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ARTICLES

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ABSTRACT

This Article considers the constitutional status of mandatory partisan balance requirements for presidential appointments to independent federal agencies. Since the 1880s, Congress routinely has included partisan balance requirements, along with fixed terms of office and "good cause" limitations on the President's removal power, as standard design elements in its template for independent federal agencies. Until recently, both federal courts and most legal scholars have assumed the constitutionality of such restrictions on the President's appointment power—and with good reason, given the ubiquity of partisan balance requirements and the executive branch's historical acquiescence to them. However, the Supreme Court's decision in Free Enterprise Fund *threatens to upend this well-settled consensus; the decision squarely holds that Congress may not unduly attenuate the President's power to supervise and control executive branch entities—including independent agencies—without violating the separation of powers doctrine. In this Article, we posit that partisan balance requirements, at least when used in conjunction with fixed terms of office and good cause removal limitations, create a problem of at least equal magnitude to the problem identified in* Free Enterprise Fund *(namely, unduly insulating executive*

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officers with policymaking authority via a two-tiered good cause removal limitation). Under the logic of Free Enterprise Fund*, requiring the President to appoint political opponents to principal offices within the executive branch, and then prohibiting the President from removing such appointees except for good cause, unduly compromises the President's ability to supervise and control these agencies. Although* Humphrey's Executor *settled the constitutional status of good cause limits on the President's removal power for principal officers serving on independent federal agencies,* Free Enterprise Fund*'s broadly formalist reading of the Vesting and Faithful Execution Clauses strongly suggests that the combination of a partisan balance requirement with a good cause removal limit constitutes a bridge too far in the age of new formalism.*

INTRODUCTION: RECONSIDERING THE CONSTITUTIONAL STATUS OF PARTISAN BALANCE REQUIREMENTS

Since the 1880s and the creation of the Utah Commission and the Civil Service Commission,[1] Congress routinely has created federal regulatory entities that feature mandatory bipartisan agency heads. In fact, a partisan balance requirement, in conjunction with a fixed term of office and a "good cause" limitation on involuntary removal from office, constitutes a core element of the standard design that Congress uses when creating a so-called "independent" federal agency.[2] The entire purpose of these restrictions is to render the principal officers serving as the heads of such administrative entities less accountable to the President—notwithstanding the fact that these entities exercise executive power and constitute part of the executive branch of the federal government.[3] The imprimatur of history and practice notwithstanding, the Supreme Court's decision in *Free Enterprise Fund v. Public Com-*

1 *See infra* notes 140–72 and accompanying text.

2 *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 483–84 (2010) (discussing constitutive elements of agency independence); *see also id.* at 586, 588 (Breyer, J., dissenting) (cataloguing federal agencies with significant insulation from direct forms of presidential control). In addition to fixed terms of office and protection against removal from office except for good cause, Justice Breyer identifies six additional indicia of agency independence:

> (1) whether the agency consists of a multimember commission; (2) whether its members are required, by statute, to be bipartisan (or nonpartisan); (3) whether eligibility to serve as the agency's head depends on statutorily defined qualifications; (4) whether the agency has independence in submitting budgetary and other proposals to Congress (thereby bypassing the Office of Management and Budget); (5) whether the agency has authority to appear in court independent of the Department of Justice; and (6) whether the agency is explicitly classified as "independent" by statute.

Id. at 588 (citation omitted); *see also* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769 (2013) (cataloguing and discussing various attributes that render a federal administrative agency "independent").

3 *See* Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459 (2008).

pany Accounting Oversight Board[4] could force Congress to abandon the use of mandatory partisan balance requirements for independent federal agencies.[5]

In 1935, the Supreme Court sustained the use of good cause limitations on the President's power to remove a principal executive officer serving on an independent agency.[6] In so doing, it limited the scope of an earlier precedent, *Myers v. United States*,[7] that seemed to hold that the President must have an unfettered ability to remove executive officers in whom he lacks confidence.[8] *Humphrey's Executor* and *Myers* have coexisted, in some tension, since 1935. The standard account reads *Myers* to prevent Congress from aggrandizing itself by claiming a direct share in the President's removal power, but concurrently reads *Humphrey's Executor* to permit Congress to limit the President's removal power provided it does not attempt to reserve some part of that power for itself. Thus, and notwithstanding sustained scholarly criticism of *Humphrey's Executor*,[9] it is a settled aspect of the separation of

4 *Free Enter. Fund*, 561 U.S. 477.

5 *See infra* notes 392–420 and accompanying text. It bears noting that the widespread and longstanding use of the legislative veto did not save it from constitutional invalidation. *See* INS v. Chadha, 462 U.S. 919, 954–59 (1983). As Chief Justice Burger explained, "it is crystal clear from the records of the Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency." *Id.* at 958–59. We do not question the relevance of historical practice in assessing the constitutional status of a particular structure or practice. *See* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012). Even so, however, for a formalist, reliance on a particular practice by Congress and the President—even over a relatively long period of time—will not save a practice that either misallocates a particular power from one branch of the federal government to another (aggrandizement) or that deprives a branch of a power granted it under the Constitution (encroachment). *See Chadha*, 462 U.S. at 944, 958–59 (noting the many potential benefits associated with the legislative veto and its consistent use since the New Deal, but nevertheless prohibiting its use on separation of powers grounds); *see also* Jay S. Bybee, Printz*, the Unitary Executive, and the Fire in the Trash Can: Has Justice Scalia Picked the Court's Pocket?*, 77 NOTRE DAME L. REV. 269, 279–80 (2001) (discussing the concepts of "aggrandizement" and "encroachment" and their use in separation of powers jurisprudence).

6 Humphrey's Ex'r v. United States, 295 U.S. 602, 627–32 (1935).

7 272 U.S. 52, 116 (1926).

8 *Id.* at 163–64 (holding that the President must have the power to remove executive officers in whom he lacks confidence).

9 *See* Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 93 ("*Humphrey's Executor*, as commentators have noted, is one of the more egregious opinions to be found on pages of the United States Supreme Court Reports."). This viewpoint is shared by others. *See, e.g.*, STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE 3–29 (2008) (positing that, under the Constitution, the President possesses the ability to select and remove subordinates freely); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994) (arguing that the Constitution and historical evidence establishes that the President is empowered to administer all federal laws); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1167 & n.62 (1992) (noting the Supreme Court's contradictory caselaw on the congressional power to limit presidential control of the executive branch, beginning with *Humphrey's Executor*); Saikrishna Prakash, *Removal and Tenure*

powers doctrine that Article II's Vesting and Faithful Execution Clauses[10] do not require the President to have plenary power to fire any and all principal and inferior officers working within the executive branch.

To be sure, this standard effort at reconciling *Myers* and *Humphrey's Executor* has left more than a little play in the joints.[11] For starters, *Humphrey's Executor* characterizes the office at issue, serving as a Federal Trade Commission (FTC) member, as not constituting service within the executive branch. Subsequent decisions, such as *Morrison v. Olson*,[12] wisely abandoned this effort to locate independent agencies in some sort of constitutional Neverland—not a part of Congress, not a part of the executive branch, and not a part of the judiciary. Today, we understand that independent federal agencies do in fact comprise part of the executive branch;[13] even so, however,

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in Office, 92 VA. L. REV. 1779, 1782 (2006) (commenting on the incompatible nature of presidential removal power cases and describing *Humphrey's Executor* as "stunted").

10 U.S. CONST. art. II, § 1, cl. 1 (vesting "[t]he executive power . . . in a President of the United States of America"); *id.* art. II, § 3 (charging the President to "take Care that the Laws be faithfully executed").

11 *See* Peter L. Strauss, *On the Difficulties of Generalization*—PCAOB *in the Footsteps of* Myers, Humphrey's Executor, Morrison, *and* Freytag, 32 CARDOZO L. REV. 2255, 2259–64 (2011) (discussing the tension between *Myers* and *Humphrey's Executor*).

12 487 U.S. 654, 687–91 (1988). *Morrison* squarely rejected the suggestion that principal officers within independent federal agencies do not perform executive duties and permitted the extension of a good cause removal limitation to an inferior officer who performed a "purely executive" function. *See id. But cf.* Kevin M. Stack, *Agency Independence After* PCAOB, 32 CARDOZO L. REV. 2391, 2392–93 (2011) (suggesting that the presence or absence of an adjudicative function within an independent federal agency once prefigured whether the agency could be insulated from direct forms of presidential control and oversight). Professor Stack argues that *Free Enterprise Fund* appears to reject this dividing line in favor of a more generalized requirement of presidential oversight power—including removal power—for any agency vested with significant policymaking authority regardless of whether it primarily undertakes adjudicative functions. *See id.* at 2392–93, 2399, 2411–14.

13 *Free Enterprise Fund* itself goes a long way toward dispelling any illusions to the contrary. *See* Strauss, *supra* note 11, at 2275, 2282 (noting that "[a]gain, the question is not whether [the President] is entitled to command or decide, but what constitute[s] the constitutionally indispensable elements of his necessary oversight relationship" and suggesting that "[t]he underlying issue . . . is finding a way of accommodating the prolixity of government structures Congress creates without teaching Congress how to avoid the President's constitutionally necessary role as our unitary executive"). The decision holds that independent federal agencies constitute "Heads of Departments" for purposes of the Appointments Clause. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 510–13 (2010); *see also* U.S. CONST. art. II, § 2, cl. 2. As Chief Justice Roberts explains, "[a]s a constitutional matter, we see no reason why a multimember body may not be the 'Hea[d]' of a 'Departmen[t]' that it governs." *Free Enter. Fund*, 561 U.S. at 512–13 (alterations in the original). The Appointments Clause vests the appointment of both principal and inferior executive officers in the President alone, but permits Congress by statute to provide for the appointment of inferior officers "in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. CONST. art. II, § 2, cl. 2. Congress may not vest the appointment of either principal or inferior officers with itself. *See* Buckley v. Valeo, 424 U.S. 1, 129, 135–43 (1976). Nor may it reserve for itself a power to remove an executive

good cause removal limitations are not unconstitutional provided that the President retains a sufficient ability to oversee and direct the operation of a particular independent agency.[14]

On the other hand, important questions about attenuating presidential control over agencies exist and lack concrete answers.[15] Most significantly, the precise boundary dividing *Myers* and *Humphrey's Executor* remains both ambiguous and disputed. Simply put, we do not know with certainty how far Congress may go in limiting the President's ability to direct and supervise the work of independent federal agencies—or, for that matter, the scope of Congress's discretion to insulate other executive branch officers from presidential control.[16]

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officer save by impeachment. Bowsher v. Synar, 478 U.S. 714, 725–27 (1986). If independent federal agencies constitute "Heads of Departments" for purposes of the Appointments Clause, it must mean that these are entities within the executive branch of the federal government; if this is so, then the Vesting and Faithful Execution Clauses require some level of presidential oversight and control. *See* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 597–601, 640–41 (1984) (arguing that the President must have effective tools at his disposal to check attempted incursions by Congress into executive branch functions and responsibilities). If independent federal agencies somehow stood outside of the executive branch, then they could not appoint inferior officers.

14 *Free Enterprise Fund* hardly celebrates *Humphrey's Executor* but does acknowledge the continuing precedential value of this decision. *See Free Enter. Fund*, 561 U.S. at 483 (citing *Humphrey's Executor*, reciting its holding, and noting that "[t]he parties do not ask us to reexamine [this precedent], and we do not do so"). So long as *Morrison* remains good law, when Congress limits the President's removal power over an executive officer (whether the officer holds a principal or an inferior office), the operative analysis involves balancing the remaining degree and scope of presidential control, the nature of the office (whether it resides at the core or the periphery of executive branch functions), and the policy objectives that animated Congress's decision to attenuate presidential control. *See Morrison*, 487 U.S. at 687–91.

15 As Professor Strauss aptly notes, the Supreme Court's "decision in *Free Enterprise Foundation* [sic] is only the most recent exhibit in this right-minded but inelegantly reasoned chain of opinions." Strauss, *supra* note 11, at 2256.

16 For example, could Congress make an inferior office within a cabinet department subject to a good cause removal limitation? Presumably even functionalists would agree with the proposition that the Secretary of State or the Attorney General must be subject to plenary presidential removal power. However, when one enters the realm of subordinate officers, such as assistant secretaries for particular divisions within the State Department, the appropriate constitutional analysis becomes considerably murkier. From a formalist perspective, these questions admit of an easy and obvious answer—any person who exercises policymaking authority within the executive branch must be subject to meaningful forms of presidential control and oversight. *See Free Enter. Fund*, 561 U.S. at 498–502. To be sure, the formalist analysis, like the functionalist analysis, must consider the residual scope of presidential authority to apply the governing rule. The difference is that, for the formalist, the potential benefits of a novel administrative structure are quite irrelevant if the degree of presidential control has been unduly attenuated; the putative benefits of the structure are simply irrelevant to the constitutional analysis. For a relevant discussion of formalist and functionalist reasoning, see Linda D. Jellum, *"Which Is to Be Master," the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV.

Until *Free Enterprise Fund*, a reasonable working assumption would have been that Congress could set any limits it desired on the President's ability to control an independent federal agency provided that Congress did not seek to claim for itself any supervisory authority over the administrative body.[17] After *Free Enterprise Fund*, however, the world has changed.[18] Now, it has become necessary to inquire not only into whether Congress has aggrandized itself by claiming supervisory authority over a federal regulatory entity, but also to inquire into whether a particular limitation—or combination of limits—on the President's supervisory powers unduly attenuates presidential control and accountability.[19]

In this Article, we consider whether *Free Enterprise Fund* raises constitutional problems for mandatory partisan balance requirements applicable to the President's appointment of principal and inferior federal executive officers. Congress has not infrequently required the President to name members of the opposition party to principal offices within the executive branch;[20] partisan balance requirements have the purpose and effect of rendering executive agencies less responsive to the President by requiring the President to staff such entities with no more than a majority of her own politi-

837, 854–55, 860–62, 870–78 (2009) (providing a comprehensive and thoughtful overview of formalism and functionalism, with citations to major works in the field); *see also* M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1136–47 (2000) (describing and critiquing the use of "formalism" and "functionalism" as discrete categories for separation of powers analysis and suggesting that the dichotomy oversimplifies the issues at stake); John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1950–62 (2011) (discussing and describing formalism and functionalism but suggesting that a more textual approach to deciding separation of powers questions might provide a better method of analysis).

17 *See Morrison*, 487 U.S. at 689–91, 695–96 (holding that, in light of the significant political benefits and enhanced credibility that insulation from political control conveyed on an independent counsel, Congress could constitutionally insulate from presidential removal an independent counsel charged with principal and direct responsibility for criminal law enforcement); *see also* Ronald J. Krotoszynski, Jr., *On the Danger of Wearing Two Hats:* Mistretta *and* Morrison *Revisited*, 38 WM. & MARY L. REV. 417, 440–47 (1998) (discussing and critiquing the majority opinion in *Morrison*).

18 *See* Stack, *supra* note 12, at 2392 (arguing that "the logic of *PCAOB*'s separation-of-agency-functions principle has no necessary limitation to second-tier removal protections" and suggesting that "[t]aken to its full extension, it redraws the constitutional grounding of agency independence"); *id.* at 2419 (arguing that "[a]t a minimum, within independent agencies, [*Free Enterprise Fund*] preserves the second layer of removal protection only for dedicated adjudicators" but noting also that "its logic extends further").

19 *See* Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 2–6, 17–19, 35–36 (2013) (arguing that a broad reading of *Free Enterprise Fund* would have very significant implications for Congress's ability to create and maintain independent federal agencies and would call into constitutional question more than multilevel good cause removal protections); *see also* Kent H. Barnett, *Avoiding Independent Agency Armageddon*, 87 NOTRE DAME L. REV. 1349, 1350–52, 1360–63 (2012) (arguing that *Free Enterprise Fund* could fundamentally change separation of powers analysis for independent federal agencies unless its holding can be limited and renormalized).

20 *See infra* notes 175–83 and accompanying text.

cal supporters. If Congress may not constitutionally limit the President's oversight powers by unduly restricting her removal power, it seems quite reasonable to ask whether it is permissible to limit the President's appointment power at the front end of things.

Judge Janice Rogers Brown of the United States Court of Appeals for the D.C. Circuit has forcefully argued for a broad reading of *Free Enterprise Fund* and suggested that design elements that are constitutional in isolation might be unconstitutional when combined.[21] As she states the proposition, "just because two structural features raise no constitutional concerns independently does not mean Congress may combine them in a single statute."[22] We believe that, at least under a broad reading of *Free Enterprise Fund*, this premise could well be correct. And, as Professor Huq aptly has noted, "[t]he *Free Enterprise Fund* principle cannot easily be limited to 'dual for-cause' regimes"[23] and could easily be read broadly to disallow other, even more commonplace structural design elements for independent agencies.[24]

Along similar lines, Professor Peter L. Strauss, a leading scholar of administrative law, has suggested that *Free Enterprise Fund* could have "enormous" implications for the ability of Congress to insulate federal executive agencies from direct forms of presidential oversight and control.[25] Professor Kevin M. Stack, also a leading administrative law scholar, posits that after *Free Enterprise Fund*, "[s]eparation of powers has a new endeavor"[26] and that the decision "has the potential to restructure the constitutional footing for agencies with a single level of good-cause removal protection, preserving that protection for dedicated adjudicators but casting it aside for agencies with more than just adjudicative functions."[27] And, yet another administrative law scholar, Professor Kent H. Barnett, has characterized *Free Enterprise Fund* as portending "independent agency armageddon."[28]

In this Article, we do not claim that *Free Enterprise Fund* necessarily or inevitably portends "independent agency armageddon" or anything even approaching it (if by "armageddon" one means the end of such entities as we have come to know them since the 1880s). Our claims and ambitions are more modest; the seven seals may well remain intact and the four horsemen unsaddled. The Supreme Court often makes broad pronouncements,

21 *See* Ass'n of Am. R.R. v. U.S. Dep't of Transp., 721 F.3d 666, 672–73 (D.C. Cir. 2013), *cert. granted*, 134 S. Ct. 2865 (2014).

22 *Id.* at 673.

23 Huq, *supra* note 19, at 3.

24 *Id.* at 2–6, 17–20.

25 Strauss, *supra* note 11, at 2261.

26 Stack, *supra* note 12, at 2419.

27 *Id.*

28 *See* Barnett, *supra* note 19, at 1349; *see also* Harold J. Krent, *Federal Power, Non-Federal Actors: The Ramifications of* Free Enterprise Fund, 79 FORDHAM L. REV. 2425, 2427 (2011) (suggesting that *Free Enterprise Fund* raises serious questions about novel administrative structures and, in particular, "provides renewed reason to consider whether congressional delegations outside the federal government" are consistent with the separation of powers doctrine).

thought to indicate a revolution in an important area of the law, such as the separation of powers or federalism, and yet, in the end, little (or nothing) ever really comes of the decision.[29] If read and applied narrowly, the decision could mean only that Congress cannot insulate principal or inferior executive officers from removal through a multilayered system of good cause removal protections—and nothing more. As one of us previously has noted, "[t]he Supreme Court is not required to follow the implications of its decisions to their logical conclusions."[30]

On the other hand, *Free Enterprise Fund* and the new formalism that the decision reflects could mean a stronger, more demanding emphasis on ensuring that the President enjoys meaningful oversight and control powers over independent federal agencies. If *Free Enterprise Fund* proves to be a major landmark decision, as Judges Janice Rogers Brown and Brett Kavanaugh separately have argued,[31] the constitutional status of partisan balance requirements will need to be reassessed under the more demanding, formalist separation of powers metrics that *Free Enterprise Fund* has established.

The argument proceeds in four parts. We begin in Part I by considering *Free Enterprise Fund* and the "new formalism" in separation of powers analysis that it represents.[32] In Part II, we examine the origins and history of partisan balance requirements for independent federal agencies.[33] This structural innovation dates to the 1880s and has been, for the most part, uncontroversial and widely accepted by Congress, the President, and the federal courts. In fact, several Presidents actually have invited Congress to create federal administrative entities that feature mandatory bipartisanship in their leadership.[34] In Part III, we analyze and critique the potential practical implica-

29 *See, e.g.*, Printz v. United States, 521 U.S. 898 (1997). *Printz*, broadly read, would have spelled the end of many cooperative federalism programs that vest state executive officers with the enforcement of federal law. *See* Evan H. Caminker, Printz*, State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 230–32 (noting the very broad implications of *Printz* for a variety of cooperative federalism programs); Roderick M. Hills, Jr., *Federalism in Constitutional Context*, 22 HARV. J.L. & PUB. POL'Y 181, 183–85 (1998) (noting that the Supreme Court did not fully explore the potential implications of its decision in *Printz* and that the majority's opinion has not been broadly interpreted and applied going forward). *But cf.* Bybee, *supra* note 5, at 288 (arguing that "[w]e have not seen the last of Section III.B of Justice Scalia's opinion in *Printz*" and predicting that "Justice Scalia will be back with *Printz*"). However, the Supreme Court, at least to date, has declined to follow the logic of *Printz* to its logical conclusions. So too, whether *Free Enterprise Fund* constitutes armageddon for independent federal agencies or merely a bump in the road remains to be seen.

30 Ronald J. Krotoszynski, Jr., *Cooperative Federalism, the New Formalism, and the Separation of Powers Revisited:* Free Enterprise Fund *and the Problem of Presidential Oversight of State-Government Officers Enforcing Federal Law*, 61 DUKE L.J. 1599, 1668 (2012).

31 Ass'n of Am. R.R. v. U.S. Dep't of Transp., 721 F.3d 666, 672–74 (D.C. Cir. 2013), *cert. granted*, 134 S. Ct. 2865 (2014); *In re* Aiken Cnty., 645 F.3d 428, 439–46 (D.C. Cir. 2011) (Kavanaugh, J., concurring).

32 *See infra* Part I.

33 *See infra* Part II.

34 *See infra* notes 175–81 and accompanying text.

tions of mandatory partisan balance requirements on the political dynamics and functioning of independent federal agencies.[35] To be clear, from a formalist perspective, real-world adverse effects on the President's ability to oversee and direct an administrative agency need not be proven to establish the existence of a separation of powers violation; formalists view prophylactic efforts to police the separation of powers as necessary to avoid the evils of undue concentrations of government power (whether or not such concentrations would likely come into existence in the absence of such prophylactic efforts).[36]

Part IV considers whether, in light of historical practice, the effects of partisan balance requirements on the functioning of federal independent agencies, and the imperatives of the unitary executive (as defined and explicated by the *Free Enterprise Fund* majority), the use of partisan balance requirements, whether in isolation or in conjunction with fixed terms of office and good cause removal protections, would likely survive judicial review in the age of new formalism.[37] To cut to the chase, we believe that the addition of each additional factor—partisan balance requirements, a fixed term of years appointment, and good cause removal protection—incre-

35 *See infra* Part III.

36 *See* Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 450–51 (1991) (observing that formalist separation of powers theory and practice, from the time of the Framers to the present, seeks to prevent undue concentrations of government power that could be potentially conducive to "tyranny" and does so regardless of whether or not bad outcomes would actually occur in the absence of such strictures); *see also* Manning, *supra* note 16, at 1950, 1958 (noting that "[f]ormalist theory presupposes that the constitutional separation of powers establishes readily ascertainable and enforceable rules of separation" whereas "[f]unctionalists believe that the Constitution's structural clauses ultimately supply few useful details of meaning"). *But cf.* Huq, *supra* note 19, at 6 (questioning whether formalist separation of powers theory and practice actually enhance presidential oversight over independent agencies and political accountability and arguing that "[t]aken together, these critiques undermine the putative correlation between presidential removal authority and democratic accountability"). Professor Huq asks and answers a question that would not necessarily occur to a formalist (like Chief Justice Roberts)—namely, whether the absence of judicial enforcement of separation of powers principles would cause actual harm to the President's ability to supervise and control the executive branch. As Justice William J. Brennan, Jr., pointed out, in many instances, enforcement of the separation of powers will seem unnecessary—and perhaps even paranoid—particularly in light of the obvious potential benefits of permitting novel new administrative structures. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 863 (1986) (Brennan, J., dissenting) (objecting that "the Court pits an interest the benefits of which are immediate, concrete, and easily understood against one, the benefits of which are almost entirely prophylactic, and thus often seem remote and not worth the cost in any single case"). Justice Brennan feared that in most cases, ad hoc balancing would inevitably cut against judicial enforcement of the separation of powers; yet, the whole point of the separation of powers doctrine is to prevent problems that *might* arise in the absence of these principles—not problems that have already arisen. *See id.* at 863 ("Article III's prophylactic protections were intended to prevent just this sort of abdication to claims of legislative convenience.").

37 *See infra* Part IV.

mentally adds weight in favor of finding that a separation of powers violation exists.[38] Thus, a federal independent agency that features all three design elements should be deemed more objectionable than an agency whose design features only one or two of these elements. Finally, the Article closes with a brief summary and conclusion.[39]

In the end, we believe that the conjunction of partisan balance requirements with good cause removal protection probably renders the President's ability to oversee an independent agency too attenuated to survive judicial review post–*Free Enterprise Fund*.[40] We also will cheerfully stipulate that this conclusion would not command universal support on the current Supreme Court.[41] Even so, if *Free Enterprise Fund* does in fact signal an enhanced commitment to the unitary executive theory of presidential power by a durable working majority of the Supreme Court, the constitutional status of partisan balance requirements—particularly when linked with good cause removal limitations—is open to considerable doubt.

I. *FREE ENTERPRISE FUND* AND THE RISE OF THE NEW FORMALISM

This Part proceeds in three stages. First, we consider the holding and potential meaning of *Free Enterprise Fund*. Second, we explore functionalism and formalism as framing devices for defining and enforcing the separation of powers doctrine. Third, and finally, we consider relevant commentary by administrative law scholars regarding the potential impact of *Free Enterprise Fund* on Congress's ability to create novel administrative structures that insulate federal agencies from presidential oversight and control.

A. *A Brief Overview of* Free Enterprise Fund *and the Supreme Court's Separation of Powers Jurisprudence*

For many years, the Supreme Court has vacillated between strictly enforcing the separation of powers (a posture of formalism) and taking a more flexible, cost/benefit approach (a posture of functionalism).[42] *Myers* and *Humphrey's Executor* reflect this duality: *Myers* is a strongly formalist decision, whereas *Humphrey's Executor* adopts a functionalist analysis.[43] Despite this historic inability to choose definitively one approach or the other, the Roberts Court consistently has issued strongly formalist separation of powers

38 *See infra* Part IV.

39 *See infra* Conclusion.

40 *See infra* Sections III.A–B.

41 *See* Strauss, *supra* note 11, at 2275–76 (discussing Justice Breyer's "strident" dissenting opinion for "the (relatively) liberal wing of the Court"). At least four Justices (Associate Justices Breyer, Ginsburg, Kagan, and Sotomayor) do not embrace either the new formalism or formalist analysis of separation of powers questions with the same brio as Chief Justice Roberts and Associate Justices Alito, Kennedy, Scalia, and Thomas.

42 *See infra* notes 44–109 and accompanying text.

43 *See supra* notes 6–16 and accompanying text.

decisions. Moreover, this embrace of the new formalism represents a sharp break with the approach of the Burger and Rehnquist Courts.

In the 1980s and 1990s, the Supreme Court was often, although not always, willing to engage in a functionalist analysis of novel administrative structures.[44] As Professor Marty Redish and his coauthor, Elizabeth Cisar, aptly note, the Burger and Rehnquist Courts "evinced something of a split personality, seemingly wavering from resort to judicial enforcement with a formalistic vengeance to use of a so-called 'functional' approach that appear[ed] to be designed to do little more than rationalize incursions by one branch of the federal government into the domain of another."[45]

Consistent with a "wavering" approach to strict enforcement of the separation of powers, the Supreme Court overwhelmingly sustained the independent counsel provisions of the Ethics in Government Act[46] and also easily sustained the structure and functions of the U.S. Sentencing Commission against multiple separation of powers objections.[47] At the same time, however, the Burger and Rehnquist Courts strictly enforced the separation of powers in other cases.[48] Most notably, the Supreme Court invalidated the legislative veto as transgressing the separation of powers by permitting enactment of a law without either bicameral passage of a bill or presentment of a bill previously passed by both houses of Congress to the President.[49] The Supreme Court also disallowed, repeatedly, efforts by Congress to aggrandize itself either by directly naming members of independent agencies or by vest-

44 *See, e.g.*, Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851–52 (1986) (applying a very flexible functionalist analysis to ascertain whether Congress could vest the adjudication of certain common law counterclaims in an independent federal agency).

45 Redish & Cisar, *supra* note 36, at 450 (footnote omitted).

46 Morrison v. Olson, 487 U.S. 654, 695–96 (1988).

47 Mistretta v. United States, 488 U.S. 361, 399, 406–07 (1989).

48 Bowsher v. Synar, 478 U.S. 714, 732–34 (1986); INS v. Chadha, 462 U.S. 919, 944–59 (1983).

49 *Chadha*, 462 U.S. at 944, 954–56, 958. Some years later, in 1998, using similarly formalist reasoning, the Supreme Court invalidated the Line Item Veto Act, which purported to vest the President with the power to cancel certain appropriations and tax expenditures. *See* Clinton v. City of New York, 524 U.S. 417 (1998). Writing for the majority, Justice John Paul Stevens explained that "[t]here is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes," and, accordingly, Congress could not constitutionally confer such a power on the President by statute. *Id.* at 438. He added that "[i]n both legal and practical effect, the President has amended two Acts of Congress by repealing a portion of each." *Id.* To vest the President with the power to cancel portions of duly enacted statutes via a line item veto power, a constitutional amendment would be requisite. *See id.* at 449 ("If there is to be a new procedure in which the President will play a different role in determining the final text of what may 'become a law,' such change must come not by legislation but through the amendment procedures set forth in Article V of the Constitution."). *Clinton v. City of New York* constitutes a broad reaffirmation, application, and extension of the *Chadha* rule that "repeal of statutes, no less than enactment, must conform with Art. I." *Chadha*, 462 U.S. at 954; *see Clinton*, 524 U.S. at 438 (quoting and applying *Chadha* on this exact point).

ing the execution of federal laws in legislative officers.[50] Thus, the story is complicated and in the late twentieth century the Supreme Court was not consistently committed to embracing either a functionalist or a formalist approach when deciding separation of powers questions.

The Roberts Court, however, has shown a remarkable consistency in its approach to analyzing separation of powers questions. In every major case, the Roberts Court has used a formalist analysis and rejected efforts to blend executive, legislative, and judicial functions.[51] Meanwhile, functionalism and functionalist analysis has been relegated to dissents. *Free Enterprise Fund* provides an excellent example of this trend.

Free Enterprise Fund involved a challenge to the terms under which members of the Public Company Accounting Oversight Board (PCAOB), an administrative entity created under the auspices of the Sarbanes-Oxley Act of 2002,[52] were to hold office. Under the Sarbanes-Oxley Act, the Securities and Exchange Commission (SEC) appoints the members of the PCAOB and enjoys some oversight authority over the PCAOB's work—"particularly with respect to the issuance of rules or the imposition of sanctions (both of which are subject to Commission approval and alteration)."[53] Significantly, however, the SEC lacks any general authority to remove members of the PCAOB; the PCAOB's members "are substantially insulated from the Commission's control"[54] and under the terms of the organic act may be removed from office only "'for good cause shown'" and "'in accordance with' certain procedures."[55] In turn, the *Free Enterprise Fund* majority also found that the SEC's commissioners could only be removed by the President for good cause.[56]

50 *Bowsher*, 478 U.S. at 726–27, 732–34; Buckley v. Valeo, 424 U.S. 1, 135–43 (1976).

51 *See* Krotoszynski, *supra* note 30, at 1606–07, 1615–23 (citing and discussing the relevant cases). As one of us previously has observed, "[t]he Roberts Court's separation-of-powers decisions, however, reflect a strong, pronounced, and consistent turn toward formalism." *Id.* at 1602.

52 Pub. L. No. 107-204, 116 Stat. 745 (2002); *see* 15 U.S.C. §§ 7211–7215 (2012) (creating the PCAOB and vesting it with the power to write and enforce rules governing accounting firms that provide services to publicly traded corporations).

53 Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 486 (2010).

54 *Id.*

55 *Id.* (quoting 15 U.S.C. § 7211(e)(6)).

56 *See Free Enter. Fund*, 561 U.S. at 487 ("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." (citations omitted)); *see also* 44 U.S.C. § 3502(5) (including the SEC among a list of "independent regulatory agenc[ies]"). Several scholarly commentators have been particularly critical of this aspect of the majority opinion. *See, e.g.*, Huq, *supra* note 19, at 15 (characterizing the majority's assumption that the SEC commissioners enjoy good cause protection from presidential removal as an "unorthodox stipulation of law" that permitted "the Court to frame the question presented as focused on the constitutionality of 'dual for-cause limitations' on presidential control"); Strauss, *supra* note 11, at 2276 (charactering the majority's acceptance of the joint stipulation as "quite astonishing, particularly coming from conservative Justices who repeatedly assert that it is for Congress, not the courts, to make law").

The constitutional question presented was whether a two-tiered system of good cause removal protection violated the separation of powers by unduly attenuating the President's ability to oversee the PCAOB's policymaking activities—as arguably required by Article II's Vesting and Faithful Execution Clauses.[57]

Writing for a five-to-four majority, Chief Justice John G. Roberts, Jr. found that this system of multilevel good cause removal protection violated the separation of powers doctrine: "We hold that such multilevel protection from removal is contrary to Article II's vesting of the executive power in the President."[58] Moreover, he added that "[t]he President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them."[59] Thus, the PCAOB's structure "contravene[d] the President's 'constitutional obligation to ensure the faithful execution of the laws.'"[60]

The *Free Enterprise Fund* majority's most fundamental objection was that the two-tiered system of good cause removal protection unduly insulated the PCAOB from presidential control and oversight, given the fact that the PCAOB's duties included significant policymaking authority. Chief Justice Roberts explained that "[n]either the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over the Board."[61] This arrangement was constitutionally problematic because "[w]ithout the ability to oversee the Board, or to attribute the Board's failings to those whom he *can* oversee, the President is no longer the judge of the Board's conduct."[62] In turn, "[h]e can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member's breach of faith."[63] In sum, the President cannot be held accountable for the actions of an entity so far removed from his supervisory powers, but the Constitution requires that the President be accountable for the execution of the laws.[64]

The majority rejected functionalist objections to its holding, quoting *Bowsher* and *Chadha* on the point that "[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government."[65]

57 *See Free Enter. Fund*, 561 U.S. at 483–84 ("May the President by restricted in his ability to remove a principal officer, who is in turn restricted in his ability to remove an inferior officer, even though that inferior officer determines the policy and enforces the laws of the United States?").

58 *Id.* at 484.

59 *Id.*

60 *Id.* (quoting Morrison v. Olson, 487 U.S. 654, 693 (1988)).

61 *Id.* at 496.

62 *Id.*

63 *Id.*

64 *See id.* at 498 ("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—as well as the public's ability to pass judgment on his efforts.").

65 *Id.* at 499 (citations omitted) (quoting Bowsher v. Synar, 478 U.S. 714, 736 (1986)) (internal quotation marks omitted).

The majority was also quite indifferent to whether the enhanced potential for presidential control afforded by invalidating the PCAOB's good cause removal protection actually affected the day-to-day operation of the PCAOB.

Even if Presidents agreed to such multilevel good cause protection or, as a practical matter, abdicated their oversight responsibilities, the separation of powers requires at least the *possibility* of active presidential oversight and control.[66] The formal legal structure that governs presidential oversight of federal agencies must comply with the imperatives of a unitary executive (as specified in Article II). Accordingly, "[i]n its pursuit of a 'workable government,' Congress cannot reduce the Chief Magistrate to a cajoler-in-chief."[67]

In sum, Congress cannot legally estrange executive officers from the President. As Chief Justice Roberts explains, "[t]he Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so."[68] Some meaningful power of removal, at most attenuated by a single layer of good cause removal protection, must remain with the President or a person directly accountable to the President. For "[w]ithout such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else."[69]

Justice Stephen Breyer authored a strong dissenting opinion that, employing a functionalist lens, found no valid constitutional objection to a two-tiered system of good cause removal protection (at least for an entity vested with the PCAOB's portfolio).[70] He argued that the use of two-tiered good cause removal protection should be considered in light of its costs and benefits: "When previously deciding this kind of nontextual question, the Court has emphasized the importance of examining how a particular provision, taken in context, is likely to function."[71] He explained that "a functional approach permits Congress and the President the flexibility needed to adapt statutory law to changing circumstances."[72] Justice Breyer warned against the adoption of "bright-line rules"[73] and in favor of considering "function and context."[74]

Justice Breyer opined that a strict formalism cannot be squared with the growth in the size, importance, and complexity of the modern administrative state. He emphasized that "[t]he functional approach required by our precedents recognizes this administrative complexity and, more importantly, recognizes the various ways presidential power operates within this context—and the various ways in which a removal provision might affect that power."[75]

66 *See id.* at 498–500.

67 *Id.* at 502.

68 *Id.* at 513.

69 *Id.* at 514.

70 *See id.* at 514–49 (Breyer, J., dissenting).

71 *Id.* at 519; *see id.* at 523 ("Thus, here, as in similar cases, we should decide the constitutional question in light of the provision's practical functioning in context.").

72 *Id.* at 520.

73 *Id.* at 519–20.

74 *Id.* at 519.

75 *Id.* at 522.

Applying the functionalist, context-specific, cost/benefit analysis that he believed requisite, Justice Breyer found that the two-tiered good cause removal structure easily passed constitutional muster. Breyer posited that "[w]here a 'for cause' provision is so unlikely to restrict presidential power and so likely to further a legitimate institutional need, precedent strongly supports its constitutionality."[76] Because "the Court's prior cases impose functional criteria that are readily met here," the multilevel for cause protection did not transgress the separation of powers doctrine.[77] For Justice Breyer and the other three dissenting Justices (Justices Stevens, Ginsburg, and Sotomayor), the pursuit of a "workable Government that the Constitution seeks to create"[78] more than justifies a system that substantially insulates executive officers tasked primarily with adjudicative functions from direct forms of presidential control and oversight.

In sum, the majority and dissenting opinions in *Free Enterprise Fund* really do constitute two ships passing in the night—they employ radically different lenses for analysis of separation of powers questions. Chief Justice Roberts adopts a categorical approach that seeks to classify the nature of the institution and the power that it exercises—once one concludes that the SEC and PCAOB fall within the executive branch and exercise significant policymaking authority, the case is all but over; any and all such executive entities must be directly accountable to the President. From this perspective, *Humphrey's Executor* and *Morrison* represent the outer limits of permissible insulation of executive officers from presidential control.

For Justice Breyer, the constitutional imperatives of Congress's general legislative authority,[79] in conjunction with the Necessary and Proper Clause,[80] give Congress no less sound a constitutional claim than the President with respect to how an agency should be structured. Moreover, in his view, formalism for its own sake has relatively little to recommend it—particularly when formalism will not even ensure in practice that the President's de facto (as opposed to de jure) oversight powers are enhanced. The dissent is a classic exposition of functionalist values and methodology. And, from a functional perspective, sufficient reasons exist to justify whatever minimal incursion the two-tiered good cause removal regime makes on the unitary executive.

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76 *Id.* at 532.

77 *Id.* at 535–36.

78 *Id.* at 549.

79 *See* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

80 *See id.* art. I, § 8, cl. 18 (providing that Congress shall have power "[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").

B. Free Enterprise Fund *and the New Formalism*

Before proceeding to the doctrinal and jurisprudential impact of *Free Enterprise Fund*, a brief overview of "formalism" and "functionalism" as organizing concepts for separation of powers analysis is necessary. We should concede at the outset that some prominent public law scholars, including Professors Bruce Ackerman[81] and Edward Rubin,[82] have questioned the utility of formalism and functionalism as coherent framing devices for generalized approaches to defining and enforcing the separation of powers doctrine. So have leading administrative law scholars, such as Dean Elizabeth Magill[83] and Professor John Manning.[84] To be sure, these sustained critiques possess merit.

First, both approaches seem to borrow insights and perspectives that appear to be more consonant with the other baseline approach.[85] Formalists will sometimes make pragmatic policy arguments that appear to have little direct relationship to the Constitution's text. For example, *Free Enterprise Fund* places great emphasis on the importance of democratic accountability—but it is not entirely clear how or why a higher degree of presidential control over the PCAOB necessarily advances this value or how this value can be inferred from the text of Article II.[86] Similarly, many functionalists will concede the imperative of making federal administrative agencies accountable to the President.[87] Even if no fixed rule exists regarding the necessary relationship between the President and independent federal agencies, some level of presidential oversight is requisite because presidential control is a necessary counterweight to congressional influence.[88]

Legal scholars who question the internal coherence of formalism and functionalism also object that the formalism/functionalism dichotomy

81 Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 634–36 (2000) (opposing "the export of the American system [of separation of powers]" to other countries and advocating instead reliance on the parliamentary model used in many democratic polities, and particularly the German constitutional framework under the Basic Law).

82 EDWARD L. RUBIN, BEYOND CAMELOT 12 (2005) (advocating the retirement of commonly used, but nevertheless outdated, organizing concepts when analyzing governmental structures and their functions and proposing instead approaching the administrative state with an updated, contemporary conceptual framework).

83 Magill, *supra* note 16, at 1132–38, 1148–49.

84 Manning, *supra* note 16, at 1950–62.

85 Magill, *supra* note 16, at 1136–47 (describing and critiquing the common ground between formalism and functionalism and describing that common ground as incoherent and inadequate).

86 *See* Huq, *supra* note 19, at 5–6, 17–19, 35–36.

87 *See, e.g.*, Strauss, *supra* note 13, at 640–41 (arguing for the practical necessity of presidential control and oversight over federal administrative agencies and also observing that "[c]entral to the overall judgments of the Constitution, and reflected in these textual passages, is the elementary judgment that we were to have a unitary, politically responsible head of government, possessed of sufficient independent authority to serve as an enduring counterweight to the political muscle of Congress").

88 *See id.* at 641–42, 648–50.

grossly oversimplifies the relevant relationships between the President, Congress, and administrative agencies.[89] As Professor Manning puts the case, "[n]ew thinking about the legitimacy of strongly purposive reasoning reveals difficulties with the approach that underlies both strands of modern separation of powers doctrine."[90] Simply put, in order to make these broad categories work as general organizing principles, one has to ignore a great many potentially relevant considerations.[91] Rather than adopting a holistic framing device that fails to account for all relevant considerations, these critics advocate more contextual analysis on a case-by-case basis.[92] One size—or even two sizes—will not fit all facts and circumstances.[93]

Although we generally agree that the formalism/functionalism dichotomy provides an imperfect mode of analysis,[94] we nevertheless believe that it represents a useful organizing metric. Moreover, the contemporary Supreme Court has embraced this nomenclature and has done so repeatedly. Whether or not this decision represents the best possible choice, the choice has been made. Accordingly, this Article will rely on formalism and functionalism as potentially useful analytical tools. But, precisely what are formalism and functionalism? And what are the salient characteristics of both approaches?

Formalism generally seeks to enforce strictly the separation of powers set forth in the text of the Constitution. It places significant reliance on the separate Vesting Clauses of Articles I, II, and III.[95] Creative reassignment of these powers among and between the three branches cannot be constitutionally countenanced because the Framers vested the legislative, executive, and judicial powers in separate branches of the federal government.[96]

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89 *See* Manning, *supra* note 16, at 1950–62; *see also* Magill, *supra* note 16, at 854–55, 870–78.

90 Manning, *supra* note 16, at 1972.

91 *See* Magill, *supra* note 16, at 1132–38, 1148–49 ("[N]either of the dominant approaches [formalism and functionalism] provides a consistent account of the methodology applied or the outcome of the cases."); Manning, *supra* note 16, at 1971–72 (questioning the utility of the formalism/functionalism dichotomy and proposing instead an approach derived more directly from the Constitution's text).

92 *See* Manning, *supra* note 16, at 1950–62.

93 *See* Jellum, *supra* note 16, at 878–79 ("Rigidly dividing separation of powers analysis into these two categories, formalism and functionalism, is imperfect.").

94 M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 609 (2001).

95 Redish & Cisar, *supra* note 36, at 455 n.24; *see* Jellum, *supra* note 16, at 861 ("Formalism is, thus, a textually literal approach that relies primarily on the vesting clauses to define categories of power—legislative, executive, and judicial—and to identify the owner of each power.").

96 Krotoszynski, *supra* note 17, at 418 n.4 ("Formalism emphasizes the structural separation of powers reflected in the division of legislative, executive, and judicial power in Articles I, II, and III of the Constitution."); Redish & Cisar, *supra* note 36, at 449–56 (discussing the practical and theoretical motivations that undergird the formalist approach to the separation of powers doctrine). For general discussions of formalism and functionalism, see Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L.

As Dean Magill explains, formalism "emphasizes that the Constitution divides governmental power into three categories and, with some explicit textual exceptions, assigns those powers to three different branches of government."[97] What's more, formalism does not concern itself very much with the real-world effects—or lack of effects—associated with this strict separation of each branch of the federal government. As Professor Lee Liberman notes, formalists "assume[ ] that all exercises of power must fall into one of these categories and take[ ] no ostensible account of the practicalities of administration in arriving at this determination."[98] She adds that "[a] formalist decision uses a syllogistic, definitional approach to determining whether a particular exercise of power is legislative, executive, or judicial."[99]

By way of contrast, "[f]unctionalism focuses on the substantive policy goals that a particular assignment of responsibilities seeks to achieve or advance and provides that as long as a given scheme does not reassign one of the core functions of a coordinate branch, the arrangement should be permitted."[100] From a functionalist perspective, attenuating the President's power to oversee the operation of an independent federal agency does not constitute a per se violation of the separation of powers;[101] in order to ascertain the constitutional permissibility of an independent federal agency's structure, one would have to take into account the nature of the agency, the precise scope of its powers, the direct and indirect means available to the President to direct its operations, and so forth.[102]

The Roberts Court, unlike the Burger and Rehnquist Courts,[103] has not demonstrated any ambivalence whatsoever about the proper attitude toward congressional efforts to redistribute or limit the exercise of powers assigned by the Constitution to a particular branch of the federal government—formalism is enjoying a period of broad ascendency.[104] The Roberts Court has eschewed functionalist analysis and reasoning in all of its major separation of

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REV. 1253, 1254–55 (1988) (describing the formalism/functionalism debate generally), and Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 492–96 (1987) (discussing formalism and functionalism and making a sustained general argument in favor of functionalism).

97 Magill, *supra* note 94, at 608.

98 Lee S. Liberman, Morrison v. Olson*: A Formalistic Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313, 343 (1989).

99 *Id.*

100 Krotoszynski, *supra* note 17, at 417 n.4; *see* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 495–96 (1987).

101 *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 524–30, 548–49 (2010) (Breyer, J., dissenting).

102 *See id.*

103 Krotoszynski, *supra* note 30, at 1606–07.

104 *But cf.* CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW 5 (1990) (failing to anticipate the Roberts Court's strong embrace of formalism in separation of powers analysis and positing that "[i]t is too late in the day to protest the interment of separation of powers formalism, at least in the context of multifunction administrative agencies"). Given the fervently functionalist tenor of the Supreme Court's major separation of powers decisions in the late 1980s—notably including *Mistretta* and *Morrison*—Dean Edley's premature con-

powers decisions.[105] Repeatedly, reliably, and forcefully, the Roberts Court has embraced highly formalist reasoning and outcomes.[106]

This new commitment to formalism potentially raises new and interesting questions about the constitutional status of independent federal agencies. Prior to *Free Enterprise Fund*, most judges, lawyers, and legal scholars would have rejected out of hand the notion that Congress could not deploy good cause protections against removal in designing both agencies and subunits that would operate within particular agencies.[107] And yet, the *Free Enterprise Fund* Court held that a two-tiered system of good cause removal unduly attenuated presidential control and oversight, giving rise to a constitutional problem that could be resolved only by holding the second layer of

signment of formalism to the dust heap of administrative law jurisprudence should be entirely understandable.

105 *See, e.g.*, Stern v. Marshall, 131 S. Ct. 2594, 2608–09 (2011); *Free Enterprise Fund*, 561 U.S. at 495–502; New Process Steel, L.P. v. NLRB, 560 U.S. 674, 679–81 (2010); *see also* Krotoszynski, *supra* note 30, at 1605–08 (discussing the consistent formalist approach reflected in Roberts Court decisions). In its most recent term, a unanimous Supreme Court employed formalist reasoning to restrict significantly the President's ability to make recess appointments to fill executive and judicial positions without obtaining the Senate's advice and consent. *See* NLRB v. Noel Canning, 134 S. Ct. 2550 (2014). Although nominally a unanimous decision, the Justices split five-to-four on precisely how narrowly to define the recess appointment power. Writing for the majority, Justice Breyer held that the Senate's "*pro forma* sessions count as sessions, not periods of recess," *id.* at 2574, and that a recess of less than ten days was not sufficient to enable use of the recess appointment power, explaining that "a recess of more than 3 days but less than 10 days is presumptively too short to fall within the Clause." *Id.* at 2554. Justice Breyer's majority opinion is an exercise in pragmatic formalism—which is likely why Justice Kennedy joined it, providing a crucial fifth vote. Justice Scalia, joined by Chief Justice Roberts and Associate Justices Thomas and Alito, authored a nominally concurring opinion, which was really more in the nature of a dissent. *See id.* at 2592–2618 (Scalia, J., concurring). The concurring bloc would have severely restricted the scope of the recess appointment power by (1) limiting it to vacancies that occur when the Senate is in recess and (2) disallowing use of the recess appointment power based on intrasession breaks within a single session of Congress. *See id.* at 2602, 2605–06. Justice Scalia complained that "[t]he majority replaces the Constitution's text with a new set of judge-made rules to govern recess appointments." *Id.* at 2617. The most remarkable aspect of *Noel Canning* is not the majority's failure to use a strictly textualist mode of analysis, but rather the fact that the Solicitor General's proposed functionalist analysis of the Recess Appointments Clause failed to garner even a single vote from any of the Justices. Justice Breyer's opinion reflects a pragmatic formalism that takes historical practice into account when reading ambiguous constitutional text. By clearly holding that the Senate, and the Senate alone, determines whether it is in session for purposes of the Recess Appointments Clause, the *Noel Canning* majority embraced formalist, rather than functionalist, reasoning. *See id.* at 2574 ("We hold that, for purposes of the Recess Appointments Clause, the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business.").

106 Krotoszynski, *supra* note 30, at 1615–23 (discussing and critiquing the major formalist Roberts Court separation of powers decisions).

107 *See* Strauss, *supra* note 11, at 2262–64 (describing and discussing the traditional understanding of *Humphrey's Executor* as permitting the imposition of "for cause" protections against removal of executive branch officers).

good cause removal protection unconstitutional.[108] The question that now must be resolved is the precise scope of application of the new formalism and its enhanced requirement of meaningful presidential oversight of independent federal agencies.[109]

C. *Assessing the Potential Scope of* Free Enterprise Fund *and the New Formalism*

The remaining question is the potential scope of the *Free Enterprise Fund* principle that the separation of powers requires that the President enjoy sufficient ability to oversee the operations of independent federal agencies so as to render these entities reasonably accountable to him (and the President accountable to the citizenry for them). Professor Strauss suggests that "[t]he underlying issue, as both [the *Free Enterprise Fund* and *Freytag*] opinions recognize, is finding a way of accommodating the prolixity of government structures Congress creates without teaching Congress how to avoid the President's constitutionally necessary role as our unitary executive."[110] In other words, the majority has failed to provide clear guidance regarding the scope and application of the principle it announced. Even so, however, the clear consensus among administrative law scholars is that the decision could easily have very broad implications for Congress's ability to create agency structures that attenuate presidential oversight powers.

Professor Aziz Huq astutely notes that although the actual holding in *Free Enterprise Fund* is "modest," that it nevertheless "rests on an underlying principle with wider potential implications."[111] Although a reading of *Free Enterprise Fund* that limits the scope of the decision's application solely to two-tiered good cause removal provisions would mean that the decision merits "only passing attention,"[112] Huq argues that "[t]he *Free Enterprise Fund* principle cannot easily be limited to 'dual for-cause' regimes."[113]

Professor Huq posits that the decision's logic calls into question virtually any and all design elements used to insulate independent federal agencies from presidential control and oversight.[114] The precise *Free Enterprise Fund* holding might be narrowly stated, but "big things often have small beginnings."[115]

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108 *Free Enter. Fund*, 561 U.S. at 496–502.

109 *See* Strauss, *supra* note 11, at 2275, 2283 (noting that *Free Enterprise Fund* clearly establishes that independent federal agencies fall within the Article II executive branch but observing, at the same time, that "much remains unresolved").

110 *Id.* at 2282.

111 Huq, *supra* note 19, at 2–3; *see also* Strauss, *supra* note 11, at 2275 ("Despite the mildness of the outcome in the case, the theoretical explanation the majority offered for its conclusion seems to sweep more broadly than the particulars of the case require.").

112 Huq, *supra* note 19, at 3.

113 *Id.*

114 *See id.* at 3–4.

115 *Id.* at 3.

Professor Kevin Stack suggests that one potential application of *Free Enterprise Fund* would be to attack *single-layer* good cause removal protection provisions that insulate principal executive officers from presidential removal.[116] He argues that *Free Enterprise Fund*'s reasoning has "no inherent limit to dual-level removal protections"[117] and posits that "[i]t applies just as readily to single-layer provisions."[118] In fact, Judge Brett Kavanaugh—whose dissenting opinion in *Free Enterprise Fund* at the U.S. Court of Appeals level provided an excellent road map to the Supreme Court's ultimate decision[119]—has already advanced this position.[120]

We readily concur with Professor Huq's prediction that "it is only a matter of time before an appropriate lawsuit raises the question of how far *Free Enterprise Fund* goes in shifting agency design authority to federal courts [from Congress]."[121] In a similar vein, Professor Strauss observes that "much remains unresolved."[122] Plainly, myriad issues will require judicial clarification going forward.

In sum, the scholarly consensus strongly suggests that *Free Enterprise Fund* will have broad implications for permissible forms of agency structure going forward. Although most scholarly attention has focused on the future constitutional viability of a single layer of good cause protection against removal for members of independent federal agencies, we believe that partisan balance requirements, when coupled with either a good cause removal protection or a fixed term of office, arguably present an easier target for invalidation post–*Free Enterprise Fund*. We elaborate this argument in the sections that follow.

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116 *See* Stack, *supra* note 12, at 2414–15.

117 *Id.* at 2415.

118 *Id.*

119 *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 685–86, 701–04 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *rev'd in part*, 561 U.S. 477 (2010); *see also* Strauss, *supra* note 11, at 2271 (arguing that Judge Kavanaugh's "dissenting opinion hinted at the hope that the Supreme Court, reviewing this decision, would endorse the position that the President, vested with 'the executive power,' must have at least that degree of authority over agency action as would permit him to remove any government official exercising executive authority for any reason, free of 'for cause' restrictions").

120 *See In re* Aiken Cnty., 645 F.3d 428, 439–46 (D.C. Cir. 2011) (Kavanaugh, J., concurring) (arguing that even a single-layer good cause removal provision unduly attenuates the President's power to direct and supervise independent federal agencies and therefore violates the separation of powers doctrine).

121 Huq, *supra* note 19, at 5. Professor Strauss argues that *Free Enterprise Fund* plainly requires that the President enjoy a meaningful ability to control and direct independent federal agencies, but notes that the precise contours of the required relationship remain undefined. *See* Strauss, *supra* note 11, at 2274 (noting that "independent regulatory commissions are seen as an element of government necessarily subject to presidential oversight, because they execute the laws" and positing that "[t]his recognition, too, is most welcome"). At the same time, however, Strauss asks "[b]ut of just what does that necessary relationship consist?" and suggests that the *Free Enterprise Fund* majority does not offer a satisfactory answer to this question. *Id.* at 2283.

122 Strauss, *supra* note 11, at 2283.

II. A Historical Overview of Mandatory Partisan Balance Requirements for Independent Federal Agencies

When creating an "independent" administrative agency, Congress routinely imposes a partisan balance requirement on the presidential appointees who form that body.[123] Usually, this takes the form of a mandate that no more than a bare majority of appointees may be of the same political party. In order to understand and properly evaluate the constitutional status of this practice, it seems essential to understand its origins, basis, and purpose. This Part explores these important issues.

A. The 1880s: The Rise of the Partisan Balance Requirement

Today, it seems axiomatic that an "independent" agency is one that Congress has imbued with certain characteristics of independence, such as fixed terms of office,[124] protection against removal from office except for good cause,[125] and a mandated split in the partisan affiliation of the agency's governing body.[126] Under the standard historical account,[127] the creation of the Interstate Commerce Commission (ICC) in 1887[128] constitutes Congress's first experimentation with "independent" agency structure.[129] Despite this well-accepted supposition, many scholars point out examples of

123 *See infra* Table 1, for a listing of administrative bodies with mandated partisan balances in their composition.

124 *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 627–32 (1935) (upholding, against a separation of powers constitutional challenge, the use of a fixed term of office for members of the Federal Trade Commission (FTC)).

125 *See* Morrison v. Olson, 487 U.S. 654, 685–96 (1988) (upholding, against a separation of powers constitutional challenge, limiting removal of independent counsels within the Department of Justice to "good cause" grounds with judicial review of any such removals).

126 *See infra* Table 1. The Supreme Court has yet to have the opportunity to decide whether statutory partisan balance requirements violate the separation of powers. The closest the issue has come to a formal Supreme Court resolution was *FEC v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993), *cert. granted*, 512 U.S. 1218 (1994). However, procedural failures kept the Court from weighing in on the substance of the issue. *Id.*, *cert. dismissed*, 513 U.S. 88, 99 (1994). For a discussion of this case, see *infra* notes 318–21 and accompanying text.

127 *See* Jay S. Bybee, *Agency Expertise, ALJ Independence, and Administrative Courts: The Recent Changes in Louisiana's Administrative Procedure Act*, 59 La. L. Rev. 431, 437–39 (1999) (discussing the political history of the Interstate Commerce Commission (ICC) and discussing the creation of other early independent federal agencies).

128 Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379. Congress eventually abolished the ICC in 1995. *See* ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803.

129 Paul Stephen Dempsey, *The Interstate Commerce Commission—Disintegration of an American Legal Institution*, 34 Am. U. L. Rev. 1, 2 (1984); Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 Calif. L. Rev. 255, 322 n.388 (1994); Angel Manuel Moreno, *Presidential Coordination of the Independent Regulatory Process*, 8 Admin. L.J. 461, 463 n.2 (1994); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 Stan. L. Rev. 1189, 1207–08 (1986).

earlier executive agencies that bore the hallmarks of intrabranch "independence."[130]

Well before 1887 and the creation of the ICC, however, Congress set up numerous offices "in a quasi-independent fashion."[131] Oftentimes, Congress "specified qualifications for [these] offices,"[132] for instance, by requiring that the Attorney General be "learned in the law"[133] and that members of the Board of Supervising Inspectors of Steamboats be "selected for their knowledge, skill, and experience."[134] In sum, Congress sought to cabin the President's freedom both to name and to control federal executive officers from the time the Constitution came into force and effect.[135]

Although not precisely contemporary with the creation of the first federal independent agencies, in 1926, Justice Louis Brandeis authored a comprehensive historical analysis that traces the partisan balance requirement to its origin. In his dissenting opinion in *Myers v. United States*,[136] he explained that, in his view, historic practice amply validated Congress's ability to restrict the President's removal power by requiring senatorial consent to an appointee's removal from office.[137] Among these practices, Justice Brandeis mentioned the enactment of statutes that impose "restrictions on the power of nomination by requiring political representation."[138]

Justice Brandeis specifically identified two federal agencies featuring partisan balance requirements created *before* the ICC: (1) the "board of elections in Utah Territory" (1882), and (2) the "Civil Service Commission" (1883).[139]

130 Professor Jerry Mashaw, for instance, notes that the first regulatory agency established outside the executive department was "not the ICC; it was the Patent Office, created ninety-seven years earlier." JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION 5 (2012). Additionally, Professor Mashaw points out that the steamboat regulatory commission of the 1860s bore "relatively independent" characteristics. *Id.* at 200–02. Professor Mashaw even goes so far as to call "the conventional story of . . . a chief executive with firm control over all federal administrative officials . . . a caricature of nineteenth-century federal administrative governance." *Id.* at 292.

131 *Id.*

132 *Id.*

133 Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93.

134 Act of Aug. 30, 1852, ch. 106, § 18, 10 Stat. 61, 70.

135 *See* Lawrence Lessig, *Readings by Our Unitary Executive*, 15 CARDOZO L. REV. 175, 176–77, 182–96 (1993) (detailing and discussing Congress's practice of creating independent executive officers from the time of the federal government's existence and positing that this early practice seriously undermines contemporary claims that the President must enjoy plenary control over all aspects of the executive branch). As Professor Lessig explains, "the practice of the executive in the early republic was inconsistent, or at least in tension, with the unitarian's claim that the executive possesses an inherent power to direct and control *all* inferior officers." *Id.* at 196 (emphasis added).

136 272 U.S. 52 (1926).

137 *Id.* at 265–75 (Brandeis, J., dissenting). Such practices included the enactment of "a multitude of laws . . . which limit the President's power to make nominations, and which, through the restrictions imposed, may prevent the selection of the person deemed by him best fitted." *Id.* at 265.

138 *Id.* at 270.

139 *Id.* at 271 n.51.

Thus, any chronicle of the partisan balance requirement should begin with the creation of these two bodies by the Forty-Seventh Congress.

1. The Utah Commission (Edmunds Act)

In 1882, Congress enacted the "Edmunds Anti-Polygamy Act of 1882"[140] in response to growing concern over the rampant practice of bigamy in the territory of Utah. The Act created the Utah Commission, a "board of five persons, to be appointed by the President, by and with the advice and consent of the Senate, *not more than three of whom shall be members of one political party*."[141] This appears to constitute Congress's first use of a partisan balance requirement.[142] The "not-more-than-*X*-of-the-same-political-party" formulation continues to be the most popular and prevalent formulation of the partisan balance requirement.[143]

As originally drafted, however, the Edmunds Act did not prefix the ratio of partisans who would make up the Utah Commission. Instead, the draft bill simply called for a board of five, "all of whom shall not be members of one political party."[144] Some senators objected to this formulation, noting that it would allow the President to seat a commission made up of four appointees of one political party and a lone minority appointee.[145] A motion was made, and agreed upon, to amend the bill to its final formulation—a three-to-two partisan split in membership.[146]

During the floor debates, several senators questioned the constitutionality of several provisions in the bill;[147] however, no senator questioned the propriety of the commission's mandated partisan balance, nor did any senator question whether such a mandate would unduly encroach on the Presi-

140 Edmunds Act, ch. 47, 22 Stat. 30 (1882). The Edmunds Act was enacted primarily for the purpose of eradicating the vestiges of polygamy in the Utah Territory by stripping offending Mormons of the right to vote.

141 Edmunds Act § 9 (emphasis added).

142 In comments on the Senate floor, Senator Edmunds reminded his colleagues that the requirement that the commissioners not all be of the same party "follow[ed] the famous jury bill that we passed three or four years ago." 13 CONG. REC. 1155 (1882). Despite best efforts, a "jury bill" with a mandated partisan split could not be found in the Congressional Record between 1876 and 1882. Perhaps the bill passed the Senate, but was either rejected or amended by the House of Representatives.

143 *See, e.g.*, H.R. 6613, 112th Cong. §§ 101, 102(a) (2d Sess. 2012) (proposing the creation of a "Securities and Derivatives Commission" made up of five members "not more than three" of whom "shall be members of the same political party").

144 13 CONG. REC. 1155 (1882).

145 *Id.*

146 *Id.*

147 Among other things, senators suggested that the bill constituted an ex post facto law, *id.* at 1197; objected that the board would possess both quasi-legislative and quasi-judicial powers, raising serious separation of powers problems, *id.* at 1156; and argued that the board could impose criminal punishment without a constitutionally required jury trial, *id.* at 1200.

dent's ability to execute the new law.[148] This trend carried over to the House, where the debate focused on the method of paying the Commissioners, rather than on constitutional concerns related to the Commission's mandated partisan balance.[149] However, as other portions of the debate demonstrate, Congress was keenly aware that its enactments could unconstitutionally infringe upon executive powers. For example, Senator George F. Hoar (R-MA) reminded his colleagues that "Congress cannot . . . extend or diminish the power of the President to grant pardon[s]."[150]

This deference to executive power stands in sharp contrast to the bullish actions of Congress just a few years before. In 1867, Congress adopted the controversial Tenure of Office Act, which purported to require the Senate's consent to the removal of executive branch officers who were initially appointed to their offices with the Senate's advice and consent.[151] Far more than an unintended encroachment on executive power, the Tenure of Office Act was an "open confrontation" between Congress and the President over the power to oversee principal executive officers.[152] This legislation ultimately set the stage for the impeachment of President Andrew Johnson.[153] Although the Senate failed to convict President Johnson of the House's articles of impeachment (by a single vote),[154] the Tenure of Office Act, and identical subsequent enactments,[155] remained in the U.S. Code until *Myers* held such restrictions on the President's removal power to be unconstitutional on separation of powers grounds.[156]

148 In fact, in response to the objections of his colleagues in both houses, Representative Townsend (R-OH) boldly "def[ied] any gentleman to put his finger upon a single provision [of the bill] that is in conflict with the Constitution." *Id.* at 1867.

149 Members of the House were primarily concerned with whether these new "officers of the United States" would be paid from the U.S. Treasury, rather than from Utah legislative funds. *Id.* at 1847. The partisan balance requirement went unmentioned. *See, e.g.*, *id.* at 1845 (containing remarks by Representative Converse (D-OH) thoroughly describing the commission, its powers and duties, but omitting any mention of the partisan balance requirement).

150 *Id.* at 1154 ("Congress cannot constitutionally extend or diminish the power of the President to grant pardon or amnesty, and cannot confer upon him any authority which he has not now . . . .").

151 Act of Mar. 2, 1867, ch. 154, 14 Stat. 430. In addition to the Tenure of Office Act, Congress in 1867 passed the Army Appropriations Act, which purported to require the Senate's consent to the removal of the General of the Army. WILLIAM H. REHNQUIST, GRAND INQUESTS 210 (1992). President Johnson signed this legislation into law "with a protest as to its constitutionality." *Id.*

152 REHNQUIST, *supra* note 151, at 209.

153 *See id.* at 210–16; *see also* Huq, *supra* note 19, at 11 (discussing the Tenure of Office Act).

154 MASHAW, *supra* note 130, at 235.

155 *See, e.g.*, Act of July 12, 1876, ch. 179, 19 Stat. 78, 80 (purporting to require the Senate's advice and consent for removal of postmasters). The Supreme Court held this statute unconstitutional in *Myers v. United States*, 272 U.S. 52 (1926).

156 *Myers*, 272 U.S. at 176 ("[T]he Tenure of Office Act of 1867, in so far as it attempted to prevent the President from removing executive officers who had been appointed by him by and with the advice and consent of the Senate, was invalid, and that subsequent legisla-

2. The Civil Service Commission (Pendleton Act)

By the early 1880s, an established system of political patronage, commonly called the "spoils system," had permeated the federal government, leading to "rampant government waste and inefficiency."[157] In 1882, Congress took the charge of bringing about meaningful civil service reform. Senator George H. Pendleton (D-OH) introduced a bill providing "for the appointment by the President of a commission of five persons, of different political parties," to oversee the much-needed overhaul.[158] As it eventually appeared in the Statutes at Large, the Pendleton Act authorized the President to "appoint, by and with the advice and consent of the Senate, three persons, *not more than two of whom shall be adherents of the same party*, as Civil Service Commissioners."[159]

According to the bill's proponents, structural "independence" was essential to the Commission's success.[160] Such independence from other government powers would prevent the new agency from becoming entangled, or being perceived by the public as being entangled, in the patronage system that Congress charged the Commission with eradicating.[161]

No one on the Senate floor debated the propriety of creating a new regulatory body to oversee these reforms; rather, senators primarily debated what removal provisions would protect the members of this new federal agency. Although Pendleton's original draft was silent as to terms in office, some senators proposed that service be limited to a term of years, proposing three commissioners, with terms of two, four, and six years, and six years after that.[162] The goal of staggered terms was straightforward—administrative independence in the face of political vicissitudes during a change of administration. However, other senators objected to a set "term of years," arguing

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tion of the same effect was equally so."); *see also* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 494 n.3 (2010) (noting that even before *Myers*, the Tenure of Office Act's "requirement was widely regarded as unconstitutional and void (as it is universally regarded today)").

157 Lydia Segal, *Can We Fight the New Tammany Hall?: Difficulties of Prosecuting Political Patronage and Suggestions for Reform*, 50 RUTGERS L. REV. 507, 508 (1998).

158 14 CONG. REC. 207 (1882).

159 Act of Jan. 16, 1883, ch. 27, 22 Stat. 403 (emphasis added).

160 14 CONG. REC. 206–07, 249. As originally reported out of committee, the Pendleton bill called for five commissioners, two of which were to be selected from within the departments in Washington. *Id.* at 248–49. The Senate eventually agreed on a commission of three persons, appointed by the President and subject to Senate confirmation, wholly independent of the executive departments. *Id.* at 323. Some senators fought the decrease in the number of commissioners, noting that "the presence of five of these commissioners enlarged the opportunity for counsel and comparison of views." *Id.*

161 In support of excluding department members from sitting on the commission, Senator William B. Allison (R-IA) stated, "I think if we are to have a civil-service commission . . . we ought to have an independent body . . . . That is the chief reason why I suggest an independent commission." *Id.* at 249.

162 *Id.* at 243.

that such terms would not "leave the chief [executive] with the fullest responsibility" for the Commission's actions.[163]

Evidence exists in the recorded floor debates that some senators viewed presidential acquiescence as a means of justifying legislative encroachments into executive branch powers. One senator stated that "when a man shall sign the bill as President and give it his constitutional assent . . . he accepts it as his own and thereby pledges himself before the country to execute the provisions of any act to which he has put his hand."[164] Senator Edmunds agreed that when the President signs a bill, the President agrees to "suitable regulations for the exercise of admitted powers," including the power of appointment.[165] Thus, it seems plausible to posit that the Senate believed that the President acquiesced in the restrictions imposed by the partisan balance requirement when he put his hand to the Act.[166] However, senators were quick to note that the President "can not abdicate his powers, and Congress may not diminish them nor add to them."[167] But, given the lack of debate on the matter, it seems that the Forty-Seventh Congress did not view limitations on the President's power to appoint free of legislative qualifications as presenting any serious constitutional questions.

Despite the absence of debate on the partisan balance requirement, it is clear from the record that Congress certainly appreciated the importance of the President's constitutional appointment power. For example, Senator Wilkinson Call (D-FL) argued that "[t]his power of appointment is the great means provided by the Constitution by which the President and his heads of Departments shall take care that the laws be faithfully executed."[168] Similarly, in the midst of a debate on civil service qualifications, Senator John A. Logan (R-IL) quoted the Appointments Clause verbatim and then stated that if that "provision of the Constitution means anything, it means that the appointing power is in the President" alone.[169] In his view, the Senate's role was limited to consenting to and confirming the President's appointees.[170]

163 *Id.* at 244.

164 *Id.* at 323.

165 *Id.* at 325.

166 For a discussion of the viability of presidential acquiescence as a means of justifying partisan balance requirements, see *infra* note 240 and accompanying text.

167 14 CONG. REC. at 323. The Supreme Court recently has embraced this point of view, noting that although an individual President might acquiesce in a separation of powers violation, he cannot "choose to bind his successors by diminishing their powers, nor can he escape responsibility for his choices by pretending that they are not his own." Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 497 (2010).

168 14 CONG. REC. at 499 (remarks of Sen. Wilkinson Call (D-FL)) (commencing after Sen. Call's quotation of the Faithful Execution Clause).

169 *Id.* at 326.

170 *Id.* at 327.

3. The Presumed Constitutionality of Mandatory Partisan Balance Requirements

The legislative history of the Edmunds Act and the Pendleton Act both demonstrate that Congress did not foresee any constitutional difficulties with imposing statutory limits on the presidential appointment power. Congress neither asked nor answered the question whether the legislature may constitutionally designate the partisan identity of a principal executive officer.[171] To be sure, Congress did reflect on the separation of powers ramifications of creating executive officers who would be insulated from direct forms of presidential control and oversight—particularly on questions associated with fixed terms of office and limits on midstream removal from office. However, the partisan balance requirement did not generate any substantive debate; it went unaddressed. Thus, when first experimenting with the structure of independent federal agencies and partisan balance requirements, Congress simply presumed that it possessed the constitutional authority to so limit the President's power to appoint principal executive officers.[172]

B. The Partisan Balance Requirement in the Twentieth Century

After the creation of the Civil Service Commission in 1883 and the ICC in 1887, Congress began to deploy the device of "independent" agencies ever more frequently. The twentieth century was marked with the creation of myriad independent executive agencies, and most of these featured organic acts that mandated partisan balance in agency composition.[173] One can attribute the increasing prevalence of partisan balance requirements in independent agency organic acts to legislative acceptance of the practice as a constitutional means of bringing about bipartisanship, as well as limited judicial and presidential acquiescence to the practice. It was not until the 1990s, over 100 years after Congress first adopted such restrictions on presidential appointments, that a President expressly objected to a legislative requirement for partisan balance within an independent federal agency.[174]

171 In a similar manner, when Congress created the bipartisan ICC just a few years later in 1887, "[t]here was little general or philosophical discussion of the separation of powers in connection with the establishment of the commission." ROBERT E. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 58 (Octagon Books 1972) (1941).

172 *See, e.g.*, HENRY B. HOGUE, CONG. RESEARCH SERV., RL33886, STATUTORY QUALIFICATIONS FOR EXECUTIVE BRANCH POSITIONS 18 (2010) (citing as the basis for Congress's authority to place statutory qualifications on executive officers "[t]he preponderance of evidence and *historical practice*" (emphasis added)).

173 *See infra* Table 1.

174 *See infra* notes 222–28 and accompanying text.

1. Congress's Continued Embrace of Partisan Balance Requirements in the Early Twentieth Century

Nearly twenty years passed between the creation of the ICC and Congress's next use of a statutory partisan balance requirement.[175] In 1914, Congress ended this hiatus by creating the FTC, mandating a three-to-two political split in its members.[176] Then in a flurry of activity in 1916, Congress created three new regulatory bipartisan commissions. One of these included the agency that would eventually become the International Trade Commission. Then known as the "Tariff Commission," Congress created the Commission to ensure the competitiveness of U.S. goods in booming international markets.[177]

In an address to industry leaders, Senator Thomas Gore (D-OK), a chief proponent of a national agency on international trade, spoke of the propriety of creating an international trade commission.[178] Regarding the commission's composition, Senator Gore envisioned that:

> The commission should consist of an even number of commissioners—say six. Not more than three of these should be of any one political party. To make the number odd you impeach in advance either its capacity or its sincerity. . . . An even number would be a mark of confidence and would be an added assurance of its fitness and efficiency.[179]

By utilizing such a composition—an even split of partisans—and staffing the agency with nonpolitical "experts and trained economists," the commission "would be less liable to change with the violent vicissitudes of party politics" and would be "less affected by the bias and prejudice of partisan controversy."[180]

Clearly, a nongovernment-like "independence" through the aegis of bipartisanship was the key feature sought.[181] And, yet, the potential ill-effects of forcing the President to appoint members of the opposition party to principal executive offices appears to have gone completely unconsidered. Congress simply presumed that it could prescribe the partisan composition of independent federal regulatory entities.

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175 *See infra* Table 1.

176 Federal Trade Commission Act, Pub. L. No. 63-203, 38 Stat. 717 (1914).

177 S. REP. NO. 64-243, at 3 (1916).

178 *Id.*

179 *Id.* at 8.

180 *Id.* at 5.

181 Industry leaders also called for an independent commission to control tariffs. Senator Gore introduced into the record a series of four correspondences from academics and industry leaders favoring a nonpartisan body. Edward A. Filene, a successful Boston entrepreneur, counseled Senator Gore that a commission of "three Republicans and three Democrats" would bring "great advantage" and that the bill's "chance of being passed at the next session of Congress will be largely increased thereby." Letter from Edward A. Filene to Senator Thomas Gore (Nov. 15, 1915), *reprinted in* 53 CONG. REC. 1550 (1916).

This proposed board of experts was to wield "broader [and] more general powers" than any other federal agency yet in existence.[182] Senator Albert B. Cummins (R-IA) envisioned that these experts would be

> three of the biggest and brainiest Democrats in the United States and three of the biggest and brainiest Republicans in the United States—three men who believe in the theory which our Democratic friends adopt for a tariff law and three men who believe in the theory or policy which the Republican Party adopts for a tariff law.[183]

Senator Cummins credited the idea that expertise, as if by magic, would overcome partisan paralysis. He opined that "if the President of the United States fails *in his appointments* to recognize the real spirit of this law, he will be false to the duty which the statute will impose upon him."[184] The overriding goal of expertise through bipartisanship carried over to the House as well.[185]

President Woodrow Wilson squarely addressed Senator Cummins's concern that the President might fail to make the best appointments. In a letter addressed to the Senate, Wilson argued that an "unpartisan inquiry" was needed into the United States' international trade situation and that an international trade "board as much as possible free from any strong prepossession in favor of any political policy and capable of looking at the whole economic situation of the country with a dispassionate and disinterested scrutiny"[186] was requisite. One potential means of avoiding a "strong prepossession" to favor either political party would be to legislate a three-to-three bipartisan split in the Board's membership. Moreover, the President's appeal for the creation of an "unpartisan" board removed any residual doubts that the Senate might have harbored about the constitutionality of the restriction. After all, if the President himself acquiesced in the creation of a body with a mandatory partisan balance requirement, what objection could there be to the adoption of such a requirement?

As was the case with previous bills containing partisan balance requirements, the Tariff Commission's partisan balance requirement did not garner any attention in floor debates. However, the Senate did afford significant consideration to the process through which the Commission's chairman and vice chairman were to be selected. As it entered committee, the tariff bill provided that the President would designate a chairman and vice chairman once every two years.[187] Senator Cummins proposed amending the bill to allow the President to designate the chairmen "annually instead of bienni-

182 53 CONG. REC. 13,803 (1916) (statement of Sen. Simmons).

183 *Id.* at 13,845 (statement of Sen. Cummins).

184 *Id.* (emphasis added).

185 *Id.* at 1768 (statement of Rep. Borland (D-MO)) (arguing that he would not limit the commission to one "theory of tariff, because if [he] did it would not be a nonpartisan tariff commission").

186 Letter from President Woodrow Wilson to Representative Claude Kitchin (Jan. 24, 1916), *reprinted in* 53 CONG. REC. 10,529 (1916).

187 53 CONG. REC. 13,794–95 (1916).

ally."[188] When prodded on the necessity of this change, Senator Cummins intimated that he preferred an arrangement that allowed the Commission's power to rest closer to the President:

> It is thought desirable for this reason: The effort in this bill . . . is to create a commission which shall reflect the varying political or economic opinions of the political parties. It is, therefore, to be composed of persons no more than three of whom shall be members of one political party. *It seems, therefore, that it is wise as nearly as possible, to get the chairman of the commission in political or economic harmony with the President of the United States*, and it would, as it seems to me, be wise to permit the President to designate the chairman and vice chairman every year.[189]

This idea, that the Commission would better perform its duties if its leaders were aligned with the President, plainly reflects concerns quite consonant with the unitary executive theory.[190]

Even though three of the six commissioners would not be political fellow travelers with the President, Senator Cummins believed that the President should be able to choose the chair and vice chair that best represented the President's policy interests (i.e., members of his own political party). Senator Cummins's remarks also indicate that some in the Senate believed that the President should have a means of supervising, if not controlling, the work of the Commission despite its fifty-fifty partisan split. This ability to name the Commission's leadership, in turn, would give the President more effective ability to supervise the execution of the tariff act.[191]

A few years later, Congress once again embraced administrative expertise, achieved through a bipartisan commission, when it revamped the nation's securities exchange laws in the Securities Act of 1934. The prior securities act, enacted in 1933, vested its administration in the existing Federal Trade Commission.[192] The 1934 Act provided for "a separate commission, an independent commission, to be appointed by the President and confirmed by the Senate, to consist of five members."[193] In summarizing the Securities Act's features, Senator Duncan U. Fletcher (D-FL) elaborated that "Section 4 establishes the Federal exchange commission about which we have been talking, a commission to be composed of five members, selected by the

188 *Id.* at 13,795 (remarks of Sen. Cummins).

189 *Id.* (emphasis added).

190 *See* Calabresi & Prakash, *supra* note 9, at 596 (arguing that the Constitution dictates that "the President *exclusively* controls the power to execute all federal laws, and therefore it must be the case that all inferior executive officers act in *his* stead").

191 This was very magnanimous of Senator Cummins, a Republican, during the election year of 1916, in which Woodrow Wilson secured another term as President and four more years to name the chair and vice chair of the Tariff Commission.

192 78 CONG. REC. 8162 (1934) (remarks of Sen. Duncan U. Fletcher (D-FL)).

193 *Id.*

President, *and so forth*."[194] The "and so forth" included a mandated three-to-two partisan split in the commission's members.[195]

By the time Congress created the independent agencies of the 1930s, its members plainly considered mandated partisan balances to be part and parcel of the necessary attributes of those agencies—"and so forth." Thus, from the nineteenth century into the twentieth, the standard template for independent federal agencies included fixed terms of office, protections against midterm removal except for good cause (and with judicial review available for any such removals), and, of course, a partisan balance requirement.

2. The Judiciary's Limited Embrace of Partisan Balance Requirements

Congress's unquestioned acceptance of the propriety and constitutionality of mandated partisan splits in executive agency heads might have been fueled by the Supreme Court's arguable endorsement of such provisions during the early twentieth century. In 1903, the Supreme Court had to decide the legality of President William McKinley's removal of an appraiser, Ferdinand N. Shurtleff, from the Federal Board of General Appraisers.[196] Holding that the removal was constitutional, Justice Rufus Wheeler Peckham quoted the portion of the Board's organic act providing for appointment, including the requirement that "[n]ot more than five of such general appraisers shall be appointed from the same political party."[197]

Writing for the *Shurtleff* majority, Justice Peckham opined that "[t]here is, of course, no doubt of the power of Congress to create such an office as is provided for in the above section."[198] At first blush, this seems to express that there is "no doubt" of the power of Congress to impose a partisan balance requirement such as the one that Justice Peckham described. However, whether the Court's lack of doubt fully embraced the partisan balance requirement that cabined the President's appointment power is not entirely clear. After all, the Court only spoke to Congress's power to "create" these offices; it did not purport to express an opinion on the exact qualifications Congress imposed on the presidential appointees. Nor did the Court purport to opine on the effect such qualifications had on the President's duty to "faithfully execute" the law charged to those offices. On the other hand, if limiting the President's ability to name political fellow travelers to federal boards and commissions presented a serious separation of powers problem, it does seem odd that the Supreme Court failed to point out this constitutional defect (or even to flag it in passing).[199]

194 *Id.* at 8164 (emphasis added)

195 15 U.S.C. § 78d(a) (2012) ("There is hereby established a Securities and Exchange Commission . . . to be composed of five commissioners. . . . [N]ot more than three of such commissioners shall be members of the same political party . . . .").

196 *See infra* note 424 (discussing the Board of General Appraisers).

197 Shurtleff v. United States, 189 U.S. 311, 313 (1903).

198 *Id.*

199 *See, e.g.*, White v. Mass. Council of Constr. Emp'rs, 460 U.S. 204, 214 n.12 (1983) (noting, but not deciding, an independent constitutional objection to minimum hiring

And, as noted earlier,[200] Justice Brandeis's dissent in the iconic *Myers v. United States*, decided some years later in 1926, might have provided support for the notion that Congress may constitutionally "restrict the exercise by the President of the power of nomination."[201] Justice Brandeis pointed to a string of qualifications used by Congress to narrow the President's choice of nominees, including "restrictions on the power of nomination by requiring political representation."[202] Justice Brandeis noted that this requirement existed in "a multitude of laws [that] have been enacted which limit the President's power to make nominations, and which . . . prevent the selection of the person deemed by him best fitted. Such restriction[s] upon the power to nominate [have] been exercised by Congress continuously since the foundation of the Government."[203] Because of this historical practice, Justice Brandeis found it unnecessary to question whether Congress had such power.[204] It also seems that the Congresses of the early twentieth century likewise found the answer to this question both obvious and easy, and hence deemed it unnecessary to even ask it.

In a separate dissent in *Myers v. United States*, Justice Oliver Wendell Holmes, Jr. also lent credence to the notion that Congress may constitutionally restrict a President's power of appointment and removal. In his view, expressed over three succinct paragraphs, the power of Congress to create an office carried with it the power to abolish the office, establish a fixed term of office, or require senatorial consent to removal.[205] Because "Congress alone confers on the President the power to appoint," that power was necessarily subject to any restrictions that Congress might impose.[206] Finally, in a narrow reading of the Faithful Execution Clause, Justice Holmes concluded that "[t]he duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress

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requirements for city residents, observing that "[t]his question has not been, to any great extent, briefed or argued in this Court," and simply "remand[ing] without passing on its merits"). However, only a year later, the Supreme Court granted certiorari on this issue and reached the merits in *United Building & Construction Trades Council v. Mayor of Camden*, 465 U.S. 208 (1984). Thus, even if the Supreme Court is not inclined to decide a question not presented, it is certainly capable of flagging it as both relevant and intentionally undecided. *See generally* Ronald J. Krotoszynski, Jr., *Constitutional Flares: On Judges, Legislatures, and Dialogue*, 83 MINN. L. REV. 1, 2 (1998) (arguing that "[j]udges could endeavor to engage legislators more directly on matters of mutual institutional concern"); *id.* at 7–8 (arguing that a dialogue between courts and legislative and executive officers about the constitutionality of particular government programs or policies could be beneficial and positing that "[i]f such [judicial] advice better enables legislators and executive branch personnel to avoid unconstitutional actions, then one could plausibly argue that the dialogue enhances, rather than debases, the legislative process").

200 *See supra* notes 136–39 and accompanying text.

201 Myers v. United States, 272 U.S. 52, 264 (1926) (Brandeis, J., dissenting).

202 *Id.* at 270.

203 *Id.* at 265.

204 *Id.* at 275.

205 *Id.* at 177 (Holmes, J., dissenting).

206 *Id.*

sees fit to leave within his power."[207] Under this approach, Congress enjoys a seemingly unlimited power to restrict the appointment or removal of executive officers (in direct conflict with the imperatives of the contemporary unitary executive theory).[208]

3. Signs of Presidential Acquiescence to Restrictions of the Appointment Power

Finally, and perhaps most striking, is the fact that the executive branch has come very close to conceding the propriety of the partisan balance requirement before the Supreme Court. In 1935, President Franklin D. Roosevelt purported to fire William E. Humphrey, a sitting member of the FTC, after Humphrey refused to honor repeated requests from President Roosevelt that he resign his office prior to the expiration of his term. Consistent with the President's view that Humphrey had been lawfully removed from office, the Roosevelt Administration declined to pay Humphrey his salary as an FTC commissioner from the time the President had removed Humphrey from office and until his death (which had preceded the end of his fixed term of office).[209]

Before the Supreme Court, the Roosevelt Administration lost its argument that the President, as the repository of the full executive power and incident to his duty to ensure faithful execution of the laws, had the inherent power to remove a sitting FTC commissioner in whom he lacked confidence.[210] Writing for the majority, Justice George Sutherland upheld Congress's decision to restrict the President's removal power to good "cause" and also found that a mere policy disagreement with a sitting FTC commissioner appointed by a prior administration of a different political party did not meet this standard.[211] The Court expressly held "that no removal can be made

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207 *Id.*

208 *See* Calabresi & Prakash, *supra* note 9, at 589 (arguing that sound interpretation of the Faithful Execution Clause forecloses the possibility that Congress holds the power to "determine who will 'carry[ ] into execution' its laws").

209 Humphrey's Ex'r v. United States, 295 U.S. 602, 618–19 (1935).

210 *Id.* at 627–32.

211 *See id.* at 631–32. *But cf.* Calabresi & Rhodes, *supra* note 9, at 1165–66 (arguing that the President has inherent constitutional authority to fire any person within the executive branch and thus rejecting the holding of *Humphrey's Executor* as inconsistent with the imperatives of the unitary executive); Saikrishna Bangalore Prakash, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991, 992 (1993) (positing that "[w]henever an official is granted statutory discretion, the Constitution endows the President with the authority to control that discretion" (footnote omitted)). Calabresi and Rhodes are very clear that, in their view, the unitary executive theory "renders unconstitutional independent agencies and counsels to the extent that they exercise discretionary executive power." Calabresi & Rhodes, *supra* note 9, at 1165–66 (internal footnote omitted). As one of us had previously observed, "[t]he unitary-executive theory, at least in its strongest iteration, would nullify all limits on presidential control of independent agencies that exercise policymaking authority, such as the Federal Communications

during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute."[212]

In its brief to the Supreme Court, the Roosevelt Administration argued that the "independence" that Congress had conveyed to the FTC did not "depend upon an implied limitation of the removal power" as urged by Humphrey's executor.[213] Rather, the Roosevelt Administration contended that Congress had provided "in unmistakable terms for *other safeguards* designed to achieve" independence.[214] These included the requirement that commissioners "represent more than one political party."[215] Although not affirmatively stating that these "other safeguards" were without constitutional defect, the government implied that such measures, when Congress adopted them, were constitutionally justified because they brought about desirable "independence" from plenary presidential control. By arguing that the adequacy of these features of independence made strict enforcement of the for-cause removal limitation unnecessary, the Roosevelt Administration appears to have tacitly accepted statutory provisions that restrict presidential appointment to "a bare majority of the members . . . [from] the same political party."[216]

There is more than a little logic, however, to the Roosevelt Administration's position. If Article II's Vesting and Faithful Execution Clauses require that the President be permitted to define "good cause" as she deems fit, then the potential effects of a partisan balance requirement would be much reduced.[217] If the President named an obstructionist member to the FTC, she could simply remove him from office before the expiration of his term of office. Thus, it is the combination of a partisan balance requirement with limitations on removal that create a problem with the President's ability to oversee and direct the operations of independent federal agencies (like the FTC).[218] If Congress or the federal courts were to remove either the partisan balance requirement (so that the President enjoys a free hand in naming principal executive officers) *or* the limitation on the power to remove a sitting board or commission member, the separation of powers problem would be, if not entirely resolved, then at least substantially reduced in scope.

As the history of the twentieth century demonstrates, Presidents generally have accepted partisan balance requirements as a matter of course and

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Commission or the Federal Reserve Bank of the United States." Krotoszynski, *supra* note 30, at 1608–09.

212 *Humphrey's Ex'r*, 295 U.S. at 632.

213 Brief for the United States at 18, *Humphrey's Ex'r*, 295 U.S. 602 (No. 667).

214 *See id.* (emphasis added) ("The Commission was left free from the continuing supervision of a department head; its membership was required to represent more than one political party; and the terms of its members were arranged to expire at different times. In later Acts creating similar commissions these factors alone have apparently been deemed sufficient to secure the objective of an independent body.").

215 *Id.*

216 *Id.* at 19.

217 *See infra* notes 272–73, 359–63 and accompanying text.

218 *See infra* notes 272–73, 359–63 and accompanying text.

signed organic acts containing such requirements without question or public objection. However, there is one key example of a presidential objection to such an encroachment on the appointment power: on March 19, 1992, President George H.W. Bush signed into law Senate Bill 2184, establishing the Morris K. Udall and Steward L. Udall Foundation.[219] The bill employed a complex scheme of qualifications for the presidential appointees who would make up the Foundation's Board of Trustees.[220] Among the myriad requirements for Board appointees, the bill prohibited certain trustees from being members "of the same political party."[221]

Although he chose to sign the bill, President Bush noted in his signing statement that he viewed the appointment restrictions "as precatory" only.[222] In the President's view, under "the Appointments Clause of the Constitution . . . congressional participation in such appointments may be exercised only through the Senate's advice and consent with respect to Presidential nominees."[223] President Bush argued that imposing a precondition to appointment, including a partisan balance requirement, violated this principle and, hence, the separation of powers doctrine.[224]

Members of Congress, including members of the Senate's leadership, did not simply acquiesce to President Bush's challenge to the use of mandatory partisan balance requirements. Contemporary news accounts quoted Senator Dennis DeConcini (D-AZ) as characterizing President Bush's position as "a foolish argument."[225] In a more sustained and formal argument, then-Majority Leader Senator George J. Mitchell (D-ME) took to the Senate floor to set forth the views of the Senate's majority caucus.[226] He suggested that President Bush's constitutional objections to the statutory

219 Morris K. Udall Scholarship and Excellence in National Environmental and Native American Public Policy Act of 1992, Pub. L. No. 102-259, 106 Stat. 78.

220 *See infra* Table 1.

221 20 U.S.C. § 5603(b)(3) (2012).

222 Statement on Signing the Morris K. Udall Scholarship and Excellence in National Environmental and Native American Public Policy Act of 1992, 28 WEEKLY COMP. PRES. DOCS. 483, 507 (Mar. 23, 1992) [hereinafter *Udall Foundation Signing Statement*]. The President had also objected to a prior version of the bill, which called for four trustees to be appointed by Congress, on the grounds that such an arrangement "would violate the Constitution." Paul Horwitz, *Pocket-Veto Conflict Ducked as House OKs Udall Scholarship Bill*, ROLL CALL, Mar. 16, 1992, *available at* LEXIS, News Library, ROLLCL File. After Congress removed these objectionable provisions, President Bush signed the successor bill despite his objection to the bill's partisan balance requirement—"[f]idelity to the constitutional analysis that provoked the first veto thus proved less than thoroughgoing." Nelson Lund, *Lawyers and the Defense of the Presidency*, 1995 BYU L. REV. 17, 47.

223 *Udall Foundation Signing Statement*, *supra* note 222, at 507.

224 *Id.*

225 Ellen Gamerman, *President Signs Udall Bill into Law: Bush Statement Takes Shot at Senate*, STATES NEWS SERV., Mar. 19, 1992, *available at* LEXIS, News Library, SNS File.

226 138 CONG. REC. 8689 (1992) (statement of Sen. Mitchell); *see also* HOGUE, *supra* note 172, at 4–5 & n.17 (summarizing the debate between President Bush and Senator Mitchell over the meaning of the Appointments Clause).

qualifications for appointees were "disturbing"[227] and constituted an attack on a provision simply "intended to promote the nonpartisanship which was important in the Congress' bipartisan support of [the] measure."[228]

Senator Mitchell argued that President Bush's signing statement was both "wrong and without any basis in history or law."[229] In support of the proposition that history was on Congress's side, Senator Mitchell proceeded to summarize the historical acceptance of statutory qualifications for executive offices. He listed two offices, the Attorney General and Solicitor General, which since their inception were required by statute to be filled by appointees "learned in the law."[230] Senator Mitchell then turned to judicial pronouncements, specifically the majority and dissenting opinions of *Myers v. United States*,[231] which he believed showed that Congress may impose "reasonable and relevant qualifications . . . of eligibility of appointees."[232] So long as those qualifications "do not so limit selection and so trench upon executive choice as to be in effect legislative designation," they should be deemed entirely constitutional.[233] And, drawing from Justice Brandeis's *Myers* dissent, partisan balance requirements are one such permissible qualification.[234]

Senator Mitchell's floor speech, a direct point-by-point rebuttal of President Bush's signing statement, demonstrates quite clearly Congress's settled view that history and practice unquestionably support its regular imposition of partisan balance requirements on presidential appointments to independent federal agencies. Notwithstanding the unitary executive theory and arguments premised on Article II's Vesting and Faithful Execution Clauses, history and practice validate the congressional imposition of partisan balance on presidential appointees.[235] Any potential objections premised on generic separation of powers theory and practice should be deemed waived—merely water under the bridge.[236] Indeed, the Senator believed that this "construction of the Constitution has become fixed over the past 200 years."[237]

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227 138 CONG. REC. 8689 (1992) (statement of Sen. Mitchell).

228 *Id.* at 8690.

229 *Id.*

230 *Id.*

231 272 U.S. 52 (1926).

232 138 CONG. REC. 8690 (1992) (statement of Sen. Mitchell) (quoting *Myers*, 272 U.S. at 129).

233 *Id.* (quoting *Myers*, 272 U.S. at 128).

234 *Id.* at 8690–91.

235 *Id.* at 8691 (arguing that "history is important in constitutional law," noting that "for more than 200 years . . . Congress has enacted numerous Federal statutes prescribing qualifications required for appointees to Federal offices that Congress has created," and observing that "Presidents have approved and abided by [these] provisions"); *see also* HOGUE, *supra* note 172, at 2 (citing as the basis for Congress's authority to place statutory qualifications on executive officers "the preponderance of evidence and *historical practices*" (emphasis added)).

236 *See* Bradley & Morrison, *supra* note 5, at 414–17.

237 138 CONG. REC. 8691 (1992) (statement of Sen. Mitchell).

However, markedly absent from the Majority Leader's argument is any rational limiting principle or stopping point to Congress's discretion to limit the President's ability to select principal officers who will serve within the executive branch.[238] Nor did Senator Mitchell address how such restrictions articulate with the President's duty to ensure that "the Laws be faithfully executed."[239] Regardless of the merits, Congress does not seem much inclined to consider seriously whether such encroachments are unconstitutional, given its view that history and consistent practice have validated them;[240] Congress's use of mandatory partisan balance requirements since the 1880s overbears any contemporary separation of powers objections to this practice.[241]

238 We believe that the separation of powers objection relates most clearly, and most powerfully, to principal officers of the United States—i.e., to those persons who have direct and substantial responsibility for making policy within the executive branch of the federal government. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 511 (2010) (holding that the heads of independent agencies are "Hea[ds] of Departmen[ts]" within the executive branch for purposes of applying the Appointments Clause); Edmond v. United States, 520 U.S. 651, 661–63 (1997) (distinguishing principal and inferior officers). As Chief Justice Rehnquist observed in *Edmond*, "[g]enerally speaking, the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President: Whether one is an 'inferior' officer depends on whether he has a superior." *Id.* at 662; *see id.* at 663 (observing that "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"). Given that the Supreme Court has squarely held that persons comprising the head of an independent federal board, commission, or agency constitute "principal officers" and also constitute the "Head of a Department" for purposes of appointing inferior officers, *see Free Enter. Fund*, 561 U.S. at 511 (internal alterations omitted), it necessarily follows that those serving on these entities are plainly principal, not inferior, officers for the purpose of applying the Vesting and Faithful Execution Clauses as well. The argument should also hold true for inferior officers (but not for mere employees), although a functionalist analysis might find that Congress possesses greater leeway to impose partisan balance requirements when those serving are subject to direct supervision by a superior officer who serves at the pleasure of the President. *See Edmond*, 520 U.S. at 662–63. We would happily accede to the proposition that Congress may circumscribe presidential control over the hiring and dismissal of mere federal "employees"—i.e., persons who lack any meaningful ability to make policy within the executive branch.

239 U.S. CONST. art. II, § 3.

240 Long use and consistent practice can certainly validate a particular practice or serve to answer a potential constitutional objection. *See* Bradley & Morrison, *supra* note 5, at 417–24, 427–30, 432–38. But, consistent historical use, and even presidential acquiescence over time are not necessarily controlling factors in contemporary separation of powers analysis. The legislative veto was a common feature of many delegations of policymaking authority to the executive branch, from the time of FDR to 1983. *See* INS v. Chadha, 462 U.S. 919, 967–68 (1983) (White, J., dissenting). This fact did not save the so-called "legislative veto" from judicial invalidation on separation of powers grounds. *See id.* at 958–59 (majority opinion).

241 Interestingly, the dispute between Congress and the President over qualifications of officers of the United States was not the only one that arose during the George H.W. Bush presidency. In 1992, Congress passed S. 2733, providing for the creation of the Office of

Save for the George H.W. Bush Administration, Presidents have rarely challenged statutory qualifications for office and have simply accepted partisan balance requirements as a settled feature of the contemporary administrative state's basic design. And, as mentioned earlier in this Article, evidence suggests that Congress has relied on presidential acquiescence to support its use of statutory qualifications for executive officers.[242] The next subsection considers whether such reliance is appropriate.

C. Acceptance Leads to Even Greater Encroachment

Into recent times, Congress continues to make the partisan balance requirement a key means of ensuring agency independence.[243] Since 1989, approximately 950 bills have been introduced in Congress that propose to create some new federal administrative body with a mandated split in political party representation among its members.[244] As some in Congress have boasted, partisan balance requirements "may be found from near the beginning to near the end of the 50 titles of the United States Code."[245]

This continued reliance on mandated partisan balance requirements is the result of Congress's belief that it may constitutionally wield this power over executive branch appointments.[246] It also reflects the legislative

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Federal Housing Enterprise Oversight. *See* Housing and Community Development Act of 1992, Pub. L. No. 102-550, 106 Stat. 3672. Before President Bush signed the measure, the Department of Justice's Office of Legislative Affairs wrote a letter to the Senate "rais[ing] questions as to the constitutionality of . . . the prescription of minimal qualifications for the person nominated as Director," among other things. S. REP. NO. 102-282, at 85 (1992). The Department of Justice asserted that "other than the constitutional disqualification of Members of Congress from being an officer of the United States in Article I, Sec. 2, '[a]ll other limitations are incompatible with the President's appointment power.'" *Id.* (quoting Letter of W. Lee Rawls, Assistant Att'y Gen., Office of Legislative Affairs, to Hon. Donald W. Riegle, Jr., Chairman, Comm. on Banking, Hous. and Urban Affairs, U.S. Senate (Apr. 7, 1992)). Much like Senator Mitchell, the Congressional Research Service deflected this assertion as "without legal foundation and . . . contradicted by Supreme Court opinions and continuous and consistent historical practice and precedent dating back to the establishment of the Republic." *Id.* The Congressional Research Service also cited with approval Senator Mitchell's remarks made the previous month in response to President Bush's objection to the partisan balance requirement mandated for the Udall Foundation. *Id.* at 88.

242 *See supra* notes 164–67 and accompanying text.

243 *See infra* Table 1.

244 This figure is arrived at via the following LexisNexis search: Combined Source Set (Congressional Full Text Bills 101st Congress – Current Congress); Search ("same political party" or "one political party" and HEADING(intro!)).

245 138 CONG. REC. 8690 (1992) (remarks of Sen. Mitchell (D-ME)) (listing the organic statutes of seven independent agencies).

246 "Not only does the Senate have the power to confirm a President's . . . nominations, . . . but the appointment power is given to Congress by the Constitution. In Article II, the President's appointment power is limited by the power of Congress." S. REP. NO. 110-552, at 3 (2008) (discussing President George W. Bush's use of the recess appointment to appoint U.S. Attorneys).

branch's belief that such limitations on the President's appointment powers are necessary to ensure that appointments are made based on relevant expertise and not partisanship[247]—all with the hope of enhancing the perceived credibility and operational efficacy of independent federal agencies.[248]

Congress certainly has embraced with gusto the proposition that historical practice ratifies its power to impose partisan quotas on presidential appointments to agencies it deems "independent."[249] Additionally, Congress has even taken the view that it has the power to impose similar requirements on presidential appointments to agencies housed within cabinet-level departments,[250] "Article I" courts,[251] and even "Article III" courts.[252]

Moreover, in recent years, Congress has taken the step of requiring the President to seek preclearance from Congress before making certain appointments. The organic act of the Privacy and Civil Liberties Oversight Board requires that the President appoint, in a somewhat paradoxical fashion, five members "without regard to political affiliation, but in no event shall more than 3 members of the Board be members of the same political party."[253] The requirements do not stop there, however. Before appointing a member who is not of the President's own party, the President must "consult with the leadership of that party, if any, in the Senate and House of Representatives."[254] The purpose of this provision is clear: "[T]hose individuals who are not of the same political party as the President *can only be appointed* after the President has consulted with the leadership of the nominee's party."[255]

Congress has failed to provide explicit justification for this new requirement on presidential appointment, and this is troubling, given that preappointment "consultation" seems to go far beyond the Senate's accepted constitutional role of giving "Advice and Consent"[256] to presidential appointees.

Perhaps the political context of the time explains Congress's motive for this novel requirement. In 2007, the time the Oversight Board's organic act was amended to include the presidential consultation requirement, both Houses were controlled by Democratic majorities, and Republican President George W. Bush had another two years in the White House. Some scholars

247 *See supra* text accompanying note 185.

248 "This change [that no more than five of the nine Commission members appointed by the President may be from the same political party] is intended to enhance the credibility of the Commission by ensuring that the Commission is not perceived as a partisan organization." 140 CONG. REC. 25,959 (1994).

249 *See generally* Bradley & Morrison, *supra* note 5 (discussing the question of historical practice as a means of establishing a binding gloss on the meaning of the Constitution).

250 *See infra* Table 2.

251 *See infra* Table 3.

252 *See infra* Table 4.

253 42 U.S.C. § 2000ee(h)(2) (2012).

254 *Id.*

255 153 CONG. REC. 533 (2007) (emphasis added).

256 U.S. CONST. art. II, § 2, cl. 2.

have opined that the greatest push for independence in administrative agencies comes at times when the parties enjoy divided control over Congress (or at least one house) and the White House.[257] No matter the motive, the Oversight Board's consultation requirement is just the latest example of a means of securing "independence" that arguably violates the separation of powers doctrine.

It also bears noting that the executive branch has not simply accepted limitations on the President's constitutional appointment power. The opinions of the Office of Legal Counsel (OLC), a division of the Department of Justice, provide strong counterevidence of presidential acquiescence in congressional efforts to control presidential appointments.[258] In fact, OLC's formal opinions stand in considerable tension with Senator Mitchell's history of a joint or shared vision of the appointment power. Although the OLC has not consistently branded partisan balance requirements as unconstitutional, the office has consistently asserted that limits on the President's appointment power are constitutionally suspect.

In 1979, during the Carter Administration, OLC issued an opinion concluding that the Age Discrimination in Employment Act of 1967 did not bar the President from considering the age of judicial appointees.[259] In that opinion, OLC readily admitted the power of Congress "to prescribe qualifications for office," including the power to require that the "President appoint members of both parties to certain kinds of boards and commissions."[260] OLC resolved, however, that the "power of appointment belongs to the President, and it cannot be usurped or abridged by Congress."[261] The "balance" between these two realms, the opinion stated, depended on the "nature of the office in question"—the closer the office lies to the President, the more problematic the qualifications become.[262]

The 1980s saw two Republican administrations and a broader view of the proper scope of the President's appointment power. In 1989, OLC issued an opinion entitled "Common Legislative Encroachments on executive branch Authority."[263] Abandoning the notion of "balance" in the 1979 opinion, the OLC asserted:

> Congress . . . imposes impermissible qualifications requirements on principal officers. For instance, Congress will require that a fixed number of members of certain commissions be from a particular political party. These requirements . . . violate the Appointments Clause. The only congressional

257 Devins & Lewis, *supra* note 3, at 464 (arguing that "the percentage of new agencies with insulating characteristics correlates with periods of divided government" (footnote omitted)).

258 Bradley & Morrison, *supra* note 5, at 458.

259 Judges—Appointment—Age Factor, 3 Op. O.L.C. 388, 388 (1979).

260 *Id.* at 389.

261 *Id.*

262 *Id.* (opining that such qualifications would be unconstitutional if imposed on cabinet appointees).

263 Common Legislative Encroachments on Executive Branch Authority, 13 Op. O.L.C. 248 (1989).

> check that the Constitution places on the President's power to appoint "principal officers" is the advice and consent of the Senate.[264]

This robust, highly expansive view of the President's Article II appointment power helps to explain the first President Bush's opposition to the seemingly innocuous Udall Foundation bill.[265]

After the election of President Bill Clinton in 1992, OLC again revised its position regarding the constitutional permissibility of mandatory partisan balance requirements. In 1996, President Clinton's OLC expressed the opinion that the Lobbying Disclosure Act of 1995, which purported to disqualify certain candidates from appointment as U.S. Trade Representative, was an unconstitutional intrusion on the President's appointment power.[266] In doing so, OLC cited its earlier 1979 opinion positing that an appropriate "balance" allows certain congressional restrictions on presidential nominations.[267] OLC argued that a proper analysis depends on the nature of the office—if the "position in question is especially close to the President," then the President must enjoy expansive authority to choose whom he pleases to serve in the executive office at issue.[268]

To be sure, OLC's opinions reflect the fact that Presidents have not been unanimous in their understanding of the appointment power. However, the point remains that OLC has never accepted any and all congressional encroachments on the President's appointment power. For example, a report by the Congressional Research Service acknowledges that OLC's position has changed over time, but nevertheless concludes that, taken as whole, "they clearly do not endorse the view that [the authority of Congress to set qualifications for office] is broad."[269] The OLC's formal opinions on the President's constitutional appointments authority demonstrate that the executive branch has not simply acquiesced in congressional efforts to shape or control the appointments process—including partisan balance requirements.[270]

In sum, many factors have driven Congress's use of partisan balance requirements from the 1880s to the present day: a desired focus on expertise above partisanship; an effort to form a bipartisan solution to difficult policy

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264 *Id.* at 250.

265 *See supra* text accompanying notes 222–24.

266 Constitutionality of Statute Governing Appointment of U.S. Trade Rep., 20 Op. O.L.C. 279, 279 (1996).

267 *Id.* at 280.

268 *Id.*

269 HOGUE, *supra* note 172, at 7.

270 *Compare* 138 CONG. REC. 8690 (1992) (statement of Sen. Mitchell (D-ME)) (arguing the congressionalist position that statutorily imposed qualifications for executive offices are constitutional and observing that partisan balance requirements "may be found from near the beginning to near the end of the 50 titles of the United States Code"), *with* Myers v. United States, 272 U.S. 52, 171 (1926) ("When instances which actually involve the question are rare . . . the weight of the mere presence of acts on the statute book for a considerable time, as showing general acquiescence in the legislative assertion of a questioned power, is minimized.").

issues; and a desire to foster a sense of legitimacy in the agency's actions in the public's eye. A less benign motive appears to be the desire of Congress to have significant input on the selection of principal officers within the executive branch.

Whatever its original motivations and justifications, however, the contemporary Congress plainly claims a general power to impose partisan balance requirements on any and all independent federal agencies and is inclined to jealously guard this prerogative. Congress does so without any regard to the effects that this historical practice has played, and continues to play, on the power of the chief executive to faithfully execute the laws. Moreover, when the chief executive does speak out, Congress has demonstrated that it is willing to defend vigorously against challenges to its power to mandate partisan balance requirements.

III. The Legal and Policy Implications of Partisan Balance Requirements for Presidential Appointments to Independent Federal Agencies

This Part focuses on the statutory partisan balance requirements that currently encumber Presidents when selecting principal officers to staff so-called independent federal regulatory agencies. We argue that partisan balance requirements, although superficially attractive, have serious detrimental consequences for effective presidential control of independent agencies. Not only are these statutory impediments arguably unconstitutional on separation of powers grounds, but, from a practical (functionalist) perspective, they also work to undermine presidential control of the executive branch. Independent agencies are already highly insulated from direct presidential control by virtue of the fact that their heads enjoy fixed terms of office and protection from presidential removal absent good cause shown (with judicial review available for any such good cause removals).[271]

Any further attenuation of presidential control arguably constitutes a constitutionally undue burden on the President's ability to faithfully execute the laws of the United States.[272] As Chief Justice John G. Roberts, Jr. noted in his majority opinion in *Free Enterprise Fund*, "[t]he Constitution requires that a President chosen by the entire Nation oversee the execution of the laws."[273] When partisan balance requirements are conjoined with fixed terms of office and good cause removal, a plausible case exists, at least post–*Free Enterprise Fund*, that the President's effective control over these

271 Geoffrey P. Miller, *Introduction: The Debate over Independent Agencies in Light of Empirical Evidence*, 1988 Duke L.J. 215, 218.

272 U.S. Const. art. II, § 3 (providing that the President "shall take Care that the Laws be faithfully executed"); *see also* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 495–96, 498–502, 513–14 (2010) (holding that the Vesting and Faithful Execution Clauses require the President to enjoy sufficient power to oversee federal administrative agencies to ensure that political responsibility and accountability for such entities remains with the President).

273 *Free Enter. Fund*, 561 U.S. at 499.

independent federal agencies within the executive branch has been unduly—and unconstitutionally—attenuated.[274]

This Part begins with a general overview of the current appointment process for independent agencies. It proceeds with an outline of how statutory partisan balance requirements clearly infringe upon the President's ability to direct and supervise independent federal agencies. Finally, this Part concludes by contrasting the increased level of control that could be available to the President in the absence of statutory requirements to make mandatory bipartisan appointments to independent federal agencies—even where such principal officers enjoy fixed terms of office and are also protected by a good cause limitation on the President's removal power.

A. The Appointment Process

The appointment process for heads of independent agencies is long and arduous;[275] the inclusion of statutory partisan balance requirements simply further lengthens the time required for appointments to independent federal agencies.[276] These statutory mandates usually limit the President in one of two ways. For some independent agencies, the agency's organic act permits the President to appoint only a bare majority of officials from the same political party to a particular board, commission, or agency.[277] For example, only three of the five commissioners heading the SEC may belong to the same political party.[278] Sometimes, however, Congress precludes the President from appointing even a simple majority of officials from the same political party to the head of independent agencies.[279] In either case, the

274 *See infra* notes 359–63 and accompanying text.

275 *See* David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1096 (2008); *Developments in the Law: Presidential Authority*, 125 HARV. L. REV. 2057, 2135–37, 2145–46 (2012); Gary E. Hollibaugh, Jr., *Naïve Cronyism and Neutral Competence: Patronage, Performance, and Policy Agreement in Executive Appointments*, J. PUB. ADMIN RES. & THEORY (forthcoming) (manuscript at 25–26), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2405163; *see also* Anderson P. Heston, *The Flip Side of Removal: Bringing Appointment into the Removal Conversation*, 68 N.Y.U. ANN. SURV. AM. L. 85, 87, 116 (2012) (blaming the Senate's use of "hearings, floor votes, filibusters, and holds—to hinder the President's appointments"); Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671, 1714–16 (2012) (noting one instance in which the President's nominee withdrew because of opposition from a minority of senators).

276 Datla & Revesz, *supra* note 2, at 797–99; Devins & Lewis, *supra* note 3, at 473–74; David C. Nixon, *Appointment Delay for Vacancies on the Federal Communications Commission*, 61 PUB. ADMIN. REV. 483, 488 (2001); David C. Nixon & Roisin M. Bentley, *Appointment Delay and the Policy Environment of the National Transportation Safety Board*, 37 ADMIN. & SOC'Y 679, 689 (2006).

277 *See, e.g.*, 15 U.S.C. § 2053 (2012) (noting that no more than three of the five commissioners to oversee the Consumer Product Safety Commission can be from the same political party).

278 15 U.S.C. § 78d.

279 *See, e.g.*, 2 U.S.C. § 437c(a)(1). Nothing in the enabling statutes explicitly requires that the President appoint only Democrats and Republicans to these positions. Rather, the

President must appoint a number of officials from an opposing political party to positions of strength within the executive branch—whether or not she wishes to do so.[280]

The Federal Elections Commission (FEC) provides a telling example of the potential difficulties that can arise from a statutory partisan balance requirement that mandates an exactly even partisan balance. The FEC's enabling statute mandates that the President appoint no more than three of the six commissioners from the same political party.

Professor Jamin Raskin aptly describes the appointment process for the FEC as one in which "the majority and minority party leaders in both chambers of Congress take turns sending to the President the names of candidates that they want appointed to the FEC."[281] Raskin points to President Clinton's nomination of Bradley Smith as an example of just how constrained Presidents are in the nomination process.[282] When faced with criticism for selecting Smith, President Clinton actually "protested that he tried to convince Senator Lott to choose another candidate but was unable to do so."[283] In fact, multiple high-ranking members of the executive branch lamented their inability to reject Smith as a nominee.[284] As Smith's nomination demonstrates, even when a President actually possesses sufficient autonomy to name a particular nominee, Congress may still wield its confirmation power so as to ensure that the candidates it wishes to be appointed are actually appointed.[285]

As a matter of constitutional text,[286] under Article II the President should enjoy the freedom to nominate principal officers within the executive branch whom she believes will be most conducive to the successful completion of the agency's mission. Article II does not permit Congress to aggran-

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statutes mandate that no more than half the members of a commission, board, or committee belong to the same political party. Because, since the 1860s, only two political parties have controlled the White House or a chamber of Congress, this requirement almost inevitably results in an even number of Democrats and Republicans being appointed to office. That said, however, the President has appointed political independents to federal independent agencies from time to time. *See* Daniel E. Ho, Congressional Agency Control: The Impact of Statutory Partisan Requirements on Regulation 2, 10 (Feb. 12, 2007) (unpublished manuscript), *available at* http://dho.stanford.edu/research/partisan.pdf.

280 *See* DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN: POLITICAL INSULATION IN UNITED STATES GOVERNMENT BUREAUCRACY, 1946–1997, at 167 (2003) ("In the modern period it has become increasingly important to control the administrative state to secure public policy outputs.").

281 Jamin B. Raskin, *"A Complicated and Indirect Encroachment": Is the Federal Election Commission Unconstitutionally Composed?*, 52 ADMIN. L. REV. 609, 615 (2000).

282 *Id.* at 615–16.

283 *Id.* at 616.

284 *Id.* at 618 n.36.

285 *See, e.g.*, Devins & Lewis, *supra* note 3, at 473–74. Devins and Lewis note that "at the end of 2007, none of the commissioners on the Federal Election Commission had been confirmed for a regular term." *Id.* at 473. Instead, "[t]hree were serving under recess appointments, two others were serving in expired terms, and a sixth slot was vacant." *Id.*

286 *See* U.S. CONST. art. II, § 2, cl. 2.

dize itself by dictating the persons whom the President will appoint to principal offices within the executive branch. The argument could be made that nothing in the Constitution expressly prohibits the adoption of mandatory partisan balance requirements, but the logic of this position proves too much. For, if Congress constitutionally may prescribe the partisan composition of the Federal Communications Commission (FCC),[287] by parity of logic it could in theory prescribe partisan balance within the President's cabinet too.

To be sure, a functionalist argument could be made that partisan balance requirements should be judged under a fact-sensitive cost-benefit calculus. One might permit mandatory partisan balance requirements for the FTC,[288] but not for the Department of State or the Department of Defense. The analysis would consider the nature and scope of the agency's powers, its relationship to "core" executive branch powers, the remaining degree of presidential control and oversight, and the like.[289]

From a formalist perspective, questions of degree or scope are not relevant to enforcing the separation of powers doctrine;[290] instead, one asks whether a congressional limitation either usurps or denies a power vested in the Presidency.[291] A formalist analysis, as noted earlier,[292] would posit that restricting the President's ability to select principal officers based on partisan affiliation, in conjunction with fixed terms of office and limitations on presidential removal during the term of office, constitute a bridge too far and unduly circumscribe the President's power and duties under Article II's Vesting and Faithful Execution Clauses.

It should not be particularly surprising that, all things being equal, Presidents tend to seek out persons who support their policy agendas when nam-

287 47 U.S.C. § 154 (2012).

288 15 U.S.C. § 41.

289 *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 857 (1986) ("[B]right-line rules cannot effectively be employed to yield broad principles applicable in all Article III inquiries. Rather, due regard must be given in each case to the unique aspects of the congressional plan at issue and its practical consequences in light of the larger concerns that underlie Article III." (citation omitted)).

290 *See* Stern v. Marshall, 131 S. Ct. 2594, 2600–01 (2011) (finding that Bankruptcy Court judges unconstitutionally exercise Article III judicial power by engaging in factfinding in common law claims related to bankruptcy proceedings despite such Article I judges lacking the constitutional attributes of Article III judges, notably including salary protection and lifetime appointments); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 484 (2010) (finding a system of multilevel good cause removal protection for PCAOB members unconstitutional because it unduly attenuates the President's ability to oversee the enforcement of federal law and thereby unduly insulates the President from responsibility, and political accountability, for the Board's actions); New Process Steel, L.P. v. NLRB, 560 U.S. 674, 676 (2010) (holding that the NLRB's organic act specifically requires three members to constitute a quorum and also holding that two members could not exercise delegated authority from a three-member NLRB that no longer exists).

291 Magill, *supra* note 94, at 608–09; *see* Krotoszynski, *supra* note 30, at 1611–13.

292 *See supra* notes 290–91 and accompanying text.

ing principal officers to independent federal agencies.[293] Although past Presidents have emphasized the relevant policy expertise of candidates, recent Presidents have focused on finding nominees whose ideology aligns with the President.[294] Consequently, the vetting process now consists of examining the "policy preferences of candidates."[295] In fact, to demonstrate their political qualifications for a position, some past agency heads have actually "file[d] separate statements . . . so that Democrats and Republicans could establish their 'reputations for loyalty.'"[296]

One should also take care to distinguish partisan balance requirements from objective qualifications for office that relate to education, training, or prior relevant work experience. For example, requiring that a particular senior office holder within the Nuclear Regulatory Commission hold a graduate degree in nuclear physics does not require the President to entrust the execution of the law to a political opponent; presumably there are both Democrats and Republicans holding advanced degrees in nuclear physics. Requiring the President to select someone competent to perform a particular task can be easily distinguished from efforts to prevent the President from enjoying effective control over the various agencies, boards, commissions, and departments that comprise the executive branch of the federal government.

Thus, a pragmatic formalist can readily accept the proposition that Congress constitutionally may establish by statute objective qualifications, related to the competence of the appointee, without transgressing the separation of powers. However, partisan affiliation simply is *not* an objective professional qualification. It constitutes a political, or perhaps even ideological, requirement for holding a particular office. It is one thing for Congress to require that an appointee be objectively qualified to perform a particular task or function; it is quite another to force the President to staff principal offices within the executive branch with her political opponents.

Moreover, statutory partisan balance requirements converge with the structure of independent federal agencies to significantly impact the appointment process. So-called independent agencies usually are headed by com-

293 Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 45–46 (2010) ("Given the modern vetting process and party partisanship that produces extreme party loyalty, presidents typically can predict with great accuracy how an appointee will decide issues of importance to the Administration.").

294 Devins & Lewis, *supra* note 3, at 481–82; *see* Barron, *supra* note 275, at 1129; William E. Brigman, *The Executive Branch and the Independent Regulatory Agencies*, 11 PRESIDENTIAL STUD. Q. 244, 246 (1981); Heston, *supra* note 275, at 121; Nixon, *supra* note 276, at 486; Nixon & Bentley, *supra* note 276, at 682; B. Dan Wood, *Does Politics Make a Difference at the EEOC?*, 34 AM. J. POL. SCI. 503, 508 (1990).

295 Nixon & Bentley, *supra* note 276, at 684; *see* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2277 (2001).

296 Devins & Lewis, *supra* note 3, at 494 (quoting Keith S. Brown & Adam Candeub, *Ideology Versus Partisanship: Regulatory Behavior and Cyclical Political Influence* 10 (MSU Legal Stud. Res. Paper Series, Paper No. 04-10, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=913806).

missioners with staggered terms, thus ensuring that every seat on an agency is not open at the same time.[297] This design also increases the amount of time required before a President can appoint a majority to an agency, if she is able to appoint a majority at all.[298] Because of statutory partisan balance requirements for members, the President's first appointment to a particular entity might have to hail from her political opposition, rather than from her own political party. For example, if an agency is headed by a board or commission which already has the maximum number of members from the President's political party, the incoming President will be forced to appoint a member from the opposing political party. Presidents tend to appoint agency heads from their own party to the longest available terms, thereby ensuring that the appointee's term continues during the incumbent President's term.[299]

Unless an incumbent member of an independent federal agency decides to step down or the President has a legally valid basis for removal, the President is powerless to fire the official regardless of whether the incumbent enjoys the President's confidence.[300] As Justice George Sutherland explained in *Humphrey's Executor*, "[w]e think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named"[301] and Congress's power to limit the President's removal power over agencies vested with quasi-legislative and quasi-judicial powers, such as the FTC, "cannot well be doubted."[302] This power "includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime."[303]

In some cases, however, a President's first appointment may be from his own party.[304] As stated above, the agency heads with the longest terms are usually from the same political party as the preceding President.[305] If the preceding President was from the political party opposing the incoming President, the incoming President must then successfully navigate the lengthy

297 *See, e.g.*, 15 U.S.C. § 78d(a) (2012) (establishing fixed terms of office for SEC commissioners).

298 Terry M. Moe, *Regulatory Performance and Presidential Administration*, 26 AM. J. POL. SCI. 197, 198 (1982).

299 Devins & Lewis, *supra* note 3, at 471.

300 Humphrey's Ex'r v. United States, 295 U.S. 602, 629–32 (1935); *see* Steven G. Calabresi et al., *The Rise and Fall of the Separation of Powers*, 106 NW. U. L. REV. 527, 540 n.57 (2012).

301 *Humphrey's Ex'r*, 295 U.S. at 629.

302 *Id.*

303 *Id.*

304 Devins & Lewis, *supra* note 3, at 471 ("[A]fter a party change in the White House . . . Presidents leaving office usually select their own partisans for the appointments that will last longest into the new administration. This means that the staggered terms that expire first after a party change are systematically more likely to be from the new President's own party.").

305 *Id.*

Senate confirmation process to achieve any semblance of working control over the agency.[306] Even when multiple seats on an agency are open, the President's appointment power is further circumscribed by the Senate practice of "batching."[307] That is, senators from the President's opposition will agree to confirm the President's nominees only if she also appoints a nominee of their choosing.[308] Consequently, Presidents can be enmeshed in negotiations for a lengthy period of time to secure the appointment and confirmation of the officials who will assist them in carrying out their constitutional duties[309]—including their duty to ensure that federal laws are faithfully executed.[310]

Not only has the time for appointing an agency head increased,[311] but, in addition, Presidents have faced the prospect of working with agencies headed entirely by commissioners from an opposing political party, a prior administration of her own party, or both.[312] Meanwhile, the agency could be either incapable of functioning due to an insufficient number of appointed commissioners,[313] under the control of commissioners from the political party opposing the President, or headed by past commissioners from the same political party as the President but not chosen by the President.[314]

306 *Id.* at 470–71.

307 *Id.* at 489.

308 *Id.*; Keith S. Brown & Adam Candeub, *Partisans & Partisan Commissions*, 17 GEO. MASON L. REV. 789, 805–06 (2010) (noting the prevalence of batching in the nomination process for FCC commissioners).

309 Heston, *supra* note 275, at 117.

310 U.S. CONST. art. II, § 3.

311 Devins & Lewis, *supra* note 3, at 472–75.

312 *Id.* at 470–71.

313 *See* New Process Steel, L.P. v. NLRB, 560 U.S. 674, 679–80, 687–88 (2010). In *New Process Steel*, the Supreme Court invalidated an effort by a three-member NLRB to delegate adjudicative power to the two remaining board members who remained in office after the third member's term expired. Justice John Paul Stevens, writing for the majority, explained that "the Board quorum requirement and the three-member delegation clause [contained in the NLRB's organic act] should not be read as easily surmounted technical obstacles of little to no import." *Id.* at 687.

314 Devins & Lewis, *supra* note 3, at 471, 473 & n.61; Heston, *supra* note 275, at 118–19; *see* Datla & Revesz, *supra* note 2, at 789–92 (discussing the effects of fixed terms of office for members of agency heads on presidential control); McGarity, *supra* note 275, at 1714–16 (noting that "[i]n one instance, Senator Shelby and forty-four other Republican senators, with the strong backing of the banking industry, refused to confirm *any* nominee to head the new [Consumer Financial Protection Bureau] until the president had agreed to replace the director of the agency with a five-member board composed of both Republicans and Democrats," and suggesting that "[b]ecause the CFPB could not promulgate any regulations until it had a full-time director, it was effectively prevented from implementing the consumer-protection provisions of the Dodd-Frank Act"); Wenmouth Williams, Jr., *Impact of Commissioner Background on FCC Decisions: 1962–1975*, 20 J. BROAD. 239, 251 (1976) (noting that President Nixon had to "contend with liberal hold-overs"). Professor McGarity observes, in the context of the CFPB, that "[i]n essence, a single senator was nearly able to repeal the new statute, and he successfully put it on hold for a year and a half." McGarity, *supra* note 275, at 1716.

Regardless of which situation exists, the President has been effectively precluded from asserting meaningful control over the agency. This result is particularly unacceptable considering that these agencies are within the executive branch, which Article II mandates must be under the effective control of the President.[315]

Regulated entities have attempted to challenge these partisan balance requirements, albeit unsuccessfully. For instance, in *National Committee of the Reform Party of United States v. Democratic National Committee*, the plaintiffs challenged partisan balance restrictions applicable to the FEC.[316] Rather than reach the merits of the issue, however, the court dismissed the action on standing grounds, holding that the plaintiffs had not suffered a legally cognizable injury in fact.[317] Likewise, a similar challenge was brought unsuccessfully against the FEC in *Federal Election Commission v. NRA Political Victory Fund*.[318] Strikingly, the court thought partisan balance requirements were not a significant impediment to Presidents.[319] The court appeared to be swayed, at least in part, by the extensive de facto influence Congress already has in the appointment process through the Senate's confirmation power.[320] Ultimately, the court found that there was nothing to suggest "that the bipartisanship requirement has any effect on the Commission's work, for without the statute the President could have appointed exactly the same members."[321]

This reasoning strikes us as very strange. To say that the President could have appointed the same persons in the absence of the partisan balance requirement is not at all the same thing as saying that the President *would*, in fact, have appointed the same persons to the FEC. In fact, this logic would support *any* and *all* congressional limits on the President's appointments to executive branch offices. After all, it is always *possible* that the President might have appointed the same person in the absence of a statutory mandate to select a person from the opposition party. Could Congress require that the President name her defeated principal opponent—either primary or general election—as the Secretary of State? And would such a limitation be constitutional because the President could have named this person in the

315 *See* U.S. CONST. art. II, § 1, cl. 1 (providing that "[t]he executive Power shall be vested in a President of the United States"); *id.* art. II, § 3 (providing that the President "shall take Care that the Laws be faithfully executed"); *see also* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 498–502 (2010) (holding that the Vesting and Faithful Execution Clauses together require that the President enjoy meaningful supervisory control over entities within the executive branch of the federal government).

316 168 F.3d 360, 365 (9th Cir. 1999).

317 *Id.*

318 6 F.3d 821, 823–24 (D.C. Cir. 1993).

319 *Id.* at 824 ("Appellants do not argue, nor can we assume, that the President wished to appoint more than three members of one party and was restrained by FECA from doing so.").

320 *See id.* at 825.

321 *Id.*

absence of the statutory requirement? We think that the answer to this question should be obvious, and easy, to any reasonable person (i.e., "no").

B. The Important Real World Effects of Statutory Partisan Balance Requirements on the Deliberative Dynamics of Independent Federal Agencies

Although statutory partisan balance requirements may appear innocuous or even beneficial at first glance, these provisions have far-reaching ramifications on the President's ability to properly influence and oversee independent federal agencies.[322] Numerous scholarly commentators have analyzed the effect of partisan limitations.[323] Although none of the studies examine every independent agency, even a cursory consideration of this important academic work will establish that statutory partisan balance requirements have a powerful impact on the day-to-day functioning of independent federal agencies.[324] This Section considers the findings from these empirical studies and will demonstrate how partisan balance requirements significantly erode effective presidential control over independent agencies. If a two-tiered system of good cause removal transgresses the separation of powers doctrine, as the *Free Enterprise Fund* majority held, a strong argument exists that mandatory partisan balance requirements should also be deemed to unduly attenuate presidential oversight and control of independent federal agencies.

1. The Problem of Compromised Agency Decisionmaking

Statutory partisan balance requirements quite literally force Presidents to rely on political enemies to carry out their executive duties. In so doing, these provisions splinter the unitary executive.[325] Professor Daniel Ho conducted a study of the FCC in which he found that "partisan requirements may have considerable effects on substantive policy outcomes."[326] In fact, multiple studies show that a commissioner's party affiliation is a reliable indicator of how the commissioner is likely to vote on policy issues.[327] This is

322 *See infra* subsection III.B.2.

323 *See infra* subsection III.B.2.

324 *See infra* subsection III.B.3.

325 LEWIS, *supra* note 280, at 48.

326 Ho, *supra* note 279, at 1. Professor Ho's study is limited in scope because it only examines the FCC; on the other hand, however, it analyzes the agency's decisions over a period of forty years. In certain areas, he expands his discussion to include other agencies. *Id.* at 9; *see* Hollibaugh, *supra* note 275, at 22 (suggesting that political affiliation can affect independent agency operations and actions). *But cf.* Williams, *supra* note 314, at 241 ("However, party affiliation has not been a reliable predictor of voting on the Commission.").

327 Barkow, *supra* note 293, at 20 n.15; Bradley C. Canon, *Voting Behavior on the FCC*, 13 MIDWEST J. POL. SCI. 587, 609 (1969); Brown & Candeub, *supra* note 296, at 2; William T. Gormley Jr., *A Test of the Revolving Door Hypothesis at the FCC*, 23 AM. J. POL. SCI. 665, 675–76 (1979); Ho, *supra* note 279, at 4; Stuart Nagel & Martin Lubin, *Regulatory Commissioners and Party Politics*, 17 ADMIN. L. REV. 39, 41 (1964).

especially troubling considering the increased polarization present in American political parties.[328] According to Professor Ho, empirical evidence belies "the notion that expertise exclusively drives decisionmaking."[329] Partisanship also correlates with the probability of whether a commissioner will agree with the agency chair.[330] For instance, Professors Keith Brown and Adam Candeub found that "when a commissioner belongs to the chair's party, the commissioner is more likely to affirm and less likely to dissent."[331] Essentially, statutory partisan balance requirements foster a politically polarizing environment at the heads of independent agencies.

The idea behind partisan balance requirements is that the presence of opposition party members will lead to a greater spirit of compromise and collaborative decisionmaking. Perhaps in an ideal world, this would be so. However, in the real world in which we actually live, instead of enhancing the quality of agency deliberations, these statutory partisan balance requirements force Presidents to carry out their executive duties with contentious and highly polarized agency heads.

It also bears noting that these are principal officers, not inferior officers or mere employees.[332] Instead of bringing an added level of expertise to the executive branch, these agencies have become yet another arena of political contention in an already highly contentious environment. Statutory partisan balance requirements preclude a President from appointing a sufficient number of agency commissioners in agreement with her political philosophy to overcome the debilitating effect of partisanship.

Although some legal scholars doubt whether partisan balance requirements for independent federal agencies actually affect the operation of these executive branch entities,[333] they generally have not provided convincing evidence in support of this (contestable) position.[334] For example, some scholars contend that party affiliation is largely irrelevant because there are so few

328 Devins & Lewis, *supra* note 3, at 477 ("Not only has the average Republican become more conservative and the average Democrat more liberal, but the divergence of views within the parties has also lessened.").

329 Ho, *supra* note 279, at 4.

330 Brown & Candeub, *supra* note 308, at 797–99.

331 *Id.* at 797. The authors actually suggest that the chair's party affiliation is more influential than the party affiliation of the commissioners. *Id.* at 799. Regardless of how much impact the chair may have, the party affiliations of commissioners has a determining role in agency decisionmaking.

332 Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 512–13 (2010) ("As a constitutional matter, we see no reason why a multimember body may not be the 'Hea[d]' of a 'Departmen[t]' that it governs." (alterations in original)); Edmond v. United States, 520 U.S. 651, 662–63 (1997) (distinguishing principal and inferior executive branch officers based on the scope of their discretionary power and observing that "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").

333 Brigman, *supra* note 294, at 251.

334 *See, e.g.*, Brown & Candeub, *supra* note 308, at 790.

dissents by agency heads.[335] However, this premise fails to fully take into account the effect of partisanship.[336] Rather, as Professor Ho observes, there are a number of points during an agency's deliberative process where the political ideologies of the commissioners can shape the agency's decisionmaking.[337]

By focusing solely on the number of dissents, these scholars have ignored other integral functions of independent agencies. For example, Professors Susan Snyder and Barry Weingast note that the composition of the agency's governing body can influence both the type of cases people choose to file with the agency and the cases the agency staff allows to go forward within the agency.[338] Accordingly, a modest number of dissents could be the result of a number of other factors and undervalues the real world effects of divided agency heads. Even if dissents are not commonplace, a more holistic view of the political dynamics of federal independent agencies demonstrates that mandatory partisan balance requirements do in fact have a material impact on the policymaking function of federal independent agencies.

It also bears noting that the *Free Enterprise Fund* majority did not require actual proof of instances in which two-tiered good cause removal restrictions actually had impeded the President's ability to oversee and direct the operations of a particular federal agency.[339] Instead, the mere fact that such a high degree of insulation of persons with policymaking authority could affect the President's ability to direct the agency's operations was sufficient to establish a violation of the separation of powers doctrine.[340] As Chief Justice Roberts explained, "[i]n its pursuit of a 'workable government,' Congress cannot reduce the Chief Magistrate to a cajoler-in-chief."[341] From a formalist per-

335 *Id.* at 805–06.

336 Ho, *supra* note 279, at 11 ("That said, the low dissent rate on other commissions suggests that a considerable dimension of agency output may not be captured by focusing on votes alone.").

337 *Id.*

338 Susan K. Snyder & Barry R. Weingast, *The American System of Shared Powers: The President, Congress, and the NLRB*, 16 J.L. ECON. & ORG. 269, 285 (2000). Professors Snyder and Weingast explain:

> For example, consider a change in board membership that creates more pro[-]labor decisions. The unions and businesses that file cases now face new probabilities of winning their cases. Unions may now file complaints that they previously thought had too little chance of winning to file. Businesses may file fewer complaints than they did before. The board staff will take their cue from the board members' voting behavior and perhaps allow more cases filed by labor to go to the board for decisions. The changes in union and business filing behavior and staff filtering decisions, in turn, create a new case mix for board decisions. . . . Thus while the policy preference of the board may have changed in the pro[-]labor direction, the voting scores may not reflect this change.

Id.

339 Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 498–513 (2010).

340 *See id.* at 498–502.

341 *Id.* at 502.

spective, it should not be necessary to prove that the President has already lost control of an executive branch entity; the *risk* of such a loss of control is itself constitutionally problematic.[342]

2. The Polarizing Effect of Statutory Partisan Balance Requirements

In addition to influencing agency decisionmaking, statutory partisan balance requirements impede the President's ability to perform his constitutional duty of overseeing the executive branch. Professor Ho found that "Republican presidents appear to appoint Democrats who are even *more liberal* than Democrats appointed by Democratic presidents (and vice versa)."[343] Thus, statutory partisan balance requirements force the President to contend with agency officials who are not only opposed to his agenda but vehemently opposed.[344] Professors Neal Devins and David Lewis suggest that this practice stems from appointees—again, who clearly constitute principal officers within the executive branch[345]—affiliating themselves with the position most favorable to their political party, which coincidentally places many of the appointees at odds with the President (and on an ongoing basis).[346]

Appointing candidates simply to satisfy a statutory partisan balance requirement further instills a polarizing political divide among the heads of independent agencies.[347] As noted above, some agency heads have structured their behavior so as to wear their political affiliations on their sleeves.[348] Professors Cass Sunstein and Thomas Miles contend that "[p]erhaps both Republican and Democratic appointees would conceive of

342 *See infra* notes 388–91 and accompanying text.

343 Ho, *supra* note 279, at 4, 18, 24–26. Professor Ho places the blame for this result on the Senate's involvement with the selection process and oversight of many of these agencies; however, a more plausible culprit is the statutory partisan requirements found in many of the enabling statutes for these agencies. Without the statutes forcing the President to appoint a certain number of agency members from the opposing party, it is highly unlikely the President would be forced to select so many appointees who do not align with his political views. *See* Nagel & Lubin, *supra* note 327, at 44.

344 Devins & Lewis, *supra* note 3, at 461; Ho, *supra* note 279, at 4. President Carter's appointees did not fall within this generalization; however, that is easily explained by his use of a selection process that deviated from other Presidents. Ho, *supra* note 279, at 25 n.30.

345 Stern v. Marshall, 131 S. Ct. 2594, 2611 (2011); Edmond v. United States, 520 U.S. 651, 662–63 (1997); *see* Tuan Samahon, *Are Bankruptcy Judges Unconstitutional? An Appointments Clause Challenge*, 60 HASTINGS L.J. 233, 233, 296 (2008) (discussing the constitutional concept of principal and inferior officers and the legal tests used to distinguish between these categories of executive officers).

346 Devins & Lewis, *supra* note 3, at 490.

347 *See* Cass R. Sunstein & Thomas J. Miles, *Depoliticizing Administrative Law*, 58 DUKE L.J. 2193, 2228 (2009) (arguing that formally requiring judicial panels on the federal appellate courts to include at least one judge appointed by a President of each major party could have the unfortunate effect of increasing, rather than decreasing, the risk of ideological—or even partisan—judging).

348 Devins & Lewis, *supra* note 3, at 494 (citing Brown & Candeub, *supra* note 296, at 10).

themselves, to a somewhat greater degree, as political partisans, simply because the requirement of mixed composition would suggest as much."[349] Essentially, statutory partisan balance requirements have resulted in polarizing entities within the executive branch to such a degree that Presidents face an increasingly difficult job of mobilizing executive officials to carry out the President's policy agenda.[350] Of course, real-world political pressure would compel the President to appoint politically diverse candidates in some circumstances;[351] however, the polarizing effect would not be as dramatic as that created by statutory partisan balance requirements.

3. Impeding Timely Executive Action

Statutory restrictions on the President's appointment power further lengthen an already lengthy confirmation process. The President's control over independent agencies becomes further attenuated because of the considerable amount of time required before the President can appoint a majority of her party to the head of the agency.[352] Depending on whether the preceding administration was of the same political party as the current administration, the temporal delay in securing a majority of commissioners from the same political party could become even more extended.[353] Furthermore, studies show that it takes Presidents twice as long to make cross-party nominations as compared to vacancies without formal partisan balance requirements,[354] and partisan balance restrictions further increase the number of cross-party appointees.[355]

Some scholars contend that Presidents can overcome this obstacle by seeking to nominate independents (i.e., persons not affiliated with either the Democratic or Republican parties) who will follow the President's instructions.[356] This suggestion, however, is impractical because political independents will not always adhere to the President's policy agenda and do not face much in the way of partisan consequences if they prove to be faithless to the

349 Sunstein & Miles, *supra* note 347, at 2228.

350 Some commentators have argued that partisan balance requirements are irrelevant. In fact, these observers point to multiple instances in which Republican presidents have appointed Democrats who, rather than vote according to the Democratic ideology and policy preferences, instead have aligned with Republican members on the agency. Such episodes have been largely anecdotal, however. Ho, *supra* note 279, at 2–3, 19 (noting that some scholars contend that "cross-party commissioners come in sheep's clothing").

351 *See, e.g.*, Brigman, *supra* note 294, at 252 (noting that President Nixon's appointments to the FCC were heavily influenced by the desires of Republican senators).

352 Devins & Lewis, *supra* note 3, at 469–70.

353 *Id.* at 470; Nixon, *supra* note 276, at 489 ("Vacancies requiring cross-party nomination are predicted to last over twice as long as unrestricted seat vacancies.").

354 Devins & Lewis, *supra* note 3, at 470; Nixon, *supra* note 276, at 489.

355 Ho, *supra* note 279, at 10–11. Yet, there was one outlier agency—the Nuclear Regulatory Commission (NRC). The NRC differed from the other agencies, however, because a number of the commissioners appointed were actually political independents not aligned with either major party. *Id.* at 10.

356 Brigman, *supra* note 294, at 251; Moreno, *supra* note 129, at 500.

President who appointed them.[357] It also seems quite likely, from a purely practical perspective, that senators from the opposition party will insist that members of their party be appointed to any and all minority party seats on independent federal agencies.[358]

Consequently, statutory partisan balance requirements have the effect of increasing the time required for Presidents to assert effective control over independent federal agencies. This result should be unacceptable if, as Chief Justice Roberts wrote in *Free Enterprise Fund*, "[t]he Constitution requires that a President chosen by the entire Nation oversee the execution of the laws."[359] The power to appoint is the mirror image of the power to remove; if undue limitations on the removal power violate the separation of powers,[360] so too should undue restrictions on the appointment power. The presidential appointment power constitutes one of the President's primary means of establishing control over independent federal agencies.[361] If an agency's structural design precludes the President from appointing a majority of commissioners from her political party, and conjoins this limitation with fixed terms of office and protection against midterm removal except for good cause shown, the President's effective control over the agency in question is, if not nullified, then substantially impeded.

We do not question the validity of the rule established in *Humphrey's Executor*, namely that fixed terms of office and good cause removal limitations against midterm removal do not violate the separation of powers doctrine.[362]

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357 Ronald Turner, *Ideological Voting on the National Labor Relations Board*, 8 U. PA. J. LAB. & EMP. L. 707, 719 (2006). Other scholars suggest that the President's recess appointment power can accommodate any strategic delays. *See, e.g.*, Huq, *supra* note 19, at 28. In light of *NLRB v. Noel Canning*, however, the President's recess appointment power is of questionable utility in overcoming senatorial opposition to her nominees. *See* NLRB v. Noel Canning, 134 S. Ct. 2550, 2574 (2014). The Supreme Court's *Noel Canning* decision has reduced significantly the President's ability to use the recess appointment power. The Senate has adopted the routine practice of holding pro forma sessions that keep the body technically in session, thereby blocking the President from making recess appointments; *Noel Canning* has validated this practice as an effective and constitutional means of preventing presidential recess appointments. *See id.* at 2567 (holding that the recess appointment power arises only when the Senate goes into recess for at least 10 days); *id.* at 2574 (holding that the Senate may determine for itself when it is in session); *see also supra* note 105 (discussing the majority and concurring opinions in *Noel Canning*).

358 *See* Devins & Lewis, *supra* note 3, at 489; Raskin, *supra* note 281, at 615.

359 Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 499 (2010).

360 *Id.* at 498–502.

361 Moe, *supra* note 298, at 200 ("For example, while the [P]resident cannot directly control commission personnel, the chairman and appointed staff nonetheless constitute a potential core of presidential partisans who are uniquely situated to shape the behavior of the commissions."); *see* Brigman, *supra* note 294, at 246 (noting the centrality of the appointments process to presidential oversight); Aulana L. Peters, *Independent Agencies: Government's Scourge or Salvation?*, 1988 DUKE L.J. 286, 287–88 (noting the difficulty of securing presidential control over independent federal agencies); Wood, *supra* note 294, at 506 (listing the appointment power as one of the means for presidential control).

362 Humphrey's Ex'r v. United States, 295 U.S. 602, 627–32 (1935); *see also Free Enter. Fund*, 561 U.S. at 483 ("Congress can, under certain circumstances, create independent

But, after *Free Enterprise Fund*, the constitutional analysis cannot simply consider partisan balance requirements in isolation from other limitations on presidential control over independent agencies; *Free Enterprise Fund* teaches that statutory devices that impede the President's ability to direct and oversee a federal independent agency must be considered in conjunction. When considered together, partisan balance requirements greatly exacerbate the independence-enhancing effects of fixed terms of office and limitations on removal. Quite plainly, the cumulative effect, or whole, of these devices is greater than the sum of the parts. To force the President to staff principal offices within federal agencies with political opponents is to attenuate, if not prevent, effective presidential control and oversight.[363]

4. So-Called "Turncoat" Appointees to Independent Federal Agencies

Yet another troubling aspect of statutory partisan balance requirements is the possibility that one of the President's appointees proves to be a "turncoat," that is, the nominee purporting to be a supporter of the President's policy agenda turns out to be an opponent of it. Although this problem has not been pervasive, it has occurred and presents troubling dilemmas. President John F. Kennedy once appointed a Democratic nominee to the FCC who, although nominally a Democrat, "rarely voted with the other Democrats appointed by Kennedy."[364] Considering the already limited control Presidents have over independent agencies because of the statutory limits on the President's removal power, appointing a "turncoat" can be highly detrimental to the President's ability to ensure faithful execution of the laws. Because of the restricted openings available for members of the President's political party, appointing a "turncoat" essentially cedes control of an agency to a President's political opponents—and because of the fixed terms of office associated with independent agency appointments, this circumstance could continue for an extended period of time.

In such circumstances, the President would be forced to wait for an opportunity to correct her error by making a new (and better) appointment, or to attempt to convince members from the opposition party to support her policy agenda for the agency. Of course, the probability of a President successfully recruiting an opposition party appointee to support her agenda is

agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause."); Morrison v. Olson, 487 U.S. 654, 691–92 (1988) ("[W]e cannot say that the imposition of a 'good cause' standard for removal by itself unduly trammels on executive authority. . . .Nor do we think that the 'good cause' removal provision at issue here impermissibly burdens the President's power to control or supervise the independent counsel, as an executive official, in the execution of his or her duties under the Act.").

363 *Cf.* Strauss, *supra* note 13, at 596–97, 649–50 (arguing that presidential control of administrative agencies constitutes an essential and constitutionally mandatory counterweight to the influence of Congress over such entities).

364 Williams, *supra* note 314, at 241, 247 (noting that this appointee often voted with Republican commissioners).

quite low precisely because the statutory partisan balance requirements have contributed to the further polarization of the members of independent federal agencies.[365]

5. Enhanced Congressional Influence on Independent Executive Branch Agencies

In addition to reducing presidential control over independent agencies, statutory partisan balance requirements render independent agencies more susceptible to congressional influence—if not de facto control. Studies suggest that insulated agencies, such as those with statutory partisan balance requirements, are prone to performing their duties according to Congress's wishes (rather than the President's policy preferences).[366] More specifically, Professor David Lewis reasons that "political insulation [serves] to decrease the impact of changing administrations."[367] Because an agency's relationship with Congress is ongoing, and because members of Congress tend to be reelected, committees of jurisdiction could easily have longer standing relationships with the members of independent agencies than a new presidential administration. And, these relationships invest members of Congress with significant influence over these independent federal agencies.[368]

In fact, Congress is more likely to create independent agencies when Congress perceives the administration to be weak.[369] Although the Constitution contemplates a system of checks and balances in the federal government, mandatory partisan balance requirements clearly create significant tension with the unitary executive created in Article II, Section 1 of the Constitution. Congressional influence over independent federal agencies merely starts, but does not finish, with the appointments process itself.[370]

Furthermore, Presidents are often powerless to remedy this imbalance in effective influence vis-à-vis Congress. Studies demonstrate that agencies with statutory bipartisan requirements are more durable than agencies without

365 *See supra* notes 343–46 and accompanying text.

366 David E. Lewis, *The Adverse Consequences of the Politics of Agency Design for Presidential Management in the United States: The Relative Durability of Insulated Agencies*, 34 BRIT. J. POL. SCI. 377, 379, 383 (2004).

367 LEWIS, *supra* note 280, at 143.

368 *See* Strauss, *supra* note 13, at 592. Professor Strauss explains that

> budgetary controls, investigations, hearings, and all the general apparatus of congressional oversight are brought to bear across the board. As has often enough been noted, these relationships can be particularly important; congressmen and committee staffs tend to be longer-lived than Presidents and their appointees, and through hearings and budgetary actions can work much mischief.

Id.

369 *Id.* at 546–49; *see* Barkow, *supra* note 293, at 25 ("[For] agencies created between 1947 and 1990 . . . Congress used independent agencies more often during periods of divided government than unified government, a result consistent with the idea that Congress uses independent agencies at least in part to keep power away from a President of the opposite party." (footnote omitted)).

370 *See* Devins & Lewis, *supra* note 3, at 489; Raskin, *supra* note 281, at 615.

those requirements.[371] That is, these agencies are less likely to be terminated or to undergo significant reorganization.[372] In fact, "[a]gencies with party balancing limitations are more than twice as likely to survive fifty years."[373] As Professor David Lewis has aptly observed, Presidents face a dilemma of "presid[ing] over an unmanageable bureaucracy, a population of unresponsive immortals."[374] In sum, even if a President wished to bring an unresponsive agency to book, she would likely be unable to do so.

C. Independent Federal Agencies Can Exist Without Imposing Partisan Constraints

Presidents have considerably greater freedom when working with independent agencies if they are not constrained by statutory partisan balance requirements.[375] In such cases, the President is legally free to choose her first choice for the position (regardless of the person's partisan affiliation). A statute that vests an agency member with a fixed term of office and good cause removal protection ensures independence, but does not force the President to name her political opponents to principal federal offices within the executive branch.

By definition, mandatory partisan balance requirements will increase the number of cross-party appointees serving on independent federal agencies. However, such statutory requirements achieve this only through a direct and proportional loss of presidential control and oversight.[376] Mandatory partisan balance requirements compel Presidents to appoint more cross-party agency members than they might otherwise;[377] considering the significant influence of partisanship,[378] the addition of even a single independent

371 Lewis, *supra* note 366, at 379, 396.

372 *Id.* at 387.

373 *Id.* at 397. In addition, "[t]he hazard rate for agencies that have party limitations on appointments is 63 percent lower than other agencies." LEWIS, *supra* note 280, at 154.

374 Lewis, *supra* note 366, at 379; *see also* LEWIS, *supra* note 280, at 164 ("The bureaucracy becomes less amenable to presidential coordination and management.").

375 Lewis, *supra* note 366, at 400 ("In insulated agencies the impact of changing administrations is muted so that policies have less variance and the variance occurs around an ideal point set by the enacting Congress or the current Congress.").

376 Ho, *supra* note 279, at 3–4, 35; *see also* Barkow, *supra* note 293, at 40 (noting that political pressures still force the President to appoint agency heads from the opposing political party). This finding should not come as a surprise considering the degree to which the federal government has become polarized politically. *See* Devins & Lewis, *supra* note 3, at 489–91.

377 Ho, *supra* note 279, at 10–11 ("[P]residents virtually never appoint . . . more cross-party appointments than statutorily required to commissions with partisan requirements.").

378 Devins & Lewis, *supra* note 3, at 489–90 (noting that senators delay confirming presidential selections to nonagency positions to force the President to appoint commissions from the opposing political party); *see also* Joshua Kershner, *Political Party Restrictions and the Appointments Clause: The Federal Election Commission's Appointments Process Is Constitutional*, 32 CARDOZO L. REV. 615, 649–50 (2010) (discussing the extensive congressional influence over presidential appointments to the Federal Election Commission (FEC)).

agency member with views opposing the President could prove highly detrimental to a President's ability to fulfill her constitutional duties under Article II.

We believe that it is entirely possible to achieve a significant level of agency independence without requiring the President to appoint her political opponents to principal offices within the executive branch. Fixed terms of office, coupled with good cause removal provisions, provide significant protection against direct forms of political control by the President without denying the President the ability to work with persons who hope to see the administration succeed at the task of governing. The National Labor Relations Board (NLRB) provides an excellent example of an agency that performs with a significant measure of independence, but without a formal partisan balance requirement.[379]

Professor Joan Flynn has found that, except for one "bizarre phenomenon," Presidents appointing officials to the NLRB have only appointed those persons who align with their political and ideological views.[380] Furthermore, there have been clear shifts in NLRB rulings, which correlate to the political composition of the board.[381] In a democracy, where elections are supposed to have consequences, this should be seen as a virtue, not a defect.[382]

In a study of the NLRB's performance, Professor Terry Moe found that "the labor-management balance . . . exhibit[s] a pattern of shifts across administrations."[383] In fact, the appointing President has been able to

379 Moe, *supra* note 298, at 197–98.

380 Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935–2000*, 61 OHIO ST. L.J. 1361, 1412–13 (2000) ("During the earlier period, Board member voting was extremely closely correlated with the political party of the appointing President . . . . And as for the appointment of partisans, while Republicans Eisenhower, Nixon, and Ford put a number of management lawyers or representatives on the Board, they most certainly did not appoint any union lawyers, nor did the Democratic Presidents appoint any management lawyers.").

381 Turner, *supra* note 357, at 720 ("Board policy [regarding employer threats to close plants] has seesawed along with the occupants of the White House and their Board appointees."); *see* Brigman, *supra* note 294, at 245; William N. Cooke & Frederick H. Gautschi III, *Political Bias in NLRB Unfair Labor Practice Decisions*, 35 INDUS. & LAB. REL. REV. 539, 546 (1982); William N. Cooke et al., *The Determinants of NLRB Decision-Making Revisited*, 48 INDUS. & LAB. REL. REV. 237, 242 (1995); Moe, *supra* note 298, at 208.

382 *But see* LEWIS, *supra* note 280, at 154–67 (noting the high degree of functional independence from the President that some federal agencies enjoy and questioning the wisdom of permitting agency members and staff to disregard the President's policy agenda); Lewis, *supra* note 366, at 379–97 (discussing the problem of independent agencies proving largely indifferent to presidential policy preferences and constituting a kind of cadre of "unresponsive immortals").

383 Moe, *supra* note 298, at 211–13. Although Professor Moe's study was limited to the Eisenhower, Kennedy, Johnson, Nixon, and Ford administrations, the implications from the study are suggestive of a larger pattern. Moe's study also referenced the FTC and SEC, two independent agencies with statutory bipartisan requirements; Moe found that the President had an impact on the performance of those agencies as well. *Id.* at 214, 217. This does not suggest that partisan balance requirements are harmless, however. For example, the presidential impact on the agencies did not align with the political ideology normally

obtain favorable rulings from cross-party appointees on the NLRB.[384] Again, agency independence should not imply a complete, or almost complete, imperviousness to presidential oversight—and this certainly seems to be a central tenet of *Free Enterprise Fund*.[385]

To be sure, some scholars lament the NLRB's predictable swings in policy (pro-labor versus pro-management) depending upon the occupant of the White House.[386] However, the NLRB's regulatory efforts, whether pro-union or pro-labor in tilt, have been, for the most part, reliably upheld by the federal courts at rates equal to or better than the regulatory efforts of other federal agencies involved with regulating labor and employment issues.[387]

Thus, it is possible to achieve a significant level of agency independence without requiring the President to appoint his political opponents to principal offices within the executive branch. Fixed terms of office, coupled with good cause removal provisions, provide significant protection against direct forms of political control by the President without denying the President the ability to work with persons who hope to see the administration succeed at the task of governing.

We recognize that it would be an overstatement to posit that statutory partisan balance requirements entirely prevent Presidents from implementing their desired policy goals through independent agencies.[388] Nevertheless, these statutory limitations plainly reduce a President's ability to supervise independent agencies on a day-to-day basis. This is not to suggest that Presidents should have the same level of control over independent agencies as they do with executive departments. However, a President should have some means of ensuring that independent agencies are sympathetic to the administration's policy objectives and reasonably accountable to the President.

As things presently stand, presidential control is unduly hampered by these statutory provisions and legislative influence is correspondingly increased.[389] This result is constitutionally problematic—particularly in light

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associated with Democratic and Republican administrations. *Id.* Rather, Moe was forced to come up with an alternative reasoning for the finding. *Id.* at 217–19.

384 Turner, *supra* note 357, at 730.

385 Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 499–502 (rejecting the concept of a government "ruled by functionaries" as incompatible with the separation of powers and holding that the President may not be reduced to the role of a mere "cajoler-in-chief").

386 Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2015–16 (2009).

387 Jeffrey M. Hirsch, *Defending the NLRB: Improving the Agency's Success in the Federal Courts of Appeals*, 5 FIU L. REV. 437, 438 (2010) ("[The NLRB's] win rate is roughly in line—albeit a bit lower—with other labor and employment agencies that engage in significant levels of adjudication."). Although Professor Hirsch questions the NLRB's effectiveness with difficult cases, he concedes that this could be the result, at least in part, of judicial bias. *Id.* at 439.

388 *See* Wood, *supra* note 294, at 508–09.

389 *See* LEWIS, *supra* note 280, at 164–67; Lewis, *supra* note 366, at 379–80.

of the requirements for presidential control and oversight set forth in *Free Enterprise Fund*.[390] A more constitutionally appropriate structure would permit Congress only to insulate agency heads from removal from office and by providing for fixed terms of office—but not for mandatory partisan balance requirements.[391]

IV. Partisan Balance Requirements and the Separation of Powers

We come then to the crux of the matter: may Congress require the President to appoint political opponents to principal (or inferior) offices within the executive branch consistent with the core holding of *Free Enterprise Fund*? The answer, we believe, might well depend on whether such a condition is conjoined with other limitations on the President's ability to hold such officers accountable.

If Congress requires the President to appoint political opponents to an independent federal agency, but does not also entrench such persons with a fixed term of office or good cause protection against removal, it is difficult to see how a partisan balance requirement on these facts would significantly impede the President's ability to oversee and direct the agency's operations. If an appointee, of whatever partisan background, proves faithless and the President may lawfully remove her from office at will, sufficient accountability plainly exists to satisfy the separation of powers doctrine.[392]

Moreover, Congress commonly has imposed substantive requirements, by statute, for certain presidential appointments. For example, the U.S. Code provides that the Solicitor General of the United States must be "learned in the law."[393] If Congress, incident to its powers to create and define the membership and authority of federal agencies, may impose substantive requirements on such presidential appointees, it is difficult to see why Congress cannot mandate bipartisanship as well.[394] The fact that Congress has consistently imposed such requirements and that the President has accepted such statutory directives since the 1880s also should go a very long way toward establishing the constitutional acceptability of the practice.[395]

At the same time, however, whatever substantive requirements Congress imposes for a particular executive branch office, the question of accountability remains salient; good cause removal protection has the effect of rendering the office holder (possessed of whatever characteristics Congress requires) less accountable to the President. A fixed term of office also reduces the

390 *See Free Enter. Fund*, 561 U.S. at 496–500, 513–14.

391 *See supra* notes 2, 297, 314 and accompanying text.

392 *See Free Enter. Fund*, 561 U.S. at 496–500.

393 28 U.S.C. § 505 (2012) ("The President shall appoint in the Department of Justice, by and with the advice and consent of the Senate, a Solicitor General, learned in the law, to assist the Attorney General in the performance of his duties.").

394 *But cf. supra* notes 235–41 and accompanying text (arguing that objective professional qualifications can be distinguished from partisan balance requirements for purposes of separation of powers analysis).

395 *See* Bradley & Morrison, *supra* note 5, at 414–18, 478–80.

accountability of the office holder, although obviously to a lesser extent than protection against removal from office absent good cause.

On the other hand, the need to remove members of independent federal agencies presumably would arise less frequently if the President enjoyed a reasonably free hand in appointing members to independent boards, agencies, and commissions. Thus, a mandatory partisan balance requirement has the effect of exacerbating the ill-effects of a good cause removal limitation by providing the President with at most a bare working majority of an independent agency's head from the start of her administration. It empowers a group of would-be bomb-throwers who also happen to serve as principal officers within these executive branch entities. What's more, and as noted earlier,[396] a single bad pick from the President's own party can empower a rogue independent agency to operate largely free and clear of the President's policies and direction—and potentially to do so for many months.

Because a partisan balance requirement makes agency cooperation with the administration less likely than would be the case with a cabinet department staffed by a person or persons who are known supporters of the President and her agenda, this practice plainly has greater separation of powers implications than a requirement that an appointee hold a particular professional credential or possess a certain amount of prior relevant experience. A partisan balance requirement creates a political dynamic that makes it harder for the President to hold the entity accountable—and, in turn, to be held accountable for the agency's actions.[397] In this sense, then, a partisan balance requirement has separation of powers implications that other kinds of statutory qualifications for holding an executive office simply do not.

The conjunction of a partisan balance requirement with good cause removal protection greatly exacerbates the potential accountability problem created by the imposition of a partisan balance requirement standing alone. By limiting the President to a bare majority of political supporters at the agency head level, and then prohibiting her from removing appointees who prove unwilling to advance the administration's policy agenda, the President is effectively precluded from exercising effective control and oversight with respect to the agency. In the terms of *Free Enterprise Fund*, without the power to appoint persons in whom she reposes confidence and the concomitant power to remove them from office if they prove to be poor stewards, "the President could not be held fully accountable for discharging [her] own responsibilities; the buck would stop somewhere else."[398]

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396 *See supra* subsection III.B.4.

397 *Free Enter. Fund*, 561 U.S. at 495–98 (emphasizing that administrative entities must be "accountable" to the President and noting that "[t]he diffusion of power carries with it a diffusion of accountability"); *see id.* at 501–02 ("The President has been given the power to oversee executive officers; he is not limited, as in Harry Truman's lament, to 'persuad[ing]' his unelected subordinates 'to do what they ought to do without persuasion.'" (alteration in original) (citation omitted)).

398 *Id.* at 514.

One obvious solution—and a solution presaged by Professors Huq[399] and Stack[400]—would be to hold unconstitutional good cause removal protections. This would, of course, require overturning *Humphrey's Executor*.[401] Some jurists, including Judge Brett Kavanaugh, already have advocated taking precisely this step.[402]

Were the Supreme Court to invalidate good cause removal protections or, alternatively, to hold that Article II requires that the President enjoy a free hand to define what constitutes "good cause" grounds for removal,[403] the separation of powers objection to mandatory partisan balance requirements would largely dissipate. The President's ability to remove at will a principal officer serving on an independent agency, board, or commission would ensure sufficient accountability—even under the demanding formalist metrics of *Free Enterprise Fund*. Moreover, such a plenary removal power would undoubtedly have a significant constraining effect on opposition party members serving as members of collective agency heads; they would no longer be free to "ride with the cops and cheer for the robbers."[404]

With that said, however, the Supreme Court should pause before embracing such a revolutionary outcome. As Professor Strauss warns, "[o]ne would have to look long and hard to find developed systems anywhere in the world that deliver financial institutions into politicians' direct control."[405] This is so because "[c]ontrol of the markets and of the money supply is not safe in their hands."[406] Accordingly, one should question whether a pragmatic formalist would be willing to open Pandora's box. We certainly do not advocate overturning *Humphrey's Executor* and requiring, as a matter of constitutional law that all executive officers serve at the pleasure of the President. Congress has insulated executive officers from direct forms of presidential

399 Huq, *supra* note 19, at 3–5.

400 Stack, *supra* note 12, at 2414–15, 2419.

401 Humphrey's Ex'r v. United States, 295 U.S. 602, 620, 627–29 (1935).

402 Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 685–87, 701–04 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *rev'd in part*, 561 U.S. 477. Justice Scalia also has questioned the constitutional validity of insulating principal executive officers from removal from office except for "good cause." Morrison v. Olson, 487 U.S. 654, 706–07 (1988) (Scalia, J., dissenting) (expressing incredulity that the good cause removal limitation on the President's power to remove an independent counsel—a provision he pejoratively characterizes as "shackles"—actually constitutes a means of empowering the President to oversee the work of an independent counsel); *cf. id.* at 691–93 (majority opinion) (holding that the "good cause" removal power held by the Attorney General constituted a sufficient means of securing constitutionally adequate presidential oversight and, accordingly, satisfied the separation of powers doctrine).

403 *See* Calabresi & Prakash, *supra* note 9, at 581–85, 595, 639–42, 660; Calabresi & Rhodes, *supra* note 9, at 1165–67; Prakash, *supra* note 9, at 992; *see also* Miller, *supra* note 9, at 44 (arguing that the President must have plenary control over all persons within the executive branch who exercise policymaking authority).

404 Rankin v. McPherson, 483 U.S. 378, 394 (1987) (Scalia, J., dissenting) (citation omitted) (internal quotation marks omitted).

405 Strauss, *supra* note 11, at 2283.

406 *Id.*

(political) control since the Washington Administration and too much water has flowed under the bridge to revisit this important baseline question.[407]

In our view, a more limited approach would provide a better potential solution: if Congress wishes to require bipartisan appointments, at least for principal officers serving within the executive branch,[408] it should grant the President a relatively free hand in removing such officers. Congress should have the choice of mandating partisan balance requirements *or* insulating principal officers who serve on agency heads from removal; it should not be permitted to impose both conditions concurrently (at least under the logic of *Free Enterprise Fund*).

One related point merits at least brief mention: may Congress conjoin fixed terms of office with partisan balance requirements? Initial consideration of this question yields an easy, reflexive "yes"—after all, if the President may terminate an appointment before a fixed term of years expires, in what way is the *Free Enterprise Fund* accountability principle compromised by marrying up a partisan balance requirement with a fixed term of office? More careful reflection, however, makes the validity of this initial response substantially less certain.

Free Enterprise Fund found that SEC commissioners enjoy good cause protection from removal, despite the absence of a formal statutory requirement expressly conferring such protection from removal before the expiration of an appointee's term of office.[409] Justice Breyer strongly objected to this aspect of the majority's decision,[410] positing that Congress intentionally omitted good cause removal protection in light of *Myers*.[411] To be sure, as Justice Breyer argues, "[t]he absence of a 'for cause' [removal] provision is . . . not

407 *See* Ronald J. Krotoszynski, Jr., *Resignations, the (Quasi) Plural Executive, and a Critical Assessment of the Unitary Executive Theory*, *in* SPEECH AND SILENCE IN AMERICAN LAW 89–93 (Austin Sarat ed., 2010) (arguing that the Constitution's text and consistent historical practice both support a constitutional requirement for meaningful presidential oversight of federal agencies but also positing that this oversight power is not necessarily the power to directly control or compel agency action); *see also* Strauss, *supra* note 13, at 599–601, 640–42 (arguing from textual and functional grounds that the President must have the ability to supervise, but not necessarily directly to control, the work of federal agencies).

408 General agreement now exists that even though independent federal agencies engage in quasi-legislative and quasi-judicial activities, these entities fall squarely within the executive branch; accordingly, presidential oversight and accountability are requisite. *See* Strauss, *supra* note 11, at 2283 ("Looking at the propositions on which all nine Justices agree, one can see the independent regulatory commissions now clearly placed where they should be—not a 'headless fourth branch,' but elements of the executive branch in a different—but necessary—oversight relationship with the President."). *But cf.* Humphrey's Ex'r v. United States, 295 U.S. 602, 220–27 (1935) (characterizing service on the FTC as involving essentially legislative and judicial work, rather than service within the executive branch).

409 *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 486–87 (2010).

410 *See id.* at 545–48 (Breyer, J., dissenting).

411 *Id.* at 546 ("Nor is the absence of a 'for cause' provision in the statute that created the Commission likely to have been inadvertent.").

fatal to agency independence."[412] Given the majority's holding on this point, presumably other indicia of independence, including fixed terms of office, can give rise to an implied "good cause" removal limitation. If this is so, then the problem with a mandatory partisan balance requirement would arise in any and all cases where an implied, as opposed to express, limitation on the President's removal power exists.

The easy, and obvious, solution to this potential problem would be for federal courts simply to refrain from inferring good cause removal limitations for independent agencies that have organic statutes requiring mandatory bipartisanship for those persons comprising the agency's head. A well-established canon of constitutional adjudication holds that whenever it is possible to interpret a statute to avoid a constitutional problem, that interpretation, if plausible, should be embraced.[413] If applied on these facts, the canon would strongly suggest that federal courts should not imply for-cause removal protection with respect to entities that feature mandatory partisan balance requirements.

This approach also would clearly advance the value of accountability that *Free Enterprise Fund* places such importance upon. Interpreting removal restrictions narrowly, rather than broadly, would facilitate the kind of presidential oversight that Chief Justice Roberts and the *Free Enterprise Fund* majority thought essential to the unitary executive.[414]

Although the limitations of time and space (and the patience of readers) prevent us from developing the argument at length, we note in passing that very plausible *functionalist* arguments exist against permitting partisan balance requirements to be combined with good cause removal limitations. Partisan balance requirements had their genesis in the modernist period, a time of great faith in the ability of agency expertise—and science—to produce good government policy.[415] Unbridled faith in agency expertise proved misguided and today most reasonable observers embrace, at least to some extent, a public choice understanding of agency functioning.[416]

Agencies certainly possess expertise, but they also constitute a significant field of battle for interest group politics. To the extent that partisan balance

412 *Id.* at 547.

413 *See* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937); *see also* Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1945, 1948–49 (1997) (discussing the canon that calls for avoiding statutory interpretations that raise constitutional problems and the Supreme Court's application of this rule over time).

414 *Free Enter. Fund*, 561 U.S. at 496–502, 510–13.

415 *See* Michael F. Duggan, *The Municipal Ideal and the Unknown End: A Resolution of Oliver Wendell Holmes*, 83 N.D. L. REV. 463, 470 n.28 (2007) (noting that storied Justice Oliver Wendell Holmes "lived long enough to straddle the naturalist and modernist traditions" and that "Holmes was also a great believer in the theories of population expressed by Thomas Robert Malthus"). *See generally* A CENTURY OF EUGENICS IN AMERICA (Paul A. Lombardo ed., 2011); A CONCISE COMPANION TO MODERNISM (David Bradshaw ed., 2003); POPULAR EUGENICS (Susan Currell & Christina Cogdell eds., 2006).

416 *See generally* JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE (1997).

requirements impede agency functioning and render elections less meaningful,[417] sound functionalist objections exist to their use. Indeed, given the potential dysfunction associated with the creation of independent agencies with a built-in heckler's gallery located within the agency head,[418] a committed functionalist should harbor serious misgivings about the use of mandatory partisan balance requirements. Again, given the limitations of space and time, we leave for another day fuller development of this thesis.

Finally, one might object that the practical difference between a statutory mandate requiring bipartisan appointments and the de facto practice of the Senate in confirming, or refusing to confirm, presidential nominees, might not be very great. Two responses to this potential objection exist.

First, formalism, unlike functionalism, seeks to erect prophylactic rules that prevent potential problems before they arise—in this instance, an unaccountable federal bureaucracy that operates, to use Professor Strauss's wonderful turn of phrase, as a "headless fourth branch"[419] of the federal government. Whether these rules actually affect outcomes on the ground is at best a secondary consideration. Formalism also places great emphasis on means, as opposed to ends; if the same result obtains by virtue of a branch exercising a power the Framers vested with it, so be it.

Second, a statutory mandate clearly operates differently than a naked political demand; were partisan-balance requirements to go the way of the legislative veto,[420] a contemporary Senate majority would have to take political responsibility—and potentially be held electorally accountable—for refusing to confirm presidential appointees to independent agencies because such nominees all happen to be political fellow-travelers of the President. A statutory mandate, in theory, renders the President's failure to make bipartisan nominations legally invalid—and a reviewing court might so hold. But, even if the opposition party in the Senate could successfully demand appointees to independent agencies, boards, and commissions, from a formalist perspective, an effective political demand is simply not the same thing as a binding legal requirement set forth in the U.S. Code.

Conclusion

We do not yet know whether, as a constitutional precedent, *Free Enterprise Fund* will prove to be a mountain or a molehill. If the decision proves to be durable, and establishes a renormalized understanding of Article II's mini-

417 *Cf.* Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) ("A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration." (footnote omitted)).

418 *See supra* text and accompanying notes 325–51, 404–08.

419 Strauss, *supra* note 11, at 2283 (internal quotation marks omitted).

420 *See* INS v. Chadha, 462 U.S. 919, 944, 954–58 (1983).

mum level of presidential oversight authority over independent federal agencies with significant policymaking authority, the constitutional status of partisan balance requirements, when combined with good cause removal limitations, appears highly questionable. In fact, well regarded administrative law scholars have suggested that *Free Enterprise Fund* might well sound the death knell for even single-layer good cause removal restrictions;[421] if this is so, then the decision certainly portends significant constitutional problems for mandatory partisan balance requirements that force the President to appoint her political opponents to principal offices within the executive branch and then significantly constrain her ability to remove these appointees through good cause removal limitations.

In sum, if the Supreme Court actually meant what it appeared to say about the centrality of presidential oversight to the separation of powers doctrine—and to the accountability of the President for the actions of independent agencies—then the use of mandatory partisan balance requirements should be held to violate the separation of powers doctrine (at least when combined with significant statutory protections against removal from office). Requiring the President to pursue her policies through the good offices of political opponents, holding principal offices within the executive branch, simply cannot be squared with the vision of the unitary executive set forth in *Free Enterprise Fund*. Accordingly, we believe that the use of mandatory partisan balance requirements, in conjunction with good cause protection against removal from office, likely violates the separation of powers in this age of new formalism.

421 *See supra* notes 399–400 and accompanying text.

PARTISAN BALANCE REQUIREMENTS APPENDIX

The Tables below depict the history of Congress's employment of the partisan balance requirement in federal agencies and commissions.

Table 1: Independent Agencies with Partisan Balance Requirements[422]

Body	Organic Act	Date Created	Split	Removal Protection
Utah Commission	Act of Mar. 22, 1882, ch. 47, 22 Stat. 30	1882	3/5	Statute silent
Civil Service Commission[423]	Act of Jan. 16, 1883, ch. 27, 22 Stat. 403	1883	2/3	At will ("the President may remove any commissioner")
Interstate Commerce Commission	Act of Feb. 4, 1887, ch. 104, § 11, 24 Stat. 379, 383	1887	3/5	For cause ("inefficiency, neglect of duty, or malfeasance")
Board of General Appraisers[424]	Act of June 10, 1890, ch. 407, § 12, 26 Stat. 131, 136	1890	5/9	For cause ("inefficiency, neglect of duty, or malfeasance")
"[V]arious commissions to negotiate Indian Treaties"[425]	Act of Mar. 2, 1889, ch. 412, § 14, 25 Stat. 980, 1005 (Cherokee) Act of Aug. 19, 1890, ch. 807, 26 Stat. 336, 354 (Chippewa) Act of July 13, 1892, ch. 164, 27 Stat. 120, 138–39	1889 1890 1892 1896	2/3 (all)	Statutes silent

422 In order of date of creation. For a similar, but shorter, listing of collegial bodies with various statutory qualification requirements, see HOGUE, *supra* note 172, at 25 tbl.A-2.

423 Reorganized as the United States Office of Personnel Management in 1979. The Office of Personnel Management does not have a mandated partisan balance requirement. 5 U.S.C. §§ 1101–1103 (2012).

424 The Board was at issue in *Shurtleff v. United States*, 189 U.S. 311 (1903), where the Court held that the President had the power to remove appraisers "on other grounds than those mentioned in the act." *Id.* at 319. Briefly mentioning the qualifications of the office, including the requirement that "[n]ot more than five of such general appraisers shall be appointed from the same political party," the Court said, in dicta, "[t]here is, of course, no doubt of the power of Congress to create such an office as is provided for in the above section." *Id.* at 313.

425 Myers v. United States, 272 U.S. 52, 270, 270 n.51 (1926) (Brandeis, J., dissenting) (listing various bodies with "restrictions on the power of nomination by require[ed] political representation").

	(Shoshone/Arapaho) Act of June 10, 1896, ch. 398, 29 Stat. 321, 342 (Klamath)			
Federal Trade Commission[426]	15 U.S.C. § 41 (Act of Sept. 26, 1914, Pub. L. No. 63-203, 38 Stat. 717)	1914	3/5	For cause ("inefficiency, neglect of duty, or malfeasance")
U.S. Shipping Board	Act of Sept. 7, 1916, Pub. L. No. 64-260, § 3, 39 Stat. 728, 729	1916	3/5	For cause ("inefficiency, neglect of duty, or malfeasance")
U.S. Employees' Compensation Commission[427]	Act of Sept. 7, 1916, Pub. L. No. 64-267, § 28, 39 Stat. 742, 748	1916	2/3	Statute silent
U.S. International Trade Commission[428]	19 U.S.C. § 1330 (Revenue Act of 1916, Pub L. No. 64-271, 39 Stat. 756, 795)	1916	3/6	Statute silent
Federal Energy Regulatory Commission[429]	42 U.S.C. § 7171	1920 (1977)[430]	3/5	For cause ("inefficiency, neglect of duty, or malfeasance in office") § 7171(b)(1)
Board of General Appraisers	Tariff Act of 1922, Pub L. No. 67-318, § 518, 42 Stat. 858, 972–73	1922	5/9	For cause ("Neglect of duty, malfeasance in office, or inefficiency")

426 William E. Humphrey, of *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), was a member of the FTC; his estate challenged his removal from that body by FDR. In its brief to the Supreme Court, the U.S. government essentially conceded the propriety of the partisan balance requirement by arguing that other "safeguards designed to achieve . . . independence," such as the FTC's mandated partisan split, obviated the need for "an implied limitation of the removal power such as that contended for by [Humphrey's Executor]." Brief for the United States at 18–19, *Humphrey's Ex'r*, 295 U.S. 602 (No. 667), 1935 WL 32965, at *18–19.

427 Reorganized to be housed within the Department of Labor in 1945.

428 Formerly the "U.S. Tariff Commission." Revenue Act of 1916, ch. 463, § 700, 39 Stat. 756, 795 (establishing the Tariff Commission which was changed in 1975).

429 Formerly the "Federal Power Commission." Act of June 10, 1920, ch. 285, § 1, 41 Stat. 1063.

430 Reorganized in 1977. 42 U.S.C. § 7171 (2012).

World War Foreign Debt Commission	Act of Feb. 28, 1923, Pub L. No. 67-455, 42 Stat. 1325, 1326	1923	4/8[431]	Statute silent
Federal Communications Commission[432]	47 U.S.C. § 154 (Communications Act of 1934, Pub. L. No. 73-416, § 4, 48 Stat. 1062, 1066–67)	1927 (1934)[433]	3/5[434]	Statute silent
Home Loan Bank Board	Federal Home Loan Bank Act, Pub. L. No. 72-304, § 17, 47 Stat. 725, 736	1932	3/5	Statute silent
National Credit Union Administration Board	12 U.S.C. § 1752a(b)(1)	1934 (1978)[435]	2/3	Statute silent
National Mediation Board	45 U.S.C. § 154 (Act of June 21, 1934, Pub. L. No. 73-442, § 4, 48 Stat. 1185, 1193)	1934	2/3	For cause ("inefficiency, neglect of duty, malfeasance in office, or ineligibility") § 154
Securities Exchange Commission	15 U.S.C. § 78d (Securities Exchange Act of 1934, Pub. L. No. 73-291, §§ 4, 48 Stat. 881, 885)	1934	3/5	Statute silent[436]
Social Security Board[437]	Act of Aug. 14, 1935, Pub. L. No. 74-271, tit.VII, § 701, 49	1935	2/3	Statute silent

431 The Secretary of the Treasury was an ex officio member. Act of Feb. 28, 1923, ch. 146, 42 Stat. 1325, 1326.

432 Formerly the "Federal Radio Commission." The Radio Commission was established in 1926. *See infra* note 433; *see also* LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 72–81 (1987); Ronald J. Krotoszynski, Jr., *The Inevitable Wasteland: Why the Public Trustee Model of Broadcast Television Regulation Must Fail*, 95 MICH. L. REV. 2101, 2105 (1997) (book review).

433 The powers of the Federal Radio Commission, Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162, were transferred to the FCC by the Act of June 19, 1934, ch. 652, § 603(b), 48 Stat. 1102.

434 The Federal Radio Commission had five members, limited to three being of the same political party. When Congress created the FCC, it increased the number of commissions to seven with a limit of four members of the same political party. Communications Act of 1934, Pub. L. No. 73-416, § 4(a)–(b), 48 Stat. 1064, 1066. Congress decreased this number in 1982 to a five-member commission with a three-to-five split. Act of Sept. 8, 1982, Pub. L. No. 97-253, § 501, 96 Stat. 805.

435 Reorganized as an independent executive agency in 1978. Act of Nov. 10, 1978, Pub. L. No. 95-630, § 501, 92 Stat. 3680.

436 For the debate on the meaning of this statutory silence regarding removal, see Huq, *supra* note 19.

437 Eventually replaced by the Social Security Administration, which lacks a partisan balance requirement. Act of Aug. 15, 1994, Pub. L. No. 103-296, Title I, § 101, 108 Stat.

	Stat. 620, 635; Aug. 28, 1950, ch. 809, tit. IV, § 401(a), 64 Stat. 558			
United States Maritime Commission	Merchant Marine Act of 1936, Pub. L. No. 74-835, § 201(a), 49 Stat. 1985	1936	3/5	For cause ("neglect of duty or malfeasance in office")
Civil Aeronautics Board[438]	Civil Aeronautics Act of 1938, Pub. L. No. 75-706, § 201(a), 52 Stat. 973, 980–81	1938 (1940)	3/5	For cause ("inefficiency, neglect of duty, malfeasance")
Export-Import Bank of the United States	12 U.S.C. § 635a (Export-Import Bank Act of 1945, Pub. L. No. 79-173, § 3, 59 Stat. 526, 527)	1945 (1934)[439]	3/5	At will ("at the pleasure of the President") § 635a(c)(8)(i)
Nuclear Regulatory Commission[440]	42 U.S.C. § 5841 (organic act: Atomic Energy Act of 1946, Pub. L. No. 79-585, 60 Stat. 755; reorganized by the Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1233)	1946 (1977)	3/5	For cause ("inefficiency, neglect of duty, or malfeasance") § 5841(e)
Federal Maritime Commission	46 U.S.C. § 301	1961	3/5	For cause ("inefficiency, neglect of duty, or malfeasance") § 301(b)(3)

1465. For a history of the myriad changes made to the administration of the Social Security program, see *Social Security History*, SOC. SEC., http://ssa.gov/history/orghist.html (last visited Jan. 5, 2015).

438 Founded as the Civil Aeronautics Authority in 1938. Civil Aeronautics Act of 1938, Pub. L. No. 75-706, § 201(a), 52 Stat. 973, 980. This agency was a forerunner to the modern Federal Aviation Agency, Federal Aviation Act of 1958, Pub. L. No. 85-726, § 301(a), 72 Stat. 731, 744, now the Federal Aviation Administration, housed in the Department of Transportation and lacking a partisan balance requirement. 49 U.S.C. § 106 (2012).

439 In 1934, FDR first chartered the Export-Import Bank by executive order, calling it "a banking corporation." Exec. Order No. 6581, 12 C.F.R. § 401 (Feb. 2, 1934), *available at* http://www.presidency.ucsb.edu/ws/?pid=14772. The President named the first five members of the board of trustees and did not impose any express partisan balance requirement. In 1945, Congress reestablished the Bank as "an independent agency of the United States" and mandated that its Board of Directors be made up of no "more than three . . . members of any one political party." 12 U.S.C. § 635a(a), (c)(2).

440 Formerly the "Atomic Energy Commission," which was created in 1946. Reorganization occurred in 1977. Both agencies had mandated three-of-five partisan majority requirements.

Peace Corps National Advisory Council	22 U.S.C. § 2511	1961	8/15	At will ("at the pleasure of the President") § 2511(c)(2)(G)
Equal Employment Opportunity Commission	42 U.S.C. § 2000e-4 (Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, § 705, 78 Stat. 241, 258)	1964	3/5	Statute silent
National Transportation Safety Board	49 U.S.C. § 1111	1967 (1974)[441]	3/5	For cause ("inefficiency, neglect of duty, or malfeasance") § 1111(c)
Inter-American Foundation	22 U.S.C. § 290f (Foreign Assistance Act of 1969, Pub. L. No. 91-175, § 401, 83 Stat. 805, 821)	1969	5/9	Statute silent
Postal Regulatory Commission[442]	39 U.S.C. § 501 (Postal Reorganization Act, Pub. L. No. 91-375, 84 Stat. 719, 759 (1970), *amended by* Postal Accountability and Enhancement Act, Pub. L. No. 109-435, 120 Stat. 3198, 3238 (2006))	1970	3/5	For cause ("for cause") § 502(a)
Farm Credit Administration Board	12 U.S.C. § 2242 (Farm Credit Act of 1971, Pub. L. No. 92-181, § 5.8, 85 Stat. 583, 617)	1971	2/3	Statute silent
Consumer Product Safety Commission	15 U.S.C. § 2053 (Consumer Product Safety Act, Pub. L. No. 92-573, § 4, 86 Stat. 1207, 1210 (1972))	1972	3/5	For cause ("neglect of duty or malfeasance in office") § 2053(a)
Federal Election Commission	2 U.S.C. § 437c	1974[443]	3/6	Statute silent

441 In 1974, Congress reestablished the NTSB as an independent agency outside the Department of Transportation. Transportation Safety Act of 1974, Pub. L. No. 93-633, § 303(a), (b)(2), (c), 88 Stat. 2156, 2167–68.

442 Originally named the "Postal Rate Commission." Postal Reorganization Act, Pub. L. No. 91-375, § 3601, 84 Stat. 719, 759 (1970). It was renamed in 2006. 39 U.S.C. § 501; Postal Accountability and Enhancement Act, Pub. L. No. 109-435, 120 Stat. 3198, 3238 (2006).

443 Congress created the FEC in 1974; however, because of the unconstitutionality of the organic act's appointments scheme, *see* Buckley v. Valeo, 424 U.S. 1 (1976), the FEC was not an operating body until 1976. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 208(a), 88 Stat. 1263, 1280 (renumbered § 309), *amended by*

Commodity Future Trading Commission	7 U.S.C. § 2 (Commodity Futures Trading Comission Act of 1974, Pub. L. No. 93-463, §§ 101(a)(1)-(3), 201, 202, 88 Stat. 1389, 1395)	1975	3/5	Statute silent
Federal Labor Relations Authority	5 U.S.C. § 7104 (Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 701, 92 Stat. 1111, 1196)	1978 (1883)[444]	2/3	For cause ("inefficiency, neglect of duty, or malfeasance") § 7104(b)
U.S. Merit System Protections Board	5 U.S.C. § 1201 (Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 202(a), 92 Stat. 1111, 1121)	1978 (1883)[445]	2/3	For cause ("inefficiency, neglect of duty, or malfeasance") § 1202(d)
African Development Foundation	22 U.S.C. § 290h-5 (International Security and Development Cooperation Act of 1980, Pub. L. No. 96-533, § 507, 94 Stat. 3131, 3154)	1980	4/7	Statute silent
Advisory Board for Cuba Broadcasting	22 U.S.C. § 1465c (Radio Broadcasting to Cuba Act, Pub. L. No. 98-111, § 5, 97 Stat. 749, 750–51 (1983))	1983	5/9	Statute silent
Defense of Nuclear Facilities Safety Board	42 U.S.C. § 2286 (National Defense Authorization Act, Fiscal Year 1989, Pub. L. No. 100-456, § 311, 102 Stat. 2076 (1988))	1988	3/5	Statute silent
Morris K. Udall and Stewart L.	20 U.S.C. § 5603	1992	3/5[446]	Statute silent

Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, §§ 101(a)–(d), 105, 90 Stat. 475, 476, 481.

444 The Authority was created out of the reorganization of the former Civil Service Commission (1883), which also created the Office of Personnel Management and the Merit System Protections Board. Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111; *see also About MSPB*, U.S. MERIT SYS. PROT. BD., http://www.mspb.gov/about/about.htm (last visited Jan. 5, 2015).

445 The Board was created out of the reorganization of the former Civil Service Commission (1883), which also created the Office of Personnel Management and the Federal Labor Relations Authority. Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat 1111; *see also About MSPB*, *supra* note 444.

446 The Board is made up of a total of thirteen trustees, four of which sit ex officio and without voting capacity. 20 U.S.C. § 5603. The President appoints the remaining nine trustees: two of which are appointed on the recommendation of the Speaker of the House and in consultation with the Minority Leader of the House; two of which are appointed on

Udall Foundation Board of Trustees				
Broadcasting Board of Governors	22 U.S.C. § 6203	1994	4/8[447]	Statute silent
Surface Transportation Board	49 U.S.C. § 701 (ICC Termination Act of 1995, Pub. L. No. 104-88, § 201(a), 109 Stat. 803, 932)	1996	2/3	For cause ("inefficiency, neglect of duty, or malfeasance") § 701(b)(3)
Election Assistance Commission	42 U.S.C. § 15323 (Help America Vote Act of 2002, Pub. L. No. 107-252, § 203, 116 Stat. 1666, 1674)	2002	2/4	Statute silent
Privacy and Civil Liberties Oversight Board	42 U.S.C. § 2000ee (Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 1061, 118 Stat. 3638, 3684)	2004	3/5	Statute silent

the recommendation of the President pro tempore of the Senate and in consultation with the Minority Leader of the Senate; and five of which are appointed by the President alone, "not more than three of whom shall be of the same political party." *Id.*

447 This figure excludes the Secretary of State, who sits as a nonvoting member ex officio. 22 U.S.C. § 6203(b)(3).

Table 2: Cabinet Level Bodies with Partisan Balance Requirements[448]

Body	Organic Act	Date	Split	Dep't	Removal Protection
Federal Farm Loan Board	Federal Farm Loan Act, Pub. L. No. 64-158, § 3, 39 Stat. 360 (1916)	1916	3/5[449]	Dep't of Treasury[450]	Statute silent
U.S. Advisory Commission on Public Diplomacy	22 U.S.C. § 1469 (United States Information and Educational Exchange Act of 1948, Pub. L. No. 80-402, § 601, 60 Stat. 6, 10–11, *amended by* Department of State Authorization Act, Fiscal Years 1980 and 1981, Pub. L. No. 96-60, § 203(f), 93 Stat. 395, 399)	1948	4/7	Dep't of State[451]	Statute silent
National Indian Gaming Commission	25 U.S.C. § 2704 (Indian Gaming Regulatory Act, Pub. L. No. 100-497, § 5, 102 Stat. 2467, 2469 (1988))	1988	2/3[452]	Dep't of Interior[453]	For cause ("neglect of duty, or malfeasance in office, or for other good cause shown") § 2704(b)(6)

448 This is not intended to be an exhaustive list, but is rather intended to present some of the most obvious examples.

449 The Secretary of Treasury was an ex officio member. Federal Farm Loan Act, Pub. L. No. 64-158, § 3, 39 Stat. 360 (1916).

450 The Board's organic act establishes the Board "at the seat of government in the Department of the Treasury." *Id.*

451 The Commission maintains its website through the State Department and states that it reports "to the President, Secretary of State, and Congress." *U.S. Advisory Commission on Public Diplomacy: About the Commission*, U.S. DEPT. OF STATE, http://www.state.gov/pdcommission/about/ (last visited Jan. 5, 2015).

452 The President of the United States is given the authority to appoint the chairman of the Commission; the Secretary of the Interior appoints the remaining two associate members, who must be of differing political parties. 25 U.S.C. § 2704(B)(a)–(b).

453 The Commission's organic act states that the Commission is "established within the Department of the Interior." *Id.* § 2704(a).

Table 3: "Article I Courts" with Partisan Balance Requirements

Body	Organic Act	Date Created	Partisan Split	Removal Protection
Court of Appeals for Veteran Claims[454]	38 U.S.C. § 7251	1988	5/9[455]	For cause ("misconduct, neglect of duty, engaging in the practice of law, or violating [38 U.S.C. § 7255(c)]")
Court of Appeals for the Armed Forces[456]	10 U.S.C. § 941	1951	3/5	For cause ("neglect of duty; misconduct; or mental or physical disability") § 942(c)

Table 4: Article III Bodies with Partisan Balance Requirements

Body	Organic Act	Date Created	Partisan Split	Removal Protection
U.S. Court of International Trade[457]	28 U.S.C. § 251 (Act of June 25, 1948, Pub. L. No. 80-773, § 251, 62 Stat. 869, 899)	1948 (1980)	5/9	For cause ("good behavior") § 252
U.S. Sentencing Commission[458]	28 U.S.C. § 991	1984	4/7	For cause ("neglect of duty or malfeasance in office or for other good cause shown") § 991(a)

454 Congress expressed that the Court was established "under Article I of the Constitution." 38 U.S.C. § 7251.

455 The number of seats on the court is not established by statute; however, the statute mandates that the court shall not consist of "more than seven judges." 38 U.S.C. § 7253(a). Interestingly, at the writing of this Article, the court was made up of nine active judges. *See Judges*, U.S. COURT OF APPEALS FOR VETERANS CLAIMS, http://www.uscourts.cavc.gov/judges.php (last visited Jan. 5, 2015).

456 Congress expressed that the Court was established under "article I of the Constitution." 10 U.S.C. § 941.

457 Formerly the U.S. Customs Court, it was renamed in 1980. Act of Oct. 10, 1980, Pub. L. No. 96-417, § 101, 94 Stat. 1727. Congress expressly "established [the Court of International Trade] under article III of the constitution of the United States." 28 U.S.C. § 251(a). For a persuasive argument that the Court of International Trade is unconstitutionally composed, see Adam J. Rappaport, Comment, *The Court of International Trade's Political Party Diversity Requirement: Unconstitutional Under Any Separation of Powers Theory*, 68 U. CHI. L. REV. 1429 (2001).

458 Congress expressly established the Sentencing Commission "as an independent commission in the judicial branch." 28 U.S.C. § 991(a).