

SYMPOSIUM: THE INDEPENDENCE OF INDEPENDENT AGENCIES

INTRODUCTION: THE DEBATE OVER INDEPENDENT AGENCIES IN LIGHT OF EMPIRICAL EVIDENCE

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Constitutional theory has rediscovered the problem of governmental structure. As the rights revolution has matured and entered the mainstream, the debate is returning to the question that preoccupied the Founding Fathers: what organization of government is most likely to establish justice, promote the general welfare, provide for the common defense, and secure the blessings of liberty?

The overriding contemporary problem is how to treat the administrative state.¹ The Constitution contemplates bureaucracies but doesn't

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1. Problems of allocating authority over administration have generated most of the Supreme Court's recent separation of powers cases. *See Morrison v. Olson*, 108 S. Ct. 2597 (1988) (role of "independent counsel" in investigating and prosecuting crimes by high executive branch officials); *Bowsher v. Synar*, 478 U.S. 714 (1986) (role of Comptroller General in formulating the federal budget); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986) (role of CFTC in adjudicating common-law counterclaims); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985) (role of binding arbitration in dispute resolution); *INS v. Chadha*, 462 U.S. 919 (1983) (role of Congress in vetoing agency action); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (role of bankruptcy judges in adjudicating private rights); *Buckley v. Valeo*, 424 U.S. 1 (1976) (role of Congress in appointing Federal Election Commissioners). Problems of administration also figure prominently in three upcoming Supreme Court cases, *Ameron, Inc. v. United States Army Corps of Eng'rs*, 809 F.2d 979 (3d Cir. 1986), *cert. granted*, 108 S. Ct. 1218 (1988) (No. 87-163) (role of Comptroller General in delaying awards or performance of procurement contracts), and *United States v. Johnson*, 682 F. Supp. 1033 (W.D. Mo.), *cert. granted sub nom. United States v. Mistretta*, 108 S. Ct. 2818 (1988) (No. 87-1904) (role of "independent commission in

clearly assign authority over them.² In theory, administrative agencies might be controlled by (1) the President, (2) the Congress, (3) neither the President nor the Congress, or (4) both the President and the Congress. Each scheme has shortcomings. The first two exalt a single branch; the last two blur the distinctions between branches. Each has been proposed as defining appropriate power relations over the administrative state.³

The problem of allocating authority over administration is particularly severe in the case of independent agencies.⁴ The distinguishing feature of such agencies is that their principal officers are protected against presidential removal at will.⁵ The removal power is ordinarily supposed to carry with it a high degree of supervisory authority: "[o]nce an of-

the judicial branch" in formulating sentencing guidelines); *Mid-America Pipeline Co. v. Dole*, No. 86-C-815-E (N.D. Okla. Feb. 8, 1988) (LEXIS, Dist file, No. 7363), *cert. granted*, 57 U.S.L.W. — (U.S. Oct. 3, 1988) (role of Transportation Department in funding regulatory program through assessments on a regulated industry).

2. U.S. CONST. art. II, § 2, cl. 1 ("principal Officer in each of the executive Departments"); *id.* § 2, cl. 2 ("Officers" and "inferior Officers" of the United States); *id.* § 3 ("Officers of the United States"); *id.* § 4 ("civil Officers of the United States").

3. For examples of the legislative viewpoint, see E. KRASNOW, L. LONGLEY & H. TERRY, *THE POLITICS OF BROADCAST REGULATION* 89 (3d ed. 1982) (reporting House Speaker Sam Rayburn's remark to FCC Chairman Newton Minow that "your agency is an arm of the Congress; you belong to us"); 5 SENATE COMM. ON GOVERNMENTAL AFFAIRS, 95TH CONG., 1ST SESS., *STUDY ON FEDERAL REGULATION* 31 (endorsing "arm of Congress" theory). For an executive branch perspective, see Meese, *Towards Increased Government Accountability*, 32 FED. B. NEWS & J. 406, 408 (1985) (reprint of Address before Federal Bar Association, September 13, 1985) (questioning rationale for agency independence of the President). Agency independence from control by either branch was favored by early New Deal theorists, especially James Landis. See J. LANDIS, *THE ADMINISTRATIVE PROCESS* 111 (1938). Most contemporary scholars endorse the theory of shared control. See, e.g., Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451 (1979); Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

4. For prior work addressing the constitutionality of independent agencies, see Anderson, *Revisiting the Constitutional Status of the Administrative Agencies*, 36 AM. U.L. REV. 277 (1987); Bruff, *On the Constitutional Status of the Administrative Agencies*, 36 AM. U.L. REV. 491 (1987); Bruff, *supra* note 3; Currie, *The Distribution of Powers After Bowsher*, 1986 SUP. CT. REV. 19; Cushman, *The Constitutional Status of the Independent Regulatory Commissions* (pts. 1 & 2), 24 CORNELL L.Q. 13, 163 (1938-1939); Donovan & Irvine, *The President's Power to Remove Members of Administrative Agencies*, 21 CORNELL L.Q. 215 (1936); Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41; Parker, *The Removal Power of the President and Independent Administrative Agencies*, 36 IND. L.J. 63 (1960); Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 460-64 (1987); Shane, *Conventionalism in Constitutional Interpretation and the Place of Administrative Agencies*, 36 AM. U.L. REV. 573 (1987); Strauss, *supra* note 3; Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U.L. REV. 59 (1983); Verkuil, *The Status of Independent Agencies After Bowsher v. Synar*, 1986 DUKE L.J. 779; Note, *In Defense of Administrative Agency Autonomy*, 96 YALE L.J. 787 (1987); Note, *Incorporation of Independent Agencies into the Executive Branch*, 94 YALE L.J. 1766 (1985).

5. In addition, independent agencies usually display some or all of the following features: (1) leadership by multi-member panels; (2) political criteria for appointment, with no more than a simple majority permitted from a single party; (3) broad rulemaking authority; (4) power to conduct on-the-record adjudications; (5) power to conduct investigations and bring enforcement actions; and (6)

ficer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey.' ”⁶ Accordingly, any substantial limitation on the removal power necessarily reduces the supervisory authority of the person exercising the power.⁷ The President’s power over the heads of independent agencies, whom he can remove only “for cause,” is therefore considered to be substantially weaker than is his power over the heads of “executive branch” agencies, who can be removed for any reason or no reason at all. From this, the inference is drawn that the regulatory commissions are “independent” of presidential power. The word “independent” attains a life of its own and exercises a powerful hypnotic influence over analysis.

The principal issue is not one of constitutional law narrowly defined.⁸ The Supreme Court upheld “for cause” removal limitations in *Humphrey’s Executor*;⁹ its recent opinion in *Morrison v. Olson*¹⁰ left little doubt about the continuing validity of such limitations, at least as applied to classical regulatory commissions. Thus, despite their theoretical incongruity,¹¹ independent agencies are not going to be judicially invalidated any time soon.¹²

The most interesting questions about independent agencies are ones of political theory. What is the policy rationale for establishing an independent instead of an executive branch agency? What political forces

specialized mandate directing the agency to focus either on particular industries or on specific cross-cutting problems.

6. *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) (quoting *Synar v. United States*, 626 F. Supp. 1374, 1401 (D.D.C. 1986)).

7. *See Morrison v. Olson*, 108 S. Ct. 2597, 2621 & n.34 (1988).

8. For discussion of the doctrinal elements in separation of powers analysis, see G. Miller, *The Law of Separation of Powers: A Primer on Doctrine* (Oct. 3, 1988) (unpublished manuscript).

9. *Humphrey’s Executor v. United States*, 295 U.S. 602, 626 (1935). Although commonly understood as a direct affirmation of independent agencies, *Humphrey’s Executor* is not quite on point because the issue was not whether the President could remove the officer at will, but whether the officer had a right to the payment of salary after his removal. *See Miller, supra* note 4, at 94 n.195.

10. 108 S. Ct. 2597 (1988). *Morrison* upheld a statute that, inter alia, allows the President (through the Attorney General) to remove “independent counsel[s]” only for “good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of [their] duties.” *Id.* at 2604 (quoting the Ethics in Government Act, 28 U.S.C.A. § 596(a)(1) (West Supp. 1988)).

11. *See Currie, supra* note 4, at 19-20.

12. *See SEC v. Blinder, Robinson & Co.*, 855 F.2d 677 (10th Cir. 1988) (upholding power of SEC to conduct civil enforcement actions). There remain serious questions, however, as to (1) what officers other than regulatory commissioners can be protected against presidential removal at pleasure, and (2) whether cause, as the basis for removal, can include an officer’s failure to comply with a presidential directive. *See G. Miller, The Removal Power After Morrison* (Sept. 14, 1988) (unpublished manuscript).

shape the decision about agency structure? What are the differences in practical function between independent agencies and their executive branch counterparts? How significant are these differences? To the extent they exist, do they improve or impair the quality of administration?

The present symposium focuses on these empirical questions. Although the authors differ widely in their political views, they all focus on the practical meaning of independence in the actual functioning of administrative agencies. The essays provide a useful antidote to the sometimes overly legalistic tone of prior debate.¹³ Any future analysis of the political legitimacy of independent agencies should profit from the insights contained in these pages.

Particularly welcome, in this regard, is Susan Bartlett Foote's skeptical view of the independent agencies debate.¹⁴ Drawing on the empirical political science literature, Foote debunks the myth of radical separation between executive and independent agencies. Both types of agencies operate in a complex field of political forces, including pressures from the President, the relevant congressional committees, the regulated industries, and other interest groups. Foote attributes the heated tenor of debate between partisans and opponents of independent agencies to political controversy rather than neutral analysis, correctly observing that many prominent critics of agency independence are affiliated with the Reagan administration while leading advocates of independent agencies tend to be political liberals. I believe Foote overstates the influence of politics on the debate; while undoubtedly abstract principles of constitutional law are often used to mask short-term political goals, there is also an important stratum of scholarly literature, pro and con, written by researchers with no particular ax to grind. Further, while Foote is surely correct that the contrast between independent and executive agencies is often exaggerated, even the studies she cites suggest that independent agencies may be somewhat more responsive to Congress, and somewhat more insulated from the President, than are traditional executive branch agencies.¹⁵ Authors in the present symposium with practical experience in independent agencies testify that Congress exercises substantial influ-

13. For useful earlier works with an empirical bent, see M. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* (1955); H. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES* (1962); Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 *YALE L.J.* 931 (1960).

14. Foote, *Independent Agencies Under Attack: A Skeptical View of the Importance of the Debate*, 1988 *DUKE L.J.* 223.

15. See Weingast & Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 *J. POL. ECON.* 765 (1983); Moe, *Regulatory Performance and Presidential Administration*, 26 *AM. J. POL. SCI.* 197 (1982).

ence over the activities of these bodies.¹⁶ The fact that the difference is discernible only at the margin does not make it insignificant; the question is whether these marginal differences are important enough to raise questions about the efficacy and legitimacy of independent agencies.

Glen O. Robinson, a former Commissioner of the Federal Communications Commission, shares much of Foote's skepticism as to whether "independence" makes much of a difference.¹⁷ Robinson observes that presidential influence is virtually never brought to bear on adjudications, whether in independent or executive agencies, and if it were, the influence would be improper as a matter of due process. As to rulemaking and enforcement, the President has no authority to influence any agency, executive or independent, to act contrary to its statutory mandate. Even where there is substantial discretion over the course of action to take, the result reached must be independently justifiable on judicial review, whether or not the President has influenced the outcome.

And even in the areas of discretion that remain after all this, it would be an error, according to Robinson, to overstress the significance of removal in the scheme of presidential influence. The President enjoys many powers to influence agency action other than the threat of removal, including appointments, budgetary control, and the promise of higher office. Conversely, the President is subject to many limitations other than requirements that removal be only "for cause." Robinson's discussion of these practical factors is insightful and convincing. I am less convinced by his argument that given the relative unimportance of the distinction between independent and executive branch agencies, the best solution is simply to maintain the status quo. If a governmental structure with dubious constitutional underpinnings can be invalidated without significant disruption in administration—and I believe this could easily be accomplished in the case of independent agencies¹⁸—it would seem more logical that the burden of proof should rest on those seeking to sustain the arrangement. An argument similar to Robinson's could have been made in the legislative veto case,¹⁹ on the ground that Congress had enacted nearly two hundred legislative veto provisions and that the differences between statutes with legislative vetoes and those without legislative vetoes were minor in practice. The Court rejected the argument and invalidated the statutes—with no discernible ill effects on gov-

16. See Miller, *A Reflection on the Independence of Independent Agencies*, 1988 DUKE L.J. 297, 298-99; Peters, *Reflections on the Independence of Independent Agencies*, 1988 DUKE L.J. 286, 293-96; Robinson, *Independent Agencies: Form and Substance in Executive Prerogative*, 1988 DUKE L.J. 238, 243-46; Wiley, "Political" Influence at the FCC, 1988 DUKE L.J. 280, 282.

17. Robinson, *supra* note 16, at 250.

18. See Miller, *supra* note 4, at 86-90.

19. *INS v. Chadha*, 462 U.S. 919 (1983).

ernment functioning. Why would a similar result not be appropriate in the case of independent agencies?

Alan Morrison, probably the nation's leading private lawyer in the field of separation of powers,²⁰ is also skeptical of whether "independence" makes much practical difference.²¹ Although in his view independent agencies are more independent of presidential influence than are executive agencies, the difference is "not substantial" in light of the important powers retained by the President and the executive branch, including powers of appointment, budget, and litigating authority.²² Moreover, the traditional rationales for agency independence, such as the need for insulation from politics or for multi-member panels to review decisions by administrative law judges, do not make much sense. Nonetheless, although independent agencies are "an anomaly," Morrison—showing the admirable instincts of a practical lawyer—thinks that nothing can or should be done about the situation given the minor practical importance of the distinction. Morrison would probably agree with Robinson's allocation of the burden of proof to those who would fold the independent agencies back into the executive branch.

Paul Verkuil's contribution²³ examines an exceedingly important question: what reasons, other than political expediency, might explain the choice to vest one administrative function in an independent agency and another function in an executive branch agency? Verkuil's thesis is that the classic multi-member agency is best suited to perform the function of adjudication, but there is a mismatch between form and function when these agencies are allowed to engage in broad rulemaking or enforcement activities. His proposal—which he disarmingly labels as "modest"²⁴—is to separate out the adjudicatory functions of multi-member agencies and to fold the rulemaking and enforcement functions back into executive branch agencies, with the heads of these executive agencies being protected by "for cause" removal limitations as a quid pro quo to Congress for relinquishing some of its powers to influence policymaking. Verkuil is to be commended for trying to make sense of an organizational pattern that most have found chaotic,²⁵ even if doing so requires heroic efforts of the cut-and-paste variety. He is undoubtedly correct in saying

20. Morrison successfully conducted the *Chadha* litigation, and is currently involved in an important Supreme Court case challenging the constitutionality of the U.S. Sentencing Commission, *United States v. Johnson*, 682 F. Supp. 1033 (W.D. Mo.), cert. granted sub nom. *United States v. Mistretta*, 108 S. Ct. 2818 (1988) (No. 87-1904).

21. Morrison, *How Independent Are Independent Agencies?*, 1988 DUKE L.J. 252.

22. *Id.* at 253.

23. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257.

24. *Id.* at 275.

25. See, e.g., Miller, *supra* note 4, at 72-75; Strauss, *supra* note 3.

that multi-member panels work much better as appellate adjudicative tribunals than as rulemakers or enforcers.²⁶ But I believe he underestimates the problems of lack of regulatory coordination and reduced accountability that would attend his proposal to protect even traditional executive branch administrators against removal for cause.²⁷ Nevertheless, his proposal is remarkably thoughtful and creative; if adopted, it would work a significant change in the structure of the federal government.

Richard E. Wiley, former Chairman of the Federal Communications Commission, provides a lively account of his real-world experience with both the reality and the (mis)perception of political influence at the agency.²⁸ Wiley's observation that "the most powerful and persistent 'political' influence over the [FCC] clearly originates with the congressional appropriations and oversight committees and with other important members of the legislature"²⁹ tends to support the thesis that independent agencies are subject to greater congressional influence than are executive branch agencies. Yet Wiley clearly perceives the agency's task to be that of remaining independent from political influence either from the President or the Congress; his institutional loyalty, which is probably shared by most other commissioners of independent agencies, is primarily to the agency and its mandate. Thus, Wiley would probably endorse as a normative matter the autonomy model mentioned in the second paragraph of this essay rather than the models of capture by the President or the Congress.

Aulana Peters, a former Commissioner of the Securities and Exchange Commission, shares Wiley's preference for the autonomy model of the independent agency, although like Wiley she is well aware of the various formal and informal mechanisms by which the President and Congress can attempt to influence agency decisions. Independent agencies in her view are a "fourth branch of government operating separately from but under the oversight or review of the other three."³⁰ Despite certain practical problems, such as the difficulty of resolving interagency

26. A lesson is available from the earliest days of the Republic, when Congress attempted to administer the country with multi-member panels but eventually abandoned the effort in favor of single executives when panels proved ineffectual. See Guggenheimer, *The Development of the Executive Departments, 1775-1789*, in *ESSAYS IN THE CONSTITUTIONAL HISTORY OF THE UNITED STATES IN THE FORMATIVE PERIOD: 1775-1789*, at 116, 120 (J. Jameson ed. 1970); C. THACH, *THE CREATION OF THE PRESIDENCY, 1775-1789: A STUDY IN CONSTITUTIONAL HISTORY* 59-70 (1969).

27. See Miller, *supra* note 4, at 75-83.

28. See Wiley, *supra* note 16, at 280.

29. *Id.* at 282.

30. Peters, *supra* note 16, at 286.

disputes involving independent agencies, she views the independent agency form as justified by the need for technical expertise and the desirability of freeing enforcement responsibilities from political interference.³¹ Among all the essays in this symposium, Peters' viewpoint probably most closely resembles the classic "functional" justification for independent agencies originally formulated by James Landis and others during the New Deal period.³²

James C. Miller, III brings to his essay³³ practical experience both as Chairman of an independent agency (the Federal Trade Commission) and as head of the Office of Management and Budget, an agency in the Executive Office of the President. Miller joins Peters and Wiley in viewing independence as giving a certain practical measure of autonomy to the agency head, subject to lobbying from many sources, most prominently including members of Congress. But Miller departs from these authors in that he sees independence as unfortunate because it reduces political accountability and inhibits policy coordination. Accordingly, Miller favors eliminating agency independence and vesting the responsibilities now exercised by independent agencies in officials serving at the pleasure of the President.

The contributions to this symposium amply demonstrate the importance and interest of the subject. I commend all of these essays for the outstanding insights that they provide on one of the most engrossing and difficult questions in American political life.

31. *Id.* at 290-93.

32. See J. LANDIS, *supra* note 3.

33. Miller, *supra* note 16, at 297.