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Paul R. Verkuil

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REFLECTIONS UPON FEDERAL AND STATE CONTROL OF ADMINISTRATIVE POLICY MAKING

Paul R. Verkuil*

I. INTRODUCTION

Among the three traditional branches of government, only the legislative and executive branches have the responsibility and, more importantly, the capacity to control the policy-making activities of administrative agencies. The judicial branch merely umpires whether the legislature and executive have overstepped their institutional bounds in seeking to control administrative policy making. The Supreme Court's constitutional function is emphatically not to guide or shape administrative policy; one frequently loses sight of this fact because the judicial branch steals center stage in setting the limits of power in inter-branch disputes.

In *Immigration & Naturalization Service v. Chadha*, the Court emphasized its pivotal constitutional role by eliminating the legislative veto as a policy control mechanism.1 Speaking for the majority, Chief Justice Burger stated: "The hydraulic pressure inherent in each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted."2 As a result of this kind of assertive decision, it is easy to exaggerate the judicial role in the constitutional plan.3 Moreover, the instructive power of the Court's opinion in *Chadha* suggests even more expansive separation of powers decisions in the future which may impose further limits upon the exercise of legislative power by revival of judicial

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* President and Professor of Law, College of William & Mary. This article was delivered as the Thirteenth Donahue Lecture at Suffolk University Law School in April 1984. It has been updated slightly but largely speaks from that time.


2. *Id.* at 951.

control techniques like the nondelegation doctrine. It is, therefore, a matter of some urgency to focus upon the proper role of the three branches in "doing government."

The business of government involves the making and implementing of policy by the legislative and executive branches, often through the vehicle of administrative agencies. The necessity for policy transmission via the administrative mechanism creates much of the inter-branch conflict that the judiciary is called upon to resolve. Further, the policy-making structure at both the federal and state levels must be examined because both levels of government share responsibility for many important domestic issues. This helps to explain the intervention of state courts into the separation of powers debate at the state level. Indeed, state supreme courts have been more assertive on these matters recently than has the Supreme Court of the United States.

Two limitations bear emphasis at the outset. First, this article analyzes only domestic policy making, not external relations or foreign policy. This constraint reflects the fact that separation of powers issues are often resolved differently, or not at all, in the foreign relations setting where the President's power is at its height. Second, the focus is upon administrative policy making, not adjudication. This is not an easy distinction to draw because policy can be made in an adjudicative setting; and it is not always easy to distinguish one


5. An article of faith of the present Administration is that federalism principles dictate state participation in national policy making. See Gray, Regulation and Federation, 1 YALE J. ON REG. 93, 93 (1983) (new federalism creates a rebuttable presumption in favor of state and local operation of regulatory programs).


7. See United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320, 327-29 (1936) (President's discretion is greater with foreign affairs than with domestic matters).
But the need to emphasize policy making over adjudication is critical simply because, in the latter setting, due process issues arise that make the judicial branch not merely an umpire but a major player. The focus of this article is on those administrative policy-making situations where the judiciary is, by its own acknowledgment, meant to be on the sidelines. Since agencies implement, interpret, and create policy, a focus on this side of administrative behavior brings one closer to understanding their relationship to the executive and legislative branches in our constitutional system.

II. THE NEED FOR ADMINISTRATIVE IMPLEMENTATION OF POLICY

One need not pause long to justify the need for administrative agencies in making policy. It would be nice to live in a world where the legislative will could be expressed directly and clearly to the citizen in the town meeting setting, but we do not have this privilege in modern society. For this reason Justice Holmes told us long ago in *Bi-Metallic Investment Co.*: "The Constitution does not require all public acts to be done in town meeting or an assembly of the whole." 10 Congress and state legislatures simply cannot make policy that is self-executing; and they will not permit the President or governors to do so entirely on their own. To achieve oversight, agencies become the inevitable intermediaries of modern government.

This does not mean that agency mandates cannot be changed or eliminated. There is an ebb and flow that often varies the content of regulations but rarely removes them from the scene. The deregulation movement has altered agency missions and eliminated certain kinds of agencies. But for every agency that is abolished as a result of deregulation, another seems to take its place. This is not due to some perverse variation upon Parkinson’s law, but because "complexity has a bright future." 11 Thus, as economic regulation falls...
into disfavor, regulation of social costs and benefits takes its place. One can make a convincing case that economic regulation of oil and gas is counterproductive, but one cannot develop an equally compelling argument for the deregulation of nuclear power plant safety requirements.

At the state level, the process is similar. For every occupational licensing law that is properly challenged as economically unjustified, administrative schemes emerge that seek to conserve and reallocate important natural resources like groundwater. In our pluralistic society, federal and state governments simply cannot carry out these complicated responsibilities without the aid of administrative agencies.

But once the indispensability of these agencies is accepted, the critical question becomes which one of our policy-making branches of government should control agency policy making or, to put the matter less contentiously, how should the two branches coordinate their mutual interests in controlling agency policy making?

III. THE TENSIONS BETWEEN CONGRESSIONAL AND EXECUTIVE CONTROL

At the federal level, the tension between Congress and the President over control of agency policy making introduces the related concepts of accountability and independence. These words are as evocative in the administrative setting as equity and efficiency are in the world of economics. The same words are heard whenever the question arises: Who should control the agencies, Congress or the President? When the President wants to increase agency policy control, he emphasizes the need for "accountability"; when Congress wants to restrain the Executive, it invokes principles of agency "independence." Although this debate is larger than the one over which branch controls executive or independent agencies, many of the problems arise in that context.


The basic issue is which branch is best suited to exercise policy-making control in an increasingly complex democratic society? The obvious answer is contained within the Constitution. Article I gives Congress the power to legislate; article II gives the President the power to implement that legislation. But these responsibilities serve only to state the tension. Congress rarely instructs the President to act directly and without exercising his executive discretion. Rather, Congress usually (and occasionally, even responsibly) delivers vague or qualified instructions, not directly to the President, but to administrative officials. It delegates policy-making responsibility to agencies within the executive branch or to agencies it chooses to call independent.

To resolve the tensions inherent in this legislative delegation process, one must tease out of the relevant articles of the Constitution some workable notion of branch competency. The task is to decide, by examining the essential characteristics of each, which branch is institutionally better suited to assert policy-making control. This analysis must be undertaken in terms of the larger principles of democratic control that inform our political system.

One way to approach the problem is to ask which branch maximizes the democratic principle of electoral responsibility that undergirds our system. This inquiry automatically sets the judicial branch to one side, because it is the least politically responsible (and in Hamilton's phrase via Bickel, "the least dangerous") branch. It also makes clear that the agencies themselves, through some mysterious "fourth branch" power, are not intended to act without supervision by a politically responsible branch. The temptation to award "philosopher king" status to the Supreme Court has its analogue in those

16. Interestingly, the Chief Justice in his opinion for the Court in Chadha also conferred upon the President the power to administer: "When the Executive acts, it presumptively acts in an executive or administrative capacity as defined in Article II." Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 951 (1983).

17. A. BICKEL, THE LEAST DANGEROUS BRANCH at ix (1962). Alexander Hamilton, in the 78th Federalist, is quoted by Professor Bickel as follows:

"Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them."

Id.

18. One of Justice White's concerns with the Chadha decision was his fear that it would isolate agencies from congressional and executive control: "To invalidate the device which allows Congress to maintain some control over the law-making process, merely guarantees that the independent agencies, once created, for all practical purposes are a fourth branch of government not subject to the direct control of either Congress or the executive branch."
who would allow the agencies to fathom and implement policy directions from Congress without significant controls from the executive branch.\textsuperscript{19}

Ultimately, we are thrown back to the only real choice—control by the legislature or the executive. Article I requires that all legislative initiatives emanate from Congress. But having had the exclusive opportunity to commence the policy-making process, should it follow that Congress has a derivative right to control or direct it? After all, by issuing discretionary directions to administrative officials, Congress has invited the executive to assert its implementation powers under article II. The question is how many strings\textsuperscript{20} may Congress attach to the exercise of policy-making authority in an effort to contain the exercise of the President’s article II power to assure that the laws are faithfully executed?

From the perspective of democratic theory, it is not obvious that Congress ought to win the contest for control. True, the legislature consists of many elected officials in the smallest—\textit{i.e.}, most representative—units of analysis possible at the federal level. But these officials are intentionally hampered by a parochialism which inhibits their roles as national policy makers. While they represent all sectors of our society on an individual basis, collectively they are less able to act decisively for society as a whole. This is evident, for example, in efforts to design a national energy policy, which have been paralyzed by regional conflict.

The President is better suited to implement national policy of the kind Congress enacts precisely because he is our only democratically elected national leader.\textsuperscript{21} By astute political management, the White House can reconcile conflicting regional claims and emerge with a national policy. Indeed, this is the likely reason why the Constitution

\textsuperscript{19} See Morrison, \textit{Presidential Intervention in Informal Rulemaking: Striking the Proper Balance}, 56 Tul. L. Rev. 879, 897-901 (1982) (arguing that the President has no more right to consult agencies in private than would a member of the general public).

\textsuperscript{20} \textit{Chadha} eliminates one method of retaining strings, namely the legislative veto.

\textsuperscript{21} A critical difference between the separation of powers concept inherited from our British forebears and the American concept is the idea of an elected executive rather than a monarch. Thus Professor Gwyn has concluded: “The American idea that the Chief Executive is as much the representative of the people as is the legislative assembly destroyed an essential assumption of the accountability argument, which was based on a belief that only the legislative assembly represented the people.” W.B. GWYN, \textit{The Meaning of the Separation of Powers} 126 (1965).
fixed responsibility in a single, rather than a plural, executive.\textsuperscript{22}

This may sound suspiciously like an argument for an imperial presidency. Perhaps it is, at least as applied to domestic policy matters. It should be remembered that Richard Nixon gave the imperial presidency a bad name for the wrong reasons.\textsuperscript{23} The imperial presidency has been around since the days of Teddy Roosevelt,\textsuperscript{24} if not Andy Jackson,\textsuperscript{25} and it reached its fulfillment with FDR and the New Deal.\textsuperscript{26} Given an occasional check by the Supreme Court for presidential hubris,\textsuperscript{27} the concept retains validity, if not indispensability, in the realm of domestic policy control.

But skeptics of presidential power have other grounds for contesting executive superiority in domestic policy matters. The text of the Constitution arguably places solely with Congress, via the "sweeping clause," which follows the "necessary and proper clause,"\textsuperscript{28} all implied powers to regulate policy.\textsuperscript{29} This proposition, followed to its

\begin{itemize}
\item \textsuperscript{22} See A. Schlesinger, \textit{The Imperial Presidency} 382-86 (1973) (discussing the idea of a "plural executive" which was rejected by the constitutional convention).
\item \textsuperscript{23} Id. at 389-90. As Professor Karl has observed, "Watergate enables specialized observers and the public alike to center attention on flawed character or charlatanism rather than on the problem of presidential power itself." Karl, \textit{Executive Reorganization and Presidential Power}, 1977 \textit{Sup. Ct. Rev.} 1, 8.
\item \textsuperscript{24} Theodore Roosevelt saw his duty as President "to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws." T. Roosevelt, \textit{Autobiography} 388-89 (1913). Earlier, Woodrow Wilson described the presidency in expansive terms he would later embody: "The President is at liberty, both in law and conscience, to be as big a man as he can." W. Wilson, \textit{Constitutional Government in the United States} 70 (1908).
\item \textsuperscript{25} See generally A. Schlesinger, \textit{The Age of Jackson} (1958) (excellent study of Jackson which helps illustrate certain "imperial" aspects of his tenure).
\item \textsuperscript{26} Professor Corwin has stated:
\item War, the Roosevelt-Truman programs, and the doctrines of Constitutional Law on which they rest, and the conception of government function which they incorporate, have all tremendously strengthened forces which even earlier were making, slowly, to be sure, but with the "inevitability of gradualness," for the concentration of governmental power in the United States, first in the hands of the National Government; and secondly, in the hands of the national Executive.
\item \textsuperscript{27} See United States v. Nixon, 418 U.S. 683, 707-13 (1974) (President’s generalized assertion of privilege must yield to demonstrated specific need for evidence in pending criminal trial and fundamental demand of due process of law in fair administration of criminal justice); Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 585-89 (1952) (authority of President to authorize government seizure of property to prevent work stoppage and settle labor dispute neither expressly nor impliedly authorized by Constitution or statute so it cannot stand).
\item \textsuperscript{28} U.S. Const. art. I, § 8, cl. 18.
\item \textsuperscript{29} This argument has been carefully formulated by Professor Van Alstyne. See Van Alstyne, \textit{The Role of Congress in Determining the Incidental Powers of the President and of the
logical conclusion, would severely limit the President's inherent policy-making rule. There is, after all, a contrary implication emanating from the executive power. The President's express powers in article II (the power faithfully to execute the laws; to appoint officers of the United States; and to demand their opinions in writing) provide enough support for the assertion that policy-making control is also an implied power of that office.

Those still unconvinced by the preference for presidential power can argue on a practical level that Congress has adequate techniques for agency policy control, in the form of budget powers and committee oversight, thus rendering presidential agency policy control unnecessary. But, while these techniques are significant, they hardly match the executive control powers and have serious limitations as national policy controls. The budgetary process, at least at the agency level, is too restricted in time and too general in its effect to serve as a policy directive. The Office of Management and Budget (OMB) sets budgets for almost all agency functions and leaves Congress only limited room to maneuver. While committee oversight offers the possibility of continuing jurisdiction, it suffers from a different defect in that it reflects the limited views of committee members rather than a general view of the Congress as a whole.

The objection to presidential control boils down to a feeling that it will unfairly politicize the process of agency policy making by removing it from the "rational" confines of the administrative process. Several responses are in order here. One is simply "so what"; policy-making is a political process and the President is elected to implement the policies he advocated during the campaign. He is simply fulfilling his responsibilities to the electorate when he tells agencies what to do.

The President's political control appears objectionable in a deeper sense when one raises the corruptive effect of campaign contributions

Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause, 40 LAW & CONTEMP. PROBS. 102 passim (1976) (Congress has sole power to limit reach of incidental executive and judicial powers).


31. A similar criticism questions the effectiveness of the legislative veto process. See generally Bruff & Gellhorn, Congressional Control of Administrative Regulation: A Study of Legislative Vetoes, 90 HARY. L. REV. 1369 passim (1977) (expressing doubts about legislative veto's efficacy).

upon the choice of policy options. Where agencies have policy decisions to make, the President—actually the White House staff—can be a conduit through which political contributions can affect agency officials otherwise immune to political favors. There is little that can be said to defend this practice except to recognize that money is politics. The question then becomes which of the two branches is more vulnerable to financial influence. When it comes to the influence of money on political decisions, Congress, as Elizabeth Drew has demonstrated, takes a back seat to no one. On this sad scale, one could still prefer that policy decisions rest within the control of the President, simply because his favor may be more expensive to gain.

Obviously, the argument for the relative superiority of executive control can go too far; perhaps it has already. Congress has an interest in having its legislative will “faithfully executed.” And it may be that rational administration suffers no matter which branch takes the lead in controlling agency policy. But unless one is willing to accept agency independence from both branches as a viable proposition, the debate returns to one of relative competency. Here, the executive branch appears to have the edge, although there are techniques that the legislative branch can still employ to retain a say in the process.

IV. AGENCY ACCOUNTABILITY: SOME PRACTICAL APPLICATIONS

The regulatory agencies of the 1970’s, unlike the old line independent agencies of the 1930’s, have been assigned by Congress to regulate social costs relating to the environment, safety and health. This kind of regulation imposes enormous costs upon the economic system thereby fueling inflation and jeopardizing employment. With the Ford administration, the White House began to recognize that policy direction was a basic responsibility of the executive branch. President Carter made it a centerpiece of his administration to achieve White House control over the policy-making functions of agencies

33. Of course, agency officials themselves may be directly or indirectly susceptible to political favors. See American Public Gas Ass’n v. FTC, 567 F.2d 1016, 1067-70 (D.C. Cir. 1977) (Congressional interference undermines integrity of agency decision); Pillsbury Co. v. FTC, 354 F.2d 952, 956 (5th Cir. 1966) (FTC commissioners affected by undue congressional interference). See generally 5 U.S.C. app. §§ 401-07 (Supp. 1985) (establishing Office of Government Ethics); R. Pierce, S. Shapiro & P. Verkuil, Administration Law and Process § 94.5 (1985).


like EPA and OSHA.36 Regulations had to survive an exhaustive cost-benefit analysis by OMB and other White House staff organizations before the President would permit them to take effect. The Reagan administration built upon this foundation to further tighten executive control of agency policy making.37

By any estimate, these executive control measures were extraordinarily successful in minimizing the unintended costs of agency regulation of the public. Until the Carter Regulatory Analysis program, no one could say how many rules federal agencies promulgated annually, let alone what their impact was on the economy.38 The Reagan administration Task Force on Regulatory Relief claims that deregulation efforts will save consumers, state and local governments, and businesses $150 billion in regulatory burdens over the next ten years.39 Even discounting for political hyperbole, this figure is of impressive dimensions. It is difficult to quarrel with these efforts to make the regulatory process more accountable to the executive branch. They were and are important achievements of government at a critical time in our history.

Cost control alone, however, does not make these efforts at establishing agency accountability unqualified achievements. One "cost" to the political system may well be the loss of congressional control over the agencies it created. Many sense that these agencies might have been better able to satisfy the task Congress assigned them by being independent in outlook. Undoubtedly, Congress lost some control over these agencies when they were made more accountable to the White House. But whether the executive branch achieved hegemony over administrative policy making is a question that only can be answered by analyzing the meaning of agency independence.

In the last three administrations, OMB's imposition of regulatory analysis upon executive agencies has shifted control of policy making to the executive branch. Those within and outside Congress have criticized this exercise of control as somehow usurping legislative

38. See generally Verkuil, Jawboning Administrative Agencies: Ex Parte Contacts by the White House, 80 Colum. L. Rev. 943, 948 (1980) (discussing Carter administration agency control mechanisms).
39. Office of the Vice President, Highlights of Regulatory Relief Accomplishments During the Reagan Administration 1 (Aug. 1983); see Gray, supra note 5, at 94 (discussing Task Force's predictions).
authority. But it is interesting to note that during this period the executive branch never asserted policy-making control over independent agencies, even though it may have had the legal and constitutional authority to do so. Congress in effect permitted, or even encouraged, the assertion of presidential control by placing agencies with environmental, health and safety mandates within the executive branch.

While one can only speculate about congressional reaction to the demise of the legislative veto as a policy control device, one response may well be that Congress will increasingly employ the independent agency device. This is exactly what happened with the United States Civil Rights Commission, which will be discussed in greater detail below. If Congress does so proceed, it could well bring to the fore the separation of powers issues surrounding executive control of independent agencies.

V. THE "MYTH" OF AGENCY INDEPENDENCE

Congress believes that it should have greater control over independent agencies than the executive branch. For example, the Chairman of the FCC, Mark Fowler, was attacked by members of Congress for meeting with the President in the White House to discuss proposed revisions of the syndication rule, which for thirteen years has kept the networks out of the business of producing and distributing feature films for television. The Hollywood independent film producers tried to alert President Reagan to the dangers they felt the revision of the rule posed.


41. See Bruff, Presidential Power and Administrative Rulemaking, 88 Yale L.J. 451, 498-99 (1979) (president possesses power to issue directives to independent agencies on a procedural basis under mandate to execute laws faithfully); Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum. L. Rev. 573, 662-66 (1984) (discussing why presidents should be granted the power to shape administrative discretion).

42. The Consumer Product Safety Commission is the only 1970's agency that was made independent. EPA and OSHA were not so created; nor was the FDA, created much earlier, which has many important safety and health functions.

43. See infra notes 61-64 & accompanying text (discussing results of change in composition of Civil Rights Commission).

To Senator Moynihan, however, the Reagan-Fowler meeting bordered on the subversive: "Under law and precedent, the President can have but one position, public or private, which is that he supports Justice and Commerce [executive agencies which favored deregulation] and that he awaits the final outcome with equanimity and impartiality." It is not self-evident what "law and precedent" would prohibit the President from discussing policy making (the syndication rule) with one of his appointees. Discussions with independent agency chairpersons are the essence of executive leadership, and they have occurred in prior administrations. Admittedly, the circumstances surrounding the timing of the Reagan-Fowler meeting were suspicious, but that should not deprive the President of the consultative powers he is entitled to exercise with independent agency chairpersons. Chairman Fowler was careful to assure Congress that there was nothing inappropriate about the White House meeting and that it did not violate FCC ex parte contact rules. Revision of the syndication rule was temporarily set aside and the House Oversight Committee contented itself by declaring that the President had "acted improperly."

It is difficult to conceive of this incident occurring had the FCC been an executive agency. Certainly, if the official involved had been a cabinet officer there would have been no doubt that private conversations were in order. There is something about independent agencies, however, that gives Congress squatter's rights, often to the consternation of the agencies themselves.

There are legal differences between executive and independent agencies. Independent agencies are organized as commissions, chaired by commissioners who must reflect a bipartisan political makeup, who are appointed for a period of years, and who are removable only

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45. Id.

46. See W. CARY, POLITICS AND THE REGULATORY AGENCIES passim (1967) (documenting meetings between the author, an SEC Chairman, and President Kennedy).


48. Id.

49. For example, the Reagan Administration reversed the policy decision of the Attorney General (through his assistant for antitrust, Paul McGrath) challenging the proposed merger between LTV and Republic Steel. While some critics said behind the scenes importuning undoubtedly occurred, none were recorded as labelling the change in policy improper. Cf. N.Y. Times, Mar. 24, 1984, at 22, col. 1 (policy reversal was political).

These restrictions seem designed to make the independent agency less political, and arguably less vulnerable to White House control. How successful they are in depoliticizing the policy-making process is questionable.

The bipartisan membership requirement can usually be satisfied by locating a cooperative member of the opposite party, or a registered independent. The term of years requirement, which is intended to carry members beyond a single presidential term of office, is only as strong as the "for cause" removal requirement. If, as some have suggested, failure to follow executive policy directions could constitute cause for removal, then this provision offers scant legal protection.

Perhaps this is why the Chairman of the Federal Trade Commission (FTC) labelled agency independence a "myth" and suggested that he was obliged to follow the directions of the President, not Congress. But "independence" may be both myth and reality at the same time. Agency independence has a political reality that makes presidents reluctant to challenge it even when its legal reality is questionable. The fact that the three executive orders imposing regulatory analysis requirements upon administrative agencies have excluded the independent agencies reflects careful political judgment. It also lends substance to the distinction between independent and executive agencies that could encourage the Court to find a legal basis for agency independence in the future.

Consider the following argument and rebuttal. In Humphrey's Executor v. United States, the Supreme Court declared illegal President Roosevelt's removal of an independent agency commissioner under circumstances where the "for cause" requirement was not satisfied. It is easy enough to narrow the case by arguing that "for

51. See Verkuil, supra note 38, at 954-57.
52. Peter Strauss, in the second Donahue Lecture, made a good case for reading the "for cause" requirement narrowly, so as to permit a president to discharge an independent agency commissioner for failure to follow policy. See Strauss, Regulatory Reform in a Time of Transition, 15 Suffolk U.L. Rev. 903, 915-16 (1981) (rulemaking is a part of politics and therefore an activity within the president's reach).
55. It may be that the three administrations that considered the question were satisfied to limit the assertion of executive control to executive agencies, such as EPA and OSHA, because these agencies were imposing the greatest costs upon the public. Thus it was a matter of political cost-benefit analysis not to challenge the independence of the less controversial agencies like FTC during this period.
cause” removal can be satisfied by a failure to follow presidential instructions. But the FTC both makes policy (for which presidential direction is appropriate) and adjudicates (for which such direction is manifestly inappropriate). Thus, in a removal situation based on failure to follow policy directives, one could never know whether the real reasons for removal had to do with disagreement over adjudicative decisions. In these circumstances, the Court could conclude that independent agency commissioners need breathing room in the removal setting to ensure that the Executive does not frustrate enforcement actions in a manner offensive to the due process interests of article III. In this manner, the political reality of independent agencies could gain legal meaning.

Moreover, executive manipulation of the removal process might cause concerns as it relates to independent agency policy directives. For most independent agencies, commissioner insulation from executive policy direction is an empty proposition. For example, it makes little sense to suggest that the FTC should be free from executive oversight of its antitrust policy, when the Attorney General sets antitrust policy under the aegis of the President. Absent executive oversight, the organizations could possibly develop conflicting policies, while interpreting and applying the same laws.

For a few independent agencies, however, policy independence from executive direction has value. Consider the policy missions of the Federal Reserve Board (FRB) and the Federal Election Commission (FEC). It is an article of faith in our society that the Federal Reserve should make monetary policy independent of the White House. This is why the Chairperson's term is fixed in time,\textsuperscript{57} and why the appointment of that Chairperson is a matter of intense national interest.\textsuperscript{58} Similarly, the FEC jealously guards its independence because its mission is to navigate between the overt political interests of the President and Congress. Indeed, because it was worried about White House control, Congress initially tried to appoint some of the FEC commissioners which necessitated the holding in \textit{Buckley v. Valeo}\textsuperscript{59} that the appointment power over “officers of the United States” rested exclusively with the President under article II.\textsuperscript{60}

\begin{itemize}
\item \textsuperscript{57} 12 U.S.C. § 242 (1982). Most independent agency chairpersons, but not commissioners, serve their terms at the pleasure of the president. Verkuil, \textit{supra} note 38, at 955 n.75.
\item \textsuperscript{58} One need only recall the anxiety created on Wall Street concerning the reappointment of Paul Volcker.
\item \textsuperscript{59} 424 U.S. 1, 118-42 (1976).
\item \textsuperscript{60} \textit{Id.}; see also U.S. Const. art. II, § 2 (President shall have power to appoint, by and with advice and consent of Senate, officers of United States).
\end{itemize}
Most would share the view that for a few agencies like FRB and FEC there is value in agency policy-making independence. Thus, the concept of agency independence is not entirely empty when applied to executive control of policy-making functions. In many situations, however, agency policy-making independence is an unnecessarily complicating factor, which makes accountability to the executive branch the better practice. As with most political matters, one searches in vain for an unqualified proposition.

VI. THE POLITICS OF AGENCY INDEPENDENCE

Congress may have fewer weapons available to control agency policy making than does the executive, but it is not defenseless. Congress can put up a tough political fight if the President presses his policy-making advantages too far. A case in point is the furor in 1983 over the United States Civil Rights Commission.

The Civil Rights Commission was an executive agency whose function was to advise on civil rights policy and whose members served at the pleasure of the President. It was the ideal agency for executive control because it had no adjudicatory function and existed exclusively to advise the President on civil rights policy. President Reagan asserted his will by replacing three members of the Commission with people of his own policy persuasion who opposed affirmative action and expansion of civil rights concerns to include ethnic minorities. There was little doubt about his legal power to remove or replace Commission members, although contrary arguments were made at the time. But the legal issue was hardly relevant.

Congress at first refused to confirm the President’s nominees and then decided to reorganize the Commission into a totally independent agency with members appointed equally by Congress and the Executive. The outcome was an agency whose membership is confused...


63. United States Commission on Civil Rights Act of 1983, Pub. L. No. 98-183, 97 Stat. 1301 (to be codified at 42 U.S.C. §§ 1975, 1975a-1975f) The bill was signed into law by the President on Nov. 30, 1983. In a statement accompanying the President’s announcement, the Department of Justice commented cautiously on the fact that only four of the eight Commissioners would be appointed by the President, the other four were—two each—to be appointed by the President of the Senate and the Speaker of the House. The Department of Justice concluded that the requirements of Buckley v. Valeo, 426 U.S. 1 (1976), placing appointment power exclusively on the President, would not be violated so long as the Commissioners did...
and whose ability to formulate national civil rights policy is seriously impaired. It makes little sense to establish as independent an agency whose principal function is to advise the executive branch. Several lessons for legislative and executive control of agency policy making emerge from this experience.

Did President Reagan overplay his hand in attempting to make an executive agency more "accountable" than Congress would tolerate? By triggering the eventual reorganization of the agency, the President appears to have lost some control over policy. It is doubtful that the President wanted to undermine the effectiveness of the Civil Rights Commission. A far more likely conclusion is that he wanted the Commission to retain its established organization and reputation, while shifting its policies toward the right. What emerged, however, is a divided agency that has lost much of its influence. Some would now rather eliminate it altogether than see it serve as an organ of administrative policy in civil rights. 64

This experience suggests that political limits on agency policy making are likely to be far more profound than legal limits. So long as the executive seeks to achieve agency accountability within these limits, inertia will force the Congress to acquiesce. How to define these limits is an exquisitely political question. It must vary from context to context and administration to administration. Our only certainty is that if these limits are exceeded the outcome is likely to be a frustration of agency policy making that cannot be of benefit to either the executive, the legislature, or the public.

In the aftermath of Chadha, we can expect Congress to be unusually sensitive about the loss or erosion of its policy control prerogatives. It may seek to employ defensive techniques, like the independent agency concept, in an effort to restore its political role. But that or any other technique will not change the fact that agency accountability is a more sensible idea than independence for the vast run of administrative policy making. Moreover, the Court in its role as umpire is likely to support the executive in its accountability efforts. It should not be forgotten that the majority opinion in Chadha referred to the President's acting in an executive and administrative capacity under article II. 65

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64. See Chron. of Higher Educ., Mar. 21, 1984, at 14 (discussing views of many that Civil Rights Commission should be eliminated by withholding funding).
65. See supra note 16 (Chadha Court apparently confers power to administer on president).
Congress still has enough legal power under article I to play a role in policy making. Advise and consent to appointments is a major one (as Mr. Meese and Mr. Reynolds have found out) and agency oversight is another (as Ms. Gorsuch and Mr. Watt discovered). In addition to these powers, there is the greatest legal power of all, the power to declare law—to legislate in the first instance. Whether or not Chadha portends greater judicial oversight of congressional delegation standards, Congress can reform itself by providing better standards and clearer directions. Where Congress has spoken, the Court has been alert in protecting legislative interests, as for example, where executive agencies have tried to reverse legislative instructions without any justification.66

As the policy-making branches of the federal government, Congress and the President are in a position to coexist and cooperate despite the fact that the Court has overruled one attempt at independent legislative control. The continuing role of the Court in the separation of powers debate, the relation of Congress and the executive to agency initiatives, and the general level of stress on the domestic aspects of government make any final assessment hazardous. But perhaps it is of some comfort to recognize that policy control problems at the federal level are modest when compared with those in state government.

VII. STATE GOVERNMENT AS A POLICY CONTROL NIGHTMARE

The problem of independence versus accountability is greater at the state level than it is at the federal level. Moreover, despite what some might think, the kinds of domestic issues states typically grapple with and resolve are hardly less critical than those of federal concern. The states have been asked to manage many of our major social problems, or at least share in their management with the federal government.

Federal policies have reduced inflation dramatically, but the cost of energy, driven by the start-up of nuclear power facilities, threatens to revive the inflationary spiral. Much of the responsibility for managing this problem lies with state public utility commissions. Similarly, improvement in the quality of public education is a state responsibility that sits high on the national agenda. Additional state policy responsibilities are bound to appear as “new federalism” transfers

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important assignments from Washington to states via block grant programs. These responsibilities make state policy control a matter of acute national interest.

To assess the states' ability to fulfill these critical responsibilities one must understand how states are organized to achieve policy control. Shifting the locus of policy control at the state level accomplishes little without an understanding of the policy-making process in the federal system.

States generally follow the tripartite branch structure of the federal constitution. But when it comes to agency coordination and control, the separation of powers issues are far more complicated than they appear on the surface of state constitutions. The primary problem is that, in many states, agency independence has achieved constitutional status. For example, in at least twelve states, public utility commissions are elected, and the trend in that direction seems to be accelerating. Similarly, in at least seventeen states, the chief education officer is an elected official. In effect, this electoral process produces administrative entities with policy roles equal to those of the traditional policy-making branches. The consequences of such constitutional and political agency independence on the coordination of critical state policies are almost certainly negative. But that may not be an obvious proposition.

67. See Gray, supra note 5, at 94-96 (new federalism creates a rebuttable presumption in favor of state and local operation of regulatory programs). Mr. Gray, Counsel to the Vice President, also documents circumstances where, due to interstate commerce and uniformity concerns, federal responsibilities cannot be delegated to the states. Gray, supra note 5, at 96-106.

68. See Taylor, supra note 6, at 6-7 (describing strict constitutional provisions on separation of powers in Massachusetts).

69. Another problem is that many policy makers at the state level (members of boards and commissions) are part-time and are often selected from the industry groups being regulated. These circumstances make it difficult, if not impossible, to define the public interest in an independent way, and present serious conflict of interest problems not present at the federal level. Part-time policy making is, however, a fiscal necessity for many states where the most critical policy makers—members of the legislature—are themselves part-time. A related difficulty is that many states treat their constitutions like statutes when it comes to the frequency of amendments, thereby frustrating the development of established relationships among the branches. In Louisiana, for example, the legislature is presently considering 48 amendments to a constitution enacted only 10 years ago. Times-Picayune/States-Item, April 8, 1984, § 1, at 26.


71. See Harris & Navarro, Does Electing Public Utility Commissioners Bring Lower Electric Rates?, PUB. UTIL. FORT., Sept. 1, 1983, at 23 (17 states have witnessed activity within last two years).

72. COUNCIL OF STATE GOVERNMENTS, supra note 70, at 196.

73. Legal constraints follow from granting constitutional status to agencies. In Louisiana, for example, it has been held that the legislature cannot alter the responsibilities of the
One could argue that if direct election and separation of powers make the governor or legislature better democratic policy makers, then electing agencies is the ideal invention of modern government (i.e. democratic agencies). The difficulty with this proposition is that it substitutes policy balkanization for policy coordination. Direct public accountability for agencies with crucial state mandates, like utility prices and educational quality, has a surface appeal which quickly dissipates in light of political realities.

First, independently elected agency officials are in effect political rivals of the elected officials of the executive and legislative branches. As rivals, they have a difficult time achieving the political (read budgetary) support necessary to accomplish their assigned tasks. Second, because of the presence of elected agencies, governors and legislatures in those states are in a position to avoid responsibility for the assigned missions of those agencies. Thus, the true policy-making branches can pass the political buck to the agencies without giving them any real bucks to do their jobs. The probable outcome is less coherent and less effective state policy making.\textsuperscript{74}

One could more easily overlook this coordination problem if it were confined to a minimum number of states, as with the example of elected public utility commissions. But the problem is more universal than that. The potential for constitutional conflict exists in all but a few states. In forty-five states, the position of attorney

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constitutionally created Public Service Commission by mere statutory directions. See Louisiana Consumers’ League, Inc. v. Louisiana Pub. Serv. Comm’n, 351 So.2d. 128, 131 (La. 1977) (refusing to apply state Administrative Procedure Act to Public Service Commission); Force & Griffith, The Louisiana Administrative Procedure Act, 42 LA. L. REV. 1227, 1231-32 (1982) (legislature unable to affect Public Service Commission’s ability to formulate rules). In Kentucky it has been held that the Governor’s power to reorganize agencies by executive order did not extend to agencies with elected officials at their head. See \textit{infra} note 86 and accompanying text (detailing Kentucky separation of power cases).
\end{quote}

\textsuperscript{74} It is not easy to demonstrate that elected agencies do less well than appointed ones. In terms of performance of public utility commissions, the evidence at least suggests that they do no better than appointed commissions in setting the level of rates. Harris & Navarro, \textit{supra} note 71, \textit{passim}. In terms of performance on educational matters, it is even more difficult to compare elected and appointed officials. One approach is to look at expenditures per capita in those states with elected officials, since elected officials arguably have less clout with the legislature and governor because of their independence and this could lead to lower appropriations for education. The evidence in this regard is inconclusive. Of the 17 states with elected education officers, 10 had educational expenditures per capita below the median level for states, including states ranked 49, 48, 46, 44, 43 and 41 in expenditures. However, three of the states with elected officials were ranked in the top ten in per capita expenditures. Compare \textit{Council of State Governments}, \textit{supra} note 70, at 288-89 (table indicating amount of money spent on education) with \textit{Council of State Governments}, \textit{supra} note 70, at 196 (table indicating method of selection of education chiefs).
general is a constitutionally established, elective office. This means that in those states the attorney general is likely to be a political rival rather than a confidante and supporter of the governor. Such a relationship seems inevitably destined to frustrate policy coordination. Many policy issues are, at heart, legal issues, and the agendas of attorney generals who work on their own priorities, rather than those of their governor, will inevitably conflict with, or at least be irrelevant to, the policy choices at hand. The reaction of Governor Cuomo to the New York Attorney General’s refusal to follow Cuomo’s policy direction is a good example of the confusion and inefficiencies that can result.

This experience suggests that while democracy generally is good, too much democracy (i.e., direct election of all policy makers) may not be better. One should consider the effect that direct public policy making, in the form of ballot issues, has had upon the State of California. What could be more democratic than policy making conducted directly by the electorate? But it is hardly possible to run a state government of California’s (or even Rhode Island’s) size and complexity with the electorate acting as a committee of the whole. While the initiative process has its defenders (and even proponents, like Representative Kemp of New York, who want to make it a national option), the more convincing argument is that government by initiative is likely to produce incoherent responses to critical problems; what one observer has labelled “electoral roulette.”

75. See Council of State Governments, supra note 70, at 195-97 (table of methods of selection of state administrative officials).

76. See Oreskes, Cuomo and Abrams in Battle Over Attorney General’s Role, N.Y. Times, Jan. 28, 1984, at 1, col. 5 (reporting dispute between Governor Cuomo and Attorney General Abrams). The Attorney General refused to follow Governor Cuomo’s request to defend the Governor’s plan to introduce sports betting. The Governor fought back on political grounds, as one might expect. “If he has less legal work to do, that’s something to consider,” Mr. Cuomo said. “He might need less resources.” Id.


78. Id.

79. Id. (quoting David Maglebey, Brigham Young University political scientist). See generally D. Maglebey, Direct Legislation passim (1984) (discussing issues involved in public participation in policy making). Professor Maglebey explains that in the initiative process the proposals are often written so unclearly that they cannot be comprehended by the vast majority of voters. Lindsey, supra note 77, at 5, col. 1 (quoting Professor Maglebey). But even if they were written clearly, one wonders how a voter who devotes a few minutes to the process would be expected to understand the meaning and implications of initiatives upon critical
What is needed is a concept of an optimum level of democracy in government. To try and fix the right number of independent democratic agents empirically or theoretically would be a futile undertaking. Perhaps the best we can do is adopt the wisdom of our forebearers who established three branches of government, with only two responsible for policy making. In this familiar structure, agencies must be accountable to either one or both of those branches in order for the system to work.

VIII. WORKABLE AND UNWORKABLE TECHNIQUES FOR ACHIEVING POLICY CONTROL AT THE STATE LEVEL

States are not helpless in the struggle for control of policy making by agencies. Indeed, in the last few years they have exhibited a concern for separation of powers issues and a flexibility as to solutions to policy control that stand as models for the federal government. For instance, states are capable of constitutionally reorganizing themselves so as to restore the discipline of tripartite government. New Jersey is a leader in this regard; its only elected officials are the Governor and members of the legislature.80 In New Jersey and five other states, the governor appoints the attorney general and almost all other important agency officials with the advice of the legislature (Senate and/or House),81 much like it is done at the federal level. Whatever else may be said for this solution, it is difficult to deny its policy control advantages over the election mania of states like Louisiana where the lieutenant governor, attorney general, secretary of state, treasurer, secretary of agriculture, secretary of education, elections administrator, insurance commissioner, and public utility commissioners are all statewide elected officials. How does a Governor or legislature begin to coordinate policy in a system with this many fiefdoms?

But even with institutional complications of this dimension, legislatures and executive branch officials have tried to overcome the problem of regulatory control. The last few years have produced an ambitious set of legislative initiatives, and, as might be expected, an

80. See COUNCIL OF STATE GOVERNMENTS, supra note 70, at 195-97 (table of methods by which state officials elected).
81. See COUNCIL OF STATE GOVERNMENTS, supra note 70, at 195-97 (procedures for state official elections).
equally ambitious series of judicial opinions on the separation of powers issues that have arisen.\footnote{82}

The experience in Kentucky is instructive. In 1982, the Kentucky General Assembly created the Legislative Research Commission (LRC) and granted it extraordinary power to manage government. The LRC's powers included the following: to act for the General Assembly when adjourned; to determine or approve budget reductions when the General Assembly is not in session; to approve actions of the executive in applying for federal block grants; to grant or withhold legal effect from any executive order made by the Governor which seeks to reorganize the executive branch; and to delay the legal effect of any administrative regulation adopted by the governor.\footnote{83}

It is difficult to conceive of a bolder assertion of legislative policy control. Understandably, the Governor of Kentucky wasted no time in challenging the LRC. In \textit{Legislative Research Commission v. Brown}, the Kentucky Supreme Court declared the statute creating the LRC unconstitutional on delegation and separation of powers grounds.\footnote{84}

\footnote{82. See, \textit{e.g.}, General Assembly of the State of New Jersey v. Byrne, 90 N.J. 376, 388-91, 448 A.2d 438, 444-46 (1982) (legislative veto provision in Legislative Oversight Act which effectively amends or repeals existing legislation without Governor's approval violates separation of powers); Advisory Opinion \textit{In re Separation of Powers}, 305 N.C. 767, 775-77, 295 S.E.2d 589, 594-95 (1982) (statute conferring power on joint legislative committee to control major line item budget transfers violates separation of powers); State \textit{ex rel. McLeod v. McInnis}, 278 S.C. 307, 314-17, 295 S.E.2d 633, 637-38 (1982) (statutorily created joint appropriations review committee which made determinations delegated to General Assembly violated separation of powers principle). In \textit{General Assembly of the State of New Jersey v. Byrne}, the court held the Legislative Oversight Act, which contained a legislative veto provision, unconstitutional on separation of powers grounds. 90 N.J. 376, 392, 448 A.2d 438, 445 (1982). By relying principally upon the legislative usurpation of the Governor's power to faithfully execute the laws, the decision was able to distinguish those legislative vetoes that impair that power, for example the legislative veto of agency rules, from those that do not, such as the legislative veto contained in reorganization acts, where the gubernatorial power to execute the laws is actually enhanced. \textit{Id.} at 385-88, 448 A.2d at 443-44. The \textit{Byrne} court concluded with some force:

\begin{quote}
We are not called upon to determine whether every form of legislative veto or oversight intrudes excessively into the executive sphere of law enforcement. We deal only with the all-inclusive veto presented in this case. In other contexts legislative cooperation or sharing of powers may be essential to further a statute's purpose. Under appropriate circumstances, the legislature can cooperate with the Executive without violating the separation of powers. (citations omitted)
\end{quote}

\textit{Id.} at 387, 448 A.2d at 444. This middle ground was where Justice Powell unsuccessfully sought to place the majority in \textit{Chadha}. Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 959-67 (1983) (Powell, J., concurring).

\footnote{83. See Legislative Research Comm'n v. Brown, 664 S.W.2d 907, 910 (Ky. 1984) (discussion of powers of LRC to exercise supervision over executive and judicial branches of government).

\footnote{84. \textit{Id.} at 916.}}
The court had little trouble in concluding that the legislature could not delegate its legislative power to the LRC.\(^8\) When it came to the separation of powers issue, however, the court had to deal with an earlier decision that gave the general assembly broad residual powers under the Kentucky Constitution.\(^8\) The court concluded that the separation of powers doctrine prevented the legislature from creating the LRC as an independent agency of state government.\(^8\) The court considered LRC's regulatory review powers the equivalent of a legislative veto and rejected them on that basis.\(^8\) The powers of the LRC to appoint and nominate agency officials conflicted with a Kentucky constitutional provision that empowered the executive power to appoint "officers" of the state,\(^8\) a power that is exclusive at the federal level and in many other states. Despite the qualified nature

8. Id. at 915.

86. Brown v. Barkley, 628 S.W.2d 616, 623 (Ky. 1982). In Brown, a suit was instituted by the Secretary of Agriculture (Barkley) challenging the validity of an executive order transferring various functions out of the Department of Agriculture. Id. at 618. Since the Secretary of Agriculture was a constitutionally elected officer, and since the General Assembly had by statute permitted reorganization by the Governor of only executive agencies, the court concluded that the governor had no power to rearrange the duties of the Department of Agriculture. Id. at 624. In the course of its opinion the court engaged in some expansive dicta on the relative constitutional powers of the three branches: "whereas the judicial branch must be and is largely independent of intrusion by the legislative branch, the executive branch exists primarily to do its bidding." Id. at 623. This language was later modified in Legislative Research Comm'n v. Brown, 664 S.W.2d 907, 911-14 (Ky. 1984).

The question of the inherent powers of the President under article II is still a contested one at the federal level. See generally Van Alstyne, *supra* note 29, at 121-22 (discussing enumerated and incidental executive powers in context of United States v. Nixon, 418 U.S. 683 (1974)). But the further complication of constitutionally-elected agency officials is not a potential limitation upon the President's power to coordinate policy and reorganize government. The closest federal analogy is to independent agencies and commissioners, but as "Officers of the United States" under article II they are at least subject to the President's appointment, if not direction. Reorganization has largely been a statutory matter with oversight by Congress via the legislative veto. The President's power to reorganize government departments is a fascinating open question after *Chadha*.


88. Legislative Research Comm'n v. Brown, 664 S.W.2d 907, 919 (1984). The court also held a nonseverability clause void because it violated the state constitution by providing that if the LRC could not veto regulations then the executive could no longer issue regulations. Id. at 919-20.

89. The Kentucky Constitution provides: "Inferior state officers, not specifically provided for in this Constitution, may be appointed or elected, in such manner as may be prescribed by law, for a term not exceeding four years, and until their successors are appointed or elected and qualified." Ky. Const., § 93.
of the power, the supreme court held all of the LRC's exercise of appointive authority invalid under separation of powers principles.\textsuperscript{90}

The Kentucky experience is useful to illustrate the problems of achieving policy control at the state level. Putting aside internecine conflicts between the governor and general assembly unique to Kentucky, one can appreciate some of the goals the LRC was meant to achieve. A state legislature that meets only infrequently and is composed of part time legislators has a greater need to delegate legislative power to a coordinating unit than does the Congress. When a state legislature is reluctant to surrender that coordination power completely to the executive branch, it creates unconventional organizations like the Legislative Research Commission.

But, of course, the general assembly went too far. The LRC is really a misnomer; it is really a legislative (and executive) usurpation commission that sought simultaneously to derogate the constitutional powers of both the general assembly and the governor. The supreme court properly struck it down. But the decision returned Kentucky to square one in terms of policy coordination. Kentucky will now have to consider the more moderate and carefully drawn efforts of other states to achieve agency policy control within traditional constraints imposed by our separation of powers system.

A notable development in California, which has attracted the attention of several states,\textsuperscript{91} may offer a workable means of resolving the tensions between the executive and legislature regarding control of administrative policy making. The Office of Administrative Law (OAL) was established by the California legislature in 1979 as a quasi-independent agency within the executive branch.\textsuperscript{92} The agency's purpose is to review all new and existing agency rules for clarity, consistency, authority and necessity.\textsuperscript{93} By any reckoning, this is a staggering task.

Clarity and consistency are harmless \textit{enough} mandates to fulfill, but authority and necessity are potentially far more intrusive on the administrative process. For instance, it is odd that a super-agency is needed to determine agency rulemaking authority because that legal conclusion is usually tested in the courts, or raised by the state's

\textsuperscript{90} Legislative Research Comm'n v. Brown, 664 S.W.2d 907, 913-14, 917, 920, 924, 928, 930-31 (Ky. 1984).


\textsuperscript{92} CAL. Gov'T CODE § 11340.1 (West 1980 & Supp. 1982).

\textsuperscript{93} Id. § 11349.
chief legal officer, the attorney general. In California, however, the attorney general is an elected official, and therefore the governor's office may not trust his response on such matters. This may be a reflection of the inefficiencies created by the inordinate number of elective officials at the state level.

A commentator who thoroughly analyzed OAL's work concluded that the OAL's necessity function encourages a substitution of judgment about the wisdom of agency rules that can frustrate legislative will and undermine agency expertise. Whatever the merits of this debate, it is undoubtedly true that the OAL has been granted extraordinary powers to coordinate and control policy making in California. In fact, it may have been granted too much power. But with all of the conflicting political forces at work, how was such an agency able to emerge at all? The answer has to lie in the carefully tailored position of the OAL, placing it somewhere between the traditional independent and executive-agency structures.

The OAL director is appointed by the governor and confirmed by the senate for a four year term. The quasi-independent status of the OAL is based on the governor's power to remove the director "for cause." Yet, it is an agency within the executive branch whose director does not serve at the pleasure of the governor. While one can speculate on the significance of the "for cause" removal restriction upon executive officials, this restriction must have been an important aspect of the legislature's willingness to cede policymaking power to the executive branch.

The OAL has the power to reject agency rules outright, which it usually does for failure to meet the "necessity" requirement. An agency can either accept the disapproval or rewrite the rule and resubmit it to the OAL. The agency will then informally negotiate

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95. See supra notes 73-74 and accompanying text (detailing inefficiencies caused by election of agency heads).
96. See Cohen, supra note 94, at 272-76 (reviews based upon intangibles instead of facts result in substitution of judgment).
98. See Cohen, supra note 94, at 265 n.193 (OAL director does not serve at pleasure of Governor yet can be removed for cause).
99. See supra note 56 and accompanying text (discussing Humphrey's Executor case dealing with "for cause" removal).
100. See Cohen, supra note 94, at 244 n.68 (discussing OAL's reasons for disapproval).
with OAL over the language of the rule. If no accommodation can be reached, the agency can appeal to the governor for reinstatement of the old rule.

This arrangement places considerable policy control in the hands of the executive branch, because it reaches all state agencies. Legislators, however, want the political power to complain about agency rules they have doubts about, and OAL sensitivity to legislative concerns helps accomplish this goal. Although OAL has a formal policy of ignoring interest groups and confining its review solely to the rulemaking file, exceptions are apparently made for legislative contacts. This practice undermines OAL’s official stance against ex parte contacts and has been criticized because of this. Similar problems have arisen with OMB at the federal level and they cannot be discounted. However, OAL (or OMB) contact with legislators does permit the political process to work in ways which are perhaps inevitable, if not desirable.

It may be that in these circumstances judicial review of the OAL process of rule denial becomes a desirable check on the politics of policy making. California appears to have so concluded by adding a provision in 1983 that permits interested persons to obtain court declarations of the validity of rejected rules. The role of judicial review in this setting, however, should not be to impose strict ex parte limitations upon legislative and executive control of OAL itself.

Of all the state policy control techniques undertaken recently, OAL

101. See Cohen, supra note 94, at 244 & n.68 (discussing alternatives once disapproval has been made).
103. CAL. GOV’T CODE § 11349.1 (West 1980).
104. Cohen, supra note 94, at 280.
106. See Verkuil, supra note 38, at 963-64 (detailing Congressional ability to control Executive access to OMB); see also Gray, Presidential Involvement in Informal Rulemaking, 56 TuL. L. Rev. 863, 863-66 (1982) (debate over propriety of presidential ex parte communication with an agency).
107. For example, members of Congress have long intervened off the record in social security disability determinations as a form of constituent service. Even though that involves intervention in adjudication rather than policy making, there does not seem to be any way to stop it. See J. Mashaw, Bureaucratic Justice 58 (1983) (each member of Congress takes part in casework); Verkuil, The Self-Legitimating Bureaucracy, 93 YALE L.J. 780, 783 (1984) (extent and variety of oversight mechanisms incorporated into disability programs invites arbitrary decision making).
seems superior to other more dramatic alternatives like the Kentucky LRC or the revival of the legislative veto by constitutional amendment. Some may see it as ironic that OAL should emerge in the state that brought us the ballot issue, since the one diffuses policy making while the other focuses it. But one should not overlook the lessons that California's efforts at executive agency policy control provide for state and federal government.

IX. THE CALIFORNIA OAL: LESSONS FOR CONGRESS AND THE PRESIDENT

In the aftermath of Chadha, there have been many suggestions for methods whereby Congress can regain the policy control it lost without further upsetting the system of checks and balances. Suggestions that the legislative veto be written into the Constitution are quixotic and they will pass. What is needed is a policy control technique that mediates between Congress and the President as well as among the agencies themselves.

OAL suggests a structure for doing so. Its closest analogue at the federal level is OMB. But there are some significant distinctions which make an OAL structure more likely to receive congressional approval than OMB, which Congress quite properly views as a presidential enclave. Differences include OAL's senate confirmation requirement and the "for cause" removal restriction upon the director. The director of OMB is a White House appointee who serves at the pleasure of the President and without Senate approval. As we have seen in the Edwin Meese nomination, the Senate confirmation process is a political reality, even in the case of established White House officials. While the idea of a quasi-independent agency within the executive branch is unusual, there is no reason why something called Federal Office of Administrative Law (or FOAL) could not be formed if both branches see it as being in their interest to do so.

What are their interests? For one, Congress would gain more control over OMB's functions by virtue of the confirmation process. But what would the President gain? One thing would be policy-control

110. Several states are considering amending their constitutions to permit the legislative veto; Connecticut has already done so. See CONN. CONST. art. II (amended 1982).

111. Professor Harold Levinson has done a good job of cataloguing the policy control options after Chadha. See LEVINSON, CONGRESSIONAL OVERSIGHT OF AGENCY RULEMAKING: OPTIONS AVAILABLE AFTER Chadha (ACUS Report), Sept. 1, 1983.
jurisdiction over the independent agencies as well as the executive ones, a considerable expansion of presidential power.

Alternatively, what would the President forfeit? Since the director of FOAL will be solely a policy-making official, the “for cause” removal requirement could be a barrier to control. But if cause for removal could be satisfied by failure to follow orders, removal would be legally easier than it would in the case of independent agency commissioners. This is because the lack of intertwined adjudicatory functions would undercut a *Humphrey’s Executor* challenge.\(^{112}\) As the furor over the Civil Rights Commission suggests, removal is a delicate matter whether or not the President has the legal power to effectuate it. Thus, as a practical matter, the confirmation requirement may not deprive the President of much real power over the director, while simultaneously giving Congress some semblance of control.\(^{113}\)

Whether private congressional access to the reconstituted FOAL would be the same as private executive access to the OMB director is an open issue. One might hazard the guess that the executive’s present private relationships with OMB and the agencies (approved by the court in *Sierra Club v. Costle*\(^ {114}\)), might encompass congressional inquiries as well.\(^ {115}\) This joint private access situation would make the FOAL directorship a delicate political balancing act, but there are people in Washington who are good at such things.

One additional concession that Congress may demand—as did the California legislature—is that the rule denial decisions of the FOAL be subject to judicial review. This concession could result in a potential loss of executive control, because the Executive Order giving OMB rule review powers specifically prohibits judicial review.\(^ {116}\) Here also, however, the tradeoffs are not intolerable. FOAL might be given specific statutory authority (which OMB currently lacks) to reject:

\(^{112}\) See *supra* note 56 and accompanying text (discussing difficulties of dismissing “for cause” when adjudicatory duties involved). This could be especially true if the President were given appellate power over FOAL decisions as is the case with the Governor of California over OAL decisions. See *supra* note 102 and accompanying text (Governor has appellate role for agency rules).


\(^{114}\) 657 F.2d 298, 409-10 (D.C. Cir. 1981).


rules outright, including perhaps even those rules where cost-benefit analysis is not presently permissible. This authority would amount to a substantial expansion of policy-making jurisdiction for the executive branch. In return, the tradeoff of judicial overseeing seems a low cost concession if not a fair exchange.\textsuperscript{117}

\section*{X. Conclusion}

The importance of agency policy control by the legislative and executive branches at either the federal or state levels is unquestioned in our complex society. In the wake of \textit{Chadha}, there is much consternation by the legislative branch over how best to achieve policy coordination on a shared basis with the executive. Many extreme proposals have emerged, but the one with the most promise emanates from California. It would be fitting if the states, which have much to learn from the federal government about the nature of separation of powers, could provide suggestions as to how Congress might improve its relationship with the President by modifying the best present policy control mechanism available—OMB—so as to make it more like a shared institution of political management within the executive branch. A FOAL is waiting to be born.

\begin{footnotesize}
\footnotetext{117. Low cost so long as decisions like Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981) continue to hold that reviewing courts "need not have to be omniscient to perform their role effectively." \textit{Id.} at 408.}
\end{footnotesize}