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*University of Colorado Law School*

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# THE YALE LAW JOURNAL

SHARON B. JACOBS

## The Statutory Separation of Powers

**ABSTRACT.** Separation of powers forms the backbone of our constitutional democracy. But it also operates as an underappreciated structural principle in subconstitutional domains. This Article argues that Congress constructs statutory schemes of separation, checks, and balances through its delegations to administrative agencies. Like its constitutional counterpart, the “statutory separation of powers” seeks to prevent the dominance of factions and ensure policy stability. But separating and balancing statutory authority is a delicate business: the optimal balance is difficult to calibrate *ex ante*, the balance is unstable, and there are risks that executive agencies in particular might seek expansion of their authority *vis-à-vis* their independent counterparts.

By explicating the architecture of statutory separation of powers, this Article explores both how statutory separation of powers can facilitate resistance to the executive and how the executive might weaponize particular statutory entanglements in pursuit of policy dominance. Presidents from both parties unapologetically leverage administrative agencies to achieve policy goals. The current administration is no exception: it has rolled back emissions limits previously promulgated by the Environmental Protection Agency, refocused immigration policy on enforcement and border security through changes at the Department of Homeland Security, and leaned on the Department of Energy to prop up the ailing coal industry. This last set of efforts has, to date, been rebuffed by other federal administrative actors. This is no accident. Congress set up the existing federal balance of energy authorities in the wake of a previous attempt by the executive to dominate energy policy. But because of the administration’s willingness to use statutory checks as a sword rather than a shield, the interagency balance of authority has come under increasing pressure.

The Article concludes with recommendations for how Congress, agencies, and the judiciary might mitigate these tendencies and preserve the statutory separation of powers as a meaningful safeguard against the perils of concentrated executive policy-making authority.

**AUTHOR.** Assistant Professor of Law, University of Colorado Law School. I am grateful to Ming Chen, Steven Croley, Dan Farber, Sean Helle, Rebecca Ingber, Craig Konnoth, Sarah Krakoff, Richard Lazarus, Ben Levin, Nina Mendelson, Gillian Metzger, Helen Norton, Jennifer Nou, Nicholas Parrillo, Carolyn Ramsey, Jim Rossi, Miriam Seifter, Pierre Schlag, Scott Skinner-Thompson, Anna Spain, Peter Strauss, Phil Weiser, and participants in the University of Michigan Law School’s Administrative Law New Scholarship Roundtable and UCLA Law School’s Climate and Energy Workshop for helpful comments and conversations. Special thanks to Alex Mechanick and other staff at the *Yale Law Journal* for their superb feedback and careful edits. All mistakes are my own.



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**INTRODUCTION**

The nature and extent of presidential power over administrative agencies is a central question in administrative law. The case in favor of expansive presidential control is grounded in the democratic accountability and efficiency that the President can bring to agency action.<sup>1</sup> Opponents of strong presidential control, however, are less convinced that presidential involvement yields true accountability or transparency.<sup>2</sup> Presidential involvement may also undermine rather than promote efficiency, especially when that involvement manifests as painstaking review of agency action by the Office of Management and Budget (OMB).<sup>3</sup> Separately, some worry that Presidents will sometimes interfere with the exercise of neutral expertise by administrative actors and thwart congressional intent as embodied in agencies' authorizing statutes.<sup>4</sup> As a result, some argue that Presidents

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1. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331-32 (2001); see also Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2 (1994) (citing the values of accountability, coordination, and uniformity in execution of the laws as reasons to favor a unitary conception of executive power).
  2. See, e.g., PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 121-32 (2009).
  3. Within OMB, the Office of Information and Regulatory Affairs (OIRA) is responsible for regulatory review. For critiques of OIRA review, see, for example, Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1267-69 (2006), which criticizes OIRA for its overly narrow focus on regulatory costs; and Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 49-52 (2006), which critiques OIRA's lack of transparency, selectivity, and narrow focus on costs based on interviews with agency officials who have participated in OIRA review. In part due to these downsides, agencies will sometimes go to great lengths to insulate their rulemaking from OIRA review. See Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1782-89 (2013). OIRA review has its supporters as well. For defenses of OIRA's practices as improving coordination and coherence within administrative policy-making, see Michael A. Livermore, *Cost-Benefit Analysis and Agency Independence*, 81 U. CHI. L. REV. 609, 613 (2014), which argues that OIRA review can enhance agency independence; and Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1841-42 (2013), which defends OIRA's role and emphasizes its utility in coordinating agency actions.
  4. See, e.g., Daniel A. Farber, *Presidential Administration: Then and Now*, ADMIN. & REG. L. NEWS, Fall 2017, at 4, 5. Moreover, even supporters of presidential involvement are aware of the importance of presidential restraint in some contexts. See, e.g., Kagan, *supra* note 1, at 2356-57 (urging presidential restraint as to technical agency actions that depend on scientific methodology and conclusions).

should merely oversee agency action, not substitute their own decisions for those of agency heads.<sup>5</sup>

Congress, as the architect of the modern executive branch, can shape and control presidential power in a given policy domain through its statutory delegations. One important way in which Congress has designed agencies to resist presidential encroachment is by vesting all administrative authority on a given matter in an independent, bipartisan commission.<sup>6</sup> By preventing the President from removing the heads of such agencies without cause, Congress eliminates or at least limits a key source of presidential influence. Other structural determinants of agency independence include multimember structure, partisan balance, litigation authority, and self-funding mechanisms.<sup>7</sup>

Congress might also compromise by dividing authorities between agencies operating at varying degrees of remove from the White House. Such a compromise preserves some of the advantages of executive oversight while preventing total control by the President within a given policy domain. By dividing statutory authorities among administrative agencies, and by setting up checks and balances between them, Congress can influence not only the internal dynamics of the administrative state but also the relationship between the constitutional branches of government. Because constitutional architecture inspires these arrangements, this Article names them the “statutory separation of powers.”

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5. See, e.g., Peter L. Strauss, *Foreword: Overseer, or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007) (opining that the President’s role in ordinary administrative-law contexts is merely to oversee administrative action). Some commentators have proposed that courts should interpret congressional delegations to agencies as presumptively excluding presidential involvement unless the statute expressly identifies a presidential role. See, e.g., Kevin M. Stack, *The President’s Statutory Power to Administer the Laws*, 106 COLUM. L. REV. 263, 267-69 (2006).
  6. See *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935) (upholding the insulation of independent committee members from presidential removal); see also Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 26 (2010) (noting that “insulating agencies from presidential oversight may also protect them from capture because interest groups can exert pressure on the President to rein in agencies”).
  7. See Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 769 (2013) (identifying six such determinants, including “removal protection, multimember structure, partisan balance requirements, budget and congressional communication authority, litigation authority, and adjudication authority”); Jennifer L. Selin, *What Makes an Agency Independent?*, 59 AM. J. POL. SCI. 971, 974-77 (2015) (adding quorum requirements, civil-service protections for agency staff, and the existence of internal Inspector General offices to this list).

Scholars have recently begun to explore the myriad relationships among agencies more carefully.<sup>8</sup> These relationships are diverse and complex. They provide opportunities for synergy<sup>9</sup> as well as conflict.<sup>10</sup> And they have implications for presidential control over administrative policy. Although Presidents may enhance their authority by aggregating the functions of various agencies under certain conditions,<sup>11</sup> the division of policy authority between multiple agencies can also be a liability for entrepreneurial executives.

This Article incorporates insights from political science and legislative history to shed light on precisely how and why Congress creates particular statutory allocations of authority between agencies operating in the same subject area. It focuses on one particular relationship: that between the Department of Energy (DOE) and the Federal Energy Regulatory Commission (FERC). This relationship was forged in the crucible of dueling external forces: the energy crises of the 1970s and the Watergate scandal.<sup>12</sup> It therefore offers a window into Congress's design choices in the face of pressure from the White House to centralize and consolidate federal energy authorities, as well as a countervailing impulse to diffuse power horizontally as a safeguard against executive aggrandizement.

In the mid-1970s, Congress faced a choice. As retribution for the United States' support of Israel in the Arab-Israeli War of 1973, Arab oil producers imposed an embargo on shipments to the United States.<sup>13</sup> The embargo caused

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8. See, e.g., Daniel A. Farber & Anne Joseph O'Connell, *Agencies as Adversaries*, 105 CALIF. L. REV. 1375, 1375-76 (2017) (focusing on the impact of agency conflict on democratic governance); Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1134-35 (2012) (examining interagency coordination); Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 201-03 (examining jurisdictional statutes in administrative law); Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181, 182-83 (2011) (discussing duplicative agency delegations); Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655, 1657-58 (2006) (questioning the call for agency unification).
  9. See Freeman & Rossi, *supra* note 8, at 1135, 1136-37 (proposing methods to coordinate agency action in the face of overlapping and fragmented delegations); Bijal Shah, *Congress's Agency Coordination*, 103 MINN. L. REV. 1961, 1962-65 (2019) (arguing that Congress creates coordinated agency regimes by statute).
  10. See Farber & O'Connell, *supra* note 8, at 1384-85 (celebrating the political, social welfare, and legitimacy benefits of such conflict).
  11. See Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211, 212-18 (2015) (describing examples of the presidential combination of legal and other resources allocated to different administrative agencies and concluding that pooling is a significant tool of executive power).
  12. See *infra* Part II.
  13. DANIEL YERGIN, *THE PRIZE: THE EPIC QUEST FOR OIL, MONEY, AND POWER* 607-08 (1990).

widespread gasoline and electricity shortages.<sup>14</sup> In response, Presidents Nixon, Ford, and Carter each sought to consolidate federal energy authority in an executive agency subject to presidential control.<sup>15</sup> The recent emergency lent a sense of urgency to these actions, which were accompanied by the usual laundry list of justifications concerning the relative speed, decisiveness, and coordination of the executive branch.<sup>16</sup> President Carter ultimately proposed a new cabinet-level Department of Energy to coordinate federal energy policy.<sup>17</sup>

But Congress balked. Legislators had no desire to set up “an all-pervasive, all-powerful czar of energy in this country”<sup>18</sup> through legislation. Instead, the Department of Energy Organization Act of 1977 (DOE Act) divided federal authority over energy between two new agencies: one an executive department, the other an independent commission. These two agencies, DOE and FERC, were each granted key powers to shape and regulate federal energy markets. Clark Byse, who published the authoritative account of the DOE Act,<sup>19</sup> was an advocate of stronger, more centralized executive energy authority. “One is tempted to protest,” Byse wrote of the division of powers between DOE and FERC, “that this is a hell of a way to wage war: in the sunshine with an eviscerated commanding general.”<sup>20</sup> And yet Congress remained firm.

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14. In the 1970s, oil-fired power plants accounted for about twenty percent of fossil-fired electric power generation in the United States. See *Competition Among Fuels for Power Generation Driven by Changes in Fuel Prices*, U.S. ENERGY INFO. ADMIN. (July 13, 2012), <https://www.eia.gov/todayinenergy/detail.php?id=7090> [<https://perma.cc/G5GA-FN5N>]. That percentage declined rapidly in the wake of the oil crisis and is in the low single digits today. *Id.*
  15. See *infra* note 155 and accompanying text.
  16. See, e.g., President Gerald R. Ford, Address to the Nation on Energy Programs (May 27, 1975), <https://www.presidency.ucsb.edu/node/256768> [<https://perma.cc/78A6-GF9N>] (berating Congress for doing “nothing positive to end our energy dependence” and vowing “decisive[.]” action, promising to “now do what I can do as President”); President Jimmy Carter, Department of Energy Remarks Outlining Proposed Legislation to Create the Department (Mar. 1, 1977), <https://www.presidency.ucsb.edu/node/242857> [<https://perma.cc/W3VE-YW6J>] (emphasizing the speed and cohesion that the new department would bring to energy policy).
  17. William V. Thomas, *Federal Reorganization and Budget Reform*, in 2 EDITORIAL RESEARCH REPORTS 1977, at 661 (Hoyt Gilman ed., 1977), <https://library.cqpress.com/cqresearcher/cqresrr1977090900> [<https://perma.cc/S874-T9PM>].
  18. 123 CONG. REC. 15,279 (1977) (statement of Sen. Glenn).
  19. Clark Byse, *The Department of Energy Organization Act: Structure and Procedure*, 30 ADMIN. L. REV. 193 (1978).
  20. *Id.* at 200. Byse does not ascribe the congressional reluctance to centralize energy authority to any particular motivation, though he proposes several. He suggests that a general distrust of

Debates on the bill were peppered with references to the well-worn concept of separation of powers and its corollary, checks and balances. Senator Charles Percy (R-Ill.), the ranking Republican on the Senate Committee on Government Operations, explained that the legislation set up a “carefully constructed balance of power between the Secretary and [an independent agency].”<sup>21</sup> And the Senate Committee on Governmental Affairs’s report indicated their reluctance to give responsibility for “both proposing and setting [energy] prices” to a single administrator, “especially where such person has a multitude of other policy and administrative responsibilities.”<sup>22</sup> Congress also set up checks between the two agencies, allowing each to serve as a safeguard against policy aggrandizement by the other.<sup>23</sup> Representative Robert McClory (R-Ill.) objected to an early version of the bill that vested more concentrated authority in DOE by noting that “[o]ur way of government includes checks and balances and safeguards,” and observing that the bill was “deficient in failing to provid[e] these safeguards.”<sup>24</sup>

Congress’s division of responsibility between agencies in the DOE Act, and its creation of entanglements, or checks, between them, is thus an exemplar of the statutory separation of powers. The Act’s separation and balancing was inspired by its constitutional cousin. It addresses many of the same concerns, including the perils of aggregating power in a single actor and the desire to prevent rapid shifts of power. Rather than concerning itself with the exercise of power in the federal government as a whole, however, it addresses these concerns in the context of a single policy domain.

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the presidency after Watergate may have contributed to congressional uneasiness, and proposes that the distrust may have also been of President Carter himself, an outsider, and his team. *Id.* at 202-03.

21. 123 CONG. REC. 15,278 (1977) (statement of Sen. Percy). In this version of the bill, the President was also permitted to veto the Board’s action if he disapproved. S. 826, 95th Cong. § 404(c) (1977). Statements in the record suggest that at least part of the reason for assigning some responsibilities to an independent agency was fear of executive agency capture. Senator William Roth (R-Del.) wondered aloud during a hearing on the legislation whether, given that “the oil company lobbyists were too close to the sources of power involved in decision-making,” both “during and prior to Watergate,” new legislation consolidating energy policy-making in the executive might subject that policy-making to special interest influence. *Department of Energy Organization Act: Hearings on S. 826 and S. 591 Before the S. Comm. on Governmental Affairs*, 95th Cong. 486 (1977) (statement of Sen. Roth).
22. S. REP. NO. 95-164, at 37 (1977). Senator Ribicoff (D-Conn.) reiterated these concerns on the floor. *See* 123 CONG. REC. 15,275 (1977) (statement of Sen. Ribicoff).
23. *See infra* Section II.D.
24. 123 CONG. REC. 17,310 (1977) (statement of Rep. McClory). Representative McClory voted for the Moss-Brown Amendment that strengthened FERC vis-à-vis the DOE. *See id.* at 17,307, 17,310.



The Article proceeds as follows. Part I introduces the idea of a statutory separation of powers. It argues that, steeped as Congress is in the tradition of constitutional separation of powers, it is only natural that it should at times replicate those design principles in its legislative delegations. This Part first explains how separating statutory powers both checks executive authority and responds to concerns about administrative accountability. It then offers a new typology of statutory separation and checks and balances to explain the phenomenon and define its limits. This typology demonstrates the diversity of options available to Congress in crafting horizontal relationships between federal agencies.

Part II presents the case study. It describes the DOE Act's passage and its separation of powers between DOE and FERC. It first presents the division of horizontal authority in historical context. Next, it describes Congress's allocation of authority between the two agencies and the statutory entanglements between them. Finally, it details these entanglements using the typology created in Part I.

Part III turns to the overlooked temporal dimension of agency relationships. The statutory separation of powers has its origin in Congress's design decisions, but like its constitutional counterpart, it evolves over time. Although separating and balancing statutory powers can be a useful strategy for avoiding concentrations of authority within the administrative state, it is a delicate business. This Part considers broader lessons from the evolution of the DOE Act's statutory scheme for the statutory separation of powers. It focuses on three areas in particular: the initial allocation of powers, the risk of executive-agency aggrandizement, and the need to adjust power allocations over time. It argues that certain types of separation and balance, notably those that divide authority between an independent agency and an executive department, are particularly unstable. These instabilities and the risk that executive agencies will read statutory authorizations expansively are particularly evident in energy regulation today. DOE is flexing its statutory muscle, having put a proposal before FERC to compensate coal-fired power more generously in wholesale energy markets, and pondering more aggressive emergency action in the wake of that proposal's failure. These efforts are a reminder that statutory checks can also be tools of aggrandizement. Ironically, after lying virtually dormant for many years, the entanglements Congress created between DOE and FERC now threaten to undo the careful balance it constructed.

## I. STATUTORY SEPARATION OF POWERS

“Separation of powers” as an ethos has assumed a prominent, if unstable, identity in American legal discourse. The idea has deep historical roots.<sup>25</sup> It is also the core design principle of our constitutional system of government.<sup>26</sup> By dividing power between the legislature, the executive, and the judiciary, the Founders sought to prevent any one branch from amassing sufficient authority to govern without constraint.<sup>27</sup>

Commentators have increasingly applied separation-of-powers logic to sub-constitutional government arrangements.<sup>28</sup> Indeed, given what Jeremy Waldron has called separation of powers’s status as “an important principle of our political theory,”<sup>29</sup> it would be surprising if the idea’s impact were not felt in subconstitutional domains. This Part extends the logic of separation of powers and its corollary, checks and balances, to statutory design. Legislation can be a vehicle

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25. See BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* bk. XI, ch. IV (Anne M. Cohler ed. & trans., Cambridge Univ. Press 1989) (1748) (articulating a theory of functional separation of powers in government so that power may check power). Montesquieu’s theory was based on observations about the English constitution and was a rejection of Thomas Hobbes’s preference for consolidation of power in the executive. See THOMAS HOBBS, *LEVIATHAN* (A.P. Martinich ed., Broadview Press 2002) (1651); see also JOHN LOCKE, *THE SECOND TREATISE: AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT, AND END OF CIVIL GOVERNMENT* § 144 (Ian Shapiro ed., Yale Univ. Press 2003) (1689) (“[T]hus the *Legislative* and the *Executive Power* come often to be separated.”).
  26. See *THE FEDERALIST* NO. 47, at 245–46 (James Madison) (Ian Shapiro ed., Yale Univ. Press 2009) (describing “[n]o political truth” as “certainly of greater intrinsic value, or . . . stamped with the authority of more enlightened patrons of liberty” than “the political maxim, that the legislative, executive, and judiciary departments ought to be separate and distinct”). Jeremy Waldron opines that the separation of powers was “accepted among the founding generation as an established touchstone of constitutional legitimacy.” Jeremy Waldron, *Separation of Powers in Thought and Practice?*, 54 B.C. L. REV. 433, 437 (2013).
  27. *THE FEDERALIST* NO. 47, *supra* note 26, at 245 (James Madison) (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.”); see also *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) (“The doctrine of the separation of powers was adopted . . . not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.”).
  28. See, e.g., Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 520 (2015) (referring to a “subconstitutional separation of powers” that keeps administrative agencies in check); see also Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989 (2006) (advocating a formalist approach to the separation of powers in the criminal state).
  29. Waldron, *supra* note 26, at 435 (emphasis removed).

for the expression of norms,<sup>30</sup> and these norms are often of constitutional origin.<sup>31</sup> I argue here that Congress has internalized a particular set of constitutional norms (separation of powers and checks and balances) and replicated them at a statutory level.<sup>32</sup> This internalization may be seen in Representative McClory's reminder to his colleagues during debates on the DOE Act that "[o]ur way of government includes checks and balances and safeguards."<sup>33</sup>

This Part first explains why Congress seeks to replicate the constitutional separation of powers at the statutory level. It then offers a typology of separations and checks in order to define the statutory separation of powers and to demonstrate the rich variety of schemes that fall within its ambit.

### A. *Why Separate and Balance Statutory Powers?*

The literature on agency design demonstrates that Congress shapes the structure and procedures of administrative agencies for various ends.<sup>34</sup> While commentators have not used the precise terminology of separated and balanced delegations, they have suggested that creating competition between bureaucratic agents makes it more likely that these agents will effectuate congressional purposes.<sup>35</sup> They have also suggested that plural delegations can leverage broader

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30. See, e.g., Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 397-98 (1997).

31. See, e.g., Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 66 (2008) (listing several such norms, including "respect for the rights of regulated parties, protection of the interests of states and Native American tribes, avoidance of government bias, and separation of powers").

32. We see similar moves in the context of federalism. Congress is influenced by constitutional federalism in its creation of cooperative statutory regimes between the states and the federal government. See Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663 (2001) (recognizing the constitutional influence on Congress's design choices).

33. 123 CONG. REC. 17,310 (1977) (statement of Rep. McClory).

34. Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987).

35. See O'Connell, *supra* note 8, at 1677, 1705.

agency expertise,<sup>36</sup> hedge against failure or capture,<sup>37</sup> and facilitate congressional monitoring of agency behavior;<sup>38</sup> Congress might also favor overlapping delegations because conflict stimulates creativity, because agencies learn from one another, or because they can correct one another's mistakes.<sup>39</sup>

This Section suggests two additional motives for the division of responsibility over particular subject matters between federal agencies and for the creation of checks between them. The first, building on the political-science literature, characterizes agency design as a tool of political control. It suggests that Congress sometimes divides delegations between independent and executive agencies, as opposed to delegating all authority in a given area to the latter, to mitigate presidential power. But Congress might also seek fragmentation of policy authority to prevent the dominance of a single perspective within the bureaucracy (regardless of how this affects the constitutional balance of powers). In all likelihood, some combination of these motivations inspires Congress in any given instance. This Section will discuss each in more detail.

Both motivations for separating powers at the statutory level harken back to the concerns about faction<sup>40</sup> and tyranny that animated constitutional separation

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36. See Gersen, *supra* note 8, at 212-13 (suggesting that competition between agencies in a given jurisdictional space might incentivize them to invest in expertise to avoid being deprived of their jurisdiction at a later date); see also Freeman & Rossi, *supra* note 8, at 1142 (suggesting that combinations of agency expertise may produce better policy and that public-interested policymakers may actively seek this outcome); Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1462-64 (2011) (arguing that institutional redundancy or overlap may better aggregate information dispersed across agencies, provide insurance against error, and contribute complementary inputs to the final outcome).

37. On the utility of overlapping delegations in hedging against failure, see Freeman & Rossi, *supra* note 8, at 1138. On their role in preventing capture, see O'Connell, *supra* note 8, at 1677.

38. See O'Connell, *supra* note 8, at 1694 (citing Mathew McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984)).

39. See Farber & O'Connell, *supra* note 8, at 1423-29 (describing the benefits of conflict between agencies in symmetrical relationships, where neither agency can veto the other's actions).

Of course, overlapping delegations may sometimes be the result of compromise or accident. Turf wars between congressional committees can result in legislative compromises that distribute authority among agencies subject to the various committees' jurisdiction. See DAVID C. KING, *TURF WARS: HOW CONGRESSIONAL COMMITTEES CLAIM JURISDICTION* 11-32 (1997). And Jason Marisam argues that duplicative delegations can be the unintentional result of congressional reliance on ambiguous language and savings clauses. Marisam, *supra* note 8, at 191-93. But the text and legislative history of the DOE Act described in the next Part confirm that congressional divisions of delegated authority can be intentional design choices. See *infra* Part II.

40. In *The Federalist Papers*, Madison defined "faction" as "a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent

of powers at the nation's founding.<sup>41</sup> President Washington enumerated two of the most pointed dangers in his farewell address. First, he cautioned that “[t]he alternate domination of one faction over another . . . is itself a frightful despotism.”<sup>42</sup> Although he did not elaborate, we can fill in the gaps. The reversal and re-reversal of policies on an electoral schedule is both jarring and expensive. Second, Washington warned, partisanship can lead “at length to a more formal and permanent despotism. . . . [S]ooner or later the chief of some prevailing faction, more able or more fortunate than his competitors, turns this disposition to the purposes of his own elevation, on the ruins of public liberty.”<sup>43</sup>

The constitutional separation of powers served to mitigate the risks Washington described. Yet Congress may still be legitimately concerned with consolidated power when it delegates to agencies. Administrative agencies are responsible for both rulemaking and law execution, giving them significant power in their individual domains.<sup>44</sup> And especially on a day-to-day basis, the sphere of administrative discretion is vast.<sup>45</sup> Concentrating discretion within a substantive domain such as health policy, immigration policy, or environmental policy in the hands of a single agency thus has its risks. This is especially true when authority is vested in agencies headed by a single director or administrator. Such agencies,

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and aggregate interests of the community.” THE FEDERALIST NO. 10, *supra* note 26, at 48 (James Madison). I have that definition in mind here.

41. Of course, the goals of the constitutional separation of powers are generally acknowledged to be broader than these two and include accountability and effectiveness in addition to prevention of tyranny. See, e.g., JESSICA KORN, THE POWER OF SEPARATION: AMERICAN CONSTITUTIONALISM AND THE MYTH OF THE LEGISLATIVE VETO 14-26 (1996) (singling out effective governance and prevention of tyranny as important values); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1729-30 (1996) (pointing to balance, accountability to the electorate, and energetic, efficient government); Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 351 (2016) (emphasizing the pluralism of values motivating constitutional structure).
42. George Washington, Farewell Address (Sept. 19, 1796), <https://www.ourdocuments.gov/doc.php?doc=15&page=transcript> [<https://perma.cc/DC4W-7BSN>] (referring to the dangers of the party system).
43. *Id.* Though these comments postdate the drafting of the Constitution, they encapsulate the Framers' fears.
44. For a discussion of the relationship between subject-matter restrictions and forms of authority in the administrative state, see Todd D. Rakoff, *The Shape of the Law in the American Administrative State*, 11 TEL AVIV U. STUD. L. 9, 22 (1992).
45. On the scope of discretion, see, for example., Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1487 (1983), which observes a pattern of “procedural catch-up” in which agencies shift their discretion into new areas as courts and Congress develop new oversight tools; and William H. Simon, *The Organizational Premises of Administrative Law*, 78 LAW & CONTEMP. PROBS. 61 (2015), which argues that canonical administrative law tolerates broad pockets of administrative discretion.

with their strong hierarchical structures, place ultimate policy-making responsibility in a solitary individual.<sup>46</sup> More worrisome, the heads of these agencies are typically subject to removal at the discretion of the President. Assigning them broad authority thus has implications for both administrative and constitutional separations of power.

### 1. *Statutory Separation of Powers as a Limit on Presidential Authority*

Especially where Congress divides authority between executive and independent agencies, the independent agency can act as a counterweight to presidential influence. Scholars generally agree that we live in an age of executive-branch ascendancy.<sup>47</sup> Although the Framers were concerned primarily with the risk of legislative dominance,<sup>48</sup> today the most significant threat of tyranny comes from the presidency.<sup>49</sup> Electoral accountability is insufficient to mitigate this threat, in part because presidential elections are a blunt tool for assessing voter preference.<sup>50</sup> Consider energy policy. President Trump favors fossil-fuel

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46. In certain areas of financial policy, for example, the Director of the Consumer Financial Protection Bureau “alone decides what rules to issue; how to enforce, when to enforce, and against whom to enforce the law; and what sanctions and penalties to impose on violators of the law.” *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 7 (D.C. Cir. 2016), *rev’d*, 881 F.3d 75 (D.C. Cir. 2018) (en banc). Some internal checks on administrators have been described in the administrative separation-of-powers literature. See *infra* notes 54-57 and accompanying text. But there is no question that single heads of agencies exercise significant authority over the direction of policy-making at their agency and proportionately more authority than do members of multimember commissions. The description holds true for the heads of executive agencies as well, albeit mitigated somewhat by the availability of more direct presidential oversight.
47. See, e.g., William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 533 (1992) (identifying a shift from congressional to presidential lawmaking); Flaherty, *supra* note 41, at 1727-30 (opining that “[n]ever has the executive branch been more powerful, nor more dominant over its two counterparts” and accusing the judiciary of complicity in expanding executive power); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 123-24 (1994) (identifying delegations of congressional authority to the executive branch as a key source of expanded presidential power).
48. See, e.g., James T. Barry III, *The Council of Revision and the Limits of Judicial Power*, 53 U. CHI. L. REV. 235, 249 & n.64 (1989) (noting the Framers’ “fear of overly powerful legislatures”). The presidential veto and division of the legislature into two houses were designed to answer the risk of a dominant legislature.
49. See, e.g., Josh Blackman, *Presidential Maladministration*, 2018 U. ILL. L. REV. 397 *passim* (2018); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2320-22 (2006).
50. See Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385, 1393-94 (2008) (noting that because voters must make electoral decisions based on a bundle

extraction, while a majority of Americans prefer the development of renewable energy sources.<sup>51</sup> This result is unsurprising when one considers that voters in the 2016 election largely failed to identify either energy or environmental policy as the issue they cared most about.<sup>52</sup>

The rise of presidential authority is due, in part, to the growth of the administrative state, a significant fraction of which falls under the President's direct or indirect control.<sup>53</sup> One response to growing executive power is for the branch to check itself from within. Neal Katyal, for example, recommends the adoption of robust civil-service protections so that government bureaucrats can act as a counterweight to political appointees without fear of reprisal.<sup>54</sup> Gillian Metzger has also concluded that internal executive checks can mitigate presidential

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of policies, the executive they elect is unlikely to act in ways that align with all of their preferences); *see also* Flaherty, *supra* note 41, at 1825 (questioning the linkage between presidential elections and the public will). Flaws in our electoral process further contribute to the disconnect between voter preference and presidential platforms. *See* THOMAS H. NEALE, CONG. RESEARCH SERV., RL32611, THE ELECTORAL COLLEGE: HOW IT WORKS IN CONTEMPORARY PRESIDENTIAL ELECTIONS 8 (2017).

51. *See* Brian Kennedy, *Two Thirds of Americans Give Priority to Developing Alternative Energy over Fossil Fuels*, PEW RES. CTR. (Jan. 23, 2017), <https://www.pewresearch.org/fact-tank/2017/01/23/two-thirds-of-americans-give-priority-to-developing-alternative-energy-over-fossil-fuels> [<https://perma.cc/YD5L-H98U>] (reporting on a poll that found that sixty-five percent of respondents favored the development of alternative energy sources like wind, solar, and geothermal over the development of fossil fuel sources like coal, oil, and gas, while only twenty-seven percent would prioritize the latter).
52. Jon Huang et al., *Election 2016: Exit Polls*, N.Y. TIMES (Nov. 8, 2016), <https://www.nytimes.com/interactive/2016/11/08/us/politics/election-exit-polls.html> [<https://perma.cc/A8KL-ZP95>] (reporting that voters identified the economy, terrorism, immigration, and foreign policy as their most important issues).
53. *See, e.g.*, Kagan, *supra* note 1, at 2246-48 (discussing presidential control of the bureaucracy as an instrument of power); Katyal, *supra* note 49, at 2317 (arguing that the executive branch has grown more powerful than the Framers intended, thereby disrupting the balance between the legislative, executive, and judicial branches of government thought essential to preventing tyranny); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 428-29 (2009) (discussing “the view that the greatest threat of aggrandized power today lies in the broad delegations of power to the Executive Branch that characterize the modern administrative and national security state”). Some commentators have found cries of executive-branch dominance unduly alarmist. Eric Posner and Adrian Vermeule argue that even given capacious legislative delegations to agencies and expansive executive emergency authority, politics still acts as a sufficient check on the President and, by extension, on the bureaucracy. ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 12-14 (2010).
54. Katyal, *supra* note 49, at 2331-34.

power.<sup>55</sup> Metzger identifies a variety of internal executive-branch constraints, including the separation of function within agencies, career protections for civil servants, the organization of employees into distinct organizational units, the presence of internal agency watchdogs, and the procedural constraints of the Administrative Procedure Act.<sup>56</sup>

The idea of a statutory separation of powers complements Metzger's and Katyal's accounts by making explicit Congress's role in creating intraexecutive checks.<sup>57</sup> Congress's position as one branch of government in a system of separated powers creates distinct incentives to preserve and potentially enlarge its own influence vis-à-vis the President.<sup>58</sup> This frequently means delegating to an independent as opposed to an executive agency.<sup>59</sup> But Congress's design discretion, while substantial, is not unlimited. The President's veto authority operates as a forceful check on delegation decisions, including on efforts to separate authority by delegating to independent agencies. President Ford, for example, was able to prevent Congress from creating an independent agency to represent consumers during his tenure.<sup>60</sup> Because legislation to create the agency had passed the House with a very small margin (208-199), its backers elected not to send it to President Ford for an all-but-certain veto.<sup>61</sup>

Where Congress cannot secure enough votes to override a veto, or when its political capital is at a low ebb, we can expect a compromise between presidential and congressional preference. Thus, where the President proposes the creation

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55. Metzger, *supra* note 53, at 424-25.

56. *Id.* at 429-31.

57. Where Metzger takes checks as a given, for example, this account explores their origins in congressional delegations. Katyal, by contrast, devotes more space to agency design. But his focus is on allocating administrative authority in a way that will produce the best information to support presidential decisions, not on checking the President. Katyal, *supra* note 49, at 2325-27.

58. As David Lewis has recognized, administrative design "is fundamentally the product of inter- and intra-branch negotiations among political actors with individual interests shaped both by the institutional incentives of their branches and by their policy preferences." DAVID E. LEWIS, *PRESIDENTS AND THE POLITICS OF AGENCY DESIGN: POLITICAL INSULATION IN THE UNITED STATES GOVERNMENT BUREAUCRACY, 1946-1997*, at 22 (2003).

59. *Id.* at 19 (citing evidence that agencies created by executive action are much less likely to be insulated from political control than those created through legislation).

60. *See id.* at 86-87. President Ford offered, as a counterproposal, to enhance the consumer protection responsibilities of existing executive departments and agencies. *See Consumer Agency Bill*, CQ ALMANAC (1976), <https://library.cqpress.com/cqalmanac/document.php?id=cqal76-1186811> [<https://perma.cc/U7X2-XHE2>].

61. *See Consumer Agency Bill*, *supra* note 60. Lewis describes the President's authority over congressional delegations as deriving from his veto authority, from his chief-executive position, and from the advantages of his status as a unitary actor. LEWIS, *supra* note 58, at 19.



of a new, powerful executive department (as President Carter did in the 1970s with DOE), Congress might assert itself through the creation of a companion independent commission (as it did in creating FERC). Party affiliation may have little to do with these dynamics. At the time of the DOE Act's passage, President Carter occupied the Oval Office, and Democratic majorities governed both chambers of Congress (with a filibuster-proof majority in the Senate).<sup>62</sup> Yet in the wake of Watergate and a recession in the early part of the decade, "[c]ongressmen felt no need to vote with the White House on legislative matters solely for reasons of Party loyalty."<sup>63</sup>

Of course, arrangements that have the potential to limit presidential power under some conditions have the potential to expand or enhance it under others.<sup>64</sup> Where agencies work together, either in a version of Bijal Shah's statutory coordination,<sup>65</sup> Jody Freeman and Jim Rossi's agency-led collaboration,<sup>66</sup> or Daphna Renan's presidential "pooling,"<sup>67</sup> they can support as well as stymie presidential initiatives. Part III discusses conditions under which the President might manipulate the statutory checks between agencies to further her own agenda. But as the case study in Part II demonstrates, where opinion is divided within the bureaucracy about the best way to proceed, and especially where a strong independent agency is available to check executive policy, separated powers are likely to mitigate rather than magnify presidential power in a given policy domain.

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62. See Richard L. Madden, *Carter's Relationship with Congress May Depend on a Series of Leadership Battles Before He Takes Office*, N.Y. TIMES (Nov. 13, 1976), <https://www.nytimes.com/1976/11/13/archives/carters-relationship-with-congress-may-depend-on-a-series-of.html> [https://perma.cc/HE6T-9X4Y].

63. G.D. Loescher, *Carter's Human Rights Policy and the 95th Congress*, 35 WORLD TODAY 149, 151 (1979); see also Eric L. Davis, *Legislative Reform and the Decline of Presidential Influence on Capitol Hill*, 9 BRIT. J. POL. SCI. 465, 465 (1979) (noting that the 95th Congress did not take positive action on many of President Carter's legislative proposals despite a nearly two-to-one majority in both houses). The Democrats in Congress were also still experiencing declining party loyalty from Southern Democrats. See Alan I. Abramowitz, *Is the Revolt Fading? A Note on Party Loyalty Among Southern Democratic Congressmen*, 42 J. POL. 568 (1980) (finding very little improvement in party unity between Southern and Northern Democrats in the late 1970s).

64. See M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 637 (2001) (observing that government power is not "a zero-sum product" and that "[a]rrangements could weaken, or strengthen, different branches at the same time").

65. Shah, *supra* note 9.

66. Freeman & Rossi, *supra* note 8, at 1161-65 (describing agencies' voluntary use of memoranda of understanding to coordinate action).

67. Renan, *supra* note 11, at 218-40.

## 2. *The Administrative Virtues of Fragmentation*

Congress need not have the constitutional separation of powers squarely in mind when it divides power between agencies and sets up checks and balances between them. A second justification for the statutory separation of powers is purely internal to the administrative state. By ensuring that no administrative actor can shape policy unilaterally, fragmenting authority within the executive branch can minimize the potential for tyranny by any one faction or interest within the administrative state. Jon Michaels expands on this idea in his argument for an “administrative separation of powers” between agency political leadership, civil servants, and civil society.<sup>68</sup> Fracture and messiness, by this account, are beneficial features of the bureaucracy rather than problems to be remedied.<sup>69</sup> As Michaels puts it, the division of responsibility for administrative policy “reconcile[s] Madison with modernity.”<sup>70</sup>

The idea of a statutory separation of powers complements the administrative-separation-of-powers literature in three ways. First, it highlights *Congress’s* role in creating and maintaining administrative separation and balance. In this way, it knits together theories of congressional delegation and agency design with the idea of administrative separation of powers. Second, it enlarges the discussion to focus not just on relationships *within* agencies, but also *among* them.<sup>71</sup> Although the idea of interagency checking has been mentioned by some commentators,<sup>72</sup> it deserves separate treatment. Finally, the existing literature takes a static approach to the division of administrative authorities. But the success or failure of schemes to separate and balance power between agencies can only be evaluated over time. By introducing a temporal dimension into the analysis, Part

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68. JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION’S THREAT TO THE AMERICAN REPUBLIC 144 (2017).

69. *See id.* at 10.

70. *Id.* at 17 (elaborating that separation within the administrative bureaucracy “anchor[s] . . . administrative agencies firmly within the constitutional tradition of employing rivalrous institutional counterweights to promote good governance, political accountability, and compliance with the rule of law”).

71. The primary focus of the administrative-separation-of-powers literature has been on the relationship between political appointees, civil servants, and civil society. *See id.* at 16 (arguing that administrative power is “triangulat[ed]” between these actors).

72. *See* Farber & O’Connell, *supra* note 8, at 1422-23 (identifying various power dynamics between agencies as well as flagging ways that internal checks and balances—and their safeguards—guard against abuse of power, as one benefit of such arrangements); Katyal, *supra* note 49, at 2324-28 (discussing the idea of agency redundancy primarily as a way of ensuring varied advice to the President).

III warns that initial divisions designed to preserve a role for independent agencies in a given policy arena can, if not carefully crafted, evolve to favor greater executive control.

### B. *The Shape of the Doctrine*

This Section elaborates the forms that the statutory separation of powers can take. Because the separation of powers, as an ethos, does not prescribe particular arrangements but merely suggests the application of general principles, the statutory separation of powers takes many forms. It need not adhere strictly to the Founders' brand of divided authority.<sup>73</sup> It may be complete or partial. It may be balanced or unbalanced. At a minimum, however, a statutory separation of powers will seek to divide authority among administrative actors so that no one actor can fully control the direction of substantive policy within a discrete subject-matter area. In keeping with its constitutional counterpart, moreover, the statutory separation of powers is likely to include mechanisms that allow agencies to check one another.<sup>74</sup> These checks play a key role in maintaining divisions of authority, as they allow agencies to resist aggrandizement and encroachment by their counterparts.

#### 1. *Separation*

The most visible manifestation of statutory separation of powers is the division of statutory responsibilities between two or more agencies. Existing typologies of redundant and overlapping delegation stress two features: whether statutory authorities are divided along *functional lines*<sup>75</sup> and the *degree of overlap* between agencies. An additional attribute, particularly vital in statutory separation-of-powers schemes, is the *relative independence* of each agency from the

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73. See, e.g., E. Donald Elliott, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506, 511 (1989) (arguing that even the courts should not slavishly adhere to the Framers' specific intentions with respect to separation of powers and should instead be guided by their spirit).

74. Statutory separation of powers therefore involves a special arrangement of overlapping agency delegations. Not all redundancies constitute such an arrangement, although redundancy may feature in a statutory separation-of-powers scheme.

75. Elizabeth Magill cautions against separation-of-powers formalism. See Magill, *supra* note 64 and accompanying text. Mindful of Magill's critique, this Section presents schemes that track notions about the "core" role of particular administrative actors as but one exemplar of a larger set of arrangements, all of which might satisfy the basic conditions of a statutory separation of powers.

White House. Examples elucidating each of these categories are discussed briefly below.

First, as with the constitutional separation of powers, many congressional delegations separate authorities between agencies along functional lines; for example, by dividing adjudicative, prosecutorial, and rulemaking authority. The adjudicative agency is often given some degree of independence, while the agency charged with legislative and executive authority remains subject to greater presidential oversight. Pairs of agencies whose authorities were divided along functional lines include the Federal Mine Safety and Health Review Commission (adjudication) and the Mining Safety and Health Administration (rulemaking and civil prosecution)<sup>76</sup>; the Occupational Safety and Health Review Commission (adjudication) and the Occupational Safety and Health Administration (rulemaking and civil prosecution);<sup>77</sup> and the Energy Research and Development Administration (research and promotion of nuclear technology) and the independent Nuclear Regulatory Commission (permitting and safety regulation).<sup>78</sup> This last division resulted from fears that the Atomic Energy Commission's dual mission of nuclear-power promotion and safety regulation created a conflict of interest.<sup>79</sup>

Sometimes Congress divides authority *within* functional domains.<sup>80</sup> Indeed, Jacob Gersen suggests that “statutes that parcel out authority or jurisdiction to

76. 30 U.S.C. §§ 801-966 (2018).

77. 29 U.S.C. §§ 651-678 (2018). Both Mining Safety and Health Administration and Occupational Safety and Health Administration refer cases of potential criminal violation to the Department of Justice for prosecution. See Daniel J. Gifford, *Adjudication in Independent Tribunals: The Role of an Alternative Agency Structure*, 66 NOTRE DAME L. REV. 965, 967 (1991) (noting that several agencies rely on the federal courts for adjudication of claims brought by the agency). Even if an agency combines all three functions, there are internal-siloing requirements.

The Administrative Procedure Act of 1946, whose requirements apply to agencies unless Congress expressly supplants them by separate statute, obligates agencies to maintain separation between officials who investigate or prosecute a case and those who preside over its adjudication. 5 U.S.C. § 554(d) (2018).

78. 42 U.S.C. §§ 5801-5891 (2018).

79. *Id.* § 5801(c) (finding that the separation was in the public interest).

80. In such cases, the precise tasks assigned to each agency may not be identical, but each is properly characterized as, for instance, “rulemaking” as opposed to “prosecutorial” or “adjudicatory” authority. When it comes to rulemaking, for example, the authority to propose rules might be separated from the authority to dispose of them; the DOE Act allocates some policy-making proposal authority to the DOE while vesting disposal authority with FERC. Pub. L. No. 95-91, § 403, 91 Stat. 565, 585 (codified at 42 U.S.C. § 7173 (2018)).

multiple agencies may be the norm, rather than an exception.”<sup>81</sup> Examples include EPA and the Department of Transportation’s effective joint authority over motor-vehicle efficiency,<sup>82</sup> EPA and FERC’s shared responsibility for hydroelectric permitting,<sup>83</sup> and the relationship described in greater detail in the next Part between FERC and DOE.<sup>84</sup> Similarly, section 216 of the Federal Power Act divides responsibility for federal siting of interstate electric transmission lines between FERC and DOE, requiring that DOE first designate suitable corridors but then granting FERC sole authority to issue permits for the lines.<sup>85</sup>

Second, the degree of overlap between agency authorities varies. Freeman and Rossi observe that delegations might involve genuinely overlapping authority, related jurisdictional assignments, interacting jurisdictional assignments, or merely delegations requiring concurrence.<sup>86</sup> Federal antitrust enforcement, for example, is split between the independent Federal Trade Commission and the Department of Justice.<sup>87</sup> These agencies have substantially overlapping authority and therefore must coordinate to divide up particular responsibilities.<sup>88</sup> By contrast, Congress carefully divided the tasks of siting interstate transmission lines between FERC and DOE with no overlap between them. Instead, DOE’s identification of National Interest Electric Transmission Corridors is a prerequisite for FERC to permit new lines.<sup>89</sup>

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81. Gersen, *supra* note 8, at 208.

82. See Freeman & Rossi, *supra* note 8, at 1169-73.

83. See J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217, 2254, 2260, 2262-63 (2005) (explaining the roles of public-resource agencies and FERC and detailing their interactions).

84. See *infra* Part II.

85. 16 U.S.C. § 824p (2018). State authorities retain primary authority to site lines, but FERC may do so if certain enumerated conditions are met. *Id.*

86. Freeman & Rossi, *supra* note 8, at 1145. Freeman and Rossi offer a detailed analysis of agencies’ potential coordination tools and their implications for presidential and judicial oversight of agencies. *Id.* This Article builds on their account by elaborating on Congress’s role in both creating and managing agency authorities.

87. See William E. Kovacic, *Downsizing Antitrust: Is It Time to End Dual Federal Enforcement?*, 41 ANTITRUST BULL. 505, 508 (1996).

88. See, e.g., *Premerger Notification and the Merger Review Process*, FED. TRADE COMMISSION (Apr. 9, 2019, 6:56 PM), <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/premerger-notification-merger-review> [<https://perma.cc/XXG7-6QJ6>] (describing the interagency “clearance process” by which the two agencies decide which will review a given merger filing).

89. FERC is only authorized to grant siting applications if states have withheld their approval for more than a year or have conditioned approval in a way that will prevent the line from reducing transmission congestion or that makes the line economically infeasible. 16 U.S.C. § 824p(b)(1)(C) (2018).

Finally, in the statutory separation of powers, agencies' relative position within the bureaucracy matters. Congress might separate powers between two or more executive departments, between two or more independent commissions, or between executive agencies and independent commissions.<sup>90</sup> Although each could have fragmentation advantages, the last arrangement—like the one that separated energy authorities between DOE and FERC—can harness the efficiency and coordination advantages of executive action while providing some checks on presidential authority.<sup>91</sup>

Congress also divided authority between an executive and an independent agency when it created the Federal Trade Commission in 1914 as a counterpart to the Department of Justice's Antitrust Division.<sup>92</sup> The conventional account of the Federal Reserve's creation similarly emphasizes its statutory separation from the executive,<sup>93</sup> a circumstance that has led to friction over the years with the

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90. The description of agencies as either “executive” or “independent” is oversimplified, but the categories have sufficient meaning to be useful for purposes of this discussion. For a more nuanced description of agency independence, see *infra* Section III.C.2.
91. Of course, independent agencies are only *relatively* independent from the President in that the President still nominates the men and women who head them. While these nominees require Senate consent, the ability to select a nominee who is more or less inclined to share presidential priorities carries significant power to shape an agency's agenda. See *infra* Section III.C.2 for a discussion of how recent nominations have affected FERC's ability to act as a counterweight to the DOE.
92. Richard Posner notes that proponents of administrative process might have supported the creation of the Federal Trade Commission in 1914 because of its institutional advantages and, in particular, its commissioners' freedom from “heavy-handed political interference by the White House.” Richard A. Posner, *The Federal Trade Commission: A Retrospective*, 72 *ANTI-TRUST L.J.* 761, 767 (2005). Posner himself is skeptical of “the theoretical case for the superiority of the administrative process over the judicial and the legislative.” *Id.* While the Department of Justice's Antitrust Division was not formally established until 1919, the legislative history of the Federal Trade Commission Act of 1914 refers to the advantages of removing antitrust authority, at least in part, from White House control. See 51 *CONG. REC.* 8,842 (1914) (statement of Rep. Covington) (explaining why “the bill remove[d] entirely from the control of the President and the Secretary of Commerce the investigations conducted . . . by the commission . . .”); see also *id.* at 8,857 (statement of Rep. Morgan) (speaking in favor of the creation of an independent commission that is “[i]ndependent of the President, independent of Cabinet Officers, [and] removed so far as possible from partisan politics”).
93. See Peter Conti-Brown, *The Institutions of Federal Reserve Independence*, 32 *YALE J. ON REG.* 257, 263–65 (2015) (describing the standard account as focusing on the “statutory separation . . . between the *President* and the *Fed Chair*” but enhancing that account with nonstatutory determinants of Federal Reserve independence).

Department of the Treasury, the agency from which the Federal Reserve's powers were removed.<sup>94</sup>

Because a constellation of structural, procedural, and political characteristics affects an agency's independence,<sup>95</sup> the ability of a particular so-called "independent" agency to push back on executive policies will vary. Congress appears to have been particularly careful in insulating FERC from both presidential and Department of Energy politics.<sup>96</sup> In the Senate debate on the DOE Act, Senator Lee Metcalf (D-Mont.) came out in favor of a truly independent counterweight to DOE, opining that "independent regulatory agencies . . . provide[] a balance against undue Executive authority."<sup>97</sup> And Representative Jack Brooks (D-Tex.) supported assigning some energy functions to an agency whose five members would "hire their own staff and hearing examiners" and "have a separately identified allocation in the Department[] [of Energy's] budget."<sup>98</sup> While complete insulation is a fiction, FERC's architects intentionally codified structural features of independence that would help FERC serve as a counterweight to DOE.

The structural characteristics of separation are an important part of the story of the statutory separation of powers. But equally important, and less well known or understood, is the companion story of statutory checks and balances to which the next Section turns.

## 2. Checks and Balances

The statutory separation of powers involves not just separation but also checks and balances, which might be called entanglements, between agencies. These checks are less well studied in the legal literature than the phenomenon of

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94. On the complex relationship between the two agencies, which share authority over many of the same actors in the banking world, see, for example, Carter H. Golembe, *Much More Is Involved in Agency Turf Wars than Meets the Eye*, 14 BANKING POL'Y REP. 2 (1995).

95. On the characteristics of agency independence, see Datla & Revesz, *supra* note 7, which identifies structural and functional features that help determine an agency's relative independence; David E. Lewis & Jennifer L. Selin, *Political Control and the Forms of Agency Independence*, 83 GEO. WASH. L. REV. 1487, 1504-05 (2015), which concludes that "agency independence should be thought of as a scale" because "so many [structural] features affect responsiveness"; and Jennifer L. Selin, *What Makes an Agency Independent*, 59 AM. J. POL. SCI. 971 (2015), which analyzes data on statutory features of independence.

96. 123 CONG. REC. 17,268 (1977) (statement of Rep. Horton) ("What we tried to do in the subcommittee and full committee was to make [FERC] as completely independent as possible.").

97. *Id.* at 15,317 (statement of Sen. Metcalf).

98. *Id.* at 17,264 (statement of Rep. Brooks).

divided agency powers.<sup>99</sup> This Section therefore provides a more detailed typology of statutory mechanisms that allow one agency to control the activities of another in some form. Not all forms of interagency interaction rise to the level of statutory checks and balances. Unlike the examples described below, most statutory consultation and coordination mechanisms would not fall within the definition of a statutory check.<sup>100</sup> Neither would the ability of one agency to intervene in the proceedings of another, nor the opportunity to comment during another agency's rulemaking or during OIRA review, nor interagency lobbying.<sup>101</sup> To the extent that such measures are voluntary or consist of procedural permissions only, they exert insufficient force to serve as genuine checks on the authority of other agencies. Where these requirements *do* have more muscle, they are better categorized under one of the headings below.

This typology does not purport to offer a complete list of entanglement types. However, it captures the most common variants and will hopefully stimulate efforts to identify and explore additional categories.<sup>102</sup>

#### a. *Veto Gates*

The strongest version of the interagency check is the interagency veto. Akin to the President's veto,<sup>103</sup> the interagency veto allows one agency to prevent action by another. As discussed below,<sup>104</sup> FERC has the authority to prevent DOE from taking certain actions if it finds that such actions would "significantly affect" any of FERC's functions.<sup>105</sup> Similarly, the Competition in Contract Act allows agencies to override Government Accountability Office bid-protest stays

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99. A notable exception is Farber & O'Connell, *supra* note 8, at 1416, which paints relationships between agencies in broad strokes as one of hard hierarchy, soft hierarchy, symmetry, or advisory/monitoring. Other work that describes the relative relationship of agencies within statutory schemes includes Shah, *supra* note 9, at 1967, which explains that when Congress expressly creates coordinated schemes involving multiple agencies, it typically assigns one agency a lead role; DeShazo & Freeman, *supra* note 83; and Freeman & Rossi.

100. See, e.g., Shah, *supra* note 9 (describing statutory mechanisms to coordinate agency authorities).

101. See DeShazo & Freeman, *supra* note 83, at 2229-31 (proposing that interagency lobbying can ensure fidelity to secondary statutory mandates).

102. Part II provides some detailed examples of the first three checks discussed below: veto gates, agenda setting, and emergency override.

103. U.S. CONST. art. I, § 7, cl. 2.

104. See *infra* Section II.D.2.

105. 42 U.S.C. § 7174(a) (2018).



for a pending government contract.<sup>106</sup> For another example, consider the Endangered Species Act (ESA), which contains two versions of the interagency veto. First, federal agencies may not proceed with actions if the Fish and Wildlife Service (FWS) or National Marine Fisheries Service (NMFS) determines that those actions are likely to jeopardize the continued existence of an endangered or threatened species.<sup>107</sup> However, in a second example of interagency veto power, the Endangered Species Interagency Committee (an agency that Congress created in 1978 composed of the heads of various existing agencies) may override FWS and NMFS conclusions and allow the underlying action to proceed.<sup>108</sup>

### *b. Agenda Setting*

One agency might also exercise control over another by influencing the latter's agenda,<sup>109</sup> and Congress can design statutory schemes to enable or require this approach. In the example discussed in Part II, Congress has authorized DOE to propose rules or standards that FERC must then consider on an expedited basis.<sup>110</sup> Agenda-setting powers like this one permit an executive agency to effectively commandeer the resources of an independent counterpart.<sup>111</sup> That au-

106. 31 U.S.C. § 3553(c) (2018). The agency may override stays if it finds that “performance of the contract is in the best interests of the United States.” *Id.* § 3553(d)(3)(C).

107. 16 U.S.C. § 1536(a)-(b) (2018). Similarly, under the Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392 (codified as amended in scattered sections of 42 U.S.C.), the EPA is given authority to review and comment on environmental-impact analyses conducted by any other agency under the National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified as amended in scattered sections of 42 U.S.C.). If EPA determines that the agency action triggering environmental review is unsatisfactory, the matter is referred to the Council on Environmental Quality. 42 U.S.C. § 7609(b) (2018).

108. 16 U.S.C. § 1536(e), (h) (2018). The committee may permit such projects to go forward based on a supermajority vote if it finds, among other things, that the action is in the public interest and that its benefits clearly outweigh those of alternative actions. *Id.* § 1536(h).

109. On the importance of agenda-setting as a tool of power in constitutional domains, see Aziz Z. Huq, *The Constitutional Law of Agenda Control*, 104 CALIF. L. REV. 1401 (2016), which argues that agenda control should be understood as a feature of constitutional design. Potential sources of agency agenda setting include Congress, courts, the President, and outside interests. See Cary Coglianese & Daniel E. Walters, *Agenda-Setting in the Regulatory State: Theory and Evidence*, 68 ADMIN. L. REV. 93, 103-11 (2016).

110. Department of Energy Organization Act § 403(a)-(b), 42 U.S.C. § 7173(a)-(b) (2018).

111. *Cf.* Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 761-70 (1982) (considering and rejecting the argument that the congressional requirement that states consider various utility-pricing reforms violated the Tenth Amendment).

thority is all the more coercive because agencies operate with limited resources.<sup>112</sup> As commentators have noted, agencies' agendas "can have a major impact on the agencies' ultimate regulatory performance."<sup>113</sup> Interagency agenda setting is thus a potentially potent tool of control.

*c. Emergency Overrides*

A further form of statutory check is the emergency override. Congress recognizes that statutory allocations of authority appropriate under business-as-usual conditions may be insufficient during periods of crisis. At such moments, concentrated executive authority may be needed to confront exigencies quickly and decisively. Sometimes, an agency's authority to override other agencies' decisions is premised on a presidential declaration of a national emergency.<sup>114</sup> In other cases, Congress locates emergency-declaration authority in agency heads.<sup>115</sup> As discussed below,<sup>116</sup> emergency overrides can be a tempting tool of executive overreach, in part because of the discretion typically afforded the President and executive agencies in declaring and taking steps to confront a national emergency.<sup>117</sup>

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112. Indeed, Eric Biber has argued that courts are particularly deferential to agency resource-allocation decisions because they recognize this pervasive feature of administrative governance. See Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1, 16-25 (2008); see also Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENVTL. L.J. 461, 467 (2008) ("[C]ourts defer to agency decisions regarding resource allocations.").
113. Coglianese & Walters, *supra* note 109, at 94 (summarizing conversations at a workshop on agency agenda setting).
114. See, e.g., Defense Production Reauthorization Act of 2009 § 301, 50 U.S.C. § 4532(d) (2018) (permitting waiver of notice to Congress of loans exceeding \$50 million for materials deemed critical to the national defense if the President has declared a national emergency).
115. See, e.g., Federal Power Act § 202(c), 16 U.S.C. § 824a(c) (2018) (granting the Federal Power Commission the authority to require temporary electricity-grid actions after determining that an emergency exists).
116. See *infra* Section II.D.3.
117. See, e.g., Sean Illing, *Trump Declared a National Emergency at the Border. I Asked 11 Experts if It's Legal.*, VOX (Feb. 15, 2019, 11:30 AM), <https://www.vox.com/2019/2/15/18225359/trump-speech-national-emergencies-act-border> [https://perma.cc/3N3V-42AT] (quoting legal scholars who explain that the National Emergencies Act, which authorizes the President to declare an emergency, does not define national emergencies).

*d. Sequential Decision-Making*

In other cases, statutes require one agency to act before another can exercise its own statutory responsibilities. Section 216(a) of the Federal Power Act, for example, gives DOE authority to designate National Interest Electric Transmission Corridors: areas where it determines that transmission-line siting would support economic growth, supply diversification, or serve other interests.<sup>118</sup> The statute also grants FERC authority to issue permits for transmission lines in such corridors under certain conditions.<sup>119</sup> But FERC's exercise of this authority, and by extension its ability to speed up the construction of interstate transmission lines, is necessarily limited by DOE's designation of corridors.<sup>120</sup>

*e. Interagency Delegation*

Agencies might also control counterparts by delegating responsibilities to them. This practice is better described as agency *subdelegation*.<sup>121</sup> Subdelegation typically involves the delegation of authority by an agency head to subordinates within the agency. But subdelegations outside of the agency also occur.<sup>122</sup> When a statute gives one agency the power to delegate responsibilities to another, it may alter the balance of authority between the two. Subdelegation can sometimes *eliminate* conflict between agencies by consolidating related authorities in a single agency actor.<sup>123</sup> But subdelegation might also facilitate a special form of agenda control, especially if the recipient of the delegated authorities is required to exercise them. Congress may not always speak clearly on this point. For example, the DOE Organization Act authorizes the Secretary of Energy to delegate

118. 16 U.S.C. § 824p(a) (2018).

119. *Id.* § 824p(b).

120. There are currently no such designations. See *Report Concerning Designation of National Interest Electric Transmission Corridors*, DEP'T OF ENERGY 4 (Sept. 2015), <https://www.energy.gov/sites/prod/files/2015/09/f26/2015%20Report%20on%20Designation%20of%20National%20Corridors.pdf> [<https://perma.cc/2BWM-5J3V>]; see also *Cal. Wilderness Coal v. U.S. Dep't of Energy*, 631 F.3d 1072, 1079 (9th Cir. 2011) (vacating the only two designations ever made for failure to conduct adequate consultation with the states).

121. On the practice of subdelegation more generally, including subdelegation to political officials and career staff within agencies, see Jennifer Nou, *Subdelegating Powers*, 117 COLUM. L. REV. 473 (2017).

122. See Farber & O'Connell, *supra* note 8, at 1447-50 (examining subdelegation's impacts on conflict between and within agencies and articulating constitutional limits on the phenomenon).

123. See Bijal Shah, *Interagency Transfers of Adjudication Authority*, 34 YALE J. ON REG. 279, 311-14 (2017).

“any of his functions” to officers and employees of the Department.<sup>124</sup> Because FERC is technically “within the Department,” this provision may authorize delegations to the Commission. It is not clear whether FERC may refuse to exercise delegated authority, and there is no evidence that it has done so to date.<sup>125</sup>

*f. Leadership Intermingling*

A final form of interagency checking is leadership intermingling, where agency leadership structures include representatives from other agencies. Commentators have identified the placement of political appointees within the agency hierarchy as a key tool of presidential control.<sup>126</sup> Similarly, placing an actor from one agency within the decision-making structure of another allows the former to influence the actions of the latter. Consider, for example, the original composition of the Federal Power Commission (FPC). The Commission’s members were the Secretary of War, the Secretary of the Interior, and the Secretary of Agriculture.<sup>127</sup> In this case, FPC lacked independent leadership altogether, and the Departments of War, Interior, and Agriculture controlled agency policy. Such cobbling together of new agency leadership was not uncommon in the early 1900s. The Secretary of the Treasury was made a member of the new Reconstruction Finance Corporation in 1932, for example.<sup>128</sup>

Sometimes, rather than serving as new agency leadership themselves, cabinet secretaries and other agency representatives are tasked with selecting new agency heads. For example, the Secretaries of Treasury and Agriculture and the

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124. Department of Energy Organization Act § 642, 42 U.S.C. § 7252 (2018).

125. DOE Organization Act Section 402(e) provides more direct authority for the Secretary to delegate responsibilities to FERC, though in this section it is clearer that such delegations grant FERC “jurisdiction” over such matters rather than compelling it to address them. *Id.* § 7172(e).

126. See David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1096 (2008); Sidney A. Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. MIAMI L. REV. 577, 577 (2011).

127. Federal Water Power Act, Pub. L. No. 66-280, § 1, 41 Stat. 1063, 1063 (1920) (codified as amended at 16 U.S.C. §§ 791a-828c (2018)); see also Clyde L. Seavey, *Functions of the Federal Power Commission*, 201 ANNALS AM. ACAD. POL. & SOC. SCI. 73, 73 (1939) (describing the Commission’s original leadership structure).

128. Reconstruction Finance Corporation Act, Pub. L. No. 72-2, § 3, 47 Stat. 5, 5 (1932), *repealed by* Reorganization Plan No. 1 of 1957, 22 Fed. Reg. 4633, *reprinted in* 5 U.S.C. app. at 173 (2018), *and in* 71 Stat. 647.

Comptroller of the Currency served as “The Reserve Bank Organization Committee” under the Federal Reserve Act of 1913.<sup>129</sup> The Secretary of Agriculture appointed the members of the Agricultural Adjustment Administration pursuant to the Agricultural Adjustment Act of 1933.<sup>130</sup> And today, the Secretary of the Interior appoints two of the National Indian Gaming Commissioners, while the President appoints the Commission Chair.<sup>131</sup>

Ultimately, the statutory separation of powers is more about intention and effect than it is about a specific set of arrangements. Of course, when examining particular instances of divided authority, the details matter a great deal (as the case study below will demonstrate). Nevertheless, the broader theory offers a useful framework for identifying individual cases and for understanding their implications.

The next Part offers a single, detailed case study to demonstrate how the statutory separation of powers works in practice.<sup>132</sup> Lessons from the case study will then be used in Part III to highlight challenges with statutory separation and balancing and to propose ways in which various institutional actors might address them.

## II. SEPARATING ENERGY POWERS

The aims of this Part are both descriptive and positive. First, it provides a brief background on the history and structure of the federal energy bureaucracy leading up to the 1970s. Second, it focuses squarely on the bureaucratic shifts and upheaval in response to the energy crisis of that decade. It examines the politics of the moment to help explain why a separation and balancing approach to energy delegation might have appealed to Congress in 1977. It also draws on the legislative history of the DOE Act to demonstrate that key members of Congress had separation and balance in mind in drafting the Act. Finally, it details the

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129. The Act tasked the Committee with designating Federal Reserve districts. Federal Reserve Act, Pub. L. No. 63-43, § 2, 38 Stat. 251, 251-53 (1913) (codified as amended at 12 U.S.C. §§ 222-223 (2018)).

130. Agricultural Adjustment Act of 1933, Pub. L. No. 73-10, § 10(a), 48 Stat. 31, 37 (codified as amended at 7 U.S.C. § 610 (2018)), *invalidated by* United States v. Butler, 297 U.S. 1 (1936).

131. 25 U.S.C. § 2704(b)(1)(A)-(B) (2018).

132. As Huq has observed with respect to the constitutional separation of powers, while “granular analysis of situated and specific dynamics provides a less breathtakingly synoptic view of legal and constitutional institutions,” it “may provide better insight about how the separation of powers works in practice.” Aziz Z. Huq, *Separation of Powers Metatheory*, 118 COLUM. L. REV. 1517, 1538-39 (2018) (reviewing JOSH CHAFETZ, CONGRESS’S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS (2017)).

DOE Act's allocations of authority between FERC and DOE and sets the stage for a discussion of their implications in Part III.<sup>133</sup>

One caveat is necessary. States retain substantial authority to regulate energy generation, transportation, and use. This design decision, too, is a structural choice by Congress to divide authority. It is a choice related to statutory separation of powers, just as the maintenance of states as separate sovereigns in a federal system is related to constitutional separation of powers.<sup>134</sup> But energy federalism is already the subject of a substantial literature,<sup>135</sup> and its exploration as a corollary to the statutory separation of powers requires separate treatment to do it justice. Thus, the focus of this Part remains on horizontal allocation of the federal government's energy authority among administrative agencies.

### A. Background

Before 1920, all regulation of electricity generation, transmission and distribution occurred at the state or local level. In 1920, Congress passed the Federal Power Act (FPA) to manage the growing number of hydroelectric projects on federal lands and waterways.<sup>136</sup> The Act created the Federal Power Commission,

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133. The focus here is primarily on authority over the generation of electric power and the regulation of markets for electricity. The federal energy bureaucracy is charged with regulating everything from uranium mining to oil pipelines, but it is with respect to electricity – and to some extent natural gas – that Congress's delegations of authority best demonstrate the statutory separation of powers. These authorities also address most squarely the area of greatest controversy in U.S. energy policy today: the choice between fossil-fuel plants and lower-emitting resources. This Part will therefore concentrate on authorities to regulate electricity.

134. For a discussion of the federalism relationship, see, for example, Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001), which argues that the separation of powers supports federalism; and Bruce G. Peabody & John D. Nugent, *Toward a Unifying Theory of the Separation of Powers*, 53 AM. U. L. REV. 1, 21 (2003), which argues that federalism and separation of powers should be seen as elements of a unified scheme of divided powers.

135. See, e.g., Daniel A. Lyons, *Protecting States in the New World of Energy Federalism*, 67 EMORY L.J. 921 (2018); Felix Mormann, *Clean Energy Federalism*, 67 FLA. L. REV. 1621 (2015); Hari M. Osofsky & Hannah J. Wiseman, *Dynamic Energy Federalism*, 72 MD. L. REV. 773 (2013); Jim Rossi, *The Brave New Path of Energy Federalism*, 95 TEX. L. REV. 399 (2016).

136. Hydropower generated more than forty percent of the United States's electricity in the early 1900s. As late as the 1940s, hydropower was responsible for seventy-five percent of electricity used in the West and Pacific Northwest. *Hydropower Program*, U.S. BUREAU RECLAMATION (Feb. 3, 2016), <https://www.usbr.gov/power/edu/history.html> [<https://perma.cc/7UFZ-AJ3W>].

which was originally composed of the Secretaries of War, Agriculture, and Interior.<sup>137</sup> This Commission was tasked with licensing and regulating hydroelectric projects that fell within federal jurisdiction.<sup>138</sup> In 1930, FPC became an independent five-member commission whose members were appointed by the President with the advice and consent of the Senate.<sup>139</sup>

Congress amended the FPA in 1935, expanding the Commission's jurisdiction to interstate transmission of power and to wholesale sales of power in interstate commerce. Gradually, other federal-government actors joined FPC in regulating aspects of the electricity system. When the first nuclear power plants were contemplated, for example, Congress created the Atomic Energy Commission to both promote and oversee them.<sup>140</sup>

Throughout this evolution, the states maintained a vital role in energy governance. With the important exceptions of hydropower and nuclear power, states retained control over the planning, siting, and construction of power plants. They also set rates for power from those plants that was sold directly to end users. And yet the federal government wields tools that can affect which plants companies choose to invest in. The rates for wholesale sales of power determine how profitable those plants will be. As will be discussed later in this Part, the Federal Power Act and other statutes also provide the federal government with emergency authority that has been used to support individual plants or sectors.

### *B. Crisis and Reorganization*

The 1970s were a decade of crisis in energy policy. In the wake of the oil-price shocks early in the decade, energy agencies first multiplied and were then consolidated. Congress yielded, to some extent, to the rhetoric of exigency that followed the national furor over spikes in energy prices and concerns about supply. But it refused to accede to President Carter's requests to consolidate all federal energy authority (with the exception of authority over nuclear power) in a single executive department. The DOE Act instead split control over energy decision-making between the cabinet-level Department of Energy and a new, independent Federal Energy Regulatory Commission that acted as a successor to

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137. Seavey, *supra* note 127, at 73.

138. *Id.*

139. 16 U.S.C. § 792 (2018); Seavey, *supra* note 127, at 73.

140. Alice Buck, *The Atomic Energy Commission*, U.S. DEP'T ENERGY 1 (1983), <https://www.energy.gov/sites/prod/files/AEC%20History.pdf> [<https://perma.cc/5BZH-LGC8>].

FPC. FERC's Commissioners were shielded from presidential removal except in the case of inefficiency, neglect of duty, or malfeasance in office.<sup>141</sup>

That division, however, was incomplete. Congress left behind a series of entanglements between the two agencies. In particular, it left the Secretary of Energy—and thus, by extension, the President—key powers over FERC. Although these powers have been infrequently used, the current Administration seems increasingly likely to employ them. To understand the balance of power in the federal energy bureaucracy, therefore, we must understand not only the separation of powers between DOE and FERC, but also the ways in which the agencies might act as checks and balances on one another. The remainder of this Part explains the history and politics of the 1970s energy reorganization and its basic allocations of power. Part III will evaluate some of the consequences of these design decisions in greater detail.

Crisis provided the impetus for reorganization of the federal energy bureaucracy. By the early 1970s, the Organization of the Petroleum Exporting Countries (OPEC), whose founding members were Iran, Iraq, Kuwait, Venezuela, and Saudi Arabia, controlled over eighty percent of the world's oil exports.<sup>142</sup> In 1973, the "October War" between Israel and its Arab neighbors led OPEC to cut supply and raise prices.<sup>143</sup> Saudi Arabia went further, banning all exports to the United States in retaliation for a military aid package to Israel.<sup>144</sup> The other Arab oil states soon followed Saudi Arabia's lead.<sup>145</sup> Gasoline prices in the United States rose by forty percent and long lines formed at gas stations.<sup>146</sup>

The embargo ended in March 1974 as the conflict drew to a close, but not before instilling in the United States a deep sense of energy insecurity.<sup>147</sup> The embargo had caught the United States totally off guard.<sup>148</sup> It had also, as Daniel Yergin put it, "struck at [Americans'] fundamental beliefs in the endless abundance of resources."<sup>149</sup> One response to the crisis was thus to pursue "energy

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141. 42 U.S.C. § 7171(b)(1) (2018).

142. ROBERT McNALLY, *CRUDE VOLATILITY: THE HISTORY AND THE FUTURE OF BOOM-BUST OIL PRICES* 120 (2017).

143. YERGIN, *supra* note 13, at 607-08.

144. See McNALLY, *supra* note 142, at 130-31; YERGIN, *supra* note 13, at 606-08.

145. YERGIN, *supra* note 13, at 606-08.

146. *Id.* at 616-17.

147. McNALLY, *supra* note 142, at 132. McNally writes that it "is difficult to overstate the depth of the gloom that descended on western officials and business people in the 1970s at the prospect of massive future dependence on Middle Eastern oil imports." *Id.*

148. YERGIN, *supra* note 13, at 588, 608.

149. *Id.* at 598.



independence.”<sup>150</sup> President Nixon imposed price restrictions designed to stimulate domestic production,<sup>151</sup> and in 1975 Congress established the Strategic Petroleum Reserve and banned oil exports.<sup>152</sup>

Another response was an executive (and, to some extent, a legislative) desire to restructure the federal energy bureaucracy in order to better situate the President, in particular, to prevent or respond to future crises. The Nixon, Ford, and Carter Administrations all pursued some form of consolidated control over energy policy.<sup>153</sup> At the same time, Congress sought to keep at least some energy policy-making in agencies with a degree of independence from the White House.

Federal energy agencies began to proliferate. In 1973, President Nixon created a Federal Energy Office within the Executive Office of the President “to carry out all energy-related functions” of that office.<sup>154</sup> One year later, in 1974, Congress transferred the Federal Energy Office’s responsibilities for oil allocation and pricing regulations to a new independent agency, the Federal Energy Administration.<sup>155</sup> It also created several new agencies in the Energy Reorganization Act of 1974.<sup>156</sup> The Energy Research and Development Administration (ERDA) was tasked with coordinating federal energy research and development

150. MCNALLY, *supra* note 142, at 133 (referring to President Nixon’s November 7, 1973 address calling for energy self-sufficiency by 1980).

151. *Id.* at 133-34.

152. *Id.* at 136. This was accomplished by way of the Energy Policy and Conservation Act of 1975, which also established fuel-economy standards for motor vehicles and conservation standards for appliances. *Id.*

153. See Charles O. Jones & Randall Strahan, *The Effect of Energy Politics on Congressional and Executive Organization in the 1970s*, 10 LEG. STUD. Q. 151, 153 (1985). Jones and Strahan applaud the instinct to consolidate, arguing that “the principles of hierarchy suggest that a President should take command of a highly disparate apparatus when it is challenged by a major event like the Arab oil embargo.” *Id.* For similar reasons, the authors are critical of congressional resistance to this centralizing tendency, likening Congress’s response to the crisis to “the Oklahoma land rush” as new committees and subcommittees sought energy-policy jurisdiction. *Id.*

154. Richard Nixon, Remarks Announcing Establishment of the Federal Energy Office (Dec. 4, 1973), <https://www.presidency.ucsb.edu/ws/index.php?pid=4060> [<https://perma.cc/FG8D-QSSR>]. In addition to allocating scarce supplies of oil and related products and gathering data on existing supplies and consumption patterns, this office, which consisted of more than two thousand employees, was also tasked with creating a plan to increase domestic-energy supplies. Roger Anders, *The Federal Energy Administration*, U.S. DEP’T ENERGY 1-2 (Nov. 1980), <https://www.energy.gov/sites/prod/files/FEA%20History.pdf> [<https://perma.cc/5BZ3-KFE7>].

155. Anders, *supra* note 154, at 2. The FEA was only authorized for two years, likely indicating Congress’s uncertainty about the best way to organize the federal energy bureaucracy. *Id.*

156. *Id.*

efforts, including those related to the promotion of nuclear power.<sup>157</sup> The Nuclear Regulatory Commission (NRC), a successor agency to the Atomic Energy Commission, would manage safety aspects of nuclear-power regulation.<sup>158</sup> Finally, the Act created an Energy Resources Council in the Executive Office of the President to coordinate energy activities across agencies.<sup>159</sup>

This proliferation of energy agencies led, perhaps inevitably, to a consolidatory countermovement. In the DOE Act, most of the energy authorities dispersed among new agencies in the early 1970s were centralized, at President Carter's urging, in the new cabinet-level DOE.<sup>160</sup> This effort was part of President Carter's more general project to reorganize government. As a presidential candidate, Carter stressed his comprehensive reorganization of the state bureaucracy while governor of Georgia.<sup>161</sup> He promised to clean up Washington and make the federal bureaucracy more efficient if elected.<sup>162</sup> While he succeeded in passing several reorganization bills, his two most notable successes were the creation of the Department of Education and DOE.<sup>163</sup> His triumph, however, was incomplete. Congress, skeptical of unrestrained executive power, refused to give the new DOE unfettered authority over such key tasks as energy pricing and public-utility oversight. These responsibilities were instead vested in the new, independent FERC. Today, FERC and DOE remain the two federal agencies with primary authority over our electricity system.

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157. Alice Buck, *A History of the Energy Research and Development Administration*, U.S. DEP'T ENERGY 1 (1982), <https://www.energy.gov/sites/prod/files/ERDA%20History.pdf> [<https://perma.cc/UG9X-GM45>].

158. Anders, *supra* note 154, at 2.

159. Energy Reorganization Act of 1974, Pub. L. No. 93-438, § 108, 88 Stat. 1233, 1241 (repealed 1977).

160. President Nixon had sought a similar consolidation of executive energy policy-making in a new Department of Energy and National Resources, but Congress did not act on the proposal. Jones & Strahan, *supra* note 153, at 155. President Ford signed the Energy Reorganization Act of 1974, which established the ERDA and the NRC and authorized the interagency Energy Resources Council. *Id.* at 157.

161. RONALD C. MOE, ADMINISTRATIVE RENEWAL: REORGANIZATION COMMISSIONS IN THE 20TH CENTURY 95 (2003); Jones & Strahan, *supra* note 153, at 158.

162. MOE, *supra* note 161, at 95. President Carter was perhaps overly ambitious in his streamlining plans, promising to cut 1,900 federal agencies down to 200 only to discover that there were only about 600 total administrative units in the executive branch. *Id.* at 96.

163. Harrison Wellford et al., *Executive Reorganization: Six Lessons from the 1970s*, CTR. FOR AM. PROGRESS 1 (June 2011), [https://cdn.americanprogress.org/wp-content/uploads/issues/2011/06/pdf/exec\\_reorg.pdf](https://cdn.americanprogress.org/wp-content/uploads/issues/2011/06/pdf/exec_reorg.pdf) [<https://perma.cc/T7AS-2HDX>]. Separately, President Carter was responsible for several reorganization plans relating to civil rights, disaster assistance, and nuclear power. *Id.* at 2.

### C. Separating Powers

Although it consolidated powers from several new agencies, the DOE Act was also a divorce decree: it dissolved the Federal Power Commission and divided its authorities between FERC and DOE.<sup>164</sup> This decree necessarily brought some of the previously independent functions of FPC under more direct presidential control.<sup>165</sup> The thinking was that such control would not only allow better coordination of overall energy policy but would also create political responsibility for some of the more controversial decisions with which FPC was tasked (including responsibility for wellhead gas pricing and natural-gas imports).<sup>166</sup>

Senator John Glenn (D-Ohio), a cosponsor of the bill, defended a strong DOE, opining that the Department's authority under the legislation was "as weak as it can be and still afford a hope of getting the job done."<sup>167</sup> Nevertheless, Congress made several alterations that further limited presidential influence over energy policy. The most significant was the transfer of electric and most natural-gas ratemaking authority to FERC rather than DOE.<sup>168</sup> Ratemaking is a crucial function that affects which utilities will succeed and which will fail.<sup>169</sup> President

164. The DOE Act transferred additional authorities from other government agencies to the new Department, including authority over building efficiency standards, the petroleum and oil shale reserve program, fuel and coal mining research and development, and data gathering and analysis. Jimmy Carter, Department of Energy Message to the Congress Transmitting Proposed Legislation (Mar. 1, 1977), <https://www.presidency.ucsb.edu/documents/departament-energy-message-the-congress-transmitting-proposed-legislation> [https://perma.cc/PQ36-8M9Q].

165. In a nod to the need for independence in adjudicatory proceedings, President Carter's proposal would have established a quasi-independent Board of Hearings and Appeals within the DOE which would be "free from the control of the Secretary of Energy." *Id.* President Carter also implicitly acknowledged the merits of some independence in energy decision-making when he explained why his plan preserved an independent NRC: "Because public concerns about the safety of nuclear power are so serious, we must have a strong, independent voice to ensure that safety does not yield to energy supply pressures." *Id.* The President also noted that the Environmental Protection Agency should remain independent from energy decision-making in order to "voice environmental concern." *Id.*

166. See Edward J. Grenier, Jr. & Robert W. Clark III, *The Relationship Between DOE and FERC: Innovative Government or Inevitable Headache?*, 1 ENERGY L.J. 325, 328 (1980).

167. See Byse, *supra* note 19, at 195.

168. 42 U.S.C. § 7172(a)(1)(B)-(C) (2018).

169. To take just one example, FERC's March 2018 rule requiring that energy storage providers be allowed to bid their services into federal energy markets will shift business away from traditional energy generators in favor of storage providers. Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators, 18 C.F.R. § 35.28 (2018). For this reason, fossil-fuel interests, who perhaps stand to lose the most market share as a result of the decision, were only lukewarm in their support for the

Carter had proposed that DOE be given the authority to fix wellhead rates of natural gas, interstate rates of natural gas and electricity, and oil prices.<sup>170</sup> The Senate Governmental Affairs Committee suggested, however, that this authority be vested in an independent, three-member Energy Regulatory Board.<sup>171</sup> Similarly, while the bill that emerged from the House Government Operations Committee was more sympathetic to the administration, it was amended on the floor to give most of the FPC's regulatory powers, including ratemaking, to the independent, five-member FERC.<sup>172</sup>

The conference committee embraced the House proposal, establishing FERC as the locus of independent energy regulatory authority in the federal government.<sup>173</sup> But they also adopted the Senate bill's approach of specifically enumerating the powers to be transferred from FPC to FERC, with the remainder vested in the new DOE.<sup>174</sup> As discussed in more detail below, one result of this choice was that FPC's authority to order certain actions during demand emergencies was, by default, vested in DOE rather than FERC.<sup>175</sup>

What accounted for the reluctance to consolidate all energy powers in DOE? In part, it was a response to the Watergate scandal of 1972 that brought down

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rule. See, e.g., Duke Energy Corporation, Comment Letter on Proposed Rule on Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operator (Feb. 13, 2017) ("applaud[ing]" the Commission's efforts but cautioning that FERC's rules "should not arbitrarily favor new technologies, such as energy storage, over others").

170. Byse, *supra* note 19, at 198.

171. *Id.* A key feature of this Board was that it would be "bipartisan" and its members removable only for "inefficiency, neglect of duty, or malfeasance in office." 123 CONG. REC. 15,278 (1977) (statement of Sen. Percy). Senator Metcalf criticized this arrangement, arguing that the proposed Board had "the appearance of being independent, but in fact is not." *Id.* at 15,317. His concerns related to the original proposal that the Secretary have authority to set general rules affecting pricing and that the President be given limited authority to veto decisions setting prices if they were deemed inconsistent with national energy policies. *Id.*

172. Byse, *supra* note 19, at 199 (noting that the amendment creating FERC was cosponsored by a liberal Democrat who favored strict price control and a conservative Republican who favored deregulation).

173. The other source of independent agency decision-making in the federal energy bureaucracy is the NRC, but their purview is confined to nuclear power. See *supra* note 165.

174. Byse, *supra* note 19, at 200 (citing H.R. REP. NO. 95-539, at 71 (1977) (Conf. Rep.), reprinted in 1977 U.S.C.C.A.N. 925, 942).

175. *Id.* at 201 (noting that no reasons were given in the conference report for the deletion). The conference committee also declined to give the President authority to overrule FERC rules setting prices for oil or natural gas. *Id.*

President Nixon.<sup>176</sup> In part, it was driven by general opposition to concentrated power. “No single official,” the Senate Committee on Governmental Affairs report stated, “should have sole responsibility for both proposing and setting [energy] prices, especially where such person has a multitude of other policy and administrative responsibilities.”<sup>177</sup>

Whatever its source, Congress’s reluctance to bestow unbridled energy decision-making authority on the President was framed in terms of the separation of powers. This was articulated most plainly by Representative John Dingell (D-Mich.), a member of the President’s own party. Congressman Dingell harkened back to the Founders’ design decisions when he reminded his fellow members that “the age of the kings expired with the French [R]evolution.”<sup>178</sup> “I plead with this body,” he continued, “do not set up a new king here in Washington.”<sup>179</sup>

A division of statutory powers was vital, Senator Abraham Ribicoff (D-Conn.) argued, because “such tremendous economic power should not be vested in a single official.”<sup>180</sup> Division was necessary, Senator Percy added, to ensure that our government remained “a government of law and not of men.”<sup>181</sup> Senator Jacob Javits (R-N.Y.) similarly defended Senate Bill 826’s approach to allo-

176. Senator William Roth (R-Del.) wondered aloud during a hearing on the legislation whether, given that “the oil company lobbyists were too close to the sources of power involved in decision-making,” both “during and prior to Watergate,” new legislation consolidating energy policy-making in the executive branch might not subject that policy-making to special interest influence. *Hearings on S. 826 & S. 591 Before the Comm. on Governmental Affairs*, 95th Cong. 486 (1977) (statement of Sen. Roth). Byse identified “basic distrust of the Executive” as one explanation for congressional reluctance to vest total authority in the new Department of Energy. Byse, *supra* note 19, at 202.

177. S. REP. NO. 95-164, at 37 (1977), *reprinted in* 1977 U.S.C.C.A.N. 854, 890-91. Senator Ribicoff reiterated these concerns on the floor. 123 CONG. REC. 15,275 (1977).

178. 123 CONG. REC. 17,306 (1977).

179. *Id.*

180. Edward Cowan, *Some in Senate Favor Keeping Energy Secretary out of Pricing*, N.Y. TIMES, Mar. 17, 1977, at D1; *see also* 123 CONG. REC. 17,267 (1977) (statement of Rep. Armstrong) (“Mr. Chairman, by consolidating this power in one person, we are making that person, the new Secretary [of Energy], more powerful in the energy field than anybody has ever been before.”); 123 CONG. REC. 15,318 (1977) (statement of Sen. Hansen) (“The bill places in the hands of one agency an inordinate amount of power over the pricing of all energy . . . There is some benefit to having several agencies involved in these issues . . .”).

181. 123 CONG. REC. 15,278 (1977) (statement of Sen. Percy).

cating energy planning authority in terms of the separation of powers, remarking “I have done everything I can in the legislative art to weave together a check and balance system of the Secretary, the President, and Congress.”<sup>182</sup>

Some members of Congress were concerned about the use of emergency rhetoric to justify far-reaching executive powers. Senator Lee Metcalf (D-Mont.) protested that “[i]n the name of emergency – one that is yet to be proved to this Senator – we are being asked, in essence, to delegate all Federal powers over the price and allocation of energy supplies to the head of a new department, subject to the direct control of the President.”<sup>183</sup> He objected to doing so “without any meaningful check or balance over the administrative use of such powers.”<sup>184</sup> Such a delegation of legislative powers, he concluded, “may result in standing the Constitution on its head.”<sup>185</sup> This concern was also raised by members of the House Committee on Government Operations in separate statements attached to their committee’s report.<sup>186</sup> Congressman John Conyers (D-Mich.) supported the creation of an independent National Energy Board with broad regulatory powers in order to “provide adequate countervailing checks and balances to the centralized distributive power inherent in the proposed [Department of Energy].”<sup>187</sup>

Notwithstanding differences of opinion about how to allocate powers between the Department of Energy and an independent agency, what is clear is that members of Congress understood their design decisions in a separation-of-powers frame. It is hard to write off the separation-of-powers discussions in Congress around the DOE Act as veiled partisan wrangling because both houses of Congress were, like President Carter, solidly Democratic. Congress more likely sought to preserve its own authority as a check on the President. This demonstrates the latent effects of the Founders’ original separation-of-powers decisions – structural separation of powers begetting statutory separation of powers.

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182. 123 CONG. REC. 15,293 (1977) (statement of Sen. Javits). Although Senator Javits seemed to conceive of this check and balance system partially in constitutional terms, the system he describes is really a hybrid of constitutional checks (between the President and Congress) and intraexecutive checks (between the President and the Secretary). The actual system created by the legislation incorporates further intra-administrative checks (between FERC and the Secretary). *See infra* Section II.D.

183. 123 CONG. REC. 15,317 (1977) (statement of Sen. Metcalf).

184. *Id.*

185. *Id.*

186. H.R. REP. NO. 95-346, pt. 1, at 75-85 (1977).

187. *Id.* at 78. Representative Clarence Brown (R-Ohio), one of only three dissenting votes on the committee, explained that his opposition stemmed from the “inordinate powers” given to the Secretary of Energy “with respect to the pricing of natural gas and the interconnection of power generating and transmission facilities.” *Id.* at 84-85.

In addition, some of the legislative statements evince a desire to divide delegations among executive actors not merely to preserve constitutional separation of powers, but to position administrative actors as checks on one another.

#### *D. Checks and Balances*

As described in the previous Section, the DOE Act separated federal authority over the energy system between FERC and DOE. Yet the bill also left behind entanglements between the two agencies. Some of these entanglements seem to have been adopted as a sop to the administration in exchange for the creation of FERC. Others may have been the result of accident rather than design. Collectively, however, these entanglements are examples of the kinds of provisions that can operate as checks and balances in a statutory separation of powers.

Three such entanglements are discussed below using the typology established in Part I: two that provide DOE with leverage over FERC, and one that does the reverse. These long-overlooked provisions received more attention after Energy Secretary Rick Perry invoked them in an effort to enhance the status of coal plants in the energy marketplace. However, they are still poorly understood, even by agency insiders.

##### *1. Agenda Setting*

Section 403 of the DOE Act, which gives DOE the authority to propose rules and policies for FERC's expedited consideration, was likely the result of a compromise between those who favored the consolidation of national energy authority in the Secretary of Energy and those who preferred that an independent agency retain responsibility over wholesale energy markets.

Section 403 originated in the Senate version of the bill that emerged from the Committee on Government Operations. Unlike the legislation originally introduced in the Senate, the committee amendment gave an independent Energy Regulatory Board authority over most ratemaking.<sup>188</sup> But while it removed ratemaking authority from the Secretary of Energy, it also gave the Secretary the authority to propose rules and policies for the Board's consideration.<sup>189</sup> The House version of the bill created FERC in place of the Energy Regulatory Board, but it contained no mechanism for the Secretary to propose rules for the Commission's consideration.<sup>190</sup> The conference committee then merged the House

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<sup>188</sup>. S. 826, 95th Cong. §§ 206, 402 (1977).

<sup>189</sup>. *Id.* § 403(a).

<sup>190</sup>. H.R. 6804, 95th Cong. § 401 (1977).

and Senate approaches, creating FERC as proposed by the House but including the Senate's rule-proposal authority for the Secretary.

In the Senate's initial version of the provision, the Act authorized the Secretary of Energy "to propose prices or other rules for Board action, to set reasonable time limits for Board action and to intervene in the Board's proceedings."<sup>191</sup> The final bill's language was similar: Section 403 of the DOE Act allows the Secretary of Energy "to propose rules, regulations, and statements of policy of general applicability with respect to any function" within FERC's jurisdiction.<sup>192</sup> Once the Secretary proposes a rule, regulation, or policy statement, the Commission must act on it "in an expeditious manner in accordance with such reasonable time limits as may be set by the Secretary."<sup>193</sup> This allows the Secretary, for example, to propose rules governing the functioning of wholesale electricity markets (as Secretary Perry recently did), which it has no jurisdiction to adopt on its own.<sup>194</sup>

Section 403 does not require FERC to promulgate the rules or policies proposed by the Secretary. But it does require FERC to consider DOE's proposal and to "take final action," whether by declining to promulgate a final rule or policy, finalizing the rule or policy as proposed by the Secretary, or promulgating it with modifications.<sup>195</sup> FERC must check all of the procedural boxes of the Administrative Procedure Act: for example, it must provide for notice-and-comment on a proposed legislative rule and support its final determination with a reasoned order. And FERC's final decision is subject to judicial review if an interested plaintiff can be found.<sup>196</sup>

The Secretary has only invoked Section 403 three times.<sup>197</sup> The first was in 1979, when DOE's Economic Regulatory Administration (ERA) proposed a rule

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191. Byse, *supra* note 19, at 199.

192. 42 U.S.C. § 7173(a) (2018).

193. *Id.* § 7173(b).

194. See Grid Resiliency Pricing Rule, 82 Fed. Reg. 46,940 (proposed Oct. 10, 2017) (to be codified at 18 C.F.R. pt. 35).

195. 42 U.S.C. § 7173(b).

196. An order issued by FERC may be reviewed under 16 U.S.C. § 8251 (2018). Where FERC takes no action, the APA sometimes permits review of its inaction. See 5 U.S.C. §§ 702, 704, 706 (2018).

197. DOE also considered proposing a rule for FERC's consideration that would impose mandatory electric reliability standards on electric utilities in the wake of blackouts and brownouts in the summers of 1999 and 2000. See Notice of Inquiry, 65 Fed. Reg. 69,753 (Nov. 20, 2000). No rule was proposed under Section 403, however, and the Energy Policy Act of 2005 conferred clearer authority on FERC to promulgate such mandatory standards. See Energy Policy Act of 2005, Pub. L. No. 109-58, § 1201, 119 Stat. 594, 941-46.



creating short-term authorizations for the transportation of natural gas purchased by end users to displace fuel oil.<sup>198</sup> FERC finalized this proposed rule.<sup>199</sup> The second was in 1985, when DOE proposed a rule setting certain natural gas prices at the wellhead.<sup>200</sup> The proposal asked FERC to increase and simplify its rate structures for “old” gas supplies (gas already in production).<sup>201</sup> At the time, producers were shutting in the old gas supply in favor of producing new gas, which commanded a much higher price.<sup>202</sup> FERC responded positively, if five days beyond the Secretary’s deadline.<sup>203</sup> It adopted DOE’s proposed simplified pricing structure for “old” gas, raising the ceiling price on such gas as suggested to encourage production.<sup>204</sup>

The third invocation of Section 403 took place last year under Secretary Perry. The Secretary proposed that “fuel-secure” power plants, defined as those with a ninety-day supply of fuel on-site and an ability to provide certain reliability services, receive guaranteed payments in wholesale energy markets.<sup>205</sup> Only

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198. Transportation Certificates for Natural Gas Displacement of Fuel Oil, 44 Fed. Reg. 17,644 (proposed March 22, 1979).

199. FERC admitted, however, that the rule was the result of policy rather than neutral expertise. Transportation Certificates for Natural Gas for the Displacement of Fuel Oil, 44 Fed. Reg. 30,323, 30,324 (May 25, 1979) (“The final rule is an attempt to balance a number of competing policy considerations.”).

200. Ceiling Prices; Old Gas Pricing Structure, 50 Fed. Reg. 48,540, 48,540 (proposed Nov. 25, 1985). DOE gave FERC an approximately six-month deadline to act on its proposal. *Id.*

201. *Id.* Interestingly, DOE placed the burden of complying with procedural rulemaking requirements on FERC since “the Commission is the agency which will take final action on this proposed rulemaking.” *Id.* at 48,546. It argued that FERC should comply with all such responsibilities in time to adopt a final rule on June 1, 1986. *Id.* at 48,540.

202. *Id.* at 48,542. While couched in the language of “just and reasonable” rates and “fair competition,” the proposed rule furthered a political position that expanding natural gas supply from old reserves and simplifying the complicated gas-pricing system was worth a short-term increase in prices and the risk of disincentivizing new exploration and production.

203. Ceiling Prices; Old Gas Pricing Structure, 51 Fed. Reg. 22,168 (June 18, 1986). At the time, the Commission comprised two Republicans (Anthony G. Sousa and Charles A. Trabandt) and two Democrats (Charles G. Stalon and C.M. Naeve). Commissioner Raymond J. O’Connor had left the agency earlier in the year, leaving one position vacant. See *Current and Previous Commissioners*, FED. ENERGY REG. COMMISSION (Jan. 24, 2019), <https://www.ferc.gov/about/com-mem/prev-comm.asp> [<https://perma.cc/6JA3-BPDK>].

204. Ceiling Prices; Old Gas Pricing Structure, 51 Fed. Reg. at 22,168. The Commission made one modification to the proposed rule, making it easier for buyers to renegotiate other, higher-priced gas contracts if producers sought higher prices for “old” gas under existing agreements. *Id.* at 22,169. In other words, FERC intervened on the side of purchasers, whereas the original DOE rule was decidedly more favorable to producers of “old” gas.

205. Grid Resiliency Pricing Rule, 82 Fed. Reg. 46,940, 46,945 (proposed Oct. 10, 2017) (to be codified at 18 C.F.R. pt. 35).

coal and nuclear plants would qualify as “fuel-secure” under the rule.<sup>206</sup> DOE demanded action from FERC within sixty days, although it subsequently granted the new FERC chairman’s request for an additional thirty days in light of Commission membership changes.<sup>207</sup> FERC rejected DOE’s proposal in early 2018, citing an absence of legal justification.<sup>208</sup> But it did so gently, thanking the Secretary for bringing the issue to its attention and promising to open a docket to examine the issue more closely.<sup>209</sup>

**TABLE 1.**  
INVOCATIONS OF SECTION 403(A) AUTHORITY BY THE DEPARTMENT OF ENERGY

Date	Name	DOE Action	FERC Action
1979	Transportation Certificates for Natural Gas for the Displacement of Fuel Oil	Rule proposed <sup>210</sup>	Rule finalized <sup>211</sup>
1985	Ceiling Prices; Old Gas Pricing Structure	Rule proposed <sup>212</sup>	Rule finalized <sup>213</sup>
2000	Interstate Electric Transmission System; Electric Reliability Issues	Notice of inquiry issued, but no rule proposed <sup>214</sup>	N/A

206. *Id.* at 46,942-45.

207. Grid Resiliency Pricing Rule, 82 Fed. Reg. 60,134, 60,134-35 (Dec. 19, 2017).

208. Order Terminating Rulemaking Proceeding, Initiating New Proceeding, and Establishing Additional Procedures, 162 FERC ¶ 61,012, at 8 (Jan. 8, 2018).

209. *Id.* at 10.

210. Transportation Certificates for Natural Gas: Displacement of Fuel Oil, 44 Fed. Reg. 17,644 (Mar. 22, 1979).

211. Transportation Certificates for Natural Gas for the Displacement of Fuel Oil, 44 Fed. Reg. 30,323 (May 25, 1979).

212. Ceiling Prices; Old Gas Pricing Structure, 50 Fed. Reg. 48,540 (Nov. 25, 1985).

213. Ceiling Prices; Old Gas Pricing Structure, 51 Fed. Reg. 22,168 (June 18, 1986).

214. Interstate Electric Transmission System; Electric Reliability Issues; Notice of Inquiry, 65 Fed. Reg. 69,753 (Nov. 20, 2000).

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2017	Grid Resiliency Pricing Rule	Rule proposed <sup>215</sup>	Rule rejected <sup>216</sup>
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As Byse remarked in his summary of the DOE Act, in Section 403 the conference committee essentially gave the Secretary “a role in the Commission’s deliberations.”<sup>217</sup> Senator Ribicoff, the bill’s sponsor, went further in discussing the Senate’s version of the provision, noting that it enabled the Secretary to “play an active role in all matters before the [Energy Regulatory] Board by proposing prices or other rules the Board must then consider” and “setting time limits for the Board to act.”<sup>218</sup> Congress thus does seem to have envisioned that Section 403 might be used to enhance the power of the Secretary of Energy vis-à-vis FERC.

Thus far, DOE has only occasionally subjected FERC to “exhortation and nudging” under Section 403.<sup>219</sup> Although DOE has rarely invoked this authority, it is worth considering what would happen were it to do so more aggressively. In theory, DOE could send a stream of proposals to FERC for its “expeditious” consideration. In this way, the Secretary of Energy could effectively set the agenda of an independent commission, crowding out FERC priorities to make way for the Secretary’s own. The effects of such an effort on FERC’s independence, and the question of whether the federal courts should step in to limit them, will be taken up in Part III.

## 2. Concurrence Requirements

Congress also gave FERC the ability to check DOE policy-making. DOE Act Section 404 requires the Secretary to notify FERC of proposed rules, regulations, and statements of policy.<sup>220</sup> FERC may then determine whether the proposed

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<sup>215</sup>. Grid Resiliency Pricing Rule, 82 Fed. Reg. 46,940, 46,945 (Oct. 10, 2017).

<sup>216</sup>. Order Terminating Rulemaking Proceeding, Initiating New Proceeding, and Establishing Additional Procedures, 162 FERC ¶ 61,012 (Jan. 8, 2018).

<sup>217</sup>. Byse, *supra* note 19, at 202.

<sup>218</sup>. 123 CONG. REC. 15,275 (1977) (statement of Sen. Ribicoff).

<sup>219</sup>. See Byse, *supra* note 19, at 202 (noting that the Energy Regulatory Board, which became FERC in the final version of the bill, would be subject to such action at the hands of DOE under Section 403).

<sup>220</sup>. 42 U.S.C. § 7174(a) (2018). This provision applies to actions of the Secretary taken pursuant to authority transferred from the Federal Energy Administration, the Energy Research and Development Administration, the Federal Power Commission, and the Interstate Commerce

action “may significantly affect any function within the jurisdiction of the Commission.”<sup>221</sup> If FERC decides that its jurisdiction may indeed be significantly affected by DOE’s proposal, DOE must refer the matter to FERC. FERC must then seek public comment and issue a recommendation after consultation with the Secretary.<sup>222</sup> FERC may concur in adoption of the rule or policy as proposed, concur in adoption of the rule or policy with changes, or recommend that the rule or policy not be adopted.<sup>223</sup> Crucially, DOE *may not* adopt the rule or policy in its original form if FERC recommends changes or recommends that it not be adopted.<sup>224</sup> Joe Tomain has therefore characterized Section 404 as “a limited veto power over the Secretary of DOE.”<sup>225</sup>

Section 404 has rarely been invoked. It is not even clear whether DOE has a consistent process for notifying FERC of its proposed rules, regulations, and policy statements as required by the section. If they exist, those notifications are not readily available in public databases. The table below compiles available information on DOE notices and any further action by FERC under Section 404.

**TABLE 2.**  
INVOCATIONS OF SECTION 404 AUTHORITY BY THE FEDERAL ENERGY REGULATORY COMMISSION

Date	Name	DOE Action	FERC Action
1979	Incentive Prices for Newly Discovered Crude Oil	Notified FERC <sup>226</sup>	Determined that the proposed rule would not significantly affect its jurisdiction <sup>227</sup>

Commission. *See, e.g.*, 49 U.S.C. § 60501 (2018) (transferring powers of the Interstate Commerce Commission).

<sup>221.</sup> 42 U.S.C. § 7174(a).

<sup>222.</sup> *Id.* § 7174(a)-(b). The time period for FERC action is not specified in the statute and, in practice, appears to be set by the Secretary.

<sup>223.</sup> *Id.* § 7174(b).

<sup>224.</sup> *Id.* § 7174(c).

<sup>225.</sup> Joseph P. Tomain, *Policy, Politics, and Law*, 31 UCLA L. REV. 1247, 1266 n.43 (1984).

<sup>226.</sup> Incentive Prices for Newly Discovered Crude Oil, 44 Fed. Reg. 25,828, 25,829-30 (May 2, 1979).

<sup>227.</sup> *Id.*

1980	Proposed Rulemaking Concerning Review and Establishment of Natural Gas Curtailment Priorities for Interstate Pipelines	Notified FERC <sup>228</sup>	Took referral, <sup>229</sup> terminated docket years later <sup>230</sup>
1986	Reports of Major Electric Utility System Emergencies	Notified FERC <sup>231</sup>	Declined to take referral <sup>232</sup>
1991	Security Skills Training and Qualifications Standards for Protective Force Personnel	Notified FERC <sup>233</sup>	Requested that DOE clarify that rule will not affect FERC facilities; DOE did <sup>234</sup>

Perhaps FERC has only rarely invoked its authority because most DOE rules and policies do not “significantly affect” its jurisdiction. Perhaps it has exercised its discretion not to intervene in DOE processes out of deference. Or perhaps DOE has simply failed to notify FERC of its proposed rules and policies, and FERC has allowed its right to review them to go dormant through inaction and inattention. In the latter two cases, FERC could invoke its Section 404 authority

228. Mississippi River Transmission Co., 23 FERC ¶ 61,239, 61,506 n.21 (1983) (noting that “the [Department of Energy’s Economic Regulatory Administration] had previously referred the proposed rule to the Commission pursuant to the requirements of Section 404(a) of the Department of Energy Organization Act”); *see also* Proposed Rulemaking Concerning Review and Establishment of Natural Gas Curtailment Priorities for Interstate Pipelines, 45 Fed. Reg. 45,098 (July 2, 1980).

229. Establishing Natural Gas Curtailment Priorities for Interstate Pipelines; Hearing and Opportunity for Comment on Proposal by Economic Regulatory Administration, 45 Fed. Reg. 49,087 (July 17, 1980).

230. Termination of Rulemaking Proceedings, 89 FERC ¶ 61,062 (Oct. 18, 1999); Errata Notice, Order Terminating Dockets (Oct. 18, 1999), FERC Accession Number: 19991021-0183 (Oct. 20, 1999).

231. Reports of Major Electric Utility System Emergencies; Proposed Changes in Requirement, 51 Fed. Reg. 26,399 (July 23, 1986); Reports of Major Electric Utility System Emergencies, 51 Fed. Reg. 39,743, 39,745 (Oct. 31, 1986).

232. Reports of Major Electric Utility System Emergencies, 51 Fed. Reg. 39,743, 39,745 (Oct. 31, 1986).

233. Security Skills Training and Qualifications Standards, for Protective Force Personnel, 56 Fed. Reg. 21,631, 21,634 (May 10, 1991).

234. Security Skills Training and Qualifications Standards for Protective Force Personnel, 58 Fed. Reg. 45,787 (Aug. 31, 1993).

more aggressively as a means of resisting DOE encroachment. Private litigants may also be able to invoke Section 404 to challenge DOE action.<sup>235</sup>

### 3. *Emergency Overrides*

Invocation of emergency authority has always been an effective tool of chief executives seeking to expand their reach. During emergencies, consolidated presidential authority has been defended as necessary to permit a swift, coordinated response to crisis.<sup>236</sup> The Public Utility Act of 1935 added an emergency provision, Section 202(c), to the Federal Power Act. This provision authorized the Federal Power Commission (FPC) to deal with imminent threats to the electricity grid by ordering “temporary connections of facilities and . . . generation, delivery, interchange, or transmission of electric energy.”<sup>237</sup> The federal government’s authority over the electricity grid was then, and is now, limited, with the states retaining primary authority over generation facilities as well as intrastate transmission. Section 202(c) not only allowed FPC to act in an emergency to ensure sufficient energy supply but it also clarified that a public utility ordered to interconnect its facilities with the interstate power transmission system would not thereby be subject to federal regulation on an ongoing basis.<sup>238</sup> An original advantage of the Section was thus to permit the federal government to override state authority on a temporary basis without any permanent jurisdictional effects.

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235. In one case, plaintiffs challenged a DOE policy statement on factors to consider in licensing natural gas imports by alleging that DOE had failed to refer the policy statement to FERC under Section 404. *Panhandle Producers & Royalty Owners Ass’n v. Econ. Regulatory Admin.*, 822 F.2d 1105, 1114 n.1 (D.C. Cir. 1987). The court dismissed the claim based on plaintiffs’ failure to raise it on rehearing before the agency. *Id.* at 1114.

236. See, e.g., Kagan, *supra* note 1, at 2341-42 (citing a tradition in American history calling for executive “energy” and “vigor”); Saikrishna B. Prakash, *Fragmented Features of the Constitution’s Unitary Executive*, 45 WILLAMETTE L. REV. 701, 721 (2009) (identifying “vigor, decision, coordination, and responsibility” as “abstract desiderata of the executive”); John Yoo, *Unitary, Executive, or Both?*, 76 U. CHI. L. REV. 1935, 1982-83 (2009) (citing Alexander Hamilton’s statements in the *Federalist Papers* that a single executive would be able to act with decision and vigor).

237. Federal Power Act § 202(c)(1), 16 U.S.C. § 824a(c) (2018).

238. See 79 CONG. REC. 10,378 (1935) (statement of Sen. Lea) (“Permission is given for emergency connections, without subjecting the companies to interstate regulation. With the consent of the Commission, permanent connections may be made with a public utility for emergency purposes without subjecting the utility to the jurisdiction of the Federal Power Commission.”).

Section 202(c)(1) refers not to the Secretary of Energy but to the “Commission.” And yet it is the Secretary, rather than FERC, that exercises 202(c) authority today. DOE has never clarified the basis for its exercise of Section 202(c) authority beyond citing the statutory section in conjunction with Section 301(b) of the DOE Act.<sup>239</sup> That Section transferred to the Secretary of Energy all of FPC’s functions not transferred FERC in Subchapter IV of the Act.<sup>240</sup> Subchapter IV does not expressly transfer FPA Section 202(c) authority to FERC even though it *does* transfer general interconnection authority under 202(b).<sup>241</sup> FERC may therefore order a public utility to interconnect its transmission facilities with those of another entity involved in transmission or sale. It may also order a public utility to sell energy or to exchange energy with such entities.<sup>242</sup> Because Section 202(c) is not mentioned in Subchapter IV, emergency interconnection and sale authority, by default, resides with the Secretary of Energy.<sup>243</sup>

There are limits on what Section 202(c) authorizes the Secretary to do and when the Secretary may invoke those powers. Section 202(c) permits the Secretary to “order . . . temporary connections of facilities and . . . generation, delivery, interchange, or transmission of electricity,” but only in the face of an “emergency.”<sup>244</sup> The first type of emergency that triggers Section 202(c) is “the continuance of any war in which the United States is engaged.”<sup>245</sup> No Secretary

239. See, e.g., Department of Energy, Order No. 202-17-1 (Apr. 14, 2017), [https://www.energy.gov/sites/prod/files/2017/08/f35/Order%20Number%20202-17-2\\_o\\_o.pdf](https://www.energy.gov/sites/prod/files/2017/08/f35/Order%20Number%20202-17-2_o_o.pdf) [<https://perma.cc/9WCW-N9RP>] (citing authority under Section 202(c) of the Federal Power Act “and section 301(b) of the Department of Energy Organization Act, 42 U.S.C. §7151(b)”).

240. Department of Energy Organization Act, Pub. L. No. 95-91, § 301(b), 91 Stat. 565, 578 (1977).

241. 42 U.S.C. § 7172(a)(1)(B) (2018).

242. Federal Power Act § 202(b), 16 U.S.C. § 824a(b) (2018). There are limitations on this authority. FERC may order such interconnections or sales only upon application of a state commission or a person engaged in the transmission or sale of energy, not sua sponte. FERC must first provide notice to each affected state commission and public utility and provide them an opportunity for hearing. FERC must find that the interconnection or sale is “necessary or appropriate in the public interest.” Finally, FERC may not compel the sale or exchange of energy when doing so would impair the public utility’s ability to serve its customers. *Id.*

243. The House version of the DOE Act *did* expressly transfer Section 202(c)’s emergency authority to the Secretary of Energy. H.R. 6804, 95th Cong. (1977) (transferring authority “under section 202 (c) and (d) of the Federal Power Act,” which related to emergency interconnections). Section 202(c) is also not mentioned among the list of sections under which FERC may exercise power if it deems that exercise to be necessary to the exercise of its other powers. 42 U.S.C. § 7172(a)(1).

244. 16 U.S.C. § 824a(c)(1) (2018).

245. *Id.*

since the Korean War has referenced the war contingency in invoking the Section, however.<sup>246</sup> A Section 202(c) emergency may also be the result of “a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for generating facilities, or other causes.”<sup>247</sup> Each modern invocation of Section 202(c) has been on the basis of one of these scenarios.

Even where an emergency has triggered Section 202(c) authority, the Secretary’s actions are still limited to ordering “temporary connections of facilities” and “generation, delivery, interchange, or transmission of electric energy.”<sup>248</sup> There is no express durational limit on these orders. But the title of the Section indicates that its purpose is to authorize “[t]emporary connection and exchange of facilities *during emergency*.”<sup>249</sup> Upon the end of the emergency, the Secretary’s authority would thus expire.<sup>250</sup> As can be seen below in Table 3, however, Secretaries have construed the term “emergency” broadly and have allowed some 202(c) orders to continue in effect for more than a year.

The Secretary has invoked Section 202(c) authority eight times since 2000: twice in the wake of hurricanes, once in response to the California energy crisis, once in response to concerns about the availability of electricity on Long Island, once in response to a major blackout, and once to prevent a blackout in the

246. For invocations of Section 202(c) during wartime, see, for example, Dairyland Power Coop. & N. States Power Co., 3 F.P.C. 934, 935 (1943) (ordering that electric power be transmitted between two utilities due to the “unusual requirements occasioned by the present state of war”); and Texas Elec. Serv. Co., 9 F.P.C. 1373 (1950). Various environmental statutes contain “act of god” or “act of war” defenses that exempt actors from responsibility for environmental releases caused by war or unforeseen natural events. The “act of war” defense in the Comprehensive Environmental Response, Cleanup and Liability Act, Pub. L. No. 96-510, 94 Stat. 2767 (1980) for example, has only been invoked once. See *United States v. Shell Oil Co.*, 13 F. Supp. 2d 1018 (C.D. Cal. 1998) (exempting an oil company from liability for the response costs of cleaning up a hazardous waste site created as part of a World War II aviation-gasoline program).

247. 16 U.S.C. § 824a(c)(1) (2018).

248. *Id.*

249. *Id.* § 824a(c) (emphasis added).

250. This alone would not necessarily ease concerns about perpetual emergencies and conflicts, such as the “war on terror.” There are stricter limits for emergency orders that result in a conflict with an environmental law or regulation. The Fixing America’s Surface Transportation (FAST) Act of 2015 amended the statute to provide that such orders expire after ninety days unless those orders are renewed or reissued for subsequent ninety-day periods “as the Commission determines necessary to meet the emergency and serve the public interest.” Fixing America’s Surface Transportation Act of 2015 § 61002, 16 U.S.C. § 824a(c)(4) (2018).



Washington, D.C. area after a generator voluntarily shut down in order to address plant emissions.<sup>251</sup> Most recently, Secretary Perry invoked the Section twice to override EPA Administrative Orders related to the Mercury and Air Toxics Rule, which would have required the modification and consequent shutdown of coal-fired power plants in Oklahoma and Virginia.<sup>252</sup> The provision was not invoked during President Obama's tenure.

**TABLE 3.**  
INVOCATIONS OF SECTION 202(c) AUTHORITY BY THE DEPARTMENT OF ENERGY SINCE 2000

Date	Name	Emergency	Duration
2000	California Independent System Operator (generation) <sup>253</sup>	California Energy Crisis	1.5 months
2002	Cross-Sound Cable Company (transmission) <sup>254</sup>	Energy availability on Long Island	1.5 months
2003	Cross-Sound Cable Company (transmission) <sup>255</sup>	Northwest/Midwest Blackout	9 months

251. Each of the orders containing the information in the following table may be found at Office of Elec., *DOE's Use of Federal Power Act Emergency Authority*, U.S. DEP'T ENERGY, <https://www.energy.gov/oe/services/electricity-policy-coordination-and-implementation/other-regulatory-efforts/does-use> [<https://perma.cc/G5H6-QH84>]; and Office of Elec., *DOE's Use of Federal Power Act Emergency Authority – Archived*, U.S. DEP'T ENERGY, <https://www.energy.gov/oe/does-use-federal-power-act-emergency-authority-archived> [<https://perma.cc/4722-YMRJ>]. See *infra* notes 253-260.

253. *Federal Power Act Section 202(c) – California, December 2000*, U.S. DEP'T ENERGY, <https://www.energy.gov/oe/downloads/federal-power-act-section-202c-california-december-2000> [<https://perma.cc/C7DJ-7WJY>].

254. *Federal Power Act Section 202(c) – Cross-Sound Cable Company, August 2002*, U.S. DEP'T ENERGY, <https://www.energy.gov/oe/downloads/federal-power-act-section-202c-cross-sound-cable-company-august-2002> [<https://perma.cc/3FKF-M7X7>].

255. *Federal Power Act Section 202(c) – Cross-Sound Cable Company, August 2003*, U.S. DEP'T ENERGY, <https://www.energy.gov/oe/downloads/federal-power-act-section-202c-cross-sound-cable-company-august-2003> [<https://perma.cc/PR9C-3FPE>].

2005	CenterPoint Energy & TXU Electricity Delivery (transmission) <sup>256</sup>	Hurricanes Rita & Katrina	1 month
2005	Mirant Corporation (generation) <sup>257</sup>	“Reasonable possibility” of blackout	18 months
2008	CenterPoint Energy (transmission) <sup>258</sup>	Hurricane Ike	1.5 months
2017	Grand River Dam Authority (generation) <sup>259</sup>	Generator retirement/lightning	3 months
2017	Dominion Energy Virginia (generation) <sup>260</sup>	Generator decision to cease power production	21 months

At least some legislators realized in 1935 that Section 202(c) contained potentially expansive authority. Senator Daniel Hastings (R-Del.) acknowledged on the Senate floor that the emergency authority granted to the Federal Power Commission would enable it to do “all kinds of things . . . without the consent of anybody.”<sup>261</sup> During the debates on the Department of Energy Act of 1977, Representative Clarence Brown (R-Ohio) likewise worried about placing “this vast authority . . . into the hands of one person.”<sup>262</sup> Indeed, it is not far-fetched

255. *Federal Power Act Section 202(c) – Cross-Sound Cable Company, August 2003*, U.S. DEP’T ENERGY, <https://www.energy.gov/oe/downloads/federal-power-act-section-202c-cross-sound-cable-company-august-2003> [https://perma.cc/PR9C-3FPE].

256. *Federal Power Act Section 202(c) – Hurricane Rita, September 2005*, U.S. DEP’T ENERGY, <https://www.energy.gov/oe/downloads/federal-power-act-section-202c-hurricane-rita-september-2005> [https://perma.cc/89VS-JL3Q].

257. *Federal Power Act Section 202(c) – Mirant Corporation, August 2005*, U.S. DEP’T ENERGY, <https://www.energy.gov/oe/downloads/federal-power-act-section-202c-mirant-corporation-august-2005> [https://perma.cc/L5FC-UYRC].

258. *Order No. 202-08-1*, U.S. DEP’T ENERGY (Sept. 14, 2008), <https://www.energy.gov/sites/prod/files/202%28c%29%20order%20202-08-1%20September%2014%2C%202008%20-%20CenterPoint%20Energy.pdf> [https://perma.cc/9FZW-WNAF].

259. *Order No. 202-17-1*, U.S. DEP’T ENERGY (Apr. 14, 2017), <https://www.energy.gov/sites/prod/files/2017/04/f34/Oklahoma.pdf> [https://perma.cc/LC63-7595].

260. *Federal Power Act Section 202(c) – PJM Interconnection & Dominion Energy Virginia, 2017*, U.S. DEP’T ENERGY, <https://www.energy.gov/oe/downloads/federal-power-act-section-202c-pjm-interconnection-dominion-energy-virginia-2017-0> [https://perma.cc/HY9L-M2LC].

261. 81 CONG. REC. 8,682 (1935) (statement of Sen. Hastings).

262. H.R. REP. NO. 95-346, pt. 1, at 84-85 (1977) (minority views of Rep. Brown).

to imagine an administration invoking Section 202(c)'s emergency authority in the face of dubious "emergencies" to make broader changes to the electricity system than it could otherwise accomplish: a DOE memorandum leaked last summer made the case for using this authority to support coal-fired generation in wholesale power markets.<sup>263</sup> Whether federal courts would uphold this move is a separate question.<sup>264</sup>

### III. EVALUATING STATUTORY SEPARATION OF POWERS

There is little reason to believe that Congress has thought through the implications of the statutory separation of powers in any kind of systematic way. In the legislative history of the DOE Act, members of Congress defend separation and balance in general terms rather than debating its nuances. It is clear, however, that key backers of the Act believed that they were preventing single-agency dominance, in this case by DOE, over energy policy. FERC would be a voice of reason, adjudicating individual rate cases, making general rate policies, and overseeing wholesale energy markets.<sup>265</sup> And that is how things worked for several decades.

But the safeguards of statutory separation and checks and balances are now being tested. The Department of Energy has begun to flex its muscles, exploiting its entanglements with FERC in an effort to dominate the direction of energy policy. In particular, DOE has sought to support coal and nuclear power generation in wholesale markets at the expense of other generation assets, including natural gas and renewable generation. This is not the first time a Secretary of Energy has considered using the entanglements described in the previous Part

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263. *Addendum*, U.S. DEP'T ENERGY (May 29, 2018) [hereinafter *DOE Addendum*], <https://www.documentcloud.org/documents/4491203-Grid-Memo.html> [https://perma.cc/X55T-8SVF].

264. For an argument that such a move would be illegal, see Sharon B. Jacobs & Ari Peskoe, *Energy Emergencies vs. Manufactured Crises: The Limits of Federal Authority to Disrupt Power Markets*, HARV. L. SCH. ENVTL. & ENERGY L. PROGRAM (June 3, 2019), <https://eelp.law.harvard.edu/wp-content/uploads/Energy-Emergencies-vs-Manufactured-Crises-FINAL.pdf> [https://perma.cc/5ULC-ADUM].

265. Of course, the wholesale energy markets in 1977 looked very different from energy markets today. The market restructuring of the 1990s has transformed FERC's role from architect to umpire. Although FERC still plays a key role in policy formation, see Joel B. Eisen, *FERC's Expansive Authority to Transform the Electric Grid*, 49 U.C. DAVIS L. REV. 1783, 1788 (2016), it is no longer burdened with the laborious process of ratemaking where markets have been deemed sufficiently competitive. On the market transformation generally, see David B. Spence, *Can Law Manage Competitive Electricity Markets?*, 93 CORNELL L. REV. 765, 767-76 (2008).

to advance the Department's energy agenda.<sup>266</sup> But it is the most concerted invocation of those entanglements to date and demonstrates that a recalibration of the balance of power between the two agencies may be warranted.

More broadly, the statutory separation of powers and its correlative statutory checks and balances hold promise as a way to defend against problems of faction and instability in the area of energy policy and others like it. But achieving and maintaining a working division of authority is no simple task. This Part will analyze some difficulties with allocating authority across agencies. First, it will explain why issues of *linguistic ambiguity*, *discretionary authority*, and *statutory multiplicity* make a stable balance of authority so difficult to strike *ex ante*. It will then explore the special problem of *executive aggrandizement* in relation to situations such as the one between FERC and DOE in which authority is divided between an executive and an independent agency. Over time, executive agencies may seek expansion of their own authority, thereby skewing the balance of power. At the same time, executive aggrandizement can erode both the authority and independence of their independent counterparts.

Finally, this Part turns to possible solutions to these problems. It considers Congress, courts, and agencies in turn as potential sources of adjustment and maintenance of the statutory separation of powers. Throughout, it draws on the case study from Part II. However, it also reaches beyond that case study to theorize about the implications of applying the statutory separation of powers approach more broadly.

#### A. *Initial Allocations*

To some extent, any legislative balancing of statutory authorities will be imprecise and imperfect. The legislative statements detailed in Part II suggest that Congress has only a rough notion of the statutory separation of powers when it delegates. As a result, its allocations are unlikely to be exact by any metric. This will be true regardless of the precise balance Congress seeks to strike. And even

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266. Nearly two decades ago, President Clinton's Energy Secretary, Bill Richardson, sought comment on whether to initiate a rulemaking under DOE Act Section 403 to require FERC to issue mandatory electric-reliability standards. Interstate Electric Transmission System; Electric Reliability Issues; Notice of Inquiry, 65 Fed. Reg. 69,753 (Nov. 20, 2000). Secretary Richardson ultimately chose not to initiate such a rulemaking, and in 2005 Congress expressly authorized FERC to approve electric reliability standards. Energy Policy Act of 2005 §§ 1211, 1291, 16 U.S.C. § 8240; 42 U.S.C. § 16,481.

if Congress sought to calibrate interagency authorities with precision, it would find it difficult to do so using conventional tools of statutory drafting.<sup>267</sup>

There are three primary reasons for this inevitable imprecision. First is the problem of *linguistic ambiguity*, which makes it difficult for Congress to clearly fix allocations of authority between agencies.<sup>268</sup> Consider Section 404 of the DOE Act, which gives FERC veto authority over DOE policies and rules that “may significantly affect any function within the jurisdiction of the Commission.”<sup>269</sup> The scope of this significance requirement has yet to be interpreted by the agencies themselves or by the federal courts. In other contexts, the term “significant” poses a challenge to interpreters. In environmental law, for example, courts and agencies have clashed over the meaning of what constitutes a “significant” portion of a species’ range under the Endangered Species Act<sup>270</sup> and how to assess a “significant” contribution to nonattainment of air quality in a downwind state under the Clean Air Act.<sup>271</sup> Whether the “significance” requirement in Section 404 of the Federal Power Act is read broadly or narrowly will either diminish or enlarge FERC’s check on DOE authority.

Second is the problem of *discretionary authority*. To preserve flexibility, Congress sometimes phrases its agency checks in permissive rather than mandatory terms. In Section 404 of the DOE Act, for example, Congress left FERC room to decline to exercise its veto authority. The statute allows FERC, “in its discretion,” to determine, within a period of time set by the Secretary, whether one of its functions may be significantly affected by a proposed policy or rule.<sup>272</sup> FERC

267. Magill cautions that the incentives of various governmental actors are notoriously difficult to determine. Magill, *supra* note 64, at 631. If Congress is unable to correctly identify the tendencies of various administrative actors, its ability to achieve a particular balance of authority will be even more difficult.

268. This is true even under the best of conditions, and statutory precision may not always reflect the best of conditions. See Alfred C. Aman, *Institutionalizing the Energy Crisis: Some Structural and Procedural Lessons*, 65 CORNELL L. REV. 491, 525 (1980) (“The DOE Act was not sufficiently clear when it came to defining the relationship between the Secretary and the Commission in general.”).

269. 42 U.S.C. § 7174(a) (2018). There are certain other limitations on FERC’s veto authority, as discussed in Part III.

270. See Alexandra Kamel, *Size, Biology, and Culture: Persistence as an Indicator of Significant Portions of Range Under the Endangered Species Act*, 37 ECOLOGY L.Q. 525, 534-35 (2010) (observing that “the meaning of ‘significant’ remains unclear”).

271. See Nathan J. Brodeur, *Michigan v. U.S. Environmental Protection Agency*, 28 ECOLOGY L.Q. 275, 280 (2001) (discussing the relationship between the term “significance” and consideration of control costs).

272. 42 U.S.C. § 7174(a) (2018).

may determine that its functions are not so affected, and may perhaps decline to make a determination altogether.<sup>273</sup>

Shortly after the DOE Act's passage, at least one commentator believed that Section 404 would be a potent defense against DOE overreach. Writing in 1980, Alfred Aman argued that FERC could use its authority under the Section to "substantially offset" power granted to DOE.<sup>274</sup> But Congress could not predict in 1977 how aggressive FERC would be in asserting its prerogative, nor how defensive DOE might be in resisting aggressive FERC interpretations. As a result, Congress could not know how effectively FERC would check DOE actions under Section 404. In fact, as discussed above, FERC has rarely invoked this provision, contributing to the problem of lopsided aggrandizement explored in the next Section.

In addition, the problem of *statutory multiplicity* means that any assessment of the balance of authority between two administrative actors requires a complicated netting calculation. This calculation must take into account various checks and balances across multiple statutes in a given subject area.<sup>275</sup> Consider again the case of energy regulation. Although Congress established a separation and balance of authorities between FERC and DOE in the DOE Act, other delegations already on the books may allow DOE to disrupt that balance. For example, the Federal Power Act delegates responsibility for setting compensation in wholesale energy markets to FERC.<sup>276</sup> These markets determine the revenue that power generators receive for their energy. Yet, as we have seen, a determined Department of Energy can try to bypass that authority in order to provide additional compensation to certain types of plants.<sup>277</sup>

One option that DOE has mentioned recently as a possible way to support coal plants is the Defense Production Act of 1950 (DPA). Congress passed the

273. *But see* Massachusetts v. EPA, 549 U.S. 497 (2007) (holding that the EPA Administrator could not decline to form a judgment about whether greenhouse gases from new motor vehicles caused or contributed to air pollution that endangered public health and welfare). The language of the two statutes is subtly but crucially different, however, because EPA's statute states that the Administrator "shall" make a determination while the DOE Act notes only that FERC "may" do so.

274. Aman, *supra* note 268, at 524.

275. *See, e.g.*, Michael M. Ting, *A Strategic Theory of Bureaucratic Redundancy*, 47 AM. J. POL. SCI. 274, 274 ("Others have also pointed out that increasing the number of components can lead to unpredictable interactions between them, ultimately hindering organizational effectiveness.").

276. 16 U.S.C. §§ 824d-824e (2018) (giving FERC both the power and the authority to ensure that wholesale rates are "just and reasonable" and "not unduly discriminatory").

277. *DOE Addendum*, *supra* note 263 (laying out possible uses of DOE emergency authority and the President's national-security authority to support coal and nuclear-power plants).

DPA at the start of the Korean War.<sup>278</sup> The Act gives the President authority to mobilize domestic industry to ensure adequate production in support of the war effort.<sup>279</sup> Although the provisions were initially time limited, Congress has reauthorized many of them, most recently through 2019.<sup>280</sup> One of the surviving provisions gives the President authority to subsidize certain industries deemed essential to national defense. The President may also require the performance and prioritization of contracts related to “materials, equipment, and services” deemed to be “scarce, critical, and essential.”<sup>281</sup> The President has, in the past, delegated portions of his authority under the Act to the Secretary of Energy.<sup>282</sup>

Secretary Perry has reportedly been looking “very closely” at the Act as a source of support for the coal industry and for coal-fired power specifically. A leaked administration memorandum outlining strategies for supporting the coal industry confirms this.<sup>283</sup> It would not be the first time the Act has been invoked to regulate the electric-power sector. Both President Clinton and President George W. Bush invoked the Act’s prioritization provisions to ensure adequate supplies of electricity and natural gas during the California energy crisis in January 2001.<sup>284</sup>

Of course, any invocation of the Act to support the coal industry will have to survive judicial scrutiny. Nevertheless, it is unlikely that Congress, in passing the DOE Act in 1977, considered whether and to what extent the DPA might shift the balance of power over electricity markets from FERC toward DOE.

In sum, thanks to statutory ambiguity, permissive rather than mandatory delegations, and statutory multiplicity, initial allocations of power will be unavoidably imprecise. As the next Section will demonstrate, such allocations are also unstable.

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278. JARED T. BROWN, CONG. RESEARCH SERV., R43767, THE DEFENSE PRODUCTION ACT OF 1950: HISTORY, AUTHORITIES, AND CONSIDERATIONS FOR CONGRESS, at Summary (2018).

279. At least one commentator suggests that President Truman believed the Act necessary, at least in part, because of the supply disruptions of the late 1940s caused by labor actions. These were the same set of circumstances that led to the famous *Steel Seizure Case*. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (striking down the President’s seizure of a steel mill in the face of a labor strike).

280. See Defense Production Reauthorization, Pub. L. No. 113-172, § 1, 128 Stat. 1896, 1896 (2014).

281. 50 U.S.C. § 4511 (2018).

282. See Exec. Order No. 13,603, 77 Fed. Reg. 16,651, 16,652 (Mar. 16, 2012) (delegating authority under Section 101 of the Act to the Secretary of Energy).

283. See *DOE Addendum*, *supra* note 263 (outlining a legal strategy for invoking the DPA in support of the domestic coal industry).

284. DANIEL H. ELSE, CONG. RESEARCH SERV., RS20587, DEFENSE PRODUCTION ACT: PURPOSE AND SCOPE 2 (2009).

### B. *Lopsided Aggrandizement*

Power relationships are dynamic, not static.<sup>285</sup> This is as true within the administrative state as it is among the three constitutional branches. As political scientists have long recognized, bureaucratic agents may deviate from congressional preferences over time.<sup>286</sup> But the temporal aspects of interagency dynamics have been overlooked and deserve greater attention.

There are myriad forces producing interagency dynamism. Political alignments within and across the political branches,<sup>287</sup> personalities and risk tolerance of agency heads,<sup>288</sup> and other forces will at times push agencies to expand their authorities, and at others to retrench.<sup>289</sup> These dynamics affect not just agency authority in the abstract, but the relative authority of agencies among which statutory powers have been separated.

Because of the number of variables and forces at work, it is difficult to predict how statutory allocations will play out on the ground. Nevertheless, one form of evolution deserves greater attention because it is in tension with congressional motivations for separating and checking statutory powers in the first instance: when an executive agency that shares subject-matter authority with an independent commission tilts the balance of authority in its favor. A more sustained

285. Indeed, some celebrate this dynamism. See Huq & Michaels, *supra* note 41, at 351 (applauding the judicial strategy of cycling between rules and standards in separation-of-powers cases as a plausible way to allow alternating expression of competing values). Although Huq and Michaels do not make the point explicitly, their approach makes the most sense if interpreted as a series of recalibrations of power between government institutions as a means of effectuating an array of values.

286. See, e.g., Kenneth A. Shepsle, *Bureaucratic Drift, Coalitional Drift, and Time Consistency*, 8 J.L. ECON. & ORG. 111, 112-13 (1992) (reviewing the literature and emphasizing the enactment of Congress's use of internal agency design to ensure that its preferences will be reflected for as long as possible); Sloan G. Speck, *Tax Planning and Policy Drift*, 69 TAX L. REV. 549, 552 (2016) (same); see also McCubbins et al., *supra* note 34. This Article suggests that the structures of delegated power across and between agencies serve a similar purpose.

287. For a discussion of the relationship between political-party dynamics and constitutional structure, see Daryl J. Levinson & Richard H. Pildes, *Separation of Powers, Not Parties*, 119 HARV. L. REV. 2312, 2327 (2006), which observes that party competition supplements, and can even replace, interbranch competition.

288. See MANUEL P. TEODORO, *BUREAUCRATIC AMBITION: CAREERS, MOTIVES, AND THE INNOVATIVE ADMINISTRATOR* 116 (2011) (observing that "some agency heads advocate vigorously for potentially incendiary policies . . . while others are content to enjoy the perquisites of office and prestige of profession without inviting controversy").

289. See, e.g., Sharon B. Jacobs, *The Administrative State's Passive Virtues*, 66 ADMIN. L. REV. 565, 568 (2014) (suggesting that agencies, cognizant of their own precarious constitutional position, frequently exercise restraint in decision-making).



reallocation of power over time toward the executive agency threatens to undermine Congress's efforts to shelter some of the administrative authorities in that area from presidential control.<sup>290</sup>

The shift in power between paired agencies depends on the factors discussed above but also on structural features. Three of those features are discussed here: agencies' leadership configurations, their political independence, and the nature of the statutory entanglements between them.

With respect to leadership, agencies with single heads can adopt and execute expansionist strategies more readily than can multimember commissions.<sup>291</sup> Independent commissions are typically made up of an uneven number of commissioners, each of whom has an equal vote. Frequently, there is also a requirement that no more than a bare majority of commissioners be from a single political party.<sup>292</sup> These requirements mean that independent commissions must deliberate to reach consensus and that there will be multiple viewpoints represented in the decision-making process. Because of these internal checks, multimember commissions are less likely to agree on a policy direction than are hierarchical executive departments. This, in turn, makes aggrandizement less likely, or at least less linear. By contrast, in an agency such as the Department of Energy, the Secretary of Energy makes policy, which the agency staff then carries out. If the Secretary wishes to adopt an aggressive understanding of the Department's authority, he or she may do so.<sup>293</sup> Leadership configuration also means that multimember commissions are less likely to be captured by a single interest than are

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290. We should be cautious in trying to measure power allocations between agencies both for the reasons elaborated in the last Section, *see supra* Section III.B, and because, as Magill warns, there may be a tendency to define such reallocations in terms of short-term rather than long-term outcomes, *see* Magill, *supra* note 64, at 643-44. Yet while precise measurements may be elusive, we can certainly observe changes in relationships between the agencies in question and track those changes over time.

291. Such commissions dominate the landscape of independent agencies. *See* PHH Corp. v. CFPB, 839 F.3d 1 (D.C. Cir. 2016), *rev'd en banc*, 881 F.3d 75 (D.C. Cir. 2018).

292. For a discussion of partisan-balance requirements, see Brian D. Feinstein & Daniel J. Hemel, *Partisan Balance with Bite*, 118 COLUM. L. REV. 9, 43-48 (2018) (finding that partisan-balance requirements have had some effect in preventing Presidents from selecting like-minded individuals for cross-party appointments); and Ronald J. Krotoszynski, Jr. et al., *Partisan Balance Requirements in the Age of New Formalism*, 90 NOTRE DAME L. REV. 941 (2015) (examining the constitutionality of such requirements).

293. There are some internal checks even within a hierarchical agency. The agency's attorneys and other career staff can provide important feedback to a department head, for example. Ultimately, however, the Secretary determines departmental policy.

executive departments. To influence a multimember commission effectively, interest groups must capture a majority of commissioners.<sup>294</sup> By contrast, interest groups can influence an executive agency by targeting the agency's single administrator.<sup>295</sup>

With respect to political control, because of their greater exposure to presidential direction, executive agencies may be more likely to expand their authorities at the expense of independent agencies. Presidents have electoral interests in implementing their policy platforms,<sup>296</sup> and they may leverage executive agency authority as a means to that end.<sup>297</sup> Whether we call this tendency aggrandizement or "forceful . . . assertion of regulatory priorities,"<sup>298</sup> it can shift control over policy in favor of the executive agency.

An independent agency whose political insulation is sufficiently robust may be able to repel such advances. But this is where analysis of particular statutory entanglements and their effects is vital. As the case study demonstrates, statutory

294. See Barkow, *supra* note 6, at 38 (“[O]nly one person at the apex can also mean that the agency is more easily captured.”); Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 611 (2010); Glen O. Robinson, *On Reorganizing the Independent Regulatory Agencies*, 57 VA. L. REV. 947, 962 (1971) (“[T]he single administrator may be *more vulnerable*” to interest group pressures “because he provides a sharper focus for the concentration of special interest power and influence”). *But see* Datla & Revesz, *supra* note 7, at 771 (“[B]y the 1960s, it became clear that [independent commissions] faced the same pathologies, such as capture and poor decision making, as executive agencies.”). Regulatory-capture theory has its roots in the sympathies of the Interstate Commerce Commission for the railroads it regulated. See William J. Novak, *A Revisionist History of Regulatory Capture*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 25, 26 (Daniel Carpenter & David A. Moss eds., 2014).

295. There are suggestions that this is precisely what took place when Murray Energy, the nation's largest coal-mining company, met with Energy Secretary Rick Perry to present their “action plan” to save coal. See Lisa Friedman, *How a Coal Baron's Wish List Became President Trump's To-Do List*, N.Y. TIMES (Jan. 9, 2018), <https://www.nytimes.com/2018/01/09/climate/coal-murray-trump-memo.html> [<https://perma.cc/68XJ-XLMW>]; Steven Mufson, *An American Energy Plan Straight from Coal Country*, WASH. POST (Dec. 8, 2017), [https://www.washingtonpost.com/business/economy/an-american-energy-plan-straight-from-coal-country/2017/12/08/1f207a26-d6ab-11e7-a986-d0a9770d9a3e\\_story.html](https://www.washingtonpost.com/business/economy/an-american-energy-plan-straight-from-coal-country/2017/12/08/1f207a26-d6ab-11e7-a986-d0a9770d9a3e_story.html) [<https://perma.cc/CLJ3-H379>].

296. See Edward Cantu, *The Separation-of-Powers and the Least Dangerous Branch*, 13 GEO. J.L. & PUB. POL'Y 1, 44-45 (2015) (describing growing presidential efforts to control administrative agencies as a response to the public's increasing expectations about what presidents can accomplish).

297. Presidents are aided in their efforts to direct executive agencies by the large number of political appointees embedded in such agencies. See Barron, *supra* note 126, at 1096.

298. Metzger, *supra* note 53, at 425 (“[N]o clear line separates forceful presidential assertion of regulatory priorities and presidential aggrandizement.”).

checks may simultaneously enable executive agency overreach and erode independent-agency autonomy.<sup>299</sup> The relationship between FERC and DOE is a good test case for the effects of statutory entanglements on agency independence. This is because FERC is one of only four agencies identified by Kiri Datla and Richard Revesz as “most insulated . . . from presidential control” in their work on the functional differences between independent and executive agencies.<sup>300</sup> FERC possesses all seven of the criteria of independence they identify.<sup>301</sup> If FERC’s independence can be eroded by entanglements with an executive department, then no agency is safe.<sup>302</sup>

Although they do not all work to transfer authority from FERC to DOE, the net result of the entanglements between the two agencies described in Part II has been to give DOE more power over FERC’s jurisdictional activities. Congress may have included these provisions with the best of intentions, but their use by the current administration in particular suggests that their effect may be more powerful than anticipated.

First, as discussed in the previous Part, Section 403 of the DOE Act permits the Secretary of Energy to propose rules and policies that fall within FERC’s exclusive jurisdiction. FERC *must* consider these policies within a timeframe set by

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299. More broadly, a closer examination of statutory entanglements should lead us to clarify our thinking on the meaning of agency “independence.” Datla and Revesz are undoubtedly correct that agencies rarely, if ever, exist in purely “independent” or “executive” form. See Datla & Revesz, *supra* note 7, at 824. In assessing independence, commentators look to factors such as whether the agency heads are subject to removal at will by the President, whether the agency has its own revenue stream, and whether they possess independent litigating authority. See Bressman & Thompson, *supra* note 294; Livermore, *supra* note 3; Selin, *supra* note 7; Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163 (2013). This article suggests that statutory entanglements are another potential source of executive control over independent agencies and deserve greater scrutiny.

300. See Datla & Revesz, *supra* note 7, at 825-26.

301. The seven criteria are removal protection, specified tenure, multimember structure, partisan balance requirements, litigation authority, freedom from centralized review, and adjudication authority. Datla & Revesz, *supra* note 7, at 784-808.

302. Of course, as Datla and Revesz point out, even independent agencies are not wholly immune from outside influence, including presidential influence. The President appoints the chairs of multimember agencies (with Senate confirmation) and the chair wields power over agenda control, among other agency functions. *Id.* at 818-20. The President also provides support that independent agencies may find useful in the form of physical resources or political advice. *Id.* at 822-24. However, independent agencies are acknowledged to be relatively more immune to presidential influence as compared with executive departments. See *generally id.* (comparing agencies by degree of independence).

the Secretary of Energy, although it need not ultimately adopt them.<sup>303</sup> This provision gives the President at least partial agenda-setting authority over FERC. In September 2017, Secretary Perry invoked Section 403 of the DOE Act in an attempt to subsidize coal and nuclear power plants in wholesale energy markets. These markets are regulated by FERC, not DOE. But by proposing a rule for FERC's consideration under Section 403, DOE obligated FERC to spend months evaluating its rulemaking proposal and reviewing the 1,500 comments filed in response.<sup>304</sup> In this particular case, DOE's effort failed in the short term when FERC declined to finalize its proposed rule.<sup>305</sup> However, FERC did open a new docket to consider whether pricing in wholesale energy markets should be modified to account for the "resilience" attributes of coal and nuclear plants.<sup>306</sup>

Second, as discussed above, Section 202(c) of the Federal Power Act authorizes the Secretary of Energy to require the generation or transmission of electricity in an emergency. Emergency, however, is defined broadly enough that a determined Secretary might be tempted to invoke this authority to override both FERC and other government agencies, including the EPA, that have responsibility for the day-to-day regulation of power facilities.<sup>307</sup> The Secretary of Energy has invoked Section 202(c) authority twice to allow coal plants to remain open notwithstanding their violation of environmental requirements and is considering more extensive use of that provision.<sup>308</sup> And he may use the sections of the DPA, discussed above, to subsidize the coal industry and coal power production more broadly.<sup>309</sup>

Each of these moves expands authority granted to DOE in ways that Congress likely did not intend or foresee. And each of these moves does so at the expense of FERC's authority to regulate wholesale energy markets. By contrast,

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303. 42 U.S.C. § 7173(b) (2018).

304. See Letter from Kevin J. McIntyre, FERC Chairman, to Rick Perry, Sec'y of Energy (Dec. 7, 2017), <https://www.ferc.gov/DOE-letter.pdf> [<https://perma.cc/KBK4-G8UF>].

305. Order Terminating Rulemaking Proceeding, Initiating New Proceeding, and Establishing Additional Procedures, 162 FERC ¶ 61,012 (Jan. 8, 2018).

306. *Id.*

307. The Department of Energy memorandum quoted above outlines just such a strategy. See *DOE Addendum*, *supra* note 263. While I do not believe that DOE's reasoning supports invocation of the provision for this purpose, the courts must resolve that question for themselves.

308. See Robert Walton & Gavin Bade, *FirstEnergy Asks DOE for Emergency Action to Save PJM Coal, Nuke Plants*, UTILITYDIVE (Mar. 29, 2018), <https://www.utilitydive.com/news/firstenergy-asks-doe-for-emergency-action-to-save-pjm-coal-uke-plants/520280> [<https://perma.cc/R9LL-T2YB>].

309. See Gavin Bade, *Perry: DOE "Looking Very Closely" at Defense Production Act to Save Coal, Nukes*, UTILITYDIVE (May 9, 2018), <https://www.utilitydive.com/news/perry-doe-looking-very-closely-at-defense-production-act-to-save-coal-n/523187> [<https://perma.cc/385U-WM73>].

FERC has declined to invoke its Section 404 authority to review DOE policies or rules. DOE's aggrandizement has thus shifted the balance of authority over the nation's energy mix away from FERC.

In passing the DOE Act, members of Congress do not seem to have taken seriously enough the impact of statutory entanglements on the erosion of FERC's autonomy. During consideration of the Act, Congress was clearly aware of the value of FERC's independence. The House Committee on Government Operations noted in their report that "[a] special effort was made to preserve the independence of action and decision of [FERC] and to insulate it from influences from other parts of the Department."<sup>310</sup> And yet the Committee appeared preoccupied with structural insulation (including removal protections) and did not consider the potential effects of the entanglements discussed in Part II.<sup>311</sup> Similarly, Senator Javits described the Senate compromise as taking seriously those who believed that energy pricing decisions be made in a "public participation process with independent decisionmakers."<sup>312</sup> This independence, Senator Javits asserted, would "guarantee that prices are not set entirely by those whose interests are singly directed toward increased domestic production."<sup>313</sup> Again, however, Senator Javits overlooked the potential influence of DOE on ratemaking through Section 403, and on the electricity sector more generally through its emergency authority.

### C. *Adjusting the Balance*

As the previous Section suggests, the balance of statutory authority between agencies is likely to shift over time. The consistent erosion of one agency's relative authority negates that agency's ability to serve as an effective counterweight to an executive agency with authority in the same policy domain.<sup>314</sup> If the ideals

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310. H.R. REP. NO. 95-346, pt. 1, at 8 (1977).

311. *Id.*

312. 123 CONG. REC. 15,281 (1977) (statement of Sen. Javits).

313. *Id.*

314. Magill chastises scholars for failing to articulate justifications for constitutional balancing of powers and for assuming that the precise balance can be measured at any point in time. Magill, *supra* note 64, at 604-06. This Section takes those critiques seriously as applied to the statutory separation of powers. But Magill's challenges are less potent in this context. For one thing, here there is no need to identify an independent justification for the statutory separation of powers: what matters are Congress's intentions. In addition, although it might not be possible to quantify the relative authority of agencies among whom statutory powers have been divided, we can observe changes to the status quo.

of separation and balance are to be preserved, therefore, adjustments will be required.<sup>315</sup> But who should take charge of the recalibration?

### 1. Congress

As original designer, Congress is the obvious first choice to safeguard the statutory separation of powers. Congress could ensure more effective balancing of authority over time in three ways: by incorporating lessons from existing delegations in designing future schemes, by monitoring its delegations more consistently with statutory balance in mind, and by amending legislation to recalibrate power dynamics where necessary.

First, Congress might take care to mitigate the problems identified above by using more precise language in its delegations and by considering the creation of mandatory rather than discretionary authority within entanglements. It should also more carefully consider existing power imbalances between agencies when it creates new arrangements. This requires both understanding the statutory universe in which any new allocations and entanglements will function as well as considering agencies' relative proximity to the President. As suggested above, Congress should take special care in setting up balances of statutory authority between independent and executive agencies. In such cases, it would be prudent to give the independent agency relatively more checks on their executive counterparts in order to prevent lopsided aggrandizement. Congress might also consider expressly delegating interpretive authority over the statutory entanglements themselves to independent agencies.<sup>316</sup>

Such precautions, however, will not always prevent unforeseen evolutions of the power dynamic between agency pairs. Postenactment, therefore, Congress should ensure that any system of separation, checks, and balances it sets up is functioning effectively by monitoring agency performance. One way to do this would be for committees with relevant jurisdiction to schedule regular oversight hearings designed to ensure that statutory checks are performing as intended. Notwithstanding Mathew McCubbins and Thomas Schwartz's well-known argument that oversight by "fire-alarm" (in which Congress relies on citizens and interest groups to bring problems to their attention) can be a rational strategy,<sup>317</sup>

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315. For a related argument regarding the constitutional separation of powers, see Jon Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515 (2015).

316. For a similar recommendation with different aims, see Bijal Shah, *Executive (Agency) Administration*, 72 STAN. L. REV. (forthcoming 2020) (on file with author) (recommending greater congressional specification of independent-agency interpretive authority in order to capitalize on such agencies' superior subject-matter expertise).

317. Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984).

that approach is less effective in the context of structural review. Because problematic invocations of statutory entanglements can be subtle, technical, and opaque, civil society actors are less likely to identify and challenge them.

Finally, if it finds that the system requires adjustment, Congress can amend statutes to eliminate or reword entanglements between agency pairs. In drafting the DOE Act, for example, Congress might not have anticipated that DOE would use its Section 403 authority to propose changes to wholesale market compensation given that it is an area squarely within FERC's regulatory domain. If Congress views this exercise as infringing unduly on FERC's authority, it might amend the legislation to limit DOE's proposal authority to areas more closely related to its own jurisdictional activities. Similarly, perceived abuses of emergency authority might lead Congress to specify more clearly the conditions under which such authority could be invoked or to require greater legislative involvement in the identification of emergency conditions.<sup>318</sup> Again, even the threat of such action may be sufficient to bring wayward agencies into line.

Unfortunately, our recent experience of congressional inaction—in addition to the many veto-gates bills must pass through to become law—makes legislative maintenance of the statutory separation of powers unlikely.<sup>319</sup> It is therefore worthwhile to consider other potential sources of rebalancing. Independent commissions might themselves assume a more active role in monitoring power relationships and asserting themselves to guard against encroachment by executive counterparts. And the courts will play a key role as they are called upon to interpret statutory language.

## 2. Agencies

Agencies too, could play a more active role in monitoring and rebalancing power relationships. Here, an analogy from the literature on constitutional separation of powers is instructive. David Pozen has exhorted federal-government actors to engage in self-help when faced with encroachment by other branches.<sup>320</sup> Pozen observes that government actors possess myriad tools, both

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318. For a more extensive discussion of the existing limits of energy emergency authorities, see Jacobs & Peskoe, *supra* note 264.

319. See, e.g., Michael J. Teter, *Congressional Gridlock's Threat to Separation of Powers*, 2013 WIS. L. REV. 1097, 1103-04 (charting a significant fall in the number of laws enacted per Congress since the 1970s); see also SARAH A. BINDER, *STALEMATE: CAUSES AND CONSEQUENCES OF LEGISLATIVE GRIDLOCK*, 37 (2003) (assigning each Congress a "gridlock score" based on a ratio of legislative output to extensiveness of agenda and finding that gridlock has increased over time).

320. David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2 (2014).

formal and informal, to restore the “constitutional status quo ante” when another branch has gone too far.<sup>321</sup>

The same is true of administrative actors. Where agencies leverage statutory entanglements to encroach on the authorities of others, the target agency can fight back. In the face of DOE’s recent expansionist posture, for example, FERC could be more aggressive in exercising the statutory entanglements that cut in its favor. As discussed in Part II, FERC has rarely invoked its authority to review DOE policies and rules that affect its jurisdiction. If this is because DOE is not notifying FERC of such policies and rules (as required by the Act), that failure could be challenged in court. Otherwise, FERC could more forcefully exercise this check on DOE authority as a way to counterbalance the Department’s expansionist efforts.<sup>322</sup>

Agency self-help is limited by norms as well as by law.<sup>323</sup> Independent agencies may be reluctant to disagree forcefully with their executive counterparts, and especially with presidential policy. As I have written elsewhere, anxiety about their position within government (both as a constitutional and as a political matter) can lead independent agencies in particular to exercise a version of Alexander Bickel’s “passive virtues.”<sup>324</sup> They are sensitive to their own vulnerabilities and cognizant that they have a limited amount of political capital to expend. Consider, for example, FERC’s response to DOE’s rulemaking proposal under Section 403 in late 2017. While dismissing DOE’s proposal as lacking any legal basis, FERC was careful to add that it “appreciate[d]” Secretary Perry’s identification of the important issue of power system resilience and assured him that it would “remain a priority” for the Commission.<sup>325</sup> Such a conciliatory tone speaks to FERC’s recognition of the importance of executive goodwill.

FERC’s caution was not misplaced. As discussed above, after its rejection of the DOE proposal, President Trump nominated the proposal’s author, former head of DOE’s Office of Policy Bernard McNamee, to replace retiring FERC

321. *Id.* at 22.

322. FERC would be limited in these efforts by the express language of the statutory check, however, which restricts its oversight to “rules, regulations, and statements of policy of general applicability.” Department of Energy Organization Act § 404(a), 42 U.S.C. § 7174(a) (2018).

323. *C.f.* Pozen, *supra* note 320, at 27–48 (analyzing constraints of law and convention in the constitutional separation of powers context).

324. *See* Jacobs, *supra* note 289, at 565.

325. Order Terminating Rulemaking Proceeding, Initiating New Proceeding, and Establishing Additional Procedures, 162 FERC ¶ 61,012 (Jan. 8, 2018).



Commissioner Robert Powelson.<sup>326</sup> If the consequence of checking DOE's actions under its Federal Power Act authorities is presidential nomination of more partisan commissioners, FERC will be limited in how aggressively it can push back on such efforts. Ultimately, therefore, independent agencies in particular may not be able to defend against interagency aggrandizement on their own.

### 3. Courts

The judiciary has assumed an unchallenged role as arbiter of the constitutional separation of powers. Its role in policing the statutory separation of powers is less well-defined. Beyond setting broad constitutional parameters, courts afford significant latitude to Congress in assigning responsibilities to agencies. In the absence of alleged constitutional violations, courts do not second-guess congressional decisions about how to divide authority among regulatory bodies.

However, courts are sometimes called upon to police the borders of separated agency powers. In *Hunter v. FERC*, the D.C. Circuit adjudicated a dispute over the boundary between FERC and Commodity Futures Trading Commission (CFTC) jurisdiction, ultimately holding that the CFTC had exclusive jurisdiction over trading in commodity futures contracts, even those that affect markets that FERC oversees.<sup>327</sup> In *Massachusetts v. EPA*, the Supreme Court navigated a question of overlapping jurisdiction when it found that the EPA and the Department of Transportation (DOT) could work together to set fuel economy standards and greenhouse-gas emissions standards.<sup>328</sup> And courts regularly confront questions of separated agency powers in the context of deference disputes where multiple agencies claim interpretive authority.<sup>329</sup>

In these contexts and others, courts could demonstrate greater awareness of the separation-of-powers framework behind particular statutory delegations. Many of the questions involving power balance between agencies will present as

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326. Gavin Bade, *Coal Lobby Pleaded as Trump Nominates Ally McNamee to FERC*, UTILITYDIVE (Oct. 4, 2018, 9:40 AM), <https://www.utilitydive.com/news/coal-lobby-pleaded-as-trump-nominates-ally-mcneee-to-ferc/538812> [<https://perma.cc/CX2P-YQ8K>]; Timothy Gardner, *Trump Nominates Coal, Nuclear Bailout Supporter to U.S. Power Agency*, REUTERS (Oct. 3, 2018, 6:01 PM), <https://www.reuters.com/article/us-usa-trump-energy-regulator/trump-nominates-coal-nuclear-bailout-supporter-to-u-s-power-agency-idUSKCN1MD2R9> [<https://perma.cc/D43X-3FFL>].

327. 711 F.3d 155, 158-59 (D.C. Cir. 2013).

328. 549 U.S. 497, 531-32 (2007) (dismissing the EPA's argument that it could not regulate carbon dioxide emissions without stepping on DOT's toes).

329. See Amanda Shami, *Three Steps Forward: Shared Regulatory Space, Deference, and the Role of the Court*, 83 *FORDHAM L. REV.* 1577, 1597-1609 (2014) (citing several such cases).

questions of statutory interpretation. As a threshold matter, it is far from clear that agencies should receive *Chevron* deference when interpreting statutory checks and balances. *Chevron* deference only applies when agencies are interpreting statutory language that they have been authorized to administer.<sup>330</sup> Courts faced with the question of how *Chevron* applies to multiple-agency statutes have not reached consensus.<sup>331</sup> Some courts give less or no deference to agency interpretations in such cases,<sup>332</sup> while others select a lead agency and defer to its interpretation.<sup>333</sup> And for some general statutes that apply across agencies, such as the Freedom of Information Act or the Administrative Procedure Act, no deference applies.<sup>334</sup> For now, given any particular statutory entanglement, whether or not courts will defer to an agency's interpretation depends on the specifics of the entanglement itself, as well as the deciding court.

When interpretive disagreements between agencies concern the proper allocation of authority between them, however, there are good reasons for courts to favor independent over executive agency interpretations. Ultimately, *Chevron* rests on ideas about congressional intent (real or imputed).<sup>335</sup> In subsequent cases, the Supreme Court has opted to consider "the agency's generally conferred authority and other statutory circumstances" for clues about Congress's intentions in any given case.<sup>336</sup> Because Congress's motivation in dividing powers between an executive and an independent agency is likely to be prevention of undue executive influence over the relevant policy area, a court might safely infer that, all else equal, Congress would prefer to have the independent agency policing the boundary between the two.

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330. See, e.g., *Am. Council on Educ. v. FCC*, 451 F.3d 226, 234 (D.C. Cir. 2006) (noting that the courts may not substitute their own interpretation of an ambiguous statute for an agency's if the agency has been "authorized to administer the statute in question" (quoting *Citizens Coal Council v. Norton*, 330 F.3d 478, 482 (D.C. Cir. 2003))).

331. See Daniel Lovejoy, Note, *The Ambiguous Basis for Chevron Deference: Multiple-Agency Statutes*, 88 VA. L. REV. 879, 910 (2002) (noting disagreement among courts).

332. E.g., *Lieberman v. FTC*, 771 F.2d 32, 37 (2d Cir. 1985) (affording the interpreting agency less deference than if it alone administered the relevant statutory provision).

333. E.g., *Kaufman v. Nielsen*, 896 F.3d 475, 485 (D.C. Cir. 2018) (observing that in some cases, "statutes administered by multiple agencies may still permit *Chevron* deference").

334. See *Collins v. Nat'l Transp. Safety Bd.*, 351 F.3d 1246, 1252-53 (D.C. Cir. 2003) (explaining that no deference is given for interpretations of general statutes because the *Chevron* justifications of specialized expertise and the potential to achieve unified interpretation are absent).

335. *Chevron, Inc. v. Nat'l Res. Def. Council*, 467 U.S. 837, 843-44 (1984) ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.")

336. *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

Consider Section 403 of the DOE Act. Neither FERC nor DOE has been “authorized to administer” the DOE Act as a whole.<sup>337</sup> Instead, the statute divides authority between them. What of the individual provision? Section 403 gives DOE the authority to propose rules and policies for FERC’s expedited consideration. But it is directed at both agencies, permitting “the Secretary and the Commission” to propose rules and policies.<sup>338</sup> Furthermore, the obligation to consider a proposal appears directed at the Commission, not the Secretary. Even where a proposal comes from the Secretary, the statute states that “[t]he Commission shall have exclusive jurisdiction with respect to any proposal . . . and shall consider and take final action on any proposal . . . in an expeditious manner.”<sup>339</sup> Thus, in the event that DOE and FERC disagree on the Section’s scope, a court should probably defer to FERC rather than DOE.

Courts might also assume the primary interpretive role regarding agency entanglements.<sup>340</sup> In doing so, courts can prevent aggrandizement through expansive interpretation of agency authority that might disrupt the balance that Congress established. For instance, the courts might interpret DOE’s emergency authority under Section 202(c) to only be available in a narrow range of “emergencies,” so that DOE cannot use the provision to broadly circumvent FERC’s authority to regulate energy markets. Or they might read in a limit on the frequency with which DOE can invoke its Section 403 proposal authority. In making such decisions, courts should give due regard to congressional purpose as expressed in the text of the relevant statute and its legislative history. They should also assess for themselves the effects of particular invocations of authority and their effect on the overall balance of power between the particular agencies at issue.

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337. *See Am. Rivers, Inc. v. FERC*, 129 F.3d 99, 107 (2d Cir. 1997) (declining to defer to FERC’s interpretation of the Clean Water Act because it was not authorized to administer that statute).

338. 42 U.S.C. § 7173(a) (2018).

339. *Id.* § 7173(b).

340. *But see* Catherine M. Sharkey, *Agency Coordination in Consumer Protection*, 2013 U. CHI. LEGAL F. 329, 353 (suggesting that courts provide extra deference to agency interpretations where two agencies with responsibility for the statute concur); William Weaver, Note, *Multiple-Agency Delegations & One-Agency Chevron*, 67 VAND. L. REV. 275, 277 (2014) (proposing that courts be ultradeferral to interpretations that are the product of more than one agency’s actions).

**CONCLUSION**

A version of the political conditions under which Congress divided authority between DOE and FERC are present again today. The separation of energy authorities described in Part II emerged in the wake of Watergate, when skepticism about executive power was at its height. Today, we see similar skepticism about executive overreach in the face of presidential efforts to consolidate authority.<sup>341</sup> In making any new delegations under such conditions, Congress would be wise to draw lessons from the past.

The DOE Act highlights the advantages of a statutory separation of powers as well as its pitfalls. If its drawbacks can be addressed effectively, however, statutory separation of powers offers an appealing solution to the perils of faction and tyranny that the Framers identified. As Magill has noted with respect to more complex divisions of powers between government actors and across branches, “This kind of fragmentation is complicated, even chaotic, but it is also our assurance against threatening concentrations of government power.”<sup>342</sup>

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341. See, e.g., Jay Cost, *Donald Trump and the Imperial Presidency*, NAT'L REV. (Dec. 10, 2018, 6:30 AM), <https://www.nationalreview.com/2018/12/donald-trump-modern-imperial-presidency> [<https://perma.cc/8T73-3RPE>] (concluding that the Trump Administration “represents the apotheosis of the imperial presidency”); Marc Fisher, *Donald Trump and the Expanding Power of the Presidency*, WASH. POST (July 30, 2016), [https://www.washingtonpost.com/politics/donald-trump-and-the-dangers-of-a-strong-presidency/2016/07/30/69cfc686-55be-11e6-b7de-dfe509430c39\\_story.html](https://www.washingtonpost.com/politics/donald-trump-and-the-dangers-of-a-strong-presidency/2016/07/30/69cfc686-55be-11e6-b7de-dfe509430c39_story.html) [<https://perma.cc/9BW7-22H8>] (citing concerns that “[t]he constitutional order set up by our founders is breaking down”); Gene Healy, *President Trump Flaunts the Dangers of Presidential Power*, CATO INST. (Jan. 11, 2018), <https://www.cato.org/publications/commentary/donald-trump-flaunts-dangers-presidential-power> [<https://perma.cc/5A5N-RCTJ>] (concluding that “if there’s ever going to be a ‘teachable moment’ on the dangers of concentrating too much power in the executive branch, it ought to be now”).

342. Magill, *supra* note 64, at 651.