Digital Age Communications Act

Report from the Working Group on Institutional Reform

Release 1.0

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I. Introduction

Since the launch of the Digital Age Communications Project in February 2005, four of the Working Groups have issued reports setting forth substantive recommendations for meaningfully reforming our nation's communications laws. The first report, issued by the Regulatory Framework Working Group in June 2005, proposed a radically different regulatory framework for the new model Digital Age Communications Act.[1] Under the proposed framework, regulatory intervention in communications markets no longer would be tied to technology-specific constructs that characterize "stovepipe" regulation under the existing Communications Act.[2] Instead, regulatory intervention would be directed toward curbing "unfair methods of competition," a concept generally defined to mean "practices that present a threat of abuse of significant and non-transitory market power as determined by the [Federal Communications] Commission consistent with the application of jurisprudential principles grounded in market-oriented competition analysis…."[3] Thus, the Regulatory Framework Working Group envisions a market-oriented regulatory regime heavily dependent upon competition analysis akin to that utilized by the antitrust authorities. Significantly, under the new regulatory paradigm, the Regulatory Framework Group concluded: "The antitrust model adopted in the DACA presumes that the Commission will generally act through adjudication, addressing unfair competition problems on a case-by-case basis *ex post*."[4]

The Regulatory Framework Working Group report was followed by a report from the Federal-State Working Group proposing a general curtailment in state economic regulatory authority over communications in light of the

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[1] The Progress and Freedom Foundation, *Proposal of the Regulatory Framework Working Group, Release 1.0,* 2005, at http://www.pff.org/issues-pubs/other/050617regframework.pdf (hereinafter *DACA Regulatory Framework Proposal*).

[2] See Randolph J. May, *Why Stovepipe Regulation No Longer Works: An Essay on the Need for a Market-Oriented Communications Policy*, 58 FED. COMM. L. J. 103 (2006). "Stovepipes" refer to the distinct sets of regulations that attach to a communications service once it is classified in a particular category, such as "telecommunications," "information services," "cable service," "mobile service," "broadcasting," and "open video system," as those services are defined in the statute. Id. at 104. That approach to regulation fails in an era in which, due to rapid technological change, the categories overlap substantially and have no distinct boundaries in the marketplace.

[3] *See DACA Regulatory Framework Proposal* at 35-36. With respect to the interconnection issue, the test for determining regulatory intervention was stated somewhat differently, but nevertheless still with reference to "competition analysis."

[4] Id. at 29.

increasing difficulty and impractically of separating intrastate from interstate and international communications.[5] The Universal Service Working Group followed with a report recommending meaningful reform of the existing universal service programs.[6] And, finally, in March 2006, the Spectrum Working Group issued its report recommending the adoption of a more market-based "propertyized" regime for allocating and assigning spectrum.[7] Consistent with new overall proposed regulatory paradigm, this new "propertyized" spectrum model mostly would involve adjudications to resolve interference disputes.[8] In sum, the recommendations of all of the groups that have reported thus far, including most importantly, the Regulatory Framework Working Group, are distinctly in the direction of market-oriented principles and directives in which regulatory determinations depend heavily (but not exclusively) on agency adjudications.

Having in mind the context of these prior Working Group reports, and informed by their recommendations, the Institutional Reform Working Group recommends that a "split agency" model be adopted as the institutional mechanism for executing the regulatory functions proposed under the Digital Age Communications Act. In effect, a multimember agency constituted along the lines of the present Federal Communications Commission would be responsible largely for conducting the adjudications envisioned under the new statute, and a single executive branch official would be vested with the authority to conduct the more limited rulemaking proceedings envisioned by the new act as a means of establishing policy. The Working Group believes that this "split agency" model is the one most conducive to fulfilling the statute's purposes in a manner that achieves political accountability for administrative policymaking through rulemaking, while at the same time achieving efficient, effective, and sound decision-making in carrying out both the adjudicatory and rulemaking functions that are the hallmarks of administrative agency action. The "split agency" model also has clear precedent in existing federal administrative practice and, as discussed below, it is consistent with the recommended reforms of a surprisingly broad group of administrative scholars and policymakers.

During its long history, the FCC often has been viewed as an agency in need of institutional reform. Over four decades ago in 1960, one of the most prominent administrative law scholars of the time, James Landis, concluded that the FCC had "drifted, vacillated and stalled in almost every major area" and that it "seems incapable of policy planning, of disposing within a reasonable period of time the business before it, of fashioning procedures that are effective to deal with its problems."[9] Three years later Newton Minow, the then-FCC Chairman

[5] http://www.pff.org/issues-pubs/books/051026daca_fed_state_report2.01.pdf

[6] http://www.pff.org/issues-pubs/books/051207daca-usf-2.0.pdf

[7] http://www.pff.org/issues-pubs/books/060309dacaspectrum1.0.pdf

[8] The Spectrum Working Group did not reach a firm conclusion as to whether the spectrum adjudications should be decided by a reformed FCC or by the courts. Id. at 23.

[9] James M. Landis, Report on Regulatory Agencies to the President-Elect 53 (1960) (hereinafter *Landis Report*)..

appointed by President Kennedy, concluded that the agency was filled with "jungles of red tape," that it existed in "a never-never land which we call quasi-legislative and quasi-judicial," and that it produced results that were "often quasi-solutions."[10] Similar critiques continue to this day. In 2005 Reed Hundt, the FCC Chairman during much of the Clinton Administration, asserted that the FCC continues to suffer from "a reputation for agency capture by special interests, mind-boggling delay, internal strife, lack of competence, and a dreadful record on judicial review."[11] These and many observations reinforce the widespread view that the agency's decision-making process is often painstakingly ponderous and frequently produces opinions and orders riddled with inconsistencies that reflect compromises devoid of a principled rationale.[12]

Dissatisfaction with the FCC and its processes have produced persistent, bi-partisan calls for institutional reform at the FCC. The suggested reforms have been varied, including outright abolition of the agency (Peter Huber's suggested change);[13] centralization of all authority in a single commissioner (Reed Hundt's suggestion);[14] splitting the agency into an independent court and an executive component headed by a single appointee serving at the pleasure of the President (Minow's proposed reform);[15] and the centralization of greater authority in the Chairman's office, coupled with greater oversight of the agency by the President (Landis's proposal).[16] Yet despite these persistent calls for change, the fundamental institutional structure of the FCC survives today in a form largely

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[10] Newton Minow, *Suggestions for Improvement of the Administrative Process*, 15 ADMIN. L. REV.146, 146 (1963).

[11] Reed E. Hundt and Gregory L. Rosston, *Communications Policy for 2006 and Beyond*, 58 FED. COMM. L. J. 1, 31 (2006),

[12] See Randolph J. May, *The FCC's Tumultuous Year 2003: An Essay on an Opportunity for Institutional Agency Reform*, 56 ADMIN. L. REV. 1307 (2004).

[13] See PETER HUBER, LAW AND DISORDER IN CYBERSPACE: ABOLISH THE FCC AND LET COMMON LAW RULE THE TELECOSM 24, 33-34 (Oxford 1997) (comparing the FCC to an Orwellian bureaucracy and concluding that the agency is a "fairly typical and well-documented representative" of the sort of commissions that "should have been extinguished years ago").

[14] See Hundt and Rosston, supra note 11, at 32 ("Preferably the agency should be headed by one commissioner and not a group of five."). Hundt and Rosston also state that "preferably, the job would be nonpartisan." Because we believe that political accountability is an important value in our democratic system, and that the goal of "nonpartisanship" is largely ephemeral , we do not agree with Hundt and Rosston on this point.

[15] See Minow, supra note 10, at 146-47 (suggesting "one basic change" to the FCC's structure: that the adjudicative functions should be vested in an "administrative court" and all other functions — including all executive, prosecutorial and rulemaking responsibilities — should be split off and "borne by a single administrator appointed by the President (with the advice and consent of the Senate) and serving at his pleasure").

[16] See *Landis Report*, supra note 9, at 85 (recommending that the power of the FCC Chairman be expanded to include almost all administrative and appointment powers); id. at 82 (recommending greater oversight of administrative agencies by the Executive Office of the President and greater "Presidential concern" with the work of agencies as a means to boost the morale of agencies and to fulfill the President's duty to see that the laws are faithfully executed).

unaltered from the 1920s when its predecessor agency, the Federal Radio Commission, was created.[17]

In conjunction with implementation of other DACA proposals, the time for changing the institutional structure of the FCC is now. As the previous DACA reports[18] have documented, the past quarter century has been a time of tremendous and accelerating change in the communications marketplace, due in major part to rapid technological change associated with the digital revolution. Competition and convergence in the marketplace have become the norm.[19] In sum:

> [W]e live in a world in which firms we still sometimes call "cable television" companies provide voice services to their subscribers at ever increasing rates. Companies we still call "telephone companies" or "telecommunications providers" are racing to provide video services in competition with cable and satellite television providers. New market entrants like Vonage, which calls itself "the broadband telephone company," utilize super-efficient Internet connections to carry voice traffic. Wireless providers we still sometimes call cellphone companies integrate voice, video and data for delivery anytime, anywhere to a screen you carry in your pocket. They now distribute popular "television" programming. And popular web sites, such as those operated by Yahoo, Google, Microsoft, and thousands and thousands more that are not as dominant but which have their own intensely loyal "viewers", compete with traditional broadcasters and cablecasters, not to mention newspapers and magazines, for consumers' eyeballs.[20]

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[17] During the 1980's, the number of FCC Commissioners was reduced from seven to five, and their tenure was correspondingly reduced from seven to five years. In legislation enacted in 1952 and 1981, Congress also consolidated some of the administrative and executive powers previously exercised by the Commission as a whole and centralized those powers in the FCC Chairman or officers accountable to the Chairman. See Communications Act Amendments, 1952, Pub. L. No. 82-554, chap. 879, § 5, 66 Stat. 711, 712-13 (establishing the Chairman as the chief executive officer of the Commission and conferring various powers, including the power to "coordinate and organize the work of the Commission"); Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, §1252, 95 Stat. 357, 738 (authorizing the Chairman to appoint a Managing Director, subject to approval by the Commission, and authorizing the Chairman to supervise and direct the Managing Director in carrying out various executive and administrative duties).

[18] See the references in notes 1 and 5-7 *supra*.

[19] See May, supra note 2, at 108-110; Randolph J. May, *The Metaphysics of VoIP,* Jan. 5, 2004, CNET News, http://news.com.com/The+metaphysics+of+VoIP/2010-7352_3-5134896.html; Randolph J. May, *Calling for a Regulatory Overhaul, Bit by Bit,* Oct. 19, 2004, CNET News, http://news.com.com/Calling+for+a+regulatory+overhaul%2C+bit+by+bit/2010-1028_3-5415778.html

[20] Testimony of Randolph J. May, on "H.R.__, a Committee Print on the Communications Opportunity, Promotion, and Enhancement Act of 2006" before the Subcommittee on Telecommunications and the Internet, Committee on Energy and Commerce, U.S. House of Representatives, March 30, 2006, http://www.pff.org/issues-pubs/testimony/060330telecom.pdf

As even the FCC leadership has recognized, these major, ongoing marketplace changes provide a good justification for implementing institutional reform. In 1999, former FCC Chairman William Kennard announced a strategic plan called, "A New FCC for the 21st Century." In this plan, Chairman Kennard proclaimed:

> In five years, we expect U.S. communications markets to be characterized predominately by vigorous competition that will greatly reduce the need for direct regulation. The advent of Internet-based and other new technology-driven communications services will continue to erode the traditional regulatory distinctions between different sectors of the communications industry. As a result, over the next five years, the FCC must wisely manage the transition from an industry regulator to market facilitator. *The FCC as we know it today will be very different in both structure and mission.* [21]

Chairman Kennard was correct in predicting that in five years (2004) communications markets would be characterized predominately by vigorous competition. But his call for an FCC "very different in both structure and mission" has, unfortunately, not been fulfilled. Instead, all that has been accomplished is some trivial renaming and reshuffling of internal bureaus and offices.[22] Although the task has not been accomplished to date, Chairman Kennard was correct in emphasizing that reform of the FCC's institutional structure is an important component of any comprehensive modernization of communications law and policy.

This report aims to advance the creation of a very different FCC, which has been the aspiration of so many FCC Chairman (Kennard, Hundt, Minow) and of other policymakers. The report provides both a thorough intellectual basis for justifying the change in administrative structure, and a comprehensive review of possible alternatives. It is divided into three major parts. The first part traces the administrative and political ideals underlying the creation of the FCC and similar independent regulatory commissions. As explained, the FCC was created in 1934 in essentially the same form as its predecessor agency, the Federal Radio Commission, created in 1927, when theorists of government and administrative law championed expert, independent agencies as innovative and effective solutions to the pressing regulatory challenges of the day. These theorists placed enormous faith in administrative expertise which, it was thought, would be based on scientific principles and could be deployed not merely to regulate, but to *manage* industry. The theorists also believed that the effective exercise of administrative expertise required "independence" from other governmental

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[21] Strategic Plan: A New FCC for the 21st Century, Aug. 1999, at 1 Plan: A New FCC for the 21st Century, Aug. 1999, at 1 (emphasis added), *available at* http://www.cclab.com/cclnews/OnlineNews19991018/draft_strategic_plan.pdf.

[22] See May, supra note 12, at 1318-19 nn. 53 &54.

institutions, including freedom from almost all political control. In other words, the theorists envisioned the FCC and similar agencies to be immune from the traditional checks and balances that inhere in the tripartite system of separation of powers written into the Constitution. The aspiration was to create a thoroughly professional, efficient and managerial agency that would rely on the integrity of the agency's leaders, rather than on separation of powers and checks and balances, to ensure that the agency pursued the public interest. Under this theory, the agency's own expertise was assumed a sufficient guide for formulating policy, and agency's power was seen not as corrupting, but as ennobling.

Experience with the actual operation of independent commissions has sufficiently undermined those original ideals that, as shown in Part II, the foundational theories justifying independent commissions are now routinely dismissed as naive. Administrative and regulatory expertise has its value. But after decades of experience, government administrators and regulators are now more humble in estimating their own abilities and less skeptical of market mechanisms. While government regulation and oversight remains appropriate in many instances, the ambit of proper regulation is more often now seen as confined to certain categories of "market failure." The general management of industry is now thought to be primarily the job of private actors who are subject to market incentives and constraints.

If faith in administrative expertise has declined, so too has the dogma of independence. Modern administrative scholars have come to believe that agencies with true independence and unchecked power are both unattainable and undesirable. Existing administrative structures of the so-called independent agencies have not actually succeeded in keeping the agencies fully independent of political forces. To the extent that the independent commissions have some independence from Presidential oversight,[23] that independence is unlikely to help the agency form or execute coherent and rational policy.

Modern scholars of administrative agencies are much more likely to view increased political accountability as facilitating regulatory vigor and expertise.[24]

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[23] The very concept of "independence" has now changed. As originally used in justifying the creation of independent regulatory commissions, the term was supposed to denote independence from almost all political influence by other government entities. More recently, independence more often has come to be associated with freedom from executive oversight, but not from congresssional oversight. See, e.g., Richard Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 54 (1969) ("independence from the President apparently spells dependence on Congress").

[24] Indeed, decisions such as the landmark *Chevron* case suggest that political accountability of administrative agencies is a positive good and provides one reason why courts are willing to defer to agencies even on legal questions. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984). See generally Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Lawrence Lessig and Cass Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994).

Strong ties to the Executive and Legislative Branches place an agency in a better position to enlist presidential and congressional support for its initiatives.[25] That support may be crucial to invigorating the agency and allowing it to resist capture by private industry.[26] Furthermore, executive oversight may complement the agency's expertise. The White House's Office of Management and Budget (OMB) maintains a highly professional staff capable of applying sophisticated economic principles to review the wisdom of proposed agency regulations.[27] OMB's more general regulatory expertise may complement an agency's more narrow range of expertise.

The theoretical underpinnings of independent agencies have been so eroded that, by the end of twentieth century, former Harvard University President Derek Bok offered the following gloomy assessment of "efforts to create permanent institutions led by experts that operate without interference from politicians":

> Starting with the Progressives in the early twentieth century, reformers have tried this technique on many occasions with only intermittent success. The Federal Reserve Board has performed reasonably well. But on the whole, independent agencies are not noted for the superior quality of their decisions, nor have they been free of the political influences and interest group pressures they were created to avoid.[28]

Such skeptical assessments of expert independent commissions have produced some concrete changes, including the outright abolition of two of the most prominent expert independent agencies, the Interstate Commerce Commission (abolished during the Clinton Administration) and the Civil Aeronautics Board (abolished during the course of the Carter and Reagan Administrations).. Yet despite the erosion of support for the independent commission form, the dramatic transformation of administrative practice and regulatory theory, and the abolition of prominent independent agencies, the FCC has been almost completely immune to meaningful institutional reform.

It is in light of all these developments that the Institutional Reform Working Group has evaluated possible reforms to the FCC's structure. As explained in

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[25] Posner, supra note 23, at 54.

[26] Landis Report 1960, supra note 9, at 82 (noting that Presidential concern with agency work may decrease "the centrifugal tendencies inherent in the 'administrative branch'" and may also help in attracting good individuals to serve in the agencies).

[27] The desirability of centralized coordination of regulatory efforts has broad intellectual support. See, for example, ROBERT E. LITAN AND WILLIAM D. NORDHAUS, REFORMING FEDERAL REGULATION 2-3 (Yale 1983) (arguing that sufficient "supervision and control are missing from the current regulatory effort" and that "[o]nly the President — through his Executive Office — has taken steps to establish an oversight procedure involving supervision of the development of individual rules within the executive branch").

[28] DEREK BOK, THE TROUBLE WITH GOVERNMENT 401 (Harvard 2001).

Part III, the Working Group's primary recommendation is that the FCC's authority to establish policy through rules should be vested in a single politically accountable official located in the executive branch. This official would be expected generally to act with greater dispatch than is typical for the FCC as presently constituted. The adjudication function, which is to be the principal form of agency action under the DACA, need not be transferred. In other words, the FCC would continue to exist in its current multi-member form for the principal purpose of conducting adjudicatory proceedings (and related enforcement activities) required under the act.

Under this fundamental restructuring, the President would be more directly responsible, just as he is with respect to the policies of the Environmental Protection Agency or the Department of Commerce, for developing communications policy through congressionally delegated authority, albeit such rulemaking authority would be exercised within the more circumscribed confines, and subject to the more stringent evidentiary standards, provided by DACA.[29] The reformed commission would focus on a function within the traditional competence of multi-member panels — applying established principles to specific facts and circumstances during the adjudication of particular cases.

The Working Group's recommendation is also very similar to the "split agency" administrative structure recently created by Congress, which feature a politically accountable rulemaking administrator and a tenure-protected adjudicatory body. This structure allows for accountability and vigor in setting policies, but it also preserves the necessary degree of political independence for the decision makers who apply those general policies to specific companies and individuals.

II. The Foundations of the Independent Commission

The theoretical foundations of the independent commission were built up in the late nineteen and early twentieth centuries. The common themes of this era have already been mentioned — faith in expert, scientific administration and in agencies free from political interference exercising largely unchecked power. These historical origins provide a necessary introduction to the intellectual basis of the independent commissions generally, and the FCC specifically.

A. Scientific Progress and the Aspiration for a Scientific Regulator

[29] See Section 5 ("Rulemaking Authority") of the proposed Digital Age Communications Act in *DACA Regulatory Framework Proposal*, supra note 1 at 36-37. This section requires that any rules must be established by "clear and convincing evidence" that "marketplace competition is not sufficiently adequate to protect consumer welfare" and that any prohibited act or practice "is likely to cause substantial injury to consumers and is not avoidable by the consumers themselves and not outweighed by countervailing benefits to consumers or to competition." Id. at 36. All rules promulgated under DACA "sunset" after five years absent a showing by clear and convincing evidence that they continue to be necessary.

The rise of expert independent commissions in the late nineteenth and early twentieth centuries was a major and radical innovation in American government. To justify the innovation — and such a radical change needed a justification — government theorists pointed to the tremendous technological changes that had occurred over the past century. Those technological changes, and the social changes they induced, demanded new forms of government. Moreover, those technological and social changes also provided an inspiration. Science had transformed technology and industry for the better; the hope was that it would do the same for government. The use of technological change to justify governmental innovation traces back to the very beginning of the movement to create expert independent regulatory commissions. Charles Francis Adams, Jr., grandson of President John Quincy Adams, began to lay the early foundations of the modern administrative state during the period immediately after the Civil War. Adams' pioneering articles argued that technological advance not only was reshaping American society, but was also demanding new forms of regulation.[30] The advent of steam power, Adams claimed, was not merely "a great result of science;" it was one of "the most tremendous and far-reaching engine[s] of social revolution which has ever either blessed or cursed the earth."[31] While steam power was a "leading element of modern progress," it was also a challenge to government because "no community can rely on competition to correct any abuses which may creep into [the rail industry]."[32]

Adams' arguments resonated with the populace precisely because the technological revolution of the time was so vast and unprecedented. Throughout all of prior recorded human history, the forces available for transportation or industrial production had always been limited to wind, water, animals, and the brute force of humans.[33] The nineteenth century saw the rise of vast networks of railroads capable not only of transporting people but also raw materials, crops

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[30] THOMAS K. MCCRAW, PROPHETS,OF REGULATION 7 (1984); Harry M. Trebing, *Regulation of Industry: An Institutional Approach* in 2 EVOLUTIONARY ECONOMICS 289, 291-92 (MARC R. TOOL, ED., 1988) (noting the influence of Adams and his arguments that technological changes were reshaping American society).

[31] Charles F. Adams, Jr., *The Railroad System*, 104 N. AMER. REV. 476, 480-83 (1867)[hereinafter Adams, *The Railroad System*]. (While this article was published anonymously, the author's identity was well known in the intellectual circles of Boston. *See* McCraw, *supra* note 31, at 312-13 n.16). For Adams, only the invention of the printing press and the discovery of the New World had wrought social changes as significant as those brought by the harnessing of steam. Adams, *The Railroad System*, supra, at 483.

[32] See also Charles F. Adams, Jr., *Railroad Commissions*, 2 J. OF SOCIAL SCIENCE 233, 233 (1870) [herinafter Adams, *Railroad Commissions*] (also an anonymous article attributed to Adams, *see* McCraw, supra note 31, at 312-13 n.16).

[33] See, e.g., John H. Lienhard, *The Rate of Technological Improvement Before and After the 1830s*, 20 TECH. & CULTURE 515, 519 (1979) (noting that for the whole of human history prior to the late 18th century, moving as fast as possible "meant approaching as closely as possible to the natural speed of horses or of the wind").

and finished goods far more cheaply, quickly and reliably than had been done in the past.[34] Steam power also brought revolutionary new techniques to manufacturing, and the perfection of telegraph and later telephone technology also brought enormous and unprecedented change to communications.

Adams' argument that the nineteenth century's great technological changes demanded governmental innovations was drawn much more academically, and in much greater detail, by Woodrow Wilson, one of the most influential of the Progressives theorists. In his 1885 book, *Congressional Government*, Wilson was even more explicit about the need for governmental reform flowing from technological changes and the industrial developments those changes begat.[35] But such simple governmental structures — and perhaps even the Constitution itself — were threatened with obsolescence because of changed conditions.[36] The "difficulties of governmental action," which had been gathering in other centuries," were "culminating in our own."[37] And it was the culmination of those difficulties that provided "the reason why we are having now what we never had before, a science of administration."[38]

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[34] See id. at 521-22 (plotting the exponential increase in transportation speed during the nineteenth century, from just over 10 miles per hour at the beginning of the century, to over 100 miles per hour by the end).

[35] WOODROW WILSON, CONGRESSIONAL GOVERNMENT 199 (1885; 15th ed. 1925).

[36] Constitutional revision was a real possibility, Wilson thought, because:

> The Constitution was adopted when it was six days' hard traveling from New York to Boston; when to cross the East River was a to venture a perilous voyage; when men were thankful for weekly mails; when the extent of the country's commerce was reckoned not in millions but in thousands of dollars; when the country knew few cities, and had but begun manufactures; when Indians were pressing on the near frontiers; when there were no telegraph lines, and no monster corporations.

Id. at 54. Wilson's concluding reference to "monster corporations" reveals an additional part of the argument in favor of governmental change. The technological changes of the nineteenth century had, in turn, produced significant social and business changes, including the rise of much larger corporations than previously had been seen, and such corporations brought with them large work forces and complex financial structures. Technological change could therefore be seen to beget new social developments, and these in turn created the need for new governmental structures. In making a case for governmental innovation, Wilson pointed not only to the rise of the modern corporation, but also to changed labor conditions, and above all else, he emphasized how new the problems were. Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. QUAR. 197, 199-200 (1887).

[37] Id. at 200.

[38] Id. at 200.

That phrase — the "science of administration" — became widely used,[39] and it gave a good indication of the type of administrative agency desired. The agency's staff was supposed to be highly trained, expert and professional. Previously, governmental regulation of various complex industries, including the banking, insurance and even railroad industries, had been undertaken by ad hoc legislative committees. But in later half of the nineteenth and beginning of the twentieth centuries, these ad hoc committees came to be viewed as inexperienced, inexpert, inadequate and readily deceived.[40] Progressive reformers such as Wilson longed to make the regulatory instruments of government not only scientific, but also more "businesslike."[41] Thus, agencies would be staffed by "[a] body of thoroughly trained officials serving during good behavior," for such a staff was "a plain business necessity."[42]

The argument pioneered by Adams and Wilson — that scientific, technological and industrial change precipitated a need for change in governmental institutions, and specifically for more scientific government, became a standard feature of Progressive and later New Deal era writings. For example, the introduction to Gerard Henderson's classic 1924 study of the Federal Trade Commission postulated that the "steady extension of legal control" that had occurred in the Progressive era merely "reflected" "[t]he vast changes wrought . . . during the nineteenth century" — particularly "the introduction of new mechanical forces, the penetrating influence of science, large scale industry and

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[39] See, e.g., Charles A. Beard, *Training for Efficient Public Service*, 64 ANNALS AM. ACA. POL. & SOC. SCI. 215, 224 (1916) (praising the development of a "new science of administration," which though as yet "[i]nchoate" was "none the less very real"); LUTHER GULICK AND L. URWICK, EDS., PAPERS ON THE SCIENCE OF ADMINISTRATION (1937) (collecting works on the topic); Edwin O. Stene, *An Approach to a Science of Administration*, 34 AM. POL. SCI. REV. 1124 (1940) (outlining foundational principles for a scientific form of administration); GERARD C. HENDERSON, THE FEDERAL TRADE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE 328 (1924).

[40] See, e.g., Leonard D. White, *The Origin of Utility Commissions in Massachusetts*, 29 J. POL. ECON. 177, 180 (1921) (reviewing antebellum regulation by legislative committee in Massachusetts and setting forth the perceived "weaknesses of the legislative committee as an enforcing agency," including that the legislative committee's "supervision was necessarily temporary and intermittent; its activities were usually undertaken after the damage had been done; it members, depending on their own genius for discovery, were readily deceived.") See also Elihu Root, *Public Service by the Bar, Address as President of the American Bar Association at the Annual Meeting in Chicago, Aug. 30, 1916,* in ELIHU ROOT, ADDRESSES ON GOVERNMENT AND CITIZENSHIP 519, 535 (Robert Bacon and James Brown Scott, eds., 1916) (asserting that administrative "agencies furnish protection to rights and obstacles to wrongdoing which under our new social and industrial conditions cannot be practically accomplished by the old and simple procedure of legislatures and courts as in the last generation").

[41] Wilson, *The Study of Administration*, supra note 36, at 210.

[42] Id. at 216. See also See H.E. Miles, *An Argument for a Permanent Expert Tarriff Commission*, 32 ANNALS AM. ACA. POL. & SOC. SCI. 170, 175 (1908) (asserting that "[t]here is no doubt of the wide-spread use of the commission plan or its efficiency in handling questions which require careful consideration" and that "[t]hose commissions generally stand for efficiency and economy and for the methods of our business life").

progressive urbanization."[43] By the time of the New Deal, administrative "regulation had become accepted as the natural response to the development of new technologies."[44] Thus, in 1938, James Landis — then Dean of the Harvard Law School, formerly the Chairman of the Securities and Exchange Commission, formerly a member of the Federal Trade Commission, and always the quintessential New Dealer[45] — could easily assert that "the administrative process springs from the inadequacy of a simple tripartite form of government to deal with modern problems" and "modern needs," especially the need to control the new "economic forces that invention had released."[46] The argument found its way into Supreme Court opinions.[47] Indeed, such was the power of the argument that it lived on even into the second half of the twentieth century.[48]

It is worth noting at least one serious flaw in the Progressive era arguments that were evident from the very beginning. First, the great technological advances acknowledged by Adams, Wilson and other Progressives had all occurred under pre-existing legal structures, with private corporations lightly regulated by governments devoid of expert independent agencies. It hardly seems an effective indictment of that regime to note that it had fostered the greatest period of technological and industrial development known to mankind. Adams appreciated this problem, conceding that "all these [technological] revolutions have been worked . . . through the machinery of private corporations."[49] But Adams nevertheless claimed in conclusory terms that "the charge now advanced against the corporate system is not a light one, nor is it supported by doubtful evidence."[50]

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[43] GERARD C. HENDERSON, THE FEDERAL TRADE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE at v. (1924).

[44] Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1262 (1986).

[45] Carl McFarland, *Landis' Report: The Voice of One Crying Out in the Wilderness*, 47 VA. L. REV. 373, 374 n.2 (1961) (summarizing Landis' career).

[46] JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 1, 9 (1938).

[47] See FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940) (quoting Elihu Root's assertion that administrative agencies were the inevitable result of "our new social and industrial conditions").

[48] Thus, as late as 1969, a respected scholar of government asserted that "[t]he increased pace of technological change in our epoch seems only to make the need for administration more intense—or else technological change would be wasted." THEODORE J. LOWI, THE END OF LIBERALISM 31 (1969). See also *Landis Report,* supra note 9, at 1-2 (asserting that "[t]he advent of atomic energy, of telecommunications, of natural gas, of jet aircraft all call for greater surveillance by government").

[49] Adams, *Railroad System,* supra note 32,at 496.

[50] *Id.* Another deep flaw with the Progressive call for a new "science of administration" was that the tools for a true "science" in the field were so primitive. Thus, while calling for a science of administration, Woodrow Wilson simultaneously eschewed one of the most fundamental pillars of science — empirical research. "The object of administrative study," Wilson contended, was "to rescue executive methods from the confusion and costliness of empirical experiment and set

B. Independence and Unchecked Powers: Admiration for the Business Corporation and for European Autocracy

If the technological revolution of the nineteenth century provided the justification, and to some extent, the aspiration for new regulatory commission, it did not dictate the precise structure for the commissions. Admiration for science did not necessarily mean that scientifically expert agencies must be constituted in the form of politically independent commissions with broad delegations and few checks on their power. The inspiration for that particular structure came from two sources: the business corporation and the centralized bureaucracy of continental Europe.

The first of these two sources was the most important. The advent of what Woodrow Wilson called "monster" corporations[51] — large scale, heavily capitalized, and thoroughly private corporations — exerted a powerful influence on Progressive era thought. For although the reformers of the time were responsible for establishing the foundations of the modern administrative state, what we now think of as "big government," they themselves were bitingly harsh critics of existing public institutions and great admirers of private business. An early reformer such as Charles Adams, for example, vigorously opposed public ownership of industry because he believed that "[g]overnments cannot economically manage large and complex interests;" that "government is the most expensive way of not doing things;" and that "self-interest is necessary to the wise and economical management of all property."[52] Indeed, he pronounced generally that "[i]t is rapidly becoming throughout the world—and the more rapidly the better—a cardinal principle of the polity, that the more the functions of government can be reduced, the better."[53] Similar sentiments were expressed by

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them upon foundations laid deep in stable principle." Wilson, *The Study of Administration*, supra note 37, at 210. But a deep and stable principle of any traditional science *is* empirical experimentation. Some writers of the time were candid in acknowledging the primitive state of administrative science. For example, Luther Gulick, the Eaton Professor of Municipal Science and Administration at Columbia University and Director of the Institute of Public Administration, wrote in 1937 that "[a]t present time administration is more an art than a science." Luther Gulick, *Science, Values and Public Administration*, in LUTHER GULICK AND L. URWICK, PAPERS ON THE SCIENCE OF ADMINISTRATION 191 (2nd ed. 1947).

[51] Wilson, *Congressional Government,* supra note 35, at 54.

[52] Adams, *The Railroad System*, *supra* note 31, at 508. Adams feared that government-owned companies would "inevitably tend to jobbery and corruption; they would become disturbing elements in party politics, and the great interests of the community [would be] made the footballs of faction."

[53] *Id*. See also Charles F. Adams, Jr., *Railroad Inflation*, 108 N. AMER. REV. 159 (1869) ("In America, particularly, the whole instinct of the people leads them to circumscribe rather than to enlarge the province of government. This policy is founded in wisdom. Government by the people is apt at all time to degenerate into government by the politicians and the caucus; and the people, if wise, will keep the province of government within reasonable limits."); Charles F. Adams, Jr., *The Government and the Railroad Corporations*, 112 N. AM. REV. 31, 50 (1871) ("That the government should engage in any business, whether as producers, as carriers, as

other contemporaneous champions of independent regulatory agencies.[54] But such negative views of government institutions did not blunt the enthusiasm for independent administrative agencies because the then-prevalent view was that, as Woodrow Wilson expressed it, "[t]he field of administration is a field of business."[55]

Distrust of existing government institutions and respect for private business created a deep paradox in the theory undergirding independent regulatory commissions. Reformers such as Adams and Wilson wanted a regulatory institution that was to some degree private and, simultaneously, to some degree public. Adams, for example, wanted institutions that would have the efficiency of private corporations, including the "self-interest . . . necessary to the wise and economical management of all property," and yet that would also be responsive to the larger public interest—all while still "preserving the separation between the body politic and all private industry."[56] Similarly, Wilson wanted politics to "set[] the tasks for administration, [though] it should not be suffered to manipulate its offices." Rather, administrative agencies were to be "removed from the hurry and strife of politics" precisely because of the "truth ... that administration lies outside the proper sphere of *politics.*"[57]

By the time of the New Deal, admiration for private business had been transformed into constitutional theory. In justifying his disregard for constitutional separation of powers doctrine, James Landis based his argument on the same ideal of bringing the efficiency of private business into government: "If in private life we were to organize a unit for the operation of an industry, it would scarcely follow Montesquieu's lines. As yet no organization in private industry either has been conceived along those triadic contours, nor would its normal development, if so conceived, have tended to conform to them."[58] The government must grant to the administrative authority all "necessary powers" and

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bankers, or as manufacturers, is opposed to the whole theory of strictly limited governmental functions.").

[54] As Edwin Seligman wrote in 1887, "[t]o cure the abuses of [rail rate] classification by letting our congressmen fix the classification would indeed be jumping from the frying pan into the fire." Edwin R.A. Seligman, *Railway Tariffs and the Interstate Commerce Law* 2 POL. SCI QUART. 223, 235 (1887); see also id. ("And those who advocate state ownership [of railroads] forget to think of the havoc that would be created by the simple political influence of lawmakers. ... Were the state to own the railways under our actual political system, the claims upon our legislators for spoils would be increased a thousand-fold."). In same era, Woodrow Wilson lamented [t]he poisonous atmosphere of city government, the crooked secrets of state administration, the confusion, sinecurism, and corruption even and again discovered in the bureaux at Washington." Wilson, *The Study of Administration*, supra note 37, at 201.

[55] Wilson, *The Study of Administration*, supra note 36, at 209.

[56] Adams, *The Government and the Railroad Corporations, supra* note 53, at 51.

[57] Wilson, *The Study of Administration*, supra note 36, at 210. .

[58] LANDIS, *supra* note 46, at 10.

"not [be] too greatly concerned with the extent to which such action does violence to the traditional tripartite theory of governmental organization."[59]

The irony here is palpable: Expert independent agencies were to emulate private enterprises even to the extent of doing violence to the traditional theory of American government. Yet such agencies would be missing crucial elements that enforce efficiency in private business—profit incentives and market discipline. This paradoxical structure remains at the heart of the independent agencies such as the FCC, and the flaws in the structure have become increasingly apparent with the passage of time.

Aside from the analogy to private business, the other inspiration for abolishing traditional checks and balances came from the strong centralized governments of continental Europe. The influence of these absolutist governments was especially clear in Woodrow Wilson's thought. For Wilson, Prussia was the country "where administration has been most studied and most nearly perfected," and "[a]lmost the whole of the admirable system has been developed by kingly initiative."[60] The rise of administration in Napoleonic France was Wilson's "second example of the perfecting of civil machinery by the single will of an absolute ruler." The administrative system developed there "was ruthlessly thorough and heartlessly perfect." In contrast, "administrative improvement [was] tardy and half-done" in countries such as England and the United States that have been preoccupied with "the art of curbing executive power to the constant neglect of the art of perfecting executive methods."[61]

Wilson was unapologetic in pointing to the administrative structures of absolutist regimes. The "democratic state" had "yet to be equipped for carrying those enormous burdens of administration which the needs of this industrial and trading age are so fast accumulating."[62] The United States could "borrow the science of administration" from foreign sources: "If I see a monarchist dyed in the wool managing a public bureau well, I can learn his business methods without changing one of my republican spots."[63]

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[59] *Id.*. at 12.

[60] Wilson, *The Study of Administration*, supra note 36,at 204.

[61] Id. 205-06.

[62] Id. at 218. See also Wilson, Congressional Government, supra note 35, at 203 (claiming that "no great administrators" have emerged in this country because "[t]he forms of government in this country have always been unfavorable to the easy elevation of talent to a station of paramount authority; and those forms in their present crystallization are more unfavorable than ever to the toleration of the leadership of a few").

[63] Id. at 219-220.

None of this is to suggest that Wilson or other Progressives were interested in jettisoning democracy.[64] Indeed, other Progressive reforms — for example, the constitutional shift to direct election of Senators and the encouragement of popular referenda for State governance — were designed to further democratic ideals. But admiration for supposed efficiency of centralized power made some Progressives skeptical of the separated power advocated by Montesquieu and embraced by the Founders. Thus, Wilson would recommend that "we must think less of checks and balances and more of coördinated power, less of separation of functions and more of the synthesis of action."[65] When Montesquieu was mentioned during this time, it was always negatively, even though the Founders' debt to him was openly and honestly acknowledged.[66]

C. The Result: The Powerful, Expert, Independent Regulatory Commission

All of these strands of thought led to the creation of expert independent commissions with broad mandates to regulate the industrial life of the nation.

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[64] The admiration for centralized expert administration did, however, create an enduring tension in Progressive era thought. For example, in struggling to reconcile the twin Progressive era impulses toward greater democracy and greater reliance on an "aristocracy" of expert administrators, the influential Progressive era writer Mary Parker Follett was driven to assert that "aristocracy is a necessary part of democracy":

> We are at present trying to secure (1) a more efficient government, and (2) a real not a nominal control of government by the people. The tendency to transfer power to the American citizenship, and the tendency towards efficient government by the employment of experts and the concentration of administrative authority, are working side by side in American political life to- day. These two tendencies are not opposed, and if the main thesis of this book has been proved, it is understood by this time why they are not opposed. Democracy I have said is not antithetical to aristocracy, but includes aristocracy. And it does not include it accidently, as it were, but aristocracy is a necessary part of democracy. Therefore administrative responsibility and expert service are as necessary a part of genuine democracy as popular control is a necessary accompaniment of administrative responsibility. They are parallel in importance. Some writers seem to think that because we are giving so much power to executives, we must safeguard our "liberty" by giving at the same time ultimate authority to the people. While this is of course so in a way, I believe a truer way of looking at the matter is to see centralized responsibility and popular control, not one dependent on the other, but both as part of the same thing — our new democracy.

MARY PARKER FOLLETT, THE NEW STATE 174-175 (Penn. State. 1998 ed., originally published 1918).

[65] WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 221 (1908).

[66] See id. at 56 (acknowledging that "[t]he makers of the federal Constitution followed the scheme as they found it expounded in Montesquieu," but arguing that government is "a living thing" and that "[n]o living thing can have its organs offset against each other as checks, and live"). That the Framers followed Montesquieu in writing the Constitution was untroubling to Wilson, for he believed that the Constitution should be viewed as "a vehicle of life" to be interpreted "not by the original intention of those who drew the paper but by the exigencies and the new aspects of life itself." Id. at 192.

These commissions were intended to be scientific, in that they should be staffed with experts. They were to be like business corporations in that they would be efficient and, at least in their day-to-day operations, independent of the corrupting influences of politics. And they were to be centralized and powerful like the governments of continental Europe, which were viewed as models of efficiency. Even a cursory description of the aspirations for the new independent commissions suggests that they would have some difficulty living up to expectations. But there are a few specific features of the independent commission's structure that demand special attention.

1. *The Check on Commission Power: More Power*

The original conceptions of independent regulatory commissions left one extremely important question, best articulated by Charles Francis Adams: "Who," as Adams asked, "will guard the virtue of the [administrative] tribunal? Why should the corporations not deal with them as with the legislatures?"[67] This issue is immensely important in hindsight because many late 20th century scholars would come to conclude that the corporations *did* eventually deal with commissions just as they had dealt with legislatures — by capturing them to serve corporate interests. It is thus worth reviewing what was originally thought to be the safeguard of the commission's virtue.

Adams' answer was extraordinarily simple, and it would be repeatedly invoked by other Progressives: "[S]omewhere and at some point, put on all the checks and balances that human ingenuity can devise, we must come back and rely on human honesty at last." Public boards of trade and railroad commissions had failed in the past, Adams admitted, but that was because those bodies had "possessed a mere simulacrum of power" and therefore had attracted as appointees "very inferior and, not seldom, corrupt men."[68] To remedy this problem, Adams proposed that "[t]he duties, the responsibilities, and the characters of those composing these boards should . . . be brought up to the highest standard,—to an equality, in short, with those of the judges of our courts."[69] Salary was also important, for "inadequate" pay would not attract competent individuals.[70] But with sufficient money and power, the positions would attract persons "fully competent to represent the interests of the State with an experience and ability, a knowledge of details, and a zeal in their occupation

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[67] Adams, *The Government and the Railroad Corporations, supra* note 53, at 58.

[68] *Id*. at 59.

[69] *Id*.

[70] Adams, *Railroad Commissions*, *supra* note 32, at 235-36 (concluding that, in creating a federal commission Congress should not "seek to procure a man competent to deal with these questions, on behalf of a great nation, on a salary so very inadequate as $3,000 a year"). Compensation of the commissioners was always an important issue to the reformers.

equal to that ever so conspicuously displayed by the agents of the corporations."[71]

In essence, Adams argued for the conferring *more responsibility* on institutions acknowledged to have failed in the past; indeed, greater duties and responsibilities was the very remedy for failure.[72] If this bold argument demonstrates a seemingly unjustified confidence in the abilities of the new class of commissioners whom Adams hoped to attract, it must be noted that the confidence was in part *self*-confidence. Adams was not a disinterested observer. In 1869, he had been appointed as a commissioner of the newly created Massachusetts Board of Railroad Commissioners, and he desperately wanted the new agency to prosper.

Though the new confidence in powerful administrative experts may have begun more as self-confidence, it was infectious. Within two decades, Woodrow Wilson advanced nearly identical arguments: "[T]he greater [a man's] power the less likely is he to abuse it, the more is he nerved and sobered and elevated by it," Wilson wrote.[73] Thus, "large powers and unhampered discretion" were, for Wilson, "indispensable conditions of responsibility."[74] Indeed, Wilson declared: "I cannot imagine power as a thing negative, and not positive."[75] These views were, of course, in sharp contrast to the dominant American political culture at the time of the founding, which had been permeated by English Whig thought with its classic distrust of accumulated power best summarized by William Pitt

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[71] Adams, *The Government and the Railroad Corporations, supra* note 53, at 60.

[72] Curiously, Adams did not propose to confer enforcement powers on the independent commission. He proposed only that the commission be given authorized to obtain information, to study the problem, and to place its results "before legislatures for intelligent action." Adams, *Railroad Commissions*, *supra* note 33, at 236; *see also* ROBERT E. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 47 (1972) (noting that Adams testified in 1885 before Congress in favor of a commission that would merely provide "observations" that "might be of value in leading gradually to the building up of legislation"). And, in fact, the Massachusetts commission created by legislation that Adams helped to write possessed only "a mere simulacrum of power," for it had no enforcement powers other than persuasion and publicity. *See* Trebing, *supra* note 31, at 292. Thomas McCraw describes Adams' limitation on commission enforcement powers as "one of the most ingenious and calculated self-denials in the entire history of regulation." McCraw, *supra* note 30, at 20. But Adams' support for such a "sunshine commission" may have been less of a self-denial than it may first seem. Adams' main concerns throughout his writing appear to be first, to establish some form of new supervisory public body and, second, to secure himself a post on the new body. Adams may very well have believed that the chances to achieve his goals were higher if he proposed a weak commission that would function as an advisory body to the legislature. Indeed, Adams support for a sunshine commission seems inconsistent with his views that the legislature had already been captured by the railroads and that responsibility attracted competence.

[73] Wilson, *The Study of Administration*, supra note 36, at 214.

[74] Id. at 213.

[75] WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 106 (1908).

the Elder's warning that "[u]nlimited power is apt to corrupt the minds of those who possess it."[76]

2. *Staffing of the Commissions: "Men and Big Abilities and Big Visions"*

The view that great power would foster great propriety had the corollary that positions on these powerful commissions would be highly prestigious and would attract some of the nation's most talented individuals for government service. Indeed, since so much power was being delegated to the commissions and so few checks placed on that power, staffing commissions with exceptional individuals was viewed as essential to the success of the project.

The importance of staffing is particularly evident in the legislative history of the FCC's immediate predecessor, the Federal Radio Commission. The FRC's structure was determined mainly by the Senate, which supported a more powerful commission having comprehensive regulatory power over radio transmissions.[77] The Senate Committee Report did not view the Commission as an arm of the government. Rather, the Report opined that radio regulation "is fraught with such great possibilities that it should not be entrusted to any one man nor to any administrative department of the Government."[78] The Senate put its faith in "one independent body" which would be granted "full and complete authority over the entire subject of radio."[79] This independent body was to be guided its expert, visionary leadership. The commissioners would be "men of big abilities and big visions,"[80] who would "study every phase of the subject" so that the commission would become "an expert authority on radio communication" and would be "able to assist and encourage development of the art."[81] To attract "men of the proper caliber," the Senate bill proposed paying the high salary: $12,000 per year, which a full 20% more than the salary then earned by the Senators themselves.[82] Such a generous salary, coupled with the broad power to be vested in the office, would attract individuals capable of carrying out "the

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[76] William Pitt, *Case of Wilkes, Speech* (Jan. 9, 1790), *quoted in* JOHN BARTLETT, FAMILIAR QUOTATIONS 313 (LITTLE, BROWN 1992). For the later, though more famous, expression of the same thought, see id. at 521 (quoting Lord Acton's 1887 Letter to Bishop Creighton, "Power tends to Corrupt and absolute power tends to corrupt absolutely").

[77] *See* S. REP. NO. 772, 69th Cong., 2nd Sess. 2 (1926).

[78] Id.

[79] *Id.* at 2-3.

[80] 67 CONG. REC. 12,354 (1926) (statement of Sen. Dill). *See also* S. REP. NO. 69-772, at 3.

[81] S. REP. NO. 69-772, at 3.

[82] *Id*. *See also* 2 U.S.C. § 31 (1926), reprinted in 44 Stat. (part 1) at 4 (setting salaries for both members of Congress and Senators at $10,000 per annum). The proposed salary was, however, consistent with the amount paid to members of the ICC. 49 U.S.C. § 18(1) (1926), reprinted in 44 Stat. (part 1) at 1666.

exercise of a high order of discretion and the most careful application of the principles of equitable treatment to all the classes and interests affected."[83]

3. *Delegating Enormous Tasks: A Commission as a "Master of Masterful Corporations"*

While today the predominant vision is almost certainly that government regulation should be directed toward remedying rather specific "market failures" — even the phrase suggests the market is a presumptive baseline — the vision for early administrative agencies was much different. Government was instead viewed as needing "some way [to] make itself master of masterful corporations."[84] "Administration" was expected to be "everywhere putting its hands to new undertakings," and reformers were "[s]eeing every day new things which the state ought to do."[85] In sum, the Progressive-era advocates of independent commissions "had an abiding faith in regulation, expertness, and the capacity of American government to make rational decisions provided experts in the administrative agencies could remain free from partisan political considerations."[86]

The level of Progressive confidence in expert commissions is well demonstrated by Adolf Berle's 1917 article *The Expansion of American Administrative Law*:

> [T]here arise problems which require peculiar and expert handling; a striking example is that of railway regulation. The popular will cannot be expressed by Congress, because the popular will does not discover a method. A result is wanted—better service and rates, freedom from discrimination and tyranny. No general body can reach that result: it takes an expert economist to formulate a rule. Accordingly, we must construct a *special* administrative body—a commission, like the Interstate Commerce Commission—and charge this body with the duty of investigating the problem and of laying down the rule which will reach the given result.[87]

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[83] S. REP. NO. 69-772, at 3.

[84] Wilson, *The Study of Administration*, supra note 36, at 201. See also Dayton-Goose C. R. Co. v. United States, 263 U.S. 456, 478 (1924) (describing the statutory policy as being designed to put the entire railroad industry "under the fostering guardianship and control of the [ICC]"); ISAIAH L. SHARFMAN, THE INTERSTATE COMMERCE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE 4 (1931) (noting that the ICC had been delegated such authority that the agency was "acting virtually as a superdirectorate for the entire railway net").

[85] Wilson, *The Study of Administration*, supra note 36, at 201.

[86] MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 36 (1955).

[87] A.A. Berle, Jr., *The Expansion of American Administrative Law*, 30 HARV. L. REV. 430, 439 (1917).

As Berle notes, neither the legislature nor the general populace knew how to solve the problem—i.e., how to get better service *and* better rates. But lack of any apparent solution did not suggest the impossibility of getting more for less. Rather, the solution must exist, though "the only hope" of finding it "is to turn a body of experts loose on a question, instructing them to use their best trained judgment, their undoubted accessibility and consequent simplicity of procedure, and a wide range of powers designated in the statute creating the commission, without technical checks."[88] This approach saddled commissions with enormous expectations and with possibly unsolvable tasks.

This approach is visible in the legislative history underlying the FCC. Representative White, Republican author of the original House bill creating the FRC, had stated as early as 1922 that "[i]t seems to be that all Congress can do is to lay down some general rules and to delegate some full powers on a regulatory body," which would then "work out the details of the regulation."[89] That sort of delegation is precisely what the FRC would receive. Congress conferred "wide powers" under a public interest delegation in the hope that the commission could "deal with, and perhaps solve, many of the problems which now perplex us" in the "extremely complicated" and "highly technical and complex subject" of radio regulation.[90]

4. *Contradictory Assumptions: Independent but Responsive*

Finally, the champions of independent commissions made two seemingly contradictory claims about how commissions would behave. On the one hand, administrative tasks of commission were supposed to be apolitical because "administration lies outside of the proper sphere of politics" and "[a]dministrative questions are not political questions."[91] On the other hand, "administration in the United States must be at all points sensitive to public opinion."[92] Officials with an administrative body were supposed to be a "body of thoroughly trained officials serving during good behavior," but the "good behavior" of the officials would be judged by their "hearty allegiance to the policy of the government they serve."[93]

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[88] Id. at 441-442.

[89] J. Roger Wollenberg, *The FCC as Arbiter of "The Public Interest, Convenience and Necessity*," in A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934, at 64 & n.17 (MAX D. PAGLIN ED., 1989) (quoting U.S. Dept. of Commerce, Conference on Radio Telephony, Minutes of Open Meeting 53 & 93 (Feb. 27-28, 1922)).

[90] 67 CONG. REC. 5486 (1926) (statement of Rep. Schuyler Bland). As to the indeterminate nature of the public interest delegation, see Randolph J. May, *The Public Interest Standard: Is It Too Indeterminate to Be Constitutional?* 53 FED. COMM. L. J. 427 (2001).

[91] Wilson, *The Study of Administration*, supra note 36, at 210.

[92] Id. at 216.

[93] Id. at 216. The two conflicting goals — independence and political responsiveness — were sometimes even evident in a single sentence. See, e.g., H.E. Miles, *An Argument for a Permanent Expert Tarriff Commission*, 32 ANNALS AM. ACA. POL. & SOC. SCI. 170, 174 (1908)

Yet commission independence was inherently in conflict with the goal of making commissions responsive to democratically established policy because, to the early champions of regulatory commissions, independence meant not merely insulation from executive removal, but also more generally from political forces. Thus, Isaiah Sharfman — who produced a definitive study of the ICC in 1931 — denounced Congress for passing the Hoch-Smith Resolution, which was an attempt to dictate the principles that the ICC would use in regulating railroad rates.[94] Sharfman found the legislation to "represent[] a type of Congressional interference ... which may seriously threaten the independent performance of the Commission's tasks, and the unhampered adjustment of rate relationships on the basis of enduring principles, calculated to promote the general welfare."[95] Given the choice between the legislature and the expert commission, Sharfman unequivocally preferred the latter:

> The powers of the Commission are so vast, the numerous tasks with which it is charged are so intimately intertwined, and the inherent scope of its discretion is so sweeping, that the more or less arbitrary infusion of extraneous influences, however well intentioned, is bound to render difficult the maintenance of unswerving adherence to reasoned conclusions and permanently significant standards of action.[96]

A sweeping view of independence is clearly apparent in the famous Supreme Court case of *Humphrey's Executor v. United States.*[97] William Humphrey, a Commissioner of the Federal Trade Commission, was appointed by President Hoover for a seven-year term. The FTC statute provides that "[a]ny commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office."[98] Soon after taking office in 1933, President Roosevelt sent Humphrey a letter purporting to remove him from his office. The President's sole reason for the removal was that "the aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of my own selection."[99] The Supreme Court's holdings in the case were quite narrow. The Court held that the FTC Act did limit the President's removal power to the statutorily listed causes and that such a limitation on the power to remove FTC Commissioners was constitutional. In

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(claiming that "[t]he fight today for experts of independent standing, who [will act] as servants of Congress").

[94] SHARFMAN, supra note 84, at 227 (discussing the Hoch-Smith Resolution, ch. 120, 43 Stat. 801 (1925)).

[95] Id. at 230.

[96] Id. at 231.

[97] 295 U.S. 602 (1935).

[98] Id. at 620 (quoting section 1 of the FTC Act, 15 U.S.C. § 41). The statutory language remains unchanged.

[99] Id. at 618.

reaching those holdings, the Court relied on the legislative history of the FTC Act, which stated that the FTC was intended "not to be 'subject to anybody in the government,'" and that it was to be "free from 'political domination or control' or the 'probability or possibility of such a thing.'"[100] The FTC Commissioners, the Court concluded, "are called upon to exercise the trained judgment of a body of experts 'appointed by law and informed by experience," and the agency was designed to be "free to exercise its judgment without the leave or hindrance of any other official or any department of the government."[101] Yet even in *Humphrey's Executor*, the Court's broad views on agency independence were coupled with the view that the FTC should be enforcing "the policy of the law" and that, while the agency would not be subject to anyone in the government, it should be "subject ... to the people of the United States."[102] The Court did not identify what mechanism would keep the FTC Commissioners faithful to the policy of the law or make them subject to the people of the United States.[103]

Two further points should be noted about the Court's opinion in *Humphrey's Executor*. First, though the Court's opinion is sometimes cited as supporting the view that independent regulatory commissions such as the FTC or FCC should be viewed as "arms of Congress,"[104] that is not a historically accurate interpretation of the Court's opinion. True, the Court did state that an independent commission such as the FTC was to remain "wholly disconnected" from executive control and influence and that it "cannot in any proper sense be characterized as an arm or an eye of the executive."[105] These statements, however, were made to emphasize that the agency would not be subject to control by the President — which was the point at issue in the litigation. But the

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[100] 295 U.S. at 625.

[101] Id. at 624-26.

[102] Id. at 625.

[103] For a decision explicitly applying the *Humphrey's Executor* rationale to the FCC and holding the FCC is an independent agency and not part of the Executive Branch, see United States v. American Tel. & Tel. Co., 461 F. Supp. 1314 (D.D.C. 1978). For an analysis of the decision, see Randolph J. May, *Solving the Mystery of "Who Is the Plaintiff?"and the Nature of Independent Regulatory Agencies*, 32 ADMIN. L. REV. 749 (1980).

[104] Yvette M. Barksdale, *The Presidency and Administrative Value Selection*, 42 AM. U.L. REV. 273, 291(1993) (asserting that the *Humphrey's Executor* Court "appeared to view administrative agencies as constitutionally independent from the Executive or perhaps even as arms or extensions of Congress"). See also Richard E. Wiley, *"Political" Influence at the FCC*, 1988 DUKE L. J. 280, 282 (recounting the "famous story" of former FCC Chairman Newton Minow who, shortly after his appointment as Chairman, was advised by House Speaker Sam Rayburn: "Just remember one thing, son. Your agency is an arm of the Congress; you belong to us. Remember that and you'll be all right.").

[105] Id. at 630, 628. The opinion also states that the commissioners occupied "no place in the executive department," were "exercis[ing] no part of the executive power vested by the Constitution in the President, and should discharge "their duties independently of executive control." Id. 628-29. The Commission itself, the Court stated, must perform its duties "free from executive control." Id. at 628.

opinion also makes clear that an independent agency was not supposed to be controlled by the executive *or by any other government official*.[106]

Second, although the Court in *Humphrey's Executor* embraced a sweeping view of independence from executive control and from all other political forces, that view has been undermined by subsequent events, and it has now been explicitly disavowed, in its pure form, by the Supreme Court. Even during the era in which the opinion in *Humphrey's Executor* was written, the original conception of commission independence was being somewhat eroded. For example, the *Humphrey's Exeucutor* Court reasoned, to ensure the Commission would be "free to exercise its judgment without the leave or hindrance of any other official or any department of the government," that "Congress was of opinion that *length* and certainty of tenure would vitally contribute."[107] The five FTC Commissioners enjoyed a seven year term. At the beginning of the Roosevelt administration, a seven-year term was among the shortest tenures enjoyed by members of independent regulatory commissions: Only commissioners on two other agencies — the Federal Radio Commission and the United States Shipping Board — enjoyed shorter six-year terms.[108] Terms at the other independent agencies, including the ICC (7 years), the Federal Reserve Board (10 years) and the United States Tariff Commission (12 years), were all equal or longer. Since then, however, five years has slowly become the normal tenure for members of most independent commissions. For commissions or boards having only five members (which has become a standard size for independent agencies), the five-year term means annual appointments, which helps keep the agency responsive to political forces. Moreover, most of the chairmanships of independent agencies — which at the time of *Humphrey's Executor* were relatively weak offices filled by rotation among an agency's

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[106] Id. 625-26. The Court also described the FTC as being "a legislative agency," but the Court applied that description only to the Commission's function in "making investigations and reports thereon for the information of Congress under § 6 [of the FTC Act], in aid of the legislative power." Id. at 628. That function involves advice only. In its other functions, the agency was acting either as "an agency of the judiciary" (if it was serving as a master in chancery pursuant to § 7) or as an agency acting "in part quasi-legislatively and in part quasi-judicially." Id. An agency that was in part judicial could not be subject to direct or indirect influence from either the Executive or the Legislative Branches because, under the Court's view of separation of powers, there was a "fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others." Id. at 629.

[107] Id. at 625-26 (emphasis added).

[108] See Shipping Act, 1916, Pub. L. No. 64-260, chap. 451, § 3, 39 Stat. 728, 729 (establishing a five-member board with each member enjoying a six-year term); Merchant Marine Act, 1920, Pub. L. No. 66-261, chap. 250, § 3(a), 41 Stat. 988, 989 (expanding the board to seven members but keeping the six year term); See Radio Act of 1927, chap. 169, P.L. No 69-632, § 3, 44 Stat. 1162, 1162-63 (creating a five-member Commission with each member having a six-year term).

members — have been changed to be more powerful offices with the chair designated by the President and serving at his pleasure.[109]

The size of independent agencies has also generally been shrinking, and the smaller size magnifies the control that can be exercised by political branches through a single annual appointment and through the power to designate (and to remove) the chairman. These changes have helped erode the concept of independence articulated in *Humphrey's Executor*, and in 1988, the Supreme Court expressly acknowledged that the *Humphrey's Executor* Court erred in asserting that an independent commission such as the FTC does not exercise executive power.[110] Current doctrine recognizes that "independent" agencies do exercise some executive power and that the President at least must retain sufficient control over the agencies so that he perform his constitutionally assigned duties.[111]

The deterioration of the original conception will be discussed in much more detail in the next section. The point here is merely that the deterioration was predictable. Between the conflicting goals of independence and responsiveness to democratic forces, courts and policy thinkers in the Progressive and New Deal eras emphasized independence over responsiveness. The second half of the twentieth century would see somewhat of a reversal as independent commissions would become more subject to political forces. Nevertheless, to the extent that a good measure of the originally envisioned independence remains with regard to the agency's policymaking functions, political accountability for those decisions is attenuated. To the extent that the notion of independence from political control has been eroded so that the reality no longer matches the idealistic vision, retention of formal independence is inconsistent with the goal of governmental transparency. To the extent that political actors do in fact influence independent agencies "by various means, formal and informal, prominent and concealed, direct and devious,"[112] "such concealed and devious methods" of influence are, as Judge Friendly concluded, "the antithesis of the democratic process."[113] Thus, though the aspiration in creating the FCC and similar so-called independent agencies was to create government entities that would maintain scrupulous political independence, while

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[109] Empirical work has shown that the President uses his power to designate Chairmen to impose some measure of political control of independent agencies. See David C. Nixon and Thomas M. Grayson, *Chairmen and the Independence of Independent Regulatory Commissions* (2004) (available at http://mpsa.indiana.edu/conf2003papers/1031956228.pdf).

[110] Morrison v. Olson, 487 U.S. 654, 690 n.28 (1988) ("[I]t is hard to dispute that the powers of the FTC at the time of Humphrey's Executor would at the present time be considered 'executive,' at least to some degree.")

[111] Id. at 496.

[112] See 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE §2.16, at 155 (1st ed. 1951).

[113] HENRY J. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS 21 n.84 (1962).

at the same time serving democratic values, by their very nature, the FCC and other independent agencies encounter difficulties doing either.

III. Declining Faith in Independent Regulatory Commissions

Faith in expert administrators and independent commissions would not be enduring. As government officials, regulatory scholars and the country at large gained experience with the new administrative agencies and commissions, reality curbed the early idealistic enthusiasm for expertise and independence. The second half of the twentieth century brought increasing disillusionment with the ideal of a independent expert regulatory commission.

Yet though this period saw the decline of the Progressive ideals for government, it also saw a renaissance for traditional governmental and social structures, including the Executive Branch, the Congress, the courts and the free market. Thus, James Landis, who earlier saw vigor in administrative agencies, now sought to make agencies more energetic by tying them closer to the President. Louis Jaffe and other administrative law scholars celebrated judicial review of agencies action as a necessary check on arbitrary agency behavior, and the courts in fact took upon themselves increased duties in policing administrative action. Many scholars also sought to have agency discretion cabined by more specific statutes and regulations, and this reform also took hold. Finally and perhaps most profoundly, the regulatory theorists both inside and outside government gained renewed respect for the virtues of market mechanisms.

A. More Realistic Views of Expert, Independent Agencies

Even while independent commissions were still being created, a few scholars began to question the then-prevalent enthusiasm for independent experts. As early as 1924, Gerard Henderson warned that government commissions could not realistically be staffed with "super-men whose decisions are always made of the substance of justice and wisdom."[114] Similarly, in 1934, Felix Frankfurter and Henry M. Hart, Jr., observed the growing divergence between the aspirations and the reality of commission staffing. The hope had been to attract administrators having "independence and authority comparable with that enjoyed by judges in the United States," but "in the main" appointees were "mediocre lawyers appointed for political considerations" who looked upon the position "not as a means for solving difficult problems of government but as a

[114] GERARD C. HENDERSON, THE FEDERAL TRADE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE 328 (1924). Suggesting that "most government affairs are run by men of average capabilities," Henderson urged that the science of administration should aspire to develop "a formal procedure which may indeed at times clip the wings of genius, but which will serve to create conditions under which average men are more likely to arrive at just results." Id.

step toward political advancement or more profitable future association with [industry]."[115]

Such skeptical views were minority positions at the time, and they were put forward somewhat cautiously and without great elaboration. Criticisms of commissions became more common and more bold in the second part of the twentieth century as experience with commissions increased. In 1955, Marver Bernstein delivered a dramatically pessimistic review of independent commissions. Bernstein observed that commissions appear to progress through a "life cycle" of "growth, maturity, and decline."[116] Commissions begin their work "in an aggressive, crusading spirit" full of "youthful vigor."[117] At the time of its creation, a commission usually enjoys "powerful political support" in both the Presidency and the Congress, but this support quickly fades.[118] In these early years, the commission is likely to attract "outstanding" individuals for appointment.[119] However, as the commission becomes more mature, "the competence of its leaders is likely to decline."[120] On average, Bernstein found overwhelming evidence that appointees to commissions were "mediocre and lacking in relevant training and experience."[121] These observations about the quality of commission leadership were significant because the early advocates of independent commissions had stressed exceptional leadership as a necessity if commissions were to achieve their ambitious goals.

Although some scholars of administrative law such as Judge Henry Friendly responded to the reality of mediocre commissioners with calls for a renewed political commitment to appointing "commissioners of higher intellectual power and moral courage,"[122] increasingly commentators accepted more realistic views. As then Professor Richard Posner noted in 1969, commissioners on

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[115] Felix Frankfurter and Henry M. Hart, Jr., *The Reasons and Methods of Regulation* (1934), reprinted in PAUL W. MACAVOY, ED., THE CRISIS OF THE REGULATORY COMMISSIONS 15-16 (1970).

[116] BERNSTEIN, supra note 86, at 74.

[117] Id. at 80.

[118] Id. at 81.

[119] Id. at 106. The classic example of an outstanding early appointment is the first Chairman of the ICC, Thomas Cooley, who was a former Justice of the Michigan Supreme Court and one of the leading commentators on constitutional law during the nineteenth century.

[120] Id.

[121] Id.

[122] FRIENDLY, supra note 113, at 142. To help in attracting such higher caliber individuals, Friendly suggested "establishing a longer term and pursuing a tradition of reappointment [and] affording the commissioners more opportunity for study and reflection by freeing them from the multitude of routine tasks that now encroach so heavily upon their time." Id. at 142-43. James Landis was another who acknowledged the "deterioration in the quality of our administrative personnel," but who nonetheless believed the solution to be a renewed commitment to appointing better individuals. *Landis Report,* supra note 9, at 11; see also id. at 66-68 (recommending better appointments).

independent agencies "lack the tenure, the high status, and the freedom from other duties that federal judges enjoy." Accordingly, "it is impossible to attract many first-rate people to a long-term, let alone lifetime, career as a member of an administrative agency."[123]

Marver Bernstein also noted that, as a commission progresses in its life cycle, the aging commission "becomes more concerned with the health of the industry and tries to prevent changes which adversely affect it."[124] It loses vitality and tends toward "passivity" and "apathy."[125] The commission becomes the "captive of the regulated groups," and it views its "primary mission" as "maintenance of the status quo in the regulated industry and its own position as recognized protector of the industry."[126] Political independence merely "facilitates maximum responsiveness by a commission to the demands and interests of regulated groups."[127] In the ensuing years, many other commentators and scholars of regulation would reach similar conclusions.[128]

Thus, in contrast to the Progressive ambition to create institutions with the public spiritedness of government and the efficiency of private corporations, later scholars have come to suspect that independent commissions actually combine the inefficiency of government with the private spiritedness of corporations. These fears have special relevance to the FCC. Former FCC Chairman Reed Hundt acknowledged the agency developed a reputation for catering to regulated interests to such an extent that the acronym FCC is disparagingly said to mean "Firmly Captured by Corporations."[129] Similarly, many other knowledgeable observers have found that, though it was charged with pursuing the public interest, the agency "became a cartel-enforcement agency, one which could reliably be called on by incumbents to formulate rules which would make

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[123] Posner, supra note 23, at 89.

[124] Id. at 87. For other early expressions of skepticism about the effectiveness of expert independent agencies, see Samuel P. Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 YALE L.J. 467, 470 (1952) (identifying a "decline of the ICC" caused by the agency's alignment with the interests of the railroads);

[125] Id. at 88.

[126] Id. at 90, 92.

[127] Id. at 101.

[128] *See generally*, MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962); GEORGE J. STIGLER, THE CITIZEN AND THE STATE: ESSAYS ON REGULATION (1975); Posner, *supra* note 24, at 87 (positing that "[e]xceptional people may rise to the challenge [of zealously pursuing consumer interests to the detriment of organized economic interests] but they are unlikely ever to constitute a sizable fraction of commissioners"). For other accounts of the rise of capture theory, see John Shepard Wiley Jr., *A Capture Theory of Antitrust Federalism*, 99 Harv. L. Rev. 713, 723-725 (1986); Thomas Merrill, *Capture Theory and the Courts: 1967-1983*, 72 Chi.-Kent L. Rev. 1039 (1997).

[129] Reed Hundt, *The Progressive Way*, available at www.benton.org/publibrary/policy/TV/rhundt_progressive.html.

competitive entry economically impossible,"[130] that it "has become a forum for rent-seeking,"[131] and that it "has often acted at the behest of powerful rent-seeking groups."[132]

B. Increased Respect for Political Control of the Bureaucracy

Another major shift in administrative theory is increased respect for political control of government agencies. The shift traces back at least as early as Marver Bernstein, who criticized the Progressive era architects of independent commissions as "lack[ing] an elementary comprehension of the theory of a democratic state."[133] Bernstein recognized that "[t]he process of regulation is unavoidably political," but he also went further. He saw strong political leadership as an essential bulwark against agency capture. The public interest needs "alert and politically powerful spokesmen [to] promote and protect it" and, without such leadership, the agency may too easily accept the philosophy, values and proposals of the regulated entities.[134]

Bernstein was not alone. More realistic assessments of agencies came from even great champions of independent commissions such as James Landis, who in 1938 had proclaimed that expert agencies possessed "the vigor that attends a lusty youth."[135] But in his 1960 report to President-elect Kennedy, Landis noted the "deterioration in the quality of our administrative personnel"[136] and acknowledged that agencies were subject to capture through "the subtle but pervasive methods pursued by regulated industries to influence regulatory agencies by social favors, promises of later employment in the industry itself, and other similar means."[137] One solution to these problems, Landis suggested, was greater ties to political leadership. Landis proposed that the President should increase supervision over the work of the agencies because such Presidential concern would "draw good men into [the agencies'] service," check "the centrifugal tendencies inherent in the 'administrative branch' of the government,"

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[130] Thomas W. Hazlett, *Explaining the Telecommunications Act of 1996*, 29 CONN. L. REV. 217, 221 (1996).

[131] J. Gregory Sidak, *Telecommunications in Jericho*, 81 CALIF. L. REV. 1209, 1228 (1993).

[132] Stuart Minor Benjamin, *Spectrum Abundance and the Choice Between Private and Public Control*, 78 N.Y.U.L. REV. 2007, 2049 n.131 (2003).

[133] BERNSTEIN, supra note 86, at 129.

[134] Id. at 285.

[135] .LANDIS, supra note 46, at 4-5.

[136] *Landis Report*, supra note 9, at 11.

[137] .*Id*. at 14. Landis also described "the daily machine-gun-like impact on both agency and its staff of industry representation that makes for industry orientation on the part of many honest and capable agency members as well as agency staffs". *Id*. at 71.

and bolster "the morale of the agency" since the agencies would "then realize how important their activities are to the national scene." [138]

Nearly two decades after Landis' report to President Kennedy, a special commission of the American Bar Association endorsed greater Presidential supervision of all administrative agencies — including independent agencies — as a means of remedying the "malaise" of "inconsistency and indecisiveness" endemic to the regulatory process.[139] Since then, many other scholars of administration and regulation have come to view executive political leadership as a source of "dynamism" and "energy," as well as a necessary counterweight to the forces that distract a bureaucracy from pursuing a coherent and broader vision of the public interest.[140]

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[138] *Id*. at 82. Simultaneously, however, Landis decried "the morale-shattering practice of permitting executive interference in the dispositions of causes and controversies delegated to the agency for decision." Id. at 36. Thus, he seemed to support greater Executive involvement in establishing overarching policies and regulatory approaches, but not in adjudications — i.e., not in the "dispositions of causes and controversies."

[139] AMERICAN BAR ASSOCIATION, COMMISSION ON LAW AND THE ECONOMY, FEDERAL REGULATION: ROADS TO REFORM 79 (1979). The ABA's recommendation for greater Presidential supervision was endorsed even by Judge Henry Friendly, who had emphatically rejected a similar proposal in 1962. See FRIENDLY, supra note 113, at 153 (finding "it hard to think of anything worse" than subjecting an independent commission such as the FCC to "policy guides" established by the White House). Friendly justified his switch based on three changes in the administrative state: first, the vast growth of the federal bureaucracy from 1962 to 1979; second, the shift in the "center of gravity" of the administrative state from independent agencies and toward more executive branch agencies; and third, the increased use of rulemaking by agencies. AMERICAN BAR ASSOCIATION, COMMISSION ON LAW AND THE ECONOMY, FEDERAL REGULATION: ROADS TO REFORM at 163 (concurring statement of Hon. Henry J. Friendly). Friendly concluded that "[s]omeone in Government, and in the short run that someone can only be the President, must have power to make the agencies work together rather than push their own special concerns to the point that the country becomes ungovernable." Id.

[140] Kagan, *supra* note 24, at 2341; see also Peter L. Strauss and Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 188 (1986) (agreeing with the "growing professional consensus" that "greater presidential control over the regulatory process is desirable"); Christopher C. DeMuth and Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1081 (1986) (arguing that executive coordination of agency rulemaking "encourages policy coordination, greater political accountability, and more balanced regulatory decisions"). Even critics of recent presidential control of regulation concede that "presidential control has several undeniable advantages." Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443, 447 (1987); see also Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1064 (1986) (conceding that centralized review "can perform some useful functions in the rulemaking process" including coordinating agency activities and assuring that relevant scientific information, cost data, and alternative approaches are shared between agencies"). Moreover, the modern critics of executive coordination are not defending the Progressive ideal of an independent commission. For example, in arguing for limits on presidential intervention in agency proceedings, Professor McGarity mentions the agency expertise — which was the primarily justification for conferring independence on agencies — only in passing, see McGarity, 36 AM. U. L. REV. at 450; instead, his criticisms focus more on the need for agencies to follow congressional policy leadership, id. at 450-51; on the possible conflicts between presidential control and judicial review, id. at 460-62; and on the desirability for

A final reason for increased respect for centralized political control, particularly control by the Executive Branch, is the need for *general* regulatory expertise. In the last quarter of the twentieth century, the Office of Management and Budget has become a focal point for developing increasingly sophisticated tools for measuring the effectiveness of regulation. While the precise details of appropriate analysis remain controversial, the important point here is that, if the Progressive aspiration for a science of administration remains at all valid, then surely the general regulatory analyses undertaken by the professional economists and policy analysts are part of that science.[141] It makes no sense to wall off some regulatory functions of the government — i.e., those delegated to independent agencies — from this important modern branch of scientific administration. Independent regulatory commissions were, after all, conceived as a means for fostering greater application of expertise to administrative problems. That goal now supports greater integration with the Executive Branch rather than continued isolation.[142]

C. Changes in the Administrative Function

Since the time when the FCC and most of the independent regulatory commissions were created, there have been dramatic changes in the expected and actual functions of administrative agencies. First and foremost, judicial

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transparency so that the electorate may hold the President accountable for his assertions of control over the regulatory process, id. at 487-89.

[141] Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 87 (1995) (noting that OMB's OIRA employs a professional staff of economists and policy analysts who are responsible for regulatory review).

[142] Indeed, greater OMB supervision over independent agencies is already occurring. E.O. 12866, first issued by President Clinton but continued in force by President George W. Bush, requires independent agencies to submit an annual regulatory plan to OIRA and authorizes the Administrator of OIRA to notify the Vice President and the agency if any planned regulatory action is "inconsistent with the President's priorities or the principles set forth in this Executive order." E. O. 12866, §4(c)(5), 58 FED. REG. 51735, 51738 (1993). The Vice President is then authorized to "consult" with the heads of the agency and request further consideration or inter-agency coordination." id. § 4(c)(6), 58 FED. REG. at 51739. Similarly, OMB now requires agencies to evaluate their programs using a "Program Assessment Ration Tool" (PART), and it has extended this rating requirement to programs of independent agencies. See Office of Management and Budget, *New Program Assessment Rating Tool (PART) Reviews Underway* 8 (July 2005) (available at http://www.whitehouse.gov/omb/part/fy2005/2005_part_list.pdf) (listing programs of the FCC, SEC and NRC as subject to ongoing PART reviews). PART reviews are intended to force agency programs to "prove results in order to earn financial support." See *Rating the Performance of Federal Programs* in Budget of the United States Government, Fiscal Year 2004, at 47, 48 (2003) (introducing and explaining PART). These developments are consistent with the weight of professional and scholarly commentary in the last quarter century, which has generally stressed the value of executive oversight for regulatory functions. See, e.g., Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 989 (1980) (concluding that "[a]t a time when no agency can be too confident of the correctness or economic impact of any policy choice in the areas of health, safety, or the environment, participation by the President and the White House staff seems desirable as well as inevitable.").

review of administrative action has become a much more common, and much more searching. The expansion of judicial review can be traced back to the 1946 enactment of the Administrative Procedure Act, which generally allowed individuals adversely affected or aggrieved by final agency actions to seek judicial review and authorized courts to apply fairly searching standards of review.[143] Decisions confirming the broad availability of a significant level of review are now entrenched features of administrative law.[144] These decisions stand in contrast to the aspirations during the founding of independent regulatory commissions; advocates of regulatory commissions had then thought that judicial review of administrative decisions might be no more intrusive than is judicial review of corporate decisions under the business judgment rule.[145] This judicial solicitousness was yet another manifestation of the early faith in expertise.[146]

Judicial review of agencies was expanded in part because of suspicions that agencies were not following their statutory mandates to pursue the public interest. Review by courts was intended as a check, to insure that agencies were responsive to broad public interests and to statutory directions. Thus, the expansion of judicial review represents a marked departure from the original theory that greater power, fewer checks and more independence would attract great regulators and spur good behavior. Moreover, to the extent that they do grant deference to the judgment of administrative agencies, modern courts do so, in large degree, on the theory that agencies are politically accountable, not politically insulated.[147]

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[143] 5 U.S.C. §§ 702, 706.

[144] See, e.g., Abbott Laboratories v. Gardner, 387 US 136 (1967) (establishing general availability of judicial review for final agency rules); Association of Data Processing Service Orgs. v. Camp, 397 U.S. 150 (1970) (interpreting broadly the concept of persons "adversely affected or aggrieved by agency action within the meaning of a relevant statute"); Citizens to Preserve Overton Park v. Volpe, 401 US 402 (1971) (establishing the availability of judicial review for even relatively informal agency actions and interpreting the "arbitrary" and "capricious" standard to require " searching and careful" judicial review); Motor Vehicle Manufacturers Assoc. v. State Farm Mutual Auto. Ins. Co., 463 US 29, 43 (1983) (also requiring significant level of judicial review).

[145] LANDIS, ,supra note 46, at 10-12. In at least some instances, the scope of review afforded was as exceedingly narrow.

[146] See SHARFMAN, supra note 84, at 8 (recognizing that judicial deference to the ICC — which was in the early twentieth century "largely free from judicial interference" — was grounded in the "increasing recognition of the need of expert inquiry and flexible performance").

[147] See, e.g., Chevron USA Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865-66 (1984) (recognizing agencies political accountability as the primary reason for courts to afford the agency greater deference). For a suggestion that the decisions of independent agencies should receive less *Chevron* deference than the decisions of executive branch agencies, precisely because the independent agencies are less politically accountable, see Randolph J. May, *Defining Deference Down: Independent Agencies and Chevron Deference*, 58 ADMIN. L. REV. 429 (2006). Whether the political accountability rationale that was the primary justification for judicial deference in *Chevron* should imply a lesser degree of deference for independent agencies is an underexplored question. May concludes that: "[A]t least with respect to the independent agencies which are not politically acountable to the people in the same measure as

A second major change in administrative law is that Congress now gives agencies — including the independent agencies — far more specific statutory directions. The change in the level of statutory specificity was sought first by scholars of administrative law in second half of the twentieth century. Louis Jaffe was one of the first to argue in 1956 that "the most serious difficulty facing regulation today ... is the radical lack of a meaningful statutory policy in many of the areas where the independent agencies function."[148] Jaffe's criticism was echoed by Judge Henry Friendly,[149] and to an even greater extent by Theodore Lowi who, believing that "Congress is at its classic best when a proposed bill embodies a good rule," famously proposed to revitalize the nondelegation doctrine to force greater specificity in statutory delegations of authority.[150] In the last quarter century, Congress appears to have adopted this approach and has written clearer policy directions into regulatory laws.[151] While many independent agencies, including the FCC, continue to have broad delegations of power, these delegations are generally found in older statutes.

A third development is the "Great Transformation" in regulation.[152] As previously discussed, independent commissions were originally created to serve more ambitious regulatory goals. These agencies were viewed as managers or directors of industry — as masters of masterful corporations, to use Woodrow Wilson's description, or as an industrial "partner" having some share of

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the President and Congress, I suggest a reading of *Chevron* that accords less deference to independent agencies' decisions than to those of the executive branch agencies would be more consistent with our constitutional system and its values." Id., at 453.

[148] Louis L. Jaffe, *The Independent Agency: A New Scapegoat*, 65 YALE L. J. 1068, 1073 (1956). Jaffe singled out the FCC as a prime example where "there never has been a statutory policy," and he attributed the Commission's failures to this "absence of congressional guidance." Id. Jaffe believed that independent agencies had been criticized excessively. Still, he conceded that "it seems to me sounder on balance that these policy-making agencies should be subject to presidential control." Id. at 1074.

[149] FRIENDLY, supra note 113, at 13 (noting that "it would be better if Congress could be somewhat more specific at the outset"). Judge Friendly criticized Congress for legislating very little even in areas, such as communications, "where dissatisfaction with agency performance has been so great." Id. at 163. Friendly ultimately suggested that, in addition to their general oversight responsibilities, the substantive committees of Congress should be charged "with the obligation to render a comprehensive report each ten or fifteen years on each major piece of legislation subject to its jurisdiction." Id. at 172. The report would be accompanied by "a thorough and searching inquiry, preferably conducted with the aid of private research organizations," and would include recommendations for any necessary amendments to the existing law. Id.

[150] LOWI, supra note 48, at 312, & 297-98.

[151] See Kagan, supra note 24, at 2255 n.19 (citing DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS 198-99 (1999)).

[152] See generally Joseph D. Kearney and Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323 (1998).

"responsibility for management."[153] Indeed, even the name of the legal field — "administrative law" — evoked not merely regulation of particular market failures, but rather a legal field devoted generally to the "science of administration" which was understood to encompass "organization, coordination and the responsible and purposeful handling of human affairs," which was the meaning of the "science and practice of administration."[154] The task of the administrative agency was thought to be something akin to serving as a Board of Directors for an entire industry.[155] Indeed, one influential writer of the Progressive era expressly derided the term "regulation" as "pernicious" because the function of democratic government was "not merely to protect, to adjust, to restrain, and all the negative rest of it, but ... to build, to construct the life of its people."[156]

Commissions were thus viewed as instruments of a "command-and-control" style of regulation.[157] When that theory of regulation prevailed, the need for political independence may have seemed more acute because a regulatory commission so intensely involved in managing an industry would have a much greater ability to pick individual corporations as winners or losers. That ability would allow political actors, if they control the commission, to seek political contributions (whether legal or illegal) from individual corporations that sought to be anointed as a favored firm. In short, politically subservient commissions could facilitate socially deleterious rent-seeking by politicians. Moreover, the political check against such rent-seeking may be very weak because the electorate is likely to remain largely ignorant of the agency's decision. For example, if a regulatory commission has the power to award some particular regulatory benefit (e.g., an FCC license) either to corporation X or to corporation Y, the commission's decision would be a matter of great concern to the individual

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[153] Jaffe, supra note 148, at 1074 (asserting that the creation of a regulatory commission "divides the responsibility for management" of an enterprise and leads to an "accommodation in which industry is the senior partner").

[154] LUTHER GULICK AND L. URWICK, PAPERS ON THE SCIENCE OF ADMINISTRATION ii (2nd ed. 1947) (from Gulick's forward to the second edition).

[155] See LANDIS, supra note 46, at 10-13. A similar conception appears in the writings of Mary Parker Follett, a prominent Progressive writer on government. She believed that "[e]veryone knows that our period of laissez-faire is over," but she also believed that the socialists were making a "fatal mistake" in trying "to give us in its place state control." Mary Parker Follett, *The Process of Control*, in GULICK AND URWICK, PAPERS ON THE SCIENCE OF ADMINISTRATION 159, 168 (2nd ed. 1947) (Follett's paper was a lecture delivered in 1932). She believed that the "opposite of laissez-faire" was not coercive state control, but "co-ordination."

[156] FOLLETT, supra note 64, at 182. .

[157] See Richard B. Stewart, *Madison's Nightmare*, 57 U. CHI. L. REV. 335 (1990) (recognizing that the "dominant form of government regulation" first adopted during the late nineteenth century and extended generally during the New Deal was "a 'command and control' system implemented by specialized administrative agencies'); Mark Tushnet, *The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 35-36 (1999) (noting that a major trend in American public law since 1980 is "phasing out command-and-control forms of economic regulation while preserving some public responsibility for ensuring that markets operate safely and without artificial obstructions").

corporations but may be of little moment to the larger electorate, particularly where both corporations would serve the public equally well. True, the public may penalize rank corruption, but corporations X and Y may have many legal ways to compete for the regulatory benefits by, for example, making legal campaign contributions. In such circumstances, insulating the commission from political forces — to the extent that such insulation can be achieved — might have been thought useful in decreasing the possibilities for political actors to use the regulatory system to seek rents.

As regulatory theory and practice moves away from attempting to manage industry and more towards establishing general ground rules for competition, the case for political responsiveness and agency accountability increases. If an agency is deciding a more general issue of policy — for example, what services should be included within the universal service obligation or whether a class of spectrum licenses may be used to provide a particular service — the agency's decision is much more likely to have large enough economic repercussions that the electorate will police the decision. Indeed, those are the general policy decisions that, in a self-governing democracy, ultimately should be subject to political forces. The possibilities for rent seeking may also be fewer where an agency is making more general policy decisions. Each individual firm may care very little about general agency decisions concerning, for example, what sort of pollution control equipment that all competitors in a field must have or what sort of services may be offered using a yet-to-be-granted license. Since all competitors in a field will be subject to the rule and prices in the field can adjust to take into account the rule, each individual firm may realize little or no competitive advantage or disadvantage from the agency decision.

A final shift in administrative functions — one that is intimately connected to the shift away from a "management" or "command-and-control" style of regulation — is that administrative agencies have shifted dramatically toward greater use of their rulemaking powers.[158] As originally conceived, independent regulatory commissions were thought of as "administrative tribunal[s],"[159] with an "emphasis on their 'quasi-judicial' character."[160] That conception of regulatory agencies led rather easily to two of the major structural features that distinguish independent agencies from more traditional executive branch agencies — (i) multi-member rather than a unitary head, and (ii) some protection of tenure. That institutional structure is traditional for appellate courts, but it may make less sense if an agency is conceived, at least in part, as a policymaking acting

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[158] See, e.g., Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 264 (recognizing that over time "rulemaking and policy formulation have captured an increasing percentage of agency resources"). Greater use of rulemakings was suggested by a number of prominent administrative law scholars in the 1960's, including Professor Ken Davis and Judge Henry Friendly. See KENNETH CULP DAVIS, DISCRETIONARY JUSTICE 65-66 (1969); FRIENDLY, supra note 113, at 145-46.

[159] Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 441 (1907).

[160] FRIENDLY, supra note 114, at 145.

through the rulemaking and other non-adjudicatory processes. After all, an administrative rulemaker is usually called upon because another multi-member rulemaker — the Congress— could not reach consensus or, perhaps more accurately, cannot reach consensus swiftly enough to keep pace with changing conditions.[161] If that is their task, then administrative agencies need "rather speedily to frame rules and regulations."[162] Yet in the very circumstances in which Congress is not able to reach a sufficient consensus, a multi-member commission may also be stymied, particularly if the agency is subject to a requirement that its membership be politically balanced, as the FCC is. Not infrequently, the delegation to the multi-member commission may merely substitute administrative deadlock for legislative deadlock.

IV. Recommendation of the DACA Institutional Reform Working Group

In light the substantial changes in governmental and regulatory theory and practice since the creation of the FCC, and the substantial changes in the communications marketplace that have been documented in the earlier DACA reports, the DACA Institutional Reform Working Group undertook a comprehensive review of the possible institutional structures. As will be obvious, it should be emphasized again here that our review takes account of, and in our view is consistent with, the recommendations of the other working groups. The Institutional Reform Working Group considered six basic administrative structures:

Option 1: An Independent Multi-Member Commission with a Significant Delegation of Power and Subject to Substantial Judicial Review (Status Quo).

Option 2: A Multi-Member Commission with an Even Greater Delegation of Power, More Independence, and Less Judicial Review (Progressive Era Ideal).

Option 3: Abolition of Administrative Functions and Regulation Accomplished Through Private Rights of Action Adjudicated in Courts (Abolitionist Model).

Option 4: A Multimember Commission Located in an Executive Department But With Some Degree of Independence (ICC Remnant Model).

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[161] See, e.g., FRIENDLY, supra note 114, at 7 (stating one of the traditional reasons for delegation is that legislature is unable to act effectively due to "the need of frequent and rapid change").

[162] Id.

Option 5: Rulemaking Powers Vested in a Single Executive Branch Official and Adjudicatory Powers Vested in a Multi-Member Independent Commission (Split Agency Model).

Option 6: An Agency with a Unitary Head Having No Political Independence (Pure Executive Agency).

The Working Group ultimately settled on the fifth or "split agency" option.[163] This option offers meaningful reform, but it is not an unduly dramatic change, especially in light of the recommendations of the other working groups that the reformed "FCC" become an institution that relies much more heavily on adjudication. Thus, it is a significant, but nonetheless incremental, reform. All six of the basic structures, and some variations from those structures, are discussed below.

A. An Independent Multi-Member Commission with a Significant Delegation of Power and Subject to Substantial Judicial Review (Status Quo).

In addition to the shift in the reformed agency's responsibilities more heavily towards adjudication, experience provides important support for deviation from the status quo. As described above, over time, and in general, the FCC has not been viewed as a particularly successful agency. For too long, the agency exercised its authority to allocate radio frequencies in the public interest by conducting seemingly never-ending, substantively much-criticized comparative hearings that generated substantial legal fees but inconsistent regulatory results. In its regulation of telephony, the agency protected the monopoly position of AT&T to such an extent that regulatory authority eventually migrated to the Department of Justice and the courtroom of Judge Greene. And in implementing the Telecommunications Act of 1996, the agency often has lacked a coherent vision, frequently allowed its rulemaking proceedings to drag on interminably,[164] and has had difficulties in having its rulemakings sustained on judicial review.[165]

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[163] It should be emphasized this option represents the consensus view of the Working Group in light of all of the considerations, including ones of political practicalities.. Individuals in the working group, acting alone and without the benefit of the earlier DACA reports, might have tilted in one direction or another, say, for example, turning over DACA'a adjudicatory functions to the FTC. Thus, the choice expressed here, as with all of the DACA recommendations, to some extent necessarily represents a melding of views. But it represents a choice the working group is confident would be an improvement over the status quo.

[164] One reason that rulemakings drag on interminably is the change in practice regarding so-called *ex parte* filings. Until the past decade or so, normally most of the information and argumentation submitted to the agency was submitted in the announced rounds of opening and reply comments. After closure of the reply round, absent exigent circumstances, the agency's staff knew that it had in hand most of the information that interested parties wanted to submit and could start to work on a proposed order and opinion. For the past many years, the practice has shifted so that the closing of the announced comment rounds mean nothing more than a shift to denominating as *ex parte* filings further ongoing "comments". In other words, comments from interested parties never stop coming in, and this lack of a stopping point makes it more difficult to

Moreover, as discussed in the earlier sections of this report, the current structure of the FCC was originally based on theories that have now been widely discredited. Although the agency was structured to insulate it from political influence,[166] it does not enjoy –nor should it in our view--practical independence from informal political pressures. Nevertheless, the agency's presumed formal independence isolates it from the administrative expertise of the executive branch and decreases that political branch's apparent responsibility for the agency's policymaking actions. The result is something that even the founders of the FCC said they did not intend— an agency that, in fact, is subject to political pressures and has less access to regulatory expertise than executive branch agencies performing similar functions. The Working Group believes that maintaining the FCC's current structure is not justifiable.

B. A Multi-Member Commission with a Greater Delegation of Power, More Independence and Less Judicial Review (Progressive Era Ideal)

The current FCC is not very close to the ideal of an independent commission as that ideal was described by the Progressive and New Deal theorists who constructed the agency. Their idealized view of an independent agency would have fewer statutory constraints, much more *de facto* political independence from both the President and the Congress, and much less judicial review.

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complete rulemakings on a timely basis. Apart from the implementation of the more fundamental change proposed here, and until then, the FCC should address ways to make it rulemaking process more efficient and sound. Another suggestion is to issue rulemaking notices that do not include so many issues in one notice and to formulate notices that actually contain specific proposals. Typically, the FCC's rulemaking notices, especially those on important matters, read like notices of inquiry, rather than notices of proposed rulemakings, in their generality and lack of specificity of proffered proposals. Though the Administrative Procedure Act provides that a notice of proposed rulemaking may include merely "a description of the subjects or issues involved," 5 U.S.C. §553 (b)(3), the agency may provide more detailed notices, which likely would be more conducive to effective and timely rulemaking.

[165] See May, *supra* note 12, at 1307-1310; *Cf.* Russ Taylor, *Rethinking Reform at the FCC: A Reply to Randolph May*, 58 FED. COMM. L. J. 263 (2006).

[166] Although the Federal Communications Act does not expressly limit the President's authority to remove commissioners, the Act does impose a political balance requirement, see 47 U.S.C. § 154(b)(5), and stagger the years in which Commissioners' terms end, see id. § 154(c). In such circumstances, the courts have generally been willing to imply a restriction on the President's power to remove commissioners. *See*, *e.g.,* FEC v. National Rifle Association Political Victory Fund, 6 F.3d 821, 826 (D.C. Cir. 1993) (stating it "likely" that the President many remove FEC commissioner "only for good cause" where the commissioners' terms are staggered and Commissioners are subject to a political balance requirement); SEC v. Blinder, Robinson & Co., 855 F.2d 677, 681 (10th Cir. 1988) (accepting the "common" understanding that "the President may remove [an SEC] commissioner only for 'inefficiency, neglect of duty or malfeasance in office'" even though the agency's statute does not explicitly impose a removal restriction).

Returning to this ideal was rejected for several reasons. First, although the Progressive theorists sought to build agencies with a significant degree of political independence, achieving that goal in practice has proven extraordinarily difficult, and not necessarily desirable. Though commissioners of an independent agency may have some tenure protection in their current positions, most commissioners owe allegiance to political patrons either in the Executive or Legislative Branch. They owe their jobs to these patrons and, because many of them hope to continue obtaining new political appointments, as a practical matter they are subject to significant political control. Furthermore, to the extent that the commissioners are not interested in further political appointments and thus may have a degree of political independence, they almost certainty desire appointments in the private sector and thus are subject to being influenced by factions in the regulated industry. Finally, rights to judicial review of administrative action are now codified in the Administrative Procedure Act (APA), which has been in place for nearly 60 years. Even before the enactment of the APA, judicial review of agency action could be obtained through a variety of legal techniques. Thus, judicial review of agency action has a long and nearly unbroken tradition within this country and it enjoys seemingly broad political support across time. Overturning that tradition — which may very well have been an aspiration of some Progressive and New Deal theorists — appears to be an utterly unrealistic goal, and no persuasive case has been made to necessitate that sort of change.

In the course of considering the Progressive era model of a strong independent agency, the Working Group devoted some attention to the experience of the Federal Reserve Board. Many regulatory theorists otherwise skeptical of independent administrative agencies are willing to make an exception for the Federal Reserve Board.[167] The Fed does seem to enjoy a reputation for being an efficient and effective agency. Moreover, it has achieved a degree of political independence far greater than that achieved by other agencies which, unlike the Fed, are routinely subject to intense political pressures.[168] In many ways, the Fed seems to achieve the Progressive ideals for an independent commission: It is relatively free from political influence. It is professional and scientific in its operations. Its seven members enjoy exceptionally long tenure (14 years), so that the political branches have limited ability to affect its decisions through the appointment process. In its most

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[167] See BOK, supra note 29, at 401.

[168] ROBERT E. LITAN AND WILLIAM D. NORDHAUS, REFORMING FEDERAL REGULATION 46 (1983) (noting that "there is in fact a continuum of independence in the way these [independent] agencies actually operate" and placing the "fiercely independent Federal Reserve Board" at "one extreme" of this continuum because it has succeeded in "exercis[ing] its money market functions independently of either Congress or the President"). Still, some scholars note that the Governors of the Fed are politically appointed and that the appointment process allows significant political control over the system. See Christopher Alan Adolph, *The Dilemma of Discretion: Career Ambitions and the Politics of Central Banking* 209 (2004) (unpublished Ph.D thesis, available at http://faculty.washington.edu/cadolph/dd.pdf) ("Fed observers long ago abandoned the idea that central banker were incorruptible, apolitical technocrats maximizing social welfare").

important function — the setting of interest rate targets — it is essentially free from judicial review. It does not have to go through the appropriations process because it funds itself through assessments levied upon the twelve Federal Reserve Banks.[169] And, perhaps most importantly in retaining its independence and long-term support, the Fed has been able to attract precisely the great personnel and leaders — the "men of big ability and big vision"[170] — who the Progressive and New Deal theorists thought would populate expert independent agencies.

Yet despite the success of the Fed itself, there are powerful reasons why the FCC could not be remolded into the Fed's image. The Fed's structure allows private parties to exercise direct power in the agency's decisionmaking process. The Fed's most important function is setting monetary policy for the nation, and its most significant tool to accomplish that function is the buying and selling of government securities in the open market.[171] The Fed's power over such transactions is, however, wielded partly by government officers and partly by non-governmental officers. The Federal Open Market Committee (FOMC),[172] which sets the target interest rates to be achieved, consists of the seven members of the Fed's Board of Directors (all of whom are appointed by the President with the advice and consent of the Senate) and five members who are essentially private actors.[173] Legal scholars have recognized that "[t]his

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[169] See Michael D. Reagan, *The Political Structure of the Federal Reserve System*, 55 AM. POL. SCI. REV. 64, 64 (1961).

[170] 67 Cong. Rec. 12,354 (1926) (statement of Sen. Dill).

[171] James L. Pierce, *A Case for Monetary Reform*, 69 AM. ECON. REV. 246, 246 (1979) (opining that the FOMC is the "primary vehicle for monetary policy in the United States"). Note, *The Federal Open Market Committee and the Sharing of Governmental Power with Private Citizens*, 75 VA. L. REV. 111, 116 (1989) (quoting FOMC publication asserting that the FOMC is "the most important monetary policy-making body of the Federal Reserve System") (quoting Governors of the Fed. Reserve Sys., FRB3-50000-0784, The Federal Open Market Committee).

[172] Despite the presence of private parties in its membership, the FOMC is considered an "agency" of the government for purposes of administrative law and is thus subject to general statutes such as the APA and FOIA. *See*, e.g., 12 CFR 272.1 (setting forth FOMC rules of procedure "pursuant to the requirement of [5 U.S.C. § 552] that every agency shall publish in the Federal Register its rules of procedure). Nevertheless, the Fed as a whole has traditionally resisted traditional administrative law constraints. *See* Marshall J. Breger, *Defining Administrative Law*, 60 GEO. WASH. L. REV. 268, 280 & n.90 (1991) (observing that banking agencies such as the Fed "traditionally have resisted the culture of administrative procedure, including rulemaking and elementary principles of disclosure" and that the leadership of the Fed "did not believe that APA regulation was appropriate or necessary").

[173] See 12 U.S.C. § 263. The five private members of the Open Market Committee are elected by the Boards of Directors of various Federal Reserve Banks and must be Presidents or First Vice-Presidents of a Federal Reserve Bank. One of the five members is selected by the Federal Reserve Bank of New York (typically the President of the Bank). Each of the other four members is selected by votes of the Federal Reserve Banks in each four regional groupings: Northeast (Boston, Philadelphia, and Richmond); Central (Cleveland and Chicago); Southcentral (Atlanta, Dallas, and St. Louis); and West (Minneapolis, Kansas City, and San Francisco). See id. Typically the membership in the Committee rotates on a yearly basis among the Bank Presidents

arrangement raises grave doubts under the Appointments Clause and perhaps also under nondelegation doctrine principles."[174] Though at least one judicial opinion (which was later vacated) has sustained the unique FOMC structure, that opinion relied heavily on the long tradition of mixing public and private authority in the banking area and on the limited power exercised by the FOMC.[175] Those considerations would not extend to an agency with significant regulatory power such as the FCC.

The problem of agency capture may also be less of a problem in the banking area — particularly in the field of monetary policy — than in other regulatory areas. Some empirical work suggests that, where interest rates fluctuate within a relatively reasonable range, commercial banks are effectively hedged against the fluctuations so that their profitability is not affected merely by a change in interest rates.[176] Commercial banks may therefore have a general interest in establishing monetary policy that will lead to overall economic growth but little self-interest in setting monetary policy.

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in a particular grouping. The Boards of Directors of each Federal Reserve Banks are appointed through the following process. One third are appointed by the Governors of Federal Reserve Board, see 12 U.S.C. § 305, and the other two thirds are elected by the member banks located in the region served by that particular Federal Reserve Bank, 12 U.S.C. § 304. Board of Governors of the Federal Reserve System, *The Federal Reserve System: Purposes and Functions*, at ___.) Each director holds office for a three year term. However, any director may be removed from his or her position by the Board of Governors of the Federal Reserve System, and though the statute requires the "cause" for removal to be communicate to the removed director, it does not explicitly limit the causes that would justify such removal. See 12 U.S.C. § 248(f). Thus, though the directors of a Federal Reserve Bank are privately elected, they are subject to discretionary removal by indisputably government officers. Despite the complexity of the appointment system, most legal scholars who have examined the system agree that the five FOMC members appointed by the Federal Reserve Banks are properly classified as private parties. See Harold J. Krent, *Legal Theory: Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government.*, 85 NW. U.L. REV. 62, 84 (1990) (recognizing that the FOMC members who are elected annually by the boards of directors of the twelve regional Federal Reserve Banks are "private members" of the FOMC); Michael D. Reagan, *The Political Structure of the Federal Reserve System*, 55 AM. POL. SCI. REV. 64, 64 (1961) (describing the Open Market Committee "in the 'middle' of the public-private pyramid" that characterizes the system); Note, *The Federal Open Market Committee and the Sharing of Governmental Power with Private Citizens*, 75 VA. L. REV. 111, 127 (1989) (finding that "[t]he FOMC provides an unusually clear example of the genuine sharing of governmental power with private representatives").

[174] Jack M. Beermann, *Privatization and Political Accountability*, 28 FORDHAM URB. L.J. 1507, 1552 (2001).

[175] See Melcher v. Fed. Open Mkt. Comm., 644 F. Supp. 510, 523 (D.D.C. 1986) (considering a constitutional challenge to the appointment of the members of the Federal Open Market Committee but rejecting it on the theory that Congress may "delegate to private persons, at least some of its Article I, section 8, powers"), vacated, 836 F.2d 561 (D.C. Cir. 1987) (holding that the district court should have exercised its equitable discretion to dismiss the suit and thereby avoided reaching the merits of the case).

[176] See Mark J. Flannery, *Market Interest Rates and Commercial Bank Profitability: An Empirical Investigation*, 36 J. FINANCE 1085, 1098-99 (1981) ("large banks as a group are not seriously endangered by market rate fluctuations, at least within the historically relevant range").

The Fed's regulatory power is also significantly different than the regulatory authority exercised by a traditional agency such as the FCC. The Fed wields its most significant power in controlling the buying and selling of Federal securities by its own Federal Reserve Banks. While this power has great economic significance, it imposes no legal constraints on fully private banks, which remain free to charge whatever interest rates they want. The Fed regulates through the sheer economic power of its assets rather than through legally binding obligations.

One final difference is that the Fed, at least in its open market activities, has quite a narrow delegation of power. The FOMC traditionally has been limited to setting a target interest rate — in other words, it picks a single number. The agency is given only a limited set of tools to achieve that target, and a significant body of economic theory guides the selection of the target interest rate. The agency simply does not have the wide range of discretion that the FCC has traditionally enjoyed in establishing regulatory goals and in promulgating specific regulatory mechanisms and rules to achieve those goals.

C. Abolition of Administrative Functions and Regulation Accomplished Through Private Rights of Action Adjudicated in Generalist Courts (Agency Abolitionist Model)

While this proposal has a superficial attraction, generalist common-law courts are not necessarily a panacea for regulatory problems. Even one strong advocate of abolishing the FCC, Peter Huber, has sung the praises of expert agencies over common law courts in other regulatory contexts.[177] Experiences in other areas, and from other nations and time periods, tend to confirm that specialization of knowledge combined with less formal and less adversarial procedures have a place in the regulatory arena, and that generalist courts cannot necessarily shoulder the whole of the regulatory burden.

Furthermore, the DACA Regulatory Framework Working Group already has recommended a continuing level of administrative regulation to be carried out predominantly through adjudication in complaint proceedings, albeit under a competition-based antitrust-like statutory standard that will constrain the agency in a way that the agency's broad public interest authority generally did not.

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[177] In discussing public safety standards, Huber has praised the "expert" agencies of the "EPA[,]...the FDA and other similar bodies" because they replace the "theater of the courtroom" with "sober, well-considered judgment." PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 46 (1988). Huber has also criticized the judge-made common law of torts for "freezing out...public prescription through all government authority other than the courts," id., and has encouraged judges, in determining the admissibility of scientific evidence, to look to the "authoritative" judgments of administrative agencies such as the Food and Drug Administration because "such institutions, established and funded to make difficult scientific calls, draw on the best and broadest scientific resources." PETER W. HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM 201 (1991).

Because the DACA regulatory framework borrows heavily from the Federal Trade Commission Act, the Regulatory Framework Working Group considered giving the FTC express jurisdiction over communications markets, eliminating sector-specific regulation. But in the end the Regulatory Framework Working Group recommended maintaining sectoral regulation under some form of specialized agency because the Working Group believed that a body of technologically and economically-oriented personnel could be helpful in adjudicating communications cases under the standards proposed in DACA.[178] In light of this recommendation, and our own sense that under the more narrowly constrained DACA regulatory regime an agency with specialized expertise may contribute to the development of sound regulatory policies, we do not recommend relying on adjudication in generalist courts as a replacement for administrative regulation and, at least for the time being, we believe that maintaining the adjudicatory functions in a specialized communication agency is the most appropriate course.[179]

[178] Regulatory Framework Working Group Report, at 22-23.

[179] We agree with the Regulatory Framework Working Group that the body responsible for adjudicating disputes under the DACA statutory standard would be assisted by having access to a body of technologically and economically-trained personnel. Since generalist courts, by definition, do not have such staff at their disposal, we believed that a specialized administrative adjudicator would be better. For the time being, the institutional entity having such a staff is the FCC, and thus a restructured version of that entity seems best for shouldering the adjudicatory responsibilities imposed under the DACA framework. In the longer run, however, the Working Group is not opposed to shifting the adjudicatory responsibilities under DACA to the FTC. Some FCC staff would have to be transferred to the FTC (perhaps as a new division within the agency) so that the Commission would have access to professionals knowledgeable about the communications industry. If such a transfer were made, Congress should make clear that the transfer of adjudicatory functions should not be construed as expanding the FTC's rulemaking power into areas that have previously been within the FCC's rulemaking jurisdiction and that under DACA would be within the jurisdiction of a politically accountable executive branch official. It should be noted that, as a practical matter, some transfer of authority already may have occurred by operation of law when the FCC determined, and the Supreme Court affirmed the agency's determination, that broadband Internet access services are "information services" and not "telecommunications" services subject to common carrier regulation under the Communications Act. See National Cable & Telecomm. Servs. v. Brand X Internet Servs., 125 S. Ct. 2688 (2005). It is the FTC's position, and certainly a very plausible one, that it has jurisdiction for purposes of exercising its competition and consumer protection jurisdiction over broadband Internet services now that the FCC has declared them to be non-common carrier services. The FTC Act provides that "common carriers subject to the Communications Act of 1934" are exempt from the FTC. 15 U.S.C. § 45(a)(2). For a statement of the FCC's position, see the Prepared Statement of the FTC on FTC Jurisdiction Over Broadband Internet Access Services, at http://www.ftc.gov/os/2006/06/P052103CommissionTestimonyReBroadbandInternetAccessServices06142006Senate.pdf. It is possible, but not certain, that the FCC retains jurisdiction over these same services as well under its so-called Title I ancillary jurisdiction. Nevertheless, the fact that the FTC may also already have authority to regulate this increasingly important market segment may argue for clarifying matters and avoiding duplicate regulation by giving the FTC adjudicatory authority over all communications matters under DACA sooner rather than later.

D. A Multimember Commission Located in an Executive Department But With Some Degree of Independence (ICC Remnant Model).

After the abolition of the Interstate Commerce Commission, the old Commission's functions were transferred to a three-member Surface Transportation Board, which is part of the Department of Transportation. The Board members have tenure protection (they can be removed only for "inefficiency, neglect of duty, or malfeasance in office"), but the Board's independence may be more limited than traditional independent agencies. The Board's statute includes the following provision:

> (c) Independence. — In the performance of their functions, the members, employees, and other personnel of the Board shall not be responsible to or subject to the supervision or direction of any officer, employee, or agent of any other part of the Department of Transportation.[180]

This provision may insulate the Board from interference from other parts of the Department of Transportation, but, by its own terms, perhaps not from Presidential or OMB oversight.

Another example of a multimember commission located within an executive branch agency is the Federal Energy Regulatory Commission, which is a successor of the independent Federal Power Commission but by statute is now established "within the Department [of Energy]."[181] The FERC has many of the features for securing independence in a classic independent agency, including: fixed terms for commissioners; a requirement for bipartisan membership; and a provision allowing removal from office by the President only "for inefficiency, neglect of duty, or malfeasance in office."[182] On its website, FERC describes itself as an independent agency, proclaiming: "There is no review of FERC decisions by the President or Congress, maintaining FERC's independence as a regulatory agency, and providing for fair and unbiased decision."[183] Yet the Secretary of Energy does have some significant authority over the FERC, including the power to propose rules and regulations, the ability to impose deadlines for the completion of the rulemaking process, and the authority to assign, and to revoke, additional jurisdiction to the FERC.[184]

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[180] 49 U.S.C. § 703 (c).

[181] 42 U.S.C. § 7171 (a).

[182] 42 U.S.C. § 7171 (b)(1).

[183] See http://www.ferc.gov/about/com-mem.asp.

[184] See 42 U.S.C. § 7173(a) (authorizing the Secretary of Energy to propose rules for FERC's approval); id. § 7173(b) (allowing the Secretary to set "reasonable time limits …for the completion of action by the Commission" on any rule proposed by the Secretary); id. § 7172 (e) & (f) (affording the Secretary discretion to expand the FERC's jurisdiction).

The greatest difficulty with this model is that it further obfuscates the relationship between the agency and the executive branch. If changing the agency from an independent agency into a component of the Departments of Transportation or Energy does not diminish agency's freedom from executive branch influence or control, then little reform of real meaning has occurred. If the change in location does allow for more oversight by the President, then the agency is more like an executive branch agency. The statutes creating the STB and FERC did not, however, clearly embrace the option of enhancing presidential superivision and control. At best, the altered agency structures such as those at STB and FERC are simply ambiguous with respect to any meaningful changed institutional outcome. Ambiguity in basic lines of authority is usually not an auspicious foundation for an institution. When the transactional costs, however modest, of effecting such a institutional relocation are considered, there seems to be no basis for recommending adoption of the multimember commission located in the executive department model.

E. A Single Executive Branch Official Vested With Rulemaking Power and a Multi-Member Independent Commission Vested Adjudicatory Powers (Split Agency Model)

The Working Group ultimately decided to recommend retaining a multimember commission primarily for the purpose of conducting adjudications, while transferring all substantive rulemaking and associated executive powers to a single executive branch official who would be politically accountable to the President.[185] In light of the existing functions performed and personnel already on board, we believe that head of the National Telecommunications and Information Administration (the Assistant Secretary of Commerce for Communications and Information) would be the most appropriate executive branch official for receiving the rulemaking and associated executive powers transferred from the existing FCC.[186] This split agency model would accomplish the goal of centralizing rulemaking powers in one politically accountable

[185] Under DACA, there are likely still to remain some functions, for example, the conduct of spectrum auctions, that are in the nature of executive functions that should be performed by the single administrator. And, of course, to the extent that rules for the conduct of such auctions need to be promulgated under authority delegated by Congress, it is the executive branch official that would be promulgating such rules. Another example of an executive function that would be performed by the executive official would be carrying out some of the tasks associated with administering a numbering plan.

[186] Under the National Telecommunications and Information Administration Organization Act, 47 U.S.C. § 901 et seq., the Secretary of Commerce for Communications and Information has the power to reassign functions conferred on the National Telecommunications and Information Administration (NTIA). See 47 U.S.C. § 904(d). The Working Group recommends that the rulemaking powers transferred from the FCC also be subject to that transfer option so that the transferred rulemaking powers are treated no differently than other functions of the NTIA. In our view, the precise location within the Department of Commerce or, indeed, within the executive branch, is not as important as the act of transferring such powers to the executive branch.

individual but would leave all adjudicatory and associated enforcement functions (including functions such as the imposition of penalties and collection of fines) in an independent multimember body.

There are numerous justifications for including rulemakings in a single agency head. As a historical matter, independent agencies were not designed with rulemaking functions in mind. The Progressive theorists who originally championed the independent agency structure often referred to such agencies as administrative "tribunals."[187] This name reflects the assumptions that the agency would be follow procedures more closely analogous (though less formal) than those utilized by traditional judicial entities. Rulemaking was not thought to be a major function of these agencies, and, thus, the agency structure was not designed with the rulemaking function in mind.

Rulemaking under modern administrative law is an extraordinarily complex process that includes numerous checks on power, including strong rights of public participation, thorough judicial review, more multifaceted and at times seemingly contradictory statutory commands, and (for the executive branch agencies) often intensive economic and policy coordination and review by the Office of Management and Budget. In light of these checks, there is less need to distribute the administrative power among the members of a commission in response to any potential concern about the concentration of authority in a single person. . Indeed, modern administrative practice creates more need for unitary, politically powerful leadership that can generate a coherent rule capable of surviving political and judicial review.[188]

In addition to the increase in political accountability that is a paramount value in our democratic system, transfer of rulemaking authority to a single

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[187] See, e.g., LANDIS, supra note 47, at 1-5 (describing the attributes of the new form of governance — the "administrative tribunal"); W. H. Pillsbury, *Administrative Tribunals*, 36 HARV. L. REV. 405 (1922-23)); Harold M. Bowman, *American Administrative Tribunals*, 21 POL. SCI. Q. 609, 612 (1906) (defining administrative tribunal as administrative authorities which "in their procedure, their constitution or their powers, or in one or more of these matter, closely resemble courts of general jurisdiction); id. at 620 (describing administrative procedure solely by comparison to judicial procedure with the "inclin[ation] toward the laxer rules of *ex parte* proceedings"); E. Blythe Stason, *Administrative Tribunals — Organization and Reorganization*, 36 MICH. L. REV. 533, 535-36 (1938) (defining administrative tribunals as those agencies that have "powers normally regarded as belonging either to the legislative or to the judicial branch of government or both," and contrasting those with other agencies that are "engaged in the carrying out of completely defined provisions of law").

[188] As an alternative to splitting the agency into two parts, we also considered the possibility of centralizing all rulemaking powers in the Chairman of the FCC, who would serve as Chairman, as is currently the case, at the pleasure of the President. This possibility is consistent with the historical trend of centralizing administrative and executive power in the chairs of independent agencies, and subjecting those chairs to removal by the President. Nevertheless, this possibility is not recommended here partly because no other administrative agency currently has such a structure, and partly because there may be some value in separating the administrative rulemaking and adjudicatory functions.

administrator almost certainly will yield benefits associated with sound governance. In his 1998 article making the reform case for a single administrator of the FCC, former Chief Counsel to the Subcommittee on Communications of the U.S. House of Representatives, Harry Shooshan, an experienced and respected observer of the agency over many years, identified many of these same benefits associated with the having a single administrator in charge of the rulemaking function that we identified earlier in our own review.[189] Even though the selection process for the single administrator would not be less political than the current process for selecting FCC commissioners—nor in our view should it necessarily be—Shooshan suggests that, "at least over time, the criteria used for selection of a single administrator would comport more closely with position relevant characteristics."[190]

With respect to decisionmaking quality, Shooshan agrees with other observers that, at least at the FCC, the multimember commission structure often leads to unprincipled decisions that lack coherence and clarity. Shooshan describes FCC decisions as frequently "opaque", and says "[i]t is often difficult to discern a rationale or underlying philosophy other than an effort to give everybody something (a result exacerbated by the multimember decision making)."[191] We agree that, all too often, the rulemaking orders "serve primarily as announcements of the action taken, rather than well-reasoned statements of principle."[192] Shooshan concludes: "Precisely because the outcome is often the product of a last-minute consensus, the decisions are often a patchwork of pieces, each intended to satisfy some (internal or external) interest. Granting the staff 'editorial privileges' following adoption of an item has become an euphemism for stitching together the necessary pieces after the fact."[193]

Probably the most notable (or notorious) example of such a last minute "consensus" followed by after-the-fact "stitching" occurred in one of the many phases of the Commission's Unbundled Network Elements proceeding. Because the supposed "consensus" on the new rules did not form until immediately before the commencement of the FCC's public meeting, an abundance of stitching and re-stitching was required. As a result, eight months elapsed between the public meeting at which the FCC commissioners voted on a draft order and the release

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[189] Harry M. Shooshan III, *A Modest Proposal for Restructuring the Federal Communications Commission*, 50 FED. COMM. L. J. 637 (1998).

[190] Id. at 646. Shooshan asserts that, as opposed to the Assistant Attorney General for Antitrust who typically has been an antitrust expert when appointed, "it has been rare that an FCC commissioner, let alone a chairman, had significant experience in telecommunications or even the direct management of a large organization." Id., at 647. Whether or not that characterization is too hyperbolic, we believe it is true that the executive branch official appointed to be responsible for rulemaking is likely, more often than not, to have position-relevant experience.

[191] Id., at 651.

[192] Id., at 648.

[193] Id.

of the agency's actual opinion and order in the case.[194] When the court of appeals reviewed the order, which was the FCC's third try at promulgating network unbundling rules that would pass judicial muster, the court yet again set aside the Commission's rulemaking. This time it took the unusual step of setting a deadline for further agency action, concluding: "This deadline is appropriate in light of the Commission's failure, after eight years, to develop lawful unbundling rules, and its apparent unwillingness to adhere to prior judicial rulings."[195] In truth, the UNE proceeding was one of the two or three most important communications policy proceedings in the decade following the enactment of the Telecommunications Act of 1996, but throughout its unfortunately tortured history, substantial disagreements among the five commissioners prevented the adoption of a coherent policy.[196]

No doubt the rulemaking orders of a single administrator will sometimes fail to be, in Justice Scalia's phrase, a "model of clarity".[197] But, surely, more often than is the case with a multimember commission, "decisions rendered by a single administrator are likely to reflect a clear philosophy, be internally consistent, and present a more logical policy outcome."[198] As Shooshan puts it, "the putative benefit of multimember commissions is precisely that they thwart effectiveness—they compel compromise and sacrifice of principle."[199] We agree with his conclusion that deliberately thwarting effectiveness, sacrificing coherence, and compromising principle is a price too high to pay when there are ample safeguards and checks in place in the form of judicial review, legislative oversight, executive branch budget authority, and press scrutiny.[200]

An additional benefit of transferring rulemaking authority to a single administrator is that the Sunshine Act requirements will no longer be applicable. FCC commissioners have long complained that the Act's open meeting requirements have hampered their ability to reach coherent decisions in an efficient manner.[201] Tellingly, in February 2005, the then-Chairman of the FCC

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[194] For a description of the saga of the Unbundled Network Elements proceeding, see. May, supra note 12*, at* 1313-16.

[195] United States Telecom Ass'n v. FCC, 359 F. 3d 554, 595 (D.C. Cir. 2004).

[196] In reversing one of the FCC's most important rulemaking proceedings in the mass media area, Judge Richard Posner was highly critical of the FCC's opinion and order, concluding: "Stripped of its verbiage, the opinion, like a Persian cat with its fur shaved, is alarmingly pale and thin." Schurz Comm., Inc. v. FCC, 982 F. 2d 1043, 1050 (7th Cir. 1992).

[197] AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 398 (1999).

[198] Harry M. Shooshan, supra note 187, at 649.

[199] Id., at 650.

[200] Id.

[201] See Letter from Steven M. Waldman, Commissioner, Securities and Exchange Commissioner, to Thomasina Rogers, Chairperson, Administrative Conference of the United States, February 17, 1995, asking for a review of the effectiveness of the Sunshine Act and consideration of possible amendments in light of problems with the act (signed by all then sitting FCC commissioners), *reprinted in*, RICHARD BERG, ET AL, AN INTERPRETIVE GUIDE TO THE GOVERNMENT IN THE SUNSHINE ACT 286 (2nd ed. 2005).

and a fellow commissioner from the opposite political party wrote the Chairman of the Senate of the Senate Committee on Commerce, Science and Transportation, stating that:

> Nor has the open-meeting requirement generally achieved its goal of having Commissioners shape each others' views in the course of public deliberations. In fact, this requirement is a barrier to the substantive exchange of ideas among Commissioners, hampering our abilities to obtain the benefits of each others' views, input, or comments, and hampering our efforts to maximize consensus on the complex issues before us… Finally, and most significantly, Commission decisions are in some cases less well informed and well explained than they would be if we each had the benefit of the others' expertise and perspective.[202]

Even if the prospects for repealing or modifying the Sunshine Act were promising, which we do not believe them to be at present, we believe that this remedial action would address only one aspect of the multifaceted problems with multimember agency policymaking discussed above.

If rulemaking power is shifted to the executive branch, then retaining adjudicatory power in an independent agency is acceptable from our perspective because adjudicators – even adjudicators within the Executive Branch – have commonly and traditionally been conferred some sort of independence in our society. As we read the history of expert independent regulatory commissions, the key flaw in these institutions is not merely that they are politically independent, but that they are politically independent actors with broad mandates to create *policy*. But politics is all about the creation of policy – it is about the formulation of rules in areas where law and science end, and questions of morality and philosophical outlook begin. When independent regulatory commissions were created, the belief – the aspiration – was that independent commissioners would not be making policy so much as they would be following scientific principles of regulation. But the science of regulation is simply too poorly developed to provide meaningful guidance, or meaningful constraints, on most agency decisions. These are still matters of pure policy, and in our culture such issues are settled – and should be settled – by political actors responding to democratic political forces.

By contrast, the concept of independence is not so meaningless, nor so undesirable, where the independent actors *do* have some substantial

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[202] Letter from Michael K. Powell, Chairman, and Michael J. Copps, Commissioner, Federal Communications Commission, to the Honorable Ted Stevens, Chairman, Senate Committee on Commerce, Science, and Transportation, February 2, 2005, *reprinted in* BERG ET AL, supra note 199, at 344. See also Randolph J. May, *Reforming the Sunshine Act*, 49 ADMIN. L. REV. 415 (1997), for a discussion of the fairly widespread consensus that the Sunshine Act is not achieving its stated objectives.

professional constraints that guide and control their decisions in meaningful ways. Adjudication as it is defined in our society, and certainly as it is contemplated under DACA, has such constraints. They are the constraints provided by time-tested legal norms and procedures. Thus, it is not meaningless nor undesirable to seek politically independent judges because, by making judges independent of political forces, society can expect the judge to be able better to follow the norms of the legal method. Similarly, maintaining some degree of independence for DACA adjudicators will allow the adjudicators better to follow normal legal principles and procedures for applying general rules to the specific facts of the case.[203] Even within the executive branch, members of adjudicatory bodies often enjoy some form of acknowledged independence.[204] Indeed, in adjudications the Supreme Court has held that, as a matter of constitutional due process, "[t]he one who decides must hear."[205] That principle imposes constraints on the degree to which adjudicators within the executive branch may be directed by their superiors with respect to the results in individual cases.[206] Because even within the executive branch longstanding law and tradition supports leaving adjudicatory functions in a multimember body that enjoys some tenure protection, we opt to recommend that the adjudicatory function remain with the reformed FCC along the lines presently constituted.

Existing law provides precedent for the type of "split agency" recommended by the Working Group. Under the Occupational Safety and Health Act of 1970 (OSHA), rulemaking powers are vested in the Secretary of Labor, while adjudicatory powers are conferred on the Occupational Safety and Health Review Commission. The Working Group's proposal requires a similar split in administrative functions, with one important difference. The OSHA statute confers *only* adjudicatory power in the independent review commission. The Secretary of Labor has all other administrative functions, including not only the rulemaking power but also the power to initiate and to prosecute adjudications. The Working Group's proposal allows all administrative functions related to the performance of the enforcement functions under DACA, including the initiation

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[203] None of this is to deny that the adjudicators under DACA would still make some policy. But they would do so subject to the constraints of the adjudicatory method. The policymaking would be done incrementally and interstitially, within the limits imposed by past decisions. Moreover, subject to the constrants of the statute, the policies formulated in the decisional law could always be overturned in rulemakings by the politically accountable rulemaking entity.

[204] See, e.g., 5 U.S.C. § 7521(a) (protecting administrative law judges from removal and other adverse personnel actions except upon a showing of "good cause" as determined by the Merit Systems Protection Board); 8 CFR 1003.1(requiring members of the Board of Immigration Appeals to "exercise their independent judgment and discretion in considering and determining the cases coming before the Board").

[205] Morgan v. United States, 298 US 468, 481 (1936).

[206] See 67 FED. REG. 54878, 54883 (2002) (noting the Department of Justice's position that, consistent with constitutional notions of "fundamental fairness," the Department of Justice "agrees with the principle of independence of adjudicators within the individual adjudications, but notes that freedom to decide cases under the law and regulations should not be confused with managing the caseload and setting standards for review").

and prosecution of adjudications, to remain with the Commission. It is only the rulemaking power and associated executive functions that will be transferred to NTIA or another designated part of the executive branch. Thus, in carrying out the important enforcement role under DACA, the slimmed-down Communications Commission will resemble the Federal Trade Commission and not be a dramatic departure from the FCC's current administrative structure.[207]

In recommending a split agency format, the Working Group was aware that some commentators have been hostile to the split administrative structure of the OSHA/OSHRC.[208] However, the problems associated with that split agency are less likely to arise under the administrative structure we propose. The OSHA statute was enacted in 1970 during the heyday of exuberance for administrative procedural protections. The split structure was then viewed as desirable because it increased the separation of prosecutorial and adjudicatory functions and thus "more closely accord[ed] with traditional notions of due process."[209] At least some of the administrative inefficiencies arose because the adjudicatory commission found itself in conflict with the prosecutorial agency during the litigation of enforcement cases. That problem would not occur under our

[207] While the purpose of this report and recommendation is not to propose specific sizes for the entities that will succeed to the administrative functions under DACA, the Working Group firmly believes that, as the need for the exercise of regulatory authority diminishes with the continued development of marketplace competition, the personnel count of the successor "reformed FCC" should be substantially lower than the more than 2000 employees of the current agency. With regulatory activity under DACA more closely tied to the existence of competition, and with rulemaking authority substantially constrained, there almost certainly will be an opportunity to realize a meaningful reduction in the size of the agency's staff. For many years, the FCC has been one of the more prolific regulation-producing agencies. And it has often also been near the top of the agency list for the number of "economically significant" (i.e., those regulations that agencies estimate will have annual impacts of at least $100 million) regulations produced. See Clyde Wayne Crews, Jr., *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State*, Competitive Enterprise Institute 2000, at http://www.cei.org/pdf/5407.pdf. Using the Unified Federal Regulatory Agenda, and applying a consistent format, Mr. Crews has examined the regulatory activity of the federal agencies in a series of annual *Ten Thousand Commandments* reports. They consistently confirm the FCC's high level of self-reported rule-writing activity. For the series of these reports, see the list of Mr. Crews' publications at http://www.cei.org/dyn/pubs_by_author.cfm?recordset=11&expert=34. DACA's constraint on the promulgation of new rulemakings should considerably reduce the number of agency personnel heretofore devoted to that activity.

[208] Derek Bok, for example, has criticized the OSHA administrative machinery as "too cumbersome" and has placed some of the blame on the "complex structure" with its "separate administrative bodies." BOK, supra note 29, at 161. Other commentators have been more harsh. Terry Moe describes the split-agency design as an "administrative nightmare," Terry Moe, *The Politics of Structural Choice: Toward a Theory of Public Bureaucracy*, in ORGANIZATION THEORY 116 (OLIVER WILLIAMSON ED., 1990), and Ken Davis and Dick Pierce assert that "[t]he inefficient multi-agency structure ... ranks high on the list of the many explanations for [administrative structure's] poor performance." 2 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 9.9 AT 100 (3D ED. 1994).

[209] 116 Cong. Rec. S36,532-33 (1970) (statement of Senator Jacob Javits, who sponsored the amendment that created the OSHA/OSHRC structure).

recommendation because the two functions would remain with the multimember body.

Where only rulemaking and associated functions are divorced from all other administrative functions, most of the enforcement powers of the agency (including initiation of complaint proceedings, prosecution of cases, and adjudication) can remain vested within the commission as a whole. In carrying out these functions, the reformed agency would function much like the FTC and the current FCC do in their adjudications. The executive branch official responsible for establishing policy through rulemakings and the independent adjudicatory body will have less opportunity for conflict because the executive branch official will not be directly involved in adjudications. With respect to adjudications, therefore, the agency's procedure and practice will be governed by a longstanding body of administrative law, so the innovative "split" structure will not create new uncertainties. Furthermore, the Supreme Court has now resolved one of the main uncertainties about the OSHA/OSHRC split agency format that caused conflict between the independent commission and the executive branch rulemaker in that instance.[210] In light of that precedent, the division of authority should not be subject to the uncertainty that existed for a time with the OSHA/OSHRC structure.

F. An Agency with a Unitary Head Having No Political Independence (Pure Executive Agency)

This model employs a very simple structure and has several variations. The agency could be free standing (like the EPA) or encompassed with a cabinet department (like the Federal Bureau of Investigation, the Patent & Trademark Office, the Federal Railroad Administration,[211] the Federal Emergency Management Agency, or the U.S. Citizenship and Immigration Services). The agency may also include adjudicatory bodies within the agency (the USCIS and the PTO have such sub-entities). There was substantial sympathy within the Working Group for this option based on the enhanced political accountability that accompanies an agency that is ultimately subject to more direct presidential control.

However, despite the appeal on the political accountability score, in this instance a major drawback with this pure executive agency model is that the DACA Regulatory Framework Working Group has recommended that adjudication should be the primary means for exercising regulatory authority in

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[210] See Martin v. Occupational Safety and Health Review Commission, 499 US 144 (1991) (holding that the Secretary of Labor, not the OSHRC, is entitled to receive deference in interpreting regulations promulgated by the Secretary).

[211] The FRA is component of the Department of Transportation. It did not receive any functions as part of the ICC Termination Act of 1995. See P.L. No. 104-88, 109 Stat. 803 (1995). The FRA assesses fines for violations of its rules, but it does not include any multi-member adjudicatory bodies.

the communications area. If the agency had a unitary agency head and if adjudication were to be conducted by a multimember body (which has traditionally been the case in executive agencies), then much of the agency's work would be accomplished through adjudicators who are likely to be at a relatively low level in the executive branch chain of command. As a result, it may be difficult to attract high-quality adjudicators to the positions. Furthermore, the head of the agency would not have control over the outcome of the adjudications and would therefore possess less power despite the apparently higher position.

Despite this possible drawback, and while preferring the split-agency model discussed in the preceding section, the Working Group is not opposed to the transfer of adjudicatory power to an executive agency as long as the proper degree of freedom from political interference and control is maintained in the adjudication of individual cases. One possibility is that, if Congress creates a split agency as we recommend, Congress could have the adjudicatory matters shared in some way between the single-headed executive branch entity and the multimember commission. A similar sharing of adjudication and related enforcement-type matters takes place between the Antitrust Division of the Justice Department and the Federal Trade Commission in reviewing merger agreements. A similar arrangement could be established on an experimental basis for adjudicating matters that arise under a revised Digital Age Communications Act, and Congress could review the performance of the different entities after sufficient time has elapsed to gain experience with the different institutional structures.

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