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THE PURPOSES AND LIMITS OF INDEPENDENT AGENCIES

PAUL R. VERKUIL*

The independent agency has been around for 100 years now, but we are still trying to understand how it best relates to the administration of government. Its popularity as an organizational mechanism is more a function of competing political forces within the legislative and executive branches than of any systematic analysis of its effectiveness. Yet one can discern reasons why independent agencies might be superior mechanisms for administering government programs if their structure and purpose are analyzed functionally. This essay proposes to do that and, in the process, reach some conclusions about both the potential and the limits of the independent agency as a vehicle for making government decisions.

I. INTRODUCTION TO THE INDEPENDENT AGENCY PUZZLE

Ironically, it was during the New Deal period, the golden age of the independent agency, that its weaknesses were eloquently exposed. Even while important new independent agencies were being established with legislative and executive cooperation (such as the Civil Aeronautics Board, Federal Communications Commission, National Labor Relations Board and Securities and Exchange Commission), President Roosevelt was being advised by the Brownlow Committee to place the independent agencies under executive departments in order to manage administrative policymaking. The vivid words of that Committee refer to the independent agency as a "headless fourth branch of government."¹ The purpose of Louis Brownlow's efforts was to restore to President Roosevelt greater control over the regulatory state his administration had virtually invented. The Committee concluded:

The independent commissions present a serious immediate problem. No administrative reorganization worthy of the name can leave hanging in the air more than a dozen powerful, irresponsible agencies free

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1. PRESIDENT'S COMM. ON ADMIN. MANAGEMENT, REPORT WITH SPECIAL STUDIES 37 (1937) (known as the Brownlow Report). The "fourth branch" image has become the standard way of describing the bureaucracy, not just the independent agencies, in most standard textbooks as well as in judicial opinions. See, e.g., *Process Gas Producers Group v. Consumer Energy Council of Am.*, 463 U.S. 1216, 1218-19 (1973) (White, J., dissenting); J. ROHR, *TO RUN A CONSTITUTION* 153 & n.77 (1986).

to determine policy and administer law. Any program to restore our constitutional ideal of a fully coordinated Executive Branch responsible to the President must bring within the reach of that responsible control all work done by these independent commissions which is not judicial in nature. That challenge cannot be ignored.²

As a practical matter, it has been. Brownlow's trenchant criticism has been spectacularly unpersuasive. In the fifty years since it was first rendered, and despite other studies that have echoed its sentiments,³ little has been done to control independent agencies.⁴ Independent agencies continue to be created by Congress in recent years with as much frequency as they were in the past (consider, for example, the Consumer Product Safety Commission, Nuclear Regulatory Commission and Commodity Future Trading Commission). They remain as popular a regulatory format as executive agencies or the executive departments themselves, even though movements, such as deregulation, have modified their missions and influence (the ICC and CAB are examples). But while they remain surprisingly resilient and resistant to congressional or executive reorganization, there are recent legislative initiatives that question whether the independent agency structure is the best way to organize management functions.⁵ This activity makes this a propitious time to study the rationale behind the independent agency idea.

What is lacking in the creation of independent agencies is any attempt in the legislative history to explain *why* Congress (or the President, for that matter) preferred one organizational format over the other. New agency structures often appear to be created in a vacuum or almost by random selection. Only in a few cases has consideration been given to the choice of executive versus independent format, and those exceptional situations involve rethinking organizational choices previously made.⁶ That becomes a fascinating question to pursue. Why does Congress choose to place a new regulatory mission in an independent agency rather than an executive one? What are the factors that go into the

2. PRESIDENT'S COMM. ON ADMIN. MANAGEMENT, *supra* note 1, at 40-41.

3. In 1971, a report prepared for President Nixon by a council headed by Roy Ash picked up the management and accountability themes (as well as the fourth branch analogy) of the Brownlow Committee, but its recommendations have fared no better. See PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE ORG., REPORT ON SELECTED INDEPENDENT REGULATORY AGENCIES 14-15 (1971).

4. During the Carter and Reagan administrations, attempts have been made to have OMB coordinate agency rulemaking, but independent agencies have been treated gingerly in that regard, with respect paid to their independent status. See NATIONAL ACADEMY OF PUB. ADMIN., PRESIDENTIAL MANAGEMENT OF RULEMAKING IN REGULATORY AGENCIES (1987); Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943 (1980); *infra* notes 34-35.

5. See *infra* notes 71-83 and accompanying text.

6. See *supra* note 4.

choice and can they tell us why independent agencies are useful as well as popular institutions?

Lacking a readily discernible congressional explanation of why these choices are made, a rationale must be supplied to help explicate the structural qualities that render independent agencies efficient or inefficient decisionmaking mechanisms. In making this inquiry I want to look beyond the simplistic answer that Congress prefers independent agencies because they are *independent* and thereby tip control over the bureaucracy in the direction of Congress and away from the President. While it is certainly true that these agencies are considered "arms of Congress"⁷ in ways that executive agencies are not, this observation proves little. If it were a controlling rationale, we could expect all agencies to be independent, or at least be the subject of overt power struggles between Congress and the President. But that is not the case.

Independent agencies are seen as solutions to organizational problems that are themselves not well articulated. Until they are it is difficult to draw any reliable conclusions about the persistent nature of this venerable institution. To answer these questions in some reasonable compass, I propose to identify the qualities of independent agencies that distinguish them from other forms of bureaucratic organization and then to relate those qualities to the various functions that administrators must perform. By seeking to match up the organizational strengths of these entities with the roles Congress, the Executive and the Constitution permit them to play, we might come closer to calculating the value they add to our administrative decision system (as well as understanding the organizational confusion they engender). From there, an assessment might be ventured as to how well the independent agencies fulfill expectations in practice and how their missions might be changed to improve their performance.

II. ASSESSING THE CHARACTERISTICS OF INDEPENDENT AGENCIES

The quality that most distinguishes independent agencies from the executive variety is the notion of independence itself. This characteristic is based largely upon three statutory arrangements: the bipartisan appointment requirement; the fixed term requirement; and the requirement that removal be limited to express causes.⁸ Taken together these qualifications distinguish independent officials from executive ones. The re-

7. See 5 SENATE COMM. ON GOV'T AFFAIRS, STUDY ON FEDERAL REGULATION: REGULATORY ORGANIZATION, S. DOC. NO. 91, 95th Cong., 1st Sess. 31 (1977). The Senate study quotes Senator Hart as follows: "The commissions, if I may risk an oversimplification, are ours." *Id.*

8. Terms vary from agency to agency. FCC Commissioners, for example, serve seven years. 47 U.S.C. § 154(c) (1982). The usual removal clause states: "[A]ny commissioner may be removed

quirement that the President appoint some commissioners of the party out of power or who are politically "independent" is designed to isolate those decisionmakers from politics. Indeed, this is a remarkable requirement, at least in theory, when it is considered that the appointment of federal judges, who are meant to be our most independent officials, bears no such onus of political balance.⁹ The term of years requirement complements the desire for independence by establishing staggered terms that usually extend beyond a President's four-year term of office.¹⁰ Finally, the limitation of removal to designated causes ensures that a President will not be able to discipline an official for purely political reasons, or for no reason at all.¹¹ These provisions do much to give independent agencies their distinctive character, but they are not all that do so.

Another distinguishing characteristic of independent agencies is their organization. They are predominantly commissions or boards, not single decisionmakers.¹² They are collegial bodies. That is another quality that distinguishes them from most executive agencies¹³ and from all cabinet departments. Collegial decisionmaking has far different purposes and effects from single (or executive) decisionmaking. It is meant to be consensual, reflective and pluralistic. It expresses shared opinions rather than decisive ukases. In this sense, collegial bodies express deeply felt values about the decisional process. They are more concerned with the

by the President for inefficiency, neglect of duty, or malfeasance in office." 15 U.S.C. § 41 (1982) (FTC).

9. The Bork nomination fight can be read two ways on that score: either as the triumph of politics over reason or as the triumph of reason over politics. The way one views it depends upon one's political outlook, but either way there was no expectation that Judge Bork should have been either a Democrat or a political independent.

10. Federal Reserve Board members, for example, serve the unusually long term of 14 years. 12 U.S.C. § 241 (1982).

11. See *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

12. It is not an obviously easy task to find an "official" list of independent agencies. One is contained in the Unified Agenda of Federal Regulations, published by OMB's Regulation Information Service Center. 53 Fed. Reg. 13,602 (1988). It lists 14 independent agencies as follows: Commodity Futures Trading Commission; Consumer Product Safety Commission; Farm Credit Administration; Federal Communications Commission; Federal Deposit Insurance Corporation; Federal Energy Regulatory Commission; Federal Home Loan Bank Board; Federal Maritime Commission; Federal Reserve System; Federal Trade Commission; Interstate Commerce Commission; National Credit Union Administration; Nuclear Regulatory Commission; and Securities and Exchange Commission. All but two of those organizations (Farm Credit Administration and National Credit Union Administration) are commissions or boards. See also 44 U.S.C. § 3502(10) (1982) (listing 17 independent agencies).

13. In the same Regulatory Information Service Center listing there are several commissions and boards included under the heading "Executive Agencies": Architectural and Transportation Barriers Compliance Board; Commission on Civil Rights; Equal Employment Opportunity Commission; Merit Systems Protection Board; Panama Canal Commission; and Railroad Retirement Board. But these are organizationally in the minority; there are 20 executive agencies that are single-headed. Unified Agenda of Federal Regulations, 53 Fed. Reg. 13,602 (1988).

values of fairness, acceptability and accuracy than with the single dimension of efficiency.

When the three qualities of independence are added in (namely bipartisan appointments, terms of years and for cause removal¹⁴), it becomes clear the independent agencies emulate our most revered collegial bodies—the courts, or, more precisely, the appellate courts.¹⁵ Judicial independence is of course a study unto itself but the analogy to administrative commissions is a compelling one. As Martin Shapiro has pointed out, the courts (in the Anglo-American setting) secured independence first from the king (the executive) and then from Parliament.¹⁶ The courts' success in doing so (testified to in article III of the Constitution) has its closest administrative analogue in the independent agency. It was emulation of the appellate courts that allowed the first independent agency, the ICC, to gain the legitimacy necessary to introduce the twentieth-century administrative state.¹⁷

Appellate decisionmaking in the judicial setting involves group deliberation. This has meaning at several levels: it promises greater accuracy (and thereby fairness) because of the dialectical nature of the deliberative process. Arguments are presented that must be refuted or accepted, a process that can exist only in the group rather than solitary setting.¹⁸ Moreover, research on the impact of multiple versus single deciders suggests that the group decision will tend toward consensus in disparate cases, whereas those same deciders sitting alone might produce more widely dispersed results.¹⁹ There is, in other words, an empirical dimension to the proposition that group decisionmaking results in compromises toward the middle position. From this, one can also conclude that group decisionmaking has a value in helping to achieve more consistent results in difficult factual situations, such as those that occur in the

14. See *supra* text accompanying note 8.

15. M. SHAPIRO, *COURTS—A COMPARATIVE AND POLITICAL ANALYSIS* 111-115 (1981).

16. *Id.* at 112.

17. That the respected constitutional authority and Michigan Supreme Court Judge Thomas Cooley headed the ICC at its inception had much to do with its acceptance. See J. ROHR, *supra* note 1, at 90-113.

18. See Jones, *Multitude of Counselors: Appellate Adjudication as Group Decision-Making*, 54 TUL. L. REV. 541 (1980). Harry Jones concludes "that blazing originality and boldness of social vision are less significant in the work of the courts than the more sober intellectual virtues: detachment; critical judgment; and patient willingness to listen, to pay genuine attention, to the orders and arguments of others." *Id.* at 553.

19. A study of Social Security Administrative Law Judge (ALJ) disability decisions analyzed certain dominant decision factors and revealed that three-person ALJ panels tended to decide the same cases with less variability than single ALJs. The extreme ends of the decisional spectrum were cut off by the use of panel decisions. See J. MASHAW, W. SCHWARZ, C. GOETZ, P. VERKUIL & F. GOODMAN, *SOCIAL SECURITY HEARINGS AND APPEALS* 20-29 (1978).

complex world of disability decisionmaking.²⁰

If these qualities are associated with appellate courts and judges, then, if the analogy holds, they should also be associated with independent agencies and commissioners. The reflective, consensual nature of the group decision process is best suited to decisions that are factual in nature, where accuracy is an important but often elusive goal. When it comes to executive policy type decisions, those activities designed to implement broad programs or to urge modifications in social behavior, single deciders who can act decisively are better suited to the task.²¹ In those circumstances, the goal is to improve society in some overall sense, not to ensure justice in the individual case. Consensus building can be frustrating and counterproductive in this setting. What is needed are deciders who can act and be held accountable for their activities. Hence the important distinction between judicial and executive decisions has long been part of our society. If that distinction is not obvious, simply remember that when the Founders established the executive branch during the constitutional period, they rejected a plural executive (or commission approach) in favor of a single executive largely on this basis.²² Adjudication and policymaking call for different skills and temperaments as well as different organizational mechanisms.

Another quality of independent commissions that relates to collegiality is the nature of their jurisdiction. Unlike courts, commissions have jurisdiction over limited types of subject matter; they are called upon to decide complex or routine matters on a repetitive basis.²³ Independent agencies develop an expertise with the subject matter that, in the ideal world, also makes their more reflective decisionmaking cost-efficient. When Congress selects industries or segments of the economy for regulation and builds agencies around them, it expects the deciders to obtain expertise. Transportation, banking, financial markets, consumer and workplace safety, communications, labor relations and nuclear energy

20. The medical and vocational evidence necessary to establish an SSA disability claim is frequently perplexing both for the ALJs and the federal district courts. In this setting consistency of result is often the best surrogate for the elusive standard of accuracy. *Id.* at 10-12. The Veterans Administration employs three-person teams (Rating Boards) that make initial disability determinations, as well as an appellate body (Board of Veterans Appeals). Individual VA decisions are exempt from judicial review because of a congressionally expressed desire to achieve "uniformity."

21. The first Hoover Commission put the matter succinctly: "The very qualities which make these agencies valuable for regulation, especially group deliberation and discussion, make them unsuited for executive and operating responsibilities." U.S. COMM'N ON ORG. OF THE EXECUTIVE BRANCH OF GOV'T, COMM. ON INDEP. REGULATORY COMM'NS, A REPORT WITH RECOMMENDATIONS (1949).

22. See A. SCHLESINGER, *THE IMPERIAL PRESIDENCY* (1973).

23. This is certainly not an exclusive characteristic of independent agencies; executive ones (notably the benefactor agencies such as the SSA and VA) share it as well.

have been selected for independent agency supervision with this thought in mind. There is no reason why other problems, such as the environment or the regulation of prescription drugs, could not have been similarly directed.²⁴ Once the choice of independent agency format has been made, the agency is obliged to become expert in identifying and solving the problems presented if it wants to survive congressional oversight.

Selecting commissioners with relevant experience and asking them to concentrate on cases that arise in their field gives them an edge that generalist judges cannot and are not meant to have. This characteristic in effect becomes a way of distinguishing agencies from courts as well as an indicator of administrative rather than judicial jurisdiction. In a recent study by the Council on the Role of the Courts that tried to identify the activities that courts perform best, "repetitive or administrative questions" were indicators of nonjudicial resolution.²⁵ The qualities of decisional independence, collegial decisionmaking, and subject matter expertise are all indicators of independent agency status. Only the first two characteristics relate exclusively to that kind of agency, but when combined with the third they produce a conceptual framework. Having identified these features of the independent agency, it is now possible to analyze the strengths and weaknesses of these agencies in terms of the decisionmaking responsibilities they have been given.

III. THE FUNCTIONS OF INDEPENDENT AGENCIES

Independent agencies conduct their business with a full range of decisional techniques. They adjudicate, that is, decide contested matters, on a case by case basis. They make policy, whether through the formal/informal method of rulemaking, or by proclaiming standards and rules of conduct. They also prosecute for civil violations of the statutes they administer. None of these functions is unique to independent agencies; executive agencies and departments employ them as well. What is unique about independent agencies is that they perform the executive functions of policymaking and prosecution through an organizational scheme that was designed with the adjudicatory function in mind.

Adjudication was the primary function of the earliest independent agency, the Interstate Commerce Commission (ICC), and it was a substantial part of the business of the Federal Trade Commission (FTC) as well. This function is uncontroversial. The Brownlow Committee, for all its criticism of the independent agency, explicitly endorsed the contin-

24. Indeed, Congress has often thought about making the FDA an independent agency. 5 SENATE COMM'N ON GOV'T AFFAIRS, *supra* note 7, at 78.

25. COUNCIL ON THE ROLE OF COURTS, THE ROLE OF COURTS IN AMERICAN SOCIETY 113-16 (1984).

uation of its judicial-type business.²⁶ Today, adjudication remains a primary activity of many independent agencies, as measured by cases processed at the Administrative Law Judge (ALJ) level.²⁷

Over the years, however, rulemaking and policy formulation have captured an increasing percentage of agency resources. Partially this was due to the realization at agencies such as the FTC and Federal Power Commission (FPC) that rules were a more efficient method of controlling regulated entities than the incremental, time-consuming adjudicatory approach.²⁸ This "more bang for the buck" theory of the 1960s and 1970s transformed many regulatory agencies from adjudicators to policymakers.²⁹ While some independent agencies, such as the National Labor Relations Board (NLRB), still preferred to proceed on a case-by-case basis,³⁰ the prevailing mode of administration became rule-oriented once the power to proceed "informally" became accepted. This kind of rulemaking, which grew out of adjudication and has express support in the Administrative Procedural Act (APA),³¹ was a decisional technique that actually gave the agencies a functional advantage over the courts, who engage in the practice without the benefit of a rulemaking process. But in the 1970s several agencies began to utilize the rulemaking process to launch wide-ranging inquiries into social and business behavior that were not supplemented by underlying adjudicative investigations. Agencies such as the FTC and FCC came into conflict with industries, Congress and ultimately the courts.³² Concern for coordinating regulatory policy through the executive branch revived and the Office of Management and Budget (OMB) became a major force in the rulemaking process.³³ OMB opened what has been called a "Pandora's box of issues centering on rulemaking authority and power."³⁴

26. See *supra* text accompanying note 2.

27. See Lubbers, *Federal Agency Adjudications: Trying to See the Forest and the Trees*, 31 FED. B. NEWS & J. 383 (1984).

28. See R. PIERCE, S. SHAPIRO & P. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* § 6.4 (1985).

29. See, e.g., *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609 (1973) (FDA); *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968) (FPC).

30. And for this persistence, the NLRB has long been criticized. See Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163 (1985).

31. 5 U.S.C. § 553 (1982).

32. Congress reacted with a bill, introduced by Senator Bumpers, designed to eliminate all judicial deference to agency statutory interpretations. S. 111, 96th Cong., 1st Sess., *introduced*, 125 CONG. REC. 737 (1979).

33. See Exec. Order No. 12,044, 3 C.F.R. 152 (1979) (Carter); Exec. Order No. 12,291, 3 C.F.R. 127 (1982) (Reagan); Exec. Order No. 12,498, 3 C.F.R. 323 (1986) (Reagan); see also ABA COMM'N ON LAW & THE ECONOMY, *FEDERAL REGULATION: ROADS TO REFORM* (1979) (advocating legislation to achieve presidential reversal of agency regulations).

34. NATIONAL ACADEMY OF PUB. ADMIN., *supra* note 4, at iii.

The popularity of the rulemaking technique by independent agencies raises an issue central to this essay. Rulemaking challenges the organizational theory behind the independent agency itself. These agencies can become policy knight-errants outside the framework of the executive branch. This tendency to go it alone is a natural consequence of creating an organization, some of whose members are selected for their political neutrality, with fixed terms of office. Moreover, the model of consensual decisionmaking is ill-suited to receiving and implementing policy directives. Given the need for the President to control policy as part of his constitutional duties pursuant to article II, independence and collegiality are being seen increasingly as qualities counterproductive to the rulemaking function. Consider that attempts to subject independent agency rulemaking to OMB control have foundered politically, even though there is a sound constitutional basis for the assertion of executive power.³⁵

To some extent the executive branch has overcome the independence problem by giving more powers to the chairpersons of independent agencies. Over the years a variety of presidentially inspired reorganization plans have transferred powers over the agencies' budget, hiring and priority-setting to the Chair,³⁶ who is usually subject to appointment by the President.³⁷ This enhanced power of the Chair, which is commented on in this symposium by Glen Robinson,³⁸ cuts two ways in terms of making collegial agencies more effective policy instruments. At the same time that it increases responsiveness, it undermines collegiality.³⁹ By

35. See Strauss & Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181 (1986). There have also been countercharges leveled at OMB for displacing congressionally mandated policy responsibilities of even executive agencies like EPA. See *Environmental Defense Fund v. Thomas*, 627 F. Supp. 566 (D.D.C. 1986); Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059 (1986).

36. See, e.g., Reorg. Plan No. 4 of 1961, 26 Fed. Reg. 6191 (1961), reprinted in 74 Stat. 837 (1961) (Federal Trade Commission); Reorg. Plan No. 6 of 1961, 26 Fed. Reg. 7541 (1961), reprinted in 75 Stat. 838 (1961) (Federal Home Loan Bank Board); Reorg. Plan No. 8 of 1950, 15 Fed. Reg. 3175 (1950), reprinted in 64 Stat. 1264 (1950) (Federal Trade Commission); Reorg. Plan No. 9 of 1950, 15 Fed. Reg. 3175 (1950), reprinted in 64 Stat. 1265 (1950) (Federal Power Commission); Reorg. Plan No. 10 of 1950, 15 Fed. Reg. 3175 (1950), reprinted in 64 Stat. 1265 (1950) (Securities and Exchange Commission); Reorg. Plan No. 13 of 1950, 15 Fed. Reg. 3176 (1950), reprinted in 64 Stat. 1266 (1950) (Civil Aeronautics Board).

37. The President can usually remove the Chair (as Chair) without ascribing cause, which gives him greater control over the agency leadership (an exception is the Federal Reserve Board). Moreover, when a President has been in office for a while, and certainly in the case of President Reagan's second term, the ability to appoint all of the members of the commissions should enhance the President's control over collegial agencies.

38. See Robinson, *Independent Agencies: Form and Substance in Executive Prerogative*, 1988 DUKE L.J. 238.

39. Discussions with the Chairs of several independent agencies lead me to believe that they feel themselves beleaguered and isolated from their members (even though the members have been ap-

pushing executive rulemaking priorities at the expense of the collegiality needed for effective adjudicatory decisionmaking, the primary function of regulatory commissions is undermined. In this circumstance, one wonders whether centralizing power in the office of the Chair is not an attempt to make collegial agencies something they are not—single-headed agencies. This raises the further inquiry whether the function (policymaking through rulemaking⁴⁰) might not itself be misplaced in independent agencies.

The third function independent agencies are called upon to perform is also inherently executive: that of prosecuting violations of agency statutes or rules. This power is the subject of much recent attention due to the independent prosecutor case⁴¹ and to a constitutional challenge to the power's exercise by the FTC.⁴² While I have defended, in earlier pages of this journal,⁴³ the constitutionality of the exercise of combined functions by the independent agencies, I remain open to a prudential argument against the exercise by collegial bodies of this executive function. Even if it is constitutional, one may fairly ask: is this function necessary to the work of independent agencies and does it enhance or detract from their primary mission and purpose?

While it is possible to erect Chinese walls and employ protocols that satisfy the APA separation-of-functions requirements and due process, is it worth it? I have my doubts. Public acceptance of the independent agency (indeed of administration in general) has long foundered on the rock of combined prosecutor and judge.⁴⁴ Modifications in the

pointed by the same president) because they are held accountable for policies not the agencies' own. Even commissioners of the same party develop independent bases of support (from the industries they regulate, the public, or Congress) that often conflict with executive branch initiatives. It is hard not to conclude that powerful Chairs are not the solution to coordinated policymaking by independent agencies.

40. Here one must draw a difficult distinction between rulemaking based upon adjudication (what might be called court-like rulemaking) and rulemaking that is pure policy execution (as in standard setting). The difference is important because the adjudicatory function is frequently advantaged by rules that explain the process of enforcement. This would include, for example, rulemaking by the NLRB, which Professor Estreicher refers to in what he calls the "policy reversal context" of previously decided cases. See Estreicher, *supra* note 30, at 179. But it would not include bold new initiatives that range far beyond existing case law.

41. See *Morrison v. Olson*, 108 S. Ct. 2597 (1988). The independent prosecutor presents a different (and really stronger) constitutional case because of the necessity argument (i.e., independence is needed to investigate the executive branch).

42. See *Ticor Title Ins. Co. v. FTC*, 814 F.2d 731 (D.C. Cir. 1987), *aff'g* 625 F. Supp. 747 (D.D.C. 1986). Plaintiffs contended that the independence of the FTC (via the "for cause" removal process) frees FTC prosecutors from executive control and is therefore unconstitutional. 625 F. Supp. at 748. The case has likely been mooted by *Morrison v. Olson*.

43. Verkuil, *The Status of Independent Agencies After Bowsher v. Synar*, 1986 DUKE L.J. 779.

44. One of the best Commissioners of the FTC, Philip Elman, surely echoed prevailing sentiments when he observed years ago: "[T]he strongest argument I would make against agency adju-

prosecutorial power could be made without jeopardizing the missions of independent agencies. The experience of the NLRB with a general counsel who is separately subject to presidential appointment⁴⁵ might be a model worth emulating by agencies like the FTC and SEC. In any event, the prosecutorial power, like the power to make broad-based legislative rules, tends to complicate the independent agencies' functions in a way that detracts from its primary organizational mission of adjudication.

IV. MATCHING FORM AND FUNCTION: REDESIGNING THE INDEPENDENT AGENCY

The foregoing discussion suggests that there is a mismatch between the characteristics or organizational form of independent agencies and the decisionmaking functions they are called upon to perform. There are undoubtedly good historical reasons why the agencies evolved to their present state, but that should not bar a reconceptualization of their role. Indeed, as has been shown, attempts have been made to do that ever since the independent agency blossomed during the New Deal. It is not that the independent agency has no clothes, but that its garments need alteration.

The independent agency is designed to emulate the appellate courts. When its focus is expanded to include rulemaking in a setting that goes beyond explaining law or adjudication, the agency confuses its form with a function best left to more accountable (to the executive) single administrators. We want the executive to control policies within the confines of appropriate congressional direction. In terms of the prosecution function, some (not all) independent agencies have added this executive responsibility unnecessarily. Fairness in terms of true separation of functions can be enhanced by providing the President with at least the power directly to appoint the agency official responsible for prosecution. Chinese walls may work, but the system would appear to function better

cation of alleged violations of law is that the blending of prosecutorial and adjudicative powers in a single tribunal imposes intolerable strains on fairness." Elman, *A Modest Proposal for Radical Reform*, 56 A.B.A. J. 1045, 1048 (1970). It should be noted that Commissioner Elman's solution was to end the adjudicative responsibilities of the FTC, make it a policy-based single-headed agency and transfer the adjudicative responsibilities to a trade court that would prosecute cases brought by the new agency. This deconstruction of the FTC anticipates some of the suggestions offered here. See *infra* text accompanying notes 53-55.

45. The General Counsel of the NLRB is an independent official appointed for a four-year term by the President. He or she has final authority to investigate and prosecute before the NLRB, which is also an independent agency. 29 U.S.C. § 153(d) (1982). To the degree that the NLRB eschews rulemaking, see *supra* note 30 and accompanying text, this arrangement comes close to splitting the functions discussed in the next section.

if the loyalties of the deciders and prosecutors were more clearly delineated.

The shearing of functions leaves the independent agency with a more tightly fitted garment. But does it reduce the agency's effectiveness and is it impractical? Some recent lessons are worth reviewing before those questions are answered. Indeed, once they are answered, it is fair to ask an additional question: does a refocused independent agency provide a superior model for the adjudicatory functions that are currently performed by executive agencies and departments?

A. *The "Split-Function" Model: Lessons from OSHA and MSHA.*

The idea of an independent agency tailored to the adjudicatory function and linked to an executive agency that exercises policymaking and prosecution responsibilities need not be invented; it exists already in at least two statutes administered by the Department of Labor, an executive department. The Department's Occupational Safety and Health Administration (OSHA) has responsibility for setting and enforcing health and safety standards.⁴⁶ Challenges to OSHA's standard enforcement are adjudicated before a three-member independent agency, the Occupational Safety and Health Review Commission (OSHRC). A similar arrangement exists for mine safety and health, where the Mine Safety and Health Administration (MSHA) sets and enforces safety and health standards and the independent, five-member Federal Mine Safety and Health Review Commission (FMSHRC) adjudicates them.⁴⁷

These innovative arrangements are the product of political compromise that overcame an attempt to give all three functions (rulemaking, prosecution and adjudication) directly to the Secretary of Labor (or his/her designate).⁴⁸ Senator Javits is given credit for working the compromise that brought an independent agency into an executive department to satisfy what he labeled "traditional notions of due process."⁴⁹ The Senator undoubtedly used this phrase for its rhetorical value, since due process dictates have long been satisfied by a commingling of functions.⁵⁰ But this coordinated independent/executive agency arrangement enhances the appearance if not the reality of fairness. The idea of an independent agency within an executive department gained further

46. 29 U.S.C. §§ 651-678 (1982).

47. 30 U.S.C. § 823 (1982).

48. See H.R. 843, 90th Cong., 1st Sess., introduced, 113 CONG. REC. 112 (1967).

49. S. REP. NO. 1282, 91st Cong., 2d Sess., reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS 5177, 5218.

50. Administrative combination-of-functions arrangements at both the federal and state levels have survived judicial challenge. See *Withrow v. Larkin*, 421 U.S. 35 (1975); *Richardson v. Perales*, 402 U.S. 389 (1971).

expansion when the independent and free-standing FPC (as the Federal Energy Regulatory Commission (FERC)) was placed within the Department of Energy in 1978.⁵¹ That compromise has been hailed as a new model of agency organization,⁵² but it has yet to gain further adherents.

It is easy to draw up a new approach to regulatory management without considering the downsides to the split-function idea. In terms of OSHRC and FMSHRC the most difficult area of accommodation has been deciding the appropriate roles of the Secretary and the Commissions in the interpretation of rules.⁵³ While the Secretary retains responsibility for rulemaking, the rules themselves often must be interpreted in adjudication. In this context, the courts have had to decide whether to defer to the interpretations offered by the Secretary. One commentator describes these "turf fights" between the Secretary and the review commissions, especially OSHA/OSHRC, as inherent in the split-function arrangement.⁵⁴

But turf battles exist in all agencies, whether "split" functionally or not. The advantages of the split-function approach must be stated in abstract terms: the purpose of collegial agencies is to adjudicate. Independence legitimizes adjudicatory agencies. If splitting functions between an executive department and an independent commission coincides with organization strengths, it should carry with it substantial benefits in the perception of fairness. It is most helpful that experience with coordinate independent agencies already exists within the Department of Labor on a variety of fronts, as well as in the Department of Energy. The benefit of extending that experience to other agencies, executive and independent, ought to be explored by Congress. The hypothesis of this essay is that it makes sense conceptually; what needs to be determined is how to make it work in practice.

51. Byse, *The Department of Energy Organization Act: Structure and Procedure*, 30 ADMIN. L. REV. 193 (1978). As Professor Byse notes, however, the mere placement of FERC within DOE did not effect a change in the rulemaking and policymaking powers that independent agency had previously enjoyed when it was the FPC. *Id.* at 208-10.

52. See 5 SENATE COMM. ON GOV'T AFFAIRS, *supra* note 7.

53. See *Donovan v. A. Amorello & Sons, Inc.*, 761 F.2d 61 (1st Cir. 1985); see also *Donovan v. Daniel Marr & Son Co.*, 763 F.2d 477 (1st Cir. 1985) (supporting but qualifying the Secretary's authority). But see *Brennan v. Gilles & Cotting, Inc.*, 504 F.2d 1255 (4th Cir. 1974) (favoring OSHRC's interpretation of a rule over OSHA's). See generally Johnson, *The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 ADMIN. L. REV. 315 (1987). This conflict should come as no surprise since it is at the sensitive juncture between the executive and judicial functions.

54. Johnson, *supra* note 53, at 340, 347. Professor Johnson is unable to conclude that the split-function/enforcement model is superior to the traditional unitary model. *Id.* at 348.

B. *Administrative Courts and the Role of Administrative Law Judges.*

If the experiments mentioned above are to become more general in application, independent agencies may become what they might well have been considered all along—administrative or article I courts. In a useful article, Susan Sommer has made a persuasive case for identifying independent agencies as article I courts.⁵⁵ As creatures of Congress, these institutions are best seen as judicial analogues, which of course serves also to isolate their policymaking and prosecutorial roles.⁵⁶ As a practical matter, the reference to administrative courts revives an old theme in administrative law that would place all agency adjudication within a separate administrative court system.⁵⁷ The difficulty with the separate administrative court idea is that it moves the adjudicatory function too far from the agencies where the business is generated; as a result it contradicts the need for specialization that led to the creation of administrative agencies in the first place.

The argument for administrative courts of general jurisdiction is largely based on lightening the judicial review burden in the federal courts.⁵⁸ This goal could also be achieved in an administrative court system that is limited in scope to the specific agency whose business it reviews. This step would be less controversial and would not preclude future consideration of whether a generalized article I administrative court (or courts) would have organizational or prestige advantages that outweigh the expertise benefits of agency-specific courts.

In a sense this debate parallels that currently involving ALJs who are seeking legislation to organize as a "corps" with more general duties extending beyond specific agency assignments.⁵⁹ While the legislation does not address the larger issue of whether ALJs and their decisions

55. Sommer, *Independent Agencies as Article One Tribunals: Foundations of a Theory of Agency Independence*, 39 ADMIN. L. REV. 83 (1987); see also Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 928 (1988) ("[T]here is . . . no difference in constitutional principle between legislative courts and administrative agencies.").

56. Ms. Sommer concedes that equating independent agencies with article I courts makes their nonadjudicatory functions more difficult to accept. Sommer, *supra* note 55, at 99. But on the hypothesis advanced here, that may be an advantage rather than a disadvantage.

57. See, e.g., Cooper, *The Proposed United States Administrative Court*, 35 MICH. L. REV. 193 (1936). This idea of a single administrative court was revived in the Ash Council Report. PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE ORG., *supra* note 3, at 53-55. The Ash Council rejected retention of adjudicatory authority within separate independent agencies on grounds both of confusion of policy and adjudicatory roles and of an alleged diminution of attractiveness of the separate judgeships. *Id.*

58. This was certainly a motivation behind the Ash Council recommendations. See ADVISORY PRESIDENT'S COUNCIL ON EXECUTIVE ORG., *supra* note 3, at 54.

59. See S. 950, 100th Cong., 1st Sess., introduced, 133 CONG. REC. S4853 (daily ed. Apr. 8, 1987); Lubbers, *supra* note 27.

should have greater independence from agency heads (whether independent or executive)⁶⁰ that issue inevitably comes up when the independent commission as an administrative court is considered. The corps concept, which has been around for a while, seeks to divide ALJs into eight programmatic groups. That approach would have relevance to commission adjudication should it be thought desirable to consolidate the business of independent agencies along similar lines.⁶¹

The corps concept may also have a bearing on the independence issue. If greater independence of adjudicatory decisions is desirable at the appellate (commission) level, it is fair to ask why it should not also be so at the ALJ or trial level. ALJs decide matters that must ultimately be reviewed by the various commissions or agency heads. Their independence is a long standing controversy; it has been acknowledged in a variety of ways relating to hiring and firing. To insulate them further from agency control would create considerable resistance. ALJ decisions certainly need not be independent of the agency in order to be reviewed by an independent commission. Indeed, OSHRC and FMSHRC employ their own ALJs to make initial decisions. Nonetheless, the role of ALJs, whether reorganized in a corps or not, will continue to be a central concern of any newly conceived independent agency concept that focuses primarily on the adjudication function, since the commission format is designed for appellate review, not trial-type initial decisions.

C. *The Administrative Court and Executive Agencies.*

If reorganizing the independent agency as an administrative court with its attention primarily focused on adjudication makes sense for independent agencies, why should it not also apply to the adjudicatory functions of executive agencies? Indeed, the largest adjudicatory agencies in the federal system are executive: the Social Security Administration (SSA) and the Veterans Administration (VA). Between them they handle millions of disability disputes each year.⁶² Yet they function without the benefit of any independent deciders. In the SSA there are ALJs (660 of them in fact) but the VA utilizes three-person rating boards whose members are not ALJs. Both agencies have review mechanisms (the SSA's Appeals Council and the VA's Board of Veterans Appeals (BVA)) that have none of the characteristics of independence (bipartisan makeup, fixed terms, for cause removal) that make the independent agen-

60. Under the Administrative Procedure Act, the agency decision resides with the agency head and the ALJ renders a tentative or advisory decision only. 5 U.S.C. § 557 (1982).

61. The Ash Council Report recommended consolidation of several agencies, including the (then) three transportation agencies (CAB, ICC, FMC).

62. See generally J. MASHAW, BUREAUCRATIC JUSTICE (1983).

cies independent. Moreover, in the case of the VA there is no judicial review of BVA decisions.⁶³

These appellate tribunals decide thousands of cases annually in what appears to be an efficient fashion.⁶⁴ Nevertheless, an appeals council with final decisional authority has been suggested⁶⁵ and a BVA with decisional responsibility patterned after an administrative court may have the benefit of staving off more dramatic attempts to subject the entire veterans claims process to judicial review.⁶⁶ The advantage of an independent tribunal within an executive agency is that it can add to the perception of fairness and perhaps reduce the number of cases that reach the courts (in the case of the SSA) or at least reduce the courts' tendency to reverse the agency (on the assumption that an independent tribunal will bolster judicial confidence in the fairness and accuracy of the administrative process).⁶⁷ If fairness of the adjudicative process has equal value, there is no reason why executive agencies should not embrace the administrative court concept as well as independent ones. There are plenty of potential applications beyond the disability context should this prove a concept that the Executive and Congress find appealing.⁶⁸

V. 100 YEARS OF INDEPENDENT AGENCIES: WHERE To Go FROM HERE

The independent agency celebrates its 100th birthday in 1989.⁶⁹ It

63. 38 U.S.C. § 211(a) (1982).

64. The SSA Appeals Council and the BVA each decide over 44,000 cases per year. SSA, EXECUTIVE HANDBOOK OF SELECTED DATA 32 (1987); 1984 VA ANNUAL REPORT 125 (1985).

65. See C. KOCH & D. KOPLOW, THE FOURTH BITE AT THE APPLE: A STUDY OF THE OPERATION AND UTILITY OF THE SOCIAL SECURITY ADMINISTRATION'S APPEALS COUNCIL (report to the ACUS, 1988).

66. See H.R. 5039, 100th Cong., 2d Sess. (proposing to convert the BVA into an article I court), introduced, 134 CONG. REC. H5718 (daily ed. July 13, 1988); S. 11, 100th Cong., 1st Sess., 134 CONG. REC. S9208 (daily ed. July 11, 1988) (passed in Senate, 86 to 11, same day as reprinted) (providing for limited judicial review of VA disability determinations).

67. See generally J. MASHAW, *supra* note 62; Redish & Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455 (1986).

68. For example, the Department of Agriculture, the Department of Justice (Immigration) and the Department of Housing and Urban Development all actively adjudicate and employ ALJs who make initial decisions without the benefit of independent commissions to review them.

69. The independent agency was born not in 1887, when the ICC was created, but in 1889, when the ICC was removed from the Department of the Interior and granted sole authority over its budget, personnel and internal management. Act of March 2, 1889, ch. 382, 25 Stat. 855. The word "independent" was not used in the legislation, and we are told there was no discussion of the ICC's relationship to Congress. R. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 61 (1941). Yet politics must have been in the background, we are also told, since the ICC amendment was adopted by a democratic Congress just two days before the inauguration of Benjamin Harrison, a republican lawyer. See 5 SENATE COMM. ON GOV'T AFFAIRS, *supra* note 7, at 27-28. Surely the politics of independent agencies has not changed that much during the intervening years.

was born without much fanfare when it emerged from an executive agency, the Department of the Interior. What better time than now to consider whether independent agencies might return to the executive departments that spawned them? This is not a fanciful idea. The Department of Energy contains an independent agency (FERC) and the leading Senate study on federal regulation suggests that FERC "might serve as a model in other areas."⁷⁰ And the OSHA and MSHA split-function models discussed above lend empirical support to the idea that the role of independent agencies can be modified and improved over time. Moreover, there are signs that Congress is prepared to rethink the value of independent commissions versus executive agencies based on the pros and cons of the organizational mechanisms themselves. This is occurring in legislative debates over the reorganization of the Nuclear Regulatory Commission (NRC). A conceptual breakthrough may be on the horizon.

A. *Rethinking the Value of Independence: The Case of Nuclear Safety.*

An extraordinary debate is currently taking place over the future of nuclear safety regulation. Legislation has been drafted by Congress that would convert the NRC, an independent commission, into a single-administrator executive agency.⁷¹ Congress seems willing to amputate one of its "arms," and a majority of the members of the NRC itself favors the idea.⁷² For one of the few times in legislative annals the debate is focused on the source of the problem: the strengths and weaknesses of the independent commission as an administrative body.

The Senate Report accompanying the legislation pulls no punches in identifying the weaknesses of a commission structure in the previously non-adjudicative context of safety regulation:

In short, the committee has found that the Commission structure is poorly suited to the task of regulating the commercial nuclear power industry. As a means of formulating decisions, the Commission decisionmaking process is inefficient and, frequently, indecisive No single individual is responsible for a decision, once made.⁷³

The Senate Committee did have the advantage of previous studies

70. See 5 SENATE COMM. ON GOV'T AFFAIRS, *supra* note 7, at 7.

71. See S. 2443, 100th Cong., 2d Sess. (Nuclear Regulation Reorganization and Reform Act of 1988), *introduced*, 134 CONG. REC. S6843 (daily ed. May 26, 1988); S. REP. NO. 364, 100th Cong., 2d Sess. (1988).

72. See Letter from Lando W. Zech, Jr., Chairman of NRC, to Hon. John B. Breaux (Nov. 9, 1987) (referring to NRC testimony in favor of the single administrator concept). The Commission did have reservations about the bill's proposed Nuclear Safety Investigations Board, discussed *infra* at notes 81-83 and accompanying text.

73. S. REP. NO. 364, *supra* note 71, at 15.

that criticized the NRC along the same lines,⁷⁴ but it nonetheless remains an unusually incisive critique of the ability of the independent agency to function in the non-adjudicatory setting. Safety regulation may be the archetypal arena where decisiveness, not deliberation or consensus-building, is the value most desired.⁷⁵

The Senate proposal would place nuclear safety under a single administrator (an independent agency in the executive branch, much like the EPA Administrator)⁷⁶ who would be appointed by the President with the advice and consent of the Senate. Once confirmed, the Administrator would serve at the pleasure of the President.⁷⁷ At this point, the Administrator becomes an executive official with the status and power to regulate nuclear safety reasonably and effectively—and, most importantly, the President becomes responsible for nuclear safety.

One can only applaud Congress's objectivity in considering the issue from a functional rather than a political perspective. But the congressional fears of agency loyalty seem to reappear later in the legislation. In order to ensure "independence" of investigations, a three-person Nuclear Safety Investigations Board is established within the agency, with its chairman separately appointed by the President, upon senatorial concurrence.⁷⁸ The other two members are appointed by the Administrator of the Nuclear Safety Agency. The three members serve fixed three-year terms and are removable by the President "only for inefficiency, neglect of duty, or malfeasance in office."⁷⁹ That language of course reintroduces the independent agency into the executive agency structure. But unlike FERC in the Department of Energy, the primary mission of this Board is not adjudication but investigation, which is traditionally an

74. In October 1979, the President's Commission on the Accident at Three Mile Island, chaired by John Kemeny, advocated a single-administrator structure, as did a subsequent NRC Report of the Special Inquiry Group, chaired by Mitchell Rogovin.

75. The Senate Report also reviews the legislative history to the establishment of the NRC in 1974 and concedes that the question whether the commission structure was the best mechanism was not raised, even though in 1962 the Kennedy administration had suggested a single administrator instead of the (then) AEC. The Senate Report conceded that earlier discussions had foundered over the fear that a single administrator proposal "would result in an agency with less accountability to Congress." S. REP. NO. 364, *supra* note 71, at 3-4.

76. *Id.* at 16. The phrase "independent agency in the executive branch" sounds contradictory unless one reads the word "independent" to mean "free-standing" to distinguish single administrators from executive departments.

77. S. 2443, *supra* note 71, § 104; *see also* S. REP. NO. 364, *supra* note 71, at 28 (summarizing this provision).

78. S. 2443, *supra* note 71, §§ 141-145; *see also* S. REP. NO. 364, *supra* note 71, at 35-40 (summarizing these sections).

79. *See* S. REP. NO. 364, *supra* note 71, at 23.

executive function.⁸⁰

The reasons given for creating this independent agency within an executive agency have to do with the conflicts of interest that could arise from the Administrator investigating nuclear safety problems where the agency itself may have had officials involved in the approval process.⁸¹ Senator Biden, in his testimony in favor of the independent board, emphasized the problem of public confidence relating to internal investigations,⁸² but one cannot help but wonder whether the real reason has more to do with maintenance of some degree of congressional control over the process. The arguments against this independent board, led by the NRC itself, are precisely that a collegial solution was what rendered the nuclear safety process under the NRC inefficient to begin with.⁸³

The innovative approach to nuclear safety proposed by the Senate deserves serious consideration, especially as it relates to the conversion of the NRC into a more effective and responsible single administrator. It certainly reflects the priorities for independent commissions advocated here, since adjudication is only a small part of the NRC's business. Moreover, it may be that the felt congressional need to maintain an independent board within this new agency to investigate nuclear incidents could be satisfied by a variation upon the idea of for cause removal of single administrators proposed in the next section.

B. *The Politics of Independence: A Modest Proposal.*

In the world of interbranch politics, if not in the real world of organizational management,⁸⁴ the structure of regulatory agencies matters. The "arm of Congress" view of independent agencies has successfully thwarted executive branch attempts significantly to reorganize them for over fifty years. It would be foolish to propose one more effort along those lines. What is needed is a technique whereby the independent agency can be refocused without offending deeply felt congressional pre-

80. Indeed, the Board is specifically denied authority or responsibility for regulation or enforcement. *See id.* at 24.

81. The Nuclear Safety Investigations Board is patterned after the National Transportation Safety Board, which investigates airline, rail and highway accidents within the Department of Transportation's jurisdiction. *Id.* at 23.

82. *See Proposals to Reorganize the Nuclear Regulatory Commission: Hearing Before the Subcomm. on Nuclear Regulation of the Senate Comm. on Environment and Public Works on S. 14, S. 100, S. 908, S. 1769, and S. 1770, 100th Cong., 1st Sess. 3-4 (1987).*

83. "An independent safety board has the potential to complicate rather than simplify nuclear regulation by further diffusing accountability and responsibility for the execution of the agency's mission." *Id.* at 16 (statement of Hon. Lando W. Zech, Jr., Chairman of NRC); *see also id.* at 83 (statement of E. Lin Draper, Jr., Gulf State Utility Company) (expressing a similar view).

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

rogatives. One way to do that is to achieve agreement that the adjudicatory mission of collegial agencies is the main justification for their independence. I hope that case has been made on these pages. It has to some degree already been accepted by influential congressional studies.⁸⁵ The harder task is to convince Congress that the executive branch has it right when it urges that policy and prosecutorial matters be given over to single-headed administrators, whether free-standing or heads of cabinet departments. The reluctance to do so is not based on theoretical notions about the proper fit between form and function, but on the concern of Congress that the executive branch will achieve hegemony over the policymaking prerogatives of the bureaucracy. It is perhaps for that reason not surprising, as stated by an influential Senate study, that "Presidents have generally tended toward a single administrator form, while Congress has an inclination favoring multi-member commissions."⁸⁶

Hence my modest proposal: subject single administrators to for cause removal limitations just like commissioners. The removal restriction has been labeled by Congress as the key to the independence idea.⁸⁷ Why not just extend it to single administrators who can supervise the functions of independent agencies, including that of adjudication by administrative courts? The administrators as presidentially selected officials would also supervise the policy and prosecutorial functions. The independent administrator would give Congress some comfort and still provide the decisiveness necessary for effective executive policymaking. This may indeed be the kind of political compromise that would render unnecessary the independent board contained in the proposed single-administrator Nuclear Safety Agency discussed in the previous section.

An obvious argument against this compromise is its constitutional status. I have argued elsewhere⁸⁸ and won't repeat here at length, that for cause removal can be justified even as to *some* cabinet officials,⁸⁹ although Congress need not go that far in order to make administrators of executive agencies removable for cause. The removal restrictions, especially if they are read to incorporate notions of failure to follow valid

85. "Independence does have its positive advantages. First and perhaps most important, these commissions exercise quasi-judicial functions in that they adjudicate and reach decisions on particular cases." 5 SENATE COMM. ON GOV'T AFFAIRS, *supra* note 7, at 75.

86. *Id.* at 79.

87. *Id.* at 36 ("[T]he removal restriction is perhaps the single most important feature of regulatory independence.").

88. See Verkuil, *Separation of Powers, the Rule of Law, and the Idea of Independence*, 30 WM. & MARY L. REV. (forthcoming, 1988).

89. Congress has, for example, made new cabinet positions and changed existing ones, including converting the Post Office into an independent corporation. For constitutional reasons, Congress could not do this with the inner circle of cabinet members, such as the Secretaries of State or Defense.

policy directions of the President,⁹⁰ gain continued support from *Humphrey's Executor*⁹¹ and do not violate *Buckley v. Valeo*⁹² or *Bowsher v. Synar*.⁹³

Perhaps an example of this approach would prove helpful. There are presently pending before Congress bills that seek to make the National Park Service an independent agency.⁹⁴ The plan is to place the Park Service under the jurisdiction of a three-member review panel, which would supervise the presidentially appointed director of the National Park Service. The reason for this reorganization is the alleged politicization of the park system by the Reagan administration.⁹⁵ Understandably, the Secretary of the Interior, Donald Hodel, regards this legislation as "an old political ploy—if you can't force your political views on an agency, then make the agency independent."⁹⁶

Under the analysis presented here the idea of a three-person review panel (or commission) makes little sense since the predominant business of the Park Service is policymaking, not adjudication. Where policymaking is the issue, a single administrator, made independent by a for cause removal provision as well as by presidential appointment, yet remaining within the Department of the Interior much as FERC is within the Department of Energy, would serve the Congress's needs for political independence with a minimal disruption to the executive oversight and coordination function. An independent administrator concept simply makes more organizational sense in this setting as well as in the Nuclear Safety Agency context discussed earlier.

A President may well not consider this compromise "modest," but if not, he or she should remember that there are costs attached to removal of executive officials like the Administrator of EPA or cabinet officers themselves, even though no statute protects their tenure. These officials are often powerful political figures in their own right with constituencies in Congress and among the public. Their removal is no easy accomplishment. Faced with "independent" administrators, a President might in-

90. See Pierce, *Separation of Powers and the Limits of Independence*, 30 WM. & MARY L. REV. (forthcoming, 1988).

91. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

92. 424 U.S. 1 (1976).

93. 478 U.S. 714 (1986). *Buckley* prevents Congress from appointing executive officials; *Bowsher* prevents Congress from removing them. The for cause requirement, justified in *Humphrey's Executor*, does not go that far; it moderates but does not eliminate the President's removal power. This limitation gains strength from *Morrison v. Olson*, 108 S. Ct. 2597 (1988), which also moderates the President's removal power.

94. See, e.g., S. 2360, 100th Cong., 2d Sess., 134 CONG. REC. S5398 (daily ed. May 10, 1988).

95. See *Washington Talk—Would Freedom Help the National Park Service?*, N.Y. Times, May 27, 1988, at A14, col. 1.

96. *Id.*

sist in return that their terms be limited to his or her four years in office, so as to avoid the holdover official problems that might burden a President's second term or his or her successor's first. This kind of compromise causes both branches to focus on the crux of the problem: the proper match between form and function of independent agencies and their alternative, the executive administrator.

C. *Independent Agencies as Administrative Courts: Unbegging a Few Hard Questions.*

Even though this essay cannot anticipate all possible objections to the approach herein suggested, several obvious difficulties need to be addressed. For one thing, if the hypothesis is correct that independent agencies are best designed to adjudicate, how does one explain those independent agencies with limited adjudicatory functions and highly significant policymaking roles? The Federal Reserve Board (FRB) leaps to mind. It is one of the largest, truly independent agencies (right down to an independent Chair), but it is a policymaker of the highest order, and only incidentally an adjudicator. By the standards posed here one would have to conclude that the FRB is miscast as a commission and should be restructured as a single-headed agency, perhaps with a board of policy advisors.⁹⁷ It may be that, as a practical matter, the issue has been resolved in this fashion anyway. Certainly the Chair of the FRB appears to have all the powers of Chairs of the independent agencies—and more.⁹⁸

But even if this possible mismatch between form and function can be reconciled, there is another that is harder to dismiss. This is the Federal Communications Commission (FCC), which, while it adjudicates by issuing and denying licenses of enormous value, does most of its work in the policy arena. Rules about ownership of stations and competition and coverage requirements of competing modes (broadcast and cable) surely dominate the FCC's docket. Why then should it be an independent agency? Wouldn't a single administrator do the policy job more effectively? The Senate study on regulation echoes the Ash Council⁹⁹ in urg-

97. This would make the Board itself much like the policy advisors of the FRB's Open Market Committee, whose members, it should be noted, have been challenged because they are not all presidential appointees. See *Melcher v. Federal Open Mkt. Comm.*, 644 F. Supp. 510 (D.D.C. 1986), *aff'd*, 836 F.2d 561 (D.C. Cir. 1987); *cert denied*, 108 S. Ct. 2034 (1988).

98. Indeed, the Chair of the FRB has the significant advantage over the usual independent agency chair in that he or she is not removable except for cause. See 12 U.S.C. § 241 (1982).

99. The Council concluded:

A single administrator for the Federal Communications Commission would be in an exceptionally vulnerable position which, because of its appearance, could impair public trust. The public is entitled to assume that the information it obtains through the broadcast media is not distorted by the political perspectives of the party in favor.

PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE ORG., *supra* note 3, at 15.

ing that the commission format is necessary in the FCC's case not because of the independence required for adjudication but because of the FCC's "sensitive and far reaching responsibilities."¹⁰⁰ If that rationale is made part of the basis for commissions then many of the independent agencies could justify their present format.¹⁰¹ But the concern with "public trust" ought not to require a commission. What it requires is independence and that can be achieved via the "independent administrator" concept introduced above.

Another objection to the administrative court idea of independent agencies is the potential diminution of the agencies' status and the commensurate difficulty in recruiting outstanding persons to fill those split-function positions. The Senate study on federal regulation devoted an entire volume to the problem of recruitment and retention of better commissioners.¹⁰²

I have several responses. The first is of the "so what?" variety: recruitment of outstanding commissioners has always been a problem, so why should this change make a real difference? The persons sought will of necessity be those with experience in the adjudicative process, who may be easier to locate and retain. What they may lack in stature may be made up for in experience and in constancy or length of service, a real problem for all commissions. Second, maybe we don't want renaissance public officials to serve in these posts anyway. The grander the credentials of the commissioners, the greater the likelihood they will become bold policymakers with ambitions and goals independent of the executive branch. That may not be a good thing. Finally, if my suggestion takes hold, recruiting an independent single administrator may be more successful precisely because that individual will have greater executive authority. One top-flight administrator may be easier to recruit than five (or more) equally outstanding commissioners.

* * * * *

Surely I have just scratched the surface of hard questions that this essay raises. I hereby beg the rest, and conclude confident that others will decide whether there is anything here worth pursuing in greater detail.

100. 5 SENATE COMM. ON GOV'T AFFAIRS, *supra* note 7, at 79.

101. Certainly the FEC engages in sensitive work, as do the SEC and other agencies.

102. 1 SENATE COMM. ON GOV'T AFFAIRS, STUDY ON FEDERAL REGULATION: THE REGULATORY APPOINTMENTS PROCESS, S. DOC. NO. 25, 96th Cong., 1st Sess. (1977) (documenting a lack of quality and balance in the appointments of independent agency commissioners).