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## Agencies as Adversaries

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# Agencies as Adversaries\*\*\*

Daniel A. Farber\* & Anne Joseph O'Connell\*\*

*Conflict between agencies and outsiders—whether private stakeholders, state governments, or Congress—is the primary focus of administrative law. But battles also rage within the administrative state: federal agencies, or actors within them, are the adversaries. Recent examples abound. In President Obama's administration, there was the battle between the Federal Bureau of Investigation and the Department of Defense over hacking the iPhone of one of the San Bernardino shooters, the conflict between the State Department and the Central Intelligence Agency over classifying some aspects of Secretary Hillary Clinton's emails, and the sharp division between the Republican and Democratic members of the Federal Communications Commission on net neutrality. President Trump's administration has begun with intense internal conflict. After President Trump issued his first immigration executive order, fights started—largely between holdover appointees (as well as career bureaucrats) and the new boss. Battles have also erupted among President Trump's chosen lieutenants in the White House and in the cabinet. While the President has denounced his opponents, he is also fostering conflict by choosing cabinet secretaries with whom he knows he has policy disagreements, placing loyalists in key agency staff positions as monitors, and selecting adversaries for top White House slots.*

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*This Article draws on rich institutional accounts to illuminate and classify the plethora of agency conflicts and dispute resolution mechanisms. Then, by applying social scientific work on agency and firm design, as well as constitutional theory, we aim to explain the creation of such conflict—largely by Congress and the White House but sometimes by the courts—and to evaluate its desirability. We assess the characteristics of conflict against economic, political, and philosophical criteria to suggest lessons for institutional design in the modern administrative state. In contrast to much of the existing literature, we focus on the potentially positive contribution of agency conflict to effective democratic governance.*

*Finally, we use our descriptive, positive, and normative work on agency conflict to contribute to longstanding legal debates and to flag important legal issues that have generated little attention. For instance, we investigate the constitutional limits of congressionally or judicially created conflict within the executive branch, the application of deference doctrines in the face of agency disagreement, and the ability of agencies to take conflicting positions directly or indirectly in the courts themselves.*

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### INTRODUCTION

Beneath the surface of the administrative state are constant battles, between and within agencies. These conflicts can emerge in litigation or public submissions, though they are often less visible. Examples abounded in President Barack Obama’s administration:

- *The San Bernardino Shooter’s iPhone*: While the Federal Bureau of Investigation (FBI) fought in court to force Apple to hack the iPhone of a perpetrator of the 2015 mass shooting in San Bernardino, California, it also faced resistance from other government agencies. These agencies expressed grave concerns about weakening encryption technologies. For example, the Department of Defense (DOD) and intelligence agencies worried that techniques to defeat encryption could be used against the United States.<sup>1</sup> The State Department argued China or Egypt could use similar decryption techniques to repress their own citizens.<sup>2</sup> The White House claimed it had a “clear” encryption policy, but did not explain how that policy resolved these conflicts.<sup>3</sup>
- *Secretary Hillary Clinton’s Emails*: Freedom of Information Act (FOIA) requesters pushed the State Department to release emails Hillary Clinton sent through a private server while Secretary of State. That struggle triggered a dispute within the government over which emails should be marked classified.<sup>4</sup>

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1. Michael D. Shear & David E. Sanger, *Competing Interests on Encryption Divide Top Obama Officials*, N.Y. TIMES, Mar. 5, 2016, at A1.

2. *Id.*

3. *Id.* (stating that the government “firmly supports” strong encryption, but also stating that it “poses a grave challenge for our national security and law enforcement professionals”).

4. Steven Lee Myers & Mark Mazzetti, *Agencies Battle Over What Is “Top Secret” in Hillary Clinton’s Emails*, N.Y. TIMES, Feb. 5, 2016, at A1; see generally Robert O’Harrow Jr., *How Clinton’s Email Scandal Took Root*, WASH. POST, Mar. 27, 2016, at A1. One dispute apparently led to a “discussion of a possible ‘quid pro quo’ to settle” it, but “no deal had been struck.” Eric Lichtblau & Steven Lee Myers, *Agencies Clashed on Classification of Clinton Email, Inquiry Shows*, N.Y. TIMES, Oct. 17, 2016, at A1.

The State Department successfully resisted some efforts by intelligence agencies and their Inspectors General (IGs) to classify portions of Clinton emails touching on their work.<sup>5</sup> For example, the Central Intelligence Agency (CIA) wanted references to its drone operations labeled Top Secret, even though the program had been widely discussed in the media.<sup>6</sup>

- *Releasing Guantánamo Bay Detainees*: President Obama may not have been drawn into the battle over classifying Secretary Clinton's emails, but he actively participated in fights between the State and Defense Departments over whether particular detainees should be released from the Guantánamo Bay military prison.<sup>7</sup> He typically sided with the State Department in favor of release.<sup>8</sup> The State Department negotiates laboriously to persuade foreign countries to accept a detainee. Once it succeeds, however, a new struggle begins with the Defense Department. For several years, Congress has mandated that the Secretary of Defense certify that various stringent security requirements are met.<sup>9</sup> A former State Department official compared negotiations with the Defense Department to "punching a pillow."<sup>10</sup> The Defense Department's resistance to these releases contributed to Secretary Chuck Hagel's firing, and to President Obama personally "upbraiding" Hagel's successor, Secretary Ashton Carter.<sup>11</sup>

Fights are not limited to core executive branch agencies. The Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC) have long tussled over jurisdiction, including early disputes over which agency should regulate futures contracts based on securities.<sup>12</sup> Initial drafts of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act would have tasked the agencies with extensive joint regulation over swaps.<sup>13</sup> The enacted version imposes some joint regulatory responsibilities but allocates most

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5. O'Harrow, *supra* note 4.

6. Myers & Mazzetti, *supra* note 4.

7. Charles Levinson & David Rohde, *Pentagon Thwarts Obama's Efforts to Close Guantanamo*, REUTERS (Dec. 28, 2015), <http://www.reuters.com/article/us-usa-gitmo-release-special-report-idUSKBN0UB1B020151229> [https://perma.cc/9RLT-36H8].

8. *See id.*

9. *See, e.g.*, National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1028(b)(1)(E), 125 Stat. 1298, 1567 (including that the country receiving the detainee "has taken or agreed to take such actions as the Secretary of Defense determines are necessary to ensure that the individual cannot engage or reengage in any terrorist activity").

10. Levinson & Rohde, *supra* note 7. The State official described meetings at which Pentagon officials "would not make a counterargument" to State's case for release, but "then nothing would happen." *Id.*

11. *Id.*

12. Donald N. Lamson & Hilary Allen, *SEC and CFTC Joint Rulemakings Under Dodd-Frank—A Regulatory Odd Couple?*, 43 SEC. REG. & L. REP. 495, 495 (2011).

13. *Id.* at 2–3.

tasks to only one agency.<sup>14</sup> The law includes dispute resolution mechanisms for the shared and divided rulemaking responsibilities. If the two agencies cannot agree on their shared duties, they can ask the Financial Stability Oversight Council (FSOC) to mediate. For divided duties, if one agency thinks the other has encroached on its assigned turf, the statute authorizes it to sue the other in the U.S. Court of Appeals for the District of Columbia. In reviewing a case, the statute directs the D.C. Circuit not to defer to either agency's interpretation.<sup>15</sup>

Finally, conflict often occurs within agencies. In late 2011, before President Obama's re-election, the Commissioner of the Food and Drug Administration (FDA) was prepared to approve a petition seeking "over-the-counter access to Plan B One-Step, the one-pill emergency contraceptive product, for all ages."<sup>16</sup> The Commissioner had found "adequate and reasonable, well-supported, and science-based evidence that Plan B One-Step is safe and effective."<sup>17</sup> But the Commissioner *denied* the petition anyway, at the direction of the Secretary of Health and Human Services (HHS).<sup>18</sup> President Obama endorsed the Secretary's position.<sup>19</sup> A district court judge, however, ordered the FDA to allow girls of all ages to buy Plan B without a prescription—drawing on materials outside the administrative record about the conflict and finding "a strong showing of bad faith and improper political influence."<sup>20</sup>

The FDA-HHS spat is arguably not an intra-agency conflict, since the FDA has a distinctive stature of its own. Battles within a single decision-making body also occur.<sup>21</sup> For example, the Federal Election Commission (FEC) must have an equal number of Democrats and Republicans, and thus is often deadlocked. In 2015, two of the Democrats tried a creative workaround: formally petitioning their own agency, as private citizens, to adopt new campaign finance disclosure

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14. *Id.* at 3.

15. Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 8302 (2012) [hereinafter *Dodd-Frank*]; see also Lamson & Allen, *supra* note 12, at 4–5 (explaining deference provision). Conflict can also arise between executive and independent agencies. The Department of Labor and the SEC have recently sparred over Labor's rulemaking placing a fiduciary duty on financial advisors for retirement planning. See Ed Beeson, *SEC, DOL Sparred Over Proposed Fiduciary Rule, Report Says*, LAW360 (Feb. 24, 2016, 5:14 PM), <https://www.law360.com/articles/762986/sec-dol-sparred-over-proposed-fiduciary-rule-report-says> [<https://perma.cc/D7XH-YEFR>].

16. *Tummino v. Hamburg*, 936 F. Supp. 2d 162, 166–67 (E.D.N.Y. 2013). Previously, only individuals seventeen years and older could buy Plan B without a prescription. *Id.*

17. *Id.*

18. *Id.* at 167.

19. Pam Belluck & Michael D. Shear, *U.S. to Defend Age Limits on Morning-After Pill Sales*, N.Y. TIMES, May 1, 2013, at A1.

20. *Tummino*, 936 F. Supp. 2d at 196–99. For more on this example, see Lisa Heinzerling, *The FDA's Plan B Fiasco: Lessons for Administrative Law*, 102 GEO. L.J. 927 (2014).

21. For a recent study of dissent within independent regulatory commissions, see Sharon Jacobs, *Administrative Dissents*, WM. & MARY L. REV. (forthcoming 2017), <https://ssrn.com/abstract=2923502> [<https://perma.cc/LBD8-W2UL>]. Jacobs's account is more risk averse than ours about the benefits of internal dissent.

rules.<sup>22</sup> The FEC is unusual, as almost all agencies with party-balancing mandates have an odd number of decision makers. Recently, the Federal Communications Commission's (FCC) final net neutrality rule—after a public appeal by President Obama<sup>23</sup>—and the National Labor Relations Board's (NLRB) final union election timing rule came after party-line, 3–2 votes of their leaders.<sup>24</sup>

These conflicts are not unique to President Obama's administration. Acting Attorney General Sally Yates, appointed as Deputy Attorney General by President Obama, announced that she would not defend President Donald Trump's initial immigration executive order to temporarily prevent citizens of seven Muslim-majority nations from entering the United States.<sup>25</sup> Hundreds of State Department employees signed a “dissent channel” memorandum expressing their opposition to the same order.<sup>26</sup> President Trump took umbrage at this opposition. He fired Yates, and the White House called her “weak on borders and very weak on illegal immigration.”<sup>27</sup> His Press Secretary announced that the memorandum's signatories should “either get with the program or they can go.”<sup>28</sup>

While the level of conflict between the administrative state and the new White House may be high, President Trump is also purposefully creating battles.<sup>29</sup> This should not be surprising, as Trump created “teams of rivals” on

22. Colby Itkowitz, *Corporations Are People. But Are FEC Commissioners People Too?*, WASH. POST: POWERPOST (June 18, 2015), <http://www.washingtonpost.com/news/powerpost/wp/2015/06/18/corporations-are-people-but-are-fec-commissioners-people-too> [<http://perma.cc/Y5CZ-E8P3>].

23. *Net Neutrality: President Obama's Plan for a Free and Open Internet*, WHITE HOUSE (Nov. 10, 2014), <https://obamawhitehouse.archives.gov/net-neutrality> [<https://perma.cc/6JUU-2RES>].

24. Press Release, FCC, FCC Adopts Strong, Sustainable Rules to Protect the Open Internet (Feb. 26, 2015); Press Release, Nat'l Labor Relations Bd., NLRB Issues Final Rule to Modernize Representation-Case Procedures (Dec. 12, 2014). Under new leadership in the aftermath of the 2016 election, the FCC is trying to repeal its net neutrality rule using notice and comment procedures. Press Release, FCC, Restoring Internet Freedom (Apr. 27, 2017).

25. Michael D. Shear et al., *Trump Fires Acting Attorney General Who Defied Him*, N.Y. TIMES, Jan. 30, 2017, at A1.

26. Jeffrey Gettleman, *State Dept. Dissent Cable on Trump's Ban Draws 1,000 Signatures*, N.Y. TIMES, Jan. 31, 2017, at A1.

27. Shear et al., *supra* note 25.

28. Karen Tumulty, *President Trump Isn't a Fan of Dissent—Inside or Outside the Government*, WASH. POST (Feb. 1, 2017), [https://www.washingtonpost.com/politics/president-trump-seeks-to-quash-dissent-inside-the-government/2017/02/01/788bdefa-e7ed-11e6-b82f-687d6e6a3e7c\\_story.html](https://www.washingtonpost.com/politics/president-trump-seeks-to-quash-dissent-inside-the-government/2017/02/01/788bdefa-e7ed-11e6-b82f-687d6e6a3e7c_story.html) [<https://perma.cc/95GQ-D8TE>].

29. The degree of conflict between President Trump and his advisors seems extraordinary compared to recent administrations. See Ashley Parker, *Trump's Cabinet Has to Work as a Cleanup Crew*, WASH. POST (Feb. 26, 2017), [https://www.washingtonpost.com/politics/cleanup-duties-are-a-big-part-of-the-job-in-the-trump-cabinet/2017/02/25/f060ffd0-faeb-11e6-9b3e-ed886f4f4825\\_story.html](https://www.washingtonpost.com/politics/cleanup-duties-are-a-big-part-of-the-job-in-the-trump-cabinet/2017/02/25/f060ffd0-faeb-11e6-9b3e-ed886f4f4825_story.html) [<https://perma.cc/5LN3-RLXN>]. Parker suggests, however, that similar disputes may have occurred within President Franklin Roosevelt's administration, but that the President resolved them internally without attracting public attention. *Id.* In contrast, Parker reports:

This public and often yawning gulf between Trump and his agency heads has added to the sense of chaos and turmoil emanating from the White House, sending his secretaries



his television show *The Apprentice* and even in his presidential campaign.<sup>30</sup> Commentators have noted that this “appears to be the staffing strategy he’ll take with him to the White House,” with his early selections of “party stalwart” Reince Priebus as Chief of Staff and “populist firebrand” Stephen Bannon as chief strategist.<sup>31</sup> In the early weeks of the Trump administration, Education Secretary Betsy DeVos and Attorney General Jeff Sessions clashed over the previous administration’s protections for transgender students.<sup>32</sup> Because Sessions needed DeVos’s agreement to rescind the policy, “he took his objections to the White House.”<sup>33</sup> President Trump resolved the conflict, siding with his Attorney General.<sup>34</sup>

In addition, President Trump has chosen cabinet secretaries and other top officials with whom he knows he disagrees on important policy issues<sup>35</sup>—and

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scrambling to interpret their boss’s exact positions and leaving other nations confused as to who, exactly, speaks on behalf of the administration.

*Id.*

30. Matthew Nussbaum, *Trump’s Day 35: The Apprentice: White House Edition*, POLITICO (Dec. 14, 2016, 8:19 AM), <http://www.politico.com/blogs/donald-trump-administration/2016/12/trump-apprentice-white-house-232617> [https://perma.cc/38MZ-PQUA]. For an analysis of how the Trump administration may provide ground for revisiting some issues in administrative law, see Daniel A. Farber, *Presidential Administration Under Trump* (Aug. 8, 2017), available at <https://ssrn.com/abstract=3015591>.

31. *Id.* In the early months of the administration, the rivalry between Bannon and the President’s son-in-law, Jared Kushner, received more attention. See Maggie Haberman et al., *In Battle for Trump’s Heart and Mind, It’s Bannon vs. Kushner*, N.Y. TIMES (Apr. 6, 2017), <https://www.nytimes.com/2017/04/06/us/politics/stephen-bannon-white-house.html> [https://perma.cc/KVM9-TVF3] (noting that Bannon has tried to team up with Priebus against Kushner); Ashley Parker et al., *Bannon Wants a War on Washington. Now He’s Part of One Inside the White House*, WASH. POST (Apr. 6, 2017), [https://www.washingtonpost.com/politics/bannon-wants-a-war-on-washington-now-hes-part-of-one-inside-the-white-house/2017/04/06/ec4a135a-1ada-11e7-9887-1a5314b56a08\\_story.html](https://www.washingtonpost.com/politics/bannon-wants-a-war-on-washington-now-hes-part-of-one-inside-the-white-house/2017/04/06/ec4a135a-1ada-11e7-9887-1a5314b56a08_story.html) [https://perma.cc/RB9V-VTBC]. In late July, Priebus “was pushed out . . . after a stormy six-month tenure.” Peter Baker & Maggie Haberman, *Reince Priebus Is Ousted Amid Stormy Days for White House*, N.Y. TIMES (July 28, 2017), <https://www.nytimes.com/2017/07/28/us/politics/reince-priebus-white-house-trump.html> [https://perma.cc/RS96-ZQXU]. A few weeks later, the new Chief of Staff (John Kelly) and Bannon “mutually agreed” that Bannon would leave the White House as well. Maggie Haberman et al., *Stephen Bannon Out at the White House After Turbulent Run*, N.Y. TIMES (Aug. 18, 2017), <https://www.nytimes.com/2017/08/18/us/politics/steve-bannon-trump-white-house.html?mcubz=0> [https://perma.cc/BBZ8-43SZ].

32. Jeremy W. Peters et al., *Trump Rescinds Rules on Bathrooms for Transgender Students*, N.Y. TIMES (Feb. 22, 2017), <https://www.nytimes.com/2017/02/22/us/politics/devos-sessions-transgender-students-rights.html> [https://perma.cc/NJP8-5BGQ].

33. *Id.*

34. *Id.*

35. Peter Baker, *Will Trump Take “Brutally Forthright” Advice from McMaster?*, N.Y. TIMES (Feb. 25, 2017), <https://www.nytimes.com/2017/02/25/us/politics/hr-mcmaster-trump.html> [https://perma.cc/55L9-AKU6]; Jennifer Steinhauer, *Latest to Disagree with Donald Trump: His Cabinet Nominees*, N.Y. TIMES (Jan. 12, 2017), <https://www.nytimes.com/2017/01/12/us/politics/trump-cabinet-mattis-tillerson.html> [https://perma.cc/UVR8-CRYJ].

even promised them “unusual autonomy.”<sup>36</sup> At the same time, however, the White House has placed high-level watchdogs in major federal agencies to keep an eye on their leaders. As *Politico* reported, the dual-reporting (to the head of the agency and the President’s staff) of these “senior advisors . . . could spur early tensions and create conflicts with that pledge of autonomy.”<sup>37</sup> Conflicts between the White House and agencies may lead frequent adversaries, like the State and Defense Departments, to team up against President Trump and his top staff.<sup>38</sup>

Agency conflict—spanning rulemaking, individual-level adjudication, and more general policymaking—is, of course, not new. Nor is it unfamiliar to scholars. Political scientists have long studied agency battles as part of bureaucratic politics.<sup>39</sup> Legal scholars, too, have discussed agency clashes over turf.<sup>40</sup> The scholarship has produced important insights, particularly in showing how agencies do not exist in individual silos. But much of this literature has denigrated agency conflict.<sup>41</sup>

Popular accounts have generally followed suit. After President Trump filled his top two White House jobs with Bannon and Priebus, the *Washington Post*

36. Josh Dawsey & Nancy Cook, *Trump Assembles a Shadow Cabinet*, POLITICO (Jan. 24, 2017), <http://www.politico.com/story/2017/01/trumps-shadow-cabinet-234088> [https://perma.cc/9S3M-QTUP].

37. *Id.* These watchdogs report “not to the secretary, but to the Office of Cabinet Affairs.” Lisa Rein & Juliet Eilperin, *White House Installs Political Aides at Cabinet Agencies to be Trump’s Eyes and Ears*, WASH. POST (March 19, 2017), [https://www.washingtonpost.com/powerpost/white-house-installs-political-aides-at-cabinet-agencies-to-be-trumps-eyes-and-ears/2017/03/19/68419f0e-08da-11e7-93dc-00f9bdd74ed1\\_story.html](https://www.washingtonpost.com/powerpost/white-house-installs-political-aides-at-cabinet-agencies-to-be-trumps-eyes-and-ears/2017/03/19/68419f0e-08da-11e7-93dc-00f9bdd74ed1_story.html) [https://perma.cc/W6BA-4VEN].

38. See Eli Stokols & Josh Dawsey, *Trump Ignores “The Grown-Ups” in His Cabinet*, POLITICO (Feb. 17, 2017, 6:51 PM), <http://www.politico.com/story/2017/02/trump-ignoring-cabinet-235124> [https://perma.cc/688H-6CAH].

39. See, e.g., FRANCIS E. ROURKE, BUREAUCRACY, POLITICS AND PUBLIC POLICY (3d ed. 1984) (treatment of interagency battles); Lewis Anthony Dexter, *Intra-Agency Politics: Conflict and Contravention in Administrative Entities*, 2 J. THEOR. POL. 151 (1990) (discussion of conflict within agencies).

40. For early treatments, see Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201 (2006); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006); Anne Joseph O’Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655 (2006). Much work followed in more recent years. Legal scholars have also examined intra-agency conflict. See, e.g., Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1 (2009).

41. See, e.g., Biber, *supra* note 40 (advocating solutions to intra-agency conflict on tasks); Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181, 190–98 (2011) (explaining how it is more efficient for the White House to deal with problems *ex post* rather than *ex ante*); Tejas N. Narechania, *Patent Conflicts*, 103 GEO. L.J. 1483 (2015) (discussing methods of preventing conflicts between agencies over patent validity); Hari M. Osofsky & Hannah J. Wiseman, *Dynamic Energy Federalism*, 72 MD. L. REV. 773 (2013) (discussing methods of preventing conflicting decisions in energy policy); cf. J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217, 2233 (2005) (showing how “interagency conflict can be productive”); Gersen, *supra* note 40 (providing a more nuanced view); Jacobs, *supra* note 21 (finding many possible negative effects from intra-agency conflict, although concluding ultimately that it may have benefits in at least some contexts); O’Connell, *supra* note 40 (arguing largely for redundancy).

flagged the risks of “confrontation or even paralysis as feuding factions work to further their own goals, edge out adversaries or distract Trump.”<sup>42</sup> In examining clashes between the current President and his cabinet secretaries, the same newspaper termed the latter group “a cleanup crew” and concluded that the conflict “has added to the sense of chaos and turmoil emanating from the White House.”<sup>43</sup>

Administrative law scholars, in particular, have recently focused on, and often celebrated, agency cooperation.<sup>44</sup> They have explored joint rulemaking, such as the Environmental Protection Agency (EPA) and the Department of Transportation (DOT) collaboration on fuel standards.<sup>45</sup> They have discussed coordination in individual-level adjudication, such as the Department of Justice (DOJ) and the Department of Homeland Security (DHS) partnering in cases involving persons without proper documentation.<sup>46</sup> And they have analyzed agency collaboration in shaping policy in complex and novel areas, such as work by DHS and the National Security Agency (NSA) to combat cyber threats.<sup>47</sup> Some research explores intra-agency coordination, such as between civil servants and political appointees.<sup>48</sup>

We are reluctant to join the celebration of agency coordination, at least not without substantial qualifications.<sup>49</sup> Coordination is not always desirable, or may not be desirable immediately. Conflict among and within agencies can provide substantial political, social welfare, and legitimacy benefits. Like adversarial criminal procedure and competitive markets,<sup>50</sup> conflict in the administrative

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42. Philip Rucker & Robert Costa, *In Trump's Washington, Rival Powers and Whispers in the President's Ear*, WASH. POST (Nov. 16, 2016), [https://www.washingtonpost.com/politics/in-trumps-washington-rival-powers-and-whispers-in-the-presidents-ear/2016/11/16/50f3306c-ac03-11e6-a31b-4b6397e625d0\\_story.html](https://www.washingtonpost.com/politics/in-trumps-washington-rival-powers-and-whispers-in-the-presidents-ear/2016/11/16/50f3306c-ac03-11e6-a31b-4b6397e625d0_story.html) [https://perma.cc/J6XW-D6YD].

43. Parker, *supra* note 29.

44. See, e.g., Jason Marisam, *Interagency Administration*, 45 ARIZ. ST. L.J. 183, 189, 191 (2013).

45. Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1168–72 (2012). They “prefer coordinated policymaking” as a general matter. *Id.* at 1183.

46. Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805, 832 (2015). Shah’s objective is descriptive. She states that she is “relatively agnostic about the actual benefits and drawbacks of coordination in any given administrative adjudicatory regime.” *Id.* at 810.

47. Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211, 213–14 (2015) (supporting such institutional designs).

48. Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421, 439–40 (2015). Nou’s article is mostly descriptive, but she plays up the benefits of coordination.

49. Older work in economics on coordination (for example, on meeting games) is “primarily focused on conflict.” Robert B. Ahdieh, *Coordination and Conflict: The Persistent Relevance of Networks in International Financial Regulation*, 78 LAW & CONTEMP. PROBS. 75, 86 (2015) (citing THOMAS SCHELLING, *THE STRATEGY OF CONFLICT* (1981)). The idea that conflict between officials can be valuable is not a product of modern government. See generally Doris Kearns Goodwin, *TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN* (2005) (recounting why President Lincoln incorporated leaders of diverse factions in his party into his cabinet).

50. See, e.g., David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1686–88 (2009) (describing arguments for the adversarial system but noting uncertainty whether they are true “in practice”).

context has benefits and costs. To be sure, we do not deny that coordination is often valuable, for example, to enhance agencies' power to regulate powerful and recalcitrant companies.<sup>51</sup> Sometimes, statutes even require agencies to cooperate.<sup>52</sup> But conflict plays an important and often productive role in the functioning of the modern administrative state. We document the prevalence of adversarial relationships between administrative actors to better understand why such relationships arise, and identify situations where administrative conflict may be desirable—where conflict is “a feature, not a bug.”

In particular, we focus on situations where agencies have different institutional cultures, political allies, or policy priorities that lead to clashes. In some situations, as we will describe, clashes arise by design, perhaps because one agency has oversight over another. In other situations, clashes are more fortuitous but still embody different, institutionally hard-wired perspectives, as in the varying perspectives on national security policies during the San Bernardino shooter's iPhone controversy. Social scientists often think of conflict in terms of “turf wars” where agency heads try to maximize the budgets, staffing, and influence of their agencies to expand their own importance.<sup>53</sup> It would not be surprising if agency heads do have such motivations, on occasion. But conflicts, whatever their motivations, can be most constructive when they bring differing expertise, information bases, constituencies, and values into policy decisions. Such conflicts have the greatest prospects for enhancing expertise and ensuring that all points of view are heard—two key goals of administrative law.

This Article's contributions can be summarized as descriptive, positive, normative, and legal. First, drawing on rich institutional details, we aim to broaden scholarship of agency conflict beyond its current focus on competition over jurisdiction. In short, we look at the myriad ways that agency battles are structured, with attention to normatively and legally relevant attributes. In addition, we direct attention to conflict-resolution mechanisms, including both well-known devices and some that surprised us, such as forced mediation. Agency conflict and the methods used to resolve it vary greatly, but can be organized along several important structural dimensions.

Second, by using social science work on agency and firm design, we aim to explain the use of conflict, as a positive matter,<sup>54</sup> and evaluate its desirability

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51. Keith Goldberg, *FERC-DOJ Teamwork Sets Stage for Increased Enforcement*, LAW360 (Apr. 7, 2016, 5:07 PM), <http://www.law360.com/articles/780801/ferc-doj-teamwork-sets-stage-for-increased-enforcement> [<https://perma.cc/68MN-48XF>]; see generally EUGENE BARDACH, *GETTING AGENCIES TO WORK TOGETHER* (1998) (focusing on how agencies working together can improve public welfare).

52. Evan Weinberger, *FDIC, OCC, FHFA Deliver Own Banker Bonus Rules*, LAW360 (Apr. 26, 2016, 2:57 PM), <http://www.law360.com/articles/788995/fdic-occ-fhfa-deliver-own-banker-bonus-rules> [<https://perma.cc/9XU7-KEXZ>].

53. See, e.g., William A. Niskanen, *Bureaucrats and Politicians*, 18 J.L. & ECON. 617 (1975).

54. We resist the impulse to conflate conflict and fragmentation for two reasons. First, since some division of authority is necessary in any large government, references to fragmentation are often more normative than descriptive; they label some divisions of authority as excessive or unnecessary as

in the administrative context. President Trump's rival-teams approach may be the most visible such strategy presently.<sup>55</sup> But political actors across both parties and both branches often desire adversarial institutional arrangements. Congress largely creates conflict through delegation and appointment restrictions. As does the White House by directives. On occasion, the agencies and courts drive conflict. These drivers of conflict carry different attractions and costs, depending on the type of agency and conflict.

We assess the characteristics of conflict against economic, political, and philosophical criteria to suggest lessons for institutional design. The idea that administrative redundancy can improve social welfare or democratic legitimacy is not new.<sup>56</sup> But studies of overlapping authority largely ignore important characteristics of modern government institutions. For example, some reduce the purpose of competition between agencies to belt-and-suspenders redundancy that ensures key government functions are performed even if one agency fails. Others see competition between agencies primarily as preventing each from shirking responsibility. We agree these are important functions of overlapping and adversarial agency relationships but see additional benefits and complexities (such as information generation and wider participation of affected interests through a longer decision-making process) that merit more attention.

Finally, we use our descriptive, positive, and normative work on agency conflict to contribute to longstanding legal debates and to flag important legal issues that have generated little attention. Administrative law clings tightly to the image of a single agency actor. As we have argued previously, however, this ignores much of the reality of modern agency practice.<sup>57</sup> Our goal is not to resolve enduring disputes over particular doctrines, but rather to enrich the discussion by showing how doctrine and agency conflict can interact.

The Article proceeds as follows. In Part I, we lay some groundwork with a typology of conflict in federal agency relationships, relying on real-world examples. Our typology is built around agency type (that is, the level of independence from the White House) and the structure of the relationship in which conflict occurs—hierarchical, advisory, or symmetrical. In Part II, we classify mechanisms by which conflicts between and within agencies are resolved. Very few involve the courts. Conflicts within hierarchical relationships

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against some particular normative benchmark. Second, the choice between a single large agency and multiple smaller ones has ambiguous implications for conflict. If jurisdictional boundaries are clear and the agencies have distinctive goals, the creation of multiple agencies may reduce conflict where intra-agency conflict might have occurred. Equally, subdividing agencies might increase the number of overlaps and the potential for conflict.

55. See *supra* note 29 and accompanying text.

56. See RICHARD A. POSNER, PREVENTING SURPRISE ATTACKS: INTELLIGENCE REFORM IN THE WAKE OF 9/11, at 199–201 (2005); Gersen, *supra* note 40, at 211–16; Katyal, *supra* note 40, at 2324–27; O'Connell, *supra* note 40, at 1658, 1675–79, 1721–24.

57. Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1142, 1150–52 (2014).

generally have resolution mechanisms that are clear in theory—the top actor decides. Various factors, however, often constrain a top actor’s power over subordinates, including the influence of actors outside the formal chain of command. Resolution mechanisms in advisory and symmetrical relationships are more varied, and include agency agreements, voting rules, and mediation.

Part III assesses the models of interactions among agencies developed in Parts I and II, in both positive and normative terms. For each model, we consider the political roots of the intended conflict and then assess that conflict against social welfare and legitimacy criteria. We examine how each model might predict agency behavior and consider specific examples of desirable and undesirable interactions. Adversarial agencies can help reduce informational asymmetries, allow wider participation of varied interests, and slow down administrative action.

In Part IV, we consider the law’s role in conflictual relationships. We first return to an old administrative law debate: whether the president can direct an agency to take a particular action when Congress has delegated authority directly to the agency, rather than the president. We then consider several other separation-of-powers issues, including congressional limitations on whom the president may name to various executive branch positions, legislative reporting mandates, and an agency’s ability to subdelegate its authority. Finally, we address legal issues stemming from direct judicial treatment of agency conflicts. We examine the application of deference doctrines when agencies clash, nonadministrative law issues in the litigation process, and the justiciability of disputes between agencies. The implications of interagency conflict for the courts have been underexplored, with the exception of the question of deference to agency actions, to which we contribute a different perspective. Part V concludes with some thoughts for future research.

We cover vast ground from distinct perspectives. Consequently, the Article does not spin a perfectly linked narrative. For those less interested in institutional details of specific agency relationships, the middle Sections of Part I could be skipped. For those drawn to the application of social science research or to doctrinal complexity, consider the two tables in Part I and Part II (Typology of Agency Conflict, and Resolution Mechanisms for Agency Conflict) before jumping straight to Part III or Part IV.

## I.

### TYPOLOGY OF ADVERSARIAL RELATIONSHIPS

We begin as taxonomists of adversarial agencies. To the hesitant reader, bear with us, at least for the start and end of this Part. Before we survey the modern manifestations of agency conflict and then summarize key examples in Table 1 (Typology of Agency Conflict), we need to define our terms and boundaries. By adversary or conflict, we do not contemplate mortal enemies. Rather, we envision scenarios where objectives are more at odds than aligned.

For this reason, independent institutions without baked-in conflicting objectives would not suffice. Competing objectives, however, neither necessarily remain unchanged over time nor govern the entire agency. After all, the same agencies could have both adversarial and nonadversarial relationships, depending on the issues, political environments, personalities, and other factors. In addition, while we recognize there are discontinuities—even sustained ones—we demand that the conflict exist (or at least, potentially exist) a good amount of the time. This means that conflict may overlap with coordination; potentially adversarial actors may choose—or be forced—to work together. But conflictual agencies may choose not to coordinate in some situations, and coordination need not involve adversarial agencies. This definition lacks precision, to be sure, but its spirit is hopefully clear.

A few words about our focus: we limit ourselves to conflict within the federal administrative state. We do not address conflict with other branches or levels of government, the benefits of which have been amply discussed by others. We also target intentional conflict, not situations where a clash between agencies seems mostly fortuitous. Granted, such clashes are often—and we suspect, most often—not accidental conflicts.<sup>58</sup> As a result, considerable agency interaction falls within our scope. In some sense then, our contribution is mainly one of organization, through a focus on dissent among and within agencies.<sup>59</sup>

Administrative conflict takes many forms, though administrative law scholarship has focused on only a few. Our categorization of administrative conflicts begins by distinguishing between conflicts entirely within the executive branch and those involving independent regulatory commissions and quasi agencies. This distinction is significant because intraexecutive disputes are potentially subject to settlement by the president, whereas the others are not. We also separate conflicts within an agency from those between agencies. To some extent, the difference is only one of scale, but the boundaries between agencies may affect the intensity and scale of interactions between actors, the degree to which the actors do or do not share a common organizational culture, and

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58. See Keith Bradley, *The Design of Agency Interactions*, 111 COLUM. L. REV. 745, 748 (2011). *But cf.* Freeman & Rossi, *supra* note 45, at 1143; Marisam, *supra* note 41, at 190–98. This is an empirical question we do not resolve, but our intuition suggests that if Congress and the president are rational actors, *see infra* Part III, they are largely choosing such designs.

59. Others have provided their own classifications of agency interactions with different focuses and boundaries. *See, e.g.,* Bradley, *supra* note 58, at 754–56 (classifying interagency interaction into “lobbying,” “lobbying” with “extra leverage,” and “express authority over some aspect of an action agency’s decisions”); Alejandro E. Camacho & Robert L. Glicksman, *Functional Government in 3-D: A Framework for Evaluating Allocations of Government Authority*, 51 HARV. J. ON LEG. 19, 23, 37–61 (2014) (classifying agency relationships along three dimensions: “centralization, overlap, and coordination”); Freeman & Rossi, *supra* note 45, at 1157–61 (classifying interagency consultation into “discretionary,” “mandatory,” with “public response requirements,” with “default position requirements,” and with “concurrence requirements”); Gersen, *supra* note 40, at 208–09 (breaking down jurisdictional delegation by whether it is “complete” or “exclusive”); Shah, *supra* note 46, at 830–50 (classifying interagency coordination in adjudication as “phased,” “substitutable,” or “collaborative”).

treatment by courts. In terms of design choices, the boundaries presumably shape the costs and benefits of adversarial relationships.

Our typology also distinguishes conflicts based on the relationship between the agencies. We break these relationships into four rough categories. In the first category, there is a hard hierarchy: one actor can veto another's actions or substitute its own binding decision. In the second category, there is a soft hierarchy: a substantive power relationship still exists, but the dominant actor's control has limits. In the third category, there is a monitoring or advisory relationship: one actor makes the decision, but another is authorized to monitor, demand information, or offer formal advice—sometimes creating legal or political obstacles. In the fourth category, there is a symmetrical relationship: the actors operate in parallel. For instance, they both claim jurisdiction over the same subject, or agree to make decisions jointly. This last form of conflict has probably received the most attention in the literature, but prior scholarship has primarily emphasized how to smooth over conflicts rather than highlight possible benefits.

The following listing may assist the reader in understanding the relationships between these categories:

1. **Hard hierarchy:** one actor is formally subordinate to the other.
2. **Soft hierarchy** (or “mixed” hierarchy and advisory): one actor can effectively overturn the other's decisions, but only in some areas.
3. **Advisory or monitoring authority:** only one actor has decisional authority, but the other can exert some degree of influence.
4. **Symmetrical relationship:** the two actors have equivalent and overlapping authority.

The four categories are ordered in terms of the imbalance of the power relationship, with formal authority of one actor over the other becoming more attenuated as we move down the list. We consider the first and second categories to be strictly vertical relationships because one agency has formal power over the other's decisions. We correspondingly call the fourth relationship horizontal. The third category has attributes of both vertical and horizontal relationships. In particular cases, an advisory or monitoring relationship may have great influence (approaching a vertical relationship in practical terms) or provide little traction (approaching a symmetrical one).

We take each of these four relational categories in turn. Within each, we consider two additional dimensions: whether the involved agencies are entirely within the executive branch or more independent, and whether the conflict is between agencies or within an agency. At the end, we summarize the typology in Table 1 (Typology of Agency Conflict) and make a few general points.



### A. Agency Conflict in a Hard Hierarchy

Our first group includes adversarial actors in a hard hierarchical relationship. When the “inferior” actor has different goals than the “superior” actor and some ability to operate independently, conflict is easily generated, even if it can be ultimately resolved because of the superior actor’s power.

#### 1. Hard Hierarchies Between Executive Agencies

Hard hierarchical relationships abound between executive agencies. One formal hierarchy within the executive branch, established through presidential directive, has generated considerable attention. Executive Order 12866, promulgated by President Bill Clinton and maintained by his successors, requires that an executive agency receive permission from the Office of Information and Regulatory Affairs (OIRA) before proposing and issuing significant regulations. Although OIRA, which is part of the White House Office of Management and Budget (OMB), can effectively veto proposed regulations mostly on cost-benefit grounds or for another listed reason in the Executive Order, it is less able to force agencies to take specific action.<sup>60</sup>

Congress also creates hard hierarchies between agencies, yielding strife. Most wide-ranging in scope, DOJ represents almost all executive agencies at every level of litigation.<sup>61</sup> Because DOJ looks out for the government’s interests as a whole in making litigation choices, conflict can arise between the action agency and DOJ.<sup>62</sup> In addition, under the Endangered Species Act, agencies are required to “consult” with the Fish and Wildlife Service (FWS) or the National Marines Fisheries Service whenever a government project may impact an

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60. See Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489, 1494–95 (2002) (noting use of prompt letters by President George W. Bush’s OIRA and calling for more such actions). Additionally, OIRA’s authority is limited largely to “significant” rulemakings, with many other important types of agency actions outside its formal authority—for instance, agency adjudications and spending decisions. See Farber & O’Connell, *supra* note 57, at 1162. More generally, OMB serves as a clearinghouse for both executive agency budget submissions and congressional testimony. See Eloise Pasachoff, *The President’s Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182 (2016).

61. 28 U.S.C. § 516 (2012) (“Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General.”). This authority includes critical control over whether a lower court loss will be appealed. Mark B. Stern & Alisa B. Klein, *The Government’s Litigator: Taking Clients Seriously*, 52 ADMIN. L. REV. 1409, 1411 (2000). The Hobbs Act does allow executive (and other) agencies to appear separately from DOJ in any proceeding reviewing an order under the Act. See generally *id.* at 1416; 28 U.S.C. § 2348 (2012). Outside of the Hobbs Act, some scholars see DOJ as primarily a “hired gun” for the agency. Michael Asimow & Yoav Dotan, *Hired Guns and Ministers of Justice: The Role of Government Attorneys in the United States and Israel*, 49 ISR. L. REV. 3, 3 (2016). While this characterization may appear to be true in many circumstances, the structure has also produced substantial disagreement.

62. See Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 CARDOZO L. REV. 273, 277–78 (1994). Recently, Justice Elena Kagan asked in oral argument why HHS, which lacks independent litigating authority, had not signed onto the government’s brief on behalf of the agency. See *infra* Part IV.A.2.b.

endangered species.<sup>63</sup> Similarly, EPA regulates other environmental actions by federal agencies, often producing tension with the Defense Department, in particular.<sup>64</sup> EPA can also reverse regulatory decisions by the Army Corps of Engineers that govern private parties.<sup>65</sup>

The legislature also establishes conflictual hierarchies by assigning and reshuffling agencies in the government's organizational chart. In 2002, for example, Congress moved the Federal Emergency Management Agency (FEMA) into the recently created DHS, making the head of FEMA report to the Secretary of Homeland Security.<sup>66</sup> The first officials in those new arrangements—FEMA Director Michael Brown and Homeland Security Secretary Tom Ridge—battled fiercely over turf, money, and personnel.<sup>67</sup> In another example, from decades earlier, Congress shifted FDA authority from the U.S. Department of Agriculture (USDA) to the Federal Security Agency and then later to HHS. As described in the Introduction, when the FDA wanted to allow access to the morning after pill to teenage girls without a prescription, the HHS Secretary could and did overrule the decision.<sup>68</sup> Because these last two examples involve entities within a larger cabinet department, they could also be viewed as legislatively created intra-agency disputes.

## 2. *Interagency Hard Hierarchies and Quasi-Independent Agencies*

Hard hierarchies sometimes involve federal actors outside classic executive agencies, where the independent agency is often the subordinate.<sup>69</sup> Most common is DOJ's litigation authority over independent regulatory commissions,

63. 16 U.S.C. § 1536 (2012). This duty to consult is broad—it is required “so long as the agency has ‘some discretion’ to take action for the benefit of a protected species.” *Nat. Res. Def. Council v. Jewell*, 749 F.3d 776, 784–85 (9th Cir. 2014) (en banc) (duty applies to renewal of a private contract). The FWS then must issue a Biological Opinion, “explaining how the proposed action will affect the species or its habitat” and setting out mandatory steps for the agency to take. *Bennett v. Spear*, 520 U.S. 154, 158 (1997).

64. See Mark P. Nevitt, *Defending the Environment: A Mission for the World's Militaries*, 36 HAW. L. REV. 27 (2014). EPA and the FWS lack enforcement authority, however, unless DOJ agrees to represent them in court. Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PENN. J. CONST. L. 559, 560 (2003) (“Agencies may not employ outside counsel for litigation and must refer all matters to DOJ.”).

65. See *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 717–18, 730 (D.C. Cir. 2016) (affirming EPA's revocation of an ACE-issued Clean Water Act permit).

66. Susan B. Glasser & Michael Grunwald, *Department's Mission Was Undermined from the Start*, WASH. POST (Dec. 22, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/21/AR2005122102327.html> [https://perma.cc/CX5B-6QE4].

67. Michael Grunwald & Susan B. Glasser, *Brown's Turf Wars Sapped FEMA's Strength*, WASH. POST (Dec. 23, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/22/AR2005122202213.html> [https://perma.cc/8YY5-Y9G4].

68. See *supra* notes 16–20 and accompanying text.

69. See DAVID E. LEWIS & JENNIFER L. SELIN, ADMIN. CONFERENCE OF THE UNITED STATES, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 127–29 tbl.18 (2012) (listing agencies that need another agency to grant approval before they can act).

particularly at the Supreme Court.<sup>70</sup> As with executive agencies, tension easily arises between DOJ and these independent agencies. Far less common is an independent agency calling the shots, as the defunct Interstate Commerce Commission and the Postal Service (USPS)—a quasi agency since 1971—have done in terms of shipping rates for federal agencies.<sup>71</sup>

There are also hard hierarchical relationships between independent and quasi agencies. For instance, the USPS must submit proposed rates to the Postal Rate Commission (PRC)—an independent regulatory commission—for approval.<sup>72</sup> These agencies do not always agree, and an early battle in federal court also generated a dispute between the USPS and DOJ over whether the latter agency controlled the former's litigation.<sup>73</sup> Today, the two independent agencies seem to generate several cases a year in the D.C. Circuit—last year, for example, the USPS lost a fight with the PRC over the price of postage on Netflix's return envelopes.<sup>74</sup>

### 3. *Hard Hierarchies Within the Agency*

Hard hierarchies within agencies can also create conflict. We consider two subgroups: conflict between political appointees and conflict between appointees and careerists.

#### a. *Between Different Politically Accountable Agents*

At the most general level, an agency head can typically overrule a political underling. A cabinet secretary (or administrator) therefore can reverse an assistant secretary (or assistant administrator). EPA's Assistant Administrator for Air and Radiation, for instance, focuses on a narrower set of topics than EPA's Administrator. Agency heads are not the only superiors within an agency, of course. Within DOJ, the Solicitor General (SG) controls a number of key decisions, including whether the government can appeal from an adverse trial court decision or seek certiorari in the Supreme Court.<sup>75</sup> Sometimes, the hierarchies are paired with other requirements to foster diverse perspectives beyond conflict that may arise from broader and narrower missions. For example, by statute, the Director of the NSA must be a military officer with at

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70. 28 U.S.C. § 516 (2012); *see generally* Devins, *supra* note 62 (discussing agencies with independent litigating authority).

71. *See* United States v. Interstate Commerce Comm'n, 337 U.S. 426 (1949) (assuming the ICC rates applied to the government because an agency had offloaded the shipment).

72. *See* Devins, *supra* note 62, at 306–10.

73. *Id.*

74. U.S. Postal Serv. v. Postal Rate Comm'n, 816 F.3d 883 (D.C. Cir. 2016).

75. *See* Department of Justice, *Procedure with Respect to Appeals Generally*, in U.S. Attorneys Manual, 2-2.101 (“All appeals to the lower appellate courts in cases handled by divisions of the Department and United States Attorneys, and all petitions for certiorari and direct appeals to the Supreme Court must be authorized by the Solicitor General.”), available at <https://www.justice.gov/usam/usam-2-2000-procedure-respect-appeals-generally#2-2.123> [<https://perma.cc/P5UB-G5DD>].

least a three-star rank; by convention, the agency's Deputy Director, by contrast, must be a technically experienced civilian.<sup>76</sup>

*b. Between Political Officials and Civil Servants*

There has been considerable discussion about the tensions between political appointees and careerists within agencies.<sup>77</sup> In principle, political officials control civil servants. There are some formal constraints, however, on this control. For example, careerists generally can be fired only for cause.<sup>78</sup> There are also considerable informal constraints. Careerists outlast, on average, political appointees, and often have an informational or expertise advantage.<sup>79</sup> Thus, conflicts between appointees and careerists remain endemic, with permanent staff utilizing some significant levers, such as whistleblowing, to frustrate the efforts of their political "masters."<sup>80</sup> If the first few months of President Trump's administration are a bellwether, careerists will be pushing back against political directives through new social media accounts, informal work slowdowns, and other mechanisms.<sup>81</sup>

A canonical administrative law case, *Universal Camera Corp. v. National Labor Relations Board*, involved a conflict between civil servants and political appointees.<sup>82</sup> The hearing examiner—the lower-level (career) decision maker—and the Board—the ultimate (political) decision maker—came to different

76. U.S. DEP'T OF DEF., DIRECTIVE NO. 5100.20 (2010). Similarly, the Administrator of the Federal Aviation Administration must be a civilian and have "experience in a field directly related to aviation," whereas the Deputy Administrator may be an active military officer. 49 U.S.C. § 106 (2012).

77. See, e.g., Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032 (2011); Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515 (2015).

78. See DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE* 18–19 (2008) (describing history of civil service protections).

79. See *id.* at 137; see also SEAN GAILMARD & JOHN W. PATTY, *LEARNING WHILE GOVERNING: EXPERTISE AND ACCOUNTABILITY IN THE EXECUTIVE BRANCH* 25–26 (2013) (developing theory for how careerists develop expertise).

80. See *infra* notes 140–143 and accompanying text.

81. Michael D. Shear & Eric Lichtblau, "A Sense of Dread" for Civil Servants Shaken by Trump Transition, N.Y. TIMES (Feb. 11, 2017), <https://www.nytimes.com/2017/02/11/us/politics/a-sense-of-dread-for-civil-servants-shaken-by-trump-transition.html> [<https://perma.cc/7KK5-6DS8>]; Juliet Eilperin et al., *Resistance from Within: Federal Workers Push Back Against Trump*, WASH. POST, (Jan. 31, 2017), [https://www.washingtonpost.com/politics/resistance-from-within-federal-workers-push-back-against-trump/2017/01/31/c65b110e-e7cb-11e6-b82f-687d6e6a3e7c\\_story.html](https://www.washingtonpost.com/politics/resistance-from-within-federal-workers-push-back-against-trump/2017/01/31/c65b110e-e7cb-11e6-b82f-687d6e6a3e7c_story.html) [<https://perma.cc/3PEH-FQJQ>]. The Administrator of EPA, Scott Pruitt, apparently had such substantial concerns about the willingness of staff to cooperate in repealing a major rule that he gave serious thought to hiring outside counsel to do the work instead. Annie Snider, *Pruitt Allies Explore Hiring Private Lawyers to Rewrite EPA Rule*, POLITICO (Apr. 18, 2017, 5:35 PM), <http://www.politico.com/story/2017/04/pruitt-water-rules-private-lawyers-237339> [<https://perma.cc/2KG3-JHMA>]. Vacancies in high-level positions within EPA are a contributing factor to the concern about the agency's inability or unwillingness to carry out the Administrator's direction. *Id.*

82. 340 U.S. 474 (1951).

factual conclusions regarding the company's reason for terminating an employee.<sup>83</sup> Reversing the Second Circuit, the Supreme Court held that the Board could, of course, overrule the examiner, but the courts would decide if that call was reasonable, considering both levels of decision making.<sup>84</sup>

### B. Agency Conflict in a Soft Hierarchy

Our second group includes adversarial actors in a mixed hierarchical and advisory relationship. While the actors have separate interests, as with the first category, here the higher-level actor has less formal control over the lower-level one. Specifically, the control has both hard and soft components.

#### 1. Soft Hierarchies Between Executive Agencies

Mixed relationships occur between executive agencies. Consider DOJ's Office of Legal Counsel (OLC). By the Attorney General's delegation, OLC provides "authoritative legal advice" to executive agencies.<sup>85</sup> Unlike more purely advisory relationships, agencies cannot ignore OLC advice.<sup>86</sup> Under President Obama, DHS wanted to extend its Deferred Action for Parents program to parents of "dreamers," children who themselves were granted deferred action under a previous program.<sup>87</sup> OLC refused on legal grounds, and DHS accordingly restricted the program to parents of children who are citizens or legally permanent residents.<sup>88</sup>

In a structure involving fewer potential agencies than the OLC example, the Director of National Intelligence (DNI) has both hierarchical and advisory authority over the intelligence community's members.<sup>89</sup> Established a decade ago after the 9/11 Commission excoriated the decentralized, conflicting structure of the intelligence community, the DNI controls the newly created National Counterterrorism Center.<sup>90</sup> The DNI has some budgetary and personnel authority over the intelligence agencies but not complete control.<sup>91</sup> The DNI also must

83. *Id.* at 491–92.

84. *Id.* at 497.

85. *Office of Legal Counsel*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/olc> [<https://perma.cc/Y6YU-JC9E>].

86. Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1455–56 (2010).

87. Dep't of Homeland Sec.'s Auth. to Prioritize Removal of Certain Aliens Unlawfully Present in the U.S. and to Defer Removal of Others, 38 Op. O.L.C. at 1–2 (Nov. 19, 2014), <https://www.justice.gov/file/179206/download> [<https://perma.cc/BK3Y-52QG>].

88. *Id.* at 42 n.218. OLC has recently functioned more as a participant than a decider on some legal questions at the choice of the White House. Daphna Renan, *The Law Presidents Make*, VA. L. REV. (forthcoming 2017) (manuscript at 62–63), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2948177](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2948177) [<https://perma.cc/7QLV-WMPL>].

89. Intelligence Reform and Terrorism Prevention Act, Pub. L. No. 108-408, 118 Stat. 3638 (2004) (codified in scattered sections of 50 U.S.C. and other titles of U.S.C.) [hereinafter IRA]; O'Connell, *supra* note 40, at 1666–69.

90. 50 U.S.C. § 3024(f)(2) (2012).

91. *Id.* §§ 3024(d)–(e); O'Connell, *supra* note 40, at 1667–68.

concur in selecting the heads of many intelligence agencies.<sup>92</sup> This complex relationship between the DNI and intelligence agencies has produced repeated conflict.<sup>93</sup>

### 2. *Interagency Soft Hierarchies and Quasi-Independent Agencies*

Adversarial mixed hierarchical and advisory examples involving nonexecutive agencies are harder to find. But the Financial Stability Oversight Council (FSOC) is a case in point. Established under Dodd-Frank to identify and address risks to financial stability, FSOC is comprised of heads of executive and independent financial regulatory agencies.<sup>94</sup> It can vote to call on a financial agency to adopt more stringent regulations, after providing prior notice and comment.<sup>95</sup> The agency then needs to comply or explain its refusal to comply to Congress.<sup>96</sup> FSOC took a preliminary vote in 2012, for example, to push the SEC to regulate money market mutual funds;<sup>97</sup> the SEC, with some opposition, eventually promulgated rules.<sup>98</sup> FSOC also plays a softer role, providing advice to financial agencies.

### 3. *Soft Hierarchies Within the Agency*

This mix of hard and soft controls also exists within agencies and produces strife. We consider three subgroups: conflict between political appointees with no reporting obligations to Congress, conflict between appointees and IGs, and conflict between chairs and members of multimember agencies.

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92. 50 U.S.C. § 3041 (2012).

93. O'Connell, *supra* note 40, at 1669.

94. See generally Jacob E. Gersen, *Administrative Law Goes to Wall Street: The New Administrative Process*, 65 ADMIN. L. REV. 689, 693–702 (2013) (describing attributes); Adam J. Levitin, *The Politics of Financial Regulation and the Regulation of Financial Politics: A Review Essay*, 127 HARV. L. REV. 1991, 2041 (2014) (concluding new agency is not likely to be effective).

95. See Dodd-Frank § 120(c)(2), 124 Stat. § 1409 (2010) (codified at 12 U.S.C. § 5330 (2010)); Gersen, *supra* note 94, at 701.

96. 12 U.S.C. §§ 5330(c)–(d) (2012).

97. FIN. STABILITY OVERSIGHT COUNCIL, U.S. DEP'T OF THE TREASURY, PROPOSED RECOMMENDATIONS REGARDING MONEY MARKET MUTUAL FUND REFORM (2012), [http://www.treasury.gov/initiatives/fsoc/Documents/Proposed Recommendations Regarding Money Market Mutual Fund Reform - November 13, 2012.pdf](http://www.treasury.gov/initiatives/fsoc/Documents/Proposed_Recommendations_Regarding_Money_Market_Mutual_Fund_Reform_-_November_13,_2012.pdf) [<https://perma.cc/DVK3-VAR9>]; see generally Michael S. Barr, *Comment: Accountability and Independence in Financial Regulation: Checks and Balances, Public Engagement, and Other Innovations*, 78 LAW & CONTEMP. PROBS. 119, 124 (2015) (providing background).

98. Press Release, Sec. & Exch. Comm'n (SEC), SEC Adopts Money Market Fund Reform Rules (July 23, 2014); SEC Comm'r Daniel M. Gallagher, *Bank Regulators at the Gates: The Misguided Quest for Prudential Regulation of Asset Managers: Remarks at the 2015 Virginia Law and Business Review Symposium* (Apr. 10, 2015), <https://www.sec.gov/news/speech/041015-spch-cdmg.html> [<https://perma.cc/6QT6-HE2G>]. We thank Adam White for pointing us to this example. For a similar, more recent conflict between FSOC and the SEC, see Ed Beeson, *SEC Guards Fund Industry Turf with New Derivatives Rules*, LAW360 (Dec. 11, 2015, 10:11 PM), <http://www.law360.com/articles/737057/sec-guards-fund-industry-turf-with-new-derivatives-rules> [<https://perma.cc/2PUU-WAVX>].

*a. Between Different Politically Accountable Agents Entirely Within the Agency*

An agency's general counsel (GC) typically plays this mixed role with other internal agency units. The GC usually has the final word on legal interpretations within the agency.<sup>99</sup> Agency leaders may also require the GC to sign off on various policy decisions. Most significantly, Congress created an independent GC in the NLRB and gave the GC sole "authority to make certain decisions, . . . including the power to issue complaints."<sup>100</sup> As with OLC, the typical GC is unauthorized to conduct the policymaking itself. Accordingly, tension can then erupt between the lawyers and on-the-ground policymakers.<sup>101</sup>

*b. Between Politically Accountable Agents and IGs*

Over seventy agencies—spanning a range of agency structures—have an IG. The IG has dual masters: the agency leader and Congress.<sup>102</sup> By statute, IGs, who are supposed to be chosen without regard to partisanship, have "access to all" information relating to programs under their authority, and report findings to both principals.<sup>103</sup> Consequently, unlike with most other political appointees, new administrations have refrained from asking current IGs to resign.<sup>104</sup> While the IG typically has formal access to information within the agency and can issue reports identifying agency problems, the IG lacks authority to fix the problems.<sup>105</sup> The IG-agency relationship is often adversarial.<sup>106</sup> Since 2010, for

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99. See Magill & Vermeule, *supra* note 77, at 1060–61.

100. *Id.* at 1059, 1072.

101. See, e.g., Thomas O. McGarity, *The Internal Structure of EPA Rulemaking*, 54 *LAW & CONTEMP. PROBS.* 57, 82 (1991).

102. See PAUL C. LIGHT, *MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY* 24–25 (1993); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-503T, *INSPECTORS GENERAL: OVERSIGHT OF SMALL FEDERAL AGENCIES AND THE ROLE OF THE INSPECTORS GENERAL* 3, 10 (2014) (testimony of Beryl H. Davis, Dir. Fin. Mgmt. & Assurance, before the Subcomm. on Fin. & Contracting Oversight, Comm. on Homeland Sec. & Governmental Affairs, U.S. Senate).

103. See LIGHT, *supra* note 102, at 50.

104. President Trump's administration pulled back its IG termination efforts after IGs raised concerns. Kevin Bogardus & Cecelia Smith-Schoenwalder, *Trump's Transition Team Targeted IGs*, *E&E NEWS* PM (Feb. 1, 2017), <https://www.eenews.net/eenewspm/stories/1060049398> [<https://perma.cc/CP8N-F5FY>]. The continuing IG of DHS reportedly announced, at the request of several members of Congress and public complaints, an investigation into the "implementation" of Trump's initial immigration executive order, instructing agency components to preserve "relevant information." Ryan Devereaux et al., *Homeland Security Inspector General Opens Investigation of Muslim Ban, Orders Document Preservation*, *INTERCEPT* (Feb. 1, 2017), <https://theintercept.com/2017/02/01/homeland-security-inspector-general-opens-investigation-of-muslim-ban-rollout-orders-document-preservation> [<https://perma.cc/4PMM-QQPZ>].

105. See *id.*

106. See Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 *STAN. L. REV.* 1027, 1040–55 (2013) (providing several examples in the national security space).

example, the FBI has tried to withhold certain records from its parent agency's IG.<sup>107</sup>

*c. Between Chairs and Members of Multimember Agencies*

Although independent regulatory commissions generally require a majority of their leaders to agree before undertaking much action, there are also hierarchies within their leadership slate. Commission and board chairpersons often have additional authority—over staffing, budgeting, relations with Congress and the White House, and even how internal dissent is expressed.<sup>108</sup> In many instances, the chair, unlike the other members who can be removed only for cause, serves in that top position at the pleasure of the president.<sup>109</sup>

*C. Agency Conflict in Advisory and Monitoring Relationships*

Our third group turns to arenas for conflict in which formal decision-making power rests entirely with one agency or official, but another agency or official has only a participatory or overseer role. Sometimes, that role is simply the ability to provide feedback; other times, the receiving agency must provide an explanation if it disagrees.<sup>110</sup> We focus on established channels for advising.<sup>111</sup>

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107. Michael E. Horowitz, *Give Inspectors General Access to the Records They Need to Do Their Job*, WASH. POST (Oct. 18, 2015), [https://www.washingtonpost.com/opinions/give-inspectors-general-access-to-the-records-they-need-to-do-their-jobs/2015/10/18/54942f30-738a-11e5-9cbb-790369643cf9\\_story.html](https://www.washingtonpost.com/opinions/give-inspectors-general-access-to-the-records-they-need-to-do-their-jobs/2015/10/18/54942f30-738a-11e5-9cbb-790369643cf9_story.html) [<https://perma.cc/52R6-EBEQ>]. In 2015, OLC ruled in favor of the FBI regarding wiretap information “that have either an attenuated or no connection with the conduct of the Department’s criminal law enforcement programs or operations,” and disclosures under the Fair Credit Reporting Act “that have either an attenuated or no connection with the approval or conduct of foreign counterintelligence investigations.” Dep’t of Justice Inspector Gen.’s Access to Info. Protected by the Fed. Wiretap Act, Rule 6(e) of the Fed. Rules of Criminal Procedure, and Section 626 of the Fair Credit Reporting Act, 39 Op. O.L.C. at 3 (July 20, 2015). A federal district court recently held that documents supplied by an agency to the IG are protected by attorney-client privilege. *See* Pub. Emp. for Envtl. Resp. v. EPA, 211 F. Supp. 3d 227 (D.D.C. 2016).

108. *See* Daniel E. Ho, *Measuring Agency Preferences: Experts, Voting, and the Power of Chairs*, 59 DEPAUL L. REV. 333, 360 (2010); Jacobs, *supra* note 21, at 37.

109. *See* LEWIS & SELIN, *supra* note 69, at 110 tbl.12. For example, in the controversy over storing nuclear waste at Yucca Mountain, there was substantial conflict between the chairs of the Nuclear Regulatory Commission (NRC) chosen by President Obama (a long-time opponent of the plan) and the agency’s licensing board and some other commissioners. According to one report, one of these chairs successfully terminated the project without holding a formal vote. Adam J. White, *Yucca Mountain: A Post-Mortem*, NEW ATLANTIS, Fall 2012, at 3, 13, <http://www.thenewatlantis.com/publications/yucca-mountain-a-post-mortem> [<https://perma.cc/A8SE-44TC>]. There is a larger dispute over the extent of presidential and congressional control over independent agencies that we do not address here. For a recent exploration, see Brian D. Feinstein, *Designing Executive Agencies for Congressional Control*, 69 ADMIN. L. REV. 259 (2017).

110. *See* DeShazo & Freeman, *supra* note 41, at 2226.

111. To be sure, there is considerable conflict that arises from informal monitoring.



### 1. *Advising and Monitoring Between Executive Agencies*

These advisory and monitoring relationships permeate the executive branch.<sup>112</sup> Some arrangements focus on the agency tasked with soliciting advice; others emphasize a particular advisor. As to the former, there are formal mechanisms for obtaining comments from agencies about proposed actions by other agencies. Under the National Environmental Policy Act (NEPA), for example, agencies must obtain comments from any other agency with relevant environmental expertise or authority for certain projects.<sup>113</sup> EPA is a frequent commentator.<sup>114</sup> For instance, it pushed the State Department to revise its analysis of the Keystone XL pipeline, sharply criticizing a draft of the environmental impact statement.<sup>115</sup> More recently, in a dispute with the Federal Energy Regulatory Commission (FERC) over approval of another major pipeline, EPA sharply criticized FERC's environmental impact statement for failing to consider impacts on greenhouse gases.<sup>116</sup> It requested a high-level meeting to resolve the dispute and invoked guidance issued by the White House Council on Environmental Quality (CEQ) in support of its views.<sup>117</sup>

Some advisory relationships within the government are specifically designed to give representation to underrepresented interest groups outside the government. Since 1976, the Small Business Administration (SBA) has contained an independent Office of Advocacy, which represents—by statute—the interests of small business within the government, often through comments in the rulemaking process.<sup>118</sup> As part of its commenting role, the agency even

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112. In the classic administrative law case, *Overton Park*, the relevant statutes commanded the Secretary of Transportation to “cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed.” *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 404–05 & nn.2–3 (1971).

113. See 40 C.F.R. § 1503.1(a). Once the request is made, agencies with the environmental expertise or authority then have a duty to respond. *Id.* § 1503.2. EPA has a specific statutory duty to respond under 42 U.S.C. § 7609(a) (2010).

114. Biber, *supra* note 40, at 43–44.

115. Lenny Bernstein & Juliet Eilperin, *EPA Wants State Dept. to Rework Analysis of Keystone XL Pipeline*, WASH. POST (Apr. 22, 2013), [https://www.washingtonpost.com/national/health-science/epa-wants-state-dept-to-rework-analysis-of-keystone-xl-pipeline/2013/04/22/1c6e9812-ab9f-11e2-b6fd-ba6f5f26d70e\\_story.html](https://www.washingtonpost.com/national/health-science/epa-wants-state-dept-to-rework-analysis-of-keystone-xl-pipeline/2013/04/22/1c6e9812-ab9f-11e2-b6fd-ba6f5f26d70e_story.html) [<https://perma.cc/SG7L-HYPS>]. EPA is also the recipient of assessments and advice. For instance, in September 2016, the U.S. Commission on Civil Rights sharply criticized EPA's handling of environmental justice issues. See Juan Carlos Rodriguez, *Civil Rights Watchdog Blasts EPA Over Environmental Justice*, LAW360 (Sept. 23, 2016, 4:11 PM), <http://www.law360.com/articles/843925/civil-rights-watchdog-blasts-epa-over-environmental-justice> [<https://perma.cc/D4Y5-3YR7>].

116. Hannah Northey, *EPA Blasts FERC Reviews, Seeks “Definitive Resolution,”* E&E NEWS: GREENWIRE (Oct. 13, 2016), <http://www.eenews.net/stories/1060044234/print> [<https://perma.cc/6AFZ-UMZM>].

117. *Id.*

118. 5 U.S.C. § 601–612 (2012); *Office of Advocacy*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/advocacy> [<https://perma.cc/WF6R-LGZT>]. An archive of the agency's comments—dozens per year—is available on its website. See *Regulatory Comment Letters*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/category/advocacy-navigation-structure/legislative->

holds its own “listening sessions” and takes submissions.<sup>119</sup> The Office of Advocacy also has the unusual authority to file an amicus brief in federal court in challenges to another agency’s rulemaking.<sup>120</sup> The Office of Advocacy’s agenda of regulatory flexibility thus often clashes with the missions of the regulatory agencies it seeks to influence.<sup>121</sup> Some members of Congress are pushing to expand the Office of Advocacy’s role into agency adjudications.<sup>122</sup>

By contrast, sometimes Congress assigns peer reviewers that share expertise with the agency’s staff.<sup>123</sup> Occasionally, these reviewers help set the priorities of another agency. For instance, the National Institute of Occupational Safety and Health (part of HHS) advises OSHA (within the Labor Department) on occupational health and safety standards.<sup>124</sup>

OIRA, whose role in cost-benefit analysis was discussed earlier as a hierarchical relationship between the White House and an executive agency, also acts as a clearinghouse for other agencies’ comments on rules.<sup>125</sup> The SBA’s advisory role often plays out at OIRA’s doorstep, as the SBA frequently demands to meet with OIRA on particular rulemakings. The SBA is also often invited to meetings that OIRA holds with others.<sup>126</sup> Former OIRA Administrator Cass Sunstein emphasizes OIRA’s role in helping “collect widely dispersed information—information that is held throughout the executive branch.”<sup>127</sup> This

actions/regulatory-comment-letters [https://perma.cc/E8J8-3WDN]. Critics argue, however, that the SBA represents the view of big business at the expense of its formal mission to represent small businesses. See CTR. FOR EFFECTIVE GOV., GAMING THE RULES: HOW BIG BUSINESS HIJACKS THE SMALL BUSINESS REVIEW PROCESS TO WEAKEN PUBLIC PROTECTIONS 4–5, 13 (2014), <http://www.foreffectivegov.org/files/regs/gaming-the-rules-exec-summary.pdf> [https://perma.cc/EM3G-WEJ4] (discussing the SBA’s role in selecting business representatives for review panels).

119. See *Labor Department Publishes New Overtime Rule*, AUTO DEALER TODAY (May 19, 2016), <http://www.autodealermthly.com/channel/dps-office/news/story/2016/05/labor-department-publishes-new-overtime-pay-rule.aspx> [https://perma.cc/3R39-G9HV].

120. See 5 U.S.C. § 612 (2012).

121. See, e.g., Bryan Koenig, *SBA Office Warns of FCC Privacy Rule’s Impact on Small ISPs*, LAW360 (June 28, 2016, 2:40 PM), <https://www.law360.com/articles/811772/sba-office-warns-of-fcc-privacy-rule-s-impact-on-small-isps> [https://perma.cc/93ED-JNJ9]; Juan Carlos Rodriguez, *Independent Unit of SBA Hits EPA Over Water Rule*, LAW360 (Oct. 2, 2014, 2:00 PM), <https://www.law360.com/articles/583619> [https://perma.cc/8LAC-S7S5].

122. See S. 1536, §5, 114th Cong. (2015); H.R. 527, §5, 114th Cong. (2015).

123. See Wendy E. Wagner, *A Place for Agency Expertise: Reconciling Agency Expertise with Presidential Power*, 115 COLUM. L. REV. 2019, 2027 (2015).

124. See Bradley, *supra* note 58, 753 (“OSHA takes its priorities for rulemaking partly from the recommendations that NIOSH provides it and may also follow the specific substantive recommendations NIOSH offers.”).

125. Lisa Heinzerling, *Inside EPA: A Former Insider’s Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENVTL. L. REV. 325, 337, 342 (2014).

126. Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1859–69 (2013).

127. *Id.* at 1840. According to Sunstein, “most of OIRA’s day-to-day work is usually spent not on costs and benefits, but on working through interagency concerns, promoting receipt of public comments (for proposed rules), ensuring discussion of alternatives, and promoting consideration of public comments (for final rules).” *Id.* at 1842.

other role of OIRA produces its own tensions.<sup>128</sup> Agencies such as the Departments of Transportation, Energy, and Defense often resist new regulations that would apply to their activities.<sup>129</sup>

Multiagency groups such as the Trade Policy Review Group (TPRG) may serve similar functions in pooling information and giving voice to other interest groups.<sup>130</sup> By presidential directive, recommendations of this group (primarily composed of cabinet officers) should guide the U.S. Trade Representative in her negotiations with other countries.<sup>131</sup> The Representative must also inform the group about the progress of negotiations.<sup>132</sup> Notably, while the list of participating cabinet-level agencies excludes EPA, an environmental review process is layered onto the interagency coordination process,<sup>133</sup> with both the Representative and the CEQ responsible for overseeing implementation of the guidelines for these reviews.<sup>134</sup>

## 2. *Interagency Advising and Monitoring and Quasi-Independent Agencies*

These advisory and monitoring relationships sometimes involve nonexecutive agencies. For instance, the Advisory Council on Historic Preservation—a quasi agency with federal, state, and local officials—makes recommendations regarding agency programs, and agencies must give it an opportunity to comment on specific projects.<sup>135</sup>

The Government Accountability Office (GAO) exemplifies another type of monitoring relationship that does not exist entirely within the executive

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128. See Heinzerling, *supra* note 125, at 343.

129. RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 34 (2004). For a discussion of why an agency might be willing to take part in a consultation process, see Marisam, *supra* note 44, at 191–98.

130. The TPRG is chaired by the Deputy U.S. Trade Representative and consists of seven high level sub-cabinet members, and the Executive Director of the Council on International Economic Policy. 15 C.F.R. § 2002.1 (2017). The overall process involves multiple levels of interagency consulting and dispute resolution that ultimately goes up to the National Economic Council chaired by the president. James Salzman, *Executive Order 13,141 and the Environmental Review of Trade Agreements*, 95 AM. J. INT'L L. 366, 372 (2001). There is also a “Trade Policy Committee” and a subordinate “Trade Policy Committee Review Group” (established by 15 C.F.R. § 2002.1). The former is composed of the U.S. Trade Representative, seven cabinet members, the Attorney General, an assistant to the president, and the Executive Director of the Council on International Economic Policy.

131. Exec. Order No. 11846, 40 Fed. Reg. 14,291 (Mar. 27, 1975) (Administration of the Trade Agreements Program).

132. *Id.*

133. *Environmental Reviews*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/issue-areas/environment/environmental-reviews> [<https://perma.cc/447T-45QM>].

134. U.S. TRADE REPRESENTATIVE & COUNCIL ON ENVTL. QUALITY, *GUIDELINES FOR IMPLEMENTATION OF EXEC. ORDER 13141: ENVIRONMENTAL REVIEW OF TRADE AGREEMENTS* (2000), [https://ustr.gov/sites/default/files/guidelines for 13141.pdf](https://ustr.gov/sites/default/files/guidelines%20for%2013141.pdf) [<https://perma.cc/L9VU-9EPK>].

135. National Historic Preservation Act, 54 U.S.C. § 304102 (2015); *About the ACHP: General Information*, ADVISORY COUNCIL ON HISTORIC PRES., <http://www.achp.gov/aboutachp.html> [<https://perma.cc/WQ99-ZZXT>].

branch.<sup>136</sup> The GAO, which is led by the Comptroller General, initially focused on the financial auditing of federal agencies, but its mandate later expanded to include other types of program evaluation, including investigating agency programs and making recommendations to Congress.<sup>137</sup> Its authority extends to both independent and executive agencies (with the possible exception of the CIA), and it can force agencies to hand over records.<sup>138</sup> Because GAO reports almost always flag problems with agency programs and are typically publicly released, conflict is rife between the agency and the subjects of its investigations. Under congressional pressure, the GAO now allows agencies to preview its reports and provide comments for inclusion in the final version.<sup>139</sup>

### 3. *Advising and Monitoring Within the Agency*

As with the other categories, these oversight adversarial relationships also arise within agencies. We discuss two subgroups: employees within an agency and agency advisory boards.

#### a. *Employees Within Agencies*

Employees within an agency can sometimes disclose agency behavior to a broader audience, even though those workers cannot control that behavior. Specifically, the Whistleblower Protection Act immunizes federal employees from retaliatory personnel actions taken for a series of actions, including communications with the IG or agency head about serious agency misconduct.<sup>140</sup> Days after President Trump's inauguration, the office in charge of protecting government whistleblowers issued a press release noting that "agencies cannot impose nondisclosure agreements and policies that fail to include required language" on employees' rights.<sup>141</sup> Judges and commentators have sharply

136. The Supreme Court has classified the GAO as an instrument of Congress because Congress can remove the Comptroller General for cause by joint resolution, subject to presidential veto. *Bowsher v. Synar*, 478 U.S. 714, 727–32 (1986). But several years ago, the D.C. Circuit termed a related entity, the Library of Congress, an executive "department" for Appointments Clause purposes, for its supervisory role over the Copyright Royalty Board. *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1341–42 (D.C. Cir. 2012).

137. FREDERICK M. KAISER, CONG. RESEARCH SERV., RL30349, GAO: GOVERNMENT ACCOUNTABILITY OFFICE AND GENERAL ACCOUNTING OFFICE 1–2 (2008); Anne Joseph O'Connell, *Auditing Politics or Political Auditing?* 1–2 (U.C. Berkeley Pub. L. Res. Paper No. 964656, 2007), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=964656](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=964656) [<https://perma.cc/3TYP-WSUU>].

138. O'Connell, *supra* note 137, at 5 n.1, 6.

139. *Id.* at 1–2.

140. 5 U.S.C. § 2302(b) (2012); *see also* W. Bradley Wendel, *Government Lawyers in the Trump Administration* 49–61 (Cornell Legal Stud. Res. Paper No. 17–04, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2906422](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2906422) [<https://perma.cc/55EH-S2BE>] (examining intersection between whistleblowing protections and attorneys' confidentiality obligations under state law).

141. Press Release, U.S. Office of Special Counsel, OSC's Enforcement of the Anti-Gag Order Provision in Whistleblower Law (Jan. 25, 2017), <https://osc.gov/News/pr17-03.pdf> [<https://perma.cc/FMH8-GBWQ>].

criticized the statute's ability to protect whistleblowers.<sup>142</sup> Notwithstanding these possible flaws, "soft whistleblowing," including leaks, remains a common adversarial mode within an agency.<sup>143</sup> Agencies sometimes formalize other channels for dissenting low-level officials to make their views known above the heads of their immediate superiors.<sup>144</sup>

*b. Advisory Boards for Agencies*

Some agencies have advisory boards. Most formally, the Department of Defense has the Joint Chiefs of Staff: outside of the command structure and now lacking operational control, the members advise the Secretary of Defense, among others.<sup>145</sup> Under the Clean Air Act, EPA must obtain input from the Clean Air Scientific Advisory Committee (CASAC) in developing air quality rules.<sup>146</sup> EPA's Administrator appoints the seven-person board, which must include "at least one member of the National Academy of Sciences, one physician, and one person representing State air pollution control agencies."<sup>147</sup> Other examples

142. See *Garcetti v. Ceballos*, 547 U.S. 410, 440–41 (2006) (Souter, J., dissenting); Mark Hertsgaard, Opinion, *Whistle-Blower, Beware*, N.Y. TIMES (May 26, 2016), <https://www.nytimes.com/2016/05/26/opinion/whistle-blower-beware.html> [https://perma.cc/G3W9-NM5R]. For a detailed account of whistleblowing under President Obama's administration, see Max Stendahl, *Did Obama Really Wage a "War on Whistleblowers"?*, LAW360 (Nov. 27, 2016, 7:40 PM), <https://www.law360.com/articles/864027/did-obama-really-wage-a-war-on-whistleblowers> [https://perma.cc/2NRS-R9Y5].

143. Amanda C. Leiter, *Soft Whistleblowing*, 48 GA. L. REV. 425 (2014) (detailing range of mechanisms employees can use when upset about policy choices, as opposed to actual malfeasance).

144. Neal Katyal provides a particularly interesting example, the State Department's "Dissent Channel," which provides a safe space for lower-level officials who dissent from the decisions of their superiors to make their views known without retaliation. Katyal, *supra* note 40, at 2328–29; Paul D. Wolfowitz, Opinion, *A Diplomat's Proper Channel of Dissent*, N.Y. TIMES, (Jan. 31, 2017), <https://www.nytimes.com/2017/01/31/opinion/a-diplomats-proper-channel-of-dissent.html> [https://perma.cc/EM7R-64WL]. An "award is given out every year to the Foreign Service officer who makes the best use of it." Katyal, *supra* note 40, at 2329. Most recently, as discussed in the Introduction, hundreds of employees noted their concerns about President Trump's initial immigration order. Gettleman, *supra* note 26. Before that, during President Obama's administration, over four-dozen employees used the Dissent Channel to encourage military strikes in Syria. Mark Landler, *51 U.S. Diplomats Urge Strikes Against Assad in Syria*, N.Y. TIMES (June 16, 2016), <https://www.nytimes.com/2016/06/17/world/middleeast/syria-assad-obama-airstrikes-diplomats-memo.html> [https://perma.cc/C9A2-Z37G].

145. Daniel Wilson, *DOD Reform Plan Opens Doors for Broader Overhaul*, LAW360 (Apr. 11, 2016, 8:25 PM), <https://www.law360.com/articles/781738> [https://perma.cc/Y25K-CDTJ].

146. Wagner, *supra* note 123, at 2048.

147. 42 U.S.C. § 7409(d) (2012). As of July 2017, the board consists of five academics, a representative of state regulators, and an industry representative. See *EPA Clean Air Scientific Advisory Committee*, EPA, [http://yosemite.epa.gov/sab/sabpeople.nsf/WebExternalCommitteeRosters?OpenView&committee=CASAC&secondname=Clean Air Scientific Advisory Committee](http://yosemite.epa.gov/sab/sabpeople.nsf/WebExternalCommitteeRosters?OpenView&committee=CASAC&secondname=Clean%20Air%20Scientific%20Advisory%20Committee) [https://perma.cc/58SH-GSXU]. According to inside sources, the EPA likely will not reappoint members whose terms are ending soon. Chris Mooney & Juliet Eilperin, *EPA just gave notice to dozens of scientific advisory board members that their time is up*, WASH. POST (June 20, 2017), [https://www.washingtonpost.com/news/energy-environment/wp/2017/06/20/trump-administration-to-decline-to-renew-dozens-of-scientists-for-key-epa-advisory-board/?utm\\_term=.87e33cfacebd](https://www.washingtonpost.com/news/energy-environment/wp/2017/06/20/trump-administration-to-decline-to-renew-dozens-of-scientists-for-key-epa-advisory-board/?utm_term=.87e33cfacebd) [https://perma.cc/KN9Q-KBBA].

include EPA's more general Science Advisory Board<sup>148</sup> and an advisory board on childhood vaccines within HHS.<sup>149</sup> More generally, the Federal Advisory Committee Act governs how agencies can use groups to provide needed information or act as a sounding board in the policymaking process.<sup>150</sup>

Despite the temptation to tilt the membership of advisory boards to favor agency policies, fear of public disclosure and congressional displeasure seems to have minimized such conduct until recently, generally preserving the boards' independence.<sup>151</sup> One possibility is that these boards' findings might conflict with the agency's determinations;<sup>152</sup> another is that the findings might conflict with the preferences of White House officials in OIRA or elsewhere.<sup>153</sup> The peer reviewers who sit on advisory boards are powerless to block contrary administrative decisions. Nevertheless, EPA must explain any decision to deviate from CASAC's scientific findings, and conflict can make it more difficult for the agency's decision to survive judicial review.<sup>154</sup> Similarly, if the vaccine advisory board makes a recommendation to HHS, "the secretary must either conduct a rulemaking in accordance with the recommendation or publish a 'statement of reasons' for refusing to do so in the Federal Register."<sup>155</sup> Outside the courts, conflict can generate media attention, political embarrassment, and pressure for agency change.

#### D. Agency Conflict in Symmetrical Relationships

Our final group concerns what may be the most classic examples of agency conflict: when more than one agency has, or at least claims to have, decision-making authority over the same topic but no agency dominates.

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148. See 42 U.S.C. § 4365 (2011). Notably, the Administrator is required to appoint a special subcommittee for measures relating to agriculture, with input from the Secretary of Agriculture. *Id.* § 4365(e)(2).

149. 42 U.S.C. § 300aa-19 (2011).

150. See WENDY GINSBERG, CONG. RESEARCH SERV., R44232, CREATING A FEDERAL ADVISORY BOARD IN THE EXECUTIVE BRANCH I (2015).

151. Wagner, *supra* note 123, at 2030.

152. See, e.g., Bonnie Eslinger, *EPA Science Panel rebukes Agency's Fracking-Water Study*, LAW360 (Jan. 8, 2016, 5:03 PM), <http://www.law360.com/articles/744191/epa-science-panel-rebukes-agency-s-fracking-water-study> [<https://perma.cc/D9XP-5S5N>]. At present, there is speculation that the new EPA Administrator, Scott Pruitt, may make new appointments to the Air Science Advisory Board with an eye to create a more favorable forum for industry. See Patrick Ambrosio & Rachel Leven, *Pruitt Could Alter Air Science Advisory Panel Direction at EPA*, BLOOMBERG BNA (Feb. 15, 2017), <https://www.bna.com/pruitt-alter-air-n73014460828> [<https://perma.cc/B9PD-NU5D>]. This is a tribute of sorts to the Board's influence.

153. Wagner, *supra* note 123, at 2035.

154. The D.C. Circuit has emphasized that EPA must give a "sound scientific reason" or an explicit policy justification for rejecting CASAC's recommendation. *Mississippi v. EPA*, 744 F.3d 1334, 1355 (D.C. Cir. 2013).

155. Adrian Vermeule, *The Parliament of Experts*, 58 DUKE L.J. 2231, 2239 (2009) (citing 42 U.S.C. §300aa-14(c)(2)).

### 1. *Symmetrical Relationships Between Executive Agencies*

There are many examples of adversarial executive agencies with overlapping turf. We began our Article with three recent examples of such conflict: formulating a policy stance on the forced decryption of an iPhone; classifying Hillary Clinton's emails as Secretary of State; and releasing Guantánamo Bay detainees.<sup>156</sup> Some earlier work by one of us examining the benefits of symmetrical adversarial arrangements analyzed the jurisdictional redundancy within the intelligence community.<sup>157</sup> And examples abound outside the national security context. The FDA alone fights with the Agriculture Department over food regulation and with the Drug Enforcement Administration over drug approvals.<sup>158</sup>

### 2. *Interagency Symmetrical Relationships and Quasi-Independent Agencies*

Similar turf battles exist with independent agencies. Sometimes the clashes involve only independent regulatory commissions. As described in the Introduction, the SEC and the CFTC parry over various issues.<sup>159</sup> The CFTC also fights with FERC over energy markets.<sup>160</sup> And the Federal Trade Commission (FTC) and the FCC skirmish over privacy, among other issues.<sup>161</sup>

Independent regulatory commissions also clash with executive agencies. One longstanding adversarial relationship is between the FTC and DOJ's Antitrust Division, with both tussling over who reviews a particular merger or

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156. See *supra* notes 1–11 and accompanying text.

157. See O'Connell, *supra* note 40, at 1676–79; see also POSNER, *supra* note 56, at 36, 43, 63, 97, 140. This work is in some tension with the 9/11 Commission's conclusions, which stated that the intelligence community's redundant structure had contributed to intelligence failures and called for unification of efforts. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 399–400 (2004) [hereinafter 9/11 COMMISSION].

158. See Richard A. Merrill & Jeffrey K. Francer, *Organizing Federal Food Safety Regulation*, 31 SETON HALL L. REV. 61, 98–99, 128–29 (2000); Kate Traynor, *FDA Advisers Support Rescheduling of Hydrocodone Products*, AM. SOC'Y OF HEALTH-SYS. PHARMACISTS (Feb. 13, 2013), [https://www.ashp.org/news/2013/02/13/fda\\_advisers\\_support\\_rescheduling\\_of\\_hydrocodone\\_products](https://www.ashp.org/news/2013/02/13/fda_advisers_support_rescheduling_of_hydrocodone_products) [https://perma.cc/QHX5-Q5FL].

159. See *supra* notes 12–15 and accompanying text.

160. See *Hunter v. Fed. Energy Regulatory Comm'n*, 711 F.3d 155 (D.C. Cir. 2013) (CFTC intervened in the case against FERC over which agency had jurisdiction to prosecute manipulation of commodity futures markets); Keith Goldberg, *Lawmakers Must Help End FERC, CFTC Discord*, *Norris Says*, LAW360 (Sept. 9, 2013, 8:18 PM), <http://www.law360.com/articles/469687/lawmakers-must-help-end-ferc-cftc-discord-norris-says> [https://perma.cc/63L5-UJHK].

161. See Michael O'Rielly & Maureen K. Ohlhausen, Opinion, *The Consequences of a Washington Internet Power Grab*, WALL ST. J. (Aug. 6, 2015, 7:19 PM), <http://www.wsj.com/articles/the-consequences-of-a-washington-internet-power-grab-1438903157> [https://perma.cc/6KZW-FWRG] (“Our two agencies, the FCC and FTC, are on a collision course that could severely hamper how the Web works.”). The agencies recently entered into an MOU involving consumer protection. Press Release, FTC, FTC and FCC Sign Memorandum of Understanding for Continued Cooperation on Consumer Protection Issues (Nov. 16, 2015), <https://www.ftc.gov/news-events/press-releases/2015/11/ftc-fcc-sign-memorandum-understanding-continued-cooperation> [https://perma.cc/89D9-M6MV].

goes after a specific antitrust violation.<sup>162</sup> More recently, the Treasury Department and the Federal Deposit Insurance Corporation had different takes on the financial crisis.<sup>163</sup> The Patent and Trademark Office (PTO), within the Department of Commerce, has battled with the FCC over providing the location of 911 cell phone calls.<sup>164</sup>

### 3. *Symmetrical Relationships Within the Agency*

As with all the other categories, these relationships exist within an agency. We discuss two groups: entities within executive agencies and leaders of independent regulatory commissions.

#### a. *Between Subagencies in Executive Agencies*

Much like the conflict between agencies, subagencies can clash. The intradepartment version of the iPhone decryption conflict between the CIA and the FBI are the three services—Army, Navy, and Air Force—within the Defense Department that share duties to defend the country.<sup>165</sup> Outside of the national security context, the FWS and the Bureau of Land Management (BLM) share overlapping duties regarding federal lands within the Department of the Interior.<sup>166</sup>

#### b. *Between Representatives in Multimember Organizations*

Multimember leadership teams of independent agencies also conflict internally, as noted in the Introduction, with formal split votes appearing to have increased.<sup>167</sup> Party-balancing requirements dominate selections for teams at

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162. See Kylie Cooper & Adrienne C. Dedjinou, *Antitrust Violations*, 42 AM. CRIM. L. REV. 179, 208 (2005).

163. SHEILA BAIR, *BULL BY THE HORNS: FIGHTING TO SAVE MAIN STREET FROM WALL STREET AND WALL STREET FROM ITSELF* 99–100, 110–11, 283, 304–05, 363–64 (2012) (emphasizing the conflict between the FDIC, which was concerned about reducing moral hazard by banks and about consumer protection, and the Treasury Department, which cared most about the stability of the financial system as a whole).

164. Narechania, *supra* note 41, at 1485.

165. For example, all three have air components. See generally HERMAN S. WOLK, *REFLECTIONS ON AIR FORCE INDEPENDENCE* (2007) (history of the conflict between the Air Force and the Army). The 1986 Goldwater-Nichols Department of Defense Reorganization Act “streamlined the chain of command” and “sought to improve the interservice operations of DOD after a series of well-publicized operational failures that had been attributed in part to ongoing interservice rivalries.” Wilson, *supra* note 145.

166. See Biber, *supra* note 40.

167. See Carmen Germaine, *SEC Unlikely to Escape Partisan Chokehold Under Trump*, LAW360 (Jan. 20, 2017, 11:32 PM), <https://www.law360.com/articles/883249/sec-unlikely-to-escape-partisan-chokehold-under-trump> [<https://perma.cc/28TE-RMUZ>] (blaming Dodd-Frank and the appointments process for partisan splits); cf. Jenna Ebersole, *New 3-Member FCC May Seek Consensus Post-Wheeler*, LAW360 (Jan. 12, 2017, 8:28 PM), <https://www.law360.com/articles/880248/new-3-member-fcc-may-seek-consensus-post-wheeler> [<https://perma.cc/2TW5-XLVG>] (noting that the new FCC chair may try harder to reach consensus agreements). Such conflict, however, is not new. It generated a classic case on ex parte communications that is a staple in Administrative Law casebooks.



independent commissions and boards—including the Consumer Products Safety Commission,<sup>168</sup> the FCC,<sup>169</sup> the FTC,<sup>170</sup> and the SEC,<sup>171</sup> to name a few.<sup>172</sup> The balancing mandate generally requires that no more than a bare majority of individuals from the president’s party can hold top positions.<sup>173</sup> In the SEC’s case, the order of appointments should alternate between the two parties “as nearly as may be practicable.”<sup>174</sup>

Experience requirements—either numerical requirements or a general balance mandate—can also build conflict into agency interactions. The Public Company Accounting Oversight Board, established by the Sarbanes-Oxley Act after the Enron accounting scandal, must have two (and only two) certified public accountants.<sup>175</sup> Some of these agencies, such as the FCC, display their considerable internal conflict through separate, public concurrences and dissents to agency decisions.<sup>176</sup>

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Prof'l Air Traffic Controllers Org. v. Fed. Labor Relations Bd., 685 F.2d 547 (D.C. Cir. 1982) (Member Frazier publicized member Applewhaite’s communications, generating PATCO’s lawsuit).

168. 15 U.S.C. § 2053(c) (2012).

169. 47 U.S.C. § 154 (2012).

170. 15 U.S.C. § 41 (2012).

171. 15 U.S.C. § 78d (2012).

172. See Ronald J. Krotoszynski et al., *Partisan Balance Requirements in the Age of New Formalism*, 90 NOTRE DAME L. REV. 941, 1009–17 (2015) (cataloging partisan balance mandates across independent regulatory commissions, cabinet departments, and Article I and II courts).

173. There are a few agencies, the FEC and the International Trade Commission, with equal party representation. 2 U.S.C. § 437c(a)(1) (2012); 19 U.S.C. § 1330 (2012).

174. 15 U.S.C. § 78d(a) (2012).

175. 15 U.S.C. § 7211(e)(2) (2010).

176. See Daniel E. Ho, *Congressional Agency Control: The Impact of Statutory Partisan Requirements on Regulation 8* (Feb. 12, 2007) (unpublished manuscript) (on file with *California Law Review*). Jacobs has recently argued that this conflict is not driven by partisanship at some agencies (such as FERC). Jacobs, *supra* note 21, at 27–28.

*E. Providing a Unified Typology*

To give a sense of the frequency and diversity of conflicting relationships within the administrative state, we have provided many examples (though not a comprehensive list) in each of the four categories. We now bring these examples together in Table 1 (Typology of Agency Conflict) to summarize our classification.

Table 1 (Typology of Agency Conflict)

	<b>Intra-Executive Branch</b> (between agencies)	<b>Intra-Executive Branch</b> (within agency)	<b>Independent Agency Involvement</b> (between agencies)	<b>Independent Agency Involvement</b> (within agency)
<b>Hard Hierarchies</b>	OIRA v. agency (rulemaking) OMB v. agency (budget, testimony) DOJ v. agency FWS v. agency EPA v. agency DHS v. FEMA HHS v. FDA	Secretary / Administrator v. Assistant Secretaries / Assistant Administrators SG v. other units in DOJ NSA Head / Deputy Appointees v. civil servants	DOJ v. agency ICC v. agency USPS v. agency PRC v. USPS	Commission / Board v. examiner Appointees v. civil servants
<b>Soft Hierarchies</b>	OLC v. DHS DNI v. intelligence agencies	SG v. DOJ units GC v. other units IG v. other units	FSOC v. members	GC v. NLRB IG v. other units Chairpersons v. Commissioners / Board Members
<b>Advisory or Monitoring Relationships</b>	NEPA comment process SBA v. EPA NIOSH v. OSHA OIRA process TPRG process	CASAC / SAB v. EPA Joint Chiefs v. DOD FACA groups v. agency Whistleblowers v. agency	ACHP v. agency GAO v. agency	FACA groups v. agency Whistleblowers v. agency
<b>Symmetrical Relationships</b>	CIA v. FBI DOD v. DOS FDA v. USDA FDA v. DEA	Services within DOD FWS v. BLM	SEC v. CFTC FERC v. CFTC FTC v. FCC FTC v. Antitrust Treasury v. FDIC PTO v. FCC	Party-balancing mandates Experience-balancing mandates

We make a few observations about this admittedly varied set of relationships between administrative actors. These relationships manifest in all forms of decision making: rulemaking, adjudication, and program-level policy. Administrative law scholars tend to focus on rulemaking.<sup>177</sup> For that reason, relationships between OIRA and regulatory agencies usually receive more extensive scholarly attention than many others identified in Table 1 (Typology of Agency Conflict). But rulemaking is only a sliver of the modern administrative state's activities, and conflicts are also widespread in the broader set.

The matrix emphasizes institutional structure as an important part of how these relationships play out—in their design, resolution (if any), and consequences. Formal structure, however, is only part of those dynamics. Agencies may find allies elsewhere in the federal bureaucracy, such as sympathetic members or committees of Congress, White House staff, the media, and interest groups. Opposition can also come from all those sources. A full treatment of adversarial agencies would flesh out these informal dynamics in ways not possible within a single Article.

We turn next, in a considerably briefer fashion, to organizing dispute-resolution mechanisms. Then, we can consider the political roots of adversarial relationships (and their resolution) and their desirability with respect to social welfare and legitimacy grounds.

## II.

### MECHANISMS OF CONFLICT RESOLUTION

We continue our taxonomic work by considering how conflict gets resolved for adversarial agencies. Not all conflict needs resolution, of course. But often, action must be taken one way or another. In this Part, we examine conflict-resolution mechanisms outside and within the courts. According to the Congressional Research Service, coordination mechanisms among agencies “appear to be growing.”<sup>178</sup> Although these mechanisms cut across agency types and categories of adversarial relationships, there are some connections to the preceding Part's typology. Here, too, we provide a table at the end to summarize the options, Table 2 (Resolution Mechanisms for Agency Conflict).

In considering the rich diversity of mechanisms used to resolve conflicts, it is helpful to distinguish between the hierarchical and symmetrical relationships of adversarial interaction. The hierarchical nature of a relationship allows for forms of dispute resolution unavailable to symmetrical relationships by their very nature. At least formally, hard hierarchical relationships seem to have clearer resolution mechanisms—the principal decides. But there are both formal

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177. See Shah, *supra* note 46, at 807 n.2 (collecting citations).

178. FREDERICK M. KAISER, CONG. RESEARCH SERV., R41803, INTERAGENCY COLLABORATIVE ARRANGEMENTS AND ACTIVITIES: TYPES, RATIONALES, CONSIDERATIONS 1 (2011).

arbiters and informal powers at play, and these may not always jibe. Although in theory the principal simply resolves disputes in hard hierarchical relationships, in practice, the mechanisms involved in other softer relationships may come into play.

In what we have called advisory and monitoring relationships, there is also the possibility of resolution by the principal—the actor with formal power over the decision. Additionally, other actors such as congressional committees might use information from monitoring and advising to influence the agency decision maker.

We will not reprise the detailed discussions of dispute resolution already found in the literature.<sup>179</sup> Instead, we will try to bring a fresh perspective, based on our view of the potentially healthy benefits of conflict among administrative actors. A conflict-resolution mechanism would ideally take advantage of the ability of adversarial relationships to foster fuller development of information and debate, along with broader representation for conflicting interests. In contrast, a poor conflict-resolution mechanism would screen out additional information and voices of some interest groups while discouraging those groups from participating and developing such information. As always, there is a trade-off between the benefits of adversarialism and decision-making efficiency. We consider that trade-off at more length in Part III, along with an exploration of the often-overlooked benefits of conflict.

With these issues in mind, we turn first to conflict-resolution mechanisms outside the courts and then very briefly to the courts as arbitrators of conflict. In some sense, the courts can weigh in on many conflicts, as we describe in Part IV. But we do not classify the courts as a conflict-resolution mechanism unless the adversary agencies are opposing parties in a case.

#### A. *Outside the Courts*

When agency conflict is ironed out, the forum is generally not judicial. We discuss three primary forms of such nonjudicial-resolution mechanisms: negotiation and mediation, adjudication, and formal voting and consensus rules.

##### 1. *Negotiation and Mediation*

Negotiation and mediation often resolve conflicts in the last two categories of relationships: advising or monitoring, and symmetrical. As in the private sector, negotiation is a crucial method of addressing intergovernmental disputes. Memorandums of understanding (MOUs) between agencies are “[p]erhaps the

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179. The problem of dispute resolution in symmetrical relationships has been the subject of extensive scholarly discussion—understandably so, since most scholars have emphasized the value of well-executed coordination, which requires ironing out conflicts. *See, e.g.*, Bradley, *supra* note 58, at 772–87; Freeman & Rossi, *supra* note 45, at 1155–1203; Marisam, *supra* note 41, at 210–18; Marisam, *supra* note 44, at 222–24; Shah, *supra* note 46, at 850–75.

most pervasive instrument of coordination in the federal government.<sup>180</sup> Despite the frequent use of MOUs across the federal government, there seem to be no government-wide policies regarding their use.

MOUs differ widely in subject matter and level of specificity.<sup>181</sup> Agencies employ MOUs, among other reasons, to clarify issues of overlapping jurisdiction, such as dividing up authority over administering energy efficiency programs;<sup>182</sup> coordinating nine agencies in decisions over siting multistate transmission lines;<sup>183</sup> and setting rules for enforcement in consumer protection.<sup>184</sup> This function is not new. The Antitrust Division of DOJ and the FTC have long negotiated complex MOUs, dividing their overlapping jurisdictions.<sup>185</sup>

Additionally, the FDA website gives a sense of the ubiquity and variety of these agreements for just one agency. It lists over one-hundred MOUs, almost all with other federal agencies, on subjects ranging from information sharing to division of regulatory or enforcement authority.<sup>186</sup>

These MOUs have normative and legal implications. On the one hand, they may shut down important voices in agency decision making.<sup>187</sup> On the other, they may create greater efficiency. We take up these potential policy consequences in Part III. MOUs also may present separation-of-powers concerns if they divide authority in ways not designed by Congress,<sup>188</sup> an issue we take up in Part IV.

In addition to negotiation directly among agencies, mediators can play a role in resolving conflict among agencies. We normally think of alternative

180. Freeman and Rossi, *supra* note 45, at 1161. For instance, a memorandum of agreement regarding determinations of federal jurisdiction over water bodies and wetlands was at the heart of the Supreme Court's recent decision in *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1814 (2016).

181. Freeman and Rossi, *supra* note 45, at 1161.

182. *Id.* at 1162.

183. *Id.* at 1164.

184. Margaret Harding McGill, *FCC Teaming Up with FTC on Consumer Protection*, LAW360 (Nov. 16, 2015, 6:11 PM), <https://www.law360.com/articles/727540/fcc-teaming-up-with-ftc-on-consumer-protection> [<https://perma.cc/VFU6-TKXS>].

185. U.S. GEN. ACCOUNTING OFFICE, GAO-01-188, JUSTICE'S ANTITRUST DIVISION: BETTER MANAGEMENT INFORMATION IS NEEDED ON AGRICULTURE-RELATED MATTERS 14 n.18 (2001) (agreements date back to 1938). The two agencies sometimes resort to arbitrary means, like a coin toss, to determine who will take the lead. Vipal Monga, *FTC's Google Probe Highlights 'Possession Arrow' Feud with DOJ*, WALL ST. J. (June 23, 2011, 2:09 PM), <http://blogs.wsj.com/cfo/2011/06/23/ftcs-google-probe-highlights-possession-arrow-fued-with-doj> [<https://perma.cc/R3RC-PTHA>].

186. See *Domestic MOUs*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/AboutFDA/PartnershipsCollaborations/MemorandaofUnderstandingMOUs/DomesticMOUs> [<https://perma.cc/K6GR-QJWL>].

187. For example, the FDA and the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) have agreed that the ATF is solely responsible for labeling alcoholic beverages with limited advice from the FDA. Marisam, *supra* note 41, at 213. The concern is that the agency that most represents regulatory beneficiaries is largely shut out of the regulatory process.

188. For instance, the NRC and OSHA have divided authority over workplace safety issues. The NRC has sole authority over radiation hazards to workers while OSHA regulates other hazards. *Id.*

dispute resolution (ADR) as occurring entirely outside the administrative state, or with at least one private party. But such techniques sometimes apply wholly within the federal bureaucracy. For example, a 2005 directive signed by the heads of the CEQ and the OMB instructs agencies to use ADR for conflicts “over the use, conservation, and restoration of the environment, natural resources, and public lands.”<sup>189</sup> A similar 2012 directive strengthens the preference for ADR.<sup>190</sup> This mechanism is often used for disputes including both federal agencies and other stakeholders. But agency-only ADR is not uncommon. About one-seventh of cases that used the ADR process involved only federal agencies and no private parties, with the Department of the Interior using the technique most frequently.<sup>191</sup> For instance, a third-party facilitator successfully led four agencies to agree on issues relating to pesticide registration and the Endangered Species Act.<sup>192</sup>

Negotiation and mediation—at the agency level—are not always successful, sometimes forcing other actors to come into play. Most commonly, the White House steps in. And while MOUs may be voluntary, the White House can interject softly or forcefully.<sup>193</sup> Indeed, sometimes the White House itself announces the coordinated solution.<sup>194</sup> Congress can also play a part. For instance, in 2005, Congress required that the CFTC and FERC enter into an MOU governing the exercise of their authority over energy markets. The agencies failed to reach an agreement eight years later.<sup>195</sup> This failure led to a request from FERC’s chairman for congressional resolution of the dispute.<sup>196</sup>

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189. This directive can be found at [http://www.udall.gov/documents/Institute/OMB\\_CEQ\\_Memorandum\\_2005.pdf](http://www.udall.gov/documents/Institute/OMB_CEQ_Memorandum_2005.pdf) [<https://perma.cc/77FL-ZYGV>].

190. OFFICE OF MGMT. & BUDGET & COUNCIL ON ENVTL. QUALITY, MEMORANDUM ON ENVIRONMENTAL COLLABORATION AND CONFLICT RESOLUTION (Sept. 2012), [https://energy.gov/sites/prod/files/OMB\\_CEQ\\_Env\\_Collab\\_Conflict\\_Resolution\\_20120907-2012.pdf](https://energy.gov/sites/prod/files/OMB_CEQ_Env_Collab_Conflict_Resolution_20120907-2012.pdf) [<https://perma.cc/WE89-HQHL>].

191. U.S. INST. FOR ENVTL. CONFLICT RESOLUTION, ENVIRONMENTAL COLLABORATION AND CONFLICT RESOLUTION (ECCR) IN THE FEDERAL GOVERNMENT 5 (2013), <https://www.udall.gov/documents/ECRReports/2013/FY2013ECCRintheFederalGovernmentReportfinal5Aug2014.pdf> [<https://perma.cc/ZJS7-853B>].

192. *Id.* at 7.

193. Freeman & Rossi, *supra* note 45, 1175. For example, in July 2015, the White House “ordered” EPA, USDA, and the FDA to “simplify the government’s Coordinated Framework for the Regulation of Biotechnology.” Kurt Orzeck, *White House Orders Updated GMO Rules Amid Criticism*, LAW360 (July 2, 2015, 10:17 PM), <https://www.law360.com/lifesciences/articles/675452/white-house-orders-updated-gmo-rules-amid-criticism> [<https://perma.cc/RS9T-7QSM>].

194. *See, e.g.*, Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews, 81 Fed. Reg. 51,866 (Aug. 1, 2016).

195. Keith Goldberg, *Lawmakers Must Help End FERC, CFTC Discord, Norris Says*, LAW360 (Sept. 9, 2013, 8:18 PM), <http://www.law360.com/articles/469687/lawmakers-must-help-end-ferc-cftc-discord-norris-says> [<https://perma.cc/39LG-L3CD>].

196. *Id.*

Three senators then intervened to urge the agencies to settle the dispute, which led to the completion of the MOU about a year later.<sup>197</sup>

## 2. *Adjudication of Administrative Disputes*

Adjudication is another device for resolving conflicts, primarily in symmetrical and advisory relationships but sometimes in hierarchical relationships as well. Primary adjudicators in the administrative state include higher-level officials within an agency, OLC, and the White House.

Within an agency, higher-level officials generally can resolve conflicts among lower-level officials. There are sometimes formal agreements about elevating and resolving such conflict.<sup>198</sup> For example, when particular program offices, the Office of Legislative Affairs, and the General Counsel at EPA disagree about interpreting a statute, the Deputy Administrator will usually first decide the dispute. It can then be elevated to the Administrator, if necessary.<sup>199</sup>

OLC can attempt to mediate, and if necessary, adjudicate disputes between executive agencies over legal matters.<sup>200</sup> OLC can also decide intra-agency disputes. A recent example, discussed briefly above, involved an OLC opinion about the authority of the Justice Department's IG to access certain wiretapping information, a matter disputed between the Department's leaders and its IG.<sup>201</sup>

Finally, the White House is a dominant adjudicator (or mediator) among agencies.<sup>202</sup> Under EO 12866, the vice president (and ultimately the president) resolves conflicts between an agency and OIRA.<sup>203</sup> And OIRA itself can play a

197. David McAfee, *CFTC, FERC Settle Energy Markets Jurisdiction, Info Sharing*, LAW360 (Jan. 2, 2014, 8:20 PM), <http://www.law360.com/articles/498411/cftc-ferc-settle-energy-markets-jurisdiction-info-sharing> [<https://perma.cc/7TCN-XNEZ>]. In a similar effort to settle an interagency dispute, the House passed legislation in October 2015 to bar the Labor Department from implementing a fiduciary standard for retirement advisors until the SEC took similar action. Daniel Wilson, *House OKs Bill to Delay Contentious DOL Fiduciary Standard*, LAW360 (Oct. 27, 2015, 8:53 PM), <http://www.law360.com/articles/719185/house-oks-bill-to-delay-contentious-dol-fiduciary-standard> [<https://perma.cc/2TTD-7FHJ>].

198. Marisam, *supra* note 44, at 206–08.

199. Nou, *supra* note 48, at 470–71.

200. U.S. DEP'T OF JUSTICE, *supra* note 85; Freeman and Rossi, *supra* note 45, at 1175–76.

201. Dep't of Justice Inspector Gen.'s Access to Info. Protected by the Fed. Wiretap Act, Rule 6(e) of the Fed. Rules of Criminal Procedure, and Section 626 of the Fair Credit Reporting Act, 39 Op. O.L.C. (July 20, 2015) (Memorandum for Deputy Attorney General, Sally Yates). More generally, DOJ was established, in part, as a coordinating mechanism. See Susan M. Olson, *Challenges to the Gatekeeper: The Debate over Federal Litigating Authority*, 68 JUDICATURE 71, 75 (1984). OLC does not go looking for disputes; rather, agencies go to OLC. Renan argues that agency officials now have reasons not to go to OLC for formal resolution of disputes because of "frequent FOIA requests and publicity concerns." Renan, *supra* note 88, at 47 n.233. Renan's focus is on tensions between OLC and the president rather than interagency disputes.

202. The distinction between adjudicating and mediating (more the topic of the preceding section) is subtle, dependent on formal and informal authority.

203. Exec. Order No. 12,866, § 7, 58 Fed. Reg. 51,735 (1993).

central role in resolving conflicts between agencies.<sup>204</sup> Outside the regulatory review process, the White House can always step in to adjudicate (or mediate) conflicts. There are particular institutions within the White House that perform this function, even for independent agencies.<sup>205</sup> For instance, White House offices dealing with specific subjects such as drug control, AIDS, or climate change may take charge of coordinating agencies in those subject matters.<sup>206</sup> In addition, the CEQ mediates disputes when EPA objects to agency projects.<sup>207</sup>

### 3. *Voting and Consensus*

Voting and consensus mechanisms are frequent conflict-resolution mechanisms. While negotiation and mediation are typically agency driven and adjudication is White House driven, this final Section primarily focuses on devices that Congress chooses to govern symmetrical and hierarchical conflicts.<sup>208</sup>

Probably the most prominent example of formal voting is FSOC's authority to veto regulations proposed by the Consumer Financial Protection Bureau, which requires a two-thirds vote of FSOC's nine member agencies regulating the financial system.<sup>209</sup> FSOC takes a number of other actions by two-thirds vote—such as determining whether a nonbank financial company's failure could pose a threat to financial stability, imposing appropriate restrictions on the company, and issuing nonbinding recommendations to “feuding agencies under its jurisdiction” if it has been asked to step in by at least one of the relevant agencies.<sup>210</sup>

Another example of voting relates to the Endangered Species Committee, which can override statutory protections for particular projects that may jeopardize an endangered species.<sup>211</sup> The Committee consists of six cabinet-level agency heads plus a representative (appointed by the president) of the affected

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204. The Executive Order gives OIRA the most authority for “significant” regulatory actions. Although much commentary on these actions focuses on the first criterion—the \$100 million threshold for significance—an action that “[c]reate[s] a serious inconsistency or otherwise interfere[s] with an action taken or planned by another agency” also falls in the significant category. *Id.* § 3(f)(2).

205. See Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 642–43 (2010).

206. Freeman and Rossi, *supra* note 45, at 1177.

207. 40 C.F.R. § 1504.3(2) (2015). Notably, the agency also has the power to make its own recommendation on the matter and, if necessary, forward the recommendation to the president for action—thereby elevating the dispute to the highest level. 40 C.F.R. §§ 1504.3(f)(6)–(7).

208. To be sure, Congress may create some conflicts in anticipation of White House resolution. See *infra* Part III.C.1.

209. Marisam, *supra* note 44, at 213.

210. Michael S. Barr, *Comment: Accountability and Independence in Financial Regulation: Checks and Balances, Public Engagement, and Other Innovations*, 78 LAW & CONTEMP. PROBS. 119, 124–25 (2015); Gersen, *supra* note 94, at 693–96.

211. Endangered Species Act of 1973 (E.S.A.) § 7(e), 16 U.S.C. § 1536(e) (2012); see generally Gersen, *supra* note 94, at 696 (discussing the Committee as an example of a multi-agency board).



state.<sup>212</sup> The Committee may exempt projects from statutory protections if five out of the seven voting members adopt certain findings.<sup>213</sup> In fact, it might be more accurate to say “five members plus two nonmembers,” because the Secretary of State can unilaterally block consideration of an exemption based on treaty obligations,<sup>214</sup> while the Secretary of Defense can mandate an exception by certifying it as being necessary for national security.<sup>215</sup>

Consensus requirements are a type of voting rule—one requiring unanimity. Such consensus may be required, for instance, when agencies agree (voluntarily or under presidential or congressional direction) to conduct joint rulemakings or concur on policy.<sup>216</sup> A notable example was the working group convened by President Obama to establish executive branch-wide guidance on the social cost of carbon.<sup>217</sup> There are also soft consensus requirements, such as a statutory directive that the SEC, the CFTC, and bank regulators coordinate to the extent possible on rulemakings and orders dealing with credit swaps.<sup>218</sup>

Such consensus requirements can result in forming an interagency working group to draft regulations, as in the case of regulations implementing the Volcker rule, where the diversity of viewpoints represented is said to have benefitted the design of the regulation.<sup>219</sup> But there are also clear efficiency costs to this kind of effort, as exemplified by a joint rulemaking between the Comptroller of the Currency, Federal Reserve, and the FDIC, where the difficulty of achieving consensus led to a delay of over a year on the seemingly simple question of how

212. E.S.A. § 7(e)(3), 16 U.S.C. § 1536(e)(3) (2012).

213. E.S.A. § 7(h)(1), 16 U.S.C. § 1536(h)(1) (2012).

214. E.S.A. § 7(i), 16 U.S.C. § 1536(i) (2012).

215. E.S.A. § 7(j), 16 U.S.C. § 1536(j) (2012).

216. See Freeman and Rossi, *supra* note 45, at 1166, 1197.

217. See *id.* at 1198–99 (with OIRA apparently playing a convening and mediating role).

218. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-81, DODD-FRANK REGULATIONS: REGULATORS' ANALYTIC AND COORDINATION EFFORTS 15 (2014) [hereinafter GAO REPORT ON REGULATORS' EFFORTS] (“SEC and CFTC must coordinate and consult with each other and prudential regulators (for the purposes of Title VII, these regulators are the Federal Reserve, OCC, FDIC, Farm Credit Administration, and Federal Housing Finance Agency), to the extent possible, before starting a rulemaking or issuing an order on swaps, security-based swaps, swap entities, or security-based swap entities.”). Coordination seems to be a pervasive feature of Dodd-Frank implementation:

The agencies reported coordinating as required or voluntarily on 19 of the 30 regulations that became effective between July 23, 2015, and July 22, 2016. The Dodd-Frank Act stipulated coordination for 17 regulations, and agencies reported coordinating on these rules. For example, in its rule on business conduct standards for security-based swap dealers and major security-based swap participants, SEC reported consulting and coordinating with CFTC and the prudential regulators in accordance with the consultation mandate in the Dodd-Frank Act. For 2 additional rules, the Dodd-Frank Act did not stipulate coordination, but the rules were jointly issued by two or more regulators, and thus, inherently required coordination.

U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-17-188, DODD-FRANK REGULATIONS: AGENCIES' EFFORTS TO ANALYZE AND COORDINATE THEIR RECENT FINAL RULES 24 (2016) (footnotes omitted).

219. GAO REPORT ON REGULATORS' EFFORTS, *supra* note 218, at 31–32. The upshot was that “SEC and the banking regulators adopted a joint Volcker rule regulation and CFTC adopted a separate regulation with text and supplementary information that, except for information specific to CFTC or the other regulators, are substantially the same.” *Id.* at 32.

to define a “small” bank.<sup>220</sup> Similar consensus requirements may exist within agencies in the form of sign-off authority reposing in multiple offices.<sup>221</sup>

### B. The Courts

In some rare cases, the courts function as the primary dispute-resolution mechanism, in both hierarchical and symmetrical relationships. The Attorney General, who has long delegated authority to the SG, typically controls litigation in the administrative state.<sup>222</sup> In the usual case, then, DOJ resolves a legal conflict. Congress has sometimes given specific agencies independent litigating authority. More often, Congress provides for such authority only in the lower courts—for example, as mentioned above, the authority given to the SEC and the CFTC in Dodd-Frank to bring disputes to the D.C. Circuit.<sup>223</sup> Notably, independent regulatory commissions typically control their litigation in the lower courts.<sup>224</sup>

Beyond this general exception, however, there is no “unified vision of [such agencies’] independent litigating authority.”<sup>225</sup> Independent agencies rarely control litigation before the Supreme Court, but there are exceptions.<sup>226</sup> For instance, the FCC and the NRC have independent litigating authority before the Court.<sup>227</sup> For other agencies—like the FTC—the authority extends to Supreme Court litigation only when the SG declines to participate.<sup>228</sup> Because agencies with litigating authority rarely sit in hierarchical relationships with each other (the PRC and the Postal Service are an exception), the courts, when they step in, primarily resolve symmetrical conflicts in the first instance.

We address the legal issues created by these congressional choices, including Article II and Article III concerns, in Part IV.

Table 2 (Resolution Mechanisms for Agency Conflict), below, summarizes these wide-ranging resolution mechanisms.

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220. Marisam, *supra* note 44, at 212.

221. Nou, *supra* note 48, at 468–71.

222. See 28 U.S.C. §§ 516–519 (2012).

223. See *supra* note 15 and accompanying text.

224. See Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CALIF. L. REV. 255, 269, 273 (1994); Olson, *supra* note 201, at 73.

225. Devins, *supra* note 224, at 273. The rules governing IRC litigation authority are “often an outgrowth of political conflict.” See *id.* at 264, 269. Olson argues that the “patchwork quality of the distribution of authority to litigate” reflects “[t]urf concerns within Congress itself or other issues only marginally related to regulatory litigation.” See Olson, *supra* note 224, at 75, 85. Sometimes, the independent litigating authority results from “dissatisfaction outside the executive branch with DOJ’s handling of cases.” Linda R. Cohen & Matthew L. Spitzer, *The Government Litigant Advantage: Implications for the Law*, 28 FLA. ST. U. L. REV. 391, 402 (2000).

226. Devins, *supra* note 224, at 273.

227. *Id.* at 274–75; Anne Joseph O’Connell, *Bureaucracy at the Boundary*, U. PENN. L. REV. 841, 921 (2014).

228. Devins, *supra* note 224, at 274–75.

Table 2 (Resolution Mechanisms for Agency Conflict)

Resolution Mechanism	Relationship Types	Examples
Principal	Hierarchical (Hard/Soft) Advisory & Monitoring	OIRA approval Primary agency deciding
Negotiation	(Hierarchical (Hard/Soft)) Advisory & Monitoring Symmetrical	MOUs
Mediation	Advisory & Monitoring Symmetrical	Environmental ADR
Adjudication	(Hierarchical (Hard/Soft)) Advisory & Monitoring Symmetrical	White House (OIRA v. agency) OLC (agencies) OIRA (agencies)
Voting/Consensus	Hierarchical (Soft) Symmetrical	FSOC voting rule IRC majorities Joint rulemaking
Courts (in first instance)	Hierarchical (Hard) Symmetrical	USPS v. PRC Dodd-Frank (SEC v. CFTC)

### III.

#### POSITIVE AND NORMATIVE ASSESSMENT OF ADVERSARIAL RELATIONSHIPS

To this point, we have largely described and classified various categories of intended, adversarial agency relationships and conflict-resolution mechanisms. We now examine larger theoretical and policy issues, drawing on social science models and democratic theory. We modify our typology slightly in this Part—by pushing parts of the second category (soft hierarchies) into the first and third categories—to streamline the discussion. We thus cover hard hierarchy, advising and monitoring, and symmetrical authority. We also focus more on interagency conflict than intra-agency disputes. Each subsection begins with a discussion of why the political branches might choose to create such relationships—a positive political theory approach.<sup>229</sup> The term “positive” here is not a policy evaluation. Because political choices are not necessarily desirable decisions on various metrics, each subsection then pivots to a consideration of some of the social welfare and democratic legitimacy implications of those decisions. While we note some key disadvantages, we seek to draw out the possible benefits that adversarial relationships can generate. We conclude with some overarching issues from the positive and normative angles explored.

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229. We leave out the courts’ interests. From a rational actor perspective, judges presumably prefer conflict that generates information—making judicial resolution easier—and enjoy the power that comes from needing to resolve conflicts.

### A. *Hard Hierarchical Relationships*

The principal-agent model, which has a long history in the social sciences, describes a hard-hierarchical, adversarial relationship.<sup>230</sup> In the administrative state, such designs allow the combination of superior expertise by the “agent” with clear lines of accountability to the “principal.” They also make outside participation more difficult than other designs. On the plus side, we may get efficient decision making without many opportunities for classic regulatory capture. But on the negative side, we may get poor outcomes from tunnel vision and the lack of differing perspectives.

#### 1. *Design Choices: Centralizing Control*

When the political branches do not want to vest the entire decision-making process in one actor—because that one actor lacks the necessary resources, is too diffuse to control, or is too powerful—political actors often turn to hierarchical relationships. This creates a clear line of authority to the principal. For example, FEMA gets placed in the new DHS for better emergency responses; DOJ gets established to oversee individual U.S. Attorneys; OIRA gets created to approve important EPA regulations before EPA issues them. At their best, the agent brings expertise, and the principal brings control.

Congress is less keen on hierarchical adversarial relationships across agencies, compared to advisory or symmetrical relationships, though it often creates them internally within an agency. Because of the fragmented committee system, a hierarchical design must frequently overcome fierce committee turf battles.<sup>231</sup> A strong congressional committee (and, in turn, likely a strong interest group) can push for such a hierarchical design. At times, Congress creates hierarchical relationships to increase accountability and transparency or to respond to public pressure, as evidenced by the creation of the Defense Department post-World War II and the DNI after the 9/11 attacks.<sup>232</sup>

By contrast, the president and agency leaders often embrace such designs.<sup>233</sup> It is no surprise that all presidents after Ronald Reagan have kept OIRA. Regulatory review, which requires its own expertise, allows for more control over agencies while drawing on specialized agency expertise and delegated authority. Unlike Congress as a designer, the president can choose herself (or someone very close to her, such as the vice president) as the principal in the hierarchical relationship.<sup>234</sup> In addition, the president may specifically

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230. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

231. See DAVID C. KING, *TURF WARS: HOW CONGRESSIONAL COMMITTEES CLAIM JURISDICTION* 144 (1997); O’Connell, *supra* note 40.

232. See 9/11 COMMISSION, *supra* note 157, at 407–15.

233. See Jason Marisam, *The President’s Agency Selection Powers*, 65 ADMIN. L. REV. 821, 835 (2013).

234. In some ways, DOD’s role in the release of detainees from Guantánamo Bay, which we allude to above and discuss in Part IV, is a congressional attempt to bring DOD closer to Congress than

choose an adversarial agent for the relationship. Jacob Gersen and Adrian Vermeule argue that principals may “delegate to enemies or potential enemies” for several reasons: “to *reveal* the agent’s type”; “to *exploit* the agent’s type”; and “to *transform* the agent’s type.”<sup>235</sup> President Trump’s “cleanup” cabinet was likely not chosen to reveal or transform their types.<sup>236</sup> But his cabinet secretaries have allowed the President to speak to both his base as well as foreign allies and other audiences.

By their nature, control is never complete in principal-agent models and may be even less so in the administrative context. For example, OIRA cannot directly set EPA’s budget, and firing presidential appointees risks causing a political fuss. Sometimes civil servants cannot be fired at all. Under a classic principal-agent model, the agents in the federal bureaucracy may use the slack to shirk responsibilities.<sup>237</sup> By contrast, in adversarial relationships they often try to express dissent over policy decisions. The FDA, for example, announced that it opposed the Secretary of HHS’s Plan B decision.<sup>238</sup> EPA can go to the vice president or president to try to override OIRA and obtain more stringent regulation. The courts can also back up the agent—most commonly, by assessing the principal’s reasons for disagreeing with the agent or, more rarely, by seeking the agent’s input directly.<sup>239</sup>

## 2. Normative Implications: Power of the President

Hierarchical adversarial relationships have important implications for social welfare and democratic legitimacy. Most critically for the former, the mechanism to resolve conflict is clear: the principal wins. In addition, the conflict is more contained than other forms of adversarial relationships, making decision making quicker. With fewer access points, the decision maker may possess at times more independence from outside groups compared to situations where multiple agencies have independent input, with each developing long-term links with specific interest groups.<sup>240</sup> With a single “enemy” agent, the principal may benefit from more stable outcomes, even if those outcomes are

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the White House, so that DOD functions more like a principal than an agent in relation to the White House. See *infra* Part IV.A.2.a.

235. Jacob E. Gersen & Adrian Vermeule, *Delegating to Enemies*, 112 COLUM. L. REV. 2193, 2195–96 (2012).

236. Cf. Parker, *supra* note 29 (criticizing conflict).

237. Mathew D. McCubbins, *The Legislative Design of Regulatory Structure*, 29 AM. J. POL. SCI. 721, 724–25 (1985).

238. See *supra* notes 16–20 and accompanying text.

239. See *infra* Parts IV.A.2.b & IV.C.2.

240. Freeman & Rossi, *supra* note 45, at 1137, 1142–43. Two additional arguments could be made in support of their conclusion that using multiple agencies weakens interest group influence. First, where an agency’s work primarily involves a single interest group, that group has a strong incentive to seek influence with the agency. Where many interest groups are implicated, they face a collective action problem in seeking to exert influence. Second, public accountability may be greater where an agency’s work involves only a single interest group because external monitors can focus their attention on one central decision maker.

less preferable, on average, when an adversarial agent is more predictable than a nonadversarial one.<sup>241</sup> Finally, the principal can coordinate decisions across hierarchical relationships of which it is a part.<sup>242</sup> At the end of the day, the attractiveness of the speed or uniformity of decision making depends on other normative priorities. The effects on the agent are more mixed than the effects on the principal. Conflict between an agent and the principal can “subvert the agent’s incentives to make informed policy decisions,” undermining the principal as well.<sup>243</sup>

For democratic legitimacy, the mechanism of conflict resolution provides clear accountability—within and outside government. Many hierarchical relationships give power to the president. For the unitary executive theorists, such arrangements better match the Vesting and Take Care clauses than more diffuse designs.<sup>244</sup> For others, the president is more accountable than other branches of government.<sup>245</sup> Turning from the ends to the means, such relationships also often restrict who gets to participate, shutting out particular perspectives. To the extent that wider participation legitimates agency action, these arrangements may undermine democratic governance.

### B. Advising and Monitoring Relationships

Several models apply to the next set of relationships, where one agency has decision-making power, but another agency or set of officials has independent authority to advise the agency or report on its activities. For instance, principal-agent models govern relationships when the monitoring or advisory agency is subject to its advisee’s control. But many monitoring arrangements involve a monitor that does not fall under the recipient’s control. In such settings, political scientists have distinguished between two types of monitoring methods: police patrols and fire alarms.<sup>246</sup> Each encourages certain types of oversight, and we

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241. Gersen & Vermeule, *supra* note 235, at 2220 (explaining mean-variance trade-off from an example of a preferred outcome of seventy where in the first context possible outcomes are fifty and ninety and in the second context possible outcomes are seventy and seventy-four).

242. See Sunstein, *supra* note 126, at 1840.

243. John W. Patty & Ian R. Turner, *Ex Post Review and Expert Policymaking: When Does Oversight Reduce Accountability 2* (working paper, 2016) (positing a mechanism where the agent “cries wolf”), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2781750](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2781750).

244. Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23 (1995); Saikrishna Bangalore Prakash, *Hail to the Chief Administrator: The Framers and the President’s Administrative Powers*, 102 YALE L.J. 991 (1993).

245. Cf. Heinzerling, *supra* note 125, at 326 (arguing that the OIRA review “process diffuses power” across the executive and legislative branches so that “no one is accountable for the results it demands (or blocks, in the case of the many rules stalled during the OIRA process)”; Jide Nzelibe, *Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217 (2006) (questioning assumption).

246. An accessible introduction to the models can be found in Mathew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989).

discuss the specific attractions to institutional designers below. As to their desirability, advisory and monitoring designs in the federal bureaucracy generally allow for more input in decision making but keep a clear decision maker, though one who can be more easily overturned.

### 1. *Design Choices: Generating Information*

Monitoring's largest draw is its information-generating capacity, which political actors and the courts can use to shape or oversee policy decisions, either independently or as a complement to other tools. We discuss why political actors might choose principal-agent models above; those insights apply equally here. As for police patrols and fire alarms, however, each has its particular enticements.<sup>247</sup> Police patrols—requiring an agent to regularly report about its activities or directing in advance others to undertake particular investigations into likely problems—give Congress or the White House more control over the information-generating process.<sup>248</sup> Fire alarms—providing a mechanism for some third-party to access information and to notify the political branches (and the courts) of problems—are more economical for the designer (who does not need to pay attention to the conduct of agencies except when notified of problems) but less directed.

Political scientists claim that Congress greatly prefers fire alarms to police patrols, presuming that interest groups are well dispersed to make the less costly device effective.<sup>249</sup> But actual institutional designs belie such a stark conclusion. To be sure, considerable agency design feeds into a fire alarm model, which requires access to information and an incentive to complain about the agent to be effective. Such an incentive exists when the third-party has preferences different from the agency decision maker. The SBA's role as a commenter on EPA's regulatory proposals fits neatly within this model. Protections for whistleblowers also clearly match this category.<sup>250</sup>

Congress, however, also actively chooses police patrols, as we describe in Part I. Indeed, when an agency must solicit comments before undertaking a project with consequences for the environment or historical preservation,<sup>251</sup> the

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247. A possible third strategy involves persuading the actors in question to voluntarily disclose information. Gailmard and Patty show that in these cases, the principal may want to appoint an agent whose preferences are closer to those of the actors than the principal, thereby persuading agents that it is safe for them to engage in greater disclosure. See GAILMARD & PATTY, *supra* note 79, at 228–29.

248. It also seems to describe the relationship between GAO and Congress, with GAO as the police patrol. See O'Connell, *supra* note 137.

249. Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 167–69 (1984).

250. The latest statute on whistleblower protections garnered strong support from both parties. The Republican-controlled House and Senate pushed through additional protections in the spring, which President Trump signed into law. Ralph R. Smith, *Follow the Rules Act Signed into Law*, FEDSMITH (June 15, 2017), <https://www.fedsmith.com/2017/06/15/follow-rules-act-signed-into-law/> [<https://perma.cc/B8WB-6Z4D>].

251. See *supra* notes 113, 135 and accompanying text.

“police” do not even need to walk the block. Rather, the agency must come to the guardhouse. Sometimes, Congress creates arrangements with elements of both police patrols and fire alarms. The GAO and IGs, for instance, have specific mandated reports from Congress and can also investigate other issues on their own.<sup>252</sup> Setting up adversarial agencies both as police patrols and fire alarms helps Congress ensure that agencies comply with its delegations, though such arrangements also “yield even greater power to the executive branch than [Congress] normally would.”<sup>253</sup>

The White House too creates advisory and monitoring relationships on its own—from White House staffers to OIRA’s coordination process.<sup>254</sup> According to Gillian Metzger, presidents may also have an incentive to foster independence by lower-level officials to improve the government’s efficacy, on the theory that presidents themselves are judged on this basis.<sup>255</sup> Through deference doctrines, courts indirectly establish such external and internal arrangements as well. In rare circumstances, courts make more direct moves such as asking an agency without litigating authority to give its views. We address these judicial actions in detail in the next Part.

These choices do more than foster the transmission of information. Most fundamentally, they may shape substantive outcomes. Specifically, the threat of oversight from political actors or the courts can influence an agency’s choices. An independent judgment from experts who are unlikely to share the agency’s biases, such as scientific advisory boards, makes it hard for the agency to veer too far from that judgment without a good explanation. Even without ex-post review by some branch of government, these arrangements may hardwire commitment to the delegator’s intentions.<sup>256</sup> The arrangements can also shift power within an agency. Soft whistleblowing, for example, can shift power within an agency from a group that does not engage in disclosure (lawyers, because of professional mandates on confidentiality) to one that does (scientists).<sup>257</sup>

In addition, these arrangements may reward particular interest groups. The assignment of softer oversight may be a sop to an interest group that is concerned about a new grant of authority to one agency but lacks the political power either to prevent passage or to insist on a veto power for another agency where it has

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252. O’Connell, *supra* note 137; Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 444–45 (2009).

253. DeShazo & Freeman, *supra* note 41, at 2221, 2229, 2300.

254. See *supra* note 127 and accompanying text.

255. Metzger, *supra* note 252, at 434.

256. See Leiter, *supra* note 143, at 51, 53; Metzger, *supra* note 252, at 430–31; cf. Gersen & Vermeule, *supra* note 235, at 2232 (arguing that “there is no a priori reason to insist that Congress either does or should prefer to grant power to friendly institutions,” so that “many core ideas about how Congress and the bureaucracy perform in the administrative state are simply built on a faulty premise”).

257. Leiter, *supra* note 143, at 52, 55, 59. Interestingly, this might counterbalance shifts going the other direction with increased procedural requirements imposed on agency actions.



more influence. But a monitoring design can also represent the dominant coalition's effort to establish fire alarms if the agency should veer away from its intended trajectory. Congressional committees with jurisdiction over legislation may represent the relevant interest groups, or the interest group may even be a committee itself seeking to maintain some toehold in an issue domain.

A particularly clear example of this dynamic involves FERC's issuance of licenses for hydroelectric dams. In determining the degree of ecological harm from the proposed dam and possible mitigation measures, FERC must consult the FWS, National Marine Fisheries Service, and the relevant state's fish and wildlife commission.<sup>258</sup> Although the major congressional oversight committee supervising FERC had no interest in further emphasizing environmental matters, the environmental subcommittee headed by an influential member of Congress successfully forced the adoption of this provision.<sup>259</sup> The congressional committee reports clarify that the provision was intended to force both FERC and license applicants to work with these other, environmentally oriented agencies.<sup>260</sup> Notably, the provision also requires that "FERC develop a dispute resolution process to resolve its disagreements with other agencies; and that the Commission give reasons for not adhering to their recommendations."<sup>261</sup> A comprehensive empirical study concluded that as a result of this provision, state and federal agencies frequently participated in these proceedings and affected the outcomes.<sup>262</sup>

## 2. Normative Implications: Internal Checks and Balances

Advising or monitoring arrangements are not always appropriate but may yield the best mix of social welfare and democratic legitimacy consequences in many circumstances. As to their efficiency, adversarial advisors and monitors generate conflicting information, which works to prevent "group think."<sup>263</sup> In turn, informational counterbalancing may produce better decisions, assuming the quality of the decision turns, in part, on the quality of information and the decision-making process. The "Dissent Channel" in the State Department, for example, is premised on this rationale.<sup>264</sup> On the other hand, advisors and

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258. 16 U.S.C. § 823a(c) (2012).

259. DeShazo & Freeman, *supra* note 41, at 2259 (finding evidence that "an intercommittee struggle between pro-environmental committees and pro-energy committees—or at least a struggle among individual members—was occurring in the background of the statutory drafting.").

260. *See id.* at 2260.

261. *Id.* at 2263. For example, FERC may refer certain disputes to mediation, specifically, the "Commission's Dispute Resolution Service," which must issue an advisory opinion within ninety days. 16 U.S.C. § 823d (2015).

262. DeShazo & Freeman, *supra* note 41, at 2266.

263. *See* Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 118 (2000).

264. Neal K. Katyal, Opinion, *Washington Needs More Dissent Channels*, N.Y. TIMES, (July 1, 2016), <https://www.nytimes.com/2016/07/02/opinion/washington-needs-more-dissent-channels.html> [<https://perma.cc/H2KY-WUBK>].

monitors may shift the outcome in socially undesirable ways, adding “bad” information or slowing down a welfare-enhancing action.

Oversight and participation designs have several consequences for democratic governance. To start, they may indirectly give relevant interest groups some voice in decisions.<sup>265</sup> The SBA’s role (and considerable authority) comes from concerns that small businesses may be unable to represent their interests effectively. This normative justification harkens back to Richard Stewart’s interest representation model of administrative law.<sup>266</sup> But as the case of the SBA’s advocacy shows, these efforts to empower marginalized groups may be co-opted by more powerful ones.<sup>267</sup> Hardwiring—through appointment restrictions, for instance—might help to counteract such an outcome.

Most critically, these arrangements may make administrative decisions more legitimate. Given the difficulty of checking administrative discretion, oversight may contribute to legitimacy by providing some safeguards against abuse of power.<sup>268</sup> Monitors and advisors may also be helpful in obtaining broader attention to an agency’s proposed decision, but they will only be successful in blocking a decision if their voices can claim the attention of actors with harder forms of power, including Congress and the courts.

Finally, to the extent that it results in increased transparency, oversight may promote democratic norms. Monitors may provide information to “hel[p] citizens (and others) assess and attempt to change their government’s performance.”<sup>269</sup> In particular, IGs and the GAO buttress transparency, as their reports can generate significant media attention.

### C. Symmetrical Relationships

Symmetrical relationships include three categories—collective decision making, independent decision making, and competitive decision making—each

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265. Cf. Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 UCLA L. REV. 1300, 1347–52 (2016) (showing how interest groups may not represent their alleged “interests” well).

266. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

267. See *supra* note 118.

268. The application of Madisonian separation-of-powers principles within the executive branch has been a matter of discussion among administrative law scholars. See JON D. MICHAELS, SEPARATION OF POWERS ALL THE WAY FORWARD (forthcoming) (working draft at 196) (on file with authors) (positing that “there is the issue of a distinctively American administrative pluralism and the need to carry the separation of powers *all the way forward*—into the administrative realm”); Katyal, *supra* note 40, at 2346 (arguing “[o]verlapping jurisdiction, civil-service protections and promotion, and the invigoration of the agency bureaucrat as an elite force will produce modest internal checks” on presidential power); Metzger, *supra* note 252, at 429–30 (pointing to “the presence of independent agency watchdogs, such as [IGs]”); O’Connell, *supra* note 40, at 1722 (suggesting that “redundancy may be more necessary to promote democratic values if the same party controls Congress and the White House”).

269. O’Connell, *supra* note 40, at 1717.

with a corresponding set of social science research.<sup>270</sup> We focus on the varied objectives of the participants in the first two categories. In short, symmetrical arrangements provide wider perspectives, with bite. Conflict resolution becomes trickier, as actors wield more power in the decision-making process—particularly if Congress does not specify resolution mechanisms in the design stage. Congress and the White House have different incentives for this form of institutional design as a positive matter, which we discuss. In terms of normative consequences, this design often results in less accountability but more participation.

### 1. *Design Choices: Creating Competition*

As Kenneth Shepsle wisely noted, “Congress is a they, not an it.”<sup>271</sup> The committee structure of Congress largely drives symmetrical arrangements. Overlapping committee turf, often with different sources of expertise, pervades the legislature.<sup>272</sup> With jurisdiction over an agency, a committee can shape the agency’s outcomes.<sup>273</sup> To maintain this control, committees frequently logroll and produce multiple delegations or similar internal structures.<sup>274</sup> Dodd-Frank, for instance, gave tasks to both the CFTC and the SEC to preserve committee turf.<sup>275</sup> In addition, Congress as a whole may prefer such deals, as the expected policy outcome may be closer to the median member if any particular committee is an outlier.<sup>276</sup>

Congress also chooses arrangements in a separated powers system. Symmetrical interagency designs prevent an agency more closely aligned with the White House from wielding too much power.<sup>277</sup> In addition, if Congress is at

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270. Collective decision making occurs when agencies with different information or preferences share control over decisions, as in FSOC, created by Dodd-Frank. Social choice models, which involve aggregating preferences, would apply. Independent decision making involves agencies with different preferences (deriving, for example, from different missions as in the SEC-CFTC conflict), which seek to achieve what each regard as a favorable outcome. In these situations, entities have no formal authority over another, which (like collective decision making) may foster diverse perspectives. Here, multiple player games from international relations would be relevant. Competitive decision making, unlike independent decision making, concerns agencies with similar preferences competing for resources, perhaps like the intelligence components of each of the military services. Tournament models from labor economics would be pertinent. To some degree, the fire alarm and police patrol models of the preceding section apply to all three groups as well.

271. Kenneth A. Shepsle, *Congress is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992).

272. KING, *supra* note 231, at 16–19.

273. KENNETH A. SHEPSLE & MARK S. BONCHEK, *ANALYZING POLITICS: RATIONALITY, BEHAVIOR, AND INSTITUTIONS* 325 (1997).

274. See Abbe R. Gluck, Anne Joseph O’Connell, & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1830–31 (2015).

275. ROBERT G. KAISER, *ACT OF CONGRESS* 88–89 (2013).

276. See DAVID EPSTEIN & SHARYN O’HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* 166–68 (1999).

277. Michael M. Ting, *A Strategic Theory of Bureaucratic Redundancy*, 47 AM. J. POL. SCI. 274, 286 (2003).

an informational disadvantage compared to the president, informational counterbalancing—drawing on contrasting sources to get needed items—may be a rational strategy. Finally, members think temporally.<sup>278</sup> Today’s majority will be tomorrow’s minority. And symmetrical conflict within an agency allows each party to always retain some authority.<sup>279</sup> It also provides information to foster congressional oversight, through individual commissioner statements, which are often publicly available, for example.<sup>280</sup> In some cases, Congress uses internal conflict to make it harder for the agency to function.<sup>281</sup>

Although the executive branch is also a *they*, not an *it*, only one person sits at the top. Because the president’s responsibility is more easily identified, the president is more likely to be held accountable than any member of Congress for agency actions.<sup>282</sup> The president therefore may seek symmetrical arrangements, such as a cabinet of rivals, to motivate agencies to improve performance and acquire information more easily. Presidents may also favor conflict when they do not exercise control over the ultimate decision or, at the other extreme, as a means of escalating important issues to their attention.<sup>283</sup> In terms of intra-agency symmetrical designs, party-balancing requirements, of course, favor the sitting president. But party control of the White House also shifts, allowing the minority seats to remain with the outgoing party. Thus, Congress and the president both have incentives to build conflicts into the system.

## 2. Normative Implications: Benefits and Costs of Redundancy

In this Section, we focus on a few considerations regarding “redundant” institutional designs, including concomitant impacts on social welfare and democratic governance.<sup>284</sup>

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278. Murray J. Horn & Kenneth A. Shepsle, *Commentary on “Administrative Arrangements and the Political Control of Agencies,”* 75 VA. L. REV. 499, 503–04 (1989).

279. Krotoszynski and his coauthors have found that “[s]ince 1989, approximately 950 bills have been introduced in Congress that propose to create some new federal administrative body with a mandated split in political party representation among its members.” Krotoszynski et al., *supra* note 172, at 979.

280. Jacobs, *supra* note 21, at 31–36.

281. Terry M. Moe, *The Politics of Bureaucratic Structure*, in CAN THE GOVERNMENT GOVERN? 267, 267 (John E. Chubb & Paul E. Peterson eds., 1989).

282. See DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN 4 (2003).

283. See Freeman & Rossi, *supra* note 45, at 1137 (arguing that multiple agency delegations “present [the president] with opportunities to put his stamp on policy”); Marisam, *supra* note 44, at 222 (noting that “[c]oherent departmentalization enables Presidents to more easily set . . . general goals”). One study found that an increase in the number of congressional committees gives more power to the president compared to Congress. See Joshua D. Clinton et al., *Influencing the Bureaucracy: The Irony of Congressional Oversight*, 58 AM. J. POL. SCI. 387 (2014).

284. One of us detailed the normative consequences of “redundant” institutional design (for both effectiveness and democratic legitimacy) a decade ago. O’Connell, *supra* note 40; see also Gersen, *supra* note 40 (independent treatment at same time); Katyal, *supra* note 40 (same). Many analyses in the public law literature followed. Of course, the theory has a long history in the social sciences. See, e.g., Martin Landau, *Redundancy, Rationality, and the Problem of Duplication and Overlap*, 29 PUB. ADMIN. REV. 346 (1969); Niskanen, *supra* note 53. In addition, similar issues arise in private law. For

Symmetrical adversaries may produce better social welfare outcomes.<sup>285</sup> The causal mechanisms include working “harder and more creatively, generating a race to the top in performance,” and motivating “one entity to correct mistakes by another entity.”<sup>286</sup> Yet, this story of beneficial competition is not without its critics. The primary concern is the cost of seemingly duplicative efforts.<sup>287</sup> Relatedly, if adversaries must engage in joint action, such efforts can take much longer than if only one entity is charged with acting.<sup>288</sup> Or, if joint action is not mandated, agencies could miss beneficial opportunities for cooperation. For instance, the 9/11 Commission found that adversarial relationships among intelligence agencies had hurt national security.<sup>289</sup> This lack of cooperation could also extend to regulated entities, where one agency plays off another.<sup>290</sup>

Agencies do, however, have “strategic interdependencies.”<sup>291</sup> The CFTC and the SEC are not separate airplane engines operating without regard to the other.<sup>292</sup> According to Michael Ting, shirking is worse when multiple agencies

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classic treatments, see ALFRED D. CHANDLER, *STRATEGY AND STRUCTURE: CHAPTERS IN THE HISTORY OF THE AMERICAN INDUSTRIAL ENTERPRISE* (1962); OLIVER E. WILLIAMSON, *CORPORATE CONTROL AND BUSINESS BEHAVIOR* 110–53 (1970). More recent private law research has interesting lessons for public law. See Ronald J. Gilson et al., *Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration*, 109 COLUM. L. REV. 431, 434–35 (2009) (noting shift “away from vertical integration” that allows “iterative collaboration” and “cross-organizational innovation”).

285. Mathias Dewatripont & Jean Tirole, *Advocates*, 107 J. POL. ECON. 1, 1 (1999) (by having “rewards closely track their performance” and “enhanc[ing] the integrity of decision making by creating strong incentives to appeal”); Alexander V. Hirsch & Kenneth W. Shotts, *Competitive Policy Development*, 105 AM. ECON. REV. 1646, 1648 (2015) (by incentivizing specific expertise); Bengt Holmstrom, *Moral Hazard in Teams*, 13 BELL J. ECON. 324, 325 (1982) (only by “provid[ing] information about another agency’s state uncertainty”); Chulyoung Kim, *Adversarial and Inquisitorial Procedures with Information Acquisition*, 30 J.L., ECON. & ORG. 767, 769 (2013) (showing how “advocates exert more effort for information collection than [an inquisitorial] judge” but noting that in some cases the trade-off between collection and communication of information could favor a nonadversarial design).

286. O’Connell, *supra* note 40, at 1677; see also CASS R. SUNSTEIN ET AL., *ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* (2006) (showing how all liberal federal panels reached outcomes more to the left than majority liberal panels and positing this resulted from “groupthink”). This analysis assumes that the principal’s goal is to obtain accurate information or higher effort. Competition could be counterproductive otherwise, if not destructive. See Annie Linskey, *Warring West Wing Factions Dismay Management Experts*, BOS. GLOBE (Feb. 18, 2017), <https://www.bostonglobe.com/news/politics/2017/02/18/trump-first-month-has-management-experts-shaking-their-heads/X8QBWGZozkaqLw4IOFpXeM/story.html> [<https://perma.cc/B4SW-ZL97>] (reporting view of management experts regarding destructive competition between presidential aides within White House).

287. FREDERICK M. KAISER, CONG. RESEARCH SERV., R41803, *INTERAGENCY COLLABORATIVE ARRANGEMENTS AND ACTIVITIES: TYPES, RATIONALES, CONSIDERATIONS*, at i (2011). A related concern is fractured oversight. *Id.* at 17–21.

288. See Evan Weinberger, *Dodd-Frank Act at 5: SEC Slammed for Slow Rulemaking*, LAW360 (July 17, 2015, 6:26 PM), <https://www.law360.com/articles/680517/dodd-frank-act-at-5-sec-slammed-for-slow-rule-making> [<https://perma.cc/X83Q-HC85>].

289. See 9/11 COMMISSION, *supra* note 157, at 353–60.

290. Cf. Levitin, *supra* note 94, at 2043 (noting how some financial agencies competed for regulated entities’ patronage by racing to create “laxity in regulation”).

291. Ting, *supra* note 277, at 275–76.

292. *Id.*

have similar objectives to Congress.<sup>293</sup> Symmetrical arrangements with more dispersed missions may help prevent collective action failures. Yet policy makers will have to consider the costs of diffused responsibility in addition to hiring more personnel and implementing conflict resolution mechanisms.

The discussion on internal separation of powers above applies to concerns about democratic governance as well. For symmetrical arrangements, the powers among agencies are more equivalent than in advising and monitoring adversarial relationships. As a result, interest group factions have more difficulty in capturing the policy area.<sup>294</sup> Arguably, symmetrical arrangements most closely approach the categories in Mark Seidenfeld's civic republicanism defense of the administrative state.<sup>295</sup> At the state level, Christopher Berry and Jacob Gersen argue that "unbundled" arrangements "produce political outcomes closer to public preferences."<sup>296</sup> On the other hand, at the federal level, where there are no elections for leaders of the bureaucracy, fragmentation may weaken political control and therefore political accountability.<sup>297</sup>

Miranda Yaver's recent work on interagency learning suggests another legitimacy benefit from symmetrical authority. Using a new dataset on appellate litigation from 1973 to 2014, Yaver found that "when an agency observes a closely-linked agency facing legal constraints, it reshapes its own regulatory strategy" to lessen its own litigation risk.<sup>298</sup> This work suggests that competitors learn to better match their efforts to congressional intentions (as the courts interpret those intentions) because they can watch what courts do to others' actions.

A final consideration on the legitimacy of designs involves public expression of dissent. Dissent is often integral to democracy. Sharon Jacobs points out, however, that dissent within an agency can sometimes undermine public confidence in an institution.<sup>299</sup> For instance, separate opinions in an

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293. *Id.*; see Andrew B. Whitford, *Adapting Agencies: Competition, Imitation, and Punishment in the Design of Bureaucratic Performance*, in *POLITICS, POLICY, AND ORGANIZATIONS* 160, 182–83 (George A. Krause & Kenneth J. Meier eds., 2003) (showing that when agencies can imitate each other, performance improves, but stability worsens).

294. See Bradley, *supra* note 58, at 748; cf. Nolan McCarty, *Complexity, Capacity, and Capture*, in *PREVENTING REGULATORY CAPTURE* 99 (Daniel Carpenter & David A. Moss eds., 2014) (suggesting that in complex areas, capture theories may work differently); Matthew Wansley, *Virtuous Capture*, 67 *ADMIN. L. REV.* 419 (2015) (arguing that capture can be "virtuous" by allowing public-interest regulation to occur through more indirect means).

295. Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 *HARV. L. REV.* 1511 (1992).

296. Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 *U. CHI. L. REV.* 1385, 1387 (2008).

297. Cf. Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 *N.Y.U. L. REV.* 1463, 1467 (2015) (arguing that *committee* driven decisions may go against collective *congressional* interests).

298. Miranda Yaver, *Inter-Agency Learning in US Regulatory Policymaking* 1, 22–24 (working paper, July 31, 2016), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2817073](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2817073).

299. Jacobs, *supra* note 21, at 53–54. Jacobs argues plausibly that the effects of internal dissent may be context-dependent:

independent regulatory commission may make the agency's reasoning hard to follow.<sup>300</sup> They may also capture judicial attention, preventing the courts from taking their own hard look.<sup>301</sup> If agencies are defended primarily on expertise grounds, conflict among experts may undercut that rationale.<sup>302</sup> Thus, Jacobs argues, because they increase the prospects for dissent, party-balancing requirements have their downsides.

Nevertheless, despite potential tensions with the president's broad power to select appointees, party-balancing requirements serve a legitimating function. Indeed, balancing requirements ensure that commissions represent a broad range of groups and provide a forum for considering all opposing arguments. Congress also has explicitly chosen these arrangements, which provides some democratic legitimacy. In any event, party-balancing requirements appear to have practical consequences for governance, in the form of higher failure rates of nominations and longer confirmation delays, compared to agencies that lack these restrictions.<sup>303</sup> To be fair, other factors besides statutory appointment restrictions may drive these failed nominations and longer confirmation processes. But some research does suggest that partisan balance requirements contribute to these issues.<sup>304</sup> On the other hand, such restrictions may force members of Congress to compromise through logrolling. In recent decades, Congress has actively engaged in batching appointments—in other words, processing a Republican and Democrat together—to independent regulatory commissions.<sup>305</sup> Batching produces more polarized appointments while also allowing Congress to fill agency positions.

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New commissions seeking to establish their reputations as trustworthy stewards may tend toward consensus in their early years. Independent commissions might also prioritize unanimity in the face of external political opposition. By contrast, more established bodies in more sympathetic political environments may worry less about reputation and feel freer to publicize internal disagreement.

*Id.* at 57.

300. *Id.* at 48 & n.220.

301. *Id.* at 55.

302. *See id.* at 58.

303. *See* Anne Joseph O'Connell, *Shortening Agency and Judicial Vacancies Through Filibuster Reform? An Examination of Confirmation Rates and Delays from 1981 to 2014*, 64 DUKE L.J. 1645, 1661–62 (2015); ANNE JOSEPH O'CONNELL, BROOKINGS CTR. ON REGULATION AND MKTS., STAFFING FEDERAL AGENCIES: LESSONS FROM 1981–2016, at tbl.3, <https://www.brookings.edu/research/staffing-federal-agencies-lessons-from-1981-2016> [<https://perma.cc/4CF8-WR9F>]. Krotoszynski and his coauthors argue these practical effects could be legally problematic. Krotoszynski et al., *supra* note 172, at 996. We do not take on that claim but do discuss legal considerations in Part IV.

304. Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 473–74 (2008).

305. Ho, *supra* note 176, at 27. In turn, the president now often nominates a slate for an independent regulatory commission at one time. *See* Ed Beeson, *Obama Taps Law Pro and Ex-Senate Aide to Join SEC*, LAW360 (Oct. 20, 2015, 7:23 PM), <http://www.law360.com/articles/716645/obama-taps-law-pro-and-ex-senate-aide-to-join-sec> [<https://perma.cc/PD6F-N9DV>].

*D. Takeaways*

Though we are unable to provide definitive statements about the benefits of adversarialism, we do want to stress its potential to strengthen the decision-making process.<sup>306</sup> We also offer some larger reflections on additional areas of research, including the effects of visibility on adversarialism, as well as refining the interaction of institutional structures and their resolution mechanisms.

To start, judging the attractions and costs of adversarial relationships among and within agencies requires a benchmark: Compared to what? As pragmatists, we lean toward a benchmark based on political feasibility.<sup>307</sup> In theory, checks between branches may be preferable in principle, but using them as a benchmark for judging the desirability of other mechanisms seems inappropriate in the present political era. Because of intense political polarization, periods of divided government may prevent Congress from making effective use of its powers to check the president, while periods of unified party government may eliminate Congress's motivation to do so. Thus, checks and balances may either cause an impasse between branches or fail to work at all. Consequently, Madison's checks and balances among the branches may not be workable as a way to increase deliberation and representation while also preventing abuses of power.<sup>308</sup> Thus, we think the question is not whether agency conflict compares well in terms of democratic norms with interbranch checks and balances, but rather whether agency conflict has desirable effects given the possibility that interbranch checks are ineffective. In short, we would compare agency conflict plus weak interbranch checks with agency harmony plus weak interbranch checks, rather than incorporating Madison's vision of interbranch relationships into the benchmark.

Putting the comparator to the side, the visibility of adversarialism may shape its implications. What is the difference between the SBA submitting a formal comment to another agency's rulemaking and having an *ex parte* meeting with that agency? On one hand, the former is guaranteed to be in the administrative record for any judicial review.<sup>309</sup> But the latter seems critical as well. Many commentators critique OIRA for not disclosing the substance of oral communications during meetings with agencies.<sup>310</sup> On the other hand, vigorous debate among national security agencies may need to be closed off, at least to

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306. Further complicating the analysis, conflict can come in different forms. For instance, IGs may develop information about fraud and abuse through routine oversight, or they may go on concerted campaigns prompted by the party out of power. Intuitively, the former types of activity seem more legitimate. Yet, by allying with the party out of power, the IG may be prompted to dig deeper and address important issues that routine auditing activities would be unlikely to identify.

307. See Farber & O'Connell, *supra* note 57 (also adopting pragmatic approach). Admittedly, some of the more theoretically minded may disdain reliance on such practicalities.

308. Gluck & O'Connell, *supra* note 274, at 1839–44.

309. Cf. *Sierra Club v. Costle*, 657 F.2d 298, 404–08 (D.C. Cir. 1981) (political *ex parte* conversations need not be disclosed).

310. Farber & O'Connell, *supra* note 57.



the public. Outside the national security context, closed deliberations may also produce more frank input.<sup>311</sup> At the least, creative solutions should be encouraged—for example, the publication of OLC opinions and disclosure of critical input to rulemakings (including from OIRA), once finalized.<sup>312</sup>

Another subject that calls out for further research is the relative virtues of various institutional structures. Hierarchical structures may be appealing because they contain (at least formally) their own dispute-resolution method, and they privilege the institutional perspective that the institutional designer may find most important. Yet they may also lead “subordinate” agencies to waste resources on efforts to avoid review, while requiring correspondingly more effort by the “principal” to exercise control. Moreover, such a one-sided relationship may tend to bury conflicts from outside view, limiting political accountability. We know relatively little about the situations where hierarchical relations may dominate symmetrical or mixed ones, or vice versa.

It would also be interesting to explore in more depth the choice of resolution mechanisms for symmetrical agencies. Fragmented horizontal authority with no strong coordinator differs from split authority with a powerful coordinator. For instance, the benefits to having DOJ handle most agency litigation (notably, the closeness of the SG and AG to the president, coordination across courts, and arguably, more objectivity on legal issues) probably outweigh the costs (specifically, duplication of agency expertise and preventing the courts from considering true agency views).<sup>313</sup> Moreover, when a process requires a unitary decision at the end of the process, competing decentralized players can produce greater social welfare than centralized arrangements, if the competition produces considerable efficiency gains.<sup>314</sup>

In addition, not all resolution devices are alike. Catherine Sharkey prefers the courts,<sup>315</sup> Bijal Shah favors the White House.<sup>316</sup> A former Deputy Secretary

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311. See *Jordan v. U.S. Dep’t of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978) (en banc) (deliberative process privilege).

312. See generally Cass R. Sunstein, *Output Transparency vs. Input Transparency* 2–3, 14 (working paper, May 25, 2017), <http://ssrn.com/abstract=2826009> [<https://perma.cc/BWQ9-MLE8>] (arguing for increased transparency on outputs and noting complexity of transparency on inputs, though flagging that the costs to transparency decline over time for a particular decision).

313. Mark B. Stern & Alisa B. Klein, *The Government’s Litigator: Taking Clients Seriously*, 52 ADMIN. L. REV. 1409, 1415 (2000) (some of the advantages); Olson, *supra* note 201, at 79–80 (both sides).

314. Ricardo Alonso et al., *When Does Coordination Require Centralization*, 98 AM. ECON. REV. 145, 145 (2008) (“[A] higher need for coordination improves horizontal communication but worsens vertical communication.”).

315. Catherine M. Sharkey, *Agency Coordination in Consumer Protection*, 2013 U. CHI. LEGAL F. 329, 330 (2013).

316. Shah, *supra* note 46, at 854; see also Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1341 (2013) (noting that OIRA, as a “[g]eneralist institution” is “harder to capture than issue-specific agencies”). By contrast, Katyal advocates for a Director of Adjudication, who can be fired only for cause, to replace OLC, an office with close White House ties, for resolving interagency disputes. Katyal, *supra* note 40, at 2337–39.

has recently suggested that although the White House should be involved, instead of “trying to quarterback . . . harmonization” with “short-staffed and non-expert . . . offices,” the White House should “empower[] high-level, accountable cabinet or sub-cabinet officials and their deep staffs from one or two agencies to lead complex, multi-agency implementation efforts.”<sup>317</sup> This debate highlights an important point: constitutional debates notwithstanding, the president’s inability to personally supervise the entire executive apparatus means that delegation of this function elsewhere is inevitable.

Specific individuals in these institutions also play a role. In the 2016 presidential election, over four dozen national security officials penned a letter saying Donald Trump was not qualified to be president. They wrote, in part: “[i]n our experience, a President must be willing to listen to his advisers and department heads; must encourage consideration of conflicting views; and must acknowledge errors and learn from them.”<sup>318</sup> As president, Trump has established some key rivalries, possibly between his initial National Security Adviser and Defense Secretary, and certainly among his initial top White House staff. Will he use them to reach better decisions? Commentators fear chaos.<sup>319</sup> But President Trump could make use of these rivalries—for example, to hone policies that more closely suit his own preferences or gain him maximum political mileage.

Further, conditioning the identity of the decision maker on the presence of conflict could shape agency interaction. For instance, recently released presidential policy guidance on Obama-era drone strikes stated that “if the top lawyers and leaders of the departments and agencies on the National Security Council agree that a proposed strike would be lawful and appropriate, the Pentagon or the Central Intelligence Agency can proceed.”<sup>320</sup> But if they do not agree, “or if the person to be targeted is an American citizen, the matter must go to the president for a decision.”<sup>321</sup>

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317. David J. Hayes, *The White House Needs to Learn When to Delegate*, WASH. MONTHLY (July 15, 2015, 10:21 AM), <http://washingtonmonthly.com/2015/07/15/the-white-house-needs-to-learn-when-to-delegate> [https://perma.cc/4NS5-67Y6].

318. Donald B. Ayer et al., Statement by Former National Security Officials 2 (2016), <https://assets.documentcloud.org/documents/3007589/Nationalsecurityletter.pdf> [https://perma.cc/A2JS-TYPG].

319. See Karen Tumulty, *Prius Faces Daunting Task Bringing Order to White House that Will Feed Off Chaos*, WASH. POST (Jan. 1, 2017, 5:00 AM), [https://www.washingtonpost.com/politics/prius-faces-daunting-task-bringing-order-to-white-house-that-will-feed-off-chaos/2017/01/01/5a2ba9e4-cd31-11e6-a87f-b917067331bb\\_story.html?tid=ss\\_tw&utm\\_term=.52bc0f850fd](https://www.washingtonpost.com/politics/prius-faces-daunting-task-bringing-order-to-white-house-that-will-feed-off-chaos/2017/01/01/5a2ba9e4-cd31-11e6-a87f-b917067331bb_story.html?tid=ss_tw&utm_term=.52bc0f850fd) [https://perma.cc/5P69-JW9C].

320. Charlie Savage, *U.S. Releases Rules for Airstrike Killings of Terror Suspects*, N.Y. TIMES (Aug. 6, 2016), <https://www.nytimes.com/2016/08/07/us/politics/us-releases-rules-for-airstrike-killings-of-terror-suspects.html> [https://perma.cc/4KSV-S7JN].

321. *Id.*

More research clearly remains to be done. Congressional choices to create conflict appear to be increasing.<sup>322</sup> Polarization and divided government drive both conflict between agencies and within agencies—primarily through statutory delegation and nomination batching, respectively.<sup>323</sup> In addition, adversarial relationships raise interesting legal issues, to which we now turn.

#### IV.

##### LEGAL DIMENSIONS OF AGENCY CONFLICT

Adversarial agencies implicate a range of constitutional and statutory issues. We consider a range of those issues here, from the familiar (*Chevron* deference when multiple agencies have jurisdiction) to the more novel (litigation between agencies and the implications for joinder of agency conflicts). Drawing on recent examples of adversarial agencies, we aim to show how accounting for agency conflict illuminates and, in some cases, reframes important doctrinal issues. In particular, we focus on how courts can encourage or undermine adversarial relationships.

##### A. *Presidential Control Over the Bureaucracy*

As discussed, the White House has a multiplicity of relationships with executive agencies; sometimes the White House functions as an adversary, other times as a resolver of conflict, and occasionally as both. These roles raise interesting legal questions. To start, we revisit the classic administrative law debate over whether the president can command an agency to do something against its will when Congress has delegated authority to the agency, not the president. We also discuss three modern examples to show the potential and practical limits of presidential control in dealing with adversarial executive agencies. In short, although the president wields considerable power, it is not as vast as proponents of strong executive power would imagine—in part due to congressional choices and agency resistance.

##### 1. *Classic Debate in New Form*

There is a well-framed, though unresolved, debate in administrative law over how much decision-making power the president has when Congress delegates work to an agency head as opposed to the president herself. We describe this as a hierarchical adversarial relationship. To summarize briefly, some commentators interpret such statutes as permitting the president to direct the agency head (or at least those in nonindependent agencies); others, taking a

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322. Sean Farhang & Miranda Yaver, *Divided Government and the Fragmentation of American Law*, 60 AM. J. POL. SCI. 401, 408, 415 (2016).

323. Cf. McGarity, *supra* note 101, at 109 (finding the “team model” and not the “adversarial model” predominates in agency decision making).

more traditional tack, read them as barring the president from exercising such control.<sup>324</sup>

Unitary executive theorists take the former approach, arguing the Constitution's Vesting Clause requires that the president have control over agency choices.<sup>325</sup> Then-professor, now-Justice Elena Kagan endorses a modified version of this approach. Kagan posits that the president can exercise directive power over executive agency leaders—but not leaders of independent regulatory commissions—if Congress has not explicitly specified otherwise.<sup>326</sup> To justify her stance, Kagan distinguishes statutes granting authority directly to the president from those delegating to agency officials. While the former allow the president to choose which agency head will administer the statute, the latter do not.<sup>327</sup> But, she contends, “when Congress delegates to an executive official, it in some necessary and obvious sense also delegates to the [p]resident.”<sup>328</sup> In contrast, when statutes grant authority to an independent regulatory commission, Kagan concludes that “Congress must . . . intend the exercise of that power to be independent,” as “making the heads subordinate in this single way would subvert the very structure and premises of the agency.”<sup>329</sup> Finally, she provides a normative justification for her position. Because presidential control over executive agency leaders “usually advances accountable and effective administration, then Congress should have to manifest any intent to limit that control.”<sup>330</sup>

Other scholars take the opposing position, maintaining that statutes that delegate authority to an agency official but are silent with respect to the president should be construed to exclude presidential control.<sup>331</sup> Kevin Stack, directly challenging Kagan's interpretive approach, holds that the president has directive authority only when Congress expressly confers that power.<sup>332</sup> Stack points to what he calls “mixed agency-[p]resident delegations”—some of which are longstanding—that give authority to either an executive official or the president,

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324. To be fair, while much ink has been spilled on this debate, the practical differences are thin as agency officials will rarely take action contrary to a president.

325. See, e.g., Calabresi & Prakash, *supra* note 244, at 596 & n.210; Prakash, *supra* note 244, at 991–94.

326. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2251, 2320, 2326–27 (2001). Kagan contrasted her position from that of unitary executive theorists. *Id.* at 2326 (“The original meaning of Article II is insufficiently precise and, in this area of staggering change, also insufficiently relevant to support the unitarian position. . . . The cases sustaining restrictions on the President's removal authority . . . are almost certain to remain the law.”).

327. *Id.* at 2326–27.

328. *Id.* at 2327. While Kagan concedes these mechanisms differ from directive power, she claims that the subtle distinction suggests Congress did not intend to separate them. *Id.* at 2328.

329. *Id.* at 2327.

330. *Id.* at 2330–31.

331. Like Kagan, these scholars also reject the unitary executive theorists' view of the Constitution.

332. Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 267 (2006).

but subject that individual to the “approval, direction, control, findings, or involvement of the other.”<sup>333</sup> With these in mind, Stack argues it would be unnecessary for Congress to make an explicit delegation of authority to the president regarding a decision, if there were a presumption that delegations to officials carry that effect anyway.<sup>334</sup> In addition, while Kagan sees a blurry line between removal and directive control, Stack contends that the powers are clearly distinct. Because the political costs of firing an official are higher than directing an agency head to implement a particular policy, officials may be more willing to defy the president’s directions when they view their discretion as independent of the president’s.<sup>335</sup> Finally, Stack too justifies his position on normative grounds. He contends that the president already has sufficient tools to manage the regulatory state.<sup>336</sup> In Stack’s view, Congress has less incentive to limit presidential authority than the president has to expand it.<sup>337</sup> Hence, he argues, “Kagan’s view may be overly optimistic as to the constraints that Congress will impose in future legislation.”<sup>338</sup>

Scholars have lined up on both sides of the presidential control debate.<sup>339</sup> But the debate largely assumes Congress has tasked only one agency with authority. Does the debate change if Congress, anticipating the potential for disagreement, delegates authority to multiple agencies? Unitary executive theorists would not budge. If anything, such delegation would provide additional, normative justification to their constitutional argument. Such a justification mirrors Kagan’s concerns of efficiency and accountability, which are presumably greater in the multiple agency context.

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333. *Id.* at 276.

334. *Id.* at 284.

335. *Id.* at 295–96.

336. *Id.* at 319.

337. *Id.* at 320–21.

338. *Id.* A third position is possible, but largely ignored: there is no presumption either way about presidential control when statutes are silent, and the issue must be determined using normal tools of statutory interpretation.

339. See, e.g., Robert V. Percival, *Who’s In Charge? Does the President Have Directive Authority over Agency Regulatory Decisions?*, 79 *FORDHAM L. REV.* 2487, 2490 (2011) (arguing removal power “does not imply that the President has the authority to dictate the substance of agency decisions that regulatory statutes entrust to agency heads”); Prakash, *supra* note 244, at 992 (positing from a study of the Framers that “even if a statute grants discretion to the Secretary of State and explicitly prohibits presidential intervention in the decisionmaking process, the President retains the constitutional authority to substitute his own judgment for the Secretary’s determination”); Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 *ALA. L. REV.* 1205, 1210 (2014) (arguing “why the executive power includes directive authority over all federal agencies”); Thomas O. Sargentich, *The Emphasis on the Presidency in U.S. Public Law: An Essay Critiquing Presidential Administration*, 59 *ADMIN. L. REV.* 1, 2 (2007) (suggesting “ways in which the presumption of presidential power over the agencies and the presidential mystique informing it diminish the vigor of pluralistic debate that is vital for informing governmental decision[making]”); Peter L. Strauss, *Foreword: Overseer, or “The Decider”? The President in Administrative Law*, 75 *GEO. WASH. L. REV.* 696, 697–98, 759 (2007) (“If [statutory] text chooses between President as overseer of the resulting assemblage, and President as necessarily entitled ‘decider,’ the implicit message is that of oversight, not decision.”).

Kagan's statutory and constitutional arguments become more complicated, however, in the context of agency conflict. On the one hand, statutes delegating to multiple executive agencies with no mention of the president's role could be the product of messy legislative practices, such as omnibus bills that bundle multiple committees' assignments almost by accident.<sup>340</sup> On the other hand, Abbe Gluck and Lisa Bressman's surveys of congressional staffers show that Congress often explicitly chooses multiple agency delegation (typically forming symmetrical, potentially adversarial relationships).<sup>341</sup> But two distinct goals could be driving that congressional intent. Congress may desire that the agencies exercise their own judgments— independent of the president. Congress might also want agencies to fully explore both sides of an issue before reaching a decision with presidential (or congressional) input. In some situations, having a method to resolve agency conflict might be important, but as we saw in Part II, presidential intervention is not the only available technique.

Stack's normative claims also look different in the context of multiple agencies. Multiple agencies may make the president's job harder, permitting more points of pushback from Congress or agencies. Congressional choices therefore may even the playing field between the two political branches. Indeed, multiple agencies might demonstrate the power of congressional committees. Though our discussion here largely ignores congressional committees, Part III addresses their role as major players in agency design.

Finally, on the conventional terms of the debate (delegation to one executive agency), if Congress intends for one agency to have different views from the White House—and we have discussed several reasons why it may desire such an arrangement—it would seem that Congress is not implicitly delegating control to the White House. Nevertheless, some of the mechanisms Congress might use to create a different perspective—for example, statutory expertise requirements for the agency's leaders—could support both sides.<sup>342</sup>

In sum, both sides of the debate may assume away too much of the actual complexity of the modern administrative state. In our view, a more granular analysis of specific, statutory delegations could unpack some of these complexities, particularly in settings where multiple agencies are involved. We now turn from this debate about the legalities of presidential control to consider how, in a variety of legal settings, centralized control over the federal bureaucracy actually operates (or fails to do so) in the context of adversarial relationships.

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340. Cf. Gluck & O'Connell, *supra* note 274, at 1804–05.

341. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation and the Canons: Part I*, 65 STAN. L. REV. 901, 1006–10 (2013).

342. For Kagan, these nomination restrictions may blur the boundary between selecting and controlling agency leaders. For Stack, the constraints may demonstrate Congress's desire that the agency exhibit certain independence.

## 2. *Centralized Control Over Agencies and Its Limits*

In this Section, we discuss several recent examples, including the congressionally created conflict between the White House and Defense Secretary over the release of detainees from Guantánamo Bay; dissenting agency voices in litigation even when Congress has given the SG control; and presidential task forces in the absence of reorganization authority from Congress.

### a. *Guantánamo Bay*

As noted in the Introduction, recent annual defense authorization legislation has included procedures to follow before the United States can release a detainee from the Guantánamo Bay military prison to a foreign country, outside of a court order.<sup>343</sup> Specifically, the Secretary of Defense must supply a “written certification” to Congress, “with the concurrence of the Secretary of State and in consultation with the Director of National Intelligence,” that the destination country will take “effective actions to ensure that the individual cannot take action to threaten the United States, its citizens, or its allies in the future,” among other items.<sup>344</sup>

Expecting conflict within the executive branch over these decisions, Congress decided to elevate the agent (DOD) in relation to the principal (president). The State Department and White House more often favor release, for diplomatic reasons, than DOD, which focuses more on security concerns. For example, according to *The Guardian*, the Defense Department blocked for some time “the return of UK permanent resident Shaker Aamer and two other longtime Guantánamo Bay detainees for whom the U.S. Department of State has completed diplomatic deals to transfer home.”<sup>345</sup> Eventually, the Defense Department’s opposition gave way, and the federal government released Aamer.<sup>346</sup> Congress considered the need for DOD’s independent judgment important enough to raise in the confirmation hearing of the previous Secretary of Defense, Ashton Carter.<sup>347</sup> In a high-level meeting, Carter apparently refused to commit to a faster procedure on releases proposed by the National Security

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343. JENNIFER K. ELSEA & MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., R42143, WARTIME DETENTION PROVISIONS IN RECENT DEFENSE AUTHORIZATION LEGISLATION, at i (2015).

344. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1028(b), 125 Stat. 1298, 1567.

345. Spencer Ackerman, *Pentagon Blocking Guantánamo Deals to Return Shaker Aamer and Other Cleared Detainees*, GUARDIAN (Aug. 13, 2015, 1:30 PM), <http://www.theguardian.com/us-news/2015/aug/13/pentagon-blocking-guantanamo-transfer-shaker-aamer> [https://perma.cc/JP9H-BCEH].

346. *Id.*

347. Charlie Savage, *Obama’s Plan for Guantánamo Is Seen Faltering*, N.Y. TIMES (July 21, 2015), <http://www.nytimes.com/2015/07/22/us/politics/obamas-plan-for-guantanamo-is-seen-faltering.html>? [https://perma.cc/Y94W-AKPS].

Council.<sup>348</sup> The Secretary before him, Chuck Hagel, also resisted White House timelines on the release of detainees.<sup>349</sup>

In this setting, Stack's position (no implied presidential directive power) seems more persuasive. No doubt, Congress intended these officials to exercise independent judgment. Although the president's directive power clearly does not operate in this context as Kagan or the unitary executive theorists might hope, there is still the removal power. Although the cost of firing may be high, as Stack suggests, presidents sometimes do remove top officials. For example, Hagel's resistance to Guantánamo Bay transfers supposedly played a role in his firing.<sup>350</sup>

In short, the principal-agent model of Part III can flip, or at least turn sideways for a time, with congressional direction enabling DOD to operate in conflict with the White House. And short of dismissal, presidents have other ways of making their displeasure felt—such as budget cuts, shifting authority over issues elsewhere, or simply denying the official in question “presidential facetime.”

#### *b. Solicitor General*

The continuing debate over presidential directive power focuses on the situation where the president personally dictates the executive branch's position, or attempts to do so. But far more often, control over executive actions devolves to a lower-level official. For instance, Congress has explicitly given DOJ the power to control litigation of executive agencies. By statute and internal agency delegation, the SG is the executive agency's lawyer at the Supreme Court (and the lawyer for most independent agencies as well),<sup>351</sup> filing briefs and participating in oral arguments. While these decisions suggest that the executive branch should speak with a single voice—that voice being the SG's—the reality is sometimes different. Thus, even when Congress and the president agree to centralize control within the executive branch by taking advantage of a hierarchical relationship, their ability to do so is not without limits.

As one manifestation of centralized control, the SG typically lists the relevant executive agency's lawyers in any filing to the Supreme Court, making it clear that the executive branch speaks with one voice. But sometimes, the message is not always unified before the Court. Indeed, the SG's occasional failure to obtain such sign-ons likely reflects conflict between DOJ and the agency.

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348. *Id.*

349. Laura Koran, *Hagel: Gitmo Transfers Caused Friction with Some at White House*, CNN (Jan. 31, 2015, 12:18 PM), <http://www.cnn.com/2015/01/30/politics/hagel-guantanamo-bay-transfers-white-house-friction> [https://perma.cc/3ZMZ-9H84].

350. Helene Cooper, *Hagel Resigns Under Pressure as Global Crises Test Pentagon*, N.Y. TIMES (Nov. 24, 2014), <http://www.nytimes.com/2014/11/25/us/hagel-said-to-be-stepping-down-as-defense-chief-under-pressure.html> [https://perma.cc/SUQH-SD9U]; Levinson & Rodhe, *supra* note 7.

351. *See infra* Part IV.C.4. Even for independent agencies without litigating authority, the issues are more complicated than for executive agencies.



Justice Kagan—who previously had served as SG under President Obama—has taken note of the brief’s signatories on occasion.<sup>352</sup> For example, in *Armstrong v. Exceptional Child Center*, which examined whether Medicaid providers lack a cause of action to challenge a state’s reimbursement rates, the SG’s merits brief, which sided with the states, had no signatories from HHS.<sup>353</sup> Former HHS officials, however, filed an amicus brief supporting the providers’ view.<sup>354</sup> The following exchange occurred in oral argument between the former and current SGs:

JUSTICE KAGAN: Judging from the—the names on the brief, I take it that HHS does not agree with that statement.

MR. KNEEDLER: Those are—those were former officials. Yes—

JUSTICE KAGAN: Judging from the names on your brief—

MR. KNEEDLER: Oh, I’m sorry.

JUSTICE KAGAN: —or the absence of names on your brief, I take it that HHS does not agree with that statement.<sup>355</sup>

Kneedler did not answer her question.<sup>356</sup>

When the SG submitted amicus briefs on the Alien Tort Statute during President George W. Bush’s administration, the State Department’s legal adviser, John Bellinger, signed every one.<sup>357</sup> By contrast, when the SG filed an

352. See William Baude, *Argument Analysis: Working Out the Broader Implications of a Medicaid Suit*, SCOTUSBLOG (Jan. 22, 2015, 10:01 AM), <http://www.scotusblog.com/2015/01/argument-analysis-working-out-the-broader-implications-of-a-medicaid-suit> [<https://perma.cc/H2TE-4NFY>]; Richard M. Re, *When Agencies Don’t Appear on the SG’s Briefs*, PRAWFSBLAWG (Jan. 22, 2015), <http://prawfsblawg.blogs.com/prawfsblawg/2015/01/when-agencies-dont-appear-on-the-sgs-briefs.html> [<https://perma.cc/9JFF-YGDD>].

353. See Brief for the United States as Amicus Curiae Supporting Petitioners at 1, *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378 (2015) (No. 14-15), 2014 WL 6660918 (arguing that only the federal government can enforce the Medicaid Act). Apparently, when the issue was first flagged in an earlier case, *Douglas v. Independent Living Center*, 565 U.S. 606 (2012), HHS officials did join an SG brief recommending that cert be denied. When the Court granted cert, HHS officials did not sign onto the merits brief in that case as well.

354. Brief for Former HHS Officials as Amici Curiae in Support of Respondents, *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378 (2015) (No. 14-15), 2014 WL 7366055.

355. Transcript of Oral Argument at 21, *Armstrong v. Exceptional Child Ctr.*, 135 S. Ct. 1378 (2015) (No. 14-15), [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/14-15\\_f2bh.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-15_f2bh.pdf) [<https://perma.cc/LV7U-6EAP>].

356. *Id.*; see also Kate Andrias, *The President’s Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1083 (2013) (describing the argument in *Hoffman Plastic Compounds* where “Justice Scalia repeatedly pressed the Government’s counsel as to whether the Immigration and Naturalization Service had agreed with the position advanced by the Solicitor General and was incredulous at the response that the agency had consented”).

357. Alison Frankel, *Kiobel Brief Shows State/DOJ Split over Human Rights Litigation*, REUTERS BLOG, June 15, 2012, <http://blogs.reuters.com/alison-frankel/2012/06/15/kiobel-brief-shows-statedoj-split-over-human-rights-litigation> [<https://perma.cc/5F5V-6KGD>]; see also John Bellinger, *Kiobel: Obama Administration Supports Shell, Argues ATS Should Not Apply to Aiding-and-Abetting Suits Against Foreign Corporations, Leaves Open Possibility of Suits Against U.S. Corporations*,

amicus brief in 2012 in *Kiobel v. Royal Dutch Petroleum*, arguing that the Act did not apply extraterritorially in the case at hand, then-legal advisor to the State Department, Harold Koh, did not list his name on the brief.<sup>358</sup> According to Bellinger: “[t]hat seemed to be a not-so-subtle message—more to the human rights community than the Supreme Court—that State did not agree with the Justice Department position. The Obama administration was in a tight spot in this one.”<sup>359</sup> Thus, we see signatures (or the lack thereof) providing signals to the Supreme Court as well as to interest groups. Given this, it is not surprising to observe similar behavior in the lower courts.<sup>360</sup>

Sometimes agencies without explicit litigating authority go even further. The Tennessee Valley Authority, for example, has represented itself in the lower courts and even submitted letters to the Supreme Court without DOJ’s permission.<sup>361</sup>

The courts sometimes go further than Justice Kagan’s questioning.<sup>362</sup> According to coverage by *Reuters*, after the SG and the FTC filed an amicus brief urging the Seventh Circuit to rehear, en banc, a case decided by Judge Richard Posner, the original panel sent a letter asking for the views of two cabinet departments that failed to sign the brief.<sup>363</sup> After the SG replied that no further submission by the United States was contemplated, the panel then *ordered* the SG to disclose the names of the officials with whom he consulted and the nature of the consultation.<sup>364</sup> Though the panel withdrew the order the next day, it did send a subsequent *request* for information to the SG.<sup>365</sup> The panel claimed a response would increase the credibility of the amicus brief “filed with [the SG’s] approval by the *FTC and the antitrust division*,” but pointedly declined to call it a brief of the United States.<sup>366</sup>

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LAWFARE (June 13, 2012, 7:55 PM), <https://www.lawfareblog.com/kiobel-obama-administration-supports-shell-argues-ats-should-not-apply-aiding-and-abetting-suits> [https://perma.cc/UW4H-UWQX].

358. Frankel, *supra* note 357.

359. *Id.*

360. In *Association for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107 (2013), the PTO refused to sign onto DOJ’s amicus brief, which claimed that genomic DNA could not be patented—a view the PTO did not share. Ben Picozzi, *The Government’s Fire Dispatcher: The Solicitor General in Patent Law*, 33 YALE L. & POL’Y REV. 427, 436 (2015). In an “unprecedented” move, the SG himself argued the government’s position in the case. *Id.*

361. See *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236 (11th Cir. 2003); *TVA Warns It Will Reverse Justice Department’s NSR Defense in Lower Court*, IWP NEWS, June 20, 2008. DOJ has tried to prevent such actions. See, e.g., *Petition for a Writ of Certiorari, EPA v. Tenn. Valley Auth.* (No. 02-1162), 2004 WL 304351, at \*23–25 (arguing that TVA lacks independent litigating authority).

362. We learned about this case from Richard Re’s post on the topic. See Re, *supra* note 352.

363. Alison Frankel, *Judge Posner Backs Down (For Now) in Antitrust Policy Duel with U.S.*, REUTERS BLOG (July 2, 2014), <http://blogs.reuters.com/alison-frankel/2014/07/02/judge-posner-backs-down-for-now-in-antitrust-policy-duel-with-u-s> [https://perma.cc/PUT6-A85W].

364. *Motorola Mobility LLC v. AU Optronics Corp.*, 746 F.3d 842 (7th Cir. 2014), *vacated*, 775 F.3d 816 (2015).

365. Frankel, *supra* note 363.

366. *Id.* (emphasis added).

Judge Posner is not alone in hunting down conflict. The Federal Circuit, believing the PTO to have different views than DOJ, has repeatedly reached out to the PTO for its positions on pending matters.<sup>367</sup> Once, the Federal Circuit ordered the PTO and DOJ (representing the United States) to file independently or “submit a joint brief, if they so choose.”<sup>368</sup> A similar proposal was made for oral argument.<sup>369</sup> According to Ben Picozzi, “[u]ltimately, the agencies chose to submit a joint brief, and an attorney from DOJ’s Civil Appellate Section represented both agencies during oral argument.”<sup>370</sup> We doubt the PTO voluntarily “chose” this option.

Richard Re has suggested that having the opportunity to place its signature on the SG’s filings is a “significant bargaining chip” for the agency.<sup>371</sup> We do not assess whether the ability to sign or not is significant, but it is historically contingent on recent SGs centralizing the government’s positions and tamping down contrary views.<sup>372</sup> After all, under President Jimmy Carter’s administration, the Attorney General allowed the Secretary of Interior to take an opposing view to the Justice Department’s position in *Tennessee Valley Authority v. Hill*.<sup>373</sup>

Nevertheless, the SG cannot control every aspect of executive agency litigation, even within DOJ. For example, the Department’s Environmental and Civil Divisions have taken different positions on prudential standing, with the former often refusing to raise it as a defense and the latter actively using the defense.<sup>374</sup> D.C. Circuit Judge Laurence Silberman has called out this discrepancy, speculating that the Environmental Division was reflecting the political views of EPA, leading to dramatic—for example, a DOJ attorney fainting under questioning—and embarrassing conflicts in cases argued within days of each other.<sup>375</sup> For Judge Silberman, DOJ’s control of executive agency

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367. Picozzi, *supra* note 360, at 428 n.3.

368. Order for Further Briefing at 1, *Consumer Watchdog v. Wis. Alumni Research Found.*, 753 F.3d 1258 (Fed. Cir. 2014) (No. 2013-1377).

369. Picozzi, *supra* note 360, at 428 n.2.

370. *Id.*

371. Re, *supra* note 352. The argument is stronger for independent regulatory commissions, particularly when such agencies request that the SG seek cert. Discounting the independent agency’s viewpoint may not be in the SG’s—or the president’s—best interest. See Devins, *supra* note 224, at 285 (suggesting Congress could retaliate by reducing SG’s authority over government regulation); see also Todd Lochner, *The Relationship Between the Office of Solicitor General and the Independent Agencies: A Reevaluation*, 79 VA. L. REV. 549, 568 (1993) (“[T]he Office does not want to so enrage an agency that it decides to challenge the Solicitor General’s monopoly, and the agencies do not want to aggravate unnecessarily the person who allows them access to the Court.”).

372. Cf. Devins, *supra* note 224, at 288–90, 301–03.

373. *Id.* at 263. The Justice Department, however, did not allow the Department of State to represent the U.S. in International Court of Justice proceedings in the same administration. *Id.* at 266.

374. The Supreme Court recently dismissed the prudential standing doctrine, casting it as a statutory analysis. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386–88 (2014).

375. *Ass’n of Battery Recyclers v. EPA*, 716 F.3d 667, 674, 678 (D.C. Cir. 2013) (Silberman, J., concurring).

litigation does not serve uniformity and quality rationales when “one division of the Justice Department [can] subordinate a government-wide litigation interest to the desires of one agency.”<sup>376</sup>

These incidents demonstrate that the United States does not always speak with one voice in court, even when only executive agencies are involved. Some judges view unresolved conflicts as a source of useful information; others may regard unresolved conflicts within the executive branch as somewhat scandalous, along the lines of Judge Posner and Judge Silberman. A related question, to which we later turn, is whether the courts have any role in resolving conflicts between different federal agencies.

### c. Presidential Reorganization

In the previous Section, we discussed a situation where Congress supported the centralization of executive power in the SG’s office. In our final example, Congress initially supported centralization but subsequently withdrew its delegated authority to the president. Between 1932 and 1981, Congress periodically granted the president reorganization power; this authority allowed the president to reorganize parts of the executive branch, often subject to constraints like not abolishing or establishing certain kinds of agencies.<sup>377</sup> Congress could reject the president’s plans by use of a legislative veto.<sup>378</sup> Over this nearly fifty-year period, presidents submitted 126 reorganization plans, of which thirty-three were vetoed by Congress.<sup>379</sup> Presidential “successes” include creating EPA and FEMA.<sup>380</sup>

In 1983, the Supreme Court invalidated the legislative veto under the Constitution’s bicameralism and presentment mandates.<sup>381</sup> Congress subsequently amended the operating reorganization authority statute to require a joint resolution (and presidential signature, absent an override of a veto) to approve any presidential plan to reshape the administrative state.<sup>382</sup> No president submitted a plan before the amended authority expired.<sup>383</sup> Since then, President Bill Clinton recommended and Presidents George W. Bush and Obama formally requested, without success, that Congress restore the reorganization authority.<sup>384</sup> For instance, under President Obama’s proposal, reorganization plans would

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376. *Id.* at 678–79.

377. HENRY B. HOGUE, CONG. RESEARCH SERV., R42852, PRESIDENTIAL REORGANIZATION AUTHORITY: HISTORY, RECENT INITIATIVES, AND OPTIONS FOR CONGRESS 1–34 (2012), <https://www.fas.org/sgp/crs/misc/R42852.pdf> [<https://perma.cc/4M76-KUYW>].

378. Under some statutes, the veto was one-house; under others, it required both chambers. *See id.* at 3, 20, 30.

379. *Id.* at 4 tbl.1. If you remove President Herbert Hoover, all of whose plans were rejected, the success rate substantially improves. *Id.*

380. *Id.* at 2.

381. *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 957–59 (1983).

382. HOGUE, *supra* note 377, at 31.

383. *Id.* at 3, 31.

384. *Id.* at 31–34.

have received fast-track treatment, so Congress would have to vote on a presidential plan without the chance for filibuster or amendment.<sup>385</sup> Given President Trump's desire to reduce the government's size, he will likely desire reorganization authority as well.<sup>386</sup>

What the president may no longer do under formal, statutory authority,<sup>387</sup> she may do functionally, at least in part. Daphna Renan recently posited that pooling—an informal mechanism through which “the executive augments capacity by mixing and matching resources dispersed across the bureaucracy”—provides an alternative to reorganization authority.<sup>388</sup> As an example, “Team Telecom” (comprised of three cabinet agencies) advises the FCC on licensing applications involving foreign ownership and negotiates with the applicant over security agreements.<sup>389</sup> With respect to the legality of these coordination arrangements, Renan, in many ways, follows Kagan by “understand[ing] presidential authority over pooling to be defeasible by Congress.”<sup>390</sup>

In addition to providing coordination mechanisms outside explicit congressional delegation, these arrangements also create opportunities for conflict. The White House designs these reorganizations without statutory authority. Because the White House voluntarily creates these arrangements, presidents presumably see some limits—at least in practice—to their ability to eliminate all conflicts via presidential directives.

The history of presidential reorganization power shows that Congress has significant power to shape the president's effective control over the bureaucracy, unitary executive theory notwithstanding. Congress has also limited the president's ability to reshape the landscape of agency conflict, for instance, by transforming symmetrical conflicts into hierarchical ones. In the next Section, we consider some legal dimensions of Congress's role.

### B. Congress and Adversarial Administrative Relationships

We focus here on congressional actions that can foster adversarial agency relationships. These actions include: creating restrictions on who can serve as

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385. Donald Wolfensberger, *Obama's Reorganization Plan Faces Long Odds*, WILSON CTR. (Mar. 8, 2012), <https://www.wilsoncenter.org/publication/obamas-reorganization-plan-faces-long-odds> [<https://perma.cc/PLY5-W5FJ>]. The proposed Act never became law. See Eric Pianin, *Why Obama's Pitch for Government Reform Hit a Wall*, FISCAL TIMES (Feb. 20, 2013), <http://www.thefiscaltimes.com/Articles/2013/02/20/Why-Obamas-Pitch-for-Government-Reform-Hit-a-Wall> [<https://perma.cc/FAW3-4EMS>]. The proposed Reforming and Consolidating Government Act of 2012, S. 2129, 112th Cong. (2012), is available at <https://www.congress.gov/bill/112th-congress/senate-bill/2129/text> [<https://perma.cc/9D4M-PHCR>].

386. See Exec. Order No. 13,781, Executive Order on a Comprehensive Plan for Reorganizing the Executive Branch, 82 Fed. Reg. 13,959 (Mar. 16, 2017).

387. Of course, under the presidential power strand of the previous directive debate, presidents arguably do not need statutory authority for some of the contemplated reorganizations.

388. Renan, *supra* note 47, at 213, 238.

389. *Id.* at 214.

390. *Id.* at 282.

agency leaders, imposing reporting and access requirements on agency officials, and controlling the timing of agency action.<sup>391</sup> The examples here are not exclusive.<sup>392</sup> We also consider when agencies (as opposed to the White House) shift congressional delegation to others. In short, although we are concerned that Congress might push the limits of its constitutional authority in creating some of these agency conflicts, and agencies might infringe on congressional power in trying to eliminate them, most of these actions strike us as legal, though not always desirable.

### 1. *Appointments Restrictions*

Although there are few constitutional imperatives on who can be picked to fill top agency positions,<sup>393</sup> there are many statutory restrictions.<sup>394</sup> As discussed in Parts I and III, some restrictions—such as party-balancing and experience requirements—foster conflict within agencies.<sup>395</sup> Conflict also results from creating meta-agencies, staffed with existing agency leadership positions tied to particular missions, such as FSOC. Left to their own devices, presidents might prefer to limit adversarial relationships by only choosing candidates from their own party or avoiding candidates with particular professional experiences. We focus here on the legal dimensions of these statutory restrictions on appointments.

In simplified form, the Constitution contemplates that only the Senate will have a role in confirming principal officers, as well as inferior officers when Congress has not chosen a permitted alternative mechanism.<sup>396</sup> Nevertheless, both chambers of Congress limit presidential choice by jointly enacting these

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391. All of the issues in this section and the preceding one involve the interaction between Congress and the president. Thus, in some sense, the division of topics is arbitrary.

392. For instance, Congress may use deadlines to circumvent executive control. *See* *Env'tl. Def. Fund v. Thomas*, 627 F. Supp. 566, 571 (D.D.C. 1986) (“OMB has no authority to use its regulatory review . . . to delay promulgation . . . beyond the date of a statutory deadline.”); *see also In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545, 551 (D.C. Cir. 1999) (“[T]he President is without authority to set aside congressional legislation by executive order, and the 1993 executive order does not purport to do so.”). For a discussion of the legitimacy of this congressional strategy, *see generally* Jacob E. Gersen & Anne Joseph O’Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923 (2008).

393. Although the Constitution sets age, citizenship, and residency requirements for the president, vice-president, representatives, and senators, it does not establish equivalent mandates for executive officers (or judges). The primary constitutional restrictions on agency leaders involve members of Congress. U.S. CONST. art. I, § 6, cl. 2.

394. William G. Howell & David E. Lewis, *Agencies by Presidential Design*, 64 J. POL. 1095, 1098–99 (2002) (finding that over seventy agencies established by legislation between 1946 and 1995 (40 percent of agencies created by legislation in that period) had restrictions on who could serve in leadership positions and, by contrast, finding only twenty agencies created unilaterally by the White House (8 percent of all such agencies) had similar mandates).

395. Although the NLRB lacks such a requirement in its statutes, appointments to the Board now follow the mandate in practice. William B. Gould IV, *Politics and the Effect on the National Labor Relations Board’s Adjudicative and Rulemaking Processes*, 64 EMORY L.J. 1501, 1507 (2015).

396. U.S. CONST. art. II, § 2, cl. 2.

statutory restrictions. Though they rarely point to party-balancing mandates, emphasizing experience requirements instead, recent presidents have complained in signing statements that certain appointments restrictions are unconstitutional.<sup>397</sup> President George H.W. Bush stated that he understood a slew of qualifications requirements of a quasi agency, including a party-balancing mandate for some trustees, “as precatory.”<sup>398</sup> Similarly, President George W. Bush challenged a post-Katrina statute that imposed substantial experience requirements on the head of FEMA, claiming that the restriction unduly limited presidential selection authority.<sup>399</sup>

OLC, unsurprisingly, has taken a similar stance. A recent survey of OLC memoranda concluded that the office “has not consistently branded partisan balance requirements as unconstitutional,” but has “consistently asserted that limits on the President’s appointment power are constitutionally suspect.”<sup>400</sup> Many commentators also attack these statutory restrictions, basing their arguments on the Vesting or Take Care Clauses.<sup>401</sup> Most recently, Ronald Krotoszynski and his coauthors posit that the combination of partisan mandates, fixed terms, and restriction of removal to good cause is problematic under the Court’s recent decision in *Free Enterprise Fund v. Public Company Accounting Oversight Board*.<sup>402</sup>

Despite these complaints, largely emanating from the executive branch, courts have not directly engaged with the issues.<sup>403</sup> In the early twentieth century, the Supreme Court declared that “[t]here is . . . no doubt of the power of Congress to create . . . an office” with party balancing requirements,<sup>404</sup> which some see as an endorsement of such mandates. The courts generally dismiss

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397. See Krotoszynski et al., *supra* note 172, at 975–76.

398. *Id.*; see also President George H.W. Bush, Statement on Signing the Morris K. Udall Scholarship and Excellence in National Environmental and Native American Public Policy Act of 1992, 28 WEEKLY COMP. PRES. DOCS. 483, 507 (Mar. 19, 1992) (exemplifying this phenomenon).

399. President George W. Bush, President’s Statement on H.R. 5441, the “Department of Homeland Security Appropriations Act, 2007” (Oct. 4, 2006), <https://georgewbush-whitehouse.archives.gov/news/releases/2006/10/20061004-10.html> [<https://perma.cc/K7JQ-VPKJ>] (directing the executive branch to construe section 503(c)(2) of the Homeland Security Act of 2002, which purportedly limits the pool of potential appointees, through the less-constrictive lens of the Appointments Clause of the Constitution).

400. Krotoszynski et al., *supra* note 172, at 981.

401. See, e.g., Donald J. Kochan, *The Unconstitutionality of Class-Based Statutory Limitations on Presidential Nominations: Can a Man Head the Women’s Bureau at the Department of Labor?*, 37 LOY. U. CHI. L.J. 43, 44 (2005); Saikrishna Prakash, *Regulating Presidential Powers*, 91 CORNELL L. REV. 215, 238 (2006) (book review); Jamie B. Raskin, “A Complicated and Indirect Encroachment”: *Is the Federal Election Commission Unconstitutionally Composed?*, 52 ADMIN. L. REV. 609 (2000); Richard P. Wulwick & Frank J. Macchiarola, *Congressional Interference with the President’s Power to Appoint*, 24 STETSON L. REV. 625, 643–45 (1995).

402. Krotoszynski et al., *supra* note 172, at 942.

403. See Strauss, *supra* note 339, at 697–705.

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

direct challenges to statutory mandates on standing or other reviewability doctrines.<sup>405</sup>

Our view applies a functionalist interpretation of separation-of-powers principles. Though they present some worries, these requirements, which often foster intra-agency horizontal conflict, generally do not aggrandize the legislative branch or dilute the president's authority under Article II.<sup>406</sup> Most notably, these mandates are longstanding, suggesting historical acceptance of their utility.<sup>407</sup> A statutory qualifications requirement, however, would raise constitutional concerns if it aggrandized Congress's role in the administrative state or significantly interfered with the president's authority to "take care that the laws be faithfully executed."<sup>408</sup> These constraints place some general limits on qualifications requirements. Most importantly, qualifications requirements cannot narrow the pool of potential officeholders so drastically that only a handful of people can be nominated. If the pool is so small, Congress—and not the president—will have taken over selecting officials. The restrictions creating agency conflict discussed here do not rise to this level.

To examine the balance of powers in the selection process, it is important to consider both the position on which the mandate is attached and the content of the requirement.<sup>409</sup> As to position, restrictions on offices closer to core executive-branch areas, such as foreign relations and defense, will need more justification than mandates for positions farther from executive power, such as independent regulatory commissions.<sup>410</sup> Similarly, constraints on higher-level positions will need more defense than lower-level positions.<sup>411</sup> The degree of

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405. See Krotoszynski et al., *supra* note 172, at 972, 990 (citing *Fed. Election Comm'n v. NRA Political Victory Fund*, 6 F.3d 821, 825 (D.C. Cir. 1993) (dismissing challenge to partisan balancing requirements)).

406. Some scholars see these restrictions as clearly constitutional. See, e.g., HAROLD J. KRENT, *PRESIDENTIAL POWERS* 31–34 (2005); Note, *Congressional Power Under the Appointments Clause After Buckley v. Valeo*, 75 MICH. L. REV. 627, 647 (1977).

407. See Michael J. Gerhardt, *The Federal Appointments Process as Constitutional Interpretation*, in CONGRESS AND THE CONSTITUTION 110, 119–20 (Neal Devins & Keith E. Whittington eds., 2005) (citing work by David Currie and Edward Corwin).

408. *Morrison v. Olson*, 487 U.S. 654, 685 (1988); *Mistretta v. United States*, 488 U.S. 361, 382 (1989).

409. Gerhardt examines the nature of the positions, but not in combination with the content of the restrictions. Gerhardt, *supra* note 407, at 534–35. We do not agree with his analysis.

410. President Clinton's OLC took a similar approach. See *Constitutionality of Statute Governing Appointment of U.S. Trade Representative*, 20 Op. O.L.C. 279, 280–81 (July 1, 1996) (Christopher Schroeder).

411. See *Common Legislative Encroachments on Exec. Branch Auth.*, 13 Op. O.L.C. 248, 250 (July 27, 1989) (William P. Barr); Hanah Metchis Volokh, *The Two Appointments Clauses: Statutory Qualifications for Federal Officers*, 10 U. PA. J. CONST. L. 745, 748–49, 775–82 (2008). The case law and commentary on removal is suggestive in analyzing the "position" dimension. See, e.g., Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 117–18 (1994) (detailing four relevant categories of officers to analyze removal restrictions). Courts and many scholars accept restrictions, explicit or implicit, on the president's ability to remove principal officers in independent regulatory commissions or agencies in the judicial branch, such as the Sentencing Commission, as well as removal limits over inferior officers that do not significantly interfere with the



expertise required for a position may add to the argument for experience requirements, while the existence of a small pool of qualified experts may amplify the impact of a restriction on the president's ability to make a free choice. As to the type of restriction, constraints on political party arguably interfere more with the president's oversight duties.<sup>412</sup> Taken together, we should not be deeply concerned about party-balancing mandates in independent regulatory commissions and most built-in expertise conflicts, but in core executive areas, those mandates may be more troubling.

## 2. Reporting and Access Requirements

As described briefly in Parts I and III, Congress also creates conflict within agencies—establishing mixed hierarchical-advisory or simply monitoring relationships—by requiring certain agency officials to report on agency problems. Some reporting raises no legal issues. Although not spelled out in the Constitution, Congress has broad oversight powers as part of its Article I duties.<sup>413</sup> To the extent that Congress requires an executive agency official to testify at a hearing or mandates that an agency submit a report on its activities—but allows the White House to review the testimony or report—there is no legal problem.

Other reporting raises more difficult issues. In certain circumstances, Congress has required agency officials to report concurrently to Congress and to other executive officials. For instance, as described in Part I, IGs must ensure that both their agencies and Congress are “fully and currently informed” about fraud and other issues.<sup>414</sup> Specifically, IGs must “submit[] detailed semiannual reports to Congress as well as notify[] Congress seven days after reporting any particularly serious problems to their agencies.”<sup>415</sup> Congress has tried to propose

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president's take care authority. See *Humphrey's Ex'r v. United States*, 295 U.S. 602, 627–32 (1935); *Mistretta*, 488 U.S. at 394; *Morrison*, 487 U.S. at 691–93. They do not, however, permit restrictions over principal officers in core executive positions. See *Myers v. United States*, 272 U.S. 52, 163–64 (1926).

412. Krotoszynski et al., *supra* note 172, at 987 (arguing that experience requirements go more to “competence of the appointee, without transgressing the separation of powers” than party-balancing mandates).

413. See *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927); see also *Watkins v. United States*, 354 U.S. 178, 187 (1957) (sweeping description of congressional investigative power).

414. Inspector General Act of 1978, Pub. L. No. 95-452, §§ 4(a)(5), 5(d), 92 Stat. 1101 (1978); see also *supra* notes 102–107 and accompanying text (discussing the relationship between IGs and their agencies).

415. *Sinnar*, *supra* note 106, at 1034. Congress has also placed reporting requirements on the White House if it removes or transfers an IG. 5 U.S.C. App. 3 § 3(b) (2012) (“If an Inspector General is removed from office or is transferred to another position or location within an establishment, the President shall communicate in writing the reasons for any such removal or transfer to both Houses of Congress, not later than 30 days before the removal or transfer.”). OLC ruled that this thirty-day restriction violated the Constitution. Inspector Gen. Legislation, 1 Op. O.L.C. 16 (Feb. 21, 1977) (John M. Harmon), <https://www.justice.gov/sites/default/files/olc/opinions/1977/02/31/op-olc-v001-p0016.pdf> [<https://perma.cc/SED8-B3BL>]. We learned about this from Rick Hills's post on the topic. See Rick Hills, *Can President Trump Fire the DOJ Inspector General Without Waiting Thirty Days*

that IGs submit such reports “without clearance or approval by the agency head or anyone else in the executive branch,” but then took out such language after OLC objected.<sup>416</sup> Congress succeeded in enacting more restrictions in the Implementing Recommendations of the 9/11 Commission Act of 2007, which mandated that the Chief Privacy Officer (CPO) of DHS submit her reports “directly to the Congress . . . without any prior comment or amendment by the Secretary, Deputy Secretary, or any other officer or employee of the Department or of the Office of Management and Budget.”<sup>417</sup>

These mandates, particularly the restriction of oversight of the CPO by the Department’s leaders, raise separation-of-powers issues. OLC has concluded that concurrent reporting requirements “clearly implicate ‘the President’s performance of his constitutionally assigned functions’ and ‘impair the Constitution’s great principle of unity and responsibility in the Executive department.’”<sup>418</sup>

We take less of a hard line on these concurrent reporting mandates. For one, IGs might be considered a distant cousin to the special prosecutor upheld by the Supreme Court in *Morrison v. Olson*,<sup>419</sup> with both serving as relatively impartial officers investigating possible legal violations. Their powers also resemble Congress’s ability to compel officials to testify directly before it. Restrictions on executive interference with an IG are therefore perhaps an easier case. Because the IG lacks actual enforcement power, the intrusion into executive power is much less severe, and it makes functional sense for Congress to limit executive interference in the IG’s ability to disclose questionable conduct. But the intrusion into the functioning of the executive branch is more significant in the case of the CPO mandate, and thus would require a stronger justification. In the case of the CPO mandate, OLC opined that the statute did not bar review of *draft* reports.<sup>420</sup> That opinion seems wrong as a matter of statutory interpretation, but it does get around what could be a real constitutional problem.

### 3. *Subdelegation*

We pivot now from congressional choices to agency decisions that can raise separation-of-powers issues. Specifically, agencies often delegate work to private entities, the states, and other agencies—the last of which we consider here. In addition, agencies allot work internally, such as requiring that particular

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*After Giving Congress a Reason?*, PRAWFSBLAWG (Jan. 12, 2017), <http://prawfsblawg.blogs.com/prawfsblawg/2017/01/can-trump-fire-the-doj-inspector-general-without-giving-congress-a-reason.html> [<https://perma.cc/5C6D-NEB4>].

416. Constitutionality of the Direct Reporting Requirement in Section 802(e)(1) of the Implementing Recommendations of the 9/11 Comm’n Act of 2007, 32 Op. O.L.C. 27, 36 (Jan. 29, 2008) (Steven G. Bradbury).

417. 6 U.S.C. § 142(e)(1) (2012).

418. Bradbury, *supra* note 416, at 37–39 (citing multiple OLC memos).

419. 487 U.S. 654, 696–97 (1988).

420. Bradbury, *supra* note 416, at 27–28, 31–32.

offices participate. This subdelegation can produce, or more likely, destroy adversarial relationships.<sup>421</sup>

Turning first to the elimination of conflict, Bijal Shah recently documented how “agencies transfer wholesale their jurisdiction to adjudicate administrative decisions to other agencies—and in particular, to agencies that do not have the statutory authority to make these decisions.”<sup>422</sup> She describes, for example, how OSHA and EPA—which share missions in workplace hazards, though do not share the same explicit authority over specific claims—have nonetheless agreed to “transfer workplace hazard claims back and forth to each other, or take on cases themselves.”<sup>423</sup> What was a symmetrical adversarial relationship disappears or becomes significantly weaker.<sup>424</sup> Shah also discusses how DHS had transferred “its authority to adjudicate H-2B nonimmigrant seasonal worker visas to DOL [Department of Labor].”<sup>425</sup> Under the statute, DHS is required to “consult” with the Labor Department before ruling on applications, but DHS retains its decision-making authority.<sup>426</sup> Thus, DHS transformed an advisory relationship into a hierarchical one.

On the other hand, delegation within an agency can create conflict. Jennifer Nou has examined how agency leaders manage their organizations’ workflow.<sup>427</sup> She notes, for instance, how the CFTC has delegated power to both the GC and the Chief Economist to oversee the agency’s cost-benefit analysis.<sup>428</sup> Such delegation creates a symmetrical adversarial relationship.

Subdelegation within the federal government has constitutional and other legal implications. As to the Constitution, Shah suggests that these “interagency transfers of adjudication authority” within the federal government could violate the nondelegation doctrine.<sup>429</sup> Because the nondelegation doctrine (involving a federal agency and not a private entity) focuses on the existence of an intelligible principle rather than the object of delegation, the concern might be better cast in broader separation-of-powers terms.<sup>430</sup> Commentators have largely discussed this in the context of presidential control: if Congress delegates authority to one agency, all but the extreme unitary executive theorist would agree that the president cannot assign the agency’s task to another agency.<sup>431</sup> If that is true, and Congress delegates to one agency, then the *agency* cannot give that authority to

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421. See Marisam, *supra* note 41, at 212–13.

422. Bijal Shah, *Interagency Transfers of Adjudication Authority*, 34 *YALE J. ON REG.* 279, 281 (2017).

423. *Id.* at 299.

424. To compare, the FTC and the FCC recently penned an agreement preserving each agency’s enforcement authority. See *supra* notes 161 & 184 and accompanying text.

425. Shah, *supra* note 422, at 291.

426. *Id.* at 291–92.

427. See Nou, *supra* note 48.

428. *Id.* at 424.

429. Shah, *supra* note 422, at 285–86, 335 n.262.

430. See *id.* at 285–86 (seeing issue more broadly than nondelegation).

431. Kagan, *supra* note 326, at 2326–27.

a different agency. But what if Congress delegates to multiple agencies, which then consolidate authority within one entity? That circumstance seems less legally troubling, assuming the consolidation does not violate any statutory language. But it still raises some concerns if Congress meant to create redundancy or fruitful interactions among agencies with different perspectives.<sup>432</sup>

Aside from the Constitution, subdelegation raises statutory and common law issues related to division of power. For example, the Tenth Circuit struck down the DHS-DOL transformation described above on statutory grounds.<sup>433</sup> Jason Marisam argues that courts should defer to such agreements that eliminate duplicative delegations.<sup>434</sup> Given our views of the potential benefits of adversarial relationships among agencies, we do not view interagency subdelegation as presumptively desirable, since it may prevent the potential for fruitful clashes between agencies.<sup>435</sup>

By contrast, within agencies, leaders have considerable freedom under current case law to delegate internally.<sup>436</sup> To start, all their actions carry a presumption of regularity, and so long as they sign off on statutorily mandated tasks, they can rely heavily on their subordinates.<sup>437</sup> In addition, leaders can generally change agency procedures that do not have a substantive effect on the public without prior notice and comment.<sup>438</sup> Nonetheless, if agency leaders do not retain control or if internal agency changes are arbitrary or violate the

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432. Cf. David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 302–03, 332 (2013) (explaining how Congress sometimes explicitly tells agencies they can choose not to perform their delegated tasks to prevent interagency conflict and calling for agencies to justify any such “waiver”).

433. *G.H. Daniels III & Assoc., Inc. v. Perez*, 626 Fed. App’x 205, 209–12 (10th Cir. 2015).

434. Marisam, *supra* note 41, at 238.

435. Across agencies, the Economy Act permits “agency-to-agency delegation” only if “(1) the agency ‘retains responsibility’ over the tasks; (2) the tasks are not part of the agency’s primary administrative functions; and (3) the tasks do not involve significant decision-making authority, such as the authority to issue binding rules and regulations.” Jason Marisam, *The Interagency Marketplace*, 96 MINN. L. REV. 886, 888 (2012). The GAO’s Comptroller General apparently has applied a “porous legal test” in applying the Act, despite a presumption against redelegations. *Id.* at 897, 907–09. Marisam has called for amendments to the Economy Act that would “permi[t] the redelegation of a reasonable amount of authority to a qualified agency” after “notice-and-comment procedures,” “gran[t] aggrieved parties standing rights in court,” and “ba[r] the redelegation of authority from independent agencies to non-independent agencies.” *Id.* at 923. Of course, statutory amendments cannot trump Article III and separation-of-power principles.

436. Jennifer Nou, *Subdelegating Powers*, 117 COLUM. L. REV. 473, 516 (2017) (concluding that judges “permit internal subdelegation” if the statutory scheme is silent on such delegation). Nou argues that courts should apply the *Mead* doctrine (specifically, whether Congress intended the delegation) to assess whether intra-agency subdelegations should be given deference. *Id.* at 517–18.

437. *Nat’l Nutritional Foods Ass’n v. Food & Drug Admin.*, 491 F.2d 1141, 1144–46 (2d Cir. 1974).

438. 5 U.S.C. § 553(a)–(b) (2012).

relevant statutory scheme, challenges—if they can get in the courthouse door—could succeed.<sup>439</sup>

### C. Courts as Conflict Resolution

We finally turn to legal issues emanating from the courts acting as arbitrators of agency conflict. These issues stem mostly from more symmetrical agency relationships, but also arise from other forms of relationships as well, such as disputes between one agency and a second agency that regulates its activities. We start by considering deference doctrines through the lens of agency conflict. We then turn to the litigation process, considering how adversarial agencies play into joinder and privilege issues. We conclude by examining the most direct form of judicial resolution: when agencies sue each other in court. In brief, we call for courts to treat conflict more favorably in reviewing agency decisions, though we also worry about forcing agencies to fight it out as litigants.

#### 1. Chevron with Multiple Agencies

This Section on the application of *Chevron* has several similarities with the previous discussion on the role of presidential direction when Congress delegates to an agency. There is a considerable literature on whether courts should defer to agency interpretations of an ambiguous statutory framework when Congress delegates to more than one agency.<sup>440</sup> The case law provides no clear resolution (though the reasons for this lack of clarity differ; for example, the preceding Section raises constitutional issues, while this Section engages with statutory ones). Most notably, the Supreme Court has yet to address the issue directly.<sup>441</sup> We try to contribute to a well-developed literature by focusing on adversarial relationships among agencies. Unlike the presidential control debate, however, we take a firmer stance here.<sup>442</sup>

Courts and commentators have largely favored one of three approaches to the question of *Chevron* deference with multiple agency interpreters. In the first,

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439. For instance, members of an independent regulatory commission likely could not agree to consolidate their power in the commission's chair. *Cf.* *New Process Steel v. Nat'l Labor Relations Bd.*, 560 U.S. 674, 676 (2010) (barring three members of NLRB from delegating decisions to two members).

440. Gersen, *supra* note 40, at 219–26; Emily Hammond Meazell, *Presidential Control, Expertise, and the Deference Dilemma*, 61 DUKE L.J. 1763, 1796–809 (2012); Sharkey, *supra* note 315, at 353–57; *cf.* Shah, *supra* note 422 (discussing whether courts should defer to an agency's statutory interpretation when another agency has delegated the authority to administer that statute to the interpreting agency).

441. Gersen, *supra* note 40, at 219; Sharkey, *supra* note 315, at 353–54.

442. We do not address two related issues. First, we do not examine preclusion at the federal level—specifically, how courts should treat interpretations of federal statutes that conflict with other federal statutes. *See, e.g.*, *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2241 (2014) (“An agency may not reorder federal statutory rights without congressional authorization.”). Second, and connected to the first, we do not address how courts treat agency interpretations of different statutes regarding their own jurisdiction. *See* Marisam, *supra* note 41, at 209–10 (discussing when courts allow multiple agencies to operate in the same space and noting that courts presume the agencies can act to “avoid inconsistency”).

and most dominant approach in the case law, the court chooses one agency from the set of possible interpreters and defers to that agency.<sup>443</sup> This approach of choosing one agency for a particular interpretative area—irrespective of criteria—also comports with a “balkanization strategy,” where agencies “create separate, non-overlapping spheres of authority.”<sup>444</sup>

This dominant approach to the multiagency *Chevron* problem is not without its difficulties. It is not entirely clear how to select the single agency that warrants deference. Many courts look to the agency most suited to make the interpretation.<sup>445</sup> In examining the Occupational Safety and Health Act of 1970, which delegated authority to both the Secretary of Labor and the Occupational Safety and Health Review Commission, the Supreme Court found that only the Secretary had “interpretative power” because the Secretary was “the administrative actor in the best position to develop [various] attributes.”<sup>446</sup> In practice, the lower-level actor in a hierarchical relationship usually holds this “best position.”<sup>447</sup> Similarly, in assessing the Controlled Substances Act, the Supreme Court determined that the Secretary of HHS, and not the Attorney General, had the authority to make “medical judgments.”<sup>448</sup> This preference for the most expert agency was implicitly at play in the recent decision on whether the Affordable Care Act’s subsidies apply to federal exchanges as well as state exchanges.<sup>449</sup> The Court, in declining to apply *Chevron* deference, noted that the statutory interpretation came from the IRS: “It is especially unlikely that Congress would have delegated this decision to the *IRS*, which has no expertise in crafting health insurance policy of this sort. This is not a case for the *IRS*.”<sup>450</sup>

Some judges and scholars prefer, however, to empower the agency closest to the president rather than the agency with the most expertise, effectively elevating the accountability justification for *Chevron* over the implied-delegation justification. In a recent case the D.C. Circuit dismissed on ripeness grounds, Judge Brett Kavanaugh concurred to acknowledge the “overlapping statutory responsibilities” between the Department of Energy and the NRC concerning nuclear waste disposal at Yucca Mountain.<sup>451</sup> Even though the statute

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443. Gersen, *supra* note 40, at 222, 224 (calling this approach an “exclusive jurisdiction canon” and noting, while not being convinced, that it “might facilitate greater democratic accountability because there is always one agency that has the authority to act with the force of law in a given policy domain”).

444. Sharkey, *supra* note 315, at 330.

445. See Gersen, *supra* note 40, at 222–24; Sharkey, *supra* note 315, at 341, 344–46.

446. *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 153 (1991). We note that this was technically not a *Chevron* case, since the issue was interpreting an ambiguous regulation, not an ambiguous statute. See *id.* at 149.

447. *Collins v. Nat’l Transp. Safety Bd.*, 351 F.3d 1246, 1252 (D.C. Cir. 2003).

448. *Gonzales v. Oregon*, 546 U.S. 243, 265, 267 (2006) (“[T]he authority claimed by the Attorney General is both beyond his expertise and incongruous with the statutory purposes and design.”).

449. *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015).

450. *Id.* at 2489.

451. *In re Aiken Cty.*, 645 F.3d 428, 439–40 (2011); see generally Meazell, *supra* note 440 (discussing *In re Aiken Country* at length).

gave the NRC “the final word,” Judge Kavanaugh stated that Article II would leave that decision with the president.<sup>452</sup> The same reasoning would suggest that, in case of statutory ambiguity, DOE rather than the NRC should receive deference. More generally, Kagan has argued deference should be given only when “presidential involvement rises to a certain level of substantiality.”<sup>453</sup> For Kagan, the justification depends less on Article II than on the policy benefits from presidential involvement.<sup>454</sup> This logic extends to multiple agencies: if there are multiple agencies charged with a statute, *Chevron* deference should be given to the one taking the most direction from the White House.

Some commentators have attempted to design a more complex test to determine which agency should receive deference. One student note advocates a “six-factor balancing test,” including agency expertise and political accountability.<sup>455</sup> Most interesting to our project, one of the factors is whether the president, OLC, or OIRA has “weighed in on the matter” because of these institutions’ roles in “resolv[ing] conflicts between agencies.”<sup>456</sup> Of course, such an approach would make it hard for agencies to predict with confidence which one would get deference. Finally, sometimes the court does not choose the specific agency if the agencies act together. Rather, “one agency stands in as the responsible party before the reviewing court in coordinated rulemaking.”<sup>457</sup>

The second approach favors no judicial deference if there are multiple, symmetrical interpreters. The D.C. Circuit has “generally” held that “where multiple agencies are charged with administering a statute,” “a single agency’s interpretation is . . . not entitled to *Chevron* deference” but should instead be reviewed *de novo*.<sup>458</sup> In a case involving exclusive agency jurisdictions under the same statute, the D.C. Circuit limited the no deference rule to “generic” statutes implemented by many agencies and applied *Skidmore* deference to specific statutes with overlapping agency responsibilities.<sup>459</sup> Alternatively, the Second Circuit has provided something less than *Chevron* deference but more than *de novo* review.<sup>460</sup> To some extent, this approach of no or minimalized deference overlaps with the first: the courts will defer to one agency, but not

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452. *In re Aiken Cty.*, 645 F.3d at 439–40.

453. Kagan, *supra* note 326, at 2376–77.

454. *Id.* at 2339, 2341, 2344.

455. Amanda Shami, Note, *Three Steps Forward: Shared Regulatory Space, Deference, and the Role of the Court*, 83 FORDHAM L. REV. 1577, 1615–17 (2014).

456. *Id.* at 1617.

457. Shah, *supra* note 46, at 853.

458. *New Life Evangelistic Ctr., Inc. v. Sebelius*, 753 F. Supp. 2d 103, 122–23 (D.D.C. 2010) (citing various D.C. Circuit cases). The Third Circuit has adopted a similar approach. *See, e.g., Chao v. Cmty. Tr. Co.*, 474 F.3d 75, 85 (3d Cir. 2007).

459. *Collins v. Nat’l Transp. Safety Bd.*, 351 F.3d 1246, 1252–53 (D.C. Cir. 2003).

460. *1185 Ave. of Ams. Assocs. v. Resolution Tr. Corp.*, 22 F.3d 494, 497 (2d Cir. 1994). Some prior authority in the D.C. Circuit was more nuanced. *See, e.g., Prof’l Reactor Operator Soc. v. U.S. Nuclear Regulatory Comm’n*, 939 F.2d 1047, 1051 (D.C. Cir. 1991) (holding that “reviewing courts do not owe the same deference to an agency’s interpretation of statutes that, like the APA, are outside the agency’s particular expertise and special charge to administer”).

multiple entities. Both approaches fit nicely within the “lost world” of administrative law doctrine, where the Administrative Procedure Act (APA) and key cases assume a single agency.<sup>461</sup>

Under a third approach, the court should defer only if the multiple agencies agree (or perhaps if the agencies do not affirmatively conflict). Sharkey proposes the following: “[W]hen faced with an interpretation by an agency that operates in shared regulatory space, courts would solicit input from the other relevant agencies. And, to the extent that there is agreement among the different agencies, *Chevron* deference would be especially warranted (regardless of whether all of those agencies were parties before the court) . . . .”<sup>462</sup> For Sharkey, this model makes the court an “agency coordinator” that “exploits (rather than constrains) overlapping agency jurisdiction.”<sup>463</sup> She would not apply the approach to statutes that require implementation by many agencies, such as the Freedom of Information Act.<sup>464</sup> In this view, although the single agency approach provides “clearer lines of accountability,” the existence of agreement signals “greater expertise, greater innovation, and greater consistency among agencies in a shared space.”<sup>465</sup>

But there is a possible fourth approach, which has not yet been firmly adopted by a court, that could countenance the possibility of deferring to all agencies, even when interpretations conflict. In a case involving the SEC’s approval of certain futures contracts under a statute also administered by the CFTC, the Seventh Circuit remarked in dictum that it would be possible to defer to the decisions of both agencies. In effect, that would mean that the financial instrument could not be marketed unless both agencies agreed.<sup>466</sup>

In our view, adopting any ironclad rule about handling cases of multiple agency involvement is misguided. We reject the view that deference should automatically be denied simply because multiple agencies have authority. To the extent that *Chevron* prioritizes congressional intent, multiple interpreters are often actively chosen. As Gluck and Bressman documented through dozens of in-depth interviews of congressional staffers, Congress actively desires to delegate to multiple agencies in many statutes.<sup>467</sup> Chief Justice John Roberts commented in his *City of Arlington* dissent that such statutes “may be the norm,

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461. Farber & O’Connell, *supra* note 57, at 1156–57.

462. Sharkey, *supra* note 315, at 330.

463. *Id.*

464. *Id.* at 344.

465. *Id.* at 356. Gersen proposes a less stringent version, suggesting that “courts should give deference to [multiple] agencies, at least absent an affirmative conflict between the two.” Gersen, *supra* note 40, at 222.

466. *Bd. of Trade of City of Chicago v. SEC*, 187 F.3d 713, 719 (7th Cir. 1999). The court did not have to decide on the applicability of *Chevron*, however, as it held the statute was not ambiguous. *Id.* Shami posits that “presently there is no case” that follows the Seventh Circuit’s proposed approach. Shami, *supra* note 455, at 1602.

467. Bressman & Gluck, *supra* note 341, at 1006–10.



rather than an exception.”<sup>468</sup> Requiring the Court to always choose one agency (or none) mistakenly assumes that Congress could not have intended to choose multiple interpreters.<sup>469</sup> Admittedly, in choosing one agency, the agency closest to the president may better reflect the realities of modern administrative law, where the president plays a large coordination role, as well as the accountability rationale of *Chevron*.<sup>470</sup>

In addition, requiring agreement among agencies may undermine congressional intent. Congress may not want agreement.<sup>471</sup> As Sharkey concedes, when there are conflictual agencies, the agreement approach “may be contrary to congressional intent and counterproductive.”<sup>472</sup> Imagine a scenario where Congress delegates to two agencies with different policy preferences. The agencies’ individual interpretations may “align outcomes more closely with the preferences of Congress” than a joint interpretation.<sup>473</sup> DOJ (whether the SG or OLC), which often has not been delegated interpretative authority, may also force executive agencies to agree, in ways not anticipated or desired by Congress.<sup>474</sup>

As we demonstrated in Part I, there are many ways to structure multiagency involvement, even within each category. Each situation involves its own history, policy constellation, and operational characteristics. The courts’ function is to work out what allocation of interpretative authority makes the most sense. The first step is to determine—given the agency’s role—whether it is reasonable to assume that Congress would have given the agency interpretative authority. Sometimes it may turn out that only one agency was intended to have interpretative authority. But we agree with the Seventh Circuit that the possibility of deferring to conflicting interpretations should not be ruled out. Moreover, in cases without actual conflict among agencies, we think courts should presumptively defer to whichever agency’s interpretation of an ambiguous statute comes before the court. This may result in a race by agencies to adopt an interpretation and, with litigation, produce a race to the courthouse in the hope that the initial judicial ruling will favor one of the agencies before the other can

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468. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1883 (2013) (Roberts, J., dissenting) (quoting Gersen, *supra* note 40, at 208).

469. Gluck & O’Connell, *supra* note 274, at 1852; William Weaver, Note, *Multiple-Agency Delegations & One-Agency Chevron*, 67 VAND. L. REV. 275, 299–302 (2014).

470. See Farber & O’Connell, *supra* note 57, at 1172.

471. To be sure, sometimes Congress does desire coordination. For instance, Congress presumably wants to avoid collisions at sea. See *Collins v. Nat’l Transp. Safety Bd.*, 351 F.3d. 1246 (D.C. Cir. 2003).

472. Sharkey, *supra* note 315, at 356. Her alternative, however, is to use the first approach—choosing a single agency—in such instances.

473. Gersen, *supra* note 40, at 226; see also O’Connell, *supra* note 40, at 1703 fig.3.

474. See Sonia Mittal, *OLC’s Day in Court: Judicial Deference to the Office of Legal Counsel*, 9 HARV. L. & POL’Y REV. 211, 226–27 (2015) (discussing potential “coercion” by OLC in the *Chevron* context); Renan, *supra* note 88 (discussing the use of OLC opinions as a method of creating effective law).

act. But if the other agency subsequently adopts a different interpretation, a court will then be free to assess the conflict between the agencies, because the Supreme Court's *Brand X* decision makes it clear that courts are not bound to follow prior decisions based on *Chevron* deference when agency positions have changed.<sup>475</sup> A rule giving deference to agency decisions unless they are actively contested by another agency enables agencies to engage in fruitful dialogue. If conflict does arise at a later time and cannot be resolved between the agencies, the courts are free to readjust.

But what about cases of actual conflict between agencies when each would have a plausible separate claim to interpretative authority? Again, the issue is how Congress would have wanted interpretative authority allocated.<sup>476</sup> As the Seventh Circuit pointed out, in some cases, Congress may have wanted both interpretations to be given effect, thereby requiring both agencies to agree before some action becomes legal. On the other hand, it may have seemed less plausible in *Martin v. Occupational Safety & Health Review Comm'n*; there, giving effect to both views would mean an employer could be sanctioned only if OSHA and OSHRC agreed about the interpretation of the law, thus expanding OSHRC's powers beyond what Congress seemingly intended. We favor a soft presumption that *Chevron* applies when multiple agencies with plausible interpretative authority have jurisdiction; *Martin* is an example where the presumption may have been overcome.<sup>477</sup>

If we keep *Chevron* as the background default rule in the face of multiple agencies with interpretative authority, Congress can always specify a different rule without violating the *Chevron* doctrine.<sup>478</sup> In Dodd-Frank, for example, Congress did two interesting things with regard to deference. First, it specified that the new Consumer Financial Protection Bureau should be treated as if it "were the only agency authorized to apply, enforce, interpret, or administer the provisions of . . . Federal consumer financial law."<sup>479</sup> Second, it provided that neither the SEC nor the CFTC should get deference for any interpretation of certain statutory authority if it conflicts with the other agency's view.<sup>480</sup> The potential litigation clash between the two agencies, however, raises constitutional concerns, which we turn to below.

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475. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs. 545 U.S. 967, 982 (2005) (holding that agency interpretations of ambiguous statutes lack precedential value); Gersen, *supra* note 40, at 227.

476. See Gluck & O'Connell, *supra* note 274, at 1852.

477. See *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144 (1991). In addition, the court in *DeNaples v. Office of Comptroller of Currency*, 706 F.3d 481 (D.C. Cir. 2013), pointed to compelling reasons to foreclose the possibility of conflicting interpretations because violation carried criminal penalties. *Id.* at 488 (citations omitted).

478. Gersen, *supra* note 94, at 722 ("[s]o long as *Chevron* is not a constitutional doctrine").

479. 12 U.S.C. § 5512(b)(4)(B) (2012); see generally Meazell, *supra* note 440, at 1792–93 (discussing this example).

480. Gersen, *supra* note 94, at 719.

If *Chevron* does apply to multiple agencies, differing interpretations by those agencies may suggest that the statute is ambiguous.<sup>481</sup> We do not take a firm view on this. After all, conflict among federal judges on a statute's meaning is not currently a relevant factor in the application of *Chevron*. Nevertheless, agencies arguably have more expertise and accountability than courts. At the extreme, large differences in interpretation or changes in multiple interpretations may undercut the application of *Chevron*.<sup>482</sup>

A similar *Chevron* issue arises for intra-agency conflict—whether courts should defer less to the legal interpretation when agency leadership in multimember bodies is split over the proper interpretation. For example, when deciding on the final rule for election timing in 2015, the NLRB split 3–2 on whether the labor laws permitted the agency to regulate, as a general matter, the conditions under which union elections could occur.<sup>483</sup> Jacobs suggests that such splits may signal ambiguity.<sup>484</sup>

The FEC routinely divides 3–3, on party lines. Because four votes are needed to pursue an enforcement action, the agency often dismisses filed complaints. Courts can review any dismissal, and those commissioners that voted against the enforcement action must provide written reasons. In this context, the D.C. Circuit has held that the “same standard of review applies to all FEC decisions, whether they be unanimous or determined by tie vote.”<sup>485</sup> Because “the Commissioners voting for dismissal ‘constitute a controlling group for purposes of the decision,’ . . . ‘their rationale necessarily states the agency’s reasons for acting as it did.’”<sup>486</sup> A former FEC Commissioner recently called such deference “undue” and argued that it contributed to the agency’s

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481. Cf. Eric A. Posner & Adrian Vermeule, *The Votes of Other Judges*, 105 GEO L.J. 159 (2016) (making a similar argument for multiple judges’ views on a statute’s meaning).

482. See *Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016).

483. See *supra* note 24 and accompanying text. There are other *Chevron* issues that arise within an agency. For some scholars and jurists, more deference should be given to an agency interpretation reached by higher-level officials than one worked on primarily by lower-level officials. David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 239–40; see also Magill & Vermeule, *supra* note 77, at 1048–49, 1061–63 (discussing deference to agency heads versus others). For Justice Antonin Scalia, it was enough to qualify for *Chevron* deference that the agency leadership defended the interpretation, assuming the statute was ambiguous. *United States v. Mead Corp.*, 533 U.S. 218, 260 (2001) (Scalia, J., dissenting).

484. Jacobs, *supra* note 21, at 48 n.230, 51–52.

485. *Citizens for Responsibility and Ethics in Washington (CREW) v. Fed. Election Comm’n*, 2016 WL 5107018, at \*5 (D.D.C. Sept. 19, 2016) (citing *In re Sealed Case*, 223 F.3d 775, 779 (D.C. Cir. 2000) (“We have . . . held that we owe deference to a legal interpretation [issued by the FEC] supporting a negative probable cause determination that prevails on a 3-3 deadlock.”)). See also *Fed. Election Comm’n v. Nat’l Republican Senatorial Comm. (NRSC)*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) (“[I]f the meaning of [FECA] is not clear, a reviewing court should accord deference to the Commission’s rationale . . . [even in] situations in which the Commission deadlocks and dismisses.”).

486. *CREW*, 2016 WL 5107018, at \*5 (citing *NRSC*, 966 F.2d at 1476).

dysfunction.<sup>487</sup> While we recognize the downsides to giving great deference to one side of an equally divided decision-making body, we generally do not favor less deference in the face of conflict.

Internal splits where power has been allocated horizontally may be less telling, however, than divisions across institutions under a *Chevron* analysis. Internal division probably plays a role, however, in how the court addresses the decision as a policy matter under *State Farm*, which we turn to next. Indeed, the D.C. Circuit's language in the FEC cases often sounds like a *State Farm* analysis, even though it is applied in the *Chevron* context.

Finally, litigants may creatively use adversarial agencies to generate seemingly run-of-the-mill *Chevron* challenges. In a recently filed complaint to DOL's fiduciary rule for retirement advisors, the Chamber of Commerce alleged that DOL exceeded its statutory authority "by seeking to regulate institutions and products in ways that conflict with the regulatory mandates and judgments of the SEC and FINRA, in areas where those entities have primary regulatory responsibility."<sup>488</sup> Additional claims under *State Farm* may be more plausible, and we turn to that avenue next.

## 2. *State Farm with Adversarial Agencies*

Less attention has been paid to how multiple agencies or internal agency conflicts play into judicial review of agency policy decisions outside the *Chevron* context.<sup>489</sup> This relative inattention is surprising given that *State Farm* issues arise more frequently for many agency actions, while *Chevron* is generally limited to agencies with delegated authority to act with the force of law.

A preliminary issue arises as to whether an agency can engage with other agencies in making its decision (which, of course, happens frequently in the OIRA review process, among other places). The primary issue involves how other agencies' participation in the decision-making process gets incorporated into judicial review. As with the Plan B example in the Introduction, negative feedback from other agencies can contribute to a finding that the agency action is arbitrary and capricious. But such a judicial finding requires the feedback to be transparent. Such feedback can also influence an agency decision for reasons outside the statutory framework. In this context, the reaction is often not transparent, making successful challenges more difficult, particularly if the interactions are shielded from public view by executive privilege or a FOIA exemption.

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487. Ann M. Ravel, Opinion, *Dysfunction and Deadlock at the Federal Election Commission*, N.Y. TIMES (Feb. 20, 2017), <https://www.nytimes.com/2017/02/20/opinion/dysfunction-and-deadlock-at-the-federal-election-commission.html>? [https://perma.cc/8EM2-WVM4].

488. Complaint ¶ 155, *Chamber of Commerce v. Perez* (N.D. Tex. June 1, 2016) (No. 16-cv-1476), 2016 WL 3086091; *see also id.* ¶ 158 (claiming that rule "impermissibly intrudes on the province of the SEC").

489. *But see* Magill & Vermeule, *supra* note 77, at 1051–55; Vermeule, *supra* note 155, at 2239–43; Jacobs, *supra* note 21, at 45–48.

A final issue concerns conflict within an agency: with increasing split votes in independent regulatory commissions, courts need to consider whether such modern horizontal (or symmetrical) division is like the traditional hierarchical conflict portrayed in the *Universal Camera* cases. What attention has been paid to these issues suggests that courts should give less deference in the face of agency conflict—whether in advisory or symmetrical capacities.<sup>490</sup> Here, too, we fight against convention, positing that the level of deference should not be affected by split votes.

Classic administrative law—through the APA and important cases—places attention on a single agency.<sup>491</sup> This raises the question: Can that agency even seek the views of other agencies? Another agency could easily qualify as an “interested person” banned from *ex parte* communications in a formal proceeding, and allowing such behind-the-scenes input could conflict with the independence Congress has attempted to give to administrative law judges.<sup>492</sup> Additionally, another agency could be prevented from engaging in *ex parte* communications in an informal proceeding, under the Due Process Clause, if the proceeding targeted “conflicting private claims to a valuable privilege.”<sup>493</sup> But as a general matter, as we describe in Part I, an agency can look to other agencies for input.<sup>494</sup> Sometimes, Congress encourages or demands this explicitly.<sup>495</sup> And when Congress does not indicate whether an agency can consult another agency, “an implicit ban on interagency consultation and coordination” cannot be “read into that statutory silence.”<sup>496</sup> According to the D.C. Circuit, such a ban would not only be undesirable but would also “raise significant constitutional concerns.”<sup>497</sup>

Once multiple agencies are involved, other legal issues arise. To start, other agencies could officially comment during informal rulemaking, and the agency conducting the rulemaking must respond if the comment is “materially cogent.”<sup>498</sup> In fact, a marquee case for the paper record requirements of notice

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490. Vermeule argues that courts should not defer to agency factual determinations that conflict with the consensus of experts “unless they can give a valid second-order reason to think that the consensus or majority view of experts as to matters of fact is not epistemically reliable.” Vermeule, *supra* note 155, at 2235.

491. Farber & O’Connell, *supra* note 57.

492. 5 U.S.C. § 557(d) (2012). The president here raises tricky issues under Article II.

493. See *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 224 (D.C. Cir. 1959).

494. See *supra* Part I.C; Shah, *supra* note 422, at 316–17.

495. See *supra* Part I.C; see also *Emerson Elec. Co. v. Schlesinger*, 609 F.2d 898, 903 (8th Cir. 1979) (citing 42 U.S.C. §§ 2000e-4(g)(1)) (indicating the EEOC “shall have power . . . to cooperate with and, with their consent, utilize . . . other agencies” under the Civil Rights Act). Even without statutory consultation mandates, Marisam argues that courts “should reject agency rationales that are based on factors outside of the agency’s core expertise if the agency failed to consult with more expert agencies.” Marisam, *supra* note 44, at 187. He does not address what courts should do if the agency consults but disagrees with advice it is given.

496. *Nat’l Mining Ass’n v. McCarthy*, 758 F.3d 243, 249 (D.C. Cir. 2014).

497. *Id.*

498. *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1031 (D.C. Cir. 1978).

and comment rulemaking actually features conflicting agencies. In *United States v. Nova Scotia Food Products Corporation*,<sup>499</sup> not only the subject of the enforcement action submitted tough comments to the FDA on its proposed rulemaking governing the manufacturing of smoked fish, but so did the Department of Interior's Bureau of Commercial Fisheries, and the court found that the agency's failure to answer the Bureau's comments violated the APA.<sup>500</sup>

More commonly, adverse reactions by other agencies can make it harder for the acting agency to survive an arbitrary and capricious challenge under the APA.<sup>501</sup> At the least, the agency must respond to relevant reactions. In *National Resource Defense Council v. United States Environmental Protection Agency*,<sup>502</sup> the record contained a letter protesting EPA's handling of the issues. The letter came from eight members of its Science Advisory Board and six members of an advisory National Academy of Sciences committee that had been charged with investigating the issue of water pollution from ballast water.<sup>503</sup> The letter attacked EPA for allegedly unduly limiting the scope of their investigation and actively thwarting their efforts to consider a broader class of technologies for treating the water pollution.<sup>504</sup> "In light of these facts," the court said, "we cannot well credit EPA's assertion" that relevant information was unavailable.<sup>505</sup> The court also faulted EPA for an inadequate response to another advisory board comment<sup>506</sup> and referred to another portion of the Board's report as "support[ing] our conclusion" that a distinction made by EPA was arbitrary and capricious.<sup>507</sup> Presumably, positive reactions from other agencies could buttress an agency's action, if in the record.<sup>508</sup>

Courts seem to treat adversarial agencies similarly under statutes besides the APA. An intriguing 1990 study concluded that "[w]here agencies with environmental expertise raised serious questions about the merits of particular projects or about the quality of environmental analysis of those projects, courts have readily found NEPA violations."<sup>509</sup> On the other hand, "where the agency

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499. 568 F.2d 240 (2d Cir. 1977).

500. *Id.* at 244–45, 252.

501. See Vermeule, *supra* note 155, at 2241–42.

502. 808 F.3d 556 (2d Cir. 2015).

503. *Id.* at 573. One letter writer belonged to both groups. *Id.* at 573 n.13.

504. *Id.* at 573.

505. *Id.*

506. The court said that in choosing one standard, "EPA overlooked crucial portions of the SAB report" and in choosing a standard, EPA "should have first looked at the available ballast water technologies as identified by the SAB Report." *Id.* at 571. On another point, the court said, "the SAB and NAS Committee scientists concluded that 'EPA should conduct a comprehensive analysis . . .'" EPA chose not to do so for time reasons, but the court did "not find that answer compelling." *Id.* at 575.

507. *Id.* at 577.

508. See *Am. Trucking Ass'ns, Inc. v. EPA*, 283 F.3d 355, 367 (D.C. Cir. 2002) (giving weight to CASAC's agreement when upholding EPA's NAAQS regulation); Vermeule, *supra* note 155, at 2250–51.

509. Michael C. Blumm & Stephen R. Brown, *Pluralism and the Environment: The Role of Comment Agencies in NEPA Litigation*, 14 HARV. ENVTL. L. REV. 277, 282 (1990). For instance, in

comments reflected no serious opposition or supported a project, courts generally found NEPA compliance, despite the opposition of one interest group or another.”<sup>510</sup> A 2012 follow-up study found a more ambiguous pattern of results, but nevertheless concluded that the earlier study’s general conclusions still held true.<sup>511</sup>

Explicit agency conflict that does not factor centrally into the legal analysis may still be used by courts and litigants as rhetorical flourish. In *Utility Air Regulatory Group v. EPA*, the Supreme Court struck down EPA’s regulation of greenhouse gas emissions largely on *Chevron* grounds, but the majority explicitly noted earlier in its opinion that other agencies disagreed with EPA’s policy decision, even quoting adversarial comments from the Departments of Agriculture, Commerce, Transportation, and Energy, the Council of Economic Advisers, the Office of Science and Technology Policy, and the SBA.<sup>512</sup> Additionally, in its complaint against DOL’s recent fiduciary rule, the Chamber of Commerce explicitly flagged objections to the rule by an SEC commissioner and SEC staff.<sup>513</sup>

Other issues arise when agency conflict shapes an agency’s policy decision in ways not listed in the operating statute. In *Massachusetts v. EPA*, the Court reviewed EPA’s refusal to engage in rulemaking on greenhouse gas emissions, which the agency did in part because of policy concerns about using the Clean Air Act to address climate change.<sup>514</sup> The Court held that the agency should not have turned to these broader concerns.<sup>515</sup>

But what if the priorities come from other agencies? If the statute explicitly bars these priorities, the answer is easy. But if the statute is silent, a strict reading of *Massachusetts v. EPA* suggests that an agency cannot consider policies beyond those included in the statute. Perhaps, as some subsequent lower courts opinions suggest, the reading should not be so strict.<sup>516</sup> In any event, the role that these other priorities played in an agency decision may be hidden. Sometimes, agencies will submit official comments, but not always. Under *Sierra Club v.*

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*Natural Resources Defense Council v. Hodel*, 865 F.2d 288 (D.C. Cir. 1988), the court ordered the agency to revise its oil and gas leasing plan in part because of its failure to respond persuasively to EPA’s critique. *Id.* at 299.

510. Blumm & Brown, *supra* note 509, at 282.

511. Michael C. Blumm & Marla Nelson, *Pluralism and the Environment Revisited: The Role of Comment Agencies in NEPA Litigation*, 37 VT. L. REV. 5, 44 (2012).

512. 134 S. Ct. 2427, 2436 n.2 (2014).

513. Complaint ¶¶ 96, 106, Chamber of Commerce v. Perez (N.D. Tex. June 1, 2016) (No. 16-cv-1476), 2016 WL 3086091. In upholding the rule, the district court did not mention these objections except to note positively that the Labor Department had consulted “numerous government and industry officials,” including the SEC. Chamber of Commerce v. Hugler, No. 3:16-cv-1476-M, 2017 WL 514424, at \*26 (N.D. Tex. Feb. 8, 2017).

514. 549 U.S. 497, 529–34 (2007).

515. *Id.* at 533.

516. For further discussion of these issues, see Daniel A. Farber, *Taking Costs into Account: Mapping the Boundaries of Judicial and Agency Discretion*, 40 HARV. ENVTL. L. REV. 87 (2016).

*Costle*, agencies do not have to disclose political considerations in the record.<sup>517</sup> If the priorities are articulated in writing during the OIRA review process, EO 12866 requires disclosure at the time of the final rule; however, many agencies do not follow that mandate, and judicial review is not available to enforce it.<sup>518</sup>

If agencies formally coordinate on an action, commentators tend to press for even more judicial deference than if a single agency faced no dissent from other agencies.<sup>519</sup> The existence of joint action itself provides a boost. Despite this boost, courts “seem not to adjust standards of review to acknowledge agency coordination.”<sup>520</sup>

Conflict within an agency can also raise judicial concern. Classic doctrine requires that conflict among actual decision makers be included in the record for review, even if a higher-level adjudicator can reverse an underling’s ruling.<sup>521</sup> That conflict, in turn, will likely make it at least marginally harder to uphold the ultimate decision by the agency.

Moreover, in independent agencies with multiple leaders, the “decision-maker” is the majority of members, often creating visible conflict.<sup>522</sup> As noted earlier, split decisions by these entities appear to be on the rise, with the FCC’s final net neutrality rule and the NLRB’s final election timing rule, for example, coming on 3–2 votes of the agencies’ leaders.<sup>523</sup> These split decisions are almost always along party lines.<sup>524</sup> The D.C. Circuit in its *Business Roundtable* decision remarked that the SEC’s proxy rule being reviewed was done on a 3–2 vote and summarized the dissenting commissioners’ views.<sup>525</sup> Such notice could be rhetorical, as in the *UARG* case, but it could also play a role in judicial review.

517. 657 F.2d 298, 404–08 (D.C. Cir. 1981); *see generally* Gluck & O’Connell, *supra* note 274 (describing transparency issues); Heinzerling, *supra* note 125 (describing and critiquing OIRA’s role).

518. Exec. Order No. 12,866, §6, 58 Fed. Reg. 51,735 (1993) (“OIRA shall make available to the public all documents exchanged between OIRA and the agency during the review by OIRA. . . .”); Farber & O’Connell, *supra* note 57, at 1164–65. President Trump imposed additional requirements on agencies seeking to promulgate new regulations in EO 13771. *See* Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs, Exec. Order No. 13,771, 82 Fed. Reg. 9,339 (Feb. 3, 2017). The Order does not address the issue we raise in the text. A subsequent Order requires agencies to obtain input on prioritizing existing regulations “as permitted by law, from entities significantly affected by Federal regulations, including State, local, and tribal governments, small businesses, consumers, non-governmental organizations, and trade associations.” Enforcing the Regulatory Reform Agenda, Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (Feb. 24, 2017). The Order does mandate that the sources or content of this input be made public.

519. *See* DeShazo & Freeman, *supra* note 41, at 2234, 2302–03; Shah, *supra* note 46, at 855; *cf.* Freeman & Rossi, *supra* note 45, at 1205 (“reluctant to endorse” position as it “yields too much leeway to the agencies and, potentially, to the President” but noting that coordinated decisions are likely to be better decisions and hence likely to receive deference).

520. Freeman & Rossi, *supra* note 41, at 1204.

521. *Universal Camera Corp. v. Nat’l Labor Relations Bd.*, 340 U.S. 474 (1951).

522. *See* *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U. S. 477, 512–13 (2010).

523. *See supra* note 24 and accompanying text.

524. *Cf.* Jacobs, *supra* note 21, at 27 (noting role of partisanship at FCC but claiming it is “less salient” for other agencies).

525. *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1147–48 (D.C. Cir. 2011).



In the recent dispute over whether FERC could regulate regional transmission organizations and independent systems operators, the D.C. Circuit and the Supreme Court reached different conclusions about whether the agency's treatment of a dissenting commissioner was arbitrary and capricious.<sup>526</sup>

More complicated issues potentially arise when conflict does not come from a decision maker. For instance, staff may disagree with the political appointee who has the authority to take the action. Specifically, courts have noted such conflict in support of judicial intervention.<sup>527</sup> More recently, Judge Williams, dissenting in part in the recent decision upholding the FCC's net neutrality rule, noted "[t]he silent treatment given to three of its former chief economists."<sup>528</sup> Metzger argues, as a general matter, that "[e]vidence that decisions were made over the objections of career staff and agency professionals often triggers more rigorous [judicial] review."<sup>529</sup>

Thinking about all these issues, we make one primary observation and several suggestions. As a descriptive matter, the courts seem more skeptical of agency decisions when other agencies or individuals within the agency disagree. As a normative matter, we are not sure if changing the intensity of scrutiny is the correct response. To the extent that doctrines require agency responsiveness to expressed concerns, we would not treat federal government actors differently from other categories of commenters. For example, the Bureau of Commercial Fisheries is equivalent to Nova Scotia under rulemaking mandates in our (and the courts') view. In addition, for hierarchical (that is, vertical) conflicts among decision makers, there is longstanding support for courts taking a closer look at the agency's ultimate decision, dating back to *Universal Camera*.

But for symmetrical (that is, horizontal) conflicts, articulated tension may demonstrate that the agency action was thoroughly debated as a matter of process. Partisan splits in decisions may also be the result of political choices (and elections) and may foster an accountability story. In addition, as with negotiated rulemaking, coordinated action may be in tension with statutory directions. Alternatively, an expertise story might cut the other way. In light of that, we would not argue for *more* deference in the face of symmetrical or monitoring conflict. Just as legislation passed by a close margin is treated similarly to unanimous legislation, we favor equal treatment of agency action in these contexts.<sup>530</sup> The burden is on the agency, of course, to provide a reasoned

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526. *Electric Power Supply Ass'n v. Fed. Energy Regulatory Comm'n*, 753 F.3d 216, 225 (D.C. Cir. 2014), *rev'd*, 136 S. Ct. 760 (2016).

527. *Pac. Rivers Council v. U.S. Forest Serv.*, 689 F.3d 1012, 1117, 1028, 1033–34 (9th Cir. 2012) (NEPA case).

528. *U.S. Telecomm. Ass'n v. FCC*, 825 F.3d 674, 765 (D.C. Cir. 2016) (Williams, J., dissenting).

529. Metzger, *supra* note 252, at 445.

530. Separately, we agree with a recent Third Circuit decision on waiver, which held that a dissenting commissioner sufficiently flagging an issue is similar to a private commenter doing so, if the

explanation of its decision based on the record, including reasoned responses to internal and external critics, where appropriate.

### 3. *Procedural Issues: Rule 19 and Discovery*

Outside of agencies suing each other, which we turn to next, and beyond classic administrative law doctrines, the litigation process raises issues in the adversarial agency context. Rule 19 provides an extreme remedy for parties facing considerable agency conflict.<sup>531</sup> For example, when the EEOC sued the lessor of coalmines on Navajo and Hopi reservations for Title VII violations, the lessor argued that the Secretary of Interior demanded that the lease include a preference for hiring Navajo workers.<sup>532</sup> The Ninth Circuit dismissed the claim for damages, finding that the EEOC could not sue the Secretary under its statutory authority—despite the fact that the Secretary was a required party to be joined.<sup>533</sup> But note that the court did allow a claim for injunctive relief to go forward, on the theory that the coal company could have brought an interpleader action between DOI and the EEOC to resolve its rights.<sup>534</sup> Thus, if agencies (typically in symmetrical adversarial relationships) cannot sue each other, Rule 19 may come into play when the conflict is great enough.

Although both DOI and the EEOC are federal entities, the case implicitly assumes that agencies are not bound by judgments in litigation involving one but not the other. There seems to be some tension between this assumption and the concept of a unitary executive (or even that the United States is a single entity). But, even Justice Antonin Scalia—a staunch supporter of the unitary executive—once opined that different executive agencies, although responsible to the president, are not bound by judgments against another agency.<sup>535</sup>

Parties have also tried to use agency conflict to their advantage in discovery and under the Freedom of Information Act. Specifically, parties have argued that agency disagreement waives the government's privileges. In *Menasha Corporation v. U.S. Dep't of Justice*, defendants in a massive Superfund case sought internal DOJ communications, arguing that the conflict between the Department's environmental enforcement and defense sections (with the former often representing EPA and the latter often representing the Army Corps of

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statute requires the agency to have the "opportunity to pass" on an issue before it is raised in court. *See Prometheus Radio Project v. FCC*, 824 F.3d 33, 57–59 (2016).

531. FED. R. CIV. P. 19.

532. *EEOC v. Peabody W. Coal Co.*, 610 F.3d 1070, 1074, 1080 (9th Cir. 2010).

533. *Id.* at 1082–83.

534. *Id.* at 1085–86.

535. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), Justice Scalia's plurality opinion argued that a suit against the Secretary of the Interior would not redress the plaintiffs' injury, which would have resulted from the funding of overseas projects by other agencies, since those agencies would not be bound by the potential judgment requiring the Secretary to consult for foreign projects. *See id.* at 569. We are not sure this is correct since those agencies, even if considered independent legal entities for purposes of litigation, might have been in privity or bound by an injunction as "persons who are in active concert" with DOI under Federal Rule of Civil Procedure 65(d)(2)(C).

Engineers) waived the work product protection.<sup>536</sup> The claim hinged on the adversarial relationship: “[t]he enforcement and defense sections are adversaries; communications between adversaries are not privileged.”<sup>537</sup> The court rejected the claim, holding that “[t]he United States, represented by the Justice Department, is the only federal party and the lawyers in the enforcement and defense sections have no authority to determine its negotiating aim and strategy.”<sup>538</sup> The court also noted that EPA and the Corps were not parties to the case.<sup>539</sup> But if a court saw separate agencies (perhaps because of independent litigating authority, which we turn to next), their communications may not be privileged.

#### 4. Agencies Suing Each Other

The most direct form of courts resolving agency conflict arises when Congress allows agencies to sue each other.<sup>540</sup> Most of these suits involve agencies in symmetrical relationships but some include agencies in hierarchical ones. At least some of these disputes are justiciable, as the Supreme Court has repeatedly found.<sup>541</sup> Lower courts have heard more such cases,<sup>542</sup> though overall such disputes are rare.<sup>543</sup> These suits between agencies raise statutory and constitutional issues. As discussed in Parts I and II, DOJ generally litigates on behalf of federal agencies, but Congress sometimes makes exceptions.

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536. 707 F.3d 846, 849 (7th Cir. 2013).

537. *Id.* at 850.

538. *Id.*

539. *Id.*

540. *See supra* Part II.B.

541. *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144 (1991) (DOL v. OSHRC); *United States v. Nixon*, 418 U.S. 683 (1974) (president v. special prosecutor); *United States ex rel. Chapman v. Fed. Power Comm’n*, 345 U.S. 153 (1953) (DOI v. FPC); *United States v. Interstate Commerce Comm’n*, 337 U.S. 426 (1949) (ICC v. DOI); *see generally* Joseph W. Mead, *Interagency Litigation and Article III*, 47 GA. L. REV. 1217, 1238–42 (2013) (describing these four cases). Through a proxy appointed at the request of the SG, the Court also heard a challenge to the IRS’s policy of refusing tax breaks to private schools that discriminate based on race, which pitted the proxy for the Treasury Department against DOJ. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *see generally* Devins, *supra* note 224, at 276 (describing the Solicitor General’s “bizarre handling” of the case to avoid “political embarrassment”).

542. *See e.g.*, *U.S. Dep’t of Interior v. Fed. Energy Regulatory Comm’n*, 952 F.2d 538 (D.C. Cir. 1992); *see also supra* note 74 and accompanying text.

543. *See Mead, supra* note 541, at 1242–49. It is also rare to have state agencies battling in federal court (even where states have provided independent litigating authority). *Va. Office for Prot. and Advocacy v. Stewart*, 563 U.S. 247, 260 (2011). By contrast, disputes between state agencies in state court are more frequent. *Mead, supra* note 541, at 1220; *Mezell, supra* note 440, at 1797 n.11; Note, *Judicial Resolution of Administrative Disputes Between Federal Agencies*, 62 HARV. L. REV. 1050, 1050 (1949). For a recent example that involves agency conflict one slight step removed, *see Hunter v. Federal Energy Regulatory Commission*, 711 F.3d 155 (D.C. Cir. 2013). In that case, FERC had found a violation by a hedge fund trader of its anti-manipulation rule. The trader challenged FERC’s jurisdiction, arguing that only the CFTC could prosecute manipulation of gas futures prices. The CFTC, which had begun its own action against the trader, intervened. In the end, the D.C. Circuit sided with the trader (and the CFTC).

A modern example of such congressional permission—involving advisory relationships—is the authority given to the SBA’s Chief Counsel for Advocacy to file an amicus brief “in any action brought in a court of the United States” on her views “with respect to compliance with [the Regulatory Flexibility Act], the adequacy of the rulemaking record with respect to small entities and the effect of the rule on small entities.”<sup>544</sup> The SBA has used this full authority only once.<sup>545</sup>

Even if agencies possess litigation authority independent from DOJ, it is not obvious that such authority is constitutional under Article II or Article III. Indeed, DOJ has opposed the SBA’s efforts, though authority to file an amicus brief is arguably different than authority to represent the agency as a party.<sup>546</sup> As in the preceding discussion on whether the president can direct an agency’s actions when Congress delegates to the agency and not the president, similar issues arise regarding litigation control.<sup>547</sup>

There presumably are some limits under Article II. Michael Herz suggests that Article II could bar an interagency policy dispute, in that the executive branch cannot ask the courts to decide how to execute the law.<sup>548</sup> What counts as a policy dispute seems very hard to determine, however. If that dispute involved independent agencies, such as the CFTC and the SEC under Dodd-Frank, it seems courts could decide between conflicting statutory interpretations.<sup>549</sup> But agencies within a cabinet department, such as the FWS and the BLM, present a more difficult question.<sup>550</sup>

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544. 5 U.S.C. § 612(b) (2012).

545. See *Nw. Mining Ass’n v. Babbitt*, 5 F. Supp. 2d 9 (D.D.C. 1998) (agreeing with issues raised by the SBA and remanding the regulation to DOI); *Lehigh Valley Farmers v. Block*, 640 F. Supp. 1497, 1499 (E.D. Pa. 1986) (noting that the Chief Counsel withdrew his motion to intervene “without explanation”). But a past Chief Counsel of the agency testified in 2002 that in “other instances,” “the mere threat of using our *amicus* authority has been sufficient for an agency to reconsider its position.” *Agency Compliance with the Small Bus. Regulatory Enforcement Fairness Act (SBREFA): Hearings Before the H. Comm. on Small Bus.*, 107th Cong. (2002) (testimony of Thomas M. Sullivan), [https://www.sba.gov/sites/default/files/files/test02\\_0306.pdf](https://www.sba.gov/sites/default/files/files/test02_0306.pdf) [<https://perma.cc/XEE7-B7PS>].

546. Doris S. Freeman et al., *The Regulatory Flexibility Act: Orienting Federal Regulation to Small Business*, 93 DICK. L. REV. 439, 450 n.41 (1989) (discussing 1983 OLC memo).

547. For Michael Herz, the “pristine model of the unitary executive has no relation to political or constitutional reality,” and consequently, “[i]nteragency litigation is not inherently or per se inconsistent with the functioning of the executive branch.” Michael Herz, *United States v. United States: When Can the Federal Government Sue Itself?*, 32 WM. & MARY L. REV. 893, 895, 930 (1991). Neal Devins has a different take, arguing control over independent agencies’ litigation undermines the independence of such agencies—independence that the Court has upheld. Devins, *supra* note 224, at 312.

548. Herz, *supra* note 547, at 973.

549. See *supra* notes 12–15 and accompanying text.

550. Cf. Herz, *supra* note 547, at 988 (contending such litigation might be plausible as a constitutional matter, though it has never occurred). Looking only at removability, agencies led by officials who serve at the pleasure of the president have litigated against each other in court. See, e.g., *Tenn. Valley Auth. v. EPA*, 278 F.3d 1184 (11th Cir. 2002); see also *Petition for a Writ of Certiorari, EPA*, No. 03-1162, 2004 WL 304351, at \*21 (arguing that such a conflict is not justiciable).

Under Article III, there must be a case or controversy.<sup>551</sup> It is generally accepted that a person cannot sue herself. Courts and commentators, however, have also recognized that “[t]he talismanic ‘a person cannot sue herself’ collapses . . . when the ‘person’ is the United States government.”<sup>552</sup> For Herz, the capacities of the dueling agencies are critical. If the suit is between a regulating agency and a regulated agency, Article III is not a bar.<sup>553</sup> By contrast, for Joseph Mead, justiciability “depends on whether the interests asserted by the competing parties are sovereign or proprietary.”<sup>554</sup> Specifically, he argues that claims by governmental entities alleging proprietary injuries are permitted, but injuries alleged by two agencies both asserting sovereign interests are not.<sup>555</sup> Thus, for Mead, it is Article III—not Article II—that bars litigation over a policy determination, even if both agencies are independent regulatory commissions. For both, the agency’s structure—it being an independent regulatory commission or cabinet department—is not determinative.<sup>556</sup>

Though we recognize the difficulty of the issue, we are more open than Mead to the constitutionality of a provision like the one in Dodd-Frank, which authorizes the judicial resolution of certain CFTC-SEC conflicts. In part, our disagreement stems from a more restrained interpretation of the cases on which he relies.<sup>557</sup> For instance, we read one of the cases—*Newport News Shipbuilding & Dry Dock Co.*—as based on statutory grounds rather than constitutional grounds, and as acknowledging the validity of interagency suits to protect a sovereign interest when authorized by Congress.<sup>558</sup>

At first blush, litigation between two government agencies over the scope of their powers seems a questionable basis for federal jurisdiction, but we are inclined to believe that such suits generally are constitutional under Article III when authorized by Congress. Consider the case of two agencies that have taken contradictory positions regarding their regulatory jurisdiction or have adopted inconsistent regulations regarding the same transaction. A private party such as

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551. Many believe that Article III requires an actual dispute between adverse parties. See James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 *YALE L.J.* 1346, 1355 (2015) (questioning conventional wisdom and arguing that the Constitution also permits federal courts to “entertain applications from parties seeking to assert . . . a legal interest under federal law”).

552. Herz, *supra* note 547, at 895.

553. *Id.* at 959–61.

554. Mead, *supra* note 541, at 1254.

555. *Id.* at 1254–55.

556. Cf. LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 541–42 (1965) (suggesting that the president is the “logical forum” for disputes between officers directly controlled by her but noting that “Presidential officers” may be delegated powers they could enforce in court against other officers).

557. Mead, *supra* note 541, at 1256.

558. See *Dir., Office of Workers’ Comp. Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 133 (1995) (“Those two cases certainly establish that Congress *could* have conferred standing upon the Director without infringing Article III of the Constitution; but they do not at all establish that Congress did so.”).

the regulated entity would presumably have standing to obtain a judicial ruling on which agency had jurisdiction or which regulation was valid. It could use the APA to challenge these final actions and let the two agencies fight out their legal claims.<sup>559</sup> The Title VII Navajo case discussed previously suggests that an interpleader action under Rule 22 (as opposed to Rule 19 joinder) might be appropriate, though a declaratory judgment action might provide a viable alternative. And whether or not this is technically correct in a given case, the litigation would have the flavor of an interpleader action: the plaintiff is caught between the two other parties, who have taken adverse positions to each other. The basis for interpleader is that the dispute is at least in part between the defendants, with the plaintiff as an innocent bystander. There seems no reason why the Constitution should block the more direct mechanism of a suit directly between those parties, provided the suit is authorized by statute.<sup>560</sup> As noted, even Justice Scalia seemed to acknowledge that different executive agencies are distinct legal entities for litigation purposes.<sup>561</sup> Thus, we are inclined to think that Article III does not categorically exclude litigation between agencies with inconsistent legal positions on regulatory matters.

Direct suits also raise particular issues for internal agency conflict. Courts have allowed agencies to sue their employees in particular circumstances. For example, Congress, long ago, permitted the Postmaster General, a core executive official, “to cause a suit to be commenced” against a Deputy Postmaster who was behind in sending in revenue to the federal government.<sup>562</sup> Currently, employees can bring suit against their agencies through *qui tam* litigation.<sup>563</sup>

Litigation authority for agencies can also shape internal agency conflict. Giving an agency litigation authority “changes the dynamics between general counsels and other professionals *within* the agency.”<sup>564</sup> These modified relationships result, in part, because agency personnel are less likely to oppose their general counsel, and, in part, because the general counsel will receive the blame or credit, from having sole responsibility.<sup>565</sup>

In sum, while direct judicial resolution of agency conflict may be an attractive design choice to congressional committees that cannot agree or to a Congress skeptical of resolution by the White House, litigation between agencies presents vexing constitutional issues. Until recently, such design choices were

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559. See the discussion of the *Peabody* case in Part IV.C.3.

560. In at least some cases when both parties must be represented by the Solicitor General, that could be a signal that Congress intended disputes to be settled internally, with the executive branch taking a unified position, rather than having access to the courts.

561. Our discussion focuses on Article III. We do not exclude the possibility that a statute authorizing such litigation might sometimes interfere with the president’s control of the executive branch sufficiently to raise an Article II barrier.

562. 1 Stat. 232, 238 (1792); see also Mead, *supra* note 541, at 1236.

563. David Freeman Engstrom, *Private Enforcement’s Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913 (2014).

564. Magill & Vermeule, *supra* note 77, at 1060–61 (emphasis added).

565. *Id.*

rather rare. To the extent that more conflict will be thrown to the courts, these issues may be harder to avoid.<sup>566</sup> We generally prefer to deemphasize Article III concerns about the identity of the parties.<sup>567</sup> We would instead encourage courts to look carefully at whether intraexecutive litigation is consistent with congressional intent and to consider requirements that agencies exhaust administrative remedies where available, so courts are not in the position of deciding disputes that could have been resolved by OLC or the SG.<sup>568</sup>

Intraexecutive litigation is undoubtedly awkward, but as we have emphasized throughout, conflict can have its benefits. We have already seen a variety of mechanisms for resolving disputes between adversarial agencies, and litigation is not necessarily the best of them. On the other hand, the very possibility of litigation may force agencies to account for perspectives of other agencies in ways they might not otherwise do. We view that as a healthy effect.

#### CONCLUSION

We will not attempt to reprise the entire Article here but simply make a few key points. To start, conflict within the administrative state seems ubiquitous at all levels, both hierarchically (White House versus agencies; political appointees versus civil servants) and symmetrically (agencies versus agencies; commissioners versus commissioners). We emphasize, as we have throughout, that cooperation and accommodation are important: the government could not function without them. But conflict, too, has its virtues.

Conflict can be a design feature, not just an unfortunate lapse. We have discussed models of bureaucracy in which conflict stems naturally from differences in the incentives of different actors. Moreover, involving actors with different objectives and information can improve the system in various ways, much as the adversary system in litigation often ensures different interests are fairly represented and provides incentives to develop fully the relevant facts and arguments.

Understanding the appropriate place of conflict in the administrative state leads us to be more accepting of agency tension in important legal settings. And unlike some judges and commentators, we support a presumption of *Chevron*

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566. In addition, a non-Article III court, which would be given deference in Article III forums, might provide a needed compromise between congressional desires and Article III concerns.

567. Putting aside the intrabranched nature of the litigation, there are other issues relating to justiciability, such as whether the issues are sufficiently concrete to warrant court resolution, whether the suit is feigned, or whether there are judicially manageable standards, all of which should apply fully to intra-executive litigation. One special situation that may require separate treatment is where the authority to make final decisions for both agencies resides in the president. If so, the litigation seems to come at least uncomfortably close an advisory opinion to the president; or to put it another way, the cases come very close to a suit by the president against herself. As observed earlier, however, all but the most fervent believers in the unitary executive would agree that there are situations falling outside of this category.

568. Cf. JAFFE, *supra* note 556, at 99 (discussing the undesirability of involving the courts in disputes that could be resolved within the executive branch).

deference even when agencies have overlapping jurisdictions. Additionally, we are open to the possibility of litigation between agencies, although we suggest some safeguards, as efforts to suppress conflicts between agencies can deprive both decision makers and the public of valuable insights.

There is much more to be learned about adversarial agencies. We had to give short shrift to the role of interest groups and congressional committees, and our exploration of the legal issues has necessarily been tentative and incomplete. For now, we hope at least to open a research avenue for others and augment the substantial body of work already addressed to agency cooperation. A full picture of bureaucratic relationships will undoubtedly need to include both.



