of the explicit authority given to Congress in the Appointments Clause with respect to inferior officers. The head of a department “has no constitutional prerogative of appointment to offices independently of the legislation of congress.”¹⁶⁶ The Constitution vests the President with the appointment power over principal officers, even though Congress must establish the offices. With respect to inferior officers, Congress both creates the offices and may choose where to vest the power of appointment. Congress may specify removal limits when it vests the appointment of inferior officers in someone other than the President.

This provides a textual and structural basis for drawing a distinction between removal restrictions in these contexts. Because the appointment of inferior officers by heads of departments depends entirely on statute, Congress has authority to specify the terms of removal. Moreover, for inferior officers properly understood, removal at will may not be essential for control, as these officers will be subordinate to an officer who is within the control and direction of the President.

3. *Adjudicators*

Allowing the President to remove executive officers at will invariably runs into the question of whether such a standard applies to adjudicators. Historically, adjudicators have not been a central part of the removal debate, perhaps because executive branch adjudication has unique characteristics that suggest at will removal is inappropriate. A full discussion is not possible here, but there are some good reasons for the conventional and established view that the President’s control does not require at will removal for administrative law judges or other officials who solely adjudicate within the executive branch.¹⁶⁷

Adjudication within the executive branch is an exercise of the executive power.¹⁶⁸ Such executive branch adjudication occurs in a number

165. *Myers v. United States*, 272 U.S. 52, 127 (1926).

166. *Perkins*, 116 U.S. at 485.

167. *Dellinger*, *supra* note 158, at 560 (noting the Office of Legal Counsel’s position that “for cause and fixed term limitations on the power to remove officers with adjudicatory duties affecting the rights of private individuals will continue to meet with consistent judicial approval: the contention that the essential role of the executive branch would be imperiled by giving a measure of independence to such officials is untenable under both precedent and principle”).

168. *See Freytag v. Comm’r*, 501 U.S. 868, 910 (1991) (Scalia, J., concurring in part and concurring in the judgment) (explaining that entities and individuals that adjudicate within the executive branch do not exercise the judicial power, but rather the executive power because “[t]o be a federal

of different contexts, including by administrative law judges (ALJs) and by commissioners of the so-called independent agencies, who often have other responsibilities in addition to adjudication. With respect to ALJs, the conventional view has been that they can be subject to for-cause removal protections.¹⁶⁹ ALJs are not considered principal officers, in part because they cannot render final decisions.¹⁷⁰ Moreover, questions of presidential control and direction arise only for discretionary actions of executive branch officers.¹⁷¹ Executive branch adjudicators are not generally thought to have discretion in this sense, but rather like other judges to be applying the law to particular facts.¹⁷²

Instead, disagreement continues about whether ALJs are better classified as inferior officers or employees.¹⁷³ The disagreement, however, is immaterial to the issue of the President's removal power, because at most ALJs would be inferior officers, and as explained above, the President need not retain the removal power over such officers, much less over ordinary employees. ALJs may be subject to different forms of control by the officers who supervise and review their decisions, but they need not be removable at will.

In addition, other constitutional limits on due process may limit presidential involvement with adjudication, although the precise scope of this has not been settled.¹⁷⁴ Given the well-established constitutional or quasi-constitutional norms that limit influencing the hearing process, there

officer and to adjudicate are necessary but not sufficient conditions of the exercise of federal judicial power, as we recognized almost a century and a half ago”).

169. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010).

170. *See* 5 U.S.C. § 557(b) (providing that an agency can review decisions of administrative law judges with “all the powers which it would have in making the initial decision”); *Landry v. FDIC*, 204 F.3d 1125, 1134 (D.C. Cir. 2000) (administrative law judges who issue recommended decisions are not “officers” because they lack the authority to render final decision); *cf.* Jerome Nelson, *Administrative Law Judges’ Removal “Only for Cause”: Is That Administrative Procedure Act Protection Now Unconstitutional?*, 63 ADMIN. L. REV. 401, 414–15 (2011) (explaining why administrative law judges should be considered “officers”).

171. *See supra* notes 48–51 and accompanying text.

172. *See, e.g.*, 5 U.S.C. §554 (providing for adjudication by administrative law judges according to law and facts).

173. *See Free Enter. Fund*, 130 S. Ct. at 3163 (suggesting it is “disputed” whether administrative law judges were “officers”); *see also* Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797, 810–14 (2013) (discussing whether ALJs are inferior officers or employees and suggesting that “ALJs’ authority seems more than sufficient to provide” inferior officer status); Peter P. Swire, Note, *Incorporation of Independent Agencies into the Executive Branch*, 94 YALE L.J. 1766, 1784 (1985).

174. *See Vermeule, supra* note 11, at 1213 (arguing that in the context of executive branch adjudication due process “does not amount to or justify a blanket prohibition on presidential direction of adjudication, even formal adjudication. . . . The appeal to background norms of due process fails because it generalizes ‘due process’ far beyond anything with support in actual due process law”); *cf.* Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 499 (1986) (arguing that even review of an ALJ’s competence creates a “system . . . replete with potential encroachments on adjudicatory independence” and that ALJs should enjoy salary and tenure protections similar to Article III judges).

is little practical concern that adjudications within the executive branch are subject to political influence.¹⁷⁵ Finally, presidents have not historically asserted the authority to remove adjudicators at will. While this does not preclude the President from having such a power, courts have reaffirmed the insulation of adjudicators from removal at will,¹⁷⁶ and this longstanding and largely unquestioned understanding has developed into a very strong convention.¹⁷⁷

A difficulty arises, however, with officers who combine adjudication with rulemaking or other functions, such as commissioners of independent agencies. Although they sometimes adjudicate, commissioners of these agencies are nonetheless principal officers, as the Supreme Court has repeatedly held.¹⁷⁸ Therefore they must be subject to removal by the President regardless of the fact that they sometimes adjudicate. In *Free Enterprise Fund*, the Court distinguished those officials who only adjudicate from officers who combine adjudication with policy or rulemaking functions.¹⁷⁹ The fact that an officer sometimes adjudicated did not provide a shield from presidential control and removal at will.¹⁸⁰ Today

175. See Glen O. Robinson, *Independent Agencies: Form and Substance in Executive Prerogative*, 1988 DUKE L.J. 238, 242 (“Adjudications are insulated from influences outside the hearing process by constitutional and statutory norms of due process that bind the President no less than the ordinary citizen. We have no evidence that these norms are violated by the former more than by the latter. Adjudications at the FDA (an executive agency) are not, so far as I am aware, any more subject to extra-record executive influence than are those of the FTC.”)

176. See *Wiener v. United States*, 357 U.S. 349, 350–53 (1958) (concluding that the President lacked the authority to remove at will a War Claims Commissioner who had to “adjudicate according to law,” even in the face of statutory silence as to removal limits).

177. As a formal matter, the arguments for presidential control through the removal power would extend to all exercises of executive power including adjudication, even though longstanding practice has assumed limits on presidential direction of adjudication. See Vermeule, *supra* note 11, at 1211–13 (noting that the legal basis for limiting presidential direction over adjudication are “at best dubious” but that “presidential direction of administrative adjudication would be seen as an unprecedented exertion of power, violating longstanding unwritten traditions, and would for that reason provoke a storm of protest”); Kagan, *supra* note 11, at 2363 (explaining that “presidential participation in [adjudication], of whatever form, would contravene procedural norms and inject an inappropriate influence into the resolution of controversies.”).

178. See *supra* notes 103–109 and accompanying text.

179. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3163 (2010); see also Nelson, *supra* note 170, at 412 (observing that ALJs have “only the power to adjudicate” unlike the members of the PCAOB); Stack, *supra* note 117, at 2392 (“The Board possesses rulemaking, enforcement, and adjudicative functions. This combination of functions sets the Board’s removal protections apart from those of dedicated adjudicators within independent agencies whose removal protections the Court sought to preserve, and furnishes the key ground of the decision.”).

180. This may counsel in favor of separating adjudication from other functions within executive agencies so that distinct protections may be given for adjudication that are not appropriate for functions such as rulemaking and prosecution. See Verkuil, *supra* note 115, at 271; Lawson, *supra* note 19, at 1249 (observing that the combination of functions in agencies is “probably the most jarring way in which the administrative state departs from the Constitution, and it typically does not even raise eyebrows”); Dellinger, *supra* note 158, at 560 & n.121 (suggesting for-cause removal limits may be appropriate for “officers whose only functions are adjudicatory” or for those whose “primary duties involve the adjudication of disputes involving private persons”).

most independent agencies, like other agencies, combine functions of rulemaking, prosecution, and adjudication. Sometimes these functions are combined within the same officer. Often a statute will leave an agency with discretion about whether to proceed through rulemaking or adjudication and the Court has held that such discretion rests with the agency.¹⁸¹ In these instances adjudication may include the development of policy objectives and can sometimes substitute for rulemaking.¹⁸² Principal officers that combine these functions must be subject to removal at will by the President; however, strong conventions support Congress insulating individuals who solely adjudicate from at-will removal.

4. *Interpreting Good Cause*

Although full at-will removal need not extend to inferior officers, adjudicators, and the civil service within the executive branch, there remains a question about how for-cause removal restrictions should be interpreted for these officials. In the legal culture, such limits on removal have traditionally been understood to include a strong form of independence and freedom from control and direction. Nonetheless, it remains uncertain how independent such individuals must be and what precise limits the for-cause restrictions impose on the President or other officers vested with the removal power. For instance, good cause for removal could include insubordination, as a number of cases have held in the civil service context.¹⁸³ This makes sense in part because an inferior officer or employee is by definition subordinate to another officer and therefore must follow direction with respect to discretionary matters. A subordinate's failure to follow direction, i.e. insubordination, is outside the scope of an inferior officer's role and therefore can provide grounds for removal.

This Article does not consider how "for-cause" should be read for non-principal officers and adjudicators, but recognizes that the existing view of "independence" is hardly necessary as a matter of statutory interpretation. Good-cause limits should allow for greater forms of direction and control than commonly assumed.¹⁸⁴ In this context, unlike for principal officers, statutory interpretation may be sufficient to ensure supervision by an

181. See *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

182. Stack, *supra* note 117, at 2406; see also M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1390–91 (2004) (explaining that agency choice among policymaking forms matters in part because they follow different processes).

183. See John F. Manning, *The Independent Counsel Statute: Reading "Good Cause" in Light of Article II*, 83 MINN. L. REV. 1285, 1298 n.46 (1999) (collecting cases from the civil service context that hold insubordination can provide "good cause" for dismissal).

184. In this context, the arguments made for interpretation of for-cause removal restrictions to fit with presidential control have more purchase. See *supra* notes 236–237 and accompanying text.

officer fully accountable to the President. Courts can interpret the statutory requirements alongside constitutional concerns about presidential supervision for executive branch officials who are not principal officers.

B. Sufficiency: Congress Retains Wide Authority over Agency Structure and Assignment of Duties

While statutory restrictions on removal remain one of the hallmarks of independent agencies, these agencies have a number of other features designed to promote independence. Since many of those who support the constitutionality of removal restrictions rely on functionalist grounds and administrative values such as expertise and freedom from political influence, it might matter that other mechanisms of independence remain available. As scholars of agency design recognize, removal works alongside a number of other structures and relationships in administrative agencies designed to promote independence.¹⁸⁵ The following are some features of agency design thought to promote functional and conventional independence that would remain available even if all agency heads were subject to removal.

1. Multi-Member Commissions or Boards

Multi-member commissions or boards lead most of the major independent agencies, including for example the Federal Trade Commission, the Securities and Exchange Commission, and the Federal Communications Commission. A multi-member body is thought to “inhibit[] political control because politicians or regulated entities must capture a majority of the membership rather than just one individual.”¹⁸⁶ Moreover, collegial decisionmaking may result in more moderate policies focused on expertise and long-term interests rather than short-term politics.

Even in decisions casting doubt on the constitutionality of removal restrictions, the Court has reaffirmed the multi-member commission. For example, in *Free Enterprise Fund*, the Supreme Court made clear that the

185. See Bressman & Thompson, *supra* note 11, at 610–11 (discussing other mechanisms of independence, including multi-member boards, fixed and staggered terms of service, bipartisan requirements for appointments, and freedom from congressional appropriations); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3183 (Breyer, J., dissenting) (“Agency independence is a function of several different factors, of which ‘for cause’ protection is only one. Those factors include, *inter alia*, an agency’s separate (rather than presidentially dependent) budgeting authority, its separate litigating authority, its composition as a multimember bipartisan board, the use of the word ‘independent’ in its authorizing statute.”); see also Huq, *supra* note 12, at 32 (explaining the variety of mechanisms for presidential control over administration beyond the removal power and noting “the observed varieties of political control technologies”).

186. Bressman & Thompson, *supra* note 11, at 611.

Securities Exchange Commission could be a “Department” for the purposes of the Appointments Clause “because [the Commission] is a freestanding component of the Executive Branch not subordinate to or contained within any other such component.”¹⁸⁷ It was of no constitutional consequence that a multi-member body, and not a single “Head,” made appointments of inferior officers. The Commission could collectively serve as the “Head” of the “Department” and appoint the members of the PCAOB (who were held to be inferior officers)—a result the Court considered consistent with the original understanding of the Constitution as well as with historical practice.¹⁸⁸ The Court has implicitly recognized the constitutionality of multi-member commissions in other cases as well.¹⁸⁹

2. *Appointment for a Term of Years*

Congress frequently establishes a term of years for agency heads, both for traditional executive branch agencies and for independent commissions.¹⁹⁰ On multi-member boards, terms are sometimes staggered so that during a four-year term the President will be able to appoint only a couple of commissioners, even if regular resignations usually allow a President more frequent appointments.¹⁹¹ By designating a term of years, Congress has provided for the eventual removal of the officer at the end of the statutory term, sometimes with the possibility of reappointment. Similar arrangements have existed since the Founding and there is widespread recognition of their constitutionality.¹⁹² Although statutory terms are often

187. *Free Enter. Fund*, 130 S. Ct. at 3163.

188. *Id.* at 3163–64 (“As a constitutional matter, we see no reason why a multimember body may not be the ‘Head’ of a ‘Department’ that it governs. The Appointments Clause necessarily contemplates collective appointments by the ‘Courts of Law,’ and each House of Congress, too, appoints its officers collectively. Petitioners argue that the Framers vested the nomination of principal officers in the President to avoid the perceived evils of collective appointments, but they reveal no similar concern with respect to inferior officers, whose appointments may be vested elsewhere, including in multimember bodies. Practice has also sanctioned the appointment of inferior officers by multimember agencies.”) (citations omitted).

189. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 138–39 (1976) (recognizing that the Federal Election Commission exercises the executive power, and therefore commissioners must be appointed pursuant to the requirements of Article II).

190. *See, e.g.*, 26 U.S.C. § 7803(a)(1)(B) (2012) (establishing a term limit for the Commissioner of the IRS); 49 U.S.C. § 115(b) (2012) (creating a multimember board within the Department of Homeland Security and specifying the “Chairperson” as the “Secretary of Homeland Security”); 47 U.S.C. § 154 (“[FCC] commissioners shall be appointed for terms of five years”).

191. *See* *Datla & Revesz*, *supra* note 11, at 821 (gathering evidence in that there is more regular turnover in independent agencies than the term of years would suggest). *But cf.* Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 497 (2008) (providing empirical evidence that opposition-party commissioners serve out most, if not all, of their terms).

192. *See, e.g.*, Calabresi & Prakash, *supra* note 16, at 592–93 (noting that pursuant to the Necessary and Proper Clause, Congress has the power to create the “entire superstructure of law

linked to for-cause removal, they sometimes stand alone and need not be accompanied by for-cause removal restrictions.¹⁹³ Properly understood, such terms do not impose a legal restriction on removal at will by the President,¹⁹⁴ although a statutory term may reinforce a culture of independence and imply a sort of presumption against removal during the term, raising the political costs of removal for the President.¹⁹⁵

3. *Independent Budgeting Sources*

Congress provides some agencies with independent budget sources. For example, the CFPB receives its funding by making requests to the Board of Governors of the Federal Reserve, and the funds are not treated as appropriations.¹⁹⁶ Agencies with their own funding sources are insulated from Congress's appropriations power. Such funding effectively delegates spending authority to the Executive. Such delegations have ample historical precedents and have been upheld when subject to presidential control.¹⁹⁷

4. *Separate Litigating Authority*

Agencies sometimes have separate litigating authority from the Department of Justice. This might make it more difficult for the White House to coordinate litigation strategy across agencies. Yet even for agencies that have this privilege, the Solicitor General usually retains authority over appeals recommendations and any litigation that reaches the Supreme Court.¹⁹⁸ This allows the Department of Justice to coordinate

execution” and therefore “Congress can set terms of office that last indefinitely (subject to presidential removal and congressional impeachment, of course), or it can grant officers limited one-year terms, thus requiring yearly congressional review of an officer’s performance if that officer is to continue in office”).

193. 28 U.S.C. § 541(a)–(c) (2012) (providing a four-year term for United States Attorneys, but stating that they are “subject to removal by the President”); 28 U.S.C. § 532 note (2012) (providing a ten-year non-renewable term for the FBI director and remaining silent on removal).

194. See *Parsons v. United States*, 167 U.S. 324, 343 (1897) (construing the four-year statutory term of the U.S. Attorney to allow the President to remove during that term).

195. See Vermeule, *supra* note 11, at 1202–03 (discussing the scandal arising when President George W. Bush fired several U.S. Attorneys during his second term and noting that although legal precedent supported the removals, “a President can now be said to act illegitimately, in the conventional sense, if he replaces individual U.S. Attorneys midstream, with no partisan change of administration”).

196. See 12 U.S.C. § 5497(a)(1) (2012).

197. See *Field v. Clark*, 143 U.S. 649 (1892) (holding that suspensions of tariffs pursuant to statutory criteria were not exercises of legislative power and providing extensive discussion of nineteenth century precedents of such delegations to the President); *Clinton v. City of New York*, 524 U.S. 417, 466–67 (1998) (Scalia J., concurring in part and dissenting in part) (arguing for the constitutionality of the Line-Item Veto Act and canvassing historical sources demonstrating that Congress has authorized money to be spent at the discretion of the President since the Founding).

198. 28 U.S.C. § 516 (2012) (establishing a presumption that litigation authority rests in the Department of Justice); see also Linda R. Cohen & Matthew L. Spitzer, *The Government Litigant*

legal interpretation within the executive branch and to control the Executive's litigating position at the highest court. The President also retains some control through the appointment of most agency general counsels.

5. *Legislative Powers of Control*

In addition to statutory structures that aim for independence and freedom from political control, Congress may assert ongoing control over agencies through its other Article I powers. While the President executes the laws, Congress may use oversight hearings, the appropriations process, and various other means to influence agency policy and rulemaking.¹⁹⁹ Congress's control over the purse provides the ultimate check in disagreements with the President about agency priorities.²⁰⁰ The Court has upheld the use of appropriations riders to control agency enforcement of particular matters.²⁰¹ This is unsurprising, as Congress always retains authority to change the scope of its delegation to an agency; to legislate a matter with greater specificity and restrain agency discretion; to discontinue funding for specific agency activities; and to eliminate an agency or an office altogether. Of course, once agencies have a mandate, the high hurdles of bicameralism and presentment as well as political inertia may create practical difficulties for legislative reform. Yet Congress always retains final control over the exercise of administrative power and discretion.

In addition to all of these design features and ongoing oversight, Congress may set forth other general indicators of independence. For example, Congress may refer to an agency as "independent" in its organic

Advantage: Implications for the Law, 28 FLA. ST. U. L. REV. 391, 401–02 (2000) (discretion for trial-level litigation generally resides in the agency, but "[a]ny appeal by the government requires the approval of the Office of the Solicitor General"); Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CALIF. L. REV. 255, 278–79 (1994). *But see* 15 U.S.C. § 56 (2012) (describing the requirements for the Federal Trade Commission authority to litigate in the Supreme Court).

199. *See* Kagan, *supra* note 11, at 2347 ("Presidential control of administration in no way precludes Congress from conducting independent oversight activity. With or without a significant presidential role, Congress can hold the same hearings, engage in the same harassment, and threaten the same sanctions in order to influence administrative action. . . . [P]residential control and legislative control of administration do not present an either/or choice.").

200. *See* Jack Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 85 (2006) ("As a practical matter, in a disagreement between Congress and the President over the priorities or the value of a particular program, Congress will win if it uses its power over the allocation of funds.").

201. *See* *United States v. Bean*, 537 U.S. 71 (2002).

statute²⁰² or state that an agency must exercise scientific, economic, or other expertise. Moreover, as Justice Breyer recognizes in *Free Enterprise Fund*, sometimes independence depends on “above all, a political environment, reflecting tradition and function, that would impose a heavy political cost upon any President who tried to remove a commissioner of the agency without cause.”²⁰³ Consider, for example, the political environment around the Federal Reserve Board, which would make it politically difficult for a President to direct the Chairman or the Board, even if members were removable at will.

These agency structures all limit to some extent the President’s control over executive branch agencies, some by raising the political costs of active control. Yet they remain largely unchallenged on constitutional grounds and are widely considered to follow from Congress’s legislative authority under Article I and in particular its sweeping authority under the Necessary and Proper Clause. Congress has used such mechanisms not only for independent agencies, but also at times for traditional executive agencies and entities.²⁰⁴ Presidents have generally acquiesced in the practice and not raised constitutional concerns about such mechanisms, even as they have resisted encroachments on their appointment and removal powers.²⁰⁵ Similarly, the Court has both explicitly and implicitly endorsed a number of these mechanisms.

Although Congress has wide latitude in structuring agencies to promote any number of policy goals, it cannot restrict the President’s removal power for principal officers because control and removal are part of the executive power. In the process of establishing an agency and creating offices, Congress may also run into other constitutional limits. While such limits are beyond the scope of this Article, a few potential problems are worth mentioning. For example, there may be particular concerns with limits on the President’s appointment power. Congress cannot appoint executive officers, as the Supreme Court has repeatedly held.²⁰⁶ Less clear, however, is the extent to which Congress can impose statutory qualifications for officers, requirements that will have the effect of limiting the range of potential nominees. Although this is a long-standing practice

202. See 44 U.S.C. § 3502(5) (2012) (defining “independent regulatory agency” with reference to a list of such agencies and including “any other similar agency designated by statute as a Federal independent regulatory agency or commission”).

203. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3128, 3183 (2010) (Breyer, J., dissenting).

204. See generally Datla & Revesz, *supra* note 11, at tbls.1–7 (identifying agencies with various features of “independence” and demonstrating that such features can be found in both executive and independent agencies).

205. See generally CALABRESI & YOO, *supra* note 16 (tracing the history and centrality of the removal power to the unitary Executive).

206. See, e.g., *Buckley v. Valco*, 424 U.S. 1, 132–33 (1976).

with respect to general qualifications,²⁰⁷ presidents have raised constitutional questions about more specific requirements.²⁰⁸ Even if a president protests the imposition of such qualifications in a signing statement, once a statute goes into effect, he may feel constrained to satisfy the qualification requirements in order to secure Senate confirmation of his nominee.

There may also be a concern with the bi-partisanship requirements for some agencies, in which the President must nominate and appoint some individuals not of his own party. Around these bi-partisanship requirements have developed conventions that allow the Senate leadership from the opposition party to propose a nominee to the White House. The convention includes a strong presumption that the President will select the Senate's proposed nominee. Do these bi-partisanship requirements amount to congressional appointment? Formally, of course, they do not, as the President nominates and appoints, but bi-partisanship requirements give the Senate greater practical control over appointments. Perhaps these bi-partisanship requirements have not been challenged because the President usually has the opportunity to appoint the chairman or head of the commission and therefore control the political balance.²⁰⁹ A full consideration of these limits is not possible here. Removal as necessary and sufficient applies to the policymaking stage, and I leave for consideration elsewhere what might be necessary and sufficient at the institutional design stage to ensure adequate presidential control.²¹⁰

In sum, Congress retains wide authority over the structure of agencies and the assignment of duties to particular officers. Treating the removal power as sufficient provides a constitutional minimum to ensure that the President controls the exercise of the executive power and also respects

207. See The Judiciary Act of 1789, ch. 20, sec. 35, 1 Stat. 73, 92–93 (1789) (providing that the Attorney General be “learned in the law”).

208. See President George W. Bush, Statement upon Signing H.R. 5441, Department of Homeland Security Appropriations Act, 2007, 2006 U.S.C.C.A.N. S49, S52 (Oct. 4, 2006) (explaining that the statute enacted after Katrina “vests in the President authority to appoint the Administrator [of FEMA], by and with the advice and consent of the Senate, but purports to limit the qualifications of the pool of persons from whom the President may select the appointee in a manner that rules out a large portion of those persons best qualified by experience and knowledge to fill the office. The executive branch shall construe section 503(c)(2) in a manner consistent with the Appointments Clause of the Constitution”).

209. As a former Commissioner of the Federal Communications Commission observes, “From personal experience I can report that the FCC’s chairman and a handful of staff—usually selected by the chair—can and usually do exercise nearly total control over that agency’s basic policy agenda.” Robinson, *supra* note 175, at 245 n.24; see also Hans Bader, Free Enter. Fund v. PCAOB: *Narrow Separation-of-Powers Ruling Illustrates that the Supreme Court Is Not “Pro-Business,”* 2010 CATO S. CT. REV. 269, 297–98 (2010); Strauss, *supra* note 12, at 590–91; Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 957–58 (1980).

210. See *supra* note 20.

Congress's authority to structure the executive branch. Congress may promote a variety of administrative values, so long as the removal power and the possibility of control remain fully with the President.

IV. ENFORCEABILITY AND OTHER BENEFITS

This Article has focused on removal as the constitutional minimum for presidential control. Recent scholarship relating to independent agencies and presidential administration has taken a different approach—emphasizing not the legal or constitutional aspects of administration, but instead focusing on how things actually work. A number of scholars have suggested that independent agencies should be thought of in more functional terms—examining what conventions govern independence²¹¹ or considering what structure would serve particular administrative values.²¹² Much of this literature treats constitutional inquiries about administration as a sideshow.²¹³ I have attempted to bring the constitutional concerns back to center stage.

In this Part, I advance some of the practical benefits of my proposal for administration. First, removal as necessary and sufficient provides a judicially enforceable constitutional standard for ensuring presidential control. Second, the proposal allows for a workable remedy, namely severance of removal restrictions, which allows regulatory agencies to continue with their statutory mandates. Third, removal as necessary and sufficient can help to clear away conventions of independence. Finally, removal may also promote certain administrative goals such as political accountability and the legitimacy of administrative choices.

A. Removal Provides an Enforceable Rule for Presidential Control

The removal power as necessary and sufficient provides a justiciable principle for ensuring the President's constitutional control over the execution of the laws. In a challenge to a particular administrative structure, courts can evaluate whether the President retains the removal power. Removal at will provides a bright line that the courts can use to ensure that the President maintains the constitutionally requisite degree of control over essential aspects of execution.

Of the various legislative agency structures employed to promote independence, restrictions on removal have raised the primary

211. See Vermeule, *supra* note 11, at 1166.

212. See Huq, *supra* note 12, at 5–6; Kagan, *supra* note 11, at 2382.

213. See, e.g., Datla & Revesz, *supra* note 11, at 774; Huq, *supra* note 12, at 6, 73; Vermeule, *supra* note 11, at 1184.

constitutional concerns. Since the First Congress and the Decision of 1789, removal has been closely associated with presidential control.²¹⁴ The extent to which removal really affects presidential control depends on myriad political factors. Yet removal and, perhaps more importantly, the threat of removal, ensure the possibility of control. Chief Justice Roberts in *Free Enterprise Fund* recognizes this when he notes that the President's ability to get things done, the degree of his functional control is beside the point because "[t]he Framers did not rest our liberties on such bureaucratic minutiae."²¹⁵ Instead, the Constitution provides the President with powers, such as removal "that 'the legislature has no right to diminish or modify.'"²¹⁶ The Court notes that this is the central issue in the case—a removal protection "matters precisely when the President finds it necessary to have a subordinate officer removed, and a statute prevents him from doing so."²¹⁷

The Court's remedy in *Free Enterprise Fund* reinforces that the removal limits were the only constitutional infirmity. Faced with a challenge to the double layer of removal protections for the PCAOB (the President could remove SEC Commissioners only for cause and the SEC could remove PCAOB members only for cause), the Court simply severs the for-cause removal provision insulating the PCAOB. This allows the Board to otherwise continue with its statutory duties. Importantly, the majority declines to assess how the President's *actual control* over the PCAOB would change with this remedy. In practical terms, severing one layer of for-cause removal may have only marginally increased the President's control over the PCAOB.²¹⁸ Nonetheless, the Court finds that removal provides the constitutional minimum and other statutory features of independence can remain with the PCAOB.²¹⁹ Having a simple rule and a clear, but limited, remedy allows for meaningful judicial review over the constitutionality of agency structures. Separation of powers questions cannot simply be left to the political process, as the Court has repeatedly recognized, because of the important constitutional protections at stake.²²⁰

214. See generally *Myers v. United States*, 272 U.S. 52 (1926) (detailing the Decision of 1789 and debates on the question of presidential control and the removal power).

215. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3128, 3156 (2010) (responding to Justice Breyer's dissenting opinion, which adopts a functionalist approach).

216. *Id.* at 3156 (quoting 1 *Annals of Cong.*, at 463 (J. Madison)).

217. *Id.* at 3154 n.4; see also Rao, *supra* note 10, at 2557 (explaining how the Court treats removal at will by the President as a constitutional requirement).

218. See *Free Enter. Fund*, 130 S. Ct. at 3156 (Breyer, J., dissenting).

219. *Id.* at 3159.

220. See, e.g., *INS v. Chadha*, 462 U.S. 919, 941–42 (1982) ("No policy underlying the political question doctrine suggests that Congress or the Executive, or both acting in concert and in compliance with Art. I, can decide the constitutionality of a statute; that is a decision for the courts."); cf. Huq, *supra* note 12, at 75 (arguing for leaving removal questions to the political branches and noting that

Removal at will has a number of advantages over functional tests proposed for presidential control. Functional tests have failed to provide robust judicial standards and therefore systematically under protect separation of powers.²²¹ For example, *Morrison v. Olson* and Justice Breyer's dissent in *Free Enterprise Fund* look holistically to whether the President has "sufficient" control of executive officers.²²² These decisions adopt a functional test of whether a particular administrative arrangement unduly burdens the President's execution of the laws or "genuinely" disrupts the constitutional balance of power.

Yet the cases demonstrate that tests of actual control by the President turn on complexities of power difficult to measure for politicians, much less judges. The flexibility of functional criteria in this context creates uncertainty and encourages courts to defer to legislative judgments instead of rigorously assessing encroachments on the President's authority. Under functional criteria, courts have not and probably will not second-guess existing administrative arrangements. Indeed, to my knowledge, the Court has never found a separation of powers violation on functional grounds.²²³ As Justice Scalia observes, the doctrine of separation of powers "is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict."²²⁴

Moreover, courts that choose functional assessments invariably must adopt some proxies for determining presidential control. Yet the proxies they locate fail to afford adequate constitutional protection to the President.

"[t]he net effect of nonjusticiability, in short, is to leave in place whatever statutory framework Congress and the President have already converged upon"

221. See Lee S. Liberman, *Morrison v. Olson: A Formalistic Perspective on Why the Court was Wrong*, 38 AM. U. L. REV. 313, 345 (1989); cf. Peter Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987).

222. See *Morrison v. Olson*, 487 U.S. 654, 689–91, 696 (1988) (noting that "[t]he analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President" but instead considers the "functions of the officials in question" and concluding that the President retained "sufficient control" over the independent counsel); *Free Enter. Fund*, 130 S. Ct. at 3167–68 (Breyer, J., dissenting) (stressing the importance of "examining how a particular provision, taken in context, is likely to function" and defending a functional approach to separation of powers from precedent and the need for flexibility); see also *Bowsher v. Synar*, 478 U.S. 714, 776 (1986) (White, J., dissenting) ("[T]he role of this Court should be limited to determining whether the Act so alters the balance of authority among the branches of government as to pose a genuine threat to the basic division between the lawmaking power and the power to execute the law.").

223. Compare *Morrison*, 487 U.S. at 689–90, 696 (adopting a functional test of executive power and upholding the Independent Counsel Act), with *Free Enter. Fund*, 130 S. Ct. at 3154 n.4 (drawing a formal line against statutory restrictions on the President's removal authority and invalidating removal restrictions for the PCAOB). See *Clinton v. City of New York*, 524 U.S. 417, 448 (1998) (invalidating the Line Item Veto Act on the grounds that it violates the "finely wrought" procedure of Article I, Section 7, but declining to consider alternative arguments that the Act "impermissibly disrupts the balance of powers among the three branches of government" (internal quotation marks omitted)).

224. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995).

In particular, the Court has identified a problem with congressional aggrandizement.²²⁵ Aggrandizement focuses on direct conflict between the branches and considers whether Congress has sought to control executive powers. For example, Congress has learned from a relatively consistent line of cases that it cannot insert itself directly into the appointment or removal process.²²⁶

Congress, however, can aggrandize itself at the expense of the President even when it does not retain an explicit statutory role in agency administration. The test of congressional aggrandizement provides an unacceptably weak protection for presidential control precisely because it is difficult to measure how power shifts between the President and Congress with the creation of independent agencies. The fact that Congress has not explicitly retained a role for itself does not necessarily mean that the President has the requisite constitutional control over execution. As Chief Justice Roberts noted in *Free Enterprise Fund*, “In a system of checks and balances, power abhors a vacuum, and one branch’s handicap is another’s strength. Even when a branch does not arrogate power to itself, therefore, it must not impair another in the performance of its constitutional duties.”²²⁷ Lessig and Sunstein have similarly explained, “[Agency] independence can be understood as a form of aggrandizement. Congress might make agencies independent not to create real independence, but in order to diminish presidential authority over their operations precisely in the interest of subjecting those agencies to the control of congressional committees. Independence, in short, might be a way of increasing legislative power over agencies.”²²⁸ When the President lacks formal control, his powers have been diminished, even if control is not explicitly vested elsewhere.²²⁹

225. See, e.g., *Morrison*, 487 U.S. at 686 (“[T]he essence of the decision in *Myers* was the judgment that the Constitution prevents Congress from ‘draw[ing] to itself . . . the power to remove’”); *Freytag v. Comm’r*, 501 U.S. 868, 878 (1991) (“Our separation-of-powers jurisprudence generally focuses on the danger of one branch’s aggrandizing its power at the expense of another branch.”); see also Strauss, *supra* note 12, at 614–15 (explaining removal cases as marking a difference “between presidential power that implicates a struggle between the branches and one that does not” and noting that “aggrandizement seems inevitable, however, where Congress asserts the right itself to control the removal question” but not necessarily where Congress has only limited the President’s removal in order to promote goals such as “objectivity”).

226. See, e.g., *Bowsher*, 478 U.S. at 732 (holding that because Congress retains removal authority over the Comptroller General, he cannot exercise executive powers); see also Richard H. Pildes, *Separation of Powers, Independent Agencies, and Financial Regulation: The Case of the Sarbanes-Oxley Act*, 5 N.Y.U. J.L. & BUS. 485, 491 (2009) (“No Supreme Court decision exists that constitutionally invalidates an administrative agency structure when Congress has not directly inserted itself into the administrative process”).

227. *Free Enter. Fund*, 130 S. Ct. at 3156 (internal quotation marks omitted).

228. Lessig & Sunstein, *supra* note 11, at 115.

229. See Calabresi, *supra* note 122, at 84 (“There are only actors influenced by the President, actors influenced by the Congress and its committee shadow governments, and actors who are tugged one way or the other. Anything that weakens the presidential set of incentives and controls strengthens Congress and *vice versa*. There is no such thing as a truly independent agency in Washington, D.C.”).

Functional tests fail to provide adequate protection to the specific constitutional guarantees related to separation of powers. Similarly, such guarantees cannot be left to the political branches as Professor Aziz Huq has recently argued. He maintains that challenges to for-cause removal limits should be treated as political questions in part because removal “does not reliably produce the constitutional good identified by the Court—democratic accountability.”²³⁰ Professor Huq argues that a rule—such as one in favor of the President’s removal power—cannot supply a judicially manageable standard if “there is no reliable and stable correlation between a rule of decision and [its] underlying values.”²³¹

The “underlying values” served by removal, however, do not supply the primary reason for protecting the President’s removal power. Rather, the removal power follows from the constitutional text and structure as an essential aspect of executive power. I agree with Professor Huq that questions about whether removal serves democratic accountability (or any other value) are well outside the competence of the courts. Nonetheless, the judiciary can enforce the basic constitutional framework of administration, as the Court recognized in *Free Enterprise Fund*.

The removal power provides a clear limit derived from the text and structure of the Constitution for the judiciary to enforce while accommodating the respective powers of the President and Congress. The Court need not evaluate the President’s functional control or influence over an agency. These forms and indicia of control, how agencies and the White House interact, are beyond the Court’s ability to judge as a constitutional matter.

B. Severance: A Minimal Remedy

In addition to being a simple rule of presidential control, removal as necessary and sufficient provides a minimalist remedy that accommodates the modern administrative state. Ensuring the President’s removal authority does not require abolishing the dozens of independent entities within the government. The Court can identify removal restrictions as the constitutional infirmity and sever them—maintaining presidential control while leaving in place the regulatory functions of an agency. The wisdom of any particular regulatory scheme would then remain a question for the political branches.

The Supreme Court in *Free Enterprise Fund* recently endorsed severability as an appropriate remedy because the “normal rule” is to

230. See Huq, *supra* note 12, at 5–6.

231. *Id.* at 5.

invalidate part rather than the whole statute.²³² Moreover, the Court explained that “the Board does not violate the separation of powers, but the substantive removal restrictions [in the statute] do.”²³³ The Court then concluded that the Sarbanes-Oxley Act remains “fully operative” without the removal restrictions and that “nothing in the statute’s text or historical context makes it ‘evident’ that Congress, faced with the limitations imposed by the Constitution, would have preferred no Board at all to a Board whose members are removable at will.”²³⁴

The Court’s reasoning can easily serve as a template for other independent agencies. It is difficult to imagine any statute creating an independent agency and charging it with administration of a regulatory scheme that would not survive this very minimal and conclusory standard for severability. The Court effectively creates a presumption in favor of severance for removal restrictions.²³⁵ Most, if not all, regulatory schemes could remain “fully operative” without for-cause removal. Removal restrictions can affect the way in which the President interacts with an agency, but the underlying regulatory mandate will usually stand on its own. As with the PCAOB, it will be difficult to show in any particular case that it is “evident” Congress would have preferred no agency at all to the severance of removal restrictions. After severance, Congress remains free to eliminate the agency altogether, to delegate regulatory authority more specifically, or to otherwise change the agency’s duties or structure.

The same result cannot be accomplished through statutory interpretation of removal limits as some scholars have proposed.²³⁶ Professors Lessig and Sunstein, for instance, argue that for-cause removal provisions should be interpreted to allow for a wide degree of presidential control.²³⁷ While this approach has some minimalist appeal by avoiding difficult constitutional questions, it does not leave administration sufficiently within the President’s control. This view assumes that

232. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3161 (2010).

233. *Id.*

234. *Id.* at 3161–62.

235. *See Rao, supra* note 10, at 2571.

236. *See Lessig & Sunstein, supra* note 11, at 110; Miller, *supra* note 91, at 86–87 (explaining various statutory constructions of removal restrictions that would allow the President substantial directive authority); *see also* Manning, *supra* note 183, at 1326 (arguing that “good cause” could be interpreted to allow removal for insubordination in order to avoid serious constitutional questions about the President’s authority).

237. *See Lessig & Sunstein, supra* note 11, at 110 (“There is no controlling judicial decision on how ‘independent’ the independent agencies and officers can legitimately claim to be. If the statutory words allow for considerable presidential removal (and hence supervisory) power, the notion of independent administration of the laws can be solved simply as a matter of statutory construction. Perhaps Congress has not, in fact, created any truly independent administrators.”); *see also* Manning, *supra* note 183, at 1308 (“In the end, all that definitively emerges from the opinions such as *Humphrey’s Executor* and *Morrison* is that they have not definitively resolved the constitutionality of a restrictive reading of ‘good cause.’”).

Congress can specifically limit the President's control precisely because it is not a constitutional requirement.²³⁸ Relying on statutory interpretation leaves significant uncertainty about the extent to which the President can control and supervise.²³⁹

Another difficulty with leaving control to statutory interpretation is that statutory removal restrictions take different forms.²⁴⁰ Some statutes limit removal "only" to certain causes. Other statutes do not specify exclusivity but nonetheless have been interpreted to limit removal only for the listed causes.²⁴¹ Indeed, removal restrictions have been inferred even from statutory silence. For example, in *Free Enterprise Fund*, the parties stipulated, and the Court accepted, an understanding that SEC commissioners could be removed only for cause, even though the statute said nothing whatsoever with regard to removal.²⁴² The Supreme Court has not faced the question of whether insubordination or other reasons will satisfy statutory causes for removal precisely because presidents have generally not removed officers with for-cause removal protections.²⁴³

Requiring the President to litigate whether removal was for a permissible cause under these varied statutory schemes impermissibly infringes on the executive power to control administration, because judicial decisions would have to turn on fact-specific and unpredictable inquiries about whether the President's reason satisfied the statutory standard.²⁴⁴ If,

238. See Datla & Revesz, *supra* note 11, at 779–80; Kagan, *supra* note 11; Lessig & Sunstein, *supra* note 11, at 112.

239. See *infra* Part IV.C.

240. See Rao, *supra* note 10, at 2568–69.

241. See *Humphrey's Ex'r v. United States*, 295 U.S. 602, 610–11 (1935) (interpreting listed causes of removal for Federal Trade Commissioners to be exclusive grounds for presidential removal); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3158 n.7 (2010) (noting the exclusivity of causes was implied because the structure of the statute would not make sense "if Board members could also be removed without any finding at all").

242. See *Free Enter. Fund*, 130 S. Ct. at 3148–49 ("The parties agree that the Commissioners cannot themselves be removed by the President except under the *Humphrey's Executor* standard of 'inefficiency, neglect of duty, or malfeasance in office,' . . . and we decide the case with that understanding."); *cf. id.* at 3182–83 (Breyer, J., dissenting) (criticizing the majority's stipulation of this fact and noting that the "Court then, by assumption, reads *into* the statute books a 'for cause removal' phrase that does not appear in the relevant statute and which Congress probably did not intend to write. And it does so in order to strike down, not to uphold, another statute. This is not a statutory construction that seeks to avoid a constitutional question, but its opposite."); see also *Wiener v. United States*, 357 U.S. 349, 355–56 (1958) (concluding that the President could not remove the War Claims Commissioner at will because of the adjudicatory functions of the Commission, despite statutory silence as to removal); Gary Lawson, *Stipulating the Law*, 109 MICH. L. REV. 1191 (2011) (arguing contrary to the standard practice that parties should be allowed to stipulate to legal conclusions such as the independence of the SEC).

243. See Manning, *supra* note 183, at 1303 n.62 (providing some reasons for this "forbearance" by Presidents including that they have other mechanisms of influence over these officers).

244. See, e.g., Miller, *supra* note 91, at 87 (noting that even if the President could remove for the failure to follow a directive, he could not remove an officer who "refused to follow an instruction that would require the officer to act in a fashion plainly beyond the officer's discretion").

for instance, failure to follow direction can be a cause, how far does insubordination have to go? As discussed above, insubordination can take many forms.²⁴⁵ Could a President safely remove an officer who did not generally support the Administration's goals? Courts will invariably have to decide these difficult questions of statutory construction when an aggrieved ex-officer brings suit.²⁴⁶ Yet there do not appear to be judicially manageable standards to apply in this context. Litigation would leave courts second-guessing the President and would chill his ability to utilize the removal power.

Moreover, leaving presidential control and supervision to statutory interpretation makes it difficult to clear away existing understandings of independence. Even if the President chooses to interpret existing statutes to allow for greater control and removal, he will be waging a difficult political battle against conventions reinforced by Congress, the Court, and past executive practice. Courts sometimes enforce these conventions through statutory interpretation—recognizing the background norms of independence.²⁴⁷ Though not legally binding, such conventions often provide an effective political constraint on presidential action and control.

C. *Clearing the Fog of Independence*

In addition to providing a simple principle and remedy for judicial enforcement, restoring the full removal power would establish a legal framework that clarifies the relationship between agencies and the President and removes the uncertainty about the consequences of removal restrictions and the independent agencies they create. It provides a rule for the political branches in allocating authority over agency interpretation. An understanding that all agencies are within the executive power would allow the President to exercise control over all agencies, without the penumbral concerns about “independence” and what it requires with respect to administration.

Although scholars have demonstrated that independence is linked to a variety of factors, removal continues to be identified as the hallmark of

245. See *supra* Part II.C.

246. See Manning, *supra* note 183, at 1301 n.57 (explaining that even with a broad interpretation of “good cause” the Executive would have to establish that a subordinate “refused to follow . . . directives, and that the directives related to a matter of legal judgment about which reasonable people could disagree” and that “[i]t presumably would be open to a court to inquire into whether the stated reasons for dismissal were pretextual”).

247. Vermeule, *supra* note 11, at 1222 (noting that the convention of agency independence may be enforced as context for statutory interpretation, but cannot be directly enforced if the President has the power to discharge an official at will).

independence.²⁴⁸ Presidents, Congress, and the courts understand independence to include a variety of conventions not specified by statute and that do not necessarily follow from statutory limits. For instance, within the White House, there is a culture of interacting with independent agencies in a different manner than executive branch agencies.²⁴⁹ Contacts with independent agencies are restricted in comparison to direction of other executive branch agencies. Independent agencies sometimes line up with the President's agenda, but usually through mechanisms other than direct control.²⁵⁰

Conventions of "independence" and the surrounding legal uncertainty are reflected in how the branches interact with these agencies. For instance, no President has required independent agencies to submit to OMB review, despite the fact that executive branch lawyers have concluded the President could constitutionally do so.²⁵¹ Similarly, statutes designed to limit White House centralization of administration are often written in a way that reflects the uncertainty about whether Congress can lawfully prohibit such centralization.²⁵² Congress understands independent agencies to have special accountability to Congress and there is some evidence that such agencies may be more responsive to congressional interests.²⁵³ Finally, Supreme Court Justices have expressed mixed understandings of how for-cause removal limits constrain the President's ability to control agencies.²⁵⁴

248. See Datla & Revesz, *supra* note 11, at 776 & n.24 (explaining that despite the diversity of agency forms, scholars have settled on one characteristic to define independence: the presence of a for-cause removal clause).

249. When I served as Associate White House Counsel, we followed a variety of guidelines for contacts with independent agencies.

250. Bressman & Thompson, *supra* note 11, at 610–11.

251. See Memorandum for the Hon. David Stockman, Dir., Office of Mgmt. & Budget, from Larry L. Simms, Acting Ass't Atty. Gen., Office of Legal Counsel (Feb. 12, 1981) (concluding that the President could legally subject independent agencies to regulatory review); Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489, 1506 (2002) (explaining that President Reagan considered bringing independent agencies within OMB review, but did not based on legal uncertainties and "fear[] of an adverse congressional reaction"). President Barack Obama issued an executive order that suggested independent agencies "should" comply with executive orders governing executive agencies with respect to cost-benefit analysis and improving regulatory review. Exec. Order No. 13,579, 3 C.F.R. 256–57 (2011); *cf.* Exec. Order No. 13,563, 3 C.F.R. 215–17 (2011) (directing repeatedly that executive agencies "shall" take steps to improve regulation and regulatory review).

252. For example, Congress provided that the director of the CFPB could not be required to consult with the OMB, but the statute does not prohibit such consultation. See, e.g., 12 U.S.C. § 5497(a)(4)(E) (providing that the statute "may not be construed as implying any obligation on the part of the Director to consult with or obtain the consent or approval of the Director of the Office of Management and Budget with respect to any report, plan, forecast, or other information . . .").

253. See Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 769–70 (1983) (noting congressional mechanisms of influence over agencies).

254. Compare *Morrison v. Olson*, 487 U.S. 654 (1988) (holding that good cause removal allows sufficient control over independent counsel), with *Free Enter. Fund v. Pub. Co. Accounting Oversight*

The branches have developed various conventions of independence,²⁵⁵ largely unmoored from any constitutional or statutory foundation.

Restoring the President's removal authority may help clear away the confusion inherent in these conventional understandings of what "independence" requires. It may help in the process of "deconstructing" independence.²⁵⁶ This would create a more predictable legal background against which Congress and the President could structure new agencies and oversee administration. Congress could promote various technocratic or other values through agency structure, so long as it does not impede the President's removal authority. Independence would properly be understood as a merely political norm, not a legal requirement. Presidents could then choose whether and how to assert control over administration in all agencies, without the uncertainty of the penumbras of independence surrounding removal restrictions.

D. Benefits to Administration

Some scholars have questioned whether anything at all turns on agency design.²⁵⁷ Indeed, there is little concrete evidence about how statutory changes to administrative structures affect agency decision making and much disagreement about the goals of good administration and whether presidential control serves those goals.²⁵⁸ The indeterminacy of the political science suggests further reason for focusing on the constitutional framework and distinguishing those questions of administration properly left for political debate. Nonetheless, here I explore some potential

Bd., 130 S. Ct. 3138, 3161 (2010) (holding that second layer of for-cause protection impermissibly limited presidential control). *See also* *Humphrey's Ex'r v. United States*, 295 U.S. 602, 625–26 (1935) (observing that "length and certainty of tenure would vitally contribute" to the congressional purpose "to create a body of experts who shall gain experience by length of service; a body which shall be independent of executive authority, *except in its selection*, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government.").

255. *See* Vermeule, *supra* note 11, at 1185 (explaining that conventions are "(1) regular patterns of political behavior (2) followed from a sense of obligation. Each of the two conditions is necessary but insufficient, taken by itself.").

256. *See* Datla & Revesz, *supra* note 11.

257. *See* Datla & Revesz, *supra* note 11, at 825–26; Robinson, *supra* note 175, at 250 ("[N]othing very important turns on organizational status . . . [A]dvocates of change must bear at least the burden of producing credible evidence showing that something worthwhile is at stake").

258. *Compare* JERRY L. MASHAW, GREED, CHAOS AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 153 (1997) (arguing that the President's national constituency allows him to better assure an agency's democratic responsiveness), *with* Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1306 (2006) (noting that the President is also subject to interest group pressures). *See also* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 30 (2010) (arguing for the need "to look beyond removal if the goal is to create the strongest barrier possible against capture"); Huq, *supra* note 12, at 27–32 (discussing mechanisms of regulatory control the President has in addition to removal).

administrative benefits of the rule of removal as necessary and sufficient, without addressing contested questions of what administration should promote or the most effective means of achieving various administrative goals.

Perhaps most importantly, a bright line of removal as necessary and also sufficient promotes a formal mechanism of accountability in the executive branch. As James Madison said, “If the President should possess alone the power of removal from office, those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community.”²⁵⁹ With the removal power the President is politically accountable for all the varied functions of the executive branch and he can oversee, direct, and control the exercise of those functions as he chooses. He cannot avoid responsibility by attributing actions to independent agencies and there is no blurring or shared responsibility with Congress for administration in those agencies.

A number of scholars have suggested that presidential control over administration does not actually promote government accountability.²⁶⁰ Some of the disagreement stems from different understandings of accountability—both the type of accountability the Constitution creates and the type of accountability that should be promoted.²⁶¹ In particular, there is a pervasive criticism that unitary theorists take a too simplistic view of accountability, both as a functional and constitutional matter. Some have suggested that presidential administration does not promote accountability to statutory requirements, to values such as “transparency and procedural

259. Speech of James Madison (June 16, 1789), available at http://www.constitution.org/jm/17890616_removal.htm.

260. See, e.g., Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531 (1998); Flaherty, *supra* note 16, at 1785; Kitrosser, *supra* note 23, at 611; Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 613–14 (2009) (explaining that even if constitutional principles require political accountability for policy making, presidential administration is a too blunt tool for furthering accountability).

261. See Huq, *supra* note 12, at 52 (“Accountability is a multifaceted and contested idea. Augmenting presidential control promotes some kinds of accountability while simultaneously undermining others.”).

regularity,²⁶² or to majoritarian preferences.²⁶³ Others have argued that any connection between removal and accountability remains unpredictable.²⁶⁴

In explaining accountability as an advantage for the removal authority, however, I do not claim that presidential control provides all the various forms of accountability that might be desirable in administration, but instead that presidential control through removal provides a certain essential political accountability required by the constitutional structure and a republican form of government. Discretionary policy decisions should be made by actors who have electoral accountability to the people. The Constitution specifies that execution of the laws must occur under the control of one Chief Executive. Other forms of accountability to legislative preferences, to scientific integrity, or to other forms of expertise may be desirable; however, for the most part these forms of accountability have sources outside the Constitution. They depend on contested administrative values. These forms of accountability can be debated on their political merits and promoted through agency design.

Related to the point about accountability, in a variety of contexts it has been suggested that presidential and political control of administrative decisions promotes the legitimacy of bureaucratic choices. Recognition of the inherently political nature of many discretionary administrative decisions requires some account of why these choices can legitimately be delegated to the bureaucracy. This legitimacy flows largely from the understanding that such decisions are made by actors responsible to the President and therefore subject to the control of a politically accountable Chief Executive.²⁶⁵

Moreover, the judiciary has over time accommodated the expansion of the administrative state and the broad delegations to the executive by

262. See Kitrosser, *supra* note 23, at 613–14 (arguing that “unitarians assume a very simple version of accountability based on whether decisions technically belong to elected officials” and that “this simple accountability bears little resemblance to the far more complex and multi-faceted accountability principles reflected in the Constitution”); see also Brown, *supra* note 260.

263. See Stephenson, *supra* note 20, at 55 (considering the argument for political control as reflecting “majoritarian values” and explaining why a “majority of voters . . . prefers a moderate level of bureaucratic insulation from political control”).

264. See Huq, *supra* note 12, at 63 (discussing “reasons for skepticism about claims of a strong casual connection between presidential control and democratic accountability.”).

265. See John O. McGinnis, *Presidential Review as Constitutional Restoration*, 51 DUKE L.J. 901, 901 (2001) (arguing that presidential regulatory review can restore constitutional principles and produce government regulation that “promotes the public interest rather than special interests”); Kagan, *supra* note 11, at 2353 (noting that the President better represents majoritarian preferences compared to members of congress, interest groups, and the bureaucracy); cf. Cynthia R. Farina, *The “Chief Executive” and the Quiet Constitutional Revolution*, 49 ADMIN. L. REV. 179, 185 (1997) (calling for a reconsideration of the view that the President can supply legitimacy to the administrative state in part because it is “absurd” to “routinely assume that regulatory behavior responds to presidential direction, and is shaped by his informed and deliberate calculus of policy preferences”); Huq, *supra* note 12, at 63–64.

affording substantial deference to executive branch interpretations.²⁶⁶ The familiar two-step determination of judicial deference to agency decision making outlined in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*²⁶⁷ depends in large part on the idea that discretionary administrative duties and policy choices should be left with the political branches, not the courts.²⁶⁸ Although this justification has receded from judicial opinions that now stress congressional intent with regard to delegation,²⁶⁹ it remains the case that as between judicial and agency interpretation, judicial deference to agencies relies in large measure on political accountability in the exercise of the executive power. The Court generally does not distinguish its levels of deference based on whether an agency is independent.²⁷⁰ This suggests something of a puzzle and might mean that presidential control is not the basis for deference,²⁷¹ or alternatively that the Court recognizes even independent agencies as executive agencies and subject to enough control to justify deference on the grounds of political accountability.

V. CASE STUDY: PRESIDENT, CONGRESS, AND THE CFPB

The challenge to the Consumer Financial Protection Bureau (CFPB) provides a good case study for analyzing how removal is necessary and sufficient for presidential control. This Part explains how the separation of powers problems regarding the structure of the Bureau can be addressed

266. Recently the Court held that it will defer even to an agency's determination of its own jurisdiction. *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863 (2013).

267. *Chevron v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

268. *Id.* at 865–66 (“[A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. . . . The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones.”).

269. *See United States v. Mead Corp.*, 533 U.S. 218 (2001).

270. *Compare FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 525–26 (2009) (“[I]t is assuredly not ‘applicable law’ that rulemaking by independent regulatory agencies is subject to heightened scrutiny. The Administrative Procedure Act, which provides judicial review, makes no distinction between independent and other agencies There is no reason to magnify the separation-of-powers dilemma posed by the Headless Fourth Branch, by letting Article III judges—like jackals stealing the lion's kill—expropriate some of the power that Congress has wrested from the unitary Executive.” (internal citations omitted)), *with id.* at 547 (Breyer, J., dissenting) (explaining that independent agencies enjoy insulation from political oversight and arguing that the FCC's “comparative freedom from ballot-box control makes it all the more important that courts review its decisionmaking to assure compliance with applicable provisions of the law—including law requiring that major policy decisions be based upon articulable reasons”).

271. *See Lisa Schultz Bressman, Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1807 (2007) (suggesting independent agencies may warrant *Chevron* deference because “administrative procedures provide Congress with an effective means of control, we might accept that independent agencies are accountable, albeit not through the President,” but recognizing that independent agencies are also responsive to presidential control to some degree).

through the removal power—if the director of the Bureau can be removed at will by the President, this would remedy constitutional infirmities by making the director accountable to the President. The Bureau’s structure has other mechanisms designed to promote independence; however, these could remain in place as a constitutional matter because they would be within the control and oversight of the President. The case study demonstrates how ensuring removal at will provides a justiciable rule for constitutional questions about administrative control and begins to clear some of the fog around agency independence.

A. Challenges to the Bureau

In the wake of the economic crisis, Congress enacted the Dodd-Frank Act, which in part establishes “an independent bureau” within the Federal Reserve for the protection of consumers.²⁷² The Bureau combines a number of features to promote independence. It is led by a single director who can serve for five years, removable by the President “for inefficiency, neglect of duty, or malfeasance in office.”²⁷³ The Bureau has an unusual degree of budgeting independence—the director determines the amount necessary for the functions of the Bureau and the Federal Reserve must pay this amount from a designated fund, limited by only a very generous cap.²⁷⁴ Thus, the director sets the budget for the Bureau outside of the congressional appropriations process. Moreover, the statute explicitly specifies that the Bureau cannot be obliged to comply with oversight or review by the White House and that the director cannot be required to participate in a review of agency actions or preclearance of testimony.²⁷⁵ The statute does not prohibit consultation; yet by purporting to remove the “obligation” of consultation and oversight, the statute suggests that it is within the director’s discretion whether he will submit to White House or OMB

272. 12 U.S.C. § 5491(a) (2012).

273. 12 U.S.C. § 5491(c)(3).

274. 12 U.S.C. § 5497(a)(1) (providing that the Federal Reserve “shall transfer to the Bureau from the combined earnings of the Federal Reserve System, the amount determined by the Director to be reasonably necessary to carry out” the CFPB’s functions); *see also* 12 U.S.C. § 5497(a)(2) (setting forth the funding cap).

275. 12 U.S.C. § 5492(c)(4) (“No officer or agency of the United States shall have any authority to require the Director or any other officer of the Bureau to submit legislative recommendations, or testimony or comments on legislation, to any officer or agency of the United States for approval, comments, or review prior to the submission of such recommendations, testimony, or comments to the Congress, if such recommendations, testimony, or comments to the Congress include a statement indicating that the views expressed therein are those of the Director or such officer, and do not necessarily reflect the views of the Board of Governors or the President.”); *see also* 12 U.S.C. § 5497(a)(4)(E) (providing that the statute “may not be construed as implying any obligation on the part of the Director to consult with or obtain the consent or approval of the Director of the Office of Management and Budget with respect to any report, plan, forecast, or other information . . . or any jurisdiction or oversight over the affairs or operations of the Bureau.”).

supervision. The arguably unique combination of structural features in the CFPB raised concerns at the outset about its significant insulation from political checks and balances.

In June 2012, former White House Counsel and Ambassador C. Boyden Gray and the Competitive Enterprise Institute initiated a lawsuit on behalf of several banks alleging in part that the CFPB violates “separation of powers” and should be enjoined from operating.²⁷⁶ These separation of powers violations include: (1) “Congress has no ‘power of the purse’ over the CFPB, because the Act authorizes the CFPB to fund itself by unilaterally claiming funds from the [Federal Reserve]”; (2) the Act “insulates the CFPB Director from presidential oversight” because of the for-cause removal protections; and (3) the CFPB is insulated from accountability even to the Federal Reserve Board because the Federal Reserve Board does not review or approve the rules of the CFPB.²⁷⁷ The plaintiffs request declaratory and injunctive relief “declaring unconstitutional the provisions of the Act creating and empowering the CFPB, and enjoining Defendants Cordray and the CFPB from exercising any powers delegated to them by [the Act].”²⁷⁸ Another lawsuit also alleges that the combination of features in the CFPB violates separation of powers.²⁷⁹

The plaintiffs’ remedy calls for invalidating the CFPB—its administrative existence declared an unconstitutional violation of separation of powers. The plaintiffs also allege that Director Cordray was unconstitutionally recess appointed—a claim that has more salience after the D.C. Circuit recently held that recess appointments to the National Labor Relations Board made at the same time were constitutionally invalid.²⁸⁰

B. Removal Provides the Constitutional Remedy

This Article’s proposal of the removal power as necessary and sufficient provides a workable judicial remedy to the constitutional concerns raised by the CFPB’s structure. All of the separation of powers infirmities alleged in the lawsuit can be reduced to the CFPB’s

276. See Brief for Plaintiffs, *supra* note 6.

277. *Id.* at 17–18.

278. See *id.* A district court judge dismissed this complaint for lack of standing and the decision is currently under appeal. See *State Nat’l Bank of Big Spring*, 958 F. Supp. 2d 127 (D.D.C. Aug. 1, 2013).

279. Brief of Plaintiffs, *Pisinski v. CFPB*, No. 13-CV-1112 (D.D.C. July 22, 2013).

280. See *Canning v. NLRB*, 705 F.3d 490, 507 (D.C. Cir., 2013), *cert. granted* (holding that appointments to the NLRB were not valid because were not made during “the Recess of the Senate,” interpreted to mean an intersession recess).

independence from the President, maintained by removal restrictions that insulate the director from presidential oversight. Accordingly, the best judicial response to this lawsuit would be to require that the director of the CFPB be removable at will by the President. This constitutional remedy, consistent with the Court's recent decision in *Free Enterprise Fund*, would declare the for-cause provision unconstitutional and sever it from the rest of the statute. If the President could remove the director at will, this would allow for the necessary presidential direction and control. It would bolster the Bureau's accountability because the director would answer to the President, and the President could direct the statutory duties of the Bureau.

In the context of this lawsuit, removal would also be sufficient to cure the other alleged separation of powers problems. For instance, the "independent" budgeting authority, like other functions of the Bureau, would be within the control of a politically accountable director. Statutes that delegate authority to executive agencies to spend up to a certain amount have existed since the Founding.²⁸¹ The budgeting authority for the CFPB takes a similar form because it allows the director to establish a budget up to a specified cap. The fact that the cap is very generous and that the statute leaves significant discretion with the director may be ill-advised as a policy matter, but this structure does not present a constitutional problem if the director is accountable to the President through the removal power. If the President can remove, then the President can direct decisions about the Bureau's budget and regulatory priorities through OMB or whatever other mechanism he chooses. Similarly, if the director answered to the President, it would no longer matter that the Bureau was insulated from the Federal Reserve. Removal at will would ensure that irrespective of its other forms of independence, the Bureau's director would answer to the President.

This approach has the advantage of being judicially administrable. As discussed above, the Constitution does not have a general separation of powers requirement,²⁸² but rather a specific allocation of powers that when maintained serves the broader structure of separation of powers. Accordingly, there is no all-things-considered functional test to protect separation of powers and I am unaware of any decision in which the Court has invalidated government action on functional separation of powers grounds.²⁸³ Given that all agencies combine powers to some degree, perhaps the Court has been loath to find that any particular combination goes too far. Courts cannot easily identify or enforce a specific quantum of "separation." Instead, the Court upholds separation of powers by ensuring

281. See *supra* notes 196–197 and accompanying text.

282. See Manning, *supra* note 15, at 1944.

283. See *supra* notes 221–224 and accompanying text.

compliance with particular constitutional requirements, such as the removal power. Removal provides a justiciable standard. Moreover, removal allows for a minimalist remedy, because the Court could sever removal limits while leaving other functions of the Bureau unimpaired. The Court has preferred severance in separation of powers cases and has been understandably reluctant to invalidate an entire agency or regulatory scheme.²⁸⁴

By contrast to my approach, litigation against the CFPB seeks an injunction against operation of the CFPB. For litigants who want out from the regulatory scheme, the removal power will not suffice because it will be unlikely to affect any particular enforcement decision of the agency. No doubt eliminating the CFPB and its functions is at least partly at issue for many politicians and for some of the parties initiating this lawsuit.²⁸⁵

The remedy preferred by the litigants, however, need not drive a court's constitutional analysis. The regulatory mandate of the CFPB is not unconstitutional (regardless of how unwise it may be) so long as the operation of the CFPB and its exercise of statutory duties remain subject to the oversight and control of the President. This remedy fixes constitutional problems with the agency structure. Of course, if the Court invalidates the for-cause removal protections, a future President may rein in the regulatory zeal of the agency or Congress may return to the drawing board, as many have suggested, to reconsider the structure and duties of the CFPB.²⁸⁶ A judicial decision severing the removal limits maintains the constitutional framework but leaves questions about an agency's structure and authority in the political process.

Moreover, as discussed above, focusing on the minimum constitutional requirements will help to clear up the uncertainty surrounding the proper relationship between the President and independent agencies. In the context of the CFPB, for instance, Director Cordray said before the 2012 election that even if a Republican won he would continue to serve out his recess

284. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3182 (2010); *Buckley v. Valeo*, 424 U.S. 1, 122–24 (1976); *Bowsher v. Synar*, 478 U.S. 714, 734–35 (1986); *INS v. Chadha*, 462 U.S. 919, 958–59 (1982).

285. See C. Boyden Gray & Jim R. Purcell, *Why Dodd-Frank Is Unconstitutional*, WALL ST. J., June 21, 2012 (noting that the “constitutional violations are not merely the stuff of law-school debates” but “they pose a direct threat to economic recovery” and explaining the practical results of regulation under Dodd-Frank).

286. Members of Congress concerned about the breadth of authority given to the Bureau and the unusually high level of insulation from political control have already introduced a number of proposals for reform. These practical reforms use agency design at least in part to promote political accountability and make the CFPB more like other independent agencies. See, e.g., H.R. 1121 (112-107) (“To replace the Director of the Bureau of Consumer Financial Protection with a five person Commission.”).

appointment²⁸⁷—essentially declaring publicly that he was not subject to removal by the President. A decision explaining that the director was removable at will would reinforce the proper supervisory relationship and chain of command between the President and executive branch officers.

C. Removal May Provide Only Limited Control

As a practical matter, at-will removal may leave the President with only a very blunt tool for controlling the Bureau. From the start, confirmation of the director has been used to secure reforms to the Dodd-Frank Act. Senate Republicans told President Obama in no uncertain terms that no director would be confirmed unless Dodd-Frank was reformed.²⁸⁸ Thus, President Obama faced an extremely difficult environment for appointing someone to head the Bureau. Elizabeth Warren, his top pick, faced likely defeat in the Senate, and so the President ultimately nominated Richard Cordray. After the Senate refused to act, the President appointed Cordray during what he characterized as a “recess” while the Senate was in a pro forma session.²⁸⁹ The D.C. Circuit has held that recess appointments of Members of the NLRB made at the same time were impermissible because they were not made during “the recess” of the Senate, which the court interpreted to mean only intersession recesses.²⁹⁰

The appointment and confirmation battles suggest just one of the difficulties of exercising removal. In the context of the Bureau, one can see just how blunt a tool removal may be since the feasibility of removal depends on the likelihood of Senate confirmation of a replacement. If the President faces a Senate controlled by a different political party, or there is strong opposition to replacing the incumbent officer, or Senators wish to

287. See Jim Puzzanghera, *Richard Cordray Marks Consumer Protection Agency's First Year*, L.A. TIMES, July 21, 2012 (Cordray stating in an interview that he plans to serve out his recess appointment through the end of 2013 even if a Republican is elected President).

288. Letter from 44 Senators to President Obama (May 2, 2011) (expressing concern about the lack of accountability in the structure of the CFPB and stating “we will not support the consideration of any nominee, regardless of party affiliation, to be the CFPB director until the structure of the [CFPB] is reformed”).

289. The Office of Legal Counsel published a decision concluding that during a pro forma session of the Senate the President “has discretion to conclude that the Senate is unavailable to perform its advise-and-consent function and to exercise his power to make recess appointments.” See Office of Legal Counsel Memorandum, *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions* (Jan. 6, 2012). Senators expressed outrage that the President did an end-run around the confirmation process. Senate Majority Leader Mitch McConnell responded, “Breaking from this precedent lands this appointee in uncertain legal territory, threatens the confirmation process and fundamentally endangers the Congress’s role in providing a check on the excesses of the executive branch. . . . Congress has a constitutional duty to examine presidential nominees, a responsibility that serves as a check on executive power.” Neil McCabe, *McConnell Blasts Obama's Cordray Non-Recess Recess Appointment*, HUMAN EVENTS, Jan. 4, 2012.

290. See *Canning v. NLRB*, 705 F.3d 490 (D.C. Cir., 2013), *cert. granted*, 133 S. Ct. 2861.

condition confirmation on the satisfaction of other demands, the Senate can make clear that removal may leave the President without a Senate-confirmed agency head.²⁹¹ Moreover, Congress has placed various statutory limits on the President's ability to appoint acting heads of agencies.²⁹²

Despite these difficulties, in the context of the lawsuit against the Bureau and with respect to other independent agencies, removal provides the necessary and sufficient constitutional criteria for ensuring presidential control over administration. Insisting that the Bureau remain accountable to the President through the removal power would allow the courts to enforce fundamental requirements of separation of powers—including that execution of the laws must proceed under the control of the Chief Executive. The judiciary can maintain separation of powers by keeping the political branches within their designated spheres and allowing them to exercise their respective powers. Removal as both necessary and sufficient provides a judicially manageable rule and avoids free-ranging functional inquiries about the extent of a separation of powers violation.

This solution of enforcing a minimal constitutional framework may leave both opponents and proponents of the CFPB unsatisfied. Nevertheless, this perhaps highlights the *political* aspects of the disagreement over how to regulate consumer finance, a disagreement that belongs in the political, not judicial arena.

CONCLUSION

The debate over presidential control of the administrative state continues amidst legal uncertainty and judicial challenges. As scholars have sought to move beyond labels of “independence” for understanding actual presidential control, realistic understandings of administration have resulted in relative indifference to constitutional requirements. Yet Article II requires the President serve as the Administrator in Chief, in control of execution of the laws and with directive authority over his subordinates. Such control cannot be left solely to congressional preferences or to politics. The executive power in the scheme of separation of powers deserves more than a rubber stamp.

291. Recess appointed agency heads are often less effective than their Senate confirmed counterparts for a number of reasons, including they lack the legitimacy of the Senate confirmation process and Congress may continue to harass the agency in order to gain various concessions with respect to policy differences or document production. *See generally* Patrick Hein, *In Defense of Broad Recess Appointment Power: The Effectiveness of Political Counterweights*, 96 CALIF. L. REV. 235, 240 (2008) (arguing from a functional perspective that Congress tolerates the President's broad recess appointment power because “the legislative branch has concluded that challenging the President's broad recess appointment power in the political, rather than the constitutional, arena promises more success”).

292. *See* Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913 (2009).

This Article has argued for removal at will as both necessary and sufficient for presidential control. This principle provides a constitutional rule that takes into account the realities of modern administration and properly accommodates the powers of Congress and the President. Based on the text and structure of the Constitution, it respects Congress's significant authority to create regulatory duties and to assign them to specific officers, yet leaves control over execution to the President. Removal as necessary and sufficient provides a judicially manageable rule for courts to assess challenges to agency structures and a remedy of severability that will allow independent agencies to continue with their regulatory duties. It is a simple rule for maintaining constitutional requirements while leaving most questions about administrative control to the political branches.