THE PRESIDENT’S AGENCY SELECTION POWERS

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In the traditional administrative law paradigm, Congress chooses which agencies it wants to act and delegates policymaking authority to those agencies. The President can supervise the agencies but he cannot select different agencies to act. This Article offers a revision of this conventional understanding of agency selection. It shows that presidents continually select which agencies act by exercising a set of statutory and constitutional powers that the Article refers to as the President’s agency selection powers. The Article describes how the President’s agency selection powers diversify the President’s tool kit for controlling administrative decisions. The Article also rejuvenates a largely forgotten, century-old debate on the desirability of presidential, instead of congressional, agency selection.

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INTRODUCTION

In the traditional administrative law paradigm, Congress chooses which agencies it wants to act and delegates policymaking authority to those agencies. The President can supervise those agencies but he cannot select different agencies to act.1 This Article offers a revision of this conventional model of agency selection. It shows that presidents continually exercise statutory and constitutional powers to select which agencies act, and the President’s use of these powers is expanding and creating new areas of legal contestation. Presidents select agencies through three powers, which I collectively refer to as the President’s agency selection powers: (1) the President’s power to subdelegate authority to the agency of his choosing when Congress has expressly delegated that authority to the President; (2) the President’s power to delegate his constitutional powers to an agency and thereby force Congress’s choice of agency to work with the President’s choice of agency on particular regulatory matters; and (3) the President’s power to reconcile agencies’ overlapping jurisdiction by deciding which of the agencies in the shared regulatory space should act.2 Historically, presidents have also selected agencies through their statutory reorganization authority, but that authority lapsed almost thirty years ago and has not been renewed.3

Each of these powers has received varying degrees of individual attention in the literature.4 By conceptualizing these powers as a group, this Article

1. See, e.g., Geoffrey P. Miller, The Unitary Executive in a Unified Theory of Constitutional Law: The Problem of Interpretation, 15 CARDOZO L. REV. 201, 205 (1993) (arguing that the President does not have power to transfer congressionally granted power from one agency to another).
2. See infra Part I (giving an overview of the President’s agency selection powers).
4. For discussion of the subdelegation power, see David J. Barron & Elena Kagan,
makes significant contributions to several strands of the administrative and constitutional law literature.

First, it fills a gap in the scholarship on presidential control of administrative decisionmaking by showing how the President’s agency selection powers diversify the President’s tool kit. For example, to explicate the usefulness of the agency selection powers, I show how they can serve as less costly alternatives to the more famous power to remove executive officers. Consider that the primary function of the removal power is to ensure that presidents have faithful and qualified officers in executive agencies and departments. But, in practice, the President’s power to remove executive officers is constrained by the political costs that come from firing agency heads and the procedural costs of finding a Senate-confirmable replacement, as well as legal limits on the removal of independent officers and civil servants. However, when one of the President’s agency selection powers is available for a president to exercise, the President can avoid the costs and constraints of the removal power by using the agency selection power to transfer authority over a particular task from one agency to another—thereby placing that task under the purview of a different set of executive officers.

Second, the Article adds to the burgeoning literature on interagency coordination and congressional delegations of authority to multiple agencies. The Article examines the implications of these shared


6. See infra Part II.

delegations for presidential power by showing that when Congress creates overlapping authority among several agencies, it enables presidents to select which of these agencies will act in the overlapping space.

Third, the Article revitalizes a largely forgotten debate on the normative desirability of presidential, instead of congressional, agency selection. As long ago as 1927, the prominent public administration theorist W.F. Willoughby argued that Congress, through statutes, should cede its control over agency selection to the President. We are far from Willoughby’s ideal point where the President has plenary power over agency selection decisions, but the President’s agency selection powers have undoubtedly expanded significantly since Willoughby’s time. This Article provides an institutional analysis of the factors that determine whether presidential agency selection is likely to produce agency designs and administrative structures that are beneficial from a general public-regarding perspective. While I do not enter the normative debate over the desirability of presidential agency selection directly, the analysis in this Article should contribute to a better understanding of the factors that will animate that debate—a debate that will only grow in importance as presidents continue to expand their agency selection powers and trigger new legal contests.

This Article proceeds as follows. In Part I, I describe the legal and political developments that have led to the creation and use of the agency selection powers. Throughout this Part, I provide illustrations showing how presidents have used their powers to ensure that agencies act in line with the President’s objectives. In Part II, I discuss a special case in which presidents have used their agency selection powers to establish small-scale review institutions that mimic centralized White House review of agency actions but replace White House analysts with executive agency regulators. This discussion raises unanswered questions about the constitutional scope of the President’s agency selection powers. In Part III, to further explicate the usefulness and operation of agency selection powers, I compare agency selection powers to the removal power. Part IV describes the factors that determine the desirability of presidential instead of congressional agency selection.


9. I assume that presidents prefer agencies that are allies, in the sense that those agencies are likely to share or at least not resist the President’s goals. See, e.g., Jack M. Beermann, Congressional Administration, 43 SAN DIEGO L. REV. 61, 71 (2006) (describing principal-agent problems underlying presidential agency selection); Matthew C. Stephenson, Information Acquisition and Institutional Design, 124 HARV. L. REV. 1422, 1440 (2011) (explaining the “ally principle”).
I. THE PRESIDENT’S AGENCY SELECTION POWERS

From the early years of the republic, legal opinion has established that, when Congress passes a law and delegates authority to a particular agency, the President cannot select a different agency to execute the law. But presidents have never surrendered the entire domain of agency selection to Congress. Instead, they have developed a significant array of statutory and constitutional powers that has allowed them to select agencies under certain conditions. This Part describes the legal and doctrinal development of the President’s agency selection powers. It also draws on positive political theory to explain why these powers evolved and are likely to continue to exist and grow. Throughout, this Part provides illustrations of how presidents have used these powers to select agencies that are suited to achieve the President’s objectives. While it is difficult to say precisely how pervasive the use of these powers has become, the analysis here shows that the President’s agency selection powers are now a permanent feature of the Executive Branch, that presidents rely on these powers from time to time, and, even when the powers are not being used, they can lie in reserve for a president to turn to if he wants.

This Part discusses the President’s ability to select agencies through, in turn, the statutory subdelegation power, constitutional delegation power, and agency overlap power. It concludes by discussing why Congress has not renewed the President’s statutory ability to select agencies through the reorganization authority, even as Congress has let these other agency selection powers persist and expand.

A. The President’s Statutory Subdelegation Power

In a typical statute delegating authority to the Executive Branch, Congress names the agency that must execute the law, and the President is implicitly forbidden from transferring authority to a different agency. However, Congress regularly enacts statutes that delegate authority directly to the President. When the President is the direct recipient of a congressional delegation of authority, it is established that the President can


12. See Kevin M. Stack, The Reviewability of the President's Statutory Powers, 62 VAND. L. REV. 1171, 1174 (2009) (asserting that Congress frequently delegates power to the President in what are called “conditional form delegations”).
subdelegate that authority to the agency of his choosing and later transfer that authority to a different agency at his discretion. This section describes the scope of this statutory subdelegation power. It then applies positive political theory tenets to explain why Congress delegates authority to the President and how presidents then use that authority to subdelegate power to the agency of their choosing.

1. The Scope of the President's Statutory Subdelegation Power

For two centuries, Congress has delegated substantial authority to the President. Since the early days of the republic, presidents have then subdelegated many of these tasks to agency officials of their choosing. These early statutes were usually silent as to whether Congress permitted such subdelegations. But courts largely upheld the President's subdelegation of his statutory powers because of the pragmatic need to ease the President's workload. For example, during hostilities with France in the nineteenth century, Congress delegated to the President the power to confine alien enemies. One alien challenged his confinement because the order authorizing his detainment had not been signed by President Thomas Jefferson but by Secretary of State James Madison, who had no authority under the statute. Nevertheless, the court upheld the confinement because "the [P]resident, for the more easy and expeditious discharge of his executive duties, may direct some other department to make known the measures which he may think proper to establish."

However, some statutory limitations remained within the scope of the President's statutory subdelegation power. Opinions from the Attorney General and some courts suggested that the President could not statutorily delegate "strictly personal and ministerial" tasks. On this basis, an 1887 Supreme Court decision struck down the President's power to subdelegate his authority to review courts-martial decisions because these decisions were

13. 3 U.S.C. §§ 301–303 (2012). This discretion does not exist when Congress has issued so called mixed-delegations that delegate authority to the President but require him to act through a particular agency. See Stack, supra note 11, at 276–77.
16. Id.
17. Lockington v. Smith, 15 Fed. Cas. 758, 760 (C.C.D. Pa. 1817); see also McElrath v. United States, 102 U.S. 426, 436 (1880) ("[A]s to the vast multiplicity of matters involved in the administration of the executive business of the government, it is physically impossible for the President to give them his personal supervision. Of necessity he must, as to such matters, discharge his duty through the instrumentality or by the agency of others.").
quasi-judicial and required the personal judgment of the President.\textsuperscript{19} Because of opinions like this one, presidents refrained from subdelegating some of their work and their workload increased. Eventually, President Truman complained to Congress that he "takes [three] hours every night" to sign papers stacked on his desk because too many statutes required his personal judgment and could not be subdelegated to lower level officials.\textsuperscript{20} Truman pushed for a legislative solution, and Congress responded by passing the Presidential Subdelegation Act of 1951.\textsuperscript{21}

The Act grants the President the power to subdelegate any "duty, power, responsibility, authority, or discretion vested in the President" by statute, unless Congress expressly declares otherwise.\textsuperscript{22} Moreover, the President can revoke a subdelegation and transfer authority to a different agency of his choosing at his discretion.

2. \textit{Why Congress Delegates Authority to the President}

The President's statutory subdelegation power would be meaningless if Congress ceased delegating authority directly to the President and revoked past delegations of authority. However, a positive political analysis suggests that Congress is likely to maintain its centuries-long practice of delegating substantial authority directly to the President for several reasons: the President's comparative institutional advantage handling certain types of policy problems, the failure of legislators to form a stable coalition that can agree to delegate authority to one specific agency, and the potential political gains for legislators that shift blame for poor agency selection choices to the President. I discuss each of these motivations in turn.

\textit{a. The President's Institutional Advantages}

Congress is likely to delegate authority directly to the President instead of to agencies when policy matters require uniformity and dispatch. Presidents, by virtue of their position as solo actors atop the executive hierarchy, are better situated than lower level agencies to ensure uniformity and decisiveness.\textsuperscript{23}

\textsuperscript{19} See Runkle v. United States, 122 U.S. 543, 557–58 (1887) (invalidating court martial during peace time authorized by the Secretary of War but not the President on the ground that the statute required presidential approval).
\textsuperscript{22} Id. at § 303.
Two realms in which speed and uniformity matter greatly are the management of national crises and foreign affairs. It is unsurprising that Congress often delegates to the President instead of agencies in these areas. These delegations of authority enable presidents to quickly transfer power among agencies as background conditions and U.S. goals change. For example, during the U.S. occupation of Iraq in 2003, Congress authorized the President to spend funds “needed to oversee and manage the relief and reconstruction of Iraq and the transition to democracy.” The President initially transferred the money and the authority to carry out the reconstruction functions to the Department of Defense, perhaps because physical security remained a primary focus during that time. Meanwhile, the President’s advisors and an Iraqi council established a timeline that would lead to sovereignty for Iraq by the end of June 2004. Immediately after Iraq gained sovereignty, the President transferred those funds and reconstruction functions to the Department of State, presumably because the United States’ primary relationship with Iraq had shifted to become more diplomatic and less militaristic.

In sum, when speed and uniformity are of prime importance, Congress is likely to delegate authority to the President and leave agency selection to the President under his statutory subdelegation power.

b. Congress’s Inability to Form a Stable Coalition

Collective action problems among the multi-member Congress can also prevent legislators from forming stable, majority coalitions that agree on which agency should receive authority. Imagine that one group of legislators wants to delegate authority to Agency X, another to Agency Y, and a third to Agency Z. No single group has a majority of votes. Congress can form a majority if one of the groups agrees to vote for its second choice agency. But instead of changing its vote to a second-choice


27. *See also* 54 Fed. Reg. 34,129 (1989) (discussing the presidential transfer of authority from the Department of Interior to the Department of the Defense under subdelegation authority).
agency, each group of legislators may prefer to delegate authority to the President because there is some probability that the President will select its preferred agency. That is, the legislators may rather take a chance at having its preferred agency act instead of settling for their second-choice agency.28

Congress's committee system aggravates this coalition-building problem.29 Legislators have the greatest influence over agencies subject to oversight from their congressional committees. Once Congress has decided to delegate authority to the executive instead of keeping the policymaking power for itself,30 legislators tend to favor assigning powers to agencies that are under their committee's purview, thereby indirectly empowering the legislators themselves.31 As a result, legislators on different committees often disagree about which agency to empower because each legislator favors his own committee's agency.32

The coalition problem is especially great for comprehensive regulatory schemes that implicate multiple committees, thus making agreement among the many legislators and committees more difficult. For example, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)33 created a large regulatory scheme that enabled government agents to order private parties to fund the cleanup of toxic sites.34 Agreeing on which agency would issue the government orders for all of the different types of private actions covered by the statute would have required painstaking detail and long negotiations among the relevant congressional committees. Legislative history reveals one senator, whose committee oversaw the Department of Transportation, emphasizing the role that he hoped the Department would play in administering the scheme, while another senator on the committee that oversaw the Environmental Protection Agency (EPA) emphasized the primary role that he envisioned

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32. See, e.g., Doran, supra note 7, at 1816.


for the EPA.\textsuperscript{35} Instead of trying to reach an agreement on how to divvy up tasks among the agencies, Congress delegated much of the authority in CERCLA to the President and let him subdelegate that authority among the agencies. After CERCLA passed, President Reagan promptly subdelegated many of the tasks in the statute to various agencies.\textsuperscript{36} Subsequent presidents have altered the subdelegations by dividing authority among agencies as they see fit.\textsuperscript{37}

In short, Congress's inability to form coalitions that can agree on which agency to empower can force Congress to instead delegate authority directly to presidents.

c. Shifting the Blame to the President

Congress also delegates authority to the President to avoid being blamed for picking an agency that is unpopular with a particular constituency or interest.\textsuperscript{38} When different interests are likely to favor different agencies, Congress can avoid angering any one interest by punting the agency selection question to the President, who will pick the agency that he prefers but also take the political heat for that choice. Consider the problem of regulating the export of dual-use technologies—those that have both civilian and military uses. Congress could delegate the regulation of these technologies to a foreign affairs agency. But this assignment might anger business interests that want the decisionmaking power vested in an agency that is more clearly pro-business. Conversely, Congress could please commercial interests by delegating the regulation of these technologies to the Department of Commerce. But this decision might anger U.S. diplomats because the agency would likely err on the side of commercial exchange and thus allow exports to nations that were not friendly with the United States. Congress avoided settling the question of which agency would oversee these technologies by delegating authority directly to the President. Initially, President Carter subdelegated these export decisions to the Department of State, an agency likely to make the export decisions with

38. Aranson et al., supra note 28, at 33 (delegating discretion to the Executive "offers the legislator a substitute for taking direct action that different constituents might find objectionable"); see also Nicholas Almendrares, Blame-Shifting, Judicial Review, and Public Welfare, 27 J.L. & Pol. 239, 239 (2012) (arguing that Congress enacts "vague or broad delegation" to shift responsibility to the agency).}
an eye toward foreign policy goals. In 1995, President Clinton transferred some of that authority to the Department of Commerce, presumably because he wanted more business-friendly decisions. Clinton’s transfer of authority enabled some legislators to blame him for favoring commercial interests over defense interests. Senator John McCain chastised Clinton: “It is clear that this was done to ensure more rapid approval of exports, without the checks inherent in the State Department’s licensing process.” By delegating authority to the President, Congress avoided having to make a difficult agency selection choice itself and left the President to both make the decision and take responsibility.

Overall, regardless of whether Congress delegates to the President because of the President’s institutional advantages, coalition-building problems in Congress, or blame shifting, Congress has historically delegated substantial authority to the President and is likely to continue doing so.

B. The President’s Constitutional Delegation Power

Just as presidents can subdelegate their statutory authority, it has long been recognized that presidents have “considerable discretion” to delegate their constitutional powers to the agency of their choosing. Textually, the President’s constitutional delegation power can be inferred from the Take Care Clause, whose passive voice—requiring that the President “take Care that the Laws be faithfully executed”—implies that the President will not execute all executive powers himself but instead will oversee those who do. The practice is also justifiable because of the pragmatic need to reduce the burden on the presidency, the same reason that led to the acceptance of the President’s statutory subdelegation power.

41. See Karri Allen, Comment, Communications Satellites and U.S. Export Controls: Correcting the Balance, 18 COMM.LAW CONSPECTUS 463, 465 (2010) (noting that Clinton’s alleged favoritism for commercial industries induced Congress to pass legislation removing the President’s authority to decide export controls).
43. Whether the President May Sign a Bill by Directing that His Signature Be Affixed to It, 29 Op. O.L.C. 1, 15 (2005).
44. U.S. CONST. art. II, § 3.
45. Cf. Myers v. United States, 272 U.S. 52, 176 (1926) (holding a law unconstitutional which prevented the President from removing executive officers who had been appointed by him); see also Samahon, supra note 4, at 178 (requiring the President to oversee the actions of his subordinates).
As a separation of powers matter, though, there is a crucial difference between how the statutory subdelegation power and the constitutional delegation power are used. Presidents use their statutory subdelegation power to select agencies in regulatory areas that Congress has decided to leave to the President, but presidents have used their constitutional delegation power to empower agencies in regulatory areas where Congress is also seeking to exert authority.

This section describes two ways in which presidents have used their constitutional delegation power to alter congressionally set administrative schemes. First, when the Constitution creates overlapping jurisdiction between Congress and the President, the President can select an agency to regulate alongside Congress's chosen agency, ensuring that the administrative outcomes are not shaped solely by Congress's selected agency. Second, presidents can create what I call interagency hierarchies by delegating some of their supervisory power over agencies to one particular agency. This chosen agency can then oversee and influence the decisions made by the agencies that Congress selected. Creating interagency hierarchies is especially effective when Congress has divided jurisdiction for a regulatory problem among multiple agencies because the hierarchy enables the President to select which of these multiple agencies will have the most say over how the government responds to the regulatory problem.

1. The Constitutional Delegation Power in Areas of Overlapping Congressional-Presidential Jurisdiction

When Congress delegates authority to an agency for a particular regulatory matter, the President must generally accept Congress's choice of agency. However, if the President can claim that the Constitution also confers broad jurisdiction on him for the same regulatory matter, then the President can claim the power to delegate authority to his own agency or agencies. The precise scope of the President's power to delegate authority to an agency after Congress has already created a regulatory scheme likely depends on how comprehensively Congress is regulating in the area. When Congress has not precluded additional agencies from acting, then the President can plausibly exercise his constitutional jurisdiction by selecting his own agency to perform tasks alongside Congress's chosen agency.\footnote{Cf. Jack Goldsmith & John F. Manning, The President's Completion Power, 115 YALE L.J. 2280, 2295–96 (2006) (noting how presidents have claimed the constitutional authority to subject Congress's chosen agency to additional procedures neither named in or precluded by the statute).} In these contexts, a regulated entity may be subject to oversight from...
Congress’s chosen agent and the President’s chosen agent.

Why would presidents set up duplicative oversight by selecting their own agent to oversee activities already under the purview of Congress’s agent? Assume that Congress delegates authority to an agency that will produce decisions Congress favors. Assume the President does not share the same preferences as Congress. Thus, decisions by Congress’s agency are unlikely to please the President. The President cannot change Congress’s choice of agency, but, if the President can claim jurisdiction, he can change the decisionmaking structure by selecting his own agency to act in the overlapping space. Congress’s agency and the President’s agency will then have to make many decisions together. The outcomes of these joint decisions will likely be closer to the President’s preferred outcomes when compared to decisions made by Congress’s chosen agency alone.47

This basic pattern of presidential delegation is illustrated by presidents’ delegation of their power to regulate structures that cross international borders. The regulation of these cross-border structures began in 1935 and 1938, when Congress enacted two statutes under its constitutional authority to regulate international commerce. The statutes required anyone transmitting electric energy or natural gas across international borders to receive a permit from the Federal Power Commission (FPC), now known as the Federal Energy Regulatory Commission (FERC).48 Compared to a cabinet department, the FPC was insulated from presidential influence because it was a multi-member independent commission with bipartisan members who had fixed tenure.49

However, President Roosevelt did not simply accept Congress’s decision to delegate authority to an agency insulated from his control. Roosevelt asserted authority over the same cross-border transmissions through his constitutional foreign affairs powers. He issued an executive order requiring that regulated entities receive what are now known as “presidential permits,” which are simply permits issued by the President or his delegate.50 To receive a presidential permit, Roosevelt required that entities apply to the FPC, which then must consult with the Secretary of

47. Cf. Freeman & Rossi, supra note 4, at 1142 (discussing how Congress may delegate authority to two agencies because “the ultimate outcome the two agencies are likely to reach is closer to the outcome lawmakers would negotiate if they were to bargain among themselves than would occur if one agency possessed all of the authority”).
49. On the features of independence, see Emily Hammond Meazell, Presidential Control, Expertise, and the Defiance Dilemma, 61 DUKE L.J. 1763, 1777 (2012) (noting that the difference between executive and independent agencies largely depends on the degree of independence from the control of the President).
State and the Secretary of Defense and receive ultimate approval from the President. President Eisenhower later changed this structure by removing the President from the process and simply requiring that the FPC receive approval from the Secretaries of Defense and State before issuing a permit.51

In effect, the presidents created a dual permitting process under which the transmission of electricity and natural gas across borders requires a statutory permit issued by the FPC and a presidential permit issued by the FPC with the approval of the Secretary of State and the Secretary of Defense.52 The FPC’s successor agency FERC continues to implement this duplicative permitting process by issuing statutory permits on its own and presidential permits with the approval of the two cabinet secretaries.53

The result of this duplicative review process is that the President can better ensure that these transmission decisions will match his policy objectives. If the FPC (now FERC) acted alone, the independent agency could make decisions that the President disliked but could do little to change. By forcing the agency to receive approval for its permitting decisions from two cabinet agencies with close ties to the President, the ultimate decision that the multiple agencies are likely to reach is closer to the outcome that the President would prefer.

2. The President’s Power to Create Interagency Hierarchies

Perhaps the most important recent development in how presidents use their constitutional delegation power concerns what I refer to as interagency hierarchies. Presidents create these hierarchies by designating a single agency or agency head to speak for the President and act as the President’s chief adviser for a particular regulatory problem. The power is particularly helpful for coordinating executive responses to regulatory problems that involve fragmented jurisdiction, which arises when Congress has granted multiple agencies the authority to address a regulatory problem but each agency is responsible for its own piece of that problem.54 Some instances of fragmented jurisdiction come about because some massive

52. See, e.g., 35 F.P.C. 96 (1966); 27 F.P.C. 11 (1962); 27 F.P.C. 1116 (1962); 12 F.P.C. 311, 331 (1953) (discussing how both the statutory permit and presidential permits were necessary to transmit across borders); see also 8 F.P.C. 393, 398 (1949).
54. See Marisam, Duplicative Delegations, supra note 4, at 189 (distinguishing duplicative delegations from fragmented delegations).
regulatory problems inevitably implicate the expertise and jurisdictions of multiple agencies. Other instances arise because competition among congressional committees drives different committees to ensure that the agencies under their purview have some input on important regulatory matters. In either event, fragmented jurisdiction can lead to collective action problems among agencies that hinder effective administration and create monitoring problems for presidents, who find it harder to observe and coordinate multiple agencies instead of one. Interagency hierarchies enable presidents to better supervise the multi-agency process by selecting an agency—one with knowledge of the regulatory problem at hand and preferences that closely align with the President's—that will speak for the President and organize the agencies' actions in his stead.

A 2002 opinion by the President's Office of Legal Counsel (OLC) explored interagency hierarchies regarding the President's power to centralize border control policy. At the time, jurisdiction over border control matters was fragmented among the Immigration and Naturalization Service in the Department of Justice, the Customs Service in the Department of the Treasury, and the Coast Guard in the Department of Transportation. The President wanted to centralize oversight of immigration control in the Department of Justice, but the President could not simply transfer to the Department the authority that Congress had placed in other agencies. However, OLC advised that the President could select the Attorney General "to serve as his chief adviser on issues relating to border control and instruct all other departments that the Attorney General speaks for him with respect to such policies." OLC recommended that the President issue an executive order to this effect. The order would establish a de facto hierarchical relationship under which the Attorney General, as head of the Department of Justice, would be placed above the other relevant cabinet secretaries whose agencies have some authority over border control policy. As OLC explained:

Such an order would not vest the Attorney General with legal authority to

55. See id.
56. See Rachel E. Barkow, Insulating Agencies: Avoiding Capture Through Institutional Design, 89 TEx. L. REV. 15, 52 (2010) (arguing that presidential power that is placed with agencies "insulate[s] certain policy decisions from presidential control").
57. White House "czars" perform a similar function, albeit from the perspective of a White House official and not a regulatory agency. See Marisam, Duplicative Delegations, supra note 4, at 184, 206–08.
58. See supra note 11.
control the actions of, for example, the Customs Service. The Customs Service would still take its orders from the Secretary of the Treasury, who in turn would receive policy direction from the President, acting through the Attorney General. If the Commissioner of the Customs Service or the Treasury Secretary were to refuse to carry out a specific directive from the Attorney General, the Attorney General would have no authority to remove them or otherwise compel their acquiescence. At the same time, however, they would be contravening a presidential order and could be subject to presidential removal or other sanction.61

President Bush never needed to implement the interagency hierarchy because that same year Congress passed the Homeland Security Act,62 which consolidated in the Department of Homeland Security the immigration, customs, and coast guard agencies that had been dispersed in the three separate departments.63 However, the OLC opinion provided a valuable legal precedent for the proposition that, in a given policy area, the President can name a particular agency whose orders will be followed by other agencies because the agency will be seen as speaking for the President.

Indeed, soon after the OLC's opinion introduced to the President the concept of interagency hierarchies for immigration policy, the President issued an executive order that created an interagency hierarchy for transportation policy.64 The permitting of transportation projects is fragmented among several agencies. Under various statutes, agencies within the Department of Transportation must permit transportation projects.65 Meanwhile, the EPA is often involved in environmental reviews of transportation projects, the Army Corps of Engineers must permit projects that affect the navigability of waterways, the Department of the Interior must permit projects that cross federally owned lands, and the Departments of Commerce and the Interior must approve projects that affect the habitats of endangered species. To streamline the permitting process, the President ordered that "the Secretary of Transportation shall designate for the purposes of this order a list of high-priority transportation

61. Id. at 27–28.
63. See 6 U.S.C. § 111(a) (Supp. II 2004) (establishing the Department of Homeland Security (DHS)); § 202(2)-(6) (listing DHS's border control responsibilities); § 211(a) (establishing within DHS the United States Customs Service); § 251 (transferring to DHS certain functions of the Immigration and Naturalization Service); § 291(a) (abolishing the Immigration and Naturalization Service); § 468(b) (transferring to DHS the functions of the Coast Guard).
infrastructure projects that should receive expedited agency reviews[.]"66 In effect, the Order established an interagency hierarchy for transportation projects in which the Secretary of Transportation is above all the other agency heads. The Transportation Secretary could in essence direct the heads of other agencies to move some permitting applications to the head of their agencies' queues. In the end, although the Secretary of Transportation's list was not created under statutory authority, the other agency heads complied with its terms because the list had the backing of the President.

Overall, presidents have broad discretion to delegate their constitutional powers to agencies. This section described two ways in which presidents have used their constitutional delegation power to alter the administrative scheme established by Congress. First, in areas of jurisdictional overlap between the President and Congress, presidents can select agencies to work with Congress's chosen agency. Second, presidents can delegate their supervisory power to a particular agency, which can then oversee the work of the agencies empowered by congressional statute. As I discuss in Part III, the scope of the President's powers here could trigger important constitutional debates in the future.

C. The President's Agency Overlap Power

The final existing agency selection power, which I refer to as the President's agency overlap power, involves the President's ability to reconcile overlapping jurisdiction among agencies by selecting which of the agencies should act. The United States Code is replete with delegations in separate statutes or statutory provisions that may reasonably be construed as granting the same authority to different agencies. These delegations have created what the legal literature has called "overlapping jurisdictions" and "duplicative delegations."67 Congress's practice of drafting these delegations has been the subject of a growing number of articles concerned with the coordination of agency actions.68 For this Article's purposes, the most important aspect of overlapping jurisdictions among agencies is how presidents manipulate the overlapping jurisdiction to select which agency in

67. See generally Gersen, supra note 7, at 203 (defining overlapping and underlapping jurisdictional schemes as "agency interpretations of statutes that share jurisdiction between multiple political institutions"); Marisam, Duplicative Delegations, supra note 4, at 182 (defining duplicative delegations as "delegations in separate statutes or statutory provisions that may reasonably be construed as granting the same regulatory authority to different agencies").
68. See sources cited supra note 7.
the shared space they want to perform tasks.69

In this Section, I first describe the legal underpinnings of the President’s agency overlap power. I then discuss the political reasons why Congress creates overlap that is likely to be reconciled by the Executive. Throughout, I provide illustrations of how presidents have manipulated overlap to select their preferred agency to act.

1. The President’s Power to Reconcile Overlapping Statutes

For the past few decades, presidents have claimed the power to resolve overlapping jurisdiction among agencies. The overlapping statutes generally do not grant this power to the President. But Congress, by failing to resolve the overlap on its own, implicitly leaves the Executive Branch to figure out how each agency in an overlapping space should act. The President, as head of the Executive Branch, can play a leading role in this regard if he wishes.

The first formal presidential dictate on the matter was a 1979 Executive Order in which President Carter asserted the power to resolve the question of “which [agency] has jurisdiction to administer a particular program or to regulate a particular activity” and delegated this power to the Attorney General.70 Subsequent presidents have relied more on the White House’s Office of Management and Budget (OMB) than the Attorney General to reconcile overlapping jurisdiction among agencies.71

Courts have accepted as legitimate the role that presidents play in reconciling overlap.72 Consider the Supreme Court decision in Train v. Colorado Public Interest Research Group, Inc.73 The case involved overlap between the EPA and the Nuclear Regulatory Commission (NRC), both of which could plausibly claim authority to regulate air and water emissions from nuclear power plants. President Nixon was a proponent of nuclear power,74 and the nuclear industry was concerned that the EPA would
regulate their plants too severely. In line with these preferences, Nixon’s OMB arranged for the NRC to regulate and told the EPA not to regulate.75 The two agencies signed an interagency memorandum memorializing this White House-orchestrated agreement.76 When the Supreme Court later upheld the NRC’s exercise of jurisdiction, it cited to the agreement as support for its outcome.77 Professor Peter Strauss explains that the Supreme Court’s recognition of the President’s role is justifiable because, “[i]f Congress has given apparently conflicting statutory instructions to differing agencies, it will not clearly have established where authority lies,” and presidential reconciliation of the matter “is a readily understandable outcome.”78

2. Reconciling Overlap Due to Ambiguous Delegations

The President’s power to reconcile overlap is significant because Congress creates so much overlap. Overlap arises for several reasons, and chief among them is Congress’s habit of enacting ambiguous delegations that do not precisely lay out agencies’ jurisdictions. Legislators delegate in these terms in part because they lack the time and resources to specify and harmonize jurisdictional boundaries. There are simply too many agencies with too many previous delegations going back decades for Congress to discover and resolve each area of potential overlap within a reasonable amount of time.79 Moreover, even if Congress wanted to delegate in specific terms, it does not have perfect foresight and cannot know what kinds of regulatory problems will emerge to create jurisdictional problems for agencies.80 Thus, Congress does not and cannot easily specify agencies’ jurisdictional boundaries in advance. As a result, multiple agencies have authorizing statutes that can be construed as granting the same authority to each agency.

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77. 426 U.S. at 24–25 n.20.


79. See Marisam, Duplicative Delegations, supra note 4.

80. See id.
The President can take advantage of this overlap to select which of the agencies he wants to act. Consider an instance of overlap between the EPA and the Department of the Interior (Interior). In 1953, Congress authorized Interior to regulate offshore oil projects. In the 1970s, Congress gave the EPA broad powers to regulate air and water pollution. Congress did not take the time to figure out exactly how these new, broad powers should be reconciled with Interior's earlier-enacted powers. That job fell to the Executive. Thus, when it became clear that both agencies could plausibly claim the authority to regulate pollution from offshore oil projects, it was the Carter Administration that resolved the problem. Unsurprisingly, the pro-environment administration sided with the EPA, allowing it to assert authority as the primary regulator of pollution from offshore oil projects.

3. Reconciling Overlap Due to Congressional Committees' Self-Interests

Presidents also reconcile overlap that arises due to the self-interest of congressional committees. Legislators have the greatest influence over agencies under the purview of their committees. To maximize their influence, legislators want their agencies to have expansive regulatory powers. Over time, as different committees broaden the jurisdiction of their own agencies, the agencies' jurisdiction expands into overlapping spaces. The overlap between the Food and Drug Administration (FDA) and the U.S. Department of Agriculture (USDA) is often cited as an example of this effect. The FDA and USDA are overseen by different committees, and over the past century the two agencies have accrued authorizing statutes with substantial overlap as each of the agency's committees have pushed for their agency to receive new powers.

When congressional committees create overlap, it is the Executive that usually resolves it. Perhaps the prime example of White House
reconciliation of overlap between the FDA and USDA comes from the regulation of genetically modified organisms (GMOs). In the 1980s, the production of GMOs was booming. The FDA and USDA, as well as the EPA to some extent, could reasonably assert jurisdiction over various aspects of the new technologies under their broad authorizing statutes. To resolve the overlap, the White House created a working group to assign regulatory tasks to each agency. The Reagan White House wanted policies that promoted and did not hinder the development of this new technology by American firms. As a result, it assigned the primary authority to the USDA, an agency whose chief mission is the promotion of American agriculture business. It assigned secondary authority to the FDA and EPA, agencies with more exclusively regulatory missions that are also known for taking more stringent regulatory approaches than the USDA.

Overall, the design of congressional committees that oversee different agencies has led to an increase in overlapping jurisdiction among agencies. Presidents take advantage of this overlap by selecting which of the agencies in the overlapping space should perform particular tasks.

4. Reconciling Overlap Due to Congressionally-Created Agency Competitions

Finally, the President can also reconcile overlap created by Congress’s desire to spur agency competition. Under the agency competition theory, overlap arises because Congress intentionally creates jurisdictional arrangements that will encourage agencies to compete with each other for power. The agency competition theory assumes that agencies are motivated by power and that two agencies with overlapping jurisdiction will compete for sole control of this space by trying to outperform each other. Congress monitors the competition and rewards the agency whose outputs align with Congress’s goals by increasing its jurisdiction and stripping the losing agency of some jurisdiction. The end result is that, in order to win the congressional grant of power, agencies produce administrative outcomes that are closer to Congress’s preferences than they otherwise


88. See Noah Zerbe, Risking Regulation, Regulating Risk: Lessons from the Transatlantic Biotech Dispute, 24 Rev. of Pol’y Res. 407, 409–10 (2007) (describing the apparent conflict of interest between the Department of Agriculture’s (USDA’s) role as the primary regulator of genetically modified organisms (GMOs) and its mission of promoting technological innovation).

89. See Gersen, supra note 7.
would be.90

The theory of agency competition has been attacked for its questionable assumption that agencies are always motivated by power.91 Agencies also have a number of other motivations—such as avoiding regulatory failures—that can cause them to avoid tackling new tasks as part of an interagency competition. But even if Congress were to place two power-maximizing agencies in competition with each other, there is another problem with the theory as stated: it assumes that Congress, and not the President, picks the winning agency. In reality, the President is more likely to choose which agency with overlapping jurisdiction will exercise more authority in the overlapping space because it is easier for the President to resolve the overlap.

For Congress, the task of picking the winning agency is cumbersome. First, a majority of legislators must agree on which agency won the competition. If the competing agencies are under the purview of different committees, then each committee is likely to fight for its own agency, making agreement difficult. Second, Congress must then devote resources to drafting amendments to the statutes to grant more power to the winning agency, and then to scheduling a vote on the matter. The amendment must then pass both houses and be signed by the President. By contrast, when the President wants to resolve a matter of overlapping jurisdiction, the President can unilaterally decide which agency should act exclusively and then direct the agencies to behave according to his decision.

As a result, even if Congress creates overlap to spur agency competition, it is more likely that the President will resolve that overlap as he sees fit and not Congress. To illustrate, consider the Supreme Court decision in Gonzales v. Oregon,92 which has been cited as a case involving jurisdictional overlap and agency competition between the Department of Justice and the Department of Health and Human Services (HHS).93 In 1994, Oregon legalized physician-assisted suicide.94 Under federal law, prescription drugs can only be prescribed for legitimate medical purposes, and the question soon arose in President Clinton’s Administration whether assisted suicide

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90. See id. at 212 (“Giving authority to multiple agencies and allowing them to compete against each other can bring policy closer to the preferences of Congress than would delegation to a single agent.”).
91. See Daryl J. Levinson, Empire-Building Government in Constitutional Law, 118 HARV. L. REV. 915, 932–33 (2005) (questioning whether the primary motivation for many agency actions is to increase the size of the agency’s budget).
93. See Gersen, supra note 7.
94. 546 U.S. at 249.
was a legitimate purpose. Clinton's Department of Justice decided that it would leave this medical determination to the states, freeing Oregon doctors to use drugs for assisted suicides in their state. After President Bush took office in 2001, the Department of Justice reversed course and issued an interpretive rule that prohibited doctors from prescribing drugs for use in physician-assisted suicides. The Supreme Court ultimately invalidated the rule, holding that Congress had placed the authority to make these medical determinations with HHS and not the Department of Justice.

For our purposes, the importance of the case is not the Court's holding but the treatment of the case as an instance of agency competition. It is not at all clear that Congress intended for the two departments to compete for power. But, even assuming Congress desired competition, it was presidential politics and not congressional politics that determined the winner of that competition. The Department of Justice issued the assisted-suicide opinion not to please legislators who were observing how the agency behaved in the overlapping space with HHS, but because the newly-inaugurated Bush Administration was opposed to assisted suicide and wanted to reverse the policy of its predecessor. Perhaps a different president more in favor of rigorous medical judgments would have arranged for a larger role for HHS instead of leaving the decision entirely to the Department of Justice. But even in that case, it would have been the President and not Congress selecting which agencies would participate in the assisted suicide decision.

While it is true that the President's choice of agency was eventually overturned by the Supreme Court, such judicial intervention is the exception. In most instances, when Congress creates overlap the President can reconcile that overlap if he wishes, and the President's decision will determine how the agencies act.

Overall, given the sheer volume of existing overlap and the great likelihood that Congress will continue to create interagency overlap at a fast clip, the White House's role in reconciling overlap has proven a boon to presidential power. This power is narrow in the sense that the President's choices are limited to those agencies whose authorizing statutes can reasonably be construed as granting them authority for the matter at hand, unlike the subdelegation and constitutional delegation powers for which the

95. Id. at 253.
96. Id.
97. Id. at 253-54.
98. Id. at 294-96 (Scalia, J., dissenting).
President can choose any agency or agency official. However, the President’s implicit power to reconcile overlapping jurisdiction is quite far reaching in the sense that such overlap is rampant and exists among most agencies in nearly all regulatory areas. As a result, overlapping jurisdiction provides the President the ability to influence agency selection in an array of regulatory areas, even though Congress never explicitly granted the President that authority.

D. The President’s Reorganization Authority

For half of the twentieth century, Congress periodically granted presidents reorganization authority to transfer functions among agencies and create and abolish agencies. In other words, presidents could select which agency should perform particular functions and, if they did not like the existing menu of agencies, they could create a new agency and transfer existing agencies’ powers to that agency. The President’s reorganization authority last expired in 1984 and has not been renewed, despite calls from subsequent presidents. Why has Congress halted presidential agency selection through the reorganization authority but done comparatively little to impede presidential agency selection through subdelegation, constitutional delegation, or agency overlap? I argue that modern Congresses are reluctant to renew the authority in large part because presidential reorganization plans minimized legislative influence during the crucial stage of an agency’s inception, when agency designers have the unique opportunity to shape an agency’s decisionmaking structure. The other agency selection powers affect which agencies perform particular tasks, but they do not involve the more influential decision about how to create agencies and thus have not generated as much congressional backlash.

This Section first discusses the conception of the reorganization authority. It then discusses the demise of the reorganization authority.

1. The Creation of the Reorganization Authority

Congress first passed the reorganization authority in 1932. The law authorized the President to submit to Congress reorganization proposals that created, abolished, and transferred functions among agencies. Procedurally, Congress could not amend the President’s plans but could block them if one house passed a resolution of disapproval. If Congress did

100. See HOGUE, supra note 3, at 1.
101. See id. at 2.
102. Reorganization of Executive Departments, 47 Stat. 413 (1932).
not act, though, the plans would take effect sixty days after they were submitted.\textsuperscript{103}

The law effectively ceded to the President the most important agency design decision: how to structure an agency at its inception. When an agency is created, the agency designers have a unique opportunity to put their imprint on the agency in a way that will influence decisions that the agency makes for years to come. As Professor Jonathan Macey has shown, the "ability to design and structure an agency will 'hardwire' the agency to generate decisions that reflect the original understanding of the enacting coalition."\textsuperscript{104} By setting the jurisdictional boundaries for the agency, the designers determine which interest groups will have access to the agency. For example, the choice to create an agency that regulates a single industry or one that regulates multiple industries will have a significant impact on the agency's decisions because single-industry agencies are more likely to produce outcomes favorable to their lone clientele, while multi-industry agencies make decisions that more likely balance the competing interests that they regulate.\textsuperscript{105}

Congress initially granted this influential power to the President because the exigencies of the Great Depression seemed to demand new administrative structures, and it was clear that the President, by virtue of his position as the single figure atop the executive hierarchy, was best suited to create these structures quickly and coherently.\textsuperscript{106} However, even from the beginning, Congress was wary of granting the President indefinite agency creation authority, and it slated the first reorganization law to lapse three years after it was enacted. When President Franklin Roosevelt pushed for the renewal of the authority, it led to "one of the hottest debates in years."\textsuperscript{107} Eventually, Roosevelt convinced Congress to renew the authority for two more years. The first major reorganization under the law came in 1939 when Roosevelt created the Federal Security Agency (FSA) to administer social service programs.\textsuperscript{108} Multiple agencies' functions were transferred from existing cabinet departments to the FSA in the process.\textsuperscript{109}

\begin{enumerate}
\item \textsuperscript{103} \textit{Id.}
\item \textsuperscript{106} See Christopher S. Yoo et al., \textit{The Unitary Executive During the Third Half-Century, 1889-1945}, 80 NOTRE DAME L. REV. 1, 104 (2004).
\item \textsuperscript{107} \textit{Id.} at 106.
\item \textsuperscript{109} \textit{Id.} at Reorganization Plan No. 1, 3 C.F.R. 248 (1939).
\end{enumerate}
2. The Demise of the Reorganization Authority

Congress became increasingly concerned about the scope of the reorganization authority as the emergencies of the Great Depression and World War II faded. Congress still periodically renewed the authority at presidents' requests, but it began to add procedural and jurisdictional restrictions that chipped away at the President's reorganization power. For example, in 1957, Congress amended the authority to allow a simple majority of either house who were present and voting to disapprove a plan, instead of a majority of the entire authorized membership of a house. In 1964, Congress agreed to renew the law but denied the President the authority to propose creating new executive departments. In 1971, Congress restricted the President's authority further by requiring that presidents limit their plans to "one logically consistent subject matter." In 1977, Congress prohibited presidents from proposing plans that would establish, abolish, or consolidate cabinet-level departments or independent regulatory agencies.

During this time, presidents produced plans that made many minor structural changes and a few major ones. The major reforms often involved the creation of a new agency with broad powers. For example, in 1970, President Nixon used the authority to create the EPA and consolidate environmental functions in the new agency. He transferred several environmental functions and agencies from Interior, the USDA, and the Department of Health, Education, and Welfare to the EPA. In 1978, President Carter created the Federal Emergency Management Agency (FEMA) by transferring agencies and functions from the Department of Commerce and the Department of Housing and Urban Development to the new agency.

Procedurally, the reorganization authority underwent its greatest change after the Supreme Court, in the 1983 opinion *INS v. Chadha*, held that one-house vetoes of the sort used in the reorganization law are unconstitutional. The next year, Congress renewed the reorganization authority but substituted the unconstitutional one-house veto provision with the constitutionally permissible requirement that Congress adopt a joint

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110. See Hogue, supra note 3, at 22.
111. See id. at 23.
115. See id.
118. Id. at 959.
resolution approving the President’s proposed reorganizations.\textsuperscript{119} This procedural change made it more difficult for presidents to reorganize the Executive Branch. Previously, presidential plans took effect even if Congress failed to act, but now presidents had to hope that Congress could overcome its collective action problem and form majorities to approve the plans. The 1984 reorganization law expired later that same year.\textsuperscript{120}

For almost twenty years after the 1984 law expired, no president directly requested that Congress renew the reorganization authority, perhaps because the authority was less appealing without the one-house veto provision.\textsuperscript{121} Eventually, under President George W. Bush’s Administration, legislation was introduced that would have renewed the authority, but it was not enacted.\textsuperscript{122} More recently, in February 2012, President Obama conveyed to Congress a legislative proposal that would renew the authority.\textsuperscript{123} Obama proposed using the authority to remake the Department of Commerce into a new cabinet department with a different name and new functions.\textsuperscript{124}

No president had been given the authority to create a new cabinet department in over fifty years, and Congress was not prepared to cede that important agency creation power to the President in 2012. Some legislators expressed concern that Obama’s proposal would let the President design a new cabinet department without affording Congress the opportunity to amend the proposal and set its own design details for the department. For example, Senator Susan Collins remarked that Congress should not enact a bill that would “undermine Congress’s ability to carefully consider and amend” agency design plans.\textsuperscript{125} As a result, Obama’s proposal failed to muster enough support in Congress, and the reorganization authority remains defunct.

In short, Congress was never enthusiastic about granting presidents broad agency creation powers. It has only enacted reorganization laws that lapsed after a short period. Over time, it placed increasingly significant restrictions on the scope of the authority until it finally decided to stop renewing the reorganization law entirely.

The President’s ability to select agencies through subdelegation,
constitutional delegation, and agency overlap powers have not engendered the same congressional hostility because they do not involve the creation of new agencies but rather the rearranging of more narrow tasks and functions among existing agencies. This rearranging has an impact on congressional dynamics because Congress oversees the agencies and different legislators may have different preferences about which agency should perform particular tasks, especially if the legislators sit on different committees. But the exercise of these agency selection powers does not deprive Congress of input on the more important agency creation questions. As a result, the existing agency selection powers have managed to persist and even expand, as the next Part shows.

II. AGENCY SELECTION AND EXECUTIVE AGENCY REVIEW

This Part discusses a special case of presidential agency selection: the use of agency selection powers to create alternatives to centralized review of agency rules by the White House’s Office of Information and Regulatory Affairs (OIRA). In these alternatives, agencies’ proposals are reviewed not by OIRA analysts but by regulators at other executive agencies. For shorthand, I refer to these kinds of structures as executive agency review. The primary benefit of executive agency review compared to OIRA review is that presidents can structure the review institution to produce stronger regulations—unlike OIRA review, which primarily has an anti-regulatory effect.

The analysis in this Part shows the versatility of the agency selection powers, documents how the aggressive use of these powers can trigger legal contests, and highlights potential constitutional concerns with the powers.

This Part proceeds as follows: Section A briefly describes the OIRA review process; Section B describes its anti-regulatory bias; Section C describes how presidents have created a few small-scale executive agency review institutions through their constitutional delegation power. It then focuses on how President Obama has used his agency overlap power to create a couple of pro-regulatory alternatives to OIRA review.

A. The OIRA Review Process

OIRA review is the primary institution through which agencies’ rules are screened before they are enacted. It is also one of the most important

tools that presidents use to control administrative outcomes because OIRA analysts can reject agency proposals that do not align with the President’s agenda.

President Reagan established OIRA review of proposed agency regulations primarily to “provide for presidential oversight of the regulatory process” and “insure well-reasoned regulations.”127 Subsequent presidents have continued to rely on OIRA review for the same purposes.128 Under the review process, agencies must submit to OIRA all “significant” rules, which are those that have an annual effect on the economy of over $100 million as well as those that “interfere with an action taken or planned by another agency.”129 OIRA then reviews the costs and benefits of the proposed rule. If a proposal is not cost-effective, OIRA can return the proposal to the agency for reconsideration.130 At heart, this process is supposed to improve the rationality of regulations by stopping rules from going forward if they do not make sense once the full array of costs are taken into account.

It is easy for White House influence to creep into the review process, though. There is almost always some additional cost or policy alternative that an agency could consider. If the White House would prefer to stall a regulation for political reasons, OIRA can flag overlooked cost or information that needs analysis.131 Similarly, if the White House wants to kill or dramatically alter a proposal, OIRA can always demand that the agency consider additional policy alternatives.132

Proponents of a strong executive cite OIRA’s responsiveness to presidential priorities as a positive aspect of OIRA review. They argue that the link to the President brings democratic accountability to a regulatory process otherwise run by unelected bureaucrats, and injects the energy of presidential leadership into a decisionmaking process that would otherwise

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129. Id. at 51,738.
131. For example, in 2011, OIRA rejected an EPA proposal to update national ambient air quality standards for the stated reason that new information would soon be available that the agency could use to produce a more up-to-date cost-benefit analysis of its proposal. See Letter from Cass R. Sunstein, Adm’r of OIRA, to Lisa P. Jackson, Adm’r of EPA (Sept. 2, 2011), http://www.whitehouse.gov/sites/default/files/ozone_national_ambient_air_quality_standards_letter.pdf.
132. See RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY 156-57 (2008) (noting that “delay can be used as a tactic . . . to kill new regulation”).
advance haltingly.133 By contrast, others have argued that too much presidential influence can turn technocratic decisionmaking into overly politicized, arbitrary results.134

The normative debate over OIRA review has been lengthy and heated. Initially, the constitutionality of OIRA review was questioned on the grounds that presidents used OIRA to impermissibly impede the acting agency’s decisionmaking autonomy.135 The Supreme Court has never decided this constitutional question, but the weight of scholarly opinion and an opinion from the D.C. Circuit support the constitutionality of OIRA review.136 Few scholars continue to object to OIRA review on constitutional grounds. Five presidents have now relied on OIRA to shape regulatory outcomes, and it has become a fixture of the administrative state.137

B. OIRA Review’s Anti-Regulatory Bias

While OIRA review enhances presidential control over agency actions, OIRA review is deficient in at least one respect: it is designed to stop regulations, not to find ways to make regulations stronger.138 As a result, for regulatory areas in which presidents want to push stronger regulations, OIRA review is less helpful.

The anti-regulatory bias simply stems from how the review process was designed and where OIRA’s strength lies. President Reagan established

133. See Kagan, supra note 11, at 2340–41.
135. See Kagan, supra note 11.
137. See Christopher C. DeMuth & Douglas H. Ginsburg, White House Review of Agency Rulemaking, 99 HARV. L. REV. 1075, 1083–84 (1986) (noting that OIRA’s job is “to serve as the eyes and ears of the President and to advance generally the set of policies (or just ‘attitudes’) that brought the President to the head of the government”); Susan E. Dudley, Observations on OIRA’s Thirtieth Anniversary, 63 ADMIN. L. REV. 113, 116 (2011) (noting that OIRA analysts “respect the authority of the President and his political aides, and work with agencies to ensure that regulations reflect presidential policies”).
OIRA review to stop regulations that are too costly for regulated industries, not to push for new or stronger regulations. OIRA continues to perform that same basic function. A 2003 report by the General Accounting Office (now Government Accountability Office) found that, in 2001 and 2002, OIRA review never resulted in stricter environmental, health, and safety regulation. Furthermore, OIRA review is designed to screen a greater proportion of regulations from agencies that have broad mandates to craft public-protecting regulations, such as the EPA and the Occupational Health and Safety Administration (OSHA). These agencies’ jurisdictions are spread over multiple regulated industries. As a result, their rules hit more firms and are likely to generate more costs for these firms. Because OIRA is set up to screen the rules with the most significant costs, the office reviews a large share of rules from these pro-regulatory agencies. The effect is that a greater proportion of the proposals from these protector agencies are slowed or stopped under OIRA review.

Some have argued for reforming OIRA to make it better at adding beneficial regulatory actions to the books instead of just blocking costly actions from taking effect. For example, in 2002, Professor Cass Sunstein and Robert Hahn argued that OIRA should not be used solely “to reduce and limit regulation, but also to spur regulation in those cases where it will do more good than harm.” But when Sunstein later served as the head of OIRA during the first four years of the Obama Administration, he was unable to transform the office into a pro-regulatory force. One of OIRA’s greatest successes during Sunstein’s tenure was a “lookback” program, which, in Sunstein’s words, was an “unprecedented government-wide review of regulations already on the books so that we can improve or remove those that are out-of-date, unnecessary, excessively burdensome or in conflict with other rules.” The program may have been a remarkable achievement, but it was a deregulatory achievement. Even with a relatively pro-regulatory president and OIRA director, such as Obama and Sunstein, OIRA’s institutional structure remains most suited for advancing the part


141. Livermore & Revesz, supra note 132, at 49.

142. Hahn & Sunstein, supra note 139, at 1495.

143. Id.

of the President's agenda that is deregulatory or anti-regulatory.

The failure to transform OIRA into a pro-regulatory institution is understandable. OIRA analysts are mostly experts at reviewing regulations. They have little or no experience creating policy proposals that generate benefits. Reforming OIRA to make it more pro-regulatory would require transforming the entire culture of the Office through an influx of new staff with far more experience crafting and enforcing regulatory policy and spotting opportunities for beneficial regulations. No president has been willing to absorb these costs. OIRA review remains a powerful presidential tool for screening rulemakings, albeit one that is less useful when the President's goal is to strengthen rulemakings.

As a result, OIRA review is less valuable to presidents like Obama and Clinton who have a comparatively pro-regulatory agenda. These presidents still use OIRA review to shape proposals to their policy preferences, but they use OIRA less often or less rigorously, effectively giving deference to the regulatory agencies that propose the rules. For example, in her influential article on presidential administration, now-Justice Elena Kagan shows that under Clinton, OIRA "chose less often than prior [OIRAs] to cross swords with the agencies on the most critical matters." She posits that "the lack of conflict arising from regulatory review in the Clinton years indeed resulted from a less interventionist stance on the part of [OIRA]," which was attributable in part to "a convergence of views about regulatory policy between rulemaking agencies and the [OIRA] of a Democratic President." By contrast, comparatively anti-regulatory presidents like Reagan and George W. Bush have used OIRA review to push back on regulatory agencies' proposals more forcefully.

C. Executive Agency Review as an Alternative to OIRA Review

To avoid OIRA review's anti-regulatory design, presidents can create institutions in which agencies are subject to review not by OIRA analysts


146. See Susan E. Dudley, Prospects for Regulatory Reform in 2011, 12 ENGAGE: J. FEDERALIST Soc'Y PRAC. GRPS. 7, 13 (2011) ("During the first year of the Obama Administration, the average length of OIRA review, which may be a reasonable proxy for the rigor of that review, was significantly less than the averages in previous Administrations.").


148. Id.

149. See LIVERMORE & REVESZ, supra note 132, at 156–57.
but by regulators at a different executive agency. While OIRA is designed to reduce regulatory costs, pro-regulatory agencies like the EPA are designed to produce policies that benefit the public. At these agencies, it is part of the professional culture that regulators are supposed to offer credible policies that protect the environment, public health, and safety. If regulators at these agencies reviewed other agencies’ work, stronger regulatory actions would likely result.

Below, I describe how presidents have used their constitutional delegation power to create these kinds of executive agency review institutions. I then describe how the Obama Administration, in two instances, has used its power to reconcile agency overlap to create executive agency review institutions. In the second instance, the legality of the Administration’s scheme is now before the D.C. Circuit. It is ironic that presidents have created counterpoints to OIRA given that OIRA review is entirely a presidential creation and under presidential control; but the institutional biases of OIRA review make such a counterpoint necessary.

1. The Constitutional Delegation Power and Executive Agency Review

In a few instances, presidents have used their constitutional delegation power to create executive agency review structures designed to strengthen regulation. For example, to coordinate the implementation of various nondiscrimination statutes enforced by many agencies, President Reagan directed the Attorney General to “review the existing and proposed rules, regulations, and orders of general applicability of the executive agencies in order to identify those which are inadequate, unclear or unnecessarily inconsistent.”150 The Attorney General had no statutory power to review these rules. His power was derived from the presidential order.151 Similarly, consider President Clinton’s plan for agencies to improve their recycling and waste prevention operations. Congress delegated to the President the authority to establish guidelines for how agencies would reduce waste.152 Clinton issued an order laying out those guidelines and then delegated to an officer in the EPA the power to “take all actions necessary to ensure that the agencies comply with the requirements of this order . . .”153 In effect, the EPA officer was acting in the President’s stead to supervise the other agencies’ implementation of the order and ensure

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151. Id.
their efforts were sufficient.

Presumably, the President’s power to create these structures is rooted in the President’s broad powers under Article II of the Constitution. If these powers were construed broadly, then presidents could create executive agency review structures that are far more ambitious than those in the examples above. Presidents could upend major congressional regulatory schemes by requiring an acting agency—that is, the agency authorized by Congress to take final action in a particular regulatory matter—to submit its proposals to another agency of the President’s choosing. For any regulatory matter, the President could then ensure that the agency of his choosing had effective veto power over Congress’s chosen agency. Moreover, if presidents were to use this power to create pro-regulatory executive agency review structures, then the exercise of this power could serve as a system-wide corrective for the anti-regulatory bias of OIRA review.

However, no president has pushed his power this far, perhaps because it would raise serious separation of powers and rule of law concerns. As a separation of powers matter, even though OIRA review is likely constitutional, it does not follow that a similar executive agency review structure is also constitutional. OIRA is not an executive agency but is instead part of the Executive Office of the President (EOP). There is a distinction between the “heads of departments or agencies,” who “have statutory obligations” and “can and do act independently” of the President, and EOP officials who primarily serve as “nonstatutory advisers to the President.” EOP officials, like those at OIRA, are subject to far less oversight from Congress and the judiciary than are executive agencies.

154. There is a long, ongoing debate over the scope of the President’s powers over executive agencies. See, e.g., Kagan, supra note 11; Lessig & Sunstein, supra note 23; Stack, supra note 11; Peter L. Strauss, Presidential Rulemaking, 72 CHI.-KENT L. REV. 965 (1997); Christopher S. Yoo et al., The Unitary Executive in the Modern Era, 1945–2004, 90 IOWA L. REV. 601 (2005).


In fact, OIRA decisions are generally not subject to judicial review.159 By contrast, the President’s power over executive agency officials is shared with Congress and the judiciary to a much larger extent. As a result, the President may have less constitutional power to turn executive agency officials into OIRA-style White House advisers who monitor other agencies for the President.160

More speculatively, executive agency review may undermine rule of law norms. The rule of law requires that executive agencies’ actions can be traced to a legal source, usually a statute. However, if the President can imbue all executive agencies with the President’s supervisory powers and have those agencies act through those powers, it could blur the lines of accountability because, for any given agency action, it could be difficult to know whether that action stems from congressional or presidential authorization and thus whether Congress or the President should be held accountable.161

Ultimately, this constitutional uncertainty may chill presidents from using their constitutional delegation power to create executive agency review institutions that are too broad or controversial and thus likely to generate political and legal challenges.

2. Using Agency Overlap to Create Executive Agency Review

Aside from the constitutional delegation power, presidents can ground their executive agency review structures in the implied statutory authority from overlapping statutes. Most statutes that create overlapping jurisdiction do not create clear procedural rules for how the agencies should interact in that space. Often, the White House or the agencies themselves reconcile the overlapping statutes by settling on a single agency that will exercise authority in that shared space, as discussed in Part I. But the Executive can also reconcile the overlap by creating procedures under which one agency will review the work of another agency. Because these

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159. See Franklin v. Massachusetts, 505 U.S. 788, 800-01 (1992) (holding that the President is not an “agency” subject to the Administrative Procedure Act (APA) despite the APA’s inclusive language); Fred Anderson et al., Regulatory Improvement Legislation: Risk Assessment, Cost-Benefit Analysis, and Judicial Review, 11 DUKE ENVTL. L. & POL’Y F. 89, 127 (2000) (explaining that because the President is outside of the ambit of the APA, “courts do not engage in direct review of OIRA oversight”).

160. Moreover, the distinction between Executive Office of the President (EOP) offices like OIRA and executive agencies has had some doctrinal relevance, mostly in cases holding that not all EOP offices are “agencies” as defined by the Freedom of Information Act and thus not subject to document requests under the Act. See, e.g., Meyer v. Bush, 981 F.2d 1288 (D.C. Cir. 1993).

executive agency review structures are rooted in implied statutory authority, they do not raise the constitutional concerns discussed above, but they may still run into legal trouble by transgressing statutory bounds set by Congress.

The Obama Administration used overlap to create pro-regulatory executive agency review structures in at least two instances. The first review structure involved the EPA's and Department of Transportation's overlapping authority to set fuel efficiency standards. For decades, the EPA played a minor role in the overlapping space, serving mostly as a consultant to Transportation's National Highway Safety and Transportation Administration (NHTSA), which crafted the final standards. When President Obama came to office, he wanted to significantly strengthen the existing fuel efficiency standards. The Obama Administration apparently did not believe that NHTSA was up for this task alone. NHTSA had a reputation for being an inefficient regulator that did not proactively challenge the auto industry. Moreover, at least one court had found that NHTSA underestimated the environmental benefits from stricter regulation. To produce stricter standards, the White House directed the EPA to become an equal player in the standard setting regime. As a result of the White House directive, the EPA reviewed the cost-benefit analyses and technical assessments that NHTSA had used to support its prior fuel efficiency standards, and the EPA helped correct for cost estimates that were too high. Moreover, the EPA helped develop assessments that better captured the environmental benefits of strict fuel efficiency standards. In effect, the Obama Administration used overlap between NHTSA and the EPA to create new decisionmaking procedures in

165. Ctr. for Biological Diversity v. NHTSA, 538 F.3d 1172, 1188 (9th Cir. 2008).
which the EPA reviewed NHTSA's earlier work and pushed for changes that would help justify new, stricter standards. The result was stricter regulation than otherwise would have been enacted.\footnote{169}

3. \textit{National Mining Association v. Jackson}

President Obama also crafted a second, more ambitious executive agency review structure that was designed for the EPA to screen permitting decisions by the Army Corps of Engineers (the Corps) under the Clean Water Act (CWA).\footnote{170}

Section 404 of the CWA charges the Corps with permitting the disposal of certain mining waste materials in streams and valleys, including waste from surface mining operations.\footnote{171} Environmentalists have not been pleased with the Corps' track record on surface mining.\footnote{172} Their concern is that, because the Corps' expertise is navigability and not environmental harms, it has failed to adequately focus on these harms.\footnote{173} To improve environmental protection, President Obama created an executive agency review institution in which the comparatively pro-regulatory EPA reviews the Corps' pending permit applications and designates some permits for an enhanced review process.\footnote{174} Under this review process, the "EPA will attempt to 'resolve' environmental concerns raised by the permit application by, for example, proposing revisions to proposed discharges, special conditions, or mitigation requirements."\footnote{175} The EPA's suggestions are not binding on the Corps, but carry great weight because they are likely perceived as having the President's support.

\begin{itemize}
\item \footnote{169}{See id.}
\item \footnote{170}{33 U.S.C. § 1344(a), (d) (2006).}
\item \footnote{171}{Id.}
\item \footnote{173}{See Coeur Alaska v. Se. Alaska Conservation Council, 129 S. Ct. 2458, 2482 (2009) (Ginsburg, J., dissenting) ("Section 404 hews to the Corps' established expertise in matters of navigability and construction.").}
\item \footnote{174}{Although the plan was signed by the agency heads, the White House took credit for the initiative. See Press Release, Evntl. Prot. Agency, Obama Administration Takes Unprecedented Steps to Reduce Environmental Impacts of Mountaintop Coal Mining, Announces Interagency Action Plan to Implement Reforms: Federal agencies take coordinated action to strengthen oversight and regulation, minimize adverse environmental consequences of mountaintop coal mining (June 11, 2009).}
\item \footnote{175}{Complaint, Nat'l Mining Ass'n v. Jackson, 880 F. Supp. 2d 119 (D.D.C. July 20, 2010) (No. 1:10cv-01220), 2010 WL 2910972.}
\end{itemize}
In effect, the Obama Administration created a process in which the EPA's review of Corps-issued permits looks very much like OIRA's review of proposed rulemakings, except that the review creates more stringent regulations instead of reducing the cost of regulation. While OIRA rejects proposals that violate a cost-benefit analysis and proposes revisions to improve a proposal, the EPA rejects permits that do not place sufficient environment-protecting conditions on the permit holder and recommends conditions that will better protect the environment and public health. Notably, because OIRA only reviews rulemakings and not permits, the Corps's decisions here were only subject to EPA review and not OIRA review.

The Administration rooted its authority to establish this structure in the statutory overlap created by the CWA. The CWA authorizes the Corps to issue mining permits that take into account environmental harms, but it also authorizes the EPA to veto Corps-issued permits that have an “unacceptable adverse affect” on the environment. Thus, under the statute, both agencies are authorized to consider the environmental harms of mining operations. For decades, the EPA's role in analyzing the environmental harms was informal, with the EPA submitting its environmental analysis to the Corp on an ad hoc basis. The Obama Administration asserted that the agencies' decision to replace this informal process with more formalized, enhanced review procedures fell “within their broad discretion to establish the procedures necessary to carry out their statutory functions.”

However, by creating a formalized review structure on top of the procedures set by Congress, the Obama Administration may have departed too much from the administrative structure established by Congress. A district court has recently enjoined the EPA from implementing the enhanced review of the Corps' permits, concluding: “the carving out [in the CWA] of limited circumstances for EPA involvement in the issuance of Section 404 permits appears to be a statutory ceiling on that involvement,” which the EPA violated by resorting to the new and enhanced review procedures. The case is now on appeal to the D.C. Circuit. Generally, the Supreme Court has held that executive agencies “should be free to fashion their own rules of procedure” on top of those set by Congress. However, this presumption in favor of additional procedures

178. 816 F. Supp. 2d at 43.
179. Id. at 44.
180. Id.
has traditionally been applied to a single agency developing procedures for itself and not procedures for how two agencies interact. It is now up to the D.C. Circuit to determine whether the executive should be free to fashion interagency rules of procedure on top of those set by Congress.

But *National Mining Association* is not just a case about this narrow doctrinal issue. Underlying the case are the far larger questions of how agency selection boosts the President's power over agencies and whether presidential agency selection is desirable. In Part III, I further explain how agency selection helps the President by comparing it to the removal power. In Part IV, I turn to the normative question.

III. COMPARING AGENCY SELECTION AND REMOVAL

Presidents have an array of powers that they use to influence administrative decisions, and one of the most examined is the President's power to remove executive officers. This Part uses the removal power as a foil to help explicate the operation and usefulness of the President's agency selection powers. Because both the removal power and the agency selection powers ultimately turn on the question of who in particular will execute laws, the removal power provides a useful point of comparison.

In this Part, I first discuss the legal, procedural, and political costs and constraints on the President's removal power. I then compare the agency selection powers to the removal power along these same dimensions. I conclude that, when available, presidents' agency selection powers operate as a less costly alternative to the removal power. I then illustrate this point with two recent examples in which presidents used their agency selection powers to change which agency and officials were responsible for particular regulatory matters.

Throughout, this Part assumes that presidents are rational actors who want to expand their control over administrative outcomes but are sensitive to the costs of doing so, in particular the costs that come from the legal, political, and institutional constraints on their use of executive powers.

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182. See Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1244 (1994) ("debate [on presidential power] has focused almost exclusively on whether and when the President must have unlimited power to remove subordinate executive officials") (emphasis omitted); John Yoo, *Unitary, Executive, or Both?*, 76 U. CHI. L. REV. 1935, 1939 (2009) ("Current legal scholarship on the Presidency remains focused on the removal debate.").

183. See Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097 (2013); Aziz Z. Huq, *Binding the Executive (by Law or*
Because of their sensitivity to costs, presidents will often eschew the use of one executive power in favor of less costly or otherwise more desirable alternatives.

A. The Removal Power’s Costs and Constraints

The Constitution grants the President the power to appoint many executive officers with Senate consent. The appointments power affords presidents the ability to fill the Executive Branch with officers who share most of the President’s basic goals and are likely to pursue those goals faithfully. However, presidents do not have perfect foresight and cannot know the precise problems that their appointees will face and how they will respond. If it later turns out that an agency head is not performing up to the President’s expectations, the Constitution also affords the President the power to remove the officer. The removal power is thus supposed to ensure that presidents have agency heads who act to their liking, at least in theory. However, the removal power has significant legal, political, and procedural costs and constraints that make it an impossible or impracticable option for presidents much of the time. In particular, the removal power does not apply fully to independent agencies, applies weakly, if at all, to civil servants, leads to vacancies that can take considerable time to fill with Senate-confirmed appointees, and can generate significant political backlash.

1. The Limited Scope of the Removal Power

a. Independent Agencies

While the President can appoint all cabinet secretaries with Senate approval and remove the same secretaries at will, he does not have the same luxury for the heads of many so-called independent agencies. Congress has created dozens of agencies whose heads are removable only “for cause”—such as the Consumer Product Safety Commission and


FERC. For these agencies, presidents cannot remove officers for mere policy disagreements. Thus, heads of these agencies can disagree with the President and be confident that they will not lose their jobs. The President will be stuck with these officials until their terms in office expire.

Moreover, some independent agencies whose heads are not protected from removal by statutory clauses have come to be seen by legal elites and Washington actors as possessing removal protection nonetheless. For example, the Securities and Exchange Commission (SEC) Commissioners are not protected by a for-cause removal clause and yet, because the agency has operated with some independence from the President for decades, courts have assumed that presidents can remove the Commissioners only for cause. For the SEC and agencies like it, removal is just as unlikely as if Congress had written for cause protection into the organic statute.

Overall, because of the removal restrictions for independent agencies, presidents almost never remove the heads of independent agencies and cannot plausibly threaten such removal in most circumstances. As a result, independent agency heads are comparatively less responsive to presidential demands.

191. See Adrian Vermeule, Conventions of Agency Independence, 113 COLUM. L. REV. 1163, 1166 (2013) ("Agencies that lack [for cause] tenure yet enjoy operative independence are protected by unwritten conventions that constrain political actors from attempting to bully or influence them").
193. Many of these independent agencies are also multi-member commissions with staggered terms, which further insulates them from presidential control. See Rachel E. Barkow, Insulating Agencies: Avoiding Capture Through Institutional Design, 89 TEX. L. REV. 15 (2010) (explaining how the agencies' multi-member structure is an administrative design to ensure independence).
195. See Lisa Schultz Bressman, Procedures as Politics in Administrative Law, 107 COLUM. L. REV. 1749, 1807 (2007) (arguing that Chevron's equal applicability to independent and nonindependent agencies is not puzzling because Congress "fills the gaps" for the former and the President does so for the latter); Strauss, supra note 5, at 592 ("[A]s a former FTC Chairman recently remarked, the independent agencies 'have no lifeline to the White
b. Civil Servants

The removal power is also largely inapplicable to civil servants. Although civil servants do not make major policy decisions, they constitute the vast majority of executive government employees and perform the bulk of day-to-day work at agencies. Presidents can have a hard time implementing their agenda if civil servants collectively drag their feet or lack the competence to carry out the President’s orders.

Initially, presidents had broad powers to fill the civil service with their appointees. During much of the nineteenth century, newly inaugurated presidents would purge the civil service and fill it with officeholders loyal to their political party. Today, this spoils system is no longer in effect. Most civil servants are hired or retained through a merit-based hiring system. Civil servant positions are protected by statutes that put the onus on the government to document specific instances of unacceptable performances by the employee before the employee can be dismissed. The Supreme Court has held that civil servants have a due process right to their job that affords them constitutional protections as well.

As a result, firing a single civil servant is an onerous process. Replacing hundreds of civil servants en masse is nearly impossible. Thus, a modern president is more or less stuck with thousands of civil servants whom he did not appoint and have little loyalty toward him. Even if a president has the perfect ally running an agency, that ally may still fail to produce the desired results if the ally runs into resistance from his civil servants. For example, the efforts of President Reagan’s EPA Administrator, Ann Gorsuch, to slow down and halt EPA regulatory actions “was marked by staff resistance to the Administration’s attempt to change the agency’s

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House. [They] are naked before Congress, without protection there,’ because of the President’s choice not to risk the political cost that assertion of his interest would entail.”). However, presidents sometimes support the establishment of independent agencies. See generally Kevin M. Stack, Obama’s Equivocal Defense of Agency Independence, 26 CONST. COMMENT. 583 (2010) (explaining President Obama’s interest in defending the creation of independent agencies).

196. See Lewis, supra note 185, at 20–22.
198. See LEWIS, supra note 185 (detailing the merit-based system for hiring and retaining civil servants).
201. See Richard J. Pierce, Jr., Saving the Unitary Executive Theory from Those Who Would Distort and Abuse It: A Review of The Unitary Executive by Steven G. Calabresi and Christopher S. Yoo, 12 U. PA. J. CONST. L. 593, 606 (2010) (asserting that the President’s power to remove civil servants propagates loyalty).
goals.”  

2. The Procedural Costs of Using the Removal Power

Any president that removes an officer then must go through the appointment process again to find a replacement. The appointment process takes significant time to complete. In an excellent study, Professor Anne O’Connell showed that, under Presidents Clinton and George W. Bush, it took over six months on average for Senate-confirmed appointees to fill their posts at the top of cabinet departments and executive agencies. Part of the problem was that presidents had to screen candidates, but the Senate confirmation process compounded the delay.

This delay deters presidents from removing officers because it comes with significant costs. When agencies are missing high level officials, they tend to make fewer policy decisions, especially controversial or novel decisions that legally or politically require the support of a top agency official. Moreover, vacancies for top agency positions can yield confusion as agency staff may be unsure which programs will become priorities under a new agency head. Presidents are understandably reluctant to remove an officer and absorb these delay costs for the “mere possibility” that they will find a more suitable officer next time.

3. The Political Costs of Removing Officers

Even when removal is allowable by law, the political costs of exercising the removal power are often sufficiently high to give a president pause. Firing an agency official is a politically salient move likely to attract public and congressional attention and generate some political backlash against the President. Presidents rarely remove officers in large part because of these political costs. As Professor Richard Pierce concludes: “Frequently,
the cost of removal is so high that a President reluctantly acquiesces in a decision with which he strongly disagrees in order to avoid incurring the high cost of removing the executive branch officer responsible for the decision.” 209 Taken together, these costs and constraints make removal a seldom used power.

B. Agency Selection’s Comparative Costs and Benefits

In this section, I discuss how the advantages and disadvantages of the agency selection powers compare to the removal power. The primary disadvantage of the agency selection powers is that they do not apply to all regulatory tasks. But when agency selection powers are available, they have several advantages over the use of the removal power: they involve far less delay, presidents can apply the agency selection powers to problems involving independent agencies and civil servants, and the political costs of exercising agency selection powers are comparatively low. The purpose of this comparison is to illustrate the strategic advantages and limitations of the agency selection powers.

1. The Scope of Agency Selection Powers

Compared to the removal power, agency selection powers are less broad in two key ways. First, while the removal power enables presidents to change who is in charge of the entire portfolio of an agency office, a president can only use his agency selection powers for a more limited set of tasks. For example, if a president is dissatisfied with how the Secretary of the Interior is performing his job, removing the current Secretary allows the President to put somebody else in charge of the entire set of tasks that the office of the Secretary oversees. By contrast, only a limited number of tasks in the Secretary’s portfolio are subject to the President’s subdelegation power, constitutional delegation power, or agency overlap power—and thus only this limited set of tasks can be transferred to another agency.

Second, when using his statutory subdelegation and constitutional delegation powers to transfer authority among agency offices, presidents can only choose from among the existing set of agencies and the officers who staff them. The choice is even more limited in the case of overlapping jurisdiction. Typically, overlapping jurisdiction on a given matter involves only two or three agencies, limiting the President’s choices to those agencies

209. See Pierce, supra note 201, at 597.
and their officers. By contrast, when replacing an officer through the removal-and-appointment process, the President can choose from a larger pool of candidates because he can draw from both inside and outside the government.

Although agency selection powers are narrower than the removal power in these two ways, the agency selection powers are broader along two key dimensions as well. First, while the President's ability to remove officers at independent agencies is quite limited, his agency selection powers are not as constrained when it comes to independent agencies. For example, presidents can reconcile overlapping jurisdiction among a cabinet department and an independent agency to favor the cabinet department that has closer ties to the presidency, as illustrated in the next section.

Second, while the President cannot use his removal power to replace civil servants en masse, he can use his agency selection powers to transfer authority from one agency to another when he is dissatisfied with the performance of the first agency's civil servants. The ability to have some control over which civil servants will work on a matter is one of the greatest advantages of using agency selection powers instead of the removal power. Imagine if one agency's staff has a bias in favor of the industry they regulate and thus does not effectively oversee that industry. A president hoping to improve that agency's performance may not be able to replace the staff en masse but, for any areas of overlapping jurisdiction, the President can push that agency's tasks over to other agencies in the overlapping space, thus ensuring that civil servants without those same biases will act.

2. The Procedural Costs From Agency Selection Powers

While the use of the removal power is hindered by delay in part because of the need for Senate confirmation, the use of agency selection powers involves far less delay because presidents can exercise these powers unilaterally with few procedural hurdles. A White House decision to reconcile overlap among agencies is usually made informally with no formal procedural barrier. The exercise of the President's constitutional delegation power requires at most a quickly signed Executive Order. The use of the President's statutory subdelegation power involves only minor delay from the statutory requirement that the President publish in the Federal Register—the government publication of agency business that is not widely read outside of Washington government circles—any decision to

210. See Marisam, Duplicative Delegations, supra note 4, at 187–88 (defining duplicative delegations and providing examples).
211. See Strauss, supra note 5.
subdelegate authority to an agency. Overall, the President’s agency selection powers can be exercised quickly and unilaterally, unlike the months-long process triggered by the use of the removal power.

3. The Political Costs From Agency Selection Powers

Finally, while removing an appointee is likely to prove a politically salient event that generates political backlash, the use of the agency selection powers is far less transparent and thus less likely to hurt a president politically. A decision to remove an agency head will likely make front page news across the country. The President’s decision to select a particular agency to act will go largely unnoticed. A presidential order delegating or subdelegating power to an agency will at most be buried in the dry pages of the Federal Register. A presidential decision on how to resolve interagency overlap will also garner little public attention.

Overall, agency selection powers are not an option for a president if the requisite constitutional, express statutory, or implied statutory powers do not apply to the matter at hand. However, when agency selection powers are available, they have several advantages over the removal power: presidents can apply the agency selection powers to problems involving independent agencies and civil servants, the powers entail far less delay, and the political costs of exercising agency selection powers are comparatively low.

C. Agency Selection’s Comparative Advantage: Illustrations

In this Section, I illustrate how the President’s agency selection powers can serve as a less costly alternative to the use of the removal power with two examples in which presidents used agency selection powers to control which agency or agency officials were in charge of responding to particular regulatory matters. Both of the examples come from recent emergencies managed by the White House. However, the choice of illustrations is not meant to suggest that agency selection powers are only useful during emergencies. The costs and constraints that make the removal power less attractive compared to the agency selection powers exist for everyday administrative problems too; these costs and constraints are simply highlighted and made more vivid when viewed in the midst of a high-profile emergency.

213. Cf. Eric A. Posner & Adrian Vermeule, The Executive Unbound: After the Madisonian Republic 32 (2010) (“When emergencies occur, the standard legislative response is delegation, for all the same reasons that delegation is a standard legislative tool in
1. Agency Selection During the 2008 Financial Crisis on Wall Street

Wall Street investment banks were the epicenter of the 2008 financial crisis. The SEC is the primary regulator of these banks. But in many ways the SEC was ill-equipped to respond to the crisis. A primary problem was that the SEC Chairman, Christopher Cox, was not in a position to lead the government's response. Cox was a former congressman and lawyer who had trouble understanding the financial intricacies of the problem and he was not respected by Wall Street executives. However, removing Cox and replacing him with a more suitable commissioner was impossible or impracticable for several reasons. First, it is widely regarded that SEC commissioners' tenures are protected by for cause removal. Second, there was no time to find a replacement through the appointment process in the midst of the crisis. Third, Cox was a staunch Republican with many allies in Washington, and removal would likely have been met with political opposition. Moreover, removal was an inadequate option because any replacement would still have been hampered by the multi-member structure of the SEC, which prevents SEC chairs from making major decisions unilaterally.

With removal off the table, the Bush Administration used its agency selection powers instead. Throughout the crisis, the White House transferred authority to the Department of the Treasury. The Treasury was the natural choice for the White House because Secretary of the Treasury Henry Paulson was a former Wall Street CEO who understood Wall Street culture, was respected by Wall Street executives, and grasped the scope and intricacies of the financial problem. Moreover, Paulson was loyal and responsive to President Bush.

The Bush Administration empowered Paulson at the SEC's expense in two key ways: it created an interagency hierarchy in which the Treasury...
and Paulson were on top, and it resolved jurisdictional overlap between the Treasury and the SEC in favor of the Treasury. The Bush Administration did not establish the interagency hierarchy through executive order but instead did so informally. The President kept abreast of the developments in the crisis through Secretary Paulson and the President deferred to the decisions favored by the Secretary. This implicit trust in Secretary Paulson and the Treasury enabled Paulson and his agency to take the lead in overseeing the government’s response to the crisis, even when the actions taken fell under the SEC’s or another financial agency’s legal purview.

The existence of the interagency hierarchy was dramatically demonstrated by Paulson’s handling of the collapse of the investment bank Lehman Brothers, a bank that was under the SEC’s and not the Treasury’s legal jurisdiction. Despite the SEC’s legal authority, throughout the crisis it was the Treasury and not the SEC that coordinated the government’s response to Lehman’s problems. When the government was busily looking for a firm to acquire Lehman, it was Paulson who worked the phones to play matchmaker rather than Cox. When no suitor emerged, it was Paulson, not Cox, who decided that Lehman had to file for bankruptcy to calm the markets. Because Paulson lacked formal authority over Lehman, Cox was the one who had to inform Lehman of the government’s position. However, Cox demurred. As a lawyer and career politician, Cox was apparently concerned that he would be overstepping his legal authority by calling the Lehman board and recommending that they file for bankruptcy. Moreover, as a free market proponent, he may have balked at the idea of government telling private industry what to do. In his exhaustive behind-the-scenes account of the crisis, journalist Andrew Ross Sorkin recounts what happened when Paulson learned that Cox was dragging his feet. According to Sorkin, Paulson directed Cox to call Lehman officers and tell them to file for bankruptcy. At one point, Paulson exclaimed to Cox: “This is your [expletive] job. You have to make the phone call.” Cox then made the late-night phone call as directed by Paulson, and Lehman Brothers filed for bankruptcy at 1:45am on

220. See Zaring, supra note 218.
221. See SORKIN, supra note 215, at 303 (giving examples of the Treasury’s management of the problems).
222. Id.
223. Id.
224. See id. at 366–68 (retelling Cox’s hesitance to recommend bankruptcy over the phone to the Lehman board).
225. Id. at 368 (emphasis omitted).
226. Id.
Why did Cox give in to Paulson’s demand? Cox may have simply been intimidated or come to understand that he had to make the call for the good of the country. But at least at some level, it is likely that Cox understood that Paulson and the Treasury had the trust of the President and had been de facto deputized as the chief adviser and agency speaking for the President in the management of the crisis. Indeed, before the crisis had even started, the SEC was accustomed to seeing the White House’s preferences “implicitly reflected” in the Treasury Secretary’s position. Thus, an order from Paulson was likely understood as having the impact of an order from the President. Legally, it remains uncertain whether independent agencies like the SEC have to follow presidential orders, although as a matter of practice they often do. In this case, the SEC Chairman followed the Secretary of the Treasury’s order in part because the Secretary was presumably speaking in the President’s stead.

Aside from this informal interagency hierarchy in which the Secretary of the Treasury was overseeing the heads of the other financial agencies like the SEC, the Bush White House also resolved overlap in favor of the Treasury during the crisis. The prime example comes from the regulation of money market mutual funds. Early in the financial crisis, there was concern about a run on these funds. To help stabilize the market, the government had to “alleviate investors’ concerns about the ability for money market mutual funds to absorb a loss.” Again, the SEC was the primary regulator of these funds, and it could have asserted authority. However, the Bush White House did not tap the SEC to resolve the problem. Instead, President Bush approved the Treasury’s proposal to finance a program to insure against losses in the funds. The Treasury could plausibly assert authority under an “aging statute that gave Treasury the ability, in its view, to disburse those assets to a domestic financial industry in trouble.” By approving the Treasury’s proposal, Bush ensured that


228. See Datla & Revesz, supra note 188.


231. See 17 C.F.R. § 270.2a-7 (2010) (regulating money market funds under the auspices of the SEC); see also Zaring, supra note 218.

232. See Zaring, supra note 218, at 232–34.
Paulson and his team, and not the overwhelmed Cox and the SEC, would administer this crucial program.

In short, the SEC was not well positioned to respond to the financial crisis. It was not possible for the Bush White House to remove the SEC's officers and replace them with appointees better suited to respond to the crisis. Instead, the Bush White House relied on the President's agency selection powers to push decisionmaking authority away from the SEC and to the Department of the Treasury, which was better positioned to manage the crisis.

2. Agency Selection During the 2010 BP Oil Spill

The government's response to the 2010 BP oil spill (also known as the Deepwater Horizon oil spill) was another instance in which agencies with key regulatory authority lacked the expertise to respond to a crisis, the removal power was not a useful option, and the President instead used his agency selection powers to transfer authority to another agency that could better manage the crisis.

Decades before the BP oil spill, Congress delegated to the President the power to respond to oil spills.233 Under this authority, the White House established a contingency plan for responses to oil spills in federal oceans that had the Department of the Interior's Mineral Management Service (MMS) playing the lead role.234 However, after the 2010 BP oil spill, MMS was flummoxed by the scope of the spill and provided little valuable oversight of containment efforts.235 According to a government report, MMS civil servants “did not view [the agency] as capable of, or responsible for, providing more substantive oversight.”236 The report noted that these civil servants lacked expertise because the most talented personnel who knew about complex oil rig and containment matters worked for the oil industry.237 Moreover, MMS was long known for its close ties and bias in favor of the industry it regulated.238

234. For an excellent treatment of the complex governance problems created by the oil spill, see Hari M. Osofsky, Multidimensional Governance and the BP Deepwater Horizon Oil Spill, 63 FLA. L. REV. 1077 (2011).
236. Id.
237. See id. at 135-36.
Because the problem was rooted in the lack of expertise and biases of the agency’s civil servants and not the preferences of the agency’s appointees, the removal power was of no use. The President could not simply replace the regulators at MMS with better regulators. Moreover, because time was of the essence, the delay of finding replacements made the removal power unattractive.

However, because Congress had delegated to the President the power to respond to oil spills, the President could use his subdelegation power to transfer authority to a different agency—assuming he could find one whose staff had the requisite expertise and lacked the pro-industry bias of the MMS staff. President Obama turned to the Department of Energy’s National Laboratories for help. The scientists at the labs were not included in the original contingency plan, probably because they were not oil rig experts like those at MMS. But they were some of the top chemists and physical scientists in the nation. After a crash course on oil and oil rigs, the scientists at the national laboratories were given a primary role overseeing the containment effort. These scientists pushed back on BP’s efforts and identified solutions that the MMS staff had not.

These two examples illustrate how presidents, when faced with agency officials and staff who do not meet the President’s expectations, use their agency selection powers to transfer authority to different agencies. Using these agency selection powers is generally far easier and less costly than trying to replace the agency officers through the removal power.

IV. THE DESIRABILITY OF PRESIDENTIAL AGENCY SELECTION

While Congress remains the primary body in charge of agency selection, this Article has shown that presidents have expanded their agency selection powers and gained increasing control over agency selection and design decisions. To help determine whether this increase in presidential agency selection is desirable, this Part offers an institutional analysis of the virtues and vices of presidential instead of congressional agency selection. While I do not take a normative position directly, the positive analysis in this Part should add to the understanding of the factors that will drive the normative debate over the President’s agency selection powers, a debate that will only

239. FINAL REPORT, supra note 235, at 148.
240. See id.
grow in importance as presidents continue to apply these powers to novel situations.

Section A discusses the benefits of presidential agency selection: adaptability, regulatory coherence, and enhanced accountability (by some measures of accountability). Section B discusses the costs of presidential agency selection: the loss of stable administrative structures, potentially arbitrary agency selection decisions, and the loss of accountability (by other measures of accountability).

A. The Benefits of Presidential Agency Selection

1. Adaptability

The primary benefit from presidential agency selection is adaptability. The fundamental difference between agency design by the President and by Congress is that the President can act unilaterally without the collective action and legislative procedural hurdles faced by Congress. As a result, for regulatory matters subject to the President's agency selection powers, it is far easier for the President to change the allocation of power among agencies than it is for Congress to do the same. Adaptability is increasingly important in our modern regulatory environment. A century ago, the regulatory environment was comparatively stable with new risks and information about risks emerging slowly. Today, regulatory environments constantly change in ways that affect which agency is best suited to regulate. Because it is easier for presidents than Congress to alter administrative designs, one can expect presidents to better adapt administrative designs to these changes.

The regulatory environment can change in two basic ways that require adaptability. First, new risks or new information about risks can emerge. Imagine that at time One, it appears that Agency A has the expertise best suited to regulate matter X. But at time Two, we learn that effectively governing regulatory matter X entails performing a host of tasks that fall more into Agency B's tool kit. If presidents were to use their agency selection powers to transfer authority from Agency A to Agency B, the public would be better off.

243. See Marisam, Interagency Administration, supra note 7.
244. New information about risks can inundate agencies in today's risk environment. See Bradley C. Karkainnen, Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?, 89 GEO. L.J. 257, 267 (2001) (noting that gathering new information can be "daunting" for regulators).
Second, the regulatory environment can change because the agency itself changes. Agencies develop habits, cultures, and biases over time. Most worrisome, agencies can become captured by the industries they regulate.\footnote{245} Thus, at time One, Agency C could be the best agency to regulate matter Y. But, if at time Two, Agency C becomes captured by the regulated industry, the public would be better off if the President could transfer authority to a different agency that lacks the pro-industry bias. If presidents behave in this way, then presidential agency selection should be added to the list of structural innovations that can help curb agency capture.\footnote{246}

The analysis in this Subsection has a clear normative implication: those concerned about adaptability in fast-moving regulatory fields should consider advocating for broader presidential agency selection powers. Consider the regulation of biotechnology. Currently, oversight is divided among the EPA, FDA, and USDA. Several scholars have argued that developments in the field have rendered the oversight structure suboptimal, with each agency performing tasks outside of its core expertise.\footnote{247} They have argued for statutory amendments to reallocate these tasks among the agencies.\footnote{248} However, even if Congress heeds their suggestions, changes in this fast-paced regulatory field could soon make these new administrative arrangements outdated. If Congress instead delegated power over this field to the President, the President could continually adjust regulatory assignments among these agencies without waiting for congressional action each time a change is desirable. There are tradeoffs to granting the President complete agency selection power, as shown in the discussion below. But if maximizing adaptability is the goal, presidential agency selection is superior to congressional agency selection.


\footnote{246. See PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE IN REGULATION, AND HOW TO LIMIT IT (Daniel Carpenter & David A. Moss, eds., forthcoming 2013), available at http://www.tobinproject.org/books-papers/preventing-capture.}

\footnote{247. See, e.g., Gregory N. Mandel, Gaps, Inexperience, Inconsistencies, and Overlaps: Crisis in the Regulation of Genetically Modified Plants and Animals, 45 WM. & MARY L. REV. 2167 (2004).}

\footnote{248. See id. at 2168 (citing new regulation and legislation as a solution to regulatory and statutory gaps).}
2. Regulatory Coherence

Regulatory coherence is another benefit from greater presidential control over agency selection decisions. Presidents, by virtue of their unitary position atop the executive hierarchy, are well situated to take a top-down view of the administrative hierarchy and assign agencies responsibilities in ways that contribute to a coherent, well organized administrative structure. By contrast, as shown earlier in this Article, Congress is more likely to assign tasks in a fragmented or overlapping manner that reflects its own internal division of authority among committees.\(^249\) When multiple congressional committees are involved, "the cacophony of congressional interests" can make it less likely that Congress will timely produce a coherent regulatory structure.\(^250\) The President is likely to do a better job.

It was largely on these grounds that the early public administration theorist W.F. Willoughby argued that Congress should delegate authority directly to the President instead of agencies. Willoughby bemoaned the "system under which the legislature seeks to control the details of administrative organization and action directly or through agencies directly responsible to it, instead of indirectly through the chief executive."\(^251\) Willoughby believed that the President, as chief executive, was well suited to structure the administrative branch to ensure that each agency performed the set of tasks that most related to its central purpose.\(^252\) The extent of the President's agency selection powers today may not be as broad as Willoughby would have hoped, but the observation that the President can use agency selection powers to build a more coherent administrative hierarchy still holds.

3. Accountability

By some measures, the President is more accountable than Congress to the public and thus the expansion of the President's ability to select agencies improves the accountability of these decisions. Because the President is elected nationally, instead of by individual districts, the President may better reflect national preferences.\(^253\) For our purposes, the concern is that legislators' parochial perspectives may lead them to make

\(^{249}\) See Marisam, Interagency Marketplace, supra note 4.
\(^{250}\) Clinton et al., supra note 86, at 6.
\(^{251}\) WILLOUGHBY, supra note 8, at 39.
\(^{252}\) Id. at 40; see also Marisam, Interagency Administration, supra note 7 (discussing the benefits of departmentalization).
\(^{253}\) See, e.g., JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 152 (1997).
agency selection decisions that benefit their constituents but not necessarily the nation as a whole. If presidents could make the agency selection decisions instead of Congress, fewer parochial agency selection decisions may result.

The field of water resource policy illustrates how legislators' desire to channel benefits to their local constituents can distort Congress's agency selection decisions. Water administration is divided between the Department of the Interior's Bureau of Reclamation (Bureau) and the Army Corps of Engineers (the Corps).\textsuperscript{254} In the mid-twentieth century, presidents pushed to consolidate these functions because it was inefficient to split them between two agencies in different departments.\textsuperscript{255} The thinking was that the functions should be consolidated in the Bureau because it made more sense to have water policy housed in the Department of the Interior, which focuses primarily on natural resource management, instead of the Department of the Army, which focuses primarily on national defense.\textsuperscript{256} However, Congress never approved the plan, in large part because the Corps has always had a close relationship with Congress.\textsuperscript{257} The Corps has a history of pleasing legislators by implementing "pork" projects passed by Congress—which are roughly political deals "favoring a particular constituency [or legislative district] and resulting in an infrastructure project or similar expenditure that is inefficient in social welfare terms."\textsuperscript{258} These pork projects help legislators win reelection. Congress likely did not want the Bureau to have full control over water resources administration because the Bureau was not as close to Congress and may not have delivered the projects as reliably as the Corps did. Thus, even though consolidating water resources administration in the Bureau could have improved administrative outcomes, Congress's fondness for the Corps led it to block the proposed consolidation. If presidents had broader agency selection powers in this field, they could have transferred authority from the Corps to the Bureau on their own, and the public would likely have benefitted from this more streamlined approach to water policy.

\begin{footnotesize}
\begin{itemize}
\item[254.] See \textit{PERI E. ARNOLD, MAKING THE MANAGERIAL PRESIDENCY: COMPREHENSIVE REORGANIZATION PLANNING 1905–1996} 326–27 (2d ed. 1998) (detailing complaints about the two agencies sharing authority over federal water resources).
\item[255.] See \textit{MARTIN REUSS, WATER RESOURCES PEOPLE AND ISSUES: INTERVIEW WITH THEODORE M. SCHAD} 88 (1988) (discussing the consolidation of water administration).
\item[256.] \textit{Id.}
\item[257.] Id. at 108–09.
\end{itemize}
\end{footnotesize}
B. The Costs of Presidential Agency Selection

1. Inconsistency

While the lack of collective action problems for a president can make for more adaptable agency designs, it can also generate costs from the loss of consistency when the President suddenly changes administrative structures more readily than Congress would. Regulated entities make decisions based on how they expect their behavior will be regulated in the future. Different agencies have different decisionmaking cultures and regulatory habits, and they are likely to regulate the same problem differently. Thus, when a president selects a different agency to act, it can unsettle regulatory expectations.

To illustrate, imagine that Agency A has always allowed firms to use technology X. The President then shifts authority to Agency B, which has concerns about technology X and pressures the firms to switch to technology Y. The firms may have made large investments in technology X under the prediction that Agency A would continue to favor that technology. These firms would then need to absorb costs as they switched to new technologies and adapted to the perspectives of a new agency.

The concern about the loss of stability was a factor in National Mining Association, as discussed earlier. In its complaint, the National Mining Association argued that the procedures were “a marked departure from prior, longstanding EPA practice.” The EPA conceded that the procedures were new, but argued that they “did not represent a significant departure from the preexisting regulatory framework” because, although the EPA had taken a greater role in the permitting process, the Corps remained the final permitting authority. Ultimately, the district court agreed with the National Mining Association that the additional procedures were significant, unjustified departures from the prior administrative structure.

For any regulated entity, there is always some risk that Congress will change the agency that oversees it after the entity has become accustomed to that agency. But the risk is magnified when the President has the power

259. See Kristin E. Hickman & Claire A. Hill, Concepts, Categories, and Compliance in the Regulatory State, 94 MINN. L. REV. 1151, 1155 (2010) (describing the “trajectory” that is used to create regulatory expectations).
260. See supra notes 175–76 and accompanying text.
to change the agency because the President can do so more easily.

2. Arbitrariness

Because presidents can use their agency selection powers without first deliberating and winning multiple votes on the matter as Congress must, the President may be more likely to make arbitrary or otherwise unwise agency selection decisions. Consider the President’s agency selection decision that sparked the Teapot Dome scandal, perhaps the most egregious instance of administrative abuse in the twentieth century. The scandal had its roots in a 1921 executive order in which President Harding transferred control over several oil fields from the Secretary of the Navy to the Secretary of the Interior, Albert Fall.\(^{264}\) Secretary Fall then leased the oil to a couple of oil companies in exchange for handsome bribes.\(^{265}\) Fall went to jail for defrauding the government. It was not believed that Harding knew of Fall’s fraudulent intent when he transferred the authority to Fall.\(^{266}\) It seems Harding simply trusted his Interior Secretary when Fall lobbied the President for the authority over the oil fields. Perhaps if Fall’s request for authority had been funneled through Congress’s deliberative voting processes, Fall may not have been able to convince legislators of his need for authority and the transfer would not have occurred. If so, then in this instance and others like it, congressional agency selection would be preferable to presidential agency selection.

3. Accountability

By some metrics, Congress is more accountable to the public than the President, and this accountability is lost when the President takes over agency selection decisions. The notion is that, while each individual legislator in Congress has his or her own parochial interests, when these interests are aggregated into a majoritarian legislative body, each individual legislator’s biases and parochial concerns “cancel each other out.”\(^{267}\) This results in policy outcomes that can closely approximate the national median voter’s preferences. By contrast, presidents are elected because a national

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265. See id. at 334–35.
266. See id. at 344 (noting that any claims regarding fraud around the actual Executive Order were “abandoned”).
majority prefers their set of positions to their opponent's. But, for any
individual issue, it is possible that the President's position is closer to the
views of his or her core political base than to the national median voter. As a result, presidents may make agency selection decisions that appear
significantly to the left or to the right politically of the national median voter.

Obviously, conservative presidents tend to favor agencies that have pro-
business tendencies, while more liberal presidents tend to favor agencies
that have more pro-regulatory tendencies. Thus, for example, President
Reagan's White House, when crafting an oversight scheme for GMOs, allocated more oversight power to the comparatively pro-business USDA
than to the pro-regulatory FDA. By contrast, the more liberal President
Obama has favored the pro-regulatory EPA when using his agency selection powers. It is plausible that Reagan's agency selection decisions
reflected a conservative position to the right of the median voter, and
Obama's agency selection decisions reflected a liberal position to the left of
the median voter.

Overall, the desirability of presidential agency selection compared to
congressional agency selection depends on a variety of factors. Whether
presidential agency selection is superior to congressional agency selection in
general depends on how much weight one assigns to each of these factors.
Whether presidential agency selection is superior to congressional agency
selection in a particular regulatory field depends in large part on a context-
specific application of these factors. One normative implication of this
conclusion is that the case for presidential agency selection is strongest in
fast-moving regulatory fields where slow-moving Congress is unlikely to
keep up and thus may fail to transfer power to the optimal agency
decisionmakers as regulatory conditions change.

CONCLUSION

This Article conceptualizes a set of statutory and constitutional powers
that enable presidents to select which agency will perform particular
functions. It shows that, in the past several decades, presidents have
expanded their use of these agency selection powers. Presidents are likely
to continue to find new ways to use these powers. New contests over the

268. See Vermeule, supra note 267. The problem is particularly prevalent at the end of a
president's tenure in office, when he cannot suffer electoral punishments for his decisions.
describing the rate of regulatory actions during presidential transitions).
269. See supra note 88.
270. See supra Part II.
scope of the President's powers will emerge as a result. Ultimately, the future of the debate over executive power will involve a debate over the President's agency selection powers. This Article advances that debate by describing how agency selection powers diversify the President's tool kit for controlling agency decisionmaking, and by rejuvenating a century-old argument on the desirability of presidential instead of congressional agency selection.