Commission Chairs

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Since 1950, Congress has granted chairs of many multimember commissions chief-executive authority as a way to increase administrative efficiency. Although it intended to maintain the ability of commission majorities to dictate policy, it inadvertently strengthened the authority of chairs to such an extent that majorities cannot enact their preferred policies without their chair's cooperation. Using their agenda authority and their authority to direct staff, chairs dictate which policy documents staff develop and which items receive a vote, meaning that a commission majority cannot enact policy if its chair prohibits staff from drafting a rule or refuses to allow a vote to occur. Despite this shift, it is common among scholars and judges to think of commissions as bodies of equals, resulting in applications of the unitary executive theory that fail to appropriately take into account the substantial amount of power chairs wield.

This Article is the first comprehensive study of the authority of commission chairs, and it examines the statutes and power dynamics scholars routinely ignore. Using a novel dataset of all federal executive-branch commissions, this Article finds that the majority of commissions operate under a "strong-chair" model, while associate commissioners in fewer than one-in-five commissions have any statutory authority to restrict their chairs' actions. Using this data, it evaluates the effects of the strong-chair model on commission governance and offers several changes that, if made, could give associate commissioners more control and supervisory authority over the agencies. Doing so would return chairs to their original role as officials who simply keep the agencies operating efficiently and ensure that majority rule drives commission actions. The Article then evaluates this research's implications for doctrinal applications of the unitary executive theory. Because presidents appoint commission chairs, this research suggests that presidential control of independent agencies is far less attenuated than proponents of the unitary executive theory presently contemplate. Indeed, the prevalence of the strong-chair model and resultant presidential control over commission activities should persuade courts that

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statutory removal protections for commissions are consistent with the purposes of unitary control of the executive branch.

Introduction

In December 2021, the Democratic members of the Board of Directors of the Federal Deposit Insurance Corporation (FDIC) attempted to use their majority position to issue a request for information but were blocked by Republican Chair[1] Jelena McWilliams.[2] The Democrats outnumbered McWilliams three-to-one, but because agency staff report to the Chair, and because she dictates meeting agendas and decides which items receive a vote, the FDIC's General Counsel refused to allow the request to be published in the *Federal Register*.[3] The Democratic majority was left with little recourse; while they were, of course, able to vote down proposals presented at Board meetings, they were unable to move their agenda forward.[4]

This reality stands in stark contrast to the accepted wisdom concerning multimember agencies (i.e., commissions). Prominent judges and scholars consider commissions to be bodies of equals and argue that commissions result in "better-informed and reasoned policy outcomes,"[5]

1. Statutes generally use the gendered term "chairman" to describe the commissioner with administrative responsibilities. Throughout this Article, the term "chair" will be used unless specifically quoting a primary source.

2. Emily Flitter, *How Bank Regulators Are Trying to Oust a Trump Holdover*, N.Y. TIMES (Dec. 10, 2021), https://www.nytimes.com/2021/12/10/business/jelena-mcwilliams-fdic-bank-regulation-trump.html [https://perma.cc/T58J-J7HP].

3. Jelena McWilliams, *A Hostile Takeover of the FDIC*, WALL ST. J. (Dec. 15, 2021, 6:30 PM ET), https://www.wsj.com/articles/hostile-takeover-fdic-board-rohit-chopra-michael-hsu-jelena-mcwilliams-abuse-power-11639432939 [https://perma.cc/KK2H-ASSN].

4. McWilliams resigned from the FDIC on December 31, 2021, effective February 4, 2022. *FDIC Chairman Jelena McWilliams Announces Her Resignation*, FDIC (Dec. 31, 2021), https://www.fdic.gov/news/press-releases/2021/pr21107.html [https://perma.cc/46E3-48ML]. It is likely her resignation was a result of growing pressure from Congress, expected litigation from the FDIC's Democrats, and a desire to not be associated with "Trumpism" as the last appointee of President Donald Trump leading a federal banking regulator. *See* Letter from Maxine Waters, Chair, H. Comm. on Fin. Servs., to Jelena McWilliams, Chair, FDIC (Dec. 21, 2021), https://financialservices.house.gov/uploadedfiles/1221_-_waters_ltrto_fdic_bank_merger_rfi.pdf [https://perma.cc/6G7L-JPPQ] (expressing "concern regarding your attempts to apparently disavow and block a sensible Request for Information (RFI) approved by a majority of the Federal Deposit Insurance Corporation's (FDIC) Board of Directors"); Rohit Chopra, Director, Consumer Fin. Prot. Bureau, Statement at the December Open Meeting of the Board (Dec. 14, 2021), https://files. consumerfinance.gov/f/documents/cfpb_fdic-board-meeting_statement_2021-12.pdf [https://perma.cc/4C25-UFAM] ("Absent a return to legal reality and constructive engagement, board members will need to take further steps to exercise independence from management and to ensure sound governance of the Federal Deposit Insurance Corporation."); @revolvingdoorDC, TWITTER (Dec. 31, 2021, 4:26 PM), https://twitter.com/revolvingdoorDC/status/1477028463030808581 [https://perma.cc/N7M8-G2U9] (arguing that McWilliams' "resignation is a victory for democracy and a blow to Trumpism").

5. Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 794 (2013); *see also* Jacob E. Gersen, *Administrative Law Goes to Wall Street: The New Administrative Process*, 65 ADMIN. L. REV. 689, 696 (2013) ("[A] multimember board allows for a representation of divergent interests in a way that a single decisionmaker simply cannot."); *Administrative Law - Agency Design - Dodd-Frank Act Creates the Consumer Financial Protection Bureau - Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010)*, 124 HARV. L. REV. 2123, 2128 (2011) [hereinafter *Dodd-Frank Act Creates the Consumer Financial Protection Bureau*] (noting that commissions require a policy's "proponent to articulate a coherent rationale").

"accommodat[e] . . . diverse or extreme views,"[6] promote a "continuity of policies" and "the development of institutional memory,"[7] have "built-in monitoring system[s],"[8] and are better able to defend against industry capture,[9] among other benefits. In 2018, then-Judge Brett Kavanaugh wrote that, "in the absence of Presidential control, the multimember structure of independent agencies serves as a critical substitute check on the excesses of any individual independent agency head."[10]

This understanding—the near-universal view in scholarship—is grounded in the belief that the members of multimember agencies (i.e., commissioners) have equal authority. That equality is thought to "foster more deliberative decision making," which, as mentioned above, leads "to better-informed and reasoned policy outcomes from the agency" and lower capacity for capture by special interests.[11] To the extent that commission chairs are considered, they are

6. Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1113 (2000); *see also* Michael B. Rappaport, *Replacing Independent Counsels with Congressional Investigations*, 148 U. PA. L. REV. 1595, 1601 n.17 (2000) (noting that commissions "prevent aberrant actions"); Joshua D. Wright, *The Antitrust/Consumer Protection Paradox: Two Policies at War with Each Other*, 121 YALE L.J. 2216, 2260 (2012) (arguing that single-director agencies "will be subject to the whims and idiosyncratic views of a single individual" (quoting *Who's Watching the Watchmen? Oversight of the Consumer Finance Protection Bureau: Hearing on H.R. 4173 Before the H. Comm. on Fin. Servs.*, 112th Cong. 11, 3 (2011) (statement of Todd Zywicki, Found. Professor of L., Geo. Mason Univ.))).

7. Datla & Revesz, *supra* note 5, at 794.

8. Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 41 (2010); *see also* Sharon B. Jacobs, *Administrative Dissents*, 59 WM. & MARY L. REV. 541, 579-80, 586 (2017) (arguing that when commission majorities do act in extreme manners, the minority acts "as 'fire alarms'" that "alert[] legislators to shirking or bureaucratic drift" so Congress may intervene and help "control arbitrariness in agency decision-making"); Glen O. Robinson, *On Reorganizing the Independent Regulatory Agencies*, 57 VA. L. REV. 947, 963 (1971) (arguing other members are "safeguards" against agency capture).

9 *See* Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 611 (2010) (arguing that agencies' "collective-board structure inhibits political control" because special interests "must capture a majority of the membership rather than just one individual"); Robinson, *supra* note 8, at 962 (noting that single directors "provide[] a sharper focus for the concentration of special interest power and influence").

10. PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 183 (D.C. Cir. 2018) (Kavanaugh, J., dissenting).

11. Datla & Revesz, *supra* note 5, at 794; *see also* Bressman & Thompson, *supra* note 9, at 611-14 (explaining that the "structural characteristics of independent agencies" insulate them from political pressures and promote nonpartisan decision making); Barkow, *supra* note 8, at 37-41 (describing the features of independent agencies that make them particularly well-suited to deterring industry capture); Jacobs, *supra* note 8, at 586-90 (observing that "both the threat and practice of drafting separate statements can have a salutary effect on decisional quality" and operate as an internal check on agency arbitrariness); Robinson, *supra* note 8, at 964 (maintaining that "the primary reason for maintaining collective deliberation and judgment on matters of broad public policy . . . is to ensure a broader, more varied perspective on complex and multifaceted issues"); Steven A. Ramirez, *Depoliticizing Financial Regulation*, 41 WM. & MARY L. REV. 503, 593 (2000) (suggesting that the increased use of "independent commissions governed by commissioners with tenure and insulated from political interloping and the appropriations process" has the potential to reduce agency capture and politicization); Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 469 (2008) (arguing that presidential control over independent agencies is effectuated when a majority of commissioners are from the same political party as the president); Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J.

merely viewed as agencies' chief administrative officers, "setting agendas, establishing budget priorities, developing consensus on substantive decisions, and handling external relationships,"[12] while commissioners collectively are thought to maintain "ultimate formal responsibility for regulatory policy development and implementation . . . to be exercised in a collegial, shared manner."[13] Under this view, chairs' policymaking leverage stems from their bully pulpit, not from structural advantages.[14] Even scholars critical of commissions take for granted this dynamic, though disagreeing that the benefits outweigh the costs.[15]

The prevalence of this view of commissions is not surprising. Since at least the nineteenth century, the law has provided that so long as there is a quorum voting on an issue, commissions are governed by the principle of majority rule and no commissioner's vote is superior to the votes of the others.[16] When Congress created its first commissions, it ensured that commissioners would be equals. Even after Congress began granting chairs the authority to manage their commissions' day-to-day operations following early- to mid-twentieth century scholarship on the inefficiencies this "equal-commissioner" model produced,[17] it still expected that chairs' actions would be "governed by [the] general policies

1337, 1366 (2013) (discussing the role of The Office of Information and Regulatory Affairs and endorsing the general principle that "traditional hallmarks of independence, such as limits on presidential removal" help insulate regulatory bodies from improper outside influence); Cass Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 103 (2000) (assessing the impact of group polarization on deliberative processes and suggesting that independent commissions' bipartisanship requirements provide a "check against" the adoption of extreme policy positions); Brian D. Feinstein & Daniel J. Hemel, *Partisan Balance with Bite*, 118 COLUM. L. REV. 9, 77-78 (2018) (evaluating the "deliberation account" of partisan balance requirements in multimember agencies and concluding that such requirements do in fact lead to ideological diversity, while noting that the volume of actual deliberation—and the effect of that deliberation—is unclear).

12. Breger & Edles, *supra* note 6, at 1174 (noting that "the chairman's unitary authority often does not extend beyond the preparation or drafting of budget documents, which is considered an administrative or executive responsibility").

13. DAVID M. WELBORN, GOVERNANCE OF FEDERAL REGULATORY AGENCIES 5 (1977).

14. *See* Daniel E. Ho, *Measuring Agency Preferences: Experts, Voting, and the Power of Chairs*, 59 DEPAUL L. REV. 333, 344 (2010); *see also* Keith S. Brown & Adam Candeub, *Partisans & Partisan Commissions*, 17 GEO. MASON L. REV. 789, 801 (2010) (finding that "Democrats were more likely to affirm under [a Democratic chair], and Republicans more likely to dissent" and vice versa).

15. *See* Ganesh Sitaraman & Ariel Dobkin, *The Choice Between Single Director Agencies and Multimember Commissions*, 71 ADMIN. L. REV. 719, 724 (2019).

16. *See* Cooley v. O'Connor, 79 U.S. 391, 397 (1870) ("[I]t is a familiar principle that an authority given to several for public purposes may be executed by a majority of their number."); Brown v. D.C., 127 U.S. 579, 586 (1888) ("[A] major part of the whole is necessary to constitute a quorum, and a majority of the quorum may act. If the major part withdraw so as to leave no quorum, the power of the minority to act is, in general, considered to cease." (quoting JOHN FORREST DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS § 283 (1872)).

17. *See, e.g.*, COMM'N ON THE ORG. OF THE EXEC. BRANCH, THE INDEPENDENT REGULATORY COMMISSIONS 3-4 (1949) (noting that "[p]urely executive duties—those that can be performed far better by a single administrative official—have been imposed upon these commissions with the result that these duties have sometimes been performed badly" while also "interfer[ing] with the performance of the strictly regulatory functions of the commissions"); COMM. ON INDEP. REG. COMM'NS, A REPORT WITH RECOMMENDATIONS: PREPARED FOR THE U.S. COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF GOVERNMENT 47 (1949) ("[A] chairman's primary responsibility for administration should not supplant the ultimate authority of the entire commission on matters which are of major significance to the agency.").

of" their commissions.[18] Commission chairs were to be caretakers of their commissions' administrative matters, executing their commissions' policies without imposing their own agendas; they would also be overseen and limited by the non-chair (i.e., associate) commissioners.[19] This model was intended to increase agencies' efficiency while maintaining compromise and collegiality.

Some commissions today are run such that commissioners have equal opportunities to shape policy. Within these equal-commissioner agencies, all commissioners are granted a (roughly) equal right to instruct staff to conduct research, draft documents, or undertake various projects and to decide which items receive a vote. However, this is no longer the principal model for most federal government commissions, and nearly all commissions that regulate the private sector. In these "strong-chair" commissions, chairs maintain the authority required to induce commission votes on particular items and to manage commissions' day-to-day operations. As a result, commission chairs direct staff to draft regulations and set enforcement priorities that adhere to the chair's vision, while associate commissioners are left to negotiate textual changes to their chairs' documents and vote up or down on enforcement actions.

Limited scholarship has wrestled with this strong-chair model. A few scholars have recognized that "[m]ost chairs are essentially their agency's chief executive and administrative officer" under statutes that "expressly give[] the chairman the right to distribute business among agency personnel and administrative units within the agency,"[20] or that by virtue of "selecting most staff," chairs "command[] staff loyalties" and "dominate commission policymaking" such that "they are far less often in dissent from commission policy decisions than their colleagues."[21] Scholarship has noted that associate commissioners "tend[] in general to defer to the chair[]" because "[i]n truth, commission members ha[ve] very little to do and few resources with which to do it,"[22] and that as a result, "agency chairs [have] the power to dominate and control their agencies' agendas."[23]

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18. *See, e.g.*, Reorganization Plan No. 8 of 1950, § 1(b)(1), 5 U.S.C. App. at 126 (2018).

19. *See* Division of Powers and Responsibilities Between the Chairperson of the Chemical Safety and Hazard Investigation Board and the Board as a Whole, 24 Op. O.L.C. 102, 103 (2000) [hereinafter Division of Powers of the CSB].

20. MARSHALL J. BREGER & GARY J. EDLES, INDEPENDENT AGENCIES IN THE UNITED STATES: LAW, STRUCTURE, AND POLITICS 295, 303 (2015).

21. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 590-91 (1984).

22. MARTHA DERTHICK & PAUL J. QUIRK, THE POLITICS OF DEREGULATION 86-87 (1985).

23. BREGER & EDLES, *supra* note 20, at 309. Some agency- or chair-specific scholarship exists that may be generally applicable. For example, one study of the Federal Communications Commission (FCC) noted that, because chairs may decide to "only bring[] forward orders with which he agrees," the chairs "concur[]-in-part, concur[], dissent[]-in-part, or dissent[]" just over one-percent of the time. Eric Hunnicutt & Adam Candeub, *Political Control of Independent Agencies: Evidence from the FCC* 3 (2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1640285 [https://perma.cc/A52H-NYQE] (noting that "the Chair concurs-in-part, concurs, dissent-in-part, or dissents only 119 times out of 9,279 orders," or 1.28%). Another found that Federal Trade Commission (FTC) Chair James Miller was able to "stall[]" rulemakings during his tenure because of his general opposition to the use of rulemakings. Mark

Despite these examples, most scholarship has ignored the shift to the strong-chair model. Although Congress created commissions in order to prevent one individual from making significant decisions alone, discussions of how chairs utilize their control of commission staff and agenda authority to shut out associate commissioners from policymaking is largely missing from the scholarship, as are discussions of the limited options available to associate commissioners for overseeing and restricting their chairs. Scholars have also not investigated the consequences of losing deliberation, negotiation, and informed decision making through a body of equals, or how the strong-chair model (and the President's authority to promote and demote chairs) interacts with the unitary executive theory.

This Article is the first comprehensive study of the authority of commission chairs, and it examines the statutes and intra-commission dynamics the literature routinely misses. In four Parts, it explains the strong-chair model, investigates the prevalence of the model and examines variation in its application, evaluates the model's effects on governance, and spells out the model's implications for the unitary executive theory.

Part I provides the conceptual foundations for the strong-chair model. This Part describes the legal relationship between chairs and associate commissioners, and explains how power imbalances permit strong chairs to run their agencies largely without the buy-in of the associate commissioners. These chairs may direct staff to engage in sub-regulatory and pre-regulatory activities in many of the same ways as do the heads of single-director agencies.

Part II is a quantitative study of the statutes governing eighty-two federal commissions using a unique dataset. It divides commissions into three categories to determine whether Congress has been more likely to implement the strong-chair model in commissions that are regulatory, adjudicatory, or executive in nature, and reviews the President's capacity to demote one commissioner and promote another to the position of chair to obtain preferred policy policies. This Part finds that most of these agencies (60% or 49/82) operate under the strong-chair model, including 92% (22/23) of commissions deemed "regulatory."

Based on these findings and others, Part III evaluates the strong-chair model of commission governance. It finds that there are advantages as well as drawbacks to the strong-chair model compared with the equal-commissioner model. The biggest gain is for efficiency. Because commissions cannot operate effectively if staff report to all commissioners equally (e.g., if one commissioner directs enforcement officials to investigate one potential violation of law and a second commissioner directs the staff not to) or if votes are required every time

E. Budnitz, *The FTC's Consumer Protection Program During the Miller Years: Lessons for Administrative Agency Structure and Operation*, 46 CATH. U. L. REV. 371, 413 (1997). Of course, these demonstrations of chairs' powers are not necessarily applicable to equal-commissioner agencies. One former Chair wrote in his memoir that "the chairmanship—given the authority of the general counsel [who is appointed by the President] to appoint regional staff and recommend regional directors to the entire Board (not just to the chairman)—is more like a bully pulpit than a position of authority." WILLIAM B. GOULD IV, LABORED RELATIONS: LAW, POLITICS, AND THE NLRB: A MEMOIR 52 (2001).

staff is to receive instructions (e.g., if commissioners must vote to direct enforcement staff to begin each investigation), commissions with chairs that may act unilaterally can address issues more quickly than commissions that must always act after deliberation.[24] However, a consequence of not needing a commission vote means that ideas are not deliberated between the commissioners.

Part III also evaluates the increased presidential influence on commissions associated with the strong-chair model, as well as differences in how strong-chair commissions affect policy continuity and the efficacy of outside oversight. Further, it provides the author's opinion regarding what constitutes optimal commission governance: a structure in which chairs retain chief-executive authority but associate commissioners may easily oversee, overrule, and demote their chairs to ensure commissions are administered in the interest of the majority. It offers five reforms Congress could implement to allow commissions to function in the manner originally envisioned.

Lastly, Part IV discusses the implications of the strong-chair commission model for the unitary executive theory. Recent Supreme Court opinions discuss the unitary executive largely in terms of presidential control of agencies; removal protections are viewed as inherently suspect. The strong-chair model of commissions, however, allows for much more presidential control than the model found constitutionally permissible in *Humphrey's Executor v. United States*.[25] In many (perhaps all) of these commissions, the President maintains the ability to demote chairs who will not effectuate her agenda and promote commissioners who will, and her appointed chairs have the opportunity to engage in important sub-regulatory and pre-regulatory activities. As such, the persistence of the strong-chair model should enable courts to find that statutory removal protections for regulatory and adjudicatory commissions are consistent with the purposes of unitary control of the executive branch.

I. Conceptualizing the Strong-Chair Model

In contrast with the equal-commissioner model of commission governance in which all commissioners have equal authority to set agency policy, the strong-chair model is defined by chairs that are generally the sole grantees of two distinct abilities necessary to set commission policies: the ability to induce commission votes on particular items (agenda authority) and the ability to manage commissions' day-to-day operations (chief-executive authority), including hiring and firing staff, assigning staff priorities, and setting budgets.[26]

24. *See, e.g.*, COMM'N ON THE ORG. OF THE EXEC. BRANCH, *supra* note 17.

25. 295 U.S. 602 (1935) (upholding a statute prohibiting the President from removing from office commissioners of the Federal Trade Commission as constitutional).

26. These authorities are similar to those of board chairs and chief-executive officers in private-sector corporations. In the private sector, the role of the board chair is "in developing and overseeing the agenda, ensuring directors are informed and participating, conducting the board meeting as well as keeping

The sources of these authorities are found in statute and custom. Accordingly, "[t]he legal relationship between an agency chair and his or her colleagues is statutorily established but nonetheless highly ambiguous and malleable" and is subject to the personalities and power dynamics within each agency.[27] For that reason, most commissions exist somewhere along a spectrum between the equal-commissioner and strong-chair models, with the majority existing further towards the strong-chair side.

Chairs benefit from presiding over commission meetings and, absent statutes providing otherwise, being the only individuals who may decide which discretionary items—like issuing regulations or initiating litigation—are debated and voted on. This authority allows chairs to control their commissions' agendas, both literally and figuratively, and can be used to great effect. Once he became Chair of the Civil Aeronautics Board, for example, Alfred Kahn bumped "two applications . . . to the head of the queue for evaluation," giving them priority over earlier-filed applications and giving the applicants monopoly or oligopoly control over air-transportation routes.[28] At the FDIC, staff indicated that "because the FDIC doesn't follow Robert's Rules of Order," associate members could call for a special meeting under the bylaws but "the Chairman would still [decide] what would be voted on."[29] As a result, even if a commission's majority supports a policy that its chair does not support, its policy will not receive a vote, let alone be enacted. Being a strong chair of a commission is not exactly like heading a single-director agency, but they certainly have much more unilateral authority than associate commissioners.

Chairs' agenda authority is not limitless. For example, in those commissions that exist to adjudicate cases brought by other agencies,[30] chairs lack almost all agenda authority because their commissions must hear and rule

track of decisions and their implementation," Pieter-Jan Bezemer, Gavin Nicholson & Amedeo Pugliese, *The Influence of Board Chairs on Director Engagement: A Case-Based Exploration of Boardroom Decision-making*, 26 CORP. GOVERNANCE 219, 220 (2018), whereas the role of the chief-executive officer is to make managerial decisions to lead the enterprise. *See generally* Andrew Kakabadse, Nada K. Kakabadse & Ruth Barratt, *Chairman and Chief Executive Officer (CEO): That Sacred and Secret Relationship*, 25 J. MGMT. DEV. 134 (2006) (examining the dyadic nature of the chair/CEO relationship and its impact on the workings and performance of the board). Thus, commission chairs in the strong-chair model are akin to individuals who are both chair and CEO of their institutions.

27. BREGER & EDLES, *supra* note 20, at 293; *see also* WELBORN, *supra* note 13, at 150 ("The evidence suggests, however, that the [commissions] almost never give systematic and focused attention to questions of balance, roles, and the quality of the working relationship between members and chairmen. In most of the agencies, the formal delineations of authority are imprecise. Even when definition has been attempted, substantial gray areas have been left.").

28. *Id.* at 310.

29. Brendan Pedersen, *How Democrats Could Gain Control of the FDIC's Agenda*, AM. BANKER (Jan. 29, 2021, 3:08 PM ET) (modifications in original), https://www.americanbanker.com/news/how-democrats-could-gain-control-of-fdics-agenda [https://perma.cc/KDD8-N379]. *But see* Authority of a Majority of the FDIC Board to Present Items for Vote and Decision, 46 Op. O.L.C. __, slip op. at 6-7 (Jul. 29, 2022) [hereinafter FDIC Board], https://www.justice.gov/olc/file/1529481/download [https://perma.cc/M5BX-ADMU] ("[U]nder parliamentary law, which the FDIC Board informally refers to for guidance, presiding officers exercise generally ministerial duties that are not understood to include the authority to defeat the will of the majority." (internal citation omitted)).

30. *See infra* Section II.A (explaining the concept of adjudicatory commissions).

on cases as they come—these chairs cannot induce votes on policies they support or prevent votes on policies they oppose. Statutes of other commissions frequently mandate commission votes on nondiscretionary matters, providing associate commissioners a say on confirming the "heads of major administrative units,"[31] approving commission budgets, adjudicating cases before the agency, and more.[32] Some statutes permit individual associate commissioners to compel their commissions to vote on particular, limited items. For example, although many statutes permit any commissioner to compel review of actions taken by staff pursuant to delegated authority, this authority can frequently only be used to compel review of decisions of administrative law judges.[33] Commissioners of only one commission, the Federal Election Commission (FEC), may call a vote on any item.[34] At every other commission, chairs may prevent associate commissioners' draft rule proposals from receiving a vote.[35]

Importantly, many commission activities never rise to the level of a commission vote, allowing chairs to run their agencies largely without the buy-in of the associate commissioners. Indeed, between their chief-executive authorities and the ability to direct staff to engage in sub-regulatory and pre-regulatory activities, chairs exercise power in many of the same ways as the heads of single-director agencies. The only things required of associate commissioners in many strong-chair commissions are votes on rulemakings, enforcement actions, and, sometimes, staff appointments.

Many—perhaps most—commission responsibilities are sub-regulatory, in that they do not rise to the level of a commission vote and are undertaken by staff. These responsibilities include advising regulated entities, approving filings, publishing guidance documents, conducting investigations and examinations, and more. Therefore, the ability to direct staff gives chairs an inordinate amount of authority vis-à-vis the other commissioners. Though these sub-regulatory activities are not "final agency action" and do not carry the force

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31. 7 U.S.C. § 2(a)(6)(C) (2018); *see also* 15 U.S.C. § 2053(g)(1)(A) (2018) (providing that the Consumer Product Safety Commission (CPSC) Chair shall appoint various positions "subject to the approval of the Commission"); 42 U.S.C. 5841(a)(4) (2018) (providing that "[t]he appointment by the [Nuclear Regulatory Commission (NRC) Chair] of the heads of major administrative units under the Commission shall be subject to the approval of the Commission"); Reorganization Plan No. 8 of 1950, § 1(b)(1), 5 U.S.C. App. at 126 (2018) (same with regard to the FTC Chair); Reorganization Plan No. 10 of 1950, § 1, 5 U.S.C. App. at 127 (2018) (same with regard to the Securities and Exchange Commission (SEC) Chair).

32. *See, e.g.*, 29 U.S.C. § 659 (2018) (providing that the Occupational Safety and Health Review Commission (OSHRC) adjudicates Occupational Safety and Health Act cases).

33. *See, e.g.*, 12 U.S.C. § 248(k) (2018) ("The [Federal Reserve Board (FRB)] shall, upon the vote of one member, review action taken at a delegated level . . . ."); 15 U.S.C. § 78d-1(b) (2018) (providing that, where the delegation of its functions are concerned, "[t]he vote of one member of the [SEC] shall be sufficient to bring any such action before the Commission for review").

34. 52 U.S.C. § 30106(d) (2018) ("The Commission shall meet at least once each month and also at the call of any member.").

35. *See infra* Section II.C.

of law, they influence private sector behavior.[36] Regulated entities act on staff advice—issued at the bequest of commission chairs or subject to their supervision—rather than wait for commissioners to vote on policy.[37] Similarly, regulated entities "consider no-action letters [staff letters indicating they will not recommend prosecution for particular activities] a source of de facto law."[38] For many "big-ticket" discretionary matters, staff will consult with chairs but rarely with associate commissioners, and no vote will be held to overturn these sub-regulatory activities because associate commissioners generally lack the agenda authority to compel such votes.[39] Although the private sector may be relatively confident that a chair does not have the votes to turn staff guidance into law, it may be unwilling to take the risk and nevertheless adhere to the principles staff have articulated.

In addition to sub-regulatory activities, chairs may direct staff to engage in pre-regulatory activities. For example, chairs may set enforcement priorities and have staff initiate prosecutions without apprising associate commissioners, leaving them without a say in enforcement matters until after cases have been investigated and settlement agreements negotiated or complaints drafted. At the Securities and Exchange Commission (SEC), the Chair generally decides who will be the Director of Enforcement and sets enforcement priorities.[40] Further, SEC policies allow senior Enforcement Division officials to initiate investigations, issue subpoenas,[41] and decide practically every relevant aspect of their cases,[42] reporting only to the enforcement director who reports only to the

36. *See* Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REGUL. 165, 184-231 (2019) (describing regulated parties' incentives to follow sub-regulatory guidance).

37. *Id*. at 194 n.97 (noting that entities in some industries would be "in a risky position if they did not comply with guidance").

38. Donna M. Nagy, *Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters: Current Problems and a Proposed Framework*, 83 CORNELL L. REV. 921, 925 (1998).

39. Although some statutes, as well as some delegations, allow individual commissioners to request a commission vote to review actions taken by delegated authority, this is a reactive (rather than proactive) right that can only be used to review actions *taken*, not actions *not taken*. *See, e.g.*, 12 U.S.C. § 248(k) (2018).

40. *Melissa Hodgman Named Acting Director of Division of Enforcement*, U.S. SEC. & EXCH. COMM'N (Jan. 22, 2021), https://www.sec.gov/news/press-release/2021-15 [https://perma.cc/5CVN-66NQ]; *SEC Division of Examinations Announces 2021 Examination Priorities*, U.S. SEC. & EXCH. COMM'N (Mar. 3, 2021), https://www.sec.gov/news/press-release/2021-39 [https://perma.cc/QLF9-E2E6]; *SEC Announces Enforcement Task Force Focused on Climate and ESG Issues*, U.S. SEC. & EXCH. COMM'N (Mar. 4, 2021), https://www.sec.gov/news/press-release/2021-42 [https://perma.cc/5V27-G323].

41. Melanie Waddell, *SEC's Acting Chair Gives Senior Officers Subpoena Power*, THINKADVISOR (Feb. 9, 2021, 2:39 PM), https://www.thinkadvisor.com/2021/02/09/secs-acting-chair-gives-senior-officers-subpoena-power/ [https://perma.cc/6DC6-6XLN].

42. These responsibilities include whom to charge, which violations to charge, which penalties and remedies to seek, and the forum in which to charge (administrative or judicial court). SEC DIVISION OF ENFORCEMENT, ENFORCEMENT MANUAL § 2.3.3–.5.3 (Nov. 28, 2017), https://www.sec.gov/divisions/enforce/enforcementmanual.pdf [https://perma.cc/QM2L-E9RK].

Chair.[43] Staff may negotiate settlements with defendants, and only once all details have been agreed to and all the documents have been drafted will the staff present the settlement to associate commissioners for approval.[44] According to one former SEC official, "[t]he pressure on the Commissioners to approve a settlement recommended by the staff is high. A disapproval would frustrate the staff's work on the investigation, delay the end of the case, possibly prevent an enforcement statistic, generate staff ill-will, and upset the expectations of the defendant."[45]

Further, because policy documents must be drafted before commissioners can vote on them, chairs' ability to direct commission staff to conduct research and develop policy proposals into regulatory text is equally significant. At the SEC, for example, there is a tradition of chairs circulating "thirty-day drafts"—proposed rule text written by commission staff that is provided to associate commissioners thirty days in advance of the meeting in which the rule is expected to be approved. At the Commodity Futures Trading Commission (CFTC), there is a tradition of "seven-day" drafts. Although associate commissioners frequently supervise small personal-office staffs—between one and five staffers, if any—so few individuals simply do not have the capacity to craft the numerous rules often necessary to regulate an industry or develop the hundreds of pages of preambulatory text that must accompany major rules. Simply as a matter of disparate resources, commission chairs direct staff to draft regulations that adhere to their visions while associate commissioners are left to negotiate textual changes to their chairs' documents.[46]

43. Reorganization Plan No. 10 of 1950, § 1(a)(1), 5 U.S.C. App. at 127 (2018) (transferring to the SEC's Chair "the executive and administrative functions of the Commission, including functions of the Commission with respect to (1) the appointment and supervision of personnel employed under the Commission").

44. At some agencies, associate commissioners may not be notified at all. At the Federal Communications Commission (FCC), for example, the Enforcement Bureau may handle enforcement matters up to $100,000 without the commissioners' involvement. *See* 47 C.F.R. § 0.311 (2021). In 2005, a former chair decreased an Enforcement Bureau's recommended $1.3 million fine of T-Mobile to just $100,000 so that T-Mobile could "escape full Commission review." COMM. ON ENERGY AND COM., DECEPTION AND DISTRUST: THE FEDERAL COMMUNICATIONS COMMISSION UNDER CHAIRMAN KEVIN J. MARTIN 23-24 (2008).

45. Email from Andrew Vollmer, Senior Affiliated Scholar, Mercatus Ctr., Geo. Mason Univ. to Todd Phillips, Dir. Fin. Regul. & Corp. Governance, Ctr. for Am. Progress (Apr. 30, 2021) (on file with author). Vollmer also notes that, although chairs may have more control over enforcement staff than associate commissioners, chairs frequently leave staff to their own devices. *Id. See also* Hester Peirce, Comm'r, Sec. & Exch. Comm'n, The Why Behind the No, Remarks at the 50th Annual Rocky Mountain Securities Conference (May 11, 2018), https://www.sec.gov/news/speech/peirce-why-behind-no-051118 [https://perma.cc/YTT2-GEMN] (explaining that the Commission "generally is asked to weigh in only once the staff has a recommended settlement in hand or when the staff is recommending litigation").

46. Perhaps the ability to direct staff was less important at the time the strong-chair model began developing than it is today. In the 1950s, agencies primarily used adjudication to make policy, which is a process that develops policy more gradually than rulemaking and requires less justification of policy changes than does rulemaking today. As a result, policy shifts may not have been as momentous (or contentious) as rulemakings, and commissioners could write policy documents (adjudicatory opinions) themselves, rather than necessarily relying on staff as many regulatory commissions do today. *See* Todd Phillips, *A Change of Policy: Promoting Agency Policymaking by Adjudication*, 73 ADMIN. L. REV. 495,

The authority to run the day-to-day operations of commissions are found in *sui generis* organic statutes.[47] No statute is explicit about the full contours of the chief-executive authority. Some "simply give the chair undefined administrative and executive powers,"[48] while others are clearer in that they grant the chief executive "the executive and administrative functions of the Commission," with detailed examples of those functions.[49] These organic statutes also grant chief-executive authority to chairs, to executive directors, or are silent on the matter. However, simply because a statute gives this authority to an executive director or is silent does not mean the chair does not impliedly possess the authority; a strong chair may still direct their agency's activities if they are granted the capacity to select their commission's executive directors without the influence of other commissioners,[50] or if the statute is silent as to where chief-executive authority lies and the other commissioners yield their claims.[51]

Legal opinions on commission governance or the balance of authorities within commissions are few. Courts have limited their involvement to imposing the principle of majority rule and quorum voting requirements for final agency actions.[52] Opinions by the Office of Legal Counsel (OLC) and Government

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506-16, 522-23 (2021) (detailing the shift from adjudicatory policymaking to rulemaking in the 1960s and 1970s and explaining how judicial precedents require agencies to craft extensive rule preambles in order to survive judicial review).

47. *See* Breger & Edles, *supra* note 6, at 1170 ("Agency statutes are different and each is, to some extent, *sui generis*.")

48. BREGER & EDLES, *supra* note 20, at 303; *see, e.g.*, 12 U.S.C. § 242 (2018) (declaring that the Chair of the Federal Reserve Board, "subject to its supervision, shall be its active executive officer"); 42 U.S.C. § 1975b(a)(1)(A) (2018) (granting that the director shall "serve as the administrative head of the [Civil Rights] Commission"); 7 U.S.C. § 1505(d) (2018) (granting that the manager of the Federal Insurance Crop Corporation "shall be [the commission's] chief executive officer, with such power and authority as may be conferred by the [commission.]"); *see also* Division of Powers of the CSB, 24 Op. O.L.C. 102, 102 (2000) ("The terms 'Chief Executive Officer' and 'executive and administrative functions' are decidedly vague, and nowhere [do statutes] define them.").

49. BREGER & EDLES, *supra* note 20, at 303; *see, e.g.*, Reorganization Plan No. 8 of 1950, § 1(b)(1), 5 U.S.C. App. at 126 (2018) (providing the Chair of the Federal Trade Commission with the powers of "(1) the appointment and supervision of personnel employed under the Commission, (2) the distribution of business among such personnel and among administrative units of the Commission, and (3) the use and expenditure of funds").

50. Frequently, equal-commissioner agencies employ executive directors who, by nature of their appointment, do not serve at the pleasure of the chair and to whom all staff report. If executive directors are appointed by commissions, rather than the chairs, they and the staff who report to them will report to all commissioners equally—or at least all commissioners who voted in favor of their appointment. If executive directors are not appointed by the commissions—perhaps having been appointed by the President, as with the NLRB's General Counsel, 29 U.S.C. § 153(d) (2018)—then they and their staffs will not report to *any* commissioners, again placing all commissioners in an equivalent position.

51. For example, the FDIC's organic statute is silent as to where chief-executive authority lies, implicitly granting it to the Board of Directors. An Act to Provide for the Safer and More Effective Use of the Assets of Banks, to Regulate Interbank Control, to Prevent the Undue Diversion of Funds into Speculative Operations, and for Other Purposes, ch. 89, § 12(B), 48 Stat. 162, 168-80 (1933) (codified at 12 U.S.C. §§ 1811-1835a) [hereinafter An Act to Provide for the Safer and More Effective Use of the Assets of Banks] (creating the FDIC). This author has personal knowledge that in practice, however, the Chair controls the day-to-day operations of the agency.

52. *See, e.g.*, FTC v. Flotill Products, 389 U.S. 179, 183 (1967) ("The almost universally accepted common-law rule is . . . in the absence of a contrary statutory provision, a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body.")

Accountability Office (GAO) are more detailed, but also still minimal.[53] OLC has explained that, unless otherwise provided for, a chief-executive's powers are limited to "superintend[ing] and carr[ying] out the day-to-day activities necessary to effectuate [the commission's] substantive decisions."[54] Statutes "vest[]" each commission "as a whole, rather than any individual member, with the authority and responsibility to carry out the statutory functions for which it was created."[55] To that end, in evaluating the division of authority within the Chemical Safety and Hazard Investigation Board (CSB), OLC provided:

> [T]he day-to-day administration of Board matters and execution of Board policies are the responsibilities of the [chief-executive] chairperson, subject to Board oversight, while substantive policymaking and regulatory authority is vested in the Board as a whole. In disputes over the allocation of authority in specific instances, the Board's decision controls, as long as it is not arbitrary or unreasonable.[56]

Of the times OLC or GAO has been asked to review whether particular functions were granted to chairs or to commissions, only the appointment of staff, preparation of budgets, "[t]he actual making of expenditures and awarding of contracts or grants," and—until recently—agenda-setting authority were deemed to be the chairs' decisions.[57] OLC has made it very clear that a majority

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53. Although these opinions are about specific agencies, they are generally applicable to agencies government-wide because they rely on statutory language similar to that of other agencies or broad principles of administrative governance. For example, one frequently cited OLC opinion relies in part on "general principles of corporate common law," among other sources. *Division of Powers of the CSB*, 24 Op. O.L.C. at 105; *see also* Breger & Edles, *supra* note 6, at 1168-69 (relying on that OLC opinion as a basis for examining the laws applicable to commissions due to "the agency's rather typical statute.").

54. *Division of Powers of the CSB*, 24 Op. O.L.C. at 104; *see also* Arthur H. Garrison, *The Opinions by the Attorney General and the Office of Legal Counsel: How and Why They Are Significant*, 76 ALB. L. REV. 217, 238 (2012) ("The exclusive authority held by the OLC to determine the interpretation of the law for the executive branch is based on the authority historically and statutorily bestowed upon the Attorney General—'because the Attorney General's opinions are treated as "final and conclusive" they necessarily become the executive branch interpretation of the law.'" (quoting Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1321 (2000)).

55. Authority of the Advisory Board for Cuba Broadcasting to Act in the Absence of a Presidentially Designated Chairperson, 24 Op. O.L.C. 24, 25 (2000) [hereinafter Cuba Broadcasting].

56. *Division of Powers of the CSB*, 24 Op. O.L.C. at 103.

57. Decision of the Comptroller General to the Equal Employment Opportunity Commission 10, B-167015, 1974 WL 7487, at *10 (Comp. Gen. Sept. 19, 1974) [hereinafter Decision of the Comptroller General to the EEOC]; *see also id.* at *2 ("Where the [Equal Employment Opportunity] Commission has set the policy in a particular matter designed to implement most effectively the principles of the Title VII (of the Civil Rights Act), it is the Chairman's responsibility through the staff of the Commission to use the special skills and expertise of the staff to see that these aims are properly carried out"); *Division of Powers of the CSB*, 24 Op. O.L.C. at 105 (noting that the chairperson "direct[s] staff work and assignments" but "may have to answer to the Board in some respects"); FDIC Board, 46 Op. O.L.C. __, slip op. at 3-4 (Jul. 29, 2022) ("Although the Bylaws do not directly address the authority to present items to the Board, our understanding is that the Board has historically construed them—without controversy—to give the Chairperson the authority to set the agenda for meetings. The authority to set the agenda of a business meeting is distinct, however, from the authority to prevent the Corporation's Board from voting on FDIC business by unilaterally blocking Board consideration of certain items entirely.").

of commissioners may override their chair, even if the chair has authority to "exercise the executive and administrative functions" of the agency.[58]

These statutorily provided executive responsibilities can be contrasted with more substantive responsibilities, which commentators believe should be reserved to the commission as a whole.[59] For example, in discussing the powers of the chair of the Equal Employment Opportunity Commission (EEOC), GAO opined that though chairs may develop budget proposals, those "proposals and any significant modifications . . . must be approved by the full commission" and though chairs may appoint staff, staffing levels are to be decided by full commissions "inasmuch as they relate to effectiveness and efficiency in carrying out the agenc[ies'] statutory functions and implementing substantive commission actions."[60] Even after determining that awarding contracts was within the province of chairs, GAO noted "that certain grants, contracts, and other expenditures may involve matters bearing upon legitimate substantive interests and responsibilities of the full commission."[61] Further, chairs' "exercise [of] administrative functions [is] subject to general policies of the commission[s],"[62] and commissions may establish "rules bearing on matters of internal Board governance (such as voting procedures and the delegation of Board authority and responsibilities) as well as rules governing the conduct of Board business with the public (such as investigations and hearings)" that chairs "must put . . . into practice."[63]

OLC and GAO also agree that in questions of whether a function is substantive or administrative, a "commission's substantive authority and responsibility as a body renders it the proper source for separating policy matters from administrative matters."[64] OLC warned, however, that "this does not mean that [a commission], exercising its oversight authority and its powers to make substantive decisions . . . may or should attempt to address itself to the plethora

58. *Division of Powers of the CSB*, 24 Op. O.L.C. at 104 ("[The chair is] subject in the exercise of his functions and duties as chairperson to oversight by the Board as a whole."). OLC has similarly held that in instances where the statute is "silent as to the Commission's internal organization, practices, and procedures[, t]he clear implication is that these matters are to be decided by the members of the Commission." National Commission on Neighborhoods (Pub. L. 95-24) — Powers—Appropriations, 2 Op. O.L.C. 366, 367 n.5 (1977) [hereinafter Nat'l Comm'n on Neighborhoods]; *see also* FDIC Board, 46 Op. O.L.C. __, slip op. at 4 (Jul. 29, 2022) (providing that agenda-setting authority "is distinct . . . from the authority to prevent the Corporation's Board from voting on FDIC business by unilaterally blocking Board consideration of certain items entirely").

59. *Decision of the Comptroller General to the EEOC*, 1974 WL 7487, at *1.

60. *Id.* at *8; *see also* Disclosure of Employee Appraisals to a Member of the Defense Nuclear Facilities Safety Board, 39 Op. O.L.C. 1, 6 (2015) [hereinafter Disclosure of Employee Appraisals] ("[O]ne of the Board's functions is to 'establish' 'policies' regarding employee supervision.").

61. *Decision of the Comptroller General to the EEOC*, 1974 WL 7487, at *10.

62. *Id.* at *7.

63. *Division of Powers of the CSB*, 24 Op. O.L.C. at 104.

64. *Decision of the Comptroller General to the EEOC*, 1974 WL 7487, at *10; *see also Division of Powers of the CSB*, 24 Op. O.L.C. at 105 (determining that commissions "as a whole, acting reasonably, ha[ve] the final authority to resolve disputes over whether a specific matter is within its oversight authority or is an administrative or executive concern of the chair-person or a legitimate concern of the [commission] as a whole").

of minute administrative problems bound up with the operation of a complex organization."[65]

It is not surprising that so many statutes grant chief-executive authority to commission chairs. The two scholars who have done the most work on commissions today have stated that "[n]o other approach is genuinely workable."[66] However, the statutory limitations on chairs are vastly different from the practical limitations. Despite being limited to running the "day-to-day activities necessary to effectuate [commissions'] substantive decisions,"[67] strong chairs have defied these limitations as mere conventions[68] and have expanded their dominion to managing nearly every aspect of commissions' substantive agendas. A Federal Trade Commission (FTC) chair once noted that "in the management of the Commission's day-to-day affairs, there are no collegial decisions. . . . [M]atters having to do with the management of the Commission's staff are not the subject of debate among the Commissioners."[69] A Federal Communications Commission (FCC) associate commissioner wrote that "the FCC's Chairman and a handful of staff—usually selected by the chair—can and usually do exercise nearly total control over that agency's basic policy agenda."[70]

Chairs have been able to wield such power because outside authorities have been unwilling to help associate commissioners hold their chairs to statutory limitations. Courts have not weighed in on issues as narrow as inter-commissioner disputes, in line with Supreme Court precedent dictating that "administrative agencies 'should be free to fashion their own rules of procedure, and to pursue method of inquiry capable of permitting them to discharge their multitudinous duties.'"[71] Similarly, OLC admits that it "is neither well-suited nor sufficiently well-versed . . . in the internal workings of [commissions] to provide

65. *Division of Powers of the CSB*, 24 Op. O.L.C. at 104-05. Of course, it also noted, "[a]t the same time, however, any number of Board activities or day-to-day aspects of Board business, while at least in part administrative and even seemingly mundane, may involve or affect the Board's duties and functions in ways that are of legitimate concern to the Board as a whole. Where that is the case, it is the prerogative of the Board to pass upon such issues in ways appropriate to its function as a policymaking and rule-setting body." *Id.* at 105.

66. BREGER & EDLES, *supra* note 20, at 303.

67. *Division of Powers of the CSB*, 24 Op. O.L.C. at 104.

68. *See* Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1182 (2013) ("Legal norms are enforceable by courts; conventions are extrajudicial unwritten norms that are enforced by the threat of political sanctions, such as defeat in re-election, retaliation by other political institutions and actors, or the internalized sanctions of conscience. Conventions, in contrast to law, are generated, identified, and enforced through decentralized processes. In principle, there is an identifiable institution to which one may go in order to press for a change in statutory or common law rules, but there is no such institution to which one may go to change conventions as such.").

69. Miles W. Kirkpatrick, *Nineteenth Annual Antitrust Spring Dinner Address*, 40 ANTITRUST L.J. 328, 332 (1971); *see also* Breger & Edles, *supra* note 6, at 1176 (noting that "an agency's statute alone rarely tells the complete story of agency operation" and citing this quote).

70. Glen O. Robinson, *Independent Agencies: Form and Substance in Executive Prerogative*, 1988 DUKE L.J. 238, 245 n.24 (1988).

71. Fed. Commc'ns Comm'n v. Schreiber, 381 U.S. 279, 290 (1965) (quoting Fed. Commc'ns Comm'n v. Pottsville Broadcasting Co., 309 U.S. 134, 143 (1940)); *see also* 5 U.S.C. § 553(b)(A) (2018) (exempting "rules of agency organization, procedure, or practice" from notice-and-comment requirements that would permit public participation).

more than a general response" to questions posed.[72] OLC has confirmed that a majority of a commission may override the chair,[73] but has largely been unwilling to read statutes in such a way that give associate commissioners the agenda authority necessary to bring motions for commission votes that would halt chairs' activities. Even in its most recent opinion on the topic, in which OLC noted that "[t]here is no general or specific source of authority in the [Federal Deposit Insurance] Act that can be read as permitting the Chairperson to prevent a majority of the Board from exercising its statutory responsibilities or otherwise making decisions for the [FDIC]" and that "under parliamentary law . . . presiding officers exercise generally ministerial duties that are not understood to include the authority to defeat the will of the majority," OLC still did not suggest a specific mechanism that would enable the majority to override the Chair if she refused to allow a vote on a topic.[74] Do associate commissioners need to sue their agencies to put this majority-rules principle into practice?

Associate commissioners can, of course, play hardball with their votes. In response to a chair's refusal to allow votes on an item of interest to an associate commissioner, that commissioner could vote against and prevent passage of the chair's priorities, incentivizing the chair to bring up the associate commissioner's priority to gain passage of their own. However, one can argue that commissioners should not be required to vote against, for example, regulations they support simply to gain leverage on items a commission majority already supports.

Thus, commission chairs have been allotted much more authority than the simple power to make the proverbial trains run on time. The result is a situation where there is little recourse for associate commissioners to make their voices heard or even to induce votes on their agendas. The idea that associate commissioners are to oversee the actions of their chairs is largely symbolic. One scholar has wondered "whether centralizing power in the office of the Chair is not an attempt to make collegial agencies something they are not—single-headed agencies."[75]

II. Quantitative Examination of Commission Governance

The strong-chair model is operational in the majority of commissions across the federal government, including all but two regulatory commissions. Instead of the idealized vision of commissions in which commissioners debate policy as equals, single individuals at many of the most important federal commissions

72. *Division of Powers of the CSB*, 24 Op. O.L.C. at 103 (quoting Memorandum from Theodore B. Olson, Assistant Att'y Gen., Off. of Legal Couns., to Reese K. Taylor, Jr., Chairman & Heather Gradison, Comm'r, Interstate Com. Comm'n 1 (Dec. 8, 1983)).

73. *Id.* at 104 (noting that the chair is "subject in the exercise of his functions and duties as chairperson to oversight by the Board as a whole"). OLC has held the same in instances where the statute is "silent as to the Commission's internal organization, practices, and procedures." Nat'l Comm'n on Neighborhoods, 2 Op. O.L.C. 366, 367 n.5 (1977).

74. FDIC Board, 46 Op. O.L.C. __, slip op. at 6-7 (Jul. 29, 2022).

75. Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 266.

that affect the private sector—including those that regulate telecommunications, capital markets, and the real economy—have authority to make significant policy decisions without the input of their presidentially-appointed, Senate-confirmed peers. Further, associate commissioners at fewer than one-in-five commissions have any statutory authority to even attempt to impose restrictions on their chairs' actions. And the President has the capacity to select or strongly influence the selection of the chair in at least two-thirds of commissions (55/82), including nearly 60% (29/49) of strong-chair commissions.

These figures are derived from a new dataset of eighty-two federal commissions created for this Article. This data was produced by reviewing commissions' statutory authorities across several traits, including whether the statute grants the chair chief-executive authority over the commission and whether associate commissioners have a statutory right to call meetings or add items to meeting agendas.

A. The Dataset

The development of this dataset of eighty-two commissions started with the list of agencies compiled by the Administrative Conference of the United States' *Sourcebook of United States Executive Agencies*.[76] Additional agencies were added from the *2021 U.S. Government Manual*.[77] All single-member agencies and agencies without Senate-confirmed leadership were removed. Finally, the internet was scoured for references to other federal commissions.

This final list excludes some federal government entities that could legitimately be considered commissions; for example, it excludes entities without Senate-confirmed positions as these entities are non-governmental organizations (e.g., the Public Company Accounting Oversight Board, the Smithsonian Institution), treaty obligation organizations as their boards of these organizations have non-U.S. members (e.g., the International Monetary Fund), and some multimember entities housed within other agencies as these entities are overseen by other Senate-confirmed officials (e.g., the Arthritis and Musculoskeletal Diseases Interagency Coordinating Committee). Additionally, the list includes agencies that some might not consider "true" agencies, such as entities that were created by Congress but are now private (e.g., the National Consumer Cooperative Bank) or federal-state partnerships with members appointed by state governors (e.g., the Northern Border Regional Commission), since they are governmental entities not housed within other agencies. No official

76. *See* JENNIFER L. SELIN & DAVID E. LEWIS, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 125-40 (2d ed. 2018).

77. *The United States Government Manual*, OFF. OF FED. REG., NAT'L ARCHIVES & REC. ADMIN. & GOV'T PUBL'G OFF. (2021), https://www.usgovernmentmanual.gov/GMEntireStructure [https://perma.cc/WCL2-QR46].

source lists all federal agencies or organizations.[78] The final list also has a recency bias: only commissions existing in 2021 were included.

Next, the commissions on the list were divided into three types—executive, adjudicatory, and regulatory. "Adjudicatory commissions" are those solely responsible for adjudicating cases brought by other agencies; "regulatory commissions" issue substantive regulations that govern private entities but may also engage in adjudication and enforcement activities; and "executive commissions" are those agencies that perform neither rulemaking nor adjudicatory activities and perform something akin to "services" for the private sector, other governments, or other federal agencies. Agencies were divided into these three types because the roles of agency chairs differ. Regulatory and executive commissions proactively make policy, whereas adjudicatory commissions must await cases brought to them; and regulatory and adjudicatory commissioners may be protected from removal by statute, whereas *Humphrey's Executor* would likely inhibit Congress from protecting executive commissioners.[79]

Table 1. Commissioners by Tripartite Type

Executive	ACUS; AMTRAK; ARC; ATBCB; BGSEEF; CSB; CCR; CCC; CNCS; CEA; CEQ; DNFSB; DRA; EAC; Ex-Im; Farmer Mac; FCIC; HFITF; FRTIB; HSTSF; IAF; IRSOB; JMMFF; LCC; MMC; MCC; MUSUSF; MWAA; NBRC; NCCB; NCD; NIBS; NTSB; NGPRA; PBGC; PCLOB; PRFOMB; RRB; SBRC; SCRC; SJI; SSAB; TVA; FODSITF; USADF; USIP; DFC; USPC; USPS
Adjudicatory	BVA; FLRA: FMSHRC; FCSC; ITC; MSPB; NMB; OSHRC
Regulatory	CFTC; CPSC; EEOC; FCA; FCSIC; FCC; FDIC; FEC; FERC; FFIEC; FMC; FRB; FTC; FSOC; NARAB; NCUA; NIGC; NLRB; NRC; PRC; SEC; SIPC; STB

Finally, each commission's organic statutes were scoured for whether they grant the chair chief-executive authority over the commission, including the authority to select the commission's executive director, and whether associate commissioners have a statutory right to add items to meeting agendas. These traits were identified as being particularly useful in understanding the powers

78. The *Boards, Commissions, and Committees* list from the U.S. Government Manual, compiled by the staff of the National Archives and Records Administration, notes, for example, that though "the editors have attempted to compile a complete and accurate listing, suggestions for improving coverage of this guide are welcome." *Boards, Commissions, and Committees*, OFF. OF FED. REG., NAT'L ARCHIVES & REC. ADMIN & GOV'T PUBL'G OFF. (2015), https://www.usgovernmentmanual.gov/ReadLibraryItem.ashx?SFN=+FG8vUAP++X7mtXAlvTS/Q==&SF=VHhnJrOeEAnGaa/rtk/JOg== [https://perma.cc/WME4-RHJE].

79. *See infra* Section III.A.

that chairs have over their commissions' operations. Statutes were also reviewed for how chairs are selected, and whether chairs have set terms, to determine the President's influence on commissions.

B. Chairs' Authorities

Nearly 60% (49/82) of commissions—including 91% (21/23) of regulatory commissions—operate under the strong-chair model, with statutes providing the chairs at least a minimal amount of executive authority.

Statutes designate the chair as the commission's executive or administrative head in nearly 40% (32/82) of the commissions. This designation is overwhelmingly granted to the chairs of adjudicatory and regulatory commissions (88% or 7/8, and 65% or 15/23, respectively), whereas the chairs of only 20% (10/51) of executive commissions are granted chief-executive status.

Table 2. Commissions with Chief-Executive Chairs

Executive	ACUS; CSB; CCC; DNFSB; Ex-Im; FHITF; FODSITF; FSMITF; NTSB; USPC[80]
Adjudicatory	BVA; FLRA; FMSHRC; FCSC; ITC; MSPB; OSHRC[81]
Regulatory	CFTC; CPSC; EEOC; FCA; FCC; FERC; FMC; FRB; FTC; NCUA; NIGC; NRC; PRC; SEC; STB[82]

That eight adjudicatory and regulatory commission chairs lack statutory chief-executive authority is likely largely an accident of history. Three commissions—the FDIC, the National Labor Relations Board (NLRB), and the National Mediation Board (NMB)—were created before the shift to strong-chair commissions occurred, and although Congress later gave chief-executive authority to the chairs of several existing commissions, it did not do so for these

80. 5 U.S.C. § 595(c) (2018) (ACUS); 12 U.S.C. § 635a(b) (2018) (Ex-Im); 15 U.S.C. § 714g(a) (2018) (CCC); 42 U.S.C. § 401(c) (2018) (FODSITF); *id.* § 1395i(b) (2018) (FHITF); *id.* § 1395t(b) (2018) (FSMITF); *id.* § 2286(c)(2) (2018) (DNFSB); *id.* § 7412(r)(6)(B) (2018) (CSB); 49 U.S.C. § 1111(e) (2018) (NTSB); An Act to Establish an Independent and Regionalized United States Parole Commission, to Provide Fair and Equitable Parole Procedures, and for Other Purposes, Pub. L. No. 94-233, sec. 2, § 4204, 90 Stat. 219, 221-22 (1976) [hereinafter An Act to Establish an Independent and Regionalized United States Parole Commission] (USPC).

81. 5 U.S.C. § 1203(a) (2018) (MSPB); *id.* § 7104(b) (2018) (FLRA); 19 U.S.C. § 1331(a) (2018) (ITC); 29 U.S.C. § 661(e) (2018) (OSHRC); 30 U.S.C. § 823(b)(2) (2018) (FMSHRC); 38 U.S.C. § 7101 (2018) (BVA); Reorganization Plan No. 1 of 1954 § 3, 5 U.S.C. App. at 156 (2018) (FCSC).

82. 7 U.S.C. § 2(a)(2)(B) (2018) (CFTC); 12 U.S.C. § 242 (2018) (FRB); *id.* § 1752a(e) (2018) (NCUA); *id.* § 2244(a)(1) (2018) (FCA); 15 U.S.C. § 2053(f) (2018) (CPSC); 25 U.S.C. § 2705 (2018) (NIGC); 39 U.S.C. § 504(a) (2018) (PRC); 42 U.S.C. § 2000e–4(a) (2018) (EEOC); *id.* § 5841(a)(2) (2018) (NRC); *id.* § 7171(c) (2018) (FERC); 46 U.S.C. § 46101(c)(2) (2018) (FMC); 47 U.S.C. § 155(a) (2018) (FCC); 49 U.S.C. § 1301(c)(2) (2018) (STB); Reorganization Plan No. 8 of 1950, § 1(a), 5 U.S.C. App. at 125-26 (2018); Reorganization Plan No. 10 of 1950, § 1(a), 5 U.S.C. App. at 127 (2018) (SEC).

three.[83] Two others—the Federal Financial Institutions Examination Council (FFIEC) and the Financial Stability Oversight Council (FSOC)—are akin to "working groups" of multiple agencies, rather than being "traditional" agencies themselves.[84] Two others—the Securities Investor Protection Corporation (SIPC) and the Farm Credit System Insurance Corporation (FCSIC)—are agencies that provide insurance to the private sector, and were structured off of the FDIC: as the FDIC's chair is not the statutory chief executive, Congress likely did not consider providing such authority to the SIPC and FCSIC chairs.[85] Finally, Congress may have intentionally not made the FEC's chair the chief executive so that individuals of one political party would not have power over those of the other.[86]

As for executive commissions, no federal co-chair of federal-state partnerships (i.e., commissions with at least one presidentially-appointed member and one state-appointed member) is the chief executive. Understandably, Congress may have wanted state leadership to have a say in decisions. Further, the three commissions that address safety issues—the CSB, the Defense Nuclear Facilities Safety Board (DNFSB), and the National Transportation Safety Board (NTSB)—have statutory chief-executive chairs.[87] Beyond these items, patterns are not readily apparent.

Some statutes place chief-executive authority in an executive director or similar position. Because chairs who unilaterally select commissions' executive directors likely have the same authorities as chief-executive chairs at other commissions (i.e., chief-executive chairs have chiefs of staff to run their commissions' day-to-day operations as statutory executive directors do), the method by which commissions select executive directors was reviewed. Only five chairs have statutory authority to unilaterally appoint the agencies' executive directors; even then, the chairs of the Marine Mammal Commission (MMC) and

83. *See* An Act to Provide for the Safer and More Effective Use of the Assets of Banks, ch. 89, § 12(B), 48 Stat. 162, 168-80 (1933) (codified at 12 U.S.C. §§ 1811-1835a) (creating the FDIC); An Act to Amend the Railway Labor Act Approved May 20, 1926, and to Provide for the Prompt Disposition of Disputes Between Carriers and their Employees, ch. 691, 48 Stat. 1185 (1933) (codified at 45 U.S.C. §§ 154-188) (creating the NMB); An Act to Diminish the Causes of Labor Disputes Burdening or Obstructing Interstate and Foreign Commerce, to Create a National Labor Relations Board, and for Other Purposes, ch. 372, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151-169) (creating the NLRB). In 1950, Congress rejected a proposed reorganization plan that would place chief-executive authority of the NLRB in its chair. *See* Reorganization Plan No. 12 of 1950, 5 U.S.C. App. at 127 (2018) ("Reorganization Plan No. 12 of 1950, which proposed reorganizations in the National Labor Relations Board, was submitted to Congress on Mar. 13, 1950, and was disapproved by the Senate on May 11, 1950.").

84. *See* 12 U.S.C. § 3303 (2018) (providing that the FFIEC is comprised of the leaders of six other agencies); *id*. § 5321 (providing that the FSOC is comprised of the leaders of nine other agencies and one independent insurance expert).

85. *See Hearings before the Subcomm. on Com. & Fin. of the H. Comm. on Interstate and Foreign Com.*, 91st Cong. 1 (1970) (statement of Rep. John E. Moss) (noting that the SIPC is modeled after the FDIC); 133 CONG. REC. 33559, 33586 (1987) (statement of Sen. Lloyd Bentsen) (noting that the FCSIC is modeled after the FDIC).

86. *See* 52 U.S.C. § 30106 (2018) (providing for the structure of the FEC).

87. *See* 42 U.S.C. § 2286(c)(2) (2018) (DNFSB); *id*. § 7412(r)(6) (CSB); 49 U.S.C. § 1111(e) (NTSB).

Puerto Rico Financial Oversight and Management Board (PRFOMB) do so with their Boards' concurrences.[88]

Table 3: Non-Chief-Executive Chairs and Executive Directors

	Non-Chief-Executive Chair Appoints Executive Director	*Full Commission or Another Appoints Executive Director*	*No Statutory Executive*
Executive	IRSOB; MMC; NCD; PCLOB; PRFOMB[89]	AMTRAK; ARC; ATBCB; BGSEEF; CCR; CNCS; CPB; DFC; DRA; EAC; Farmer Mac; FCIC; FRTIB; HSTSF; IAF; JMMFF; LSC; MCC; MUSUSF; NCCB; NIBS; NBRC; NGPRA; PBGC; SSAB; SCRC; SBRC; SJI; TVA; USIP; USPS[90]	CEA; CEQ; MWAA; RRB; USADF
Adjudicatory			NMB
Regulatory		FEC; NLRB[91]	FCSIC; FDIC; FFIEC; FSOC; NARAB; SIPC

88. *See* 16 U.S.C. § 1401(e) (2018) (MMC); 48 U.S.C. § 2123(a) (2018) (PRFOMB).

89. 16 U.S.C. § 1401(e) (2018) (MMC); 26 U.S.C. § 7802(e)(3)(A) (2018) (IRSOB); 29 U.S.C. § 783(a) (2018) (NCD); 42 U.S.C. § 2000ee(j) (2018) (PCLOB); 48 U.S.C. § 2123(a) (2018) (PRFOMB).

90. 5 U.S.C. § 8474(a) (2018) (FRTIB); 7 U.S.C. § 1505(d) (2018) (FCIC); *id.* § 2009aa–1(h)(5) (2018) (DRA); *id.* § 2009bb–1(h)(5) (2018) (NGPRA); 12 U.S.C. § 1701j–2(c)(7) (2018) (NIBS); *id.* § 2279aa–3(b) (2018) (Farmer Mac); *id.* § 3012(3) (2018) (NCCB); 16 U.S.C. § 831a(h) (2018) (TVA); 20 U.S.C. § 2011(a) (2018) (HSTSF); *id.* § 4512(a) (2018) (JMMFF); *id.* § 4709(a) (2018) (BGSEEF); *id.* § 5603(f) (2018) (MUSUSF); 22 U.S.C. § 290f(*l*) (2018) (IAF); *id.* § 4606(a) (2018) (USIP); *id.* § 7703(b)(2) (2018) (MCC); *id.* § 9613(d) (2018) (DFC); 29 U.S.C. § 792(f) (2018) (ATBCB); *id.* § 1302(a) (2018) (PBGC); 39 U.S.C. § 202(c) (2018) (USPS); 40 U.S.C. § 14301(e) (2018) (ARC); 40 U.S.C.§ 15301(d)(1) (2018) (NBRC, SCRC, SBRC); 42 U.S.C. § 903(i) (2018) (SSAB); *id.* § 1975b(a)(1) (2018) (CCR); *id.* § 2996d(a) (2018) (LSC); *id.* § 10703(k)(3) (2018) (SJI); *id.* § 12651c(a) (2018) (CNCS); 47 U.S.C. § 396(e)(1) (2018) (CPB); 49 U.S.C. § 24303 (2018)(a) (AMTRAK); 52 U.S.C. § 20924(a)(3) (2018) (EAC).

91. 29 U.S.C. § 153(d) (2018) (NLRB); 52 U.S.C. 30106(f)(1) (2018) (FEC).

Twelve commissions' statutes are silent as to where chief-executive authority lies, providing it neither to chairs nor executive directors. Without insight into their day-to-day operations, it is impossible to discern whether their chairs have assumed the status as their agencies' chief executive. This author has personal knowledge that the chairs of several of these commissions all in some way direct their agencies' activities, and, given the shift of policymaking away from adjudication and towards rulemaking (that is, towards commission staff playing larger roles in agency operations, and control of commission staff being more important), it is rational to expect the same for the other similarly situated commissions. Future research could examine the internal agency dynamics that lead to this conclusion.

To summarize the above, the chairs of forty-nine commissions have some chief-executive authority, either through statutory grant (32), authority to select an executive director (5), or through statutory silence as to where executive authority lies (12).

Table 4. Chief-Executive Authority of Chair

	Chair Has No Chief-Executive Authority	*Chair Has Some Chief-Executive Authority*[92]
Executive	AMTRAK; ARC; ATBCB; BGSEEF; CCR; CNCS; CPB; DFC; DRA; EAC; Farmer Mac; FCIC; FRTIB; HSTSF; IAF; JMMFF; LSC; MCC; MUSUSF; NCCB; NIBS; NBRC; NGPRA; PBGC; SSAB; SCRC; SBRC; SJI; TVA; USIP; USPS	ACUS; CSB; CCC; DNFSB; Ex-Im; FHITF; FSMITF; NTSB; FODSITF; USPC; IRSOB; MMC; NCD; PCLOB; PRFOMB; CEA; CEQ; MWAA; RRB; USADF
Adjudicatory		BVA; FLRA; FMSHRC; FCSC; ITC; MSPB; NMB; OSHRC
Regulatory	FEC; NLRB	CFTC; CPSC; EEOC; FCA; FCC; FCSIC; FDIC; FERC; FFIEC; FMC; FRB; FSOC; FTC; NARAB; NCUA; NIGC; NRC; PRC; SEC; STB; SIPC

92. A chair is deemed to have some chief-executive authority if: chair is chief executive, chair unilaterally appoints chief executive, or statute is silent.

C. Associate Commissioners' Agenda Authority

The ability to induce votes on items is a necessary step in setting policy, and is one largely reserved for commissions' chairs. Associate commissioners at only 17% (14/82) of commissions have any authority to influence commission agendas; even then, that authority is less powerful than it may seem.

Table 5. Associate Commissioner Agenda Authority

	Multiple Associate Commissioners or a Particular Associate Commissioner Have Agenda Authority	*Any Individual Associate Commissioner Has Agenda Authority*	*Individual Associate Commissioner Authority Limited to Any Matter*
Executive	ARC; DRA; NBRC; NGPRA; PCLOB; SCRC; SBRC; USPC[93]		
Adjudicatory			
Regulatory	FEC; FRB; FTC; FSOC; NLRB; SEC[94]	FEC; FRB; FTC; NLRB; SEC[95]	FEC[96]

Although organic statutes allow associate commissioners of these fourteen agencies some ability to affect their commissions' agendas, statutes for nine only permit *multiple* commissioners to induce votes[97] or only allow a *particular* commissioner to induce votes,[98] rather than allowing *any one* commissioner to do so. Of the five remaining commissions in which *any one* commissioner has

93. 7 U.S.C. § 2009aa-1(a)(3) (2018) (DRA); *id*. § 2009bb-1(a)(3) (2018) (NGPRA); 40 U.S.C. § 14301(b)(3) (2018) (ARC); *id*. § 15301 (2018) (NBRC, SCRC, SBRC); 42 U.S.C. § 2000ee(h)(5) (2018) (PCLOB); An Act to Establish an Independent and Regionalized United States Parole Commission, Pub. L. No. 94-233, sec. 2, § 4204(a)(1), 90 Stat. 219, 221 (1976) (USPC).

94. 12 U.S.C. § 248(k) (2018) (FRB); *id*. § 5321(r) (2018) (FSOC); 15 U.S.C. § 78d-1(b) (2018) (SEC); *id*. § 43 (2018) (FTC); 29 U.S.C. § 155 (2018) (NLRB); 52 U.S.C. § 30106(d) (2018) (FEC).

95. See *supra* sources cited in note 94.

96. 52 U.S.C. § 30106(d) (2018).

97. *See, e.g.*, 12 U.S.C. § 5321(e)(1) (2018) ("The [FSOC] shall meet at the call of the Chairperson or a majority of the members then serving . . . .").

98. *See, e.g.*, 7 U.S.C. § 2009aa-1 (2018) (providing that the DRA's state co-chair is co-equal to the federal co-chair).

some agenda authority, statutes limit Federal Reserve Board (FRB) and SEC associate commissioners the power to compel review only of actions taken pursuant to delegated authority, and individual Federal Trade Commission (FTC) and NLRB members are limited to compel review only of litigation that they themselves initiate.[99] Only FEC commissioners are granted by statute the capacity to raise *any* matter to the commission.[100]

Further, of the fourteen commissions that permit associate commissioners some agenda control, only six are chaired by individuals granted chief-executive authority: FRB, FTC, Federal Stability Oversight Council (FSOC), Privacy and Civil Liberties Oversight Board (PCLOB), SEC, and the U.S. Parole Commission (USPC). The agenda authority for the other eight is somewhat less important than it would be otherwise; with an executive director who is responsible to all commissioners equally, a vote of the full commission is necessary to change policy direction, rather than that authority residing with the chair alone.

D. Commissioner Removal Protections

Associate commissioners' ability to affect agendas only matters if they have freedom to do so without fear of losing their positions due to a hostile President. Courts and scholars have made compelling arguments that commissioners with set terms cannot be removed by the President for the duration of their terms.[101] However, the Supreme Court has indicated that statutes must provide explicit removal protections for commissioners to be protected against removal.[102] To wit, Congress has provided explicit statutory removal protections for only 35% (28/80) of commissions.

99. *See* 12 U.S.C. § 248(k) (2018) (providing that the FRB "shall, upon the vote of one member, review action taken at a delegated level"); 15 U.S.C. § 78d-1(b) (2018) ("The vote of one [SEC] member . . . shall be sufficient to bring any such action [taken on delegated authority] before the Commission for review."); *id.* § 43 (2018) ("The [FTC] may, by one or more of its members, . . . prosecute any inquiry necessary to its duties."); 19 U.S.C. § 155 (2018) (providing the same for the NLRB).

100. 52 U.S.C. § 30106(d) (2018) ("The Commission shall meet at least once each month and also at the call of any member.").

101. *See, e.g.*, PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 94 (D.C. Cir. 2018) (noting that "the independence of financial regulators . . . is so well established by tradition and precedent that courts have assumed these agencies' heads have removal protection even in the absence of clear statutory text so directing" and listing cases); Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 1 (2021) (arguing that for-cause removal provisions "are removal permissions that authorize removal where it is otherwise prohibited by an officer's term of years, a tenure long understood to bar executive removal for any reason").

102. *See* Collins v. Yellen, 141 S. Ct. 1761, 1782-83 (2021) (explaining that "Congress has described many agencies as 'independent' without imposing any restriction on the President's power to remove the agency's leadership," and citing as examples the DNFSB, 42 U.S.C. § 2286(d); CFTC, 7 U.S.C. § 2(a)(2); FCA, 12 U.S.C. § 2242(b); NCUA, 12 U.S.C. § 1752a(c); and RRB, 45 U.S.C. § 231f(a)).

Table 6. Commissions with Statutory Removal Protections[103]

	Commissioners Do Not Have Statutory Removal Protections	*Commissioners Have Statutory Removal Protections*
Executive	ACUS; AMTRAK; ARC; ATBCB; BGSEEF; CCC; CNCS; CPB; CEA; CEQ; DFC; DNFSB; DRA; EAC; Ex-Im; Farmer Mac; FCIC; FHITF; FODITF; FRTIB; FSMITF; HSTSF; IAF; IRSOB; JMMFF; MMC; MCC; MUSUSF; NCD; NIBS; NBRC; NGPRA; PBGC; PCLOB; RRB; SSAB; SCRC; SBRC; TVA; USADF; USPC	CSB; CCR; LSC; MWAA; NCCB; NTSB; PRFOMB; SJI; USIP; USPS[104]
Adjudicatory	ITC	BVA; FLRA; FMSHRC; FCSC; MSPB; NMB; OSHRC[105]
Regulatory	CFTC; EEOC; FCA; FCC; FDIC; FEC; FSOC NCUA; SEC; SIPC	CPSC; FERC; FMC; FRB; FTC; NARAB; NIGC; NLRB; NRC; PRC; STB[106]

103. Seven commissions were created between the Supreme Court's decisions in *Myers v. United States* (1926) and *Humphrey's Executor v. United States* (1935): Ex-Im (1934); FCA (1933); FCC (1934); FDIC (1933); RRB (1935); SEC (1934); and TVA (1933). FHITF, FSMITF, FODITF, and FSOC have *ex officio* membership of other agencies, plus individual members appointed by the President and confirmed by the Senate for the sole purpose of serving on these commissions. These commissions have been categorized based on whether the non-*ex officio* members have removal protections. It is also worth noting that FFIEC and FCSIC are commissions consisting entirely of *ex officio* members of other agencies. They have been removed from this list, as no commissioner is appointed for the sole purpose of serving on them. 12 U.S.C. §§ 2277a–2(a), 3303(a).

104. 12 U.S.C. § 3013(a) (2018) (NCCB); 22 U.S.C. § 4605(f) (2018) (USIP); 39 U.S.C. § 202(a) (2018) (USPS); 42 U.S.C. § 1975(e) (2018) (CCR); *id.* § 2996c(r)(e) (2018) (LSC); *id.* § 7412(r)(6)(B) (2018) (CSB); *id.* § 10703(h) (2018) (SJI); 48 U.S.C. § 2121(e)(5)(B) (2018) (PRFOMB); 49 U.S.C. § 1111(c) (2018) (NTSB); *id.* § 49106(c)(6)(C) (2018) (MWAA).

105. 5 U.S.C. § 1202(d) (2018) (MSPB); *id.* § 7104(b) (2018) (FLRA); 22 U.S.C. § 1622(c) (2018) (FCSC); 29 U.S.C. § 661(b) (2018) (OSHRC); 30 U.S.C. § 823(b)(1) (2018) (FMSHRC); 38 U.S.C. § 7101(b) (2018) (BVA); 45 U.S.C. § 154 First (2018) (NMB).

106. 12 U.S.C. § 242 (2018) (FRB); 15 U.S.C. § 41 (2018) (FTC); *id.* § 2053(a) (2018) (CPSC); 29 U.S.C. § 153(a) (2018) (NLRB); 39 U.S.C. § 502(a) (2018) (PRC); 42 U.S.C. § 5841(e) (2018) (NRC); *id.* § 7171(b) (2018) (FERC); 46 U.S.C. § 301(b)(3) (2018) (FMC); 49 U.S.C. § 1301(b)(3) (2018) (STB).

An initial item to note is that although adjudicatory commissions do not set their own agendas (they must wait for cases to come to them), all but the International Trade Commission (ITC) have statutory removal protections. It is unclear why Congress declined to protect ITC commissioners. Further, of the adjudicatory commissions, only the ITC conducts additional research and advises other government agencies, making the role of the chair that much more important.

Second, just over half of regulatory commissions (11/21) have statutory removal protections, despite the Supreme Court's clear holding in *Humphrey's Executor* that Congress may impose such restrictions on these agencies. Conventional wisdom is that members of independent commissions generally are provided for-cause removal protections, but this is not necessarily the case.[107] Some have argued that removal protections might be presumed for regulatory commissions created in the period between *Myers v. United States*[108] and *Humphrey's Executor*. In *Myers*, the Supreme Court held statutory removal protections unconstitutional, but reinterpreted its holding in *Humphrey's Executor* nine years later as applicable only to "purely executive officers."[109] During that period, Congress may have wanted to include statutory removal protections in various statutory schemes but had been "unwilling to take the risk that if that provision [providing limitations on the President's removal power] was found unconstitutional, the result would be to jeopardize the whole scheme" of an agency regulating some industry.[110] Given this, it may be prudent for courts to intuit Congress's intent for statutory removal protections for agencies created during this period. If that is the case, then four additional regulatory commissions would have removal protections, shifting the ratio of commissions with removal protections to over two-thirds (15/21). There does not appear to be a discernible rationale for not providing the other six regulatory commissions removal protections while granting them to similar agencies, though agency-specific reasons may exist.

Historically, for-cause removal protections and the ability to fully participate in commission governance have gone hand-in-hand;[111] it would not be rational to protect commissioners from presidential control but inhibit their ability to fully participate in commission activities. But this is what Congress did. Commissioners at more than 70% (15/21) of regulatory commissions have no agenda authority, and of the commissioners at the remaining six agencies that

107. *See* Collins, 141 S. Ct. at 1783 ("Congress has referred to an agency as 'independent' but has not expressly provided that the removal of the agency head is subject to any restrictions. That combination of provisions shows that the term 'independent' does not necessarily connote independence from Presidential control." (internal citations omitted)).

108. 272 U.S. 52 (1926).

109. Humphrey's Ex'r v. U.S., 295 U.S. 602, 632 (1935).

110. Peter L. Strauss, *On the Difficulties of Generalization—PCAOB in the Footsteps of* Myers, Humphrey's Executor, Morrison, *and* Freytag, 32 CARDOZO L. REV. 2255, 2276 (2011).

111. *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2201 (2020) (noting that there are "'only a handful of isolated' incidents in which Congress has provided good-cause tenure to principal officers who wield power alone rather than as members of a board or commission").

do have some agenda authority, only three commissions have removal protections.[112] The FEC—the one commission that allows any commissioner to call a meeting for any reason—is not among them.

The third item to note from Table 6 is that Congress has imposed removal restrictions on ten executive commissions, despite *Humphrey's Executor*'s holding that Congress cannot place removal restrictions on "purely executive officers."[113] It is difficult to determine why some have been granted removal protections and some have not, as the ten commissions have little in common: five provide some service to the public; four advise other parts of government; two are private, nongovernmental entities; and one is a federal-state partnership (and one commission falls into more than one category).[114] Two executive commissions with removal restrictions—the CSB and NTSB—have safety as an explicit a part of their missions, but so does the DNFSB, and presumably the safety of defense nuclear facilities warrants independence at least as strong as those for chemical and transportation safety, if not more so. A third commission, the U.S. Commission on Civil Rights (CCR), was created to appraise the laws and policies of the federal government and make recommendations, but so was the Administrative Conference of the United States (ACUS). Two executive commissions, the State Justice Institute (SJI) and National Consumer Cooperative Bank (NCCB), are private entities, but so are AMTRAK and the Federal Agricultural Mortgage Corporation (Farmer Mac).[115]

Further, although Congress granted associate commissioners at these ten executive commissions removal protections, their commissioners have no agenda authority. Whether these removal protections would even be upheld on constitutional grounds is another question.[116]

112. *See* 12 U.S.C. § 242 (FRB); 15 U.S.C. § 41 (FTC); 29 U.S.C. § 153(a) (NLRB).

113. Humphrey's Ex'r v. U.S., 295 U.S. 602, 628 (1935).

114. The service-oriented commissions are MWAA, USPS, LSC, and PRFOMB. The advisory-oriented commissions are CSB, CCR, NTSB, and USIP. The private corporations are SJI and NCCB. Finally, the federal-state partnership is MWAA.

115. Perhaps most surprising is that Congress granted removal protections to the USPS Board of Governors. Though the current USPS is a profit-seeking enterprise (or at least profit-neutral, as Congress intended for USPS to pay for itself), *see* 39 U.S.C. § 2401 (2018), it is still, at its core, an executive commission, and the Postal Service was the agency at issue in *Myers*, the leading case on removal of executive (as opposed to quasi-judicial or -legislative) appointees. That the Supreme Court held that providing statutory removal protections for the Postmaster General was unconstitutional in 1926, yet Congress later decided the provide such protections for the Board of Governors, is curious.

116. It seems clear that under *Myers* and *Humphrey's Executor*, removal protections for officials with solely executive powers are unconstitutional. However, the Supreme Court seemed to back away from *Humphrey's Executor*'s articulation of when removal protections are permissible in *Morrison v. Olson*. Morrison v. Olson, 487 U.S. 654 (1988). Rather than relying on a test of whether an official's activities are executive in nature or something different, the Court upheld removal protections for an independent counsel within the Department of Justice on the grounds that "the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light." *Id.*, at 691.

E. Presidential Demotion and Selection of the Chairs

The final traits reviewed relate to the ease with which the President may demote a commission's chair and select the replacement: how the chair is appointed and whether the chair has a set term. The importance of these traits can hardly be overstated. A President who can demote a commission's chair and promote another commissioner in their stead without further Senate confirmation can immediately change the direction of an agency. For example, having been named Chair of the EEOC by President Biden, Democrat Charlotte Burrows issued guidance explaining how the Commission will enforce laws consistent with *Bostock v. Clayton County*.[117] Although the case law is unclear, it appears that the President likely has the capacity to effectuate the demotion and promotion of at least two-thirds (55/82) of commission chairs at will, including thirty-one that do not require further Senate confirmation for promotion.

Commissions may be divided by whether the President has a role in selecting the chair. In more than 30% (25/82) of commissions, the President has no say in the selection of the chair; that responsibility is granted to the other commissioners.[118]

Table 7. No Presidential Authority to Select Chair

Executive	AMTRAK; ATBCB; BGSEEF; CNCS; CPB; EAC; FCIC; HSTSF; IRSOB; JMMFF; LSC; MWAA; MUSUSF; NCCB; NIBS; PRFOMB; SJI; TVA; USIP; USPS[119]
Adjudicatory	NMB[120]
Regulatory	FEC; FCSIC; FFIEC; NARAB[121]

117. U.S. EQUAL EMP. OPPORTUNITY COMM'N, PROTECTIONS AGAINST EMPLOYMENT DISCRIMINATION BASED ON SEXUAL ORIENTATION OR GENDER IDENTITY (2021), https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender [https://perma.cc/9L2R-GSAQ] (explaining the Supreme Court's decision in *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) and the EEOC's legal positions on sexual-orientation- and gender-identity-related workplace discrimination).

118. The relative statute does not provide the method by which chairs are selected in three commissions (BGSEEF, FCSIC, and MUSUSF). Historically, when a statute does not provide for the methods by which commission chairs are selected, the commissioners themselves select the chair. *See* COMM. ON INDEP. REG. COMM'NS, *supra* note 17, at 31.

119. 49 U.S.C § 24302(a)(4) (2018) (AMTRAK); 29 U.S.C § 792(a)(1)(B) (2018) (ATBCB); 20 U.S.C. § 4703 (2018) (BGSEEF); 42 U.S.C. § 12651(b)(1) (2018) (CNCS); 47 U.S.C. § 396(d)(1) (2018) (CPB); 52 U.S.C. § 20923(c) (2018) (EAC); 12 U.S.C. § 2277a–2(b) (2018) (FCIC); 20 U.S.C. § 2004 (2018) (HSTSF); 26 U.S.C. § 7802(f)(1)(A) (2018) (IRSOB); 20 U.S.C. § 4502 (2018) (JMMFF); 42 U.S.C. § 2996c(d) (2018) (LSC); 49 U.S.C. § 49106 (2018) (MWAA); 20 U.S.C. § 5603 (2018) (MUSUSF); 12 U.S.C. § 3013(f) (2018) (NCCB); 12 U.S.C. § 1701j-2(c)(5) (2018) (NIBS); 48 U.S.C. § 2121(e)(4) (2018) (PRFOMB); 42 U.S.C. § 10703(g) (2018) (SJI); 16 U.S.C. § 831a(a)(2) (2018) (TVA); 22 U.S.C. § 4605(h)(1) (2018) (USIP); 39 U.S.C. § 202(a)(1) (2018) (USPS).

120. 45 U.S.C. § 154(2d) (2018) (NMB).

121. 52 U.S.C. § 30106(a)(5) (2018) (FEC); 12 U.S.C. § 2277a–2(b) (2018) (FCSIC); 12 U.S.C. § 3303(b) (2018) (FFIEC); 15 U.S.C. § 6754(c)(1)(A) (2018) (NARAB).

The surprising item to note about this table is that the President has no role in selecting the chairs of twenty executive commissions, which is odd in light of the holding in *Humphrey's Executor* that removal protections for solely executive agencies are unconstitutional. For these agencies, the President could direct the commissioners to select a certain commissioner as chair or they will be removed from their positions.

Of the remaining fifty-seven commissions in which the President has authority to select the chair, twenty-nine allow the President to select the chair without further Senate confirmation; twenty-seven require Senate confirmation or provide that chair is an *ex officio* member who serves in another position in the President's cabinet; and one allows the President to select the chair, subject to approval by the commissioners.

Table 8: President's Method of Chair Selection

	No Senate Confirmation Required	*Senate Confirmation Required*	*Other*
Executive	CEQ; CSB; DNFSB; Farmer Mac; FRTIB; IAF; MMC; NCD; SSAB[122]; USADF; USPC[123]	ACUS; ARC; CCC; CEA; DRA; Ex-Im; FHITF; FSMITF; MCC; NTSB; NBRC; NGPRA; PBGC; PCLOB; RRB; SCRC; SBRC; FOASITF; DFC[124]	CCR[125]

122. The SSAB Chair has "a term of 4 years, coincident with the term of the President, or until the designation of a successor." 42 U.S.C. § 903(e) (2018).

123. 5 U.S.C. § 8472(b)(1) (2018) (FRTIB); 12 U.S.C. § 2279aa–2(a)(8) (2018) (Farmer Mac); 16 U.S.C. § 1401(c) (2018) (MMC); 22 U.S.C. § 290f(g) (2018) (IAF); *id.* § 290h–5(a)(1) (2018) (USADF); 29 U.S.C. § 780(c) (2018) (NCD); 42 U.S.C. § 903(e) (2018) (SSAB); *id.* § 2286(c)(1) (2018) (DNFSB); *id.* § 4342 (2018) (CEQ); *id.* § 7412(r)(6)(B) (CSB); An Act to Establish an Independent and Regionalized United States Parole Commission, Pub. L. 94-233, sec. 2, § 4202, 90 Stat. 219, 220 (1976) (USPC).

124. 5 U.S.C § 593(b) (2018) (ACUS); 40 U.S.C. § 14301(b)(1) (2018) (ARC); 15 U.S.C. § 714g(a) (2018) (CCC); 15 U.S.C. § 1023(a)(2)(A) (2018) (CEA); 7 U.S.C. § 2009aa-1(a)(2)(A) (2018) (DRA); 12 U.S.C. § 635a(b) (2018) (Ex-Im); 42 U.S.C. § 1395i(b) (2018) (FHITF); 42 U.S.C. § 1395t(b) (2018) (FSMITF); 22 U.S.C. § 7703(b)(2)(A) (2018) (MCC); 49 U.S.C. § 1111(d) (2018) (NTSB); 40 U.S.C. § 15301(b)(1)(A) (2018) (NBRC, SCRC, SBRC); 7 U.S.C. § 2009bb-1(a)(2)(A) (2018) (NGPRA); 29 U.S.C. § 1302(a) (2018) (PBGC); 42 U.S.C. § 2000ee(h)(1) (2018) (PCLOB); 45 U.S.C. § 231f(a) (2018) (RRB); 42 U.S.C. § 401(c) (2018) (FOASITF); 22 U.S.C. § 9613(b)(3) (2018) (DFC).

125. 42 U.S.C. § 1975(d) (2018) (CCR).

	No Senate Confirmation Required	*Senate Confirmation Required*	*Other*
Adjudicatory	FLRA; FMSHRC; FCSC; ITC; OSHRC[126]	BVA; MSPB[127]	
Regulatory	EEOC; FCA; FCC; FERC; FMC; FTC; NCUA; NLRB; NRC; PRC; SEC; SIPC; STB[128]	CFTC; CPSC; FDIC; FRB; FSOC; NIGC[129]	

The final table of this Section divides commissions into those in which chairs have a set term and those in which they do not. Fifty-seven have no set term and twenty-five have a set term of years or serve "for the duration of the member's term."[130]

Table 9. Chair Term

	Set Term	*No Set Term*
Executive	ACUS; ATBCB; CSB; EAC; Ex-Im; FRTIB; IRSOB; LSC; NCCB; NIBS; NTSB; PCLOB; RRB; SJI; USIP[131]	AMTRAK; ARC; BGSEEF; CCR; CCC; CNCS; CPB; CEA; CEQ; DNFSB; DRA; Farmer Mac; FCIC; FHITF;

126. 5 U.S.C. § 7104(b) (2018) (FLRA); 19 U.S.C. § 1330(c) (2018) (ITC); 29 U.S.C. § 661(a) (2018) (OSHRC); 30 U.S.C. § 823(a) (2018) (FMSHRC); Reorganization Plan No. 1 of 1954, § 1, 5 U.S.C. App. at 156 (2018) (FCSC).

127. 38 U.S.C. § 7101(b)(1) (2018) (BVA); 5 U.S.C. § 1203(a) (2018) (MSPB).

128. 12 U.S.C. § 1752a(b)(1) (2018) (NCUA); *id.* § 2242(a) (2018) (FCA); 15 U.S.C. § 78ccc(c)(3) (2018) (SIPC); 29 U.S.C. § 153(a) (2018) (NLRB); 39 U.S.C. § 502(d) (2018) (PRC); 42 U.S.C. § 2000e-4(a) (2018) (EEOC); *id.* § 5841(a) (2018) (NRC); *id.* § 7171(b) (2018) (FERC); 46 U.S.C. § 46101(c)(1) (2018) (FMC); 47 U.S.C. § 154(a) (2018) (FCC); 49 U.S.C. § 1301(c)(1) (2018) (STB); Reorganization Plan No. 8 of 1950, § 3, 5 U.S.C. App. at 126 (2018) (FTC); Reorganization Plan No. 10 of 1950, § 3, 5 U.S.C. App. at 127 (2018) (SEC).

129. 7 U.S.C. § 2(a)(2)(A) (2018) (CFTC); 15 U.S.C. § 2053(a) (2018) (CPSC); 12 U.S.C. § 1812(b)(1) (2018) (FDIC); 12 U.S.C. § 242 (FRB) (2018); 12 U.S.C. § 5321(b)(1)(A) (2018) (FSOC); 25 U.S.C. § 2704(b)(1)(A) (2018) (NIGC).

130. *See e.g.*, 12 U.S.C. § 2242(a) (2018).

131. 5 U.S.C § 593(b)(1) (2018) (ACUS); 29 U.S.C § 792(a)(2)(A)(i) (2018) (ATBCB); 42 U.S.C. § 7412(r)(6)(B) (2018) (CSB); 52 U.S.C. § 20923(b)(1) (2018) (EAC); 12 U.S.C. § 635a(c)(8) (2018) (Ex-Im); 5 U.S.C. § 8472(e)(1)(A) (2018) (FRTIB); 26 U.S.C. § 7802(f)(1)(A) (2018) (IRSOB); 42 U.S.C. § 2996c(d) (2018) (LSC); 12 U.S.C. § 3013(f) (2018) (NCCB); 12 U.S.C. § 1701j-2(c)(5) (2018) (NIBS); 49 U.S.C. § 1111(d) (2018) (NTSB); 42 U.S.C. § 2000ee(h)(4) (2018) (PCLOB); 45 U.S.C. § 231f(a) (2018) (RRB); 42 U.S.C. § 10703(g) (2018) (SJI); 22 U.S.C. § 4605(h)(1) (2018) (USIP).

	Set Term	*No Set Term*
		FSMITF; HSTSF; IAF; JMMFF; MMC; MWAA; MCC; MUSUSF; NCD; NBRC; NGPRA; PBGC; PRFOMB; SCRC; SBRC; SSAB[132]; TVA; FOSDITF; USADF; IDC; USPC; USPS
Adjudicatory	BVA; FCSC; ITC; NMB[133]	FLRA; FMSHRC; MSPB; OSHRC
Regulatory	FCA; FDIC; FEC; FFIEC; FRB; NIGC[134]	CFTC; CPSC; EEOC; FCSIC; FCC; FERC; FMC; FTC; FSOC; NARAB; NCUA; NLRB; NRC; PRC; SEC; SIPC; STB

This final table is included because the law governing presidential demotion of chairs is unsettled. In *Collins v. Yellen*, the Court noted that courts "generally presume that the President holds the power to remove at will executive officers and that a statute must contain 'plain language to take [that power] away.'"[135] As no commission chair has statutory protections against removal from that position, the implication is that the President may demote all chairs. However, the Court disclaimed the application of its decision to "multi-member agencies for which the chair is nominated by the President and confirmed by the Senate to a fixed term."[136] A pre-*Collins* OLC opinion similarly argued that failure to provide for statutory removal protections means no removal protections exist, but added that the responsibility of chairs as "the principal executive officer[s]" of their commissions "help[s] explain why Congress would intend different conditions for the removal of the Chairman as opposed to removal of the Commissioners generally."[137] Yet, there is evidence that Congress's intention for

132. The SSAB Chair has "a term of 4 years, coincident with the term of the President, or until the designation of a successor." 42 U.S.C. § 903(e) (2018).

133. 38 U.S.C. § 7101(b)(1) (2018) (BVA); Reorganization Plan No. 1 of 1954, § 1, 5 U.S.C. App. at 156 (2018) (FCSC); 19 U.S.C. § 1330(c)(2)(B) (2018) (ITC); 45 U.S.C. § 154 (Second) (2018) (NMB).

134. 12 U.S.C. § 2242(a) (2018) (FCA); 12 U.S.C. § 1812(b)(1) (2018) (FDIC); 52 U.S.C. § 30106(a)(5) (2018) (FEC); 12 U.S.C. § 3303(c) (2018) (FFIEC); 12 U.S.C. § 242 (2018) (FRB); 25 U.S.C. § 2704(b)(4)(B)(i) (NIGC) (2018).

135. Collins v. Yellen, 141 S. Ct. 1761, 1783 (2021) (quoting Shurtleff v. United States, 189 U.S. 311, 316 (1903)).

136. *Id.* at 1787 n.21.

137. The President's Authority to Remove the Chairman of the Consumer Product Safety Commission, 25 Op. O.L.C. 171, 174 (2001) (quoting 15 U.S.C. § 2053(f)(1)).

providing chairs set terms was to prohibit the President from removing them. Professors Jane Manners and Lev Menand have traced the history of "term-of-years tenures" to eighteenth-century England and the American colonies, arguing that "[w]ithout provisions to the contrary in a controlling statute, constitution, or grant of office, an officer serving for a term of years could not be removed mid-term short of impeachment or other extraordinary measure."[138]

If chairs' terms of years are found to be binding, as argued by Manners and Menand, then the President likely has the capacity to replace two-thirds (55/82) of commission chairs. There are thirty-nine commissions for which statute ostensibly prevents the President from switching chairs mid-term, due to their term of years or because statute gives authority to the commissioners to select their chair. If removal protections do not apply for executive commissions and the President may bully commissioners into selecting their preferred chairs, that number drops to twenty-seven. With the remaining forty-three commissions, the President may demote and promote chairs without Senate involvement in twenty-four. For the remaining nineteen commissions, the President's selection of the chair requires additional Senate confirmation (or requires concurrence of the commission's majority in the case of the CCR). Finally, in all, the President may demote chairs at will and name new chairs (with or without Senate confirmation) in 60% (29/49) of strong-chair commissions, including fourteen strong-chair regulatory commissions (out of twenty-one regulatory commissions total).

This last finding is surprising, as the conventional wisdom is that regulatory commissions are independent of direct presidential influence. If these fourteen regulatory commission chairs displease the President in some way, the President can demote them and promote another commissioner such that, because of chairs' extraordinary control over running commissions and setting agendas, the President may be involved in setting the commissions' agendas to a larger extent than traditional for-cause removal protections imply.

If commission chairs' terms of years are not binding, as argued by OLC, and the President may demote chairs during those periods, then the President has even greater authority to control commissions. The President would be allowed to demote and promote chairs without Senate involvement in 35% (29/82) of commissions. The President would be required to obtain Senate confirmation for new chairs in another 34% (28/82) commissions. If one also includes the executive commissions that select their own chairs as commissions the President can influence, the President has effective control of the chairs of 94% (77/82) of federal commissions—and of the five that the President would have no control over, one (FFIEC) has no authority of its own and another (NARAB) has never had leadership appointed and confirmed by the Senate.

138. *See* Manners & Menand, *supra* note 101, at 18-19.

III. Evaluating The Strong-Chair Model

More than half of commissions operate under the strong-chair model, and it is far-and-away the model of choice in regulatory commissions: over 90% (21/23) of regulatory commissions have some chief-executive authority. Further, associate commissioners at only 17% (14/82) of commissions have some statutory agenda authority, including only a quarter of regulatory commissions and only 12% (6/49) of strong-chair commissions. Clearly, statutes grant commission chairs significant power today over the operation of their agencies, and associate commissioners have limited opportunity to influence their agencies if opposed by their chairs.

A. Evaluating the Strong-Chair Model's Effects on Governance

Although many commission chairs have nearly unfettered authority to direct their agencies and associate commissioners have little recourse, this model remains largely unstudied. Two of the most important dimensions with which to evaluate the strong-chair model is the tradeoff between efficiency and deliberation, and the influence of the President in setting commission policy. Other factors which may be considered are policy continuity between administrations, effective congressional oversight, the possibility of regulatory capture, and recruitment.

1. Efficiency and Deliberation

Section II.C. found that associate commissioners of only fourteen of the seventy-four non-adjudicatory commissions have any authority to induce votes, and associate commissioners of only one (the FEC) are allowed to induce votes on any matter of their choosing. These numbers imply that public debate in the remaining sixty commissions only occurs on items of the chairs' choosing. The Sunshine Act's additional restriction that a majority of an agency's commissioners may not meet outside of public meetings makes it unlikely that private debate occurs either.[139]

The primary tradeoff between the strong-chair and equal-commissioner models of commission governance is between the speed with which strong chairs may act unilaterally and the deliberation that comes with debate and majority vote, though deliberation may occur elsewhere.[140] As discussed previously,

139. 5 U.S.C. § 552b (2018).

140. *See supra* text accompanying notes 16-19. Congress selected the single-director with for-cause removal protection structure for the Consumer Finance Protection Bureau (CFPB) because "legislators came to recognize that it was particularly important that a regulator be capable of responding promptly to new developments," which could not be done with the commission structure. Brief of Current and Former Members of Congress as Amici Curiae in Support of Affirmance at 17-18, Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020) (No. 19-7) ("A major cause of the financial crisis was the failure of regulators to use their authority 'in a timely way' to address new consumer abuses, and

strong chairs may direct staff to investigate violations of law, publish guidance documents, and undertake other sub-regulatory or pre-regulatory actions. Although these actions are not "final agency action" and do not carry the force of law, they have the capacity to influence private sector behavior: though private sector actors may be confident that chairs do not have the votes to turn particular investigations into enforcement actions, or to turn "no-action" letters into commission policies, they may be unwilling to risk their companies on that confidence.[141] Chairs who can undertake sub-regulatory activities without first negotiating with associate commissioners can "facilitate more immediate response[s] to the needs of the public and to structural, economic, and technological changes in the regulated industries" than can multiple individuals who must debate and negotiate such actions before they are undertaken.[142] Further, the ability to direct staff to research and begin developing policy proposals may allow for more efficient uses of staff resources than if staff divide their time between serving multiple leaders and research issues that may never even be considered for a vote. There are opportunity costs for every agency action, and limiting staff to working on activities assigned by chairs—with comprehensive visions of their agencies—can result in significant efficiencies.

Having one individual making sub-regulatory policy decisions means that these decisions will not be filtered through a body of equals, as was Congress's intention in creating multimember agencies. The equal-commissioner structure requires deliberation and negotiation, and such negotiations may force commissioners to cogently form rationales for or against policy proposals, resulting in "informed and reasoned policy outcomes."[143] Further, requiring a majority of political appointees to agree on a course of action allows for representation in the decision-making process and, perhaps, accommodation of divergent interests in policy outcomes in that requiring multiple individuals to agree on a policy forces the final policy decision to be palatable to all agreeing parties.

The author finds the argument that policy decisions are improved or better deliberated if filtered through a body of equals unpersuasive. It is not necessarily the case that a commission will be ideologically diverse, that a vote of this majority would result in a true compromise between varying viewpoints, and that deliberation only occurs through discussions of commissioners. If a five-member commission has three progressives and two conservatives, the progressive coalition will be in the majority with each and every vote. Although the

lawmakers viewed this lack of responsiveness as 'underscoring the importance of creating a dedicated consumer entity' that could 'respond quickly and effectively to these new threats to consumers.' What was needed was a 'streamlined' regulator to write new rules and 'enforce those rules consistently.'" (internal citations omitted)).

141. Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REGUL. 165, 184-231 (2019).

142. PRESIDENT'S ADVISORY COUNCIL ON EXEC. ORG., A NEW REGULATORY FRAMEWORK; REPORT ON SELECTED INDEPENDENT REGULATORY AGENCIES 21 (1971).

143. Datla & Revesz, *supra* note 5, at 794.

conservative perspective may be articulated in deliberations, any "moderation" that occurs will be a compromise between the three progressives, perhaps resulting in *more* progressive policies than the median commissioner would prefer.[144] But even if a commission is ideologically diverse, "the dynamics of group decision making can actually increase the tendency of the group to choose an outcome that is on one end of the scale rather than in the middle."[145] And also, because of the way items are brought to commissions for a vote, it is likely that the policy outcomes from a commission's deliberation will be in line with the chair's preferred policies, though final decisions may have been made in a less effective manner.[146]

Further, simply because policy decisions were made by commission chairs does not mean they were not fully considered. Professors Dan Farber and Anne O'Connell have discussed policy clashes—and therefore discussions and deliberations—between individual agency officials and the White House, other agencies, other officials within the same agency, inspectors general, advisory committees, civil service staff, the public, and others.[147] A focus on staff is important; deliberation and negotiations are always conducted by knowledgeable agency staff. Though strong chairs may set final policies, staff debate the prudence of policies, offer presidential appointees the benefits, costs, and alternatives of every policy proposal, and engage in other activities to shape how policies are actually put into practice by commissioners.[148]

2. Presidential Influence

The President is not infrequently permitted to select commission chairs. They may, at will, demote chairs in 60% (29/49) of strong-chair commissions. In these agencies, even if commissioners have for-cause removal protections, the President's authority to select chairs clearly can make commissions less independent. If a majority of commissioners in any agency oppose a policy that the President supports, the President can make a supporting commissioner the chair. Even if no commissioners are supportive, one commissioner may promise to effectuate the President's policy in exchange for being made chair.

144. *See* Hanjo Hamann, *Unpacking the Board: A Comparative and Empirical Perspective on Groups in Corporate Decision-Making*, 11 BERKELEY BUS. L.J. 1, 54 (2014) ("[G]roups tend to deteriorate decision quality and to amplify cognitive biases, thereby falling short of the potential of their ablest member."); *see also* Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 538 (2002) ("If most of the members of a group share an initial view of the best decision, the group will seek predominantly information that supports that view.").

145. Seidenfeld, *supra* note 144, at 535.

146. *See* Cass R. Sunstein, *Group Judgments: Statistical Means, Deliberation, and Information Markets*, 80 N.Y.U. L. Rev. 962, 982 (2005) ("[T]here is no systematic evidence that deliberating groups will usually succeed in aggregating the information that their members have.").

147. Daniel A. Farber & Anne Joseph O'Connell, *Agencies as Adversaries*, 105 CALIF. L. REV. 1375 (2017).

148. *See* PRESIDENT'S ADVISORY COUNCIL ON EXEC. ORG., *supra* note 142, at 17 ("[T]he fairness of regulatory decisions results more from the mechanics of internal decisionmaking and breadth of perspective of the regulators than from the fact of bi-partisan representation on the commissions.").

Whether one views presidential influence positively or negatively is largely in the eye of the beholder. The President is democratically elected so that she may effectuate the will of the people. However, the President is not immune from lobbying pressure, and what the President actually does on any given subject may not be in the people's interest; a vocal minority of the public may convince the President to influence a commission in ways detrimental to the majority. The structure and removal protections of the first regulatory commission were instituted explicitly to prevent the kind of political influence that presidential selection of chairs imposes.[149] More recently, Congress granted the Consumer Finance Protection Bureau (CFPB) director removal protections and a five-year term to insulate her from presidential (and congressional) influence, as "the political branches [had] intensely pressured the financial regulatory agencies at the behest of industry lobbyists to prevent robust oversight"[150] of industry activities.[151] While the Supreme Court recently ruled it unconstitutional for Congress to restrict the President's ability to remove an agency head if that agency is headed by a single individual,[152] the underlying congressional judgment remains relevant.

3. Policy Continuity

One consideration promoted by some academics and judges is whether the structure will "lead[] to the continuity of policies"[153] rather than changing with new presidential administrations. In *Seila Law*, for example, the Court argued that the FTC's staggered terms for its multiple commissioners "prevented complete turnovers in agency leadership and guaranteed that there would always be some Commissioners who had accrued significant expertise," whereas the CFPB's single-director structure "guarantee[d] abrupt shifts in agency leadership and with it the loss of accumulated expertise."[154]

149. Jay S. Bybee, *Agency Expertise, ALJ Independence, and Administrative Courts: The Recent Changes in Louisiana's Administrative Procedure Act*, 59 LA. L. REV. 431, 438 (1999) (describing the Interstate Commerce Commission).

150. Brief of Current and Former Members of Congress as Amici Curiae in Support of Appellee at 13, CFPB v. All Am. Check Cashing, Inc., 33 F.4th 218 (5th Cir. 2022) (No. 18-60302).

151. *See* Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L. 321, 339 (2013) ("[C]onsumer advocates urged a more independent agency, fearing industry capture and heavy-handed political interference by Congress and the White House."). All but two of these financial regulatory agencies were commissions. Those two were the Office of the Comptroller of the Currency and the Office of Thrift Supervision (OTS). The same law that created the CFPB also abolished the OTS. Dodd-–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (2010).

152. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2211 (2020).

153. Datla & Revesz, *supra* note 5, at 794.

154. *Seila Law LLC*, 140 S. Ct. at 2200; *see also* PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 190 (D.C. Cir. 2018) (Kavanaugh, J., dissenting) (noting that staggered terms enable an increase in presidential influence over time and thus presumably more incremental shifts in policy); Datla & Revesz, *supra* note 5, at 820-21 (explaining that "commissioners or board members other than the chair serve staggered terms and are replaced by the President as their terms expire," providing for gradual change in leadership).

It is this author's opinion that policy continuity should not be a consideration when designing agencies.[155] However, to the extent it currently is, "abrupt shifts in agency leadership" occur *whenever* a new chair is named in all but adjudicatory commissions. The policies of strong-chair commissions are likely to flip as frequently as with single-director agencies because, although strong chairs must still obtain a majority of votes for regulatory action, they may direct staff to take sub-regulatory action and refuse to permit votes on items with which they disagree. Only 12% (6/49) of strong-chair commissions provide associate commissioners some statutory agenda authority.

Theoretically, commissions operating under the equal-commissioner model are more likely than those with the strong-chair model to have gradual policy changes as commissioners cycle on and off and the median vote shifts, but this is not necessarily the case. Chairs of equal-commissioner agencies still control which items are voted on and only one-quarter of equal-commissioner commissions (8/33) provide associate commissioners some sort of agenda authority. There is further evidence that chairs "of independent agencies often resign when a President of the opposing party is elected," meaning that the gradual policy change of commissions happens more quickly than theory would dictate.[156] In sum, it is unclear that the equal-commissioner model truly ensures policy consistency to a greater extent than the strong-chair model.

4. Oversight Efficacy

Arguments in the literature differ on whether the single-director model or the equal-commissioner model better allows for congressional oversight: some argue not only that minority commissioners' "statements can serve as 'fire-alarms'" to apprise Congress of the majority's actions,[157] but also that "[t]he

155. The argument is frequently made that the private sector requires policy consistency for long-term planning. *See, e.g.*, Nathan Rott, *Nothing Certain in Search for "Regulatory Certainty" at EPA*, NPR (May 22, 2018, 5:00 AM ET), https://www.npr.org/2018/05/22/611819300/nothing-certain-in-search-for-regulatory-certainty-at-epa [https://perma.cc/J8TX-QRSS] ("Those that we regulate ought to know what we expect of them, so that they can plan and allocate resources to comply." (quoting former Environmental Protection Agency Chief Scott Pruitt)). However, it may be that the benefits of more immediate policy shifts outweigh the costs in some instances, such as to affirmatively protect workers or the environment. Further, there are alternate mechanisms Congress can use to ensure the business community has sufficient time to incorporate policy changes into their activities, such as ensuring that agency regulations cannot become effective for six months or a year after publication. *See, e.g.*, 12 U.S.C. § 4802(b)(1) (2018) (requiring that certain new regulations "take effect on the first day of a calendar quarter which begins on or after the date on which the regulations are published in final form"). Furthermore, the argument about the loss of accumulated expertise is a red herring. Though there is a loss of expertise whenever any individual leaves a position, not only do presidential appointees usually enter office with significant management experience and policy expertise in their agencies' activities, but career civil servants, some with decades of experience, ensure agencies remain operational during periods of transition.

156. Datla & Revesz, *supra* note 5, at 821.

157. Jacobs, *supra* note 8, at 579. There are, of course, other fire alarms in commissions than just dissenting commissioners, including interest groups, who can articulate to Congress rationales as to why newly enacted policies are unwise, and civil servants, who can blow the whistle to inspectors-general or Congress regarding illicit or extrastatutory activities taking place within agencies. *See, e.g.*, Farber & O'Connell, *supra* note 147, at 1401-02 (discussing employee monitoring of political appointees).

presence of minority commissioners may encourage majority commissioners to provide greater information than they otherwise would,"[158] while others argue that Congress may find it easier to hold a single individual to account than multiple commissioners.[159]

The strong-chair structure combines all benefits, by allowing Congress to hold a single individual accountable for commission decisions, rather than multiple commissioners, while also ensuring that associate commissioners may alert Congress to unlawful or improper agency actions. For example, the Chair of the Federal Reserve is expected to annually brief Congress on issues of monetary policy despite being only one of eleven individuals on the Federal Open Markets Committee that makes monetary policy decisions.[160]

5. Regulatory Capture

Related to oversight is the possibility of regulatory capture. The literature suggests that the multimember structure inhibits capture more effectively than the single-director structure as industry "must capture a majority of the membership rather than just one individual"[161] whereas single directors "provide[] a sharper focus for the concentration of special interest power and influence."[162]

Regulated industries can capture agencies via multiple avenues: they may take control of commissions by capturing staff, capturing a majority of commissioners, and/or capturing commission chairs. The capture of staff appears equally possible in any agency structure. Similarly, under both the strong-chair and equal-commissioner models, the capture of a commission majority prevents the commission from taking regulatory action that negatively impacts the capturers. However, in strong-chair commissions, the capture of chairs alone means that sub-regulatory actions will be taken to benefit capturers and chairs will use their agenda authority to prevent the full commissions from voting on items detrimental to the capturers, while the capture of equal-commissioner model chairs alone simply means that no detrimental items will be voted upon, as sub-regulatory action is taken pursuant to direction from executive directors. With both models, capture of chairs and commission majorities is necessary to act *proactively* on behalf of capturers at both the regulatory and sub-regulatory levels. Table 10 shows which actions can be taken, or not be taken, on behalf of capturers based on who is captured under the different models.

158. Feinstein & Hemel, *supra* note 11, at 73 n.174. They also note that it is likely Congress creates multimember agencies with partisan balance requirements "when they are most worried about the executive branch straying from their own policy preferences." *Id*.

159. *See* Sitaraman & Dobkin, *supra* note 15, at 733 ("Congress's oversight function [of commissions] is hampered because it is unable to focus its energy at hearings on commissioner-specific issues.").

160. 12 U.S.C. § 247a (2018).

161. Bressman & Thompson, *supra* note 9, at 611.

162. Robinson, *supra* note 8, at 962.

Table 10. Regulatory Capture at Commissions

		Industry-Supported	*Only Capture Chair*	*Only Capture Commission Majority*	*Capture Both*
Strong-Chair Model		Action	Sub-regulatory		Regulatory & Sub-regulatory
		Inaction	Regulatory & Sub-regulatory	Regulatory	Regulatory & Sub-regulatory
Equal-Commissioner Model		Action			Regulatory & Sub-regulatory
		Inaction	Regulatory	Regulatory	Regulatory & Sub-regulatory

This model of regulatory capture is simplistic. It presumes that associate commissioners do not have full agenda authority, which is true under statute for all commissions but the FEC. It also presumes that the capture of commission chairs is equally feasible under both the strong-chair and equal-commissioner models, which may or may not be accurate. It may be that strong chairs are more able to reject outside influence as a result of having staff that can provide sufficient information to counter outside influence. However, it shows that the equal-commissioner model is more effective at preventing regulatory capture than the strong-chair model, as capture of a strong chair permits sub-regulatory action and inaction on behalf of capturers.

6. Recruitment

Finally, the strong-chair model may have detrimental effects on recruiting competent individuals to serve on commissions. When it proposed granting commission chairs executive authority in 1949, the Committee on Independent Regulatory Commissions of the President's Commission on Organization of the Executive Branch of the Government—the commission that led President Truman to propose various reorganization acts to give commission chairs chief-executive authorities—addressed the objection that the proposal "will reduce the status of the other members and make it more difficult to attract good men."[163] It wrote that, under the proposal, not only will "[e]ach member . . . have

163. COMM. ON INDEP. REG. COMM'NS, *supra* note 17, at 47.

undiminished authority on all substantive policies and decisions and on basic administrative matters" and that "their participation in substantive action will be facilitated by freedom from partial and shared responsibility for administrative details," but also that "[a]ble and intelligent men will recognize that a committee is not well fitted for administration," and "competent men are more likely to be willing to serve where a commission is well run under an able chairman than where it is badly managed."[164] In other words, it argued that placing administrative power in a chair will free the other members to engage in other policymaking activities and commissions will actually receive better candidates as a result of the efficiencies that will be gained.

As extensively discussed throughout this Article, the strong-chair model has severely diminished associate commissioners' capacity to engage in substantive policymaking; the ability for any one associate commissioner to significantly shape policy is minor. At the same time, the personal costs to becoming a commissioner can be substantial: not only does the confirmation process subject a nominees' finances and history to close public scrutiny, but the opportunity cost to accepting a commission appointment can be significant. Law firm partners can expect to take a significant pay cut, from earning well in excess of $1 million a year to the no more than $221,400 annually (and likely less) that salaried commissioners are paid, and professors are likely to lose tenure or their tenure-track positions if they remain a commissioner for the full duration of their term. Those outside of the Washington beltway may also be expected to uproot their lives to serve. Although one early in their career may find it worthwhile to be an associate commissioner, it is unlikely a President would want someone in that position to serve, whereas those who are eminently qualified are likely to find the position of associate commissioner to be a step down. In writing this Article, the author spoke with a mid-thirties tenure-track professor who commented that, although it would be a boon for their career to become an associate commissioner, the President would likely prefer to appoint someone like their dean, yet that dean would never accept anything less than commission chair.

B. Optimal Commission Governance Model and Proposed Statutory Reforms

After evaluating the strong-chair model and noting that what works for one agency may not necessarily work for all others, this author's opinion is that the optimal commission governance structure is one in which chairs retain chief-executive authority but also one that permits associate commissioners to effectively oversee, easily overrule, and demote their chairs in order to ensure that chairs truly administer their commissions in the interest of the majority.[165] The problems and inefficiencies that commissions faced in the early- to mid-

164. *Id.*

165. The author does not take a stance as to whether this preferred commission structure is preferable to single-director agencies.

twentieth century—including the difficulty of mandating a "bureau chief to report to five or more masters" and requiring time at commission meetings to address "minor personnel appointments or promotions," "leaves of absence," or whether to "send[] a staff member to an outside meeting," and which staff member to send[166]—underscored the need for strong chief executives. The steady accumulation of power in commission chairs suggests that Congress made a policy choice: that the effective and efficient operation of commission staff—and the ability to act quickly and unilaterally when necessary—outweigh the benefits of deliberation that come with commission votes. However, prioritizing the efficiency gains from the strong-chair model over the costs from the deliberative process makes a mockery of the multimember "deliberative" structure. The inability of many associate commissioners to induce votes on items of importance or to ensure their chairs are administering staff and utilizing commission authorities in a manner consistent with the majority defies the original rationale for having commissions in the first place. Similarly, allowing the President to promote associate commissioners to the positions of chair without further Senate confirmation is contrary to the value of agency independence. Moreover, granting the President authority to name chairs—with or without additional Senate confirmation—with near-unilateral authority to direct their commissions' activities over the wishes of the associate commissioners begs the question: why have commissions at all?

Specific changes can be made to improve the commission structure in ways that would allow associate commissioners a greater say in decision making and prevent unnecessary presidential influence while still maintaining the efficiencies stemming from the strong-chair model. This Section discusses five policy changes that would make this structure a reality across the government. Although not every policy proposal is appropriate for every commission, they are largely applicable to regulatory, adjudicatory, and even some executive commissions.

1. Chairs Should Be Selected Without Presidential Involvement

First, while maintaining chairs' status as their agencies' chief executives, commissioners should be allowed—and expected—to select their chairs, rather than having the President do it for them. Chairs are generally politically aligned with a majority of their fellow commissioners, but when they are in the minority, chairs may stymie their commissions' majorities from enacting the majorities' preferred agendas and may use commission staff to prepare materials for when the chairs' party is in power. This proposed change would generally ensure that chairs are of the majority political party on their commissions, such that a majority of commissioners are able to effectuate their policy priorities as Congress intended.

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166. COMM. ON INDEP. REG. COMM'NS, *supra* note 17, at 43-44.

This change would also force chairs to be more accommodative to the preferences of all commissioners as chairs could be replaced at any time. Take, for example, a hypothetical in which a chair is at one end of the ideological spectrum on a five-member commission, rather than in the middle. Unless the chair navigates the commission's business to the middle, the two other majority commissioners could join with a minority member to give the chairpersonship to a more moderate majority commissioner.[167]

2. Associate Commissioners' Authority Should Be Expanded

Second, associate commissioners should have a greater say in the items that are considered at meetings. As explained previously, associate commissioners at only one commission are permitted by statute to place any item they wish on their meeting agendas, commissioners of some agencies are limited to placing items on meeting agendas that review actions taken by delegated authority, and some commissioners have no such authority at all. This lack of authority inhibits associate commissioners' ability to hold their chairs accountable for management decisions, allows chairs to ignore their associate commissioners except when it is time to vote, and limits the candidates interested in accepting an associate commissioner position in the first place. Instead, associate commissioners should have some mechanism of forcing votes. At a minimum, commission majorities should be able to collectively induce votes on any item so as to prevent chairs from stymying their majorities and to allow majorities to direct agency staff to work on particular items of interest to a majority (such as rulemaking text), rather than only being permitted to vote for or against chairs' policies. Additional changes could be made to ensure chairs are truly subject to oversight by their fellow commissioners, such as allowing single commissioners to induce votes to disapprove of actions taken by their chairs, including actions made pursuant to authority delegated from the full commissions. Another possible change would be to require commissions to use Robert's Rules of Order or other parliamentary procedures that allow members to offer amendments or provide privileged motions, ensuring commission meetings follow procedures that preserve minority rights. Needless to say, these proposals would help

167. The tenure of FCC Chairman Kevin Martin exemplifies the consequences of a commission chair losing the support of the other commissioners yet remaining in that leadership position. A congressional report detailed how Martin "withheld important and relevant data from the other Commissioners," "manipulated, withheld, or suppressed data, reports, and information from the public," "failed to carry out some important responsibilities" delegated to the Chair alone, mismanaged Commission staff, and, perhaps most astonishingly, "prohibited career staff from talking directly to his fellow Commissioners without prior clearance or without supervision." COMM. ON ENERGY AND COM., DECEPTION AND DISTRUST: THE FEDERAL COMMUNICATIONS COMMISSION UNDER CHAIRMAN KEVIN J. MARTIN 2-3, 20 (2008). Martin was frequently opposed by the other four commissioners, but they did not have the authority to stop him. The only thing that ended Martin's control over the agency was the inauguration of a new President who demoted him. *Chairman Kevin J. Martin Announces Resignation Effective January 20th,* FED. COMMC'N COMM'N (Jan. 15, 2009), https://www.fcc.gov/document/chairman-kevin-j-martin-announces-resignation-effective-january-20th [https://perma.cc/NXF7-9GPP].

associate commissioners oversee their chairs, even if they are never given the opportunity to select their own chairs.

3. Associate Commissioners' Personal Offices Should Be Expanded

Third, because in some of the largest commissions it is impossible for each individual commissioner to have a firm understanding of all of their agency's activities, each associate commissioner should be given their own staff of a size sufficient to effectively participate in commission policymaking. At many regulatory commissions, members are granted a certain number of policy staffers to work in their "immediate" or "personal" offices, reporting directly to the commissioner rather than to the chair or commission as a whole. In commissions where such staff exist, so few individuals cannot craft the hundreds of pages of preambulatory text that accompany large rules sufficient to survive judicial review, limiting associate commissioners' capacity to engage in policymaking. In commissions where such staff do not exist, commissioners have no hope of being able to truly influence policy decisions when commission staff reports to the chair alone.[168] Staff is particularly necessary if associate commissioners are given increased agenda authority but not the authority to instruct commission staff.

The number of staff appropriately provided to each associate commissioner should depend on the nature of the commission's activities: commissioners of adjudicatory agencies may only require one or two staffers to serve as law clerks, and part-time commissioners may need none at all, whereas five policy aides may be inadequate for commissioners of the largest regulatory agencies. The number must be sufficiently large to allow commissioners to adequately stay abreast of technological and market changes within their agency's ambit, monitor and negotiate policy changes to activities occurring within their commission's divisions, draft concurring or dissenting opinions for agency adjudications and statements for rulemakings, and address all other activities and responsibilities of being a commissioner.

4. Commissions Should Be Divisible into Committees

Fourth, commissions with the most expansive jurisdictions should be required to divide themselves into committees to ensure an effective and efficient administration of activities in which all commissioners have an adequate say. These committees would have one of two roles based on proven, workable models. The first role is based on committees used by the Interstate Commerce Commission (ICC) and would be to perform functions of the full commission for a subset of activities under the agency's jurisdiction. The ICC divided itself into divisions of at least three commissioners to handle tasks related to assigned areas

168. *See* Phillips, *supra* note 46, at 514-16 (detailing the judicially created requirements that result in agencies crafting extensive rule preambles).

within its jurisdiction (e.g., valuations, applications for rates and fares), and each division could "hear and determine, order, certify, report, or otherwise act" with "all the jurisdiction and powers [and] same duties and obligations" of the full ICC, with decisions appealable to the full eleven-member commission.[169] Regulatory commissions with broad jurisdictions or which regulate industries with many market participants, such as the FCC or SEC, would benefit from such committees.

The second role for committees would be to develop recommendations for the full commission to consider. This role is based on committees used by the FRB in which the governors operate eight issue-area committees (e.g., Economic and Monetary Affairs, Supervision and Regulation) that conduct oversight of division staff in assigned areas and direct those staff to develop policy to bring to the full board for a vote.[170]

Even though commissioners will invariably disagree, either committee model would force them to rely on each other to ensure that staff are being effectively managed and would allow individual associate commissioners to take a leading role in shaping commission policy. At the FRB, for example, although Governor Lael Brainard was for several years the lone Democrat, she led its Committee on Payments, Clearing, and Settlement, and the other governors looked to Brainard regarding how to move forward with updating the nation's antiquated payment system.[171] Such comity and devolution of authority would benefit all executive and regulatory commissions.

No statute is necessary to create committees, yet their existence appears to be extremely limited. The existence of statutes *permitting* chairs to assign functions to other commissioners has proven insufficient to *ensure* that it happens. As such, Congress should require the regulatory commissions to have functional or oversight committees of no less than one per commissioner. Congress could decide the topics of each commission's committees or allow the commissions to determine their own topic areas.

5. Concurring and Dissenting Statements Should Be Published in the Federal Register

Lastly, commissions should be governed by statutory provisions requiring the publication of commissioners' dissenting or concurring opinions alongside agency rulemakings and adjudicatory orders. The ability of commissioners to issue concurring or dissenting opinions should go hand-in-hand with voting.

169. An Act to Authorize the Interstate Commerce Commission to delegate certain of its powers, ch. 136, 47 Stat. 1368 (1933) (adding section 17(6) to the Interstate Commerce Act).

170. *See Board Members*, FED. RESERVE, https://www.federalreserve.gov/aboutthefed/bios/board/ [https://perma.cc/CHM7-AHQY]; *Structure of the Federal Reserve System*, FED. RESERVE, https://www.federalreserve.gov/aboutthefed/organization-charts-accessible.htm [https://perma.cc/2LLN-D3GC].

171. *See Board Members*, *supra* note 170 (identifying Lael Brainard as Chair of the Committee on Payments, Clearing, and Settlement).

When a commissioner disagrees with the majority on a particular matter, they should have the opportunity to publish a concurring or dissenting opinion explaining why they disagree. These opinions can serve as not only as "a built-in monitoring system" as some scholars have argued,[172] but can also illustrate different ways of thinking about a particular issue. They could ultimately provide bases for future policies, similar to how Supreme Court dissents can serve as the bases for future majority opinions.

The CFTC is governed by such a provision, which requires that the agency publish the statements of individual commissioners in the *Federal Register*.[173] This provision has two demonstrated benefits. First, it helps protect the rights of commissioners by preventing a majority from silencing a minority and ensuring debate may occur between commissioners.[174] Additionally, publication of commissioners' concurring or dissenting statements in the *Federal Register* rather than only on the agency's website provides readers easy access to alternate views on agency actions that are not captured in the official legal document (i.e., in a rule's preamble or adjudication's order).[175]

Of course, dissenters cannot be allowed to delay the publication of majority action for a prolonged period by failing to provide an opinion, but there are methods to protect against abuses. For example, the NLRB previously had a rule "that if a dissent or concurrence regarding a draft opinion was not circulated to colleagues within two weeks of board approval of the majority decision, that

172. Barkow, *supra* note 8, at 41.

173. 7 U.S.C. § 2(a)(10)(C) (2018). This provision was inserted into the Senate version of the bill at the request of Senator Bob Kerrey, who expressed concern that in one case, "by a 3-to-l vote [the Commission] refused to allow a fellow Commissioner's dissent to be published in the Federal Register" alongside the majority opinion. The dissent was ultimately published elsewhere. *Futures Trading Practices Act of 1991: Hearings on S. 207 Before the Comm. on Agric., Nutrition, and Forestry*, 102nd Cong. 200 (1991) (statement of Sen. Bob Kerrey). In response to a question for the record, CFTC Chair Wendy Gramm responded that "[t]he Commission's decision was consistent with its existing practices. The Commission has never printed dissenting votes or statements in Federal Register documents such as rulemakings or statutory interpretations." *Id*. at 266; *see also* H.R. REP. NO. 102-978, at 72-73 (1992) ("The House bill contains no similar provision. The Senate amendment provides that whenever the Commission issues an opinion, release, rule, order, interpretation, or other determination, publication shall be made of any Commissioner's separate opinion or dissent. The Conference substitute adopts the Senate provision.").

174. In 2019, the CFTC had entered into a settlement agreement with Kraft Foods, which provided that "[n]either party shall make any public statement about this case . . . ." *In Re* Commodity Futures Trading Comm'n, 941 F.3d 869, 871 (7th Cir. 2019). Two commissioners released statements explaining that they voted to approve the agreement because they "believe[d] that Kraft . . . manipulated the wheat market." Dan M. Berkovitz, Comm'r, Commodity Futures Trading Comm'n, Statement Regarding the Commission's Settlement with Kraft Foods Group, Inc., and Mondelez Global LLC (Aug. 15, 2019), https://www.cftc.gov/PressRoom/SpeechesTestimony/berkovitzstatement081519 [https://perma.cc/7HBM-ATQJ]. Kraft moved to have the court hold the commissioners in contempt for violating the agreement. A Seventh Circuit panel refused, in part, because the commissioners have a statutory "right to publish an explanation of his or her vote" that the commission as a body cannot limit. *In re Commodity Futures Trading Comm'n*, *supra*, at 873.

175. *See, e.g.*, *Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants*, 86 Fed. Reg. 229, 246-50 (Jan. 5, 2021) (statements of Brian D. Quintenz, Dawn D. Stump & Dan M. Berkovitz).

decision would issue two weeks hence," regardless of whether dissents or concurring opinions were fully drafted.[176]

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One change—limiting the President's ability to promote and demote chairs at will—requires a statutory change. The other recommendations face the same challenge: chairs have little incentive to voluntarily cede authority to associate commissioners, especially in today's hyperpartisan climate. Why give up power to those who can—and will, if given the opportunity—stymie your agenda?[177] Associate commissioners can vote against items they support, providing a makeshift incentive for chairs to bring up items they oppose in order to ensure passage of their own priorities. However, this author believes commissioners should not be required to vote against agency actions they support—potentially causing those actions to fail—simply to compel their commissions to vote on items a majority of already supports. The courts are unlikely to weigh in. Indeed, the Supreme Court has stated that it is up to agencies themselves "to fashion their own rules of procedure, and to pursue method of inquiry capable of permitting them to discharge their multitudinous duties."[178] As such, "[i]nternal operations . . . are rarely disturbed by the courts."[179] It is likely up to Congress to implement changes if they are to occur at all.

IV. Doctrinal Implications for the Unitary Executive Theory

The prevalence of the strong-chair model poses implications for the way courts should treat commissions under the unitary executive theory, which asserts that Congress is restricted in its ability to limit the President's "control over administration" of the executive branch and that some statutes limiting the President's ability to remove officials are unconstitutional.[180] Recently, the Supreme Court explained that "the Constitution prohibits even 'modest

176. BREGER & EDLES, *supra* note 20, at 315.

177. Consider the following extreme hypothetical: A bare majority of commissioners may take all legal steps necessary to delegate the commission's entire authority to the chair, and so long as future chairs never devolve authority back to the commission, associate commissioners would never have the opportunity to vote on issues. This situation appears to be legally permissible at the CFTC, as no statute or principle of law prohibits it and no statute permits associate commissioners to induce votes on actions made pursuant to delegated authority. Addressing this situation would require Congress to enact a new law or a chair to devolve authority back to the Commission.

178. Fed. Commc'ns Comm'n v. Pottsville Broadcasting Co., 309 U.S. 134, 143 (1940).

179. BREGER & EDLES, *supra* note 20, at 305.

180. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2251 (2001); *see also* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994) (setting forth an originalist and textualist defense of unitary executive theory grounded in the Take Care Clause); Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205 (2014) (arguing that full presidential power to remove principal officers is necessary for effective presidential control over the executive branch); STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH (2008) (undertaking a historical survey of presidential practices to conclude that, as expressed through their exertion of executive power, U.S. presidents have all thereby subscribed to what is now called unitary executive theory).

restrictions' on the President's power to remove the head of an agency with a single top officer."[181] As removal protections for single-director regulatory agencies have been deemed unconstitutional, scholars are left to ponder whether removal protections for commissions will suffer a similar fate. While on the U.S. Court of Appeals for the D.C. Circuit, then-Judge Kavanaugh provided a compelling explanation for why statutory removal protections are constitutional for officials operating under the equal-commissioner model. This Part argues that removal protections should similarly be deemed constitutional for many commissions operating under the strong-chair model.

A. Overview of the Unitary Executive Theory

The unitary executive theory maintains that Congress's ability to restrict the President's authority to remove subordinates within the executive branch is limited. The Supreme Court's recent decisions on the topic identify two primary rationales. First, the "removal power" is necessary to "help[] the President maintain a degree of control over the subordinates he needs to carry out his duties as the head of the Executive Branch."[182] The theory is that because the Constitution clearly states that "[t]he executive Power shall be vested in a President"[183] and because the President is responsible for "tak[ing] Care that the Laws be faithfully executed,"[184] this individual is tasked with overseeing the government's officers to ensure that their vision for administering Congress's laws is effectuated. As articulated by Justice Gorsuch in a concurring opinion, given that "[n]ew Presidents always inherit thousands of Executive Branch officials whom they did not select," it is possible that "as between presidential hiring and firing 'the unfettered ability to remove is the more important'" to enacting that vision.[185] Second, "[t]he Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty," and the unitary executive with removal power is one of those structural protections.[186] The Framers "deemed an energetic executive essential," and, "[a]ccordingly, they chose not to bog the Executive down with the 'habitual

181. Collins v. Yellen, 141 S. Ct. 1761, 1787 (2021) (quoting Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S.Ct. 2183, 2205 (2020)).

182. *Id.* at 1784.

183. U.S. CONST. art. II, § 1.

184. U.S. CONST. art. II, § 3.

185. *Collins*, 141 S. Ct. at 1796 (Gorsuch, J., concurring) (emphasis removed) (quoting MICHAEL MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING 167 (2020)); *see also id.* ("It is the power to supervise—and, if need be, remove—subordinate officials that allows a new President to shape his administration and respond to the electoral will that propelled him to office.").

186. Bowsher v. Synar, 478 U.S. 714, 730 (1986); *see also Collins*, 141 S. Ct. at 1780 ("[T]he separation of powers is designed to preserve the liberty of all the people."); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (noting that the Constitution "diffuses power the better to secure liberty").

feebleness and dilatoriness' that comes with" management of multiple individuals.[187]

Today, several clear statements can be made about the application of the unitary executive theory. Congress may place restrictions on the President's ability to remove inferior executive officers, as well as the President's ability to remove commissioners whose activities are solely judicial in nature.[188] In addition, "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment."[189] Congress also may not place dual for-cause removal restrictions on inferior officers subordinate to principal officers.[190] Most recently, in *Seila Law* and its companion case *Collins*, the Court declared that Congress may not limit the President's ability to remove at will principal officers who are the singular head of an agency "vested with significant executive power."[191]

Other than these assertions, the line between what Congress can and cannot do remains muddled; the Supreme Court's "precedents on for-cause removal are a jurisprudential train wreck."[192] Over more than a century, different justices have emphasized different considerations as they have determined which offices may have statutory removal protections and which may not. In *Myers v. United States*, the Court held that "the power of removal must remain where the Constitution places it, with the President, as part of the executive power."[193] In *Humphrey's Executor v. United States*, the Court reinterpreted *Myers* to have held only that the President has "unrestrictable power . . . to remove purely executive officers," as an officer whose responsibilities are limited to the performance of executive functions is "merely one of the units in the executive department, and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is."[194] Congress may impose removal restrictions for an officer with "dut[ies] at all related to either the legislative or judicial power."[195] A half-century later in *Morrison v. Olson*, the Court refined the principle further: removal restrictions on purely executive officers are actually dependent on "whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty."[196] Recently, in *Seila Law*, the Court articulated a much narrower holding for *Humphrey's Executor* and a much larger holding for

187. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S.Ct. 2183, 2203 (2020) (quoting THE FEDERALIST NO. 70, at 471, 476 (Alexander Hamilton)).

188. *See* Morrison v. Olson, 487 U.S. 654, 691-93 (1988); Wiener v. United States, 357 U.S. 349, 355-56 (1958).

189. *Bowsher*, 478 U. S. at 726.

190. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 492-508 (2010).

191. *Seila Law LLC*, 140 S. Ct. at 2201.

192. Jerry L. Mashaw, *Of Angels, Pins and For-Cause Removal: A Requiem for the Passive Virtues*, 2020 U. CHI. L. REV. ONLINE 13, 14.

193. Myers v. United States, 272 U.S. 52, 161 (1926).

194. Humphrey's Ex'r v. U.S., 295 U.S. 602, 627 (1935).

195. *Id*. at 632.

196. Morrison v. Olson, 487 U.S. 654, 691 (1988).

Morrison, describing the first case as merely "permit[ting] Congress to give for-cause removal protections to a multimember body of experts, balanced along partisan lines, that perform[s] legislative and judicial functions and [is] said not to exercise *any* executive power,"[197] and the latter as one that "[b]ack[ed] away from the reliance in *Humphrey's Executor* on the concepts of 'quasi-legislative' and 'quasi-judicial' power."[198]

Although *Humphrey's Executor* remains good law, there is significant debate about the extent to which the principles *actually* articulated in that case, as opposed to the principles the *Seila Law* Court affixed to it, will be upheld in the future. And even if the Court upholds the *Seila Law*-affixed principles, questions remain as to the extent to which regulatory and adjudicatory agencies wield executive power.[199] As a result, it is unclear whether or to what extent Congress may truly place removal restrictions on regulatory commissioners.[200]

There appear to be two schools of thought as to where the unitary executive theory goes from here on that topic. Under one, the *Seila Law* Court's statements about *Humphrey's Executor* are merely dicta, and therefore certain limitations may be placed on the President's ability to remove commissioners that maintain at least some legislative and judicial authority. As one scholar put it, "the best framing of the [*Seila Law*] decision is that it is a part of a consistent practice by the Court of posturing about the separation of powers when the costs of doing so are relatively low."[201] The other school of thought contends that "the President has the constitutional authority to remove all noninferior policymaking officials who exercise executive power,"[202] including commissioners whose responsibilities include the exercise of legislative or judicial power. According to Justice Thomas, "[t]he decision in *Humphrey's Executor* poses a direct threat to our constitutional structure and, as a result, the liberty of the American

197. *Seila Law LLC*, 140 S. Ct. at 2199 (emphasis added).

198. *Id.* (quoting *Morrison*, 487 U.S. at 691).

199. *See* Bowsher v. Synar, 478 U.S. 714, 733 (1986) ("Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law."); *Humphrey's Ex'r*, 295 U.S. at 628 (finding that an FTC commissioner "exercises no part of the executive power vested by the Constitution in the President"); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 315 (2021) (discussing how "agency rulemaking pursuant to statutory authorization would qualify as an exercise of executive power"); Thomas W. Merrill, *The Constitutional Principle of the Separation of Powers*, 1991 SUP. CT. REV. 225, 232 ("All functionalists reject the exclusive-functions idea, and believe that many governmental activities can be categorized as falling within more than one function.").

200. *See* Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 SUP. CT. REV. 83, 84 (2021) ("[I]t is not obvious what the legally relevant description of *Humphrey's Executor* should now be taken to be.").

201. Edward Cantu, Seila Law *as Separation-of-Powers Posturing*, 110 GEO. L. J. ONLINE 38, 39 (2021).

202. Sunstein & Vermeule, *supra* note 200, at 88 (citing Steven Calabresi & Saikrishna Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994)).

people"[203] by "reducing the Chief Magistrate to the role of cajoler-in-chief.'"[204] As another scholar explained, "[m]ulti-headed independent agencies should watch out because the constitutionality of their removal protections rests on a 1935 case that conflicts with the Supreme Court's current understanding of the separation of powers."[205]

B. The Strong-Chair Model with Removal Protections Supports the Unitary Executive

A thorough defense of removal protections for equal-commissioner model agencies (though positing it as true for *all* commissions) is provided by then-Judge Kavanaugh in his *PHH Corp. v. Consumer Finance Protection Bureau* dissent while on the D.C. Circuit. The previous Section noted that the Supreme Court has identified two primary rationales for the unitary executive theory—ensuring the President maintains control over the executive branch and preserving liberty—Kavanaugh centered his dissent on the latter. Because "no single commissioner or board member can *affirmatively* do much of anything," commissions "serve[] as a critical substitute check on the excesses of any individual independent agency head" and "help[] to prevent arbitrary decisionmaking and abuse of power."[206] Further, because commissions "can go only as far as the middle vote is willing to go,"[207] that structure "'can foster . . . deliberative decision making'" that will lead to liberty-protecting decisions.[208] The "diverse perspectives and different points of view among the commissioners and board members" will "make it more likely that the costs and downsides of proposed decisions will be more fully ventilated,"[209] and because commissions have an "inherent requirement for compromise and consensus[,

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203. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2211 (2020) (Thomas, J., dissenting). Scholars quickly wrote to combat Justice Thomas' concerns, arguing that the President's authority over independent agencies is more than what Thomas claims it to be. *See, e.g.*, Cass R. Sunstein & Adrian Vermeule, *Presidential Review: The President's Statutory Authority over Independent Agencies*, 109 GEO. L.J. 637, 660 (2021) (arguing that the President's authority to remove officials for "inefficiency, neglect of duty, or malfeasance in office" allows her to "supervise" commissioners and that the President may "tell commissioners to show up for work, to do their jobs expeditiously, and to produce in accordance with a respectable schedule," in addition to being able to "set out standards to combat wrongdoing and corruption"); Howard Schweber, *The Roberts Court's Theory of Agency Accountability: A Step in the Wrong Direction*, 8 BELMONT L. REV. 460, 490-91 (2021) (discussing Justice Thomas' concurrence and how "the Constitution itself stands against any such a pure system" as Thomas advocated).

204. *Seila Law LLC*, 140 S. Ct. at 2211 (Thomas, J., dissenting) (quoting Free Enter. Fund. v. Pub. Co. Acct. Oversight Bd, 561 U.S. 477, 502 (2010)).

205. Aaron L. Nielson, *Is the FTC on a Collision Course with the Unitary Executive?*, YALE J. ON REGUL.: NOTICE & COMMENT (July 2, 2021), https://www.yalejreg.com/nc/is-the-ftc-on-a-collison-course-with-the-unitary-executive/ [https://perma.cc/6MJ4-AWZK].

206. PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 183 (D.C. Cir. 2018) (Kavanaugh, J., dissenting).

207. *Id.* at 184 (citing Wright, *supra* note 6, at 2260; then *Dodd-Frank Act Creates the Consumer Financial Protection Bureau*, *supra* note 5, at 2128; and then Rappaport, *supra* note 6, at 1601 n.17).

208. *Id.* (quoting Datla & Revesz, *supra* note 5, at 794).

209. *Id.* (citing Breger & Edles, *supra* note 6, at 1113; then Gersen, *supra* note 5, at 696; then Robinson, *supra* note 8, at 963; and then Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1645 (2003)).

they] tend to lead to decisions that are not as extreme, idiosyncratic, or otherwise off the rails" as single-director agencies.[210] Kavanaugh's overall assertion was that because the commission structure protects individual liberty, it is consistent with the Constitution's separation of powers and the unitary executive.

Kavanaugh's defense of commissions may be consistent with the structure and activities of equal-commissioner agencies, but it is not consistent with the strong-chair commissions described in this Article. In strong-chair commissions, chairs have much more authority than their associate peers, can go further than the middle vote on many sub-regulatory actions, and may make decisions for their commissions without full ventilation of the costs and benefits. Kavanaugh's defense of commissions is also largely inconsistent with the emphasis placed by the Supreme Court in *Seila Law* on presidential control of agencies. Writing for the majority, Chief Justice Roberts opined that one of the most significant problems with removal protections for the CFPB Director was that, when combined with the Director's five-year term, "some Presidents may not have any opportunity to shape its leadership and thereby influence its activities," and could have even less control than they have over commissions.[211] With commissions, however, Presidents can "appoint any other leaders—such as a chair or fellow members of a Commission or Board—who can serve as a check on [a commissioner's] authority and help bring the agency in line with the President's preferred policies."[212] Regarding strong-chair commissions, the power of the President to shape commission activities is even greater than that which Roberts identifies. Given strong chairs' chief-executive and agenda-setting authority, the President's ability to demote and promote these chairs allows her more influence over their agencies than simply appointing new commissioners as terms expire. Accordingly, a compelling argument can be made that the strong-chair model is consistent with and supports the goals of unitary control of the executive branch, especially when combined with statutory removal protections.[213]

Across both equal-commissioner and strong-chair agencies, the President may remove many commission chairs from their positions as chair at will and, as discussed previously, may remove all chairs were the Supreme Court to rule that commission chairs' terms of years do not prohibit their removal during that term.[214] If removal of chairs during their terms is prohibited, then the President may demote chairs in 70% (57/82) of commissions, including 67% (33/49) of strong-chair commissions. If removal during a term is instead permitted, then the President may demote *all* commission chairs.

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210. *Id.*

211. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2204 (2020).

212. *Id.*

213. A tension exists between the recommendations provided in Section III and the defense of strong-chair commissions in this section. The recommendations—especially the proposal to allow commissioners to select their own chairs—would ensure commissions fulfill Congress's goal of having bodies of equals deliberate, but they may not be consistent with the Supreme Court's contemporary unitary executive doctrine.

214. *See supra* Section II.E.

Importantly, this demotion authority is much more significant for strong-chair commissions than those under the equal-commissioner model. Under the latter, who is chair does not have significant policy implications since commissioners all have an equal say, whereas for strong-chair commissions, removing a chair will have significant consequences. Stopping chairs who oppose the President's agenda from exercising chief-executive authority has such significant policy implications that even when that President lacks an ideological majority on a commission, removing the chair can stop opposing policies in their tracks.

Further, once a chair has been demoted, it is more likely that a President will be able to select their replacement under the strong-chair model, further contributing to the President's control over the executive branch. If removal during terms of years is not permitted, then the President may demote and then promote another commissioner at will or with further Senate confirmation in 61% (29/49) of strong-chair commissions, as compared with only 39% (13/33) of equal-commissioner agencies. However, if terms of years are not binding on Presidents, the President's ability to demote and then promote another commissioner at will or with further Senate confirmation jumps to 85% (42/49) of strong-chair commissions, as compared with only 45% (15/33) of equal-commissioner agencies. And to be sure, the fact that some of a President's nominees for chair positions must go through Senate confirmation is not problematic for presidential control over those commissions, as it is likely that the President may put forth a sitting commissioner for Senate confirmation while also naming them as acting chair.[215] For those seven remaining strong-chair commissions for which the President has no official role in selecting the chairs, the President can fire every chair the commission selects until they choose a chair for whom the President approves.

Although simply being able to demote chairs and promote commissioners provides the President an opportunity to shape agency leadership, statutory partisan-balance requirements—which generally prohibit more than a bare majority of an agency's commissioners to be of one political party—all but ensure that the President will be able to select as chair someone of whom they approve ideologically. A recent empirical analysis of these balance requirements found that, when naming commissioners of the opposing party, Presidents "generally choose 'bona fide, honest-to-God' members of the opposite party—or, at least, individuals whose observed ideologies are significantly different

215. OLC has posited that "'it should be assumed that the power to designate an Acting Chairman remains in the President,' when the President has exclusive authority under [statute] to designate the chairperson." Cuba Broadcasting, 24 Op. O.L.C. 24, 28 (2000) (quoting *Federal Home Loan Bank Board - Chairman – Vacancy – Reorganization Plan No. 3 of 1947 (5 U.S.C. App. 1), Reorganization Plan No. 6 of 1961 (5 U.S.C. App.*), 3 Op. O.L.C. 283, 283 (1979)). However, even if a court were to declare that the commission as a whole may decide who is acting chair, it is likely the President may fire whomever they select. OLC did also write that "general principles regarding the operation of boards [provide commissions with] the authority to meet and to conduct business without either a presidentially designated or an acting chairperson." *Id.* at 25.

from the President's own."[216] If the President decides to demote a chair with whom they disagree, it is very likely that they will find an ideologically aligned commissioner to promote. And because the chairs of so many commissions have agenda and chief-executive authority, it is likely that these chairs are able to engage in sub-regulatory and pre-regulatory actions to effectuate policy supportive of the President's agenda and halt policy antithetical to it.[217]

Importantly, a new President's ability to promote ideologically supportive associate commissioners exists only if statutory removal restrictions are constitutional. Take, for example, a Democratic President who will soon be replaced by a Republican. The Democrat's five-member FTC (which maintains both partisan-balance requirements and statutory removal restrictions) is comprised of three Democrats and two Republicans. Absent statutory removal restrictions, that President could fire the two Republicans on the last day of her term, leaving the incoming Republican President with an FTC comprised of only three Democrats. While the Republican President could nominate a new Republican to head the agency, one of the three Democrats would serve as acting chair in the interim before Senate confirmation.[218] However, with statutory removal protections, the Democratic President could not have fired the two Republican commissioners, allowing the incoming Republican President to promote one of those two to Chair. In situations such as this, the existence of removal protections benefits a President's ability to control the executive branch.

One objection to these arguments is that a President's ability to select a commission's chair from among its existing membership is not the same as appointing new officials. Although this is true, demotion and promotion authority is quite similar to that of the President with regard to single-director agencies. By and large, the President generally does not set agency policies because statutes largely place authority in agency officials instead of the President, and although there are mechanisms in place for White House staff to review agency decisions before they are effectuated,[219] the President's only "fool-proof" mechanism to enforce policy decisions is to fire offending officials

216. Feinstein & Hemel, *supra* note 11, at 14. Feinstein and Hemel also note that "Republican Presidents appoint Democrats who are more liberal than they are and more liberal than their Republican co-party appointees are. Likewise, Democratic Presidents appoint Republicans who are more conservative than they and their Democratic co-party appointees are." *Id*.

217. *See supra* Part I.

218. The Republican President could, in the alternative, fire the three Democrats, leaving the Commission unable to function entirely. Whereas single-director agencies are governed by the Federal Vacancies Reform Act of 1998, 5 U.S.C. §§ 3345-3349d (2018), and deputies may perform the functions of vacant superior positions, commissions cease to function when there are no commissioners. *See, e.g.*, Eric Katz, *Biden Finally Nominates a Full Slate to Long-Vacant Federal Employee Appeals Board*, GOVEXEC (Feb. 28, 2019, 7:24 PM ET), https://www.govexec.com/management/2021/09/biden-finally-nominates-full-slate-long-vacant-federal-employee-appeals-board/185060/ [https://perma.cc/39L6-3Q74] (noting the four-year period in which the Merit Systems Protection Board (MSPB) was not operational because it had no quorum and no board members).

219. *See* Kagan, *Presidential Administration*, *supra* note 180, at 2285-90 (discussing means by which the White House and Office of Management and Budget review agency actions); *see also* STEPHEN BREYER, MAKING OUR DEMOCRACY WORK 110 (2010) ("[T]he president may not have the time or willingness to review [agency] decisions.").

and put in their places appointees who would undo offending actions. Though statutes may protect commission chairs from being removed from their commissions, removing their authority to engage in sub-regulatory or pre-regulatory activities may be nearly as effective for a President.

In fact, having Senate-confirmed commissioners "waiting in the wings" to take over as chair may, at times, be more beneficial for the President than the situation at single-director agencies. Whereas the commission structure allows the President to simply demote chairs and promote new individuals, allowing them to take office immediately, the single-director structure requires the President to wait for their picks to be confirmed or rejected by the Senate. Acting officials may undertake leadership responsibilities in those agencies, but they may be hesitant to make significant policy decisions if they know they will not be in the position for long, especially if they are civil servants.[220] It may be that the President, when granted the authority to demote or promote commission chairs, has *more* of an ability to effectuate desired policy in some instances with commissions than with single-director agencies.[221]

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In *Seila Law*, the Supreme Court noted that the single-director independent agency structure allowed the CFPB Director to "*unilaterally*, without meaningful supervision, issue final regulations, oversee adjudications, set enforcement priorities, initiate prosecutions, and determine what penalties to impose on private parties."[222] It is true that commission chairs cannot alone issue final regulations, but chairs with chief-executive authority frequently do "oversee adjudications, set enforcement priorities, [and] initiate prosecutions."[223] The ability to propose "what penalties to impose on private parties"[224] and regulatory text to their colleagues is frequently sufficient to determine final outcomes. Taken together, the role chairs play in their agencies, the significant ability of the

220. *See Government Disservice: Overcoming Washington Dysfunction to Improve Congressional Stewardship of the Executive Branch*, P'SHIP FOR PUB. SERV. 29 (Sept. 16, 2015), https://ourpublicservice.org/wp-content/uploads/2019/02/Government-Disservice.pdf [https://perma.cc/SAU2-R876] (quoting Thad Allen, former commandant of the Coast Guard, for the proposition that "people who are in an acting capacity feel they do not have the power to make long-term changes and do what they need to do"). Additionally, the Federal Vacancies Reform Act of 1998 prohibits an individual from serving in a position in an acting capacity if the President has also nominated them for that office. 5 U.S.C. § 3345(b)(1)(B) (2018).

221. The above arguments apply primarily to executive and regulatory commissions and not to adjudicatory commissions; the former can be proactive, whereas the latter must be reactive. Because adjudicatory commission chairs lack the agenda authority of their regulatory and executive commission peers—as their commissions must hear and rule on cases as they come—the President's authority to promote or demote them similarly provides minimal opportunity to shape their commissions' agendas. This was, presumably, Congress's intention. *See* Wiener v. United States, 357 U.S. 349, 356 (1958) ("If, as one must take for granted, the War Claims Act precluded the President from influencing the Commission in passing on a particular claim, *a fortiori* must it be inferred that Congress did not wish to have hang over the Commission the Damocles' sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing.").

222. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2203-04 (2020).

223. *Id.* at 2204.

224. *Id.*

President to demote or otherwise change chairs should be sufficient for the courts to find statutory removal protections for strong-chair regulatory and adjudicatory commissions consistent with the purposes of unitary control of the executive branch.

Conclusion

The topline conclusion of this new research is that the power structure within federal commissions is highly unequal. Not only do the vast majority of commission chairs have the sole authority to decide which items are even voted upon, but they also can decide which items receive staff attention and are developed into policy proposals or effective policy. Congress did not intend to give chairs this power over policymaking, but by granting chairs chief-executive authority to enable operational efficiencies without simultaneously granting associate commissioners adequate power to oversee their chairs, this result was inevitable.

There are benefits, of course, to this strong-chair model of commission governance, such as the aforementioned efficiency gains and the role it grants the President in shaping commission decisions. The latter benefit, as detailed in Part IV, is a strong argument in favor of the constitutionality of statutory removal restrictions for commissioners even in light of the concerns raised by proponents of the unitary executive theory. But to the extent that Congress has decided to imbue particular agencies with a multimember structure, it is contrary to that intention to allow chairs to run roughshod over the other commissioners. The statutes governing regulatory commissions require interpretation, but chairs are unlikely to permit their commissioners to even vote on an interpretation. Commission governance is rarely litigated, and when it is, the issues are never as narrow as inter-commissioner disputes. OLC opinions are more developed than judicial doctrine,[225] but even then, OLC admits it that it "is neither well-suited nor sufficiently well-versed . . . in the internal workings of [commissions] to provide more than a general response" to questions posed to it,[226] and that it cannot enforce its opinions. Time and again, clashes over chairs' management "demonstrate the inadequacy of law and the ascendancy of political will even in the resolution of internal agency conflicts."[227]

Similarly inadequate is previous scholarship and court opinions. Not only do they largely ignore that this strong-chair structure exists, but doctrinal issues have been decided on the presumption that all members of a given commission

225. *See, e.g.*, Division of Powers of the CSB, 24 Op. O.L.C. 102, 105 (2000) (explaining that "[t]he term 'Chief Executive Officer' comes from corporate law," and, because "as a matter of corporate common law, [CEOs] are 'subordinate in legal authority' to their corporations' boards of directors," a majority vote of an agency's members can override the chair); Disclosure of Employee Appraisals, 39 Op. O.L.C. 1, 5 (2015) (concluding that associate members of a commission had access to performance appraisals of senior staff so that the chair could be "'subject to' the Board's policymaking authority when he supervises employees").

226. *Division of Powers of the CSB*, 24 Op. O.L.C. at 103.

227. BREGER & EDLES, *supra* note 20, at 311.

have equal power to shape their agency's agendas when this is rarely the case.[228] It is this author's hope that additional research be conducted on the prevalence and nuances of this governance model. One area of worthy study would be reviewing commission regulations and customs to understand in more detail which authorities are granted to commission chairs, how associate commissioners conduct oversight of their chairs, and how agencies address associate commissioner proposals. Investigating the model's implications for constitutional- and administrative-law doctrines would also be a fruitful line of inquiry.

Contrary to Congress's wishes, strong-chair commissions across the government are the norm, with chairs provided more authority over their agencies' activities than their associate-commissioner colleagues. Congress should correct this power imbalance and restore commissions to the bodies of equals it originally intended them to be.

228. *See, e.g.*, *Seila Law LLC*, 140 S. Ct. at 2204 (noting that associate commissioners "can serve as a check on the [agency head's] authority and help bring the agency in line with the President's preferred policies"); PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 183-86 (D.C. Cir. 2018) (Kavanaugh, J., dissenting) (discussing the power dynamics within commissions).

Appendix[†]

Agency	*Type*	*CE*	*SED*	*CAED*	*CS*	*AAA*	*Term*
Administrative Conference of the United States Council	E	X			SC		5
AMTRAK (National Railroad Passenger Corporation)	E		X		NPI		
Appalachian Regional Commission	E		X		SC	X	
Architectural and Transportation Barriers Compliance Board	E		X		NPI		1
Barry Goldwater Scholarship and Excellence in Education Foundation	E		X		NPI		
Board of Veterans Appeals	A	X			SC		6
Chemical Safety and Hazard Investigations Board	E	X			P		5
Commission on Civil Rights	E		X		PCM		
Commodity Credit Corporation	E	X		X	SC		
Commodity Futures Trading Commission	R	X			SC		
Consumer Product Safety Commission	R	X			SC		
Corporation for National and Community Service	E		X		NPI		
Corporation for Public Broadcasting	E		X		NPI		

[†] Legend—CE: The Chair is the statutory executive. SED: The statute provides for an executive director. CAED: The Chair, rather than the full commission or the President, appoints the commission's statutory executive director. CS: Chair-selection method. AAA: The statute provides for some associate agenda authority. E: The commission is an executive commission. A: The commission is an adjudicatory commission. R: The commission is a regulatory commission. SC: The Chair is Senate-confirmed or is an *ex officio* member that is Senate-confirmed to another position. NPI: No presidential involvement in selecting the Chair. P: The President selects the Chair without the involvement of others. PCM: The President selects the Chair with a concurrence of the commission majority.

A spreadsheet with specific statutory provisions is available from the author upon request.

Agency	*Type*	*CE*	*SED*	*CAED*	*CS*	*AAA*	*Term*
Council of Economic Advisers	E				SC		
Council on Environmental Quality	E				P		
Defense Nuclear Facilities Safety Board	E	X			P		
Delta Regional Authority	E		X		SC	X	
Election Assistance Commission	E		X		NPI		1
Equal Employment Opportunity Commission	R	X			P		
Export-Import Bank	E	X			SC		4
Farm Credit Administration	R	X			P		
Farm Credit System Insurance Corporation	R				NPI		
Federal Agricultural Mortgage Corporation	E		X		P		
Federal Communications Commission	R	X			P		
Federal Crop Insurance Corporation	E		X		NPI		
Federal Deposit Insurance Corporation	R				SC		5
Federal Election Commission	R		X		NPI	X	1
Federal Energy Regulatory Commission	R	X			P		
Federal Financial Institutions Examination Council	R				NPI		2
Federal Hospital Insurance Trust Fund	E	X			SC		
Federal Labor Relations Authority	A	X			P		
Federal Maritime Commission	R	X			P		
Federal Mine Safety and	A	X			P		

Agency	*Type*	*CE*	*SED*	*CAED*	*CS*	*AAA*	*Term*
Health Review Commission							
Federal Reserve Board of Governors	R	X			SC	X	4
Federal Retirement Thrift Investment Board	E		X		P		4
Federal Supplementary Medical Insurance Trust Fund	E	X			SC		
Federal Trade Commission	R	X			P	X	
Financial Stability Oversight Council	R				SC	X	
Foreign Claims Settlement Commission	A	X			P		3
Harry S. Truman Scholarship Foundation	E		X		NPI		
Inter-American Foundation	E		X		P		
Internal Revenue Service Oversight Board	E		X	X	NPI		2
International Trade Commission	A	X			P		2
James Madison Memorial Fellowship Foundation	E		X		NPI		
Legal Services Corporation	E		X		NPI		1
Marine Mammal Commission	E		X	X	P		
Merit Systems Protection Board	A	X			SC		
Metropolitan Washington Airports Authority	E				NPI		
Millennium Challenge Corporation	E		X		SC		
Morris K. Udall and Stewart L. Udall Scholarship Foundation	E		X		NPI		
National Association of	R				NPI		

Agency	*Type*	*CE*	*SED*	*CAED*	*CS*	*AAA*	*Term*
Registered Agents and Brokers							
National Consumer Cooperative Bank	E		X		NPI		1
National Council on Disability	E		X	X	P		
National Credit Union Administration	R	X			P		
National Indian Gaming Commission	R	X			SC		3
National Institute of Building Sciences	E		X		NPI		1
National Labor Relations Board	R		X		P	X	
National Mediation Board	A				NPI		1
National Transportation Safety Board	E	X			SC		3
Northern Border Regional Commission	E		X		SC	X	
Northern Great Plains Regional Authority	E		X		SC	X	
Nuclear Regulatory Commission	R	X			P		
Occupational Safety and Health Review Commission	A	X			P		
Pension Benefit Guaranty Corporation	E		X		SC		
Postal Regulatory Commission	R	X			P		
Privacy and Civil Liberties Oversight Board	E		X	X	SC	X	6
Puerto Rico Financial Oversight and Management Board	E		X	X	NPI		
Railroad Retirement Board	E				SC		5
Securities and Exchange Commission	R	X			P	X	

Agency	*Type*	*CE*	*SED*	*CAED*	*CS*	*AAA*	*Term*
Securities Investor Protection Corporation	R				P		
Social Security Advisory Board	E		X		P		4
Southeast Crescent Regional Commission	E		X		SC	X	
Southwest Border Regional Commission	E		X		SC	X	
State Justice Institute	E		X		NPI		1
Surface Transportation Board	R	X			P		
Tennessee Valley Authority	E		X		NPI		
Trustees of the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund	E	X			SC		
U.S. African Development Foundation	E				P		
U.S. Institute of Peace	E		X		NPI		3
U.S. International Development Finance Corporation	E		X		SC		
U.S. Parole Commission	E	X			P	X	
U.S. Postal Service Board of Governors	E		X		NPI		