INDEPENDENCE, CONGRESSIONAL WEAKNESS, AND THE IMPORTANCE OF APPOINTMENT: THE IMPACT OF COMBINING BUDGETARY AUTONOMY WITH REMOVAL PROTECTION

The influence of appropriations on independent agencies has long been overshadowed by the traditional focus on the consequences of removal restrictions.[1] The very definition of an independent agency is an agency with a head or board that the President can remove only for cause.[2] Constitutional and normative evaluations have also focused on the impact of limiting removal.[3] Similarly, the Supreme Court's analysis of independent agencies has focused on the constitutionality of removal restrictions.[4]

However, this focus on removal has obscured other means of control. Indeed, some judges and scholars have recognized that removal restrictions do not render independent agencies completely independent. Rather, they argue that removal restrictions replace presidential control with increased, or at least continued, congressional control,[5] or that presidential control continues, despite removal protection, through other channels.[6] These propositions tend to be stated as self-evident conclusions, with the role of the budget in controlling independent

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[1] While this Note focuses on independent agencies, the term "agency" is also used where the distinction between agency and independent agency is irrelevant.

[2] *See, e.g.*, Jacob E. Gersen, *Designing Agencies*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 333, 347–48 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010) (defining independent agencies as those with for-cause removal restrictions); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2247 (2001) (same); *cf.* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 16–17 (2010) (finding an "obsessive focus on removal as the touchstone of independence," *id.* at 17).

[3] *See* Barkow, *supra* note 2, at 16–17 (observing that removal limits have "spawned countless law review articles," *id.* at 16). For examples of such articles, see Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 583 (1994); and Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 492 (1987).

[4] *See, e.g.*, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3146–47 (2010); Humphrey's Ex'r v. United States, 295 U.S. 602, 631–32 (1935); Myers v. United States, 272 U.S. 52, 106 (1926).

[5] *See, e.g.*, FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1815 (2009) (opinion of Scalia, J.) ("[Independent agencies'] freedom from presidential oversight (and protection) has simply been replaced by increased subservience to congressional direction."); Calabresi & Prakash, *supra* note 3, at 583 ("[A]bsent presidential control, congressional oversight and appropriations powers become the only concern . . . ."); Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1341 (1994).

[6] *See, e.g.*, ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND 6 (2010) (finding "growing evidence suggesting that presidents often manage to assert effective control over the independent agencies").

agencies described briefly as one of many factors.[7] A separate vein of scholarship has examined how the budget controls agencies, including independent agencies.[8] While this scholarship provides a foundation for understanding the mechanics of budgetary influence,[9] thus far neglected are the effects of self-funding on independent agencies.[10]

A complete exemption from appropriations is rare; Professor Steven Ramirez claims that "the Fed is the only regulatory agency that is totally self-funded."[11] An independent survey found several other exempt agencies, but it is a short list composed of narrowly focused agencies, including many agencies that only regulate financial institutions or make technical financial decisions.[12] These exempt agencies tend to operate in technical sectors where political insulation is generally considered appropriate,[13] and it is likely that the paucity of, as well as lack of concern over the independence of, narrowly focused agencies contributes to the lack of scholarship on combining removal protection with self-funding.

Now, however, the creation of the Consumer Financial Protection Bureau (CFPB) necessitates a deeper inquiry into the consequences of

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[7] *See, e.g.*, Barkow, *supra* note 2, at 42–45, 77; Calabresi & Prakash, *supra* note 3, at 583; Easterbrook, *supra* note 5, at 1341; Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 963–64 (1980).

[8] *See, e.g.*, Haoran Lu, *Presidential Influence on Independent Commissions: A Case of FTC Staffing Levels*, 28 PRESIDENTIAL STUD. Q. 51, 51 (1998); Joseph Stewart, Jr. et al., *Presidential and Congressional Support for "Independent" Regulatory Commissions: Implications of the Budgetary Process*, 35 W. POL. Q. 318, 318 (1982); Bruce Yandle, *Regulators, Legislators and Budget Manipulation*, 56 PUB. CHOICE 167, 172–78 (1988).

[9] *See, e.g.*, Daniel P. Carpenter, *Adaptive Signal Processing, Hierarchy, and Budgetary Control in Federal Regulation*, 90 AM. POL. SCI. REV. 283, 284–87 (1996) (setting out budgetary control models); D. Roderick Kiewiet & Mathew D. McCubbins, *Presidential Influence on Congressional Appropriations Decisions*, 32 AM. J. POL. SCI. 713 (1988) (examining presidential control over agency budgets); Michael M. Ting, *The "Power of the Purse" and Its Implications for Bureaucratic Policy-Making*, 106 PUB. CHOICE 243, 245–47 (2001) (examining budgetary control models).

[10] The term "self-funding" is used in this Note to refer to statutorily provided funding that is not contingent on the appropriations process, such as fees that go directly to the agency or funding from another source.

[11] Steven A. Ramirez, *Depoliticizing Financial Regulation*, 41 WM. & MARY L. REV. 503, 525 (2000).

[12] Narrowly focused agencies exempt from appropriations include the Farm Credit Administration, Farm Credit System Insurance Corporation, Federal Deposit Insurance Corporation, Federal Home Loan Mortgage Corporation, Federal Housing Finance Agency, Federal Prison Industries, Inc., and Bureau of Engraving and Printing. Narrowly focused agencies that regulate only financial institutions include the National Credit Union Administration, Comptroller of the Currency, and Office of Thrift Supervision. *See* Survey of Self-Funded Agencies (May 5, 2011) (unpublished survey) (on file with the Harvard Law School Library).

[13] For example, many believe that the Federal Reserve's mission — regulating the monetary system — is a technical judgment that should be outside of politics. *See, e.g.*, DONALD F. KETTL, LEADERSHIP AT THE FED 2–3 (1986); Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 616 (2010).

exempting an independent agency from control through appropriations. Created by the Dodd-Frank Wall Street Reform and Consumer Protection Act[14] (Dodd-Frank Act), the CFPB possesses the rare structure of an independent agency with financial independence.[15] The impact of CFPB's self-funding is important because of the agency's potential power.[16] Understanding the possible effects of combining removal protection with self-funding is necessary to explore the impact of budgetary control and the key consequences should this model be used for future agencies.

Looking at the influence of appropriations and other means of control shows that independent agencies, although somewhat insulated from presidential pressure through removal restrictions, remain accountable to the political branches, especially Congress, through appropriations. However, when the traditional independent agency model is combined with self-funding, as was done with the CFPB, control is substantially diminished, especially because of reduced congressional power. Thus, appointment becomes the primary means of control. The heightened importance of appointment is likely to create gridlock and confirmation fights unless the agency rests upon a strong political consensus.

Part I explains how independent agencies remain subject to congressional and presidential control because of the appropriations process and uses the Securities and Exchange Commission (SEC) as a case study. Part II examines the weakness of substitutes for budgetary control — when an independent agency also has financial independence, it is subject to much less congressional control and to only moderate presidential control, largely through appointments, as illustrated by the Federal Reserve (Fed). Part III considers the structural consequences of providing independent agencies with self-funding, using the example of the CFPB, and thus lays the groundwork for future scholarship on the structure's normative consequences.

I. BUDGETARY CONTROL OF TRADITIONAL INDEPENDENT AGENCIES

Although removal restrictions suffice to define an agency as independent, these restrictions provide only partial insulation because traditional independent agencies remain politically accountable, especially

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[14] Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of the U.S. Code) [hereinafter Dodd-Frank Act].

[15] *See* Dodd-Frank Act, 12 U.S.C. § 5491(c)(3) (Supp. IV 2011) (providing removal protection); *id.* § 5497(a) (providing financial independence). Furthermore, the lack of a multimember board is atypical for independent agencies and will amplify the Director's independence. *See* Recent Legislation, 124 HARV. L. REV. 2123, 2128 (2011).

[16] *See infra* note 139.

through appropriations. This Part argues that Congress and, to a lesser degree, the President use the budget to control independent agencies. It concludes by examining how appropriations operate as a control over the SEC, a nominally independent agency.

Agencies are entirely dependent upon Congress (and a lack of presidential veto or sufficient congressional support to overcome a veto) for funding. The Appropriations Clause provides that money can only be drawn from the Treasury by appropriations approved through the legislative process.[17] Consequently, unless statutorily allowed, agencies may not collect funds beyond their appropriations or spend funds on any activity not authorized by an appropriation.[18] In other words, even for programs authorized by statute or appropriation, agencies cannot conduct additional fundraising unless statutorily permitted, and for unauthorized programs, agencies cannot spend a penny of appropriated funds even if the expense is fixed, like employee wages.[19] For all agencies without self-funding, appropriations bills are thus the sole determinant of funding. However, Congress and the President can authorize alternative funding schemes outside of appropriations.[20]

A. Methods of Congressional Control

Congress uses the appropriations monopoly to exert control over agencies by altering total funding, targeting specific programs through earmarks and riders, and using signals and threats. Altering the total level of funding is an ex ante, broad means of control; earmarks and riders are ex ante, specific means of control; and signals and threats are often ex post responses to day-to-day activities.

1. Level of Funding. — The crudest method of control through appropriations is to curtail an agency's activity by reducing its budget, or to increase its activity by raising its budget.[21] A well-known example, and a key reason that CFPB proponents sought self-funding, was the use of budget cuts to stymie the Consumer Product Safety Commission (CPSC).[22] Although the CPSC appeared to be the "most powerful

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[17] U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."); Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 84–85 (2006).

[18] *See* Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1356 (1988) ("Federal agencies may not resort to nonappropriation financing *because their activities are authorized only to the extent of their appropriations*.").

[19] *See id.* at 1356–63.

[20] *See* Barkow, *supra* note 2, at 44 (noting that Congress can authorize self-funding).

[21] *See* Jonathan Bendor & Terry M. Moe, *An Adaptive Model of Bureaucratic Politics*, 79 AM. POL. SCI. REV. 755, 756–62 (1985) (modeling how an agency's budget impacts its enforcement levels); Ting, *supra* note 9, at 245 (arguing that "budgets . . . constrain agencies' feasible policies").

[22] *See* Barkow, *supra* note 2, at 78 (reporting that "the CFPB's designers learned some important lessons from the CPSC").

Federal regulatory agency ever created,"[23] budget cuts of sixty percent between 1975 and 1990[24] left it "if not a do-nothing, a do-very-little agency."[25] Many other agencies, independent and nonindependent, have experienced similar brute-force control through funding.[26]

2. Earmarks and Riders. — Should Congress seek more fine-tuned influence, it can earmark funds or use riders to forbid the expenditure of funds. Earmarks designate money for a particular activity, thereby preventing those funds from being used for other purposes.[27] Earmarks may also be used to encourage an agency to take action not authorized by statute.[28]

Riders prohibit the use of funds for a specific activity.[29] Riders act as "temporary, narrowly focused amendments to the underlying statute" by defining what activities an agency may pursue.[30] Riders may even have the functional equivalence of substantive statutory text[31]: the Supreme Court has given riders "the same respect" as other legislation,[32] and riders often render government inaction unreviewable because Congress can prevent agencies from reaching justiciable results.[33]

3. Threats and Signaling. — The appropriations process can control agencies through subtle, indirect means as well. For instance, the budget or talk of the budget can be a signaling device to convey pref-

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[23] *Id.* at 66 (quoting Teresa M. Schwartz, *The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade*, 51 GEO. WASH. L. REV. 32, 43–44 (1982)) (internal quotation marks omitted).

[24] *Id.* at 67; *see also* Susan Bartlett Foote, *Independent Agencies Under Attack: A Skeptical View of the Importance of the Debate*, 1988 DUKE L.J. 223, 234.

[25] Foote, *supra* note 24, at 234.

[26] *See, e.g.*, RENA STEINZOR & SIDNEY SHAPIRO, THE PEOPLE'S AGENTS AND THE BATTLE TO PROTECT THE AMERICAN PUBLIC 3–5 (2010) (asserting that the EPA, FDA, NHTSA, and OSHA are in "shambles," *id.* at 4, because of "severe shortfalls in funding," *id.* at 5).

[27] *See* Beermann, *supra* note 17, at 89; *cf.* Stith, *supra* note 18, at 1356 ("[A]ppropriations . . . define the character, extent, and scope of authorized activities.").

[28] *See* Beermann, *supra* note 17, at 89–90 & n.108 (giving the example of Congress's requiring spending on research that did not otherwise meet the National Science Foundation's standards).

[29] *See id.* at 85.

[30] *Id.* at 87; *see also* Susan Rose-Ackerman, *Judicial Review and the Power of the Purse*, 12 INT'L REV. L. & ECON. 191, 193 (1992) (arguing that though "[b]oth houses of Congress have rules that forbid the amendment of statutes through appropriations acts . . . [t]hey are routinely violated or waived"); Stith, *supra* note 18, at 1352 ("Generally, an appropriation is thought of as the specification of an amount of money for a federal agency or activity, while the range of actions on which the money may be spent is defined in other legislation . . . .").

[31] *Cf.* Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2155 (2004) ("[M]ore and more often, important statutes are rammed through as appropriation riders . . . ."); J. Gregory Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162, 1206 ("It is generally accepted . . . that Congress may enact or repeal substantive legislation by means of a rider to an appropriations bill.").

[32] Beermann, *supra* note 17, at 89 n.106.

[33] *Id.* at 87–88.

erences or to indicate approval of an activity.[34] Small changes to the budget can therefore provoke large responses from the agency because of the threat of deeper change the following year. Similarly, signals of an impending budget cut can cause agencies to act preemptively.[35] Thus, even where congressional action appears absent, the agency may still be responding to Congress — a dynamic that is obscured by the agency's action being within the range of outcomes acceptable to Congress and therefore not generating any overt congressional response.[36] These indirect methods combine with direct methods to make the budget "the most effective sanction" for influencing agencies.[37]

B. Methods of Presidential Control

As appropriations bills must pass through the constitutional legislative process,[38] the President also exercises some control over independent agencies through the budget. However, Congress uses the budget to exert more influence over independent agencies than does the President because of the limits on the President's proposal, veto, and negotiation powers.[39]

1. Proposal Power. — Although the appropriations process gives the President influence through the power to propose the initial budget to Congress, the President has less proposal power over requests of independent agencies than over requests of nonindependent agencies. Since 1921, agencies have been required to submit their requests to the President (via what is now the Office of Management and Budget (OMB)) for inclusion in an overall budget.[40] However, since the 1970s, Congress has placed provisions in statutes that allow many indepen-

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[34] *See* Carpenter, *supra* note 9, at 298 (arguing that the budget is a "signalling influence"); *cf.* Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 793 (1983) (concluding that, when it comes to even nonbudgetary signals of congressional desires, "little ostensible activity by Congress may mask more subtle but nonetheless strong congressional influence").

[35] *See* Weingast & Moran, *supra* note 34, at 769 ("The threat of ex post sanctions creates ex ante incentives for the bureau to serve a congressional clientele."); *cf.* Matthew C. Stephenson, *Statutory Interpretation by Agencies*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW, *supra* note 2, at 285, 295 (asserting that, though scholars have dismissed the idea that "agencies are 'budget maximizers[,]' . . . the weaker assumption that agencies are partly motivated by a desire to preserve or increase their discretionary budget remains compelling").

[36] *See* Weingast & Moran, *supra* note 34, at 793.

[37] Yandle, *supra* note 8, at 178; *see also* Lu, *supra* note 8, at 51 (noting that appropriations and legislation are "the most effective" tools to control independent commissions).

[38] *See supra* p. 1825.

[39] The debate over whether Congress or the President predominates in influencing the agencies through appropriations is longstanding. *See* Carpenter, *supra* note 9, at 284 (listing scholars on both sides of the debate).

[40] *See* Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1151–52 (2000) (discussing the requirements of the Budget and Accounting Act of 1921).

dent agencies to bypass the OMB and submit requests directly to Congress; other provisions allow agencies to submit requests simultaneously to Congress and the OMB, ensuring that Congress will be apprised of the agency's original position.[41] Simultaneous submission or even skipping the OMB entirely prevents the President from asking for changes before Congress sees the request, thereby reducing presidential influence.[42]

2. *Veto Power.* — The President could also use his or her veto power to control an agency through the budget, but the President's veto power is costly and is less effective in the context of appropriations. Vetoing is an expensive tool: while Congress may alter a line in a bill relatively easily, the unconstitutionality of the line item veto[43] means that the President must bear the cost of vetoing the entire bill.

Additionally, it is more difficult for the President to use a veto to get more funding than to get less funding for an agency. When Congress seeks to punish through budget cuts, the President's veto power is a weak tool because Congress submits "'take it or leave it' offers."[44] The President's choice is between the proposed amount or the "reversionary level," which is the funding level that the agency receives if there is no appropriation before the new fiscal year.[45] The reversionary level, though zero in the absence of additional congressional action, is almost always the amount contained in a continuing resolution.[46] With a "high degree of regularity," continuing resolutions provide for funding that is no higher than the amount passed by the House.[47] Therefore, the President has the option of accepting the congressional proposal or a continuing resolution with an equal or lower funding level. The past use of the veto shows this limitation: "Of the 18 appropriations bills vetoed from 1948 to 1979, the president never vetoed one because it called for too little spending."[48]

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41 *See id.* at 1152.

42 Absent statutory interference, the President's influence over agencies through OMB has been recognized as vast. *See* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 506 (1989); *see also* Christopher R. Berry et al., *The President and the Distribution of Federal Spending*, 104 AM. POL. SCI. REV. 783, 785–86 (2010) (arguing that proposal power gives the President influence).

43 *See* Clinton v. City of New York, 524 U.S. 417, 421 (1998) (holding that the Line Item Veto Act of 1996 violated the Presentment Clause).

44 Kiewiet & McCubbins, *supra* note 9, at 714.

45 *Id.*

46 *Id.* at 716.

47 *Id.* (arguing that the formula for continuing resolutions is that "[a]gencies are allowed to spend at the previous year's rate or, if only the House has passed the appropriation bill, at whichever rate is lower, or, if both Senate and House have passed the bill, at whichever of those two rates is lower" (quoting RICHARD F. FENNO, THE POWER OF THE PURSE 421 (1966)) (internal quotation marks omitted)).

48 *Id.* at 721.

3. Negotiation Power. — The President can also attempt to influence appropriations through negotiations, but Congress often possesses more leverage. Throughout the budgetary process, negotiations occur between the President and Congress, the House and the Senate, and the subcommittees and Congress.[49] During these negotiations, the President has less leverage than Congress because of the high costs of a veto, the reversionary level as a veto limit, and the potential for a supermajority to override a veto.[50] Though the President can negotiate with Congress using other leverage, this requires the President to expend perhaps significant political capital. However, the President certainly is not without power during these negotiations, as is illustrated by agencies' compliance with presidential wishes in order to obtain presidential support during budgetary debates.[51]

C. Case Study: The SEC

The recent history of the SEC (specifically, the chairmanship of Arthur Levitt from 1993 to 2001) illustrates the primacy of congressional control through the budget and the influence of appropriations over independent agencies.[52] Although the SEC collects a large amount of fees, the SEC remains dependent on appropriations because Congress requires that some of the fees collected be given to the Treasury.[53] Congress also caps the amount the SEC may spend in a year, and thus the fees the SEC does retain are subtracted from its general appropriations, leaving the agency with the same budget Congress had set.[54]

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[49] *See* Elizabeth Garrett, *The Congressional Budget Process: Strengthening the Party-in-Government*, 100 COLUM. L. REV. 702, 723 (2000) (explaining that congressional party leaders and the President draft budget resolutions in consultation with the committees); *cf.* Henry L. Chambers, Jr. & Dennis E. Logue, Jr., *Separation of Powers and the 1995–1996 Budget Impasse*, 16 ST. LOUIS U. PUB. L. REV. 51, 52 (1996) (noting that budgets blend executive and legislative agendas).

[50] *See* Beermann, *supra* note 17, at 85 ("[I]n a disagreement between Congress and the President over the priorities or the value of a particular program, Congress will win if it uses its power over the allocation of funds.").

[51] *See* Bressman & Thompson, *supra* note 13, at 632 (writing that agencies are influenced by the President because "the President can remove support from an agency in negotiations with Congress over [the] budget").

[52] The SEC is an independent agency because the Commissioners are removable only for cause. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3148 (2010) (noting that the parties to the case agreed that Commissioners were only removable for cause).

[53] *See* Karen Buck Burgess et al., *Recent Legislative Developments Affecting the Work of the Securities and Exchange Commission — December 29, 2000*, *in* THE SEC SPEAKS IN 2001, at 799, 847 (PLI Corporate Law & Practice, Course Handbook Ser. No. 1234, 2001).

[54] *See* 15 U.S.C. § 77f(b)(3) (2006 & Supp. IV 2011) (requiring fees collected under this subsection to be "offsetting collections" and that fees be collected only "to the extent provided in advance in appropriation Acts"); *id.* § 78m(e)(4) (same); *id.* § 78n(g)(4) (same); *id.* § 78ee(i)(1) (same); *id.* § 78kk (authorizing such appropriations for 2011 to 2015).

Congress used the budget to control the SEC through overall funding limits and direct and indirect threats of budgetary cuts. First, Congress repeatedly denied Chairman Levitt's requests for significant increases in funding.[55] Because Levitt's tenure coincided with the market boom of the 1990s and the consequent increase in the number of securities and companies subject to the SEC's jurisdiction, Congress's choice to limit the SEC's budget increases predictably led the agency to use rulemaking to reduce the number of companies subject to regulation.[56] Congress recognized the power it held over the SEC due to the budget: even though Levitt pushed for self-funding, Levitt later termed this proposal "naive" because "Congress was unwilling to give up the pursestrings."[57]

Additionally, on multiple occasions Congress used direct or indirect budget threats to control the SEC. For example, after Levitt proposed rules on the independence of accounting firms, Levitt received letters and phone calls from congressmen threatening budget cuts and riders.[58] Levitt backed down from his initial proposal because he believed that "[n]ever before had the SEC faced such a threat to its independence" and worried that "vindictive lawmakers could decimate the SEC's budget and tie its hands for years to come."[59] Similarly, in 1995, after legislation was introduced to freeze the SEC budget for five years and reduce the number of Commissioners, Levitt appointed Philip K. Howard, a critic of federal regulation, to lead a task force.[60] Levitt subsequently adopted numerous proposals from the task force in order to preempt Congress's deregulatory inclination.[61]

During Levitt's tenure, the President also likely influenced the SEC through its budget, though Levitt's personal recollections focus on congressional, not presidential, influence.[62] The President likely has more influence over the SEC's budget than is typical for a traditional independent agency because the administration has the power to make the initial submission of the SEC's budget to Congress.[63] For example,

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55 *See, e.g.*, Joel Seligman, *Self-Funding for the Securities and Exchange Commission*, 28 NOVA L. REV. 233, 240 (2004) (citing Levitt's 1993 request as one of many occasions on which Congress limited the SEC's activities by denying the agency's proposed budget).

56 *See id.* at 238–39 (discussing the market boom and the SEC's resource limitations); *id.* at 244 (discussing how the SEC exempted additional companies from the Securities Exchange Act of 1934).

57 *Id.* at 241 (internal quotation marks omitted) (quoting interview by Joel Seligman with Arthur Levitt).

58 *See* ARTHUR LEVITT WITH PAULA DWYER, TAKE ON THE STREET 131–32 (2002).

59 *Id.* at 133.

60 *See* Seligman, *supra* note 55, at 242.

61 *See id.*

62 *See generally* LEVITT, *supra* note 58.

63 *See* Bressman & Thompson, *supra* note 13, at 644 (stating that the President makes the initial submission of the SEC's budget); *supra* pp. 1827–28 (discussing how many independent agen-

President Clinton instructed the SEC to seek a "no-growth" budget for the 1998 fiscal year;[64] this budget was ultimately enacted.[65] The SEC, then, "needs the White House on its side to retain its funding and strength."[66]

II. LIMITATIONS OF REMAINING MECHANISMS OF CONTROL

Given that appropriations can be a powerful tool in controlling agency action, it is important to determine whether an independent financial stream lessens oversight by Congress and the President. In other words, are there effective alternative means of control? This Part argues that Congress, and especially the President, have alternative means of control, but that each alternative is a limited substitute. Legislation is more difficult and costly to enact, oversight is diminished by the absence of the carrot and stick of appropriations, and appointments are limited by entrenched bureaucracies and by a lack of ex post control. The Part concludes with a short case study of the Fed.

A. *Legislative Efforts*

Congress can continue to influence self-funded independent agencies by passing new legislation.[67] However, the very design of the federal government is intended to divide power and to make action challenging.[68] Supporters must overcome a crowded agenda,[69] obtain the support of congressional leadership[70] and both houses,[71] and survive the presidential veto.[72] Additionally, the potential for filibuster "imposes an effective supermajority requirement."[73] With limited "legisla-

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cies limit presidential influence by submitting their budget directly or simultaneously to Congress).

[64] Seligman, *supra* note 55, at 244 (internal quotation marks omitted).

[65] *See id.* at 244–45.

[66] Bressman & Thompson, *supra* note 13, at 644. Similarly, Professor Joel Seligman argues that a reason for Levitt's inability to get his desired funding was that President Clinton was not particularly interested in securities litigation or the SEC. *See* Seligman, *supra* note 55, at 239.

[67] *See* Ramirez, *supra* note 11, at 517–18; Stephenson, *supra* note 35, at 294.

[68] *See* Bowsher v. Synar, 478 U.S. 714, 721–22 (1986) (explaining checks and balances); THE FEDERALIST NO. 47, at 297–98 (James Madison) (Clinton Rossiter ed., 2003) (articulating the liberty interest in separating legislative and executive power).

[69] *Cf.* Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 U. KAN. L. REV. 1113, 1127 (1997); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 1022 (1992).

[70] *See* Michael Edmund O'Neill, *A Legislative Scorecard for the United States Senate: Evaluating Legislative Productivity*, 36 J. LEGIS. 297, 299 (2010).

[71] *See* Rui J.P. de Figueiredo, Jr., *Electoral Competition, Political Uncertainty, and Policy Insulation*, 96 AM. POL. SCI. REV. 321, 322 (2002) (arguing that passing legislation is more difficult in a system with separated powers than in a unicameral system).

[72] *See* Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 392.

[73] Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 245 (1997).

tive capacity," there are substantial opportunity costs as well.[74] These costs reduce the likelihood of using legislation as a means for control.[75] In contrast, the budget imposes far fewer costs on Congress because the budget is determined by a standardized annual process[76] and because the President's veto is not an effective tool for preventing budget cuts.[77]

Similarly, the Congressional Review Act[78] (CRA) is not a strong alternative because of its costs. The CRA provides a means of enacting a "resolution of disapproval" to overturn any federal agency rule, but the resolution, like standard legislation, must pass both houses and be signed by the President (or pass with two-thirds congressional support to overcome a veto).[79] Thus, the CRA has been used only once.[80]

Though Congress could nevertheless influence a self-funded agency by inserting substantive legislation into an appropriations bill, this tack is a more difficult route than is influencing a traditional independent agency through an appropriations bill. Riders can serve as substantive legislative fixes but typically do so by limiting how an agency spends its funds[81] (which would not impact self-funded agencies). Supporters must convince the drafters and the appropriations committee to insert a substantive amendment rather than merely to include an expected provision of funds,[82] must overcome congressional rules discouraging substantive legislation in appropriations bills,[83] and will face judicial precedent requiring a clear statement when substantive legislation comes from an appropriations bill.[84]

The President can also influence self-funded agencies through legislation. The President's power stems from his or her position as a party

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[74] Meltzer, *supra* note 72, at 392.

[75] *See* Weingast & Moran, *supra* note 34, at 770–71 (setting out a model of legislative choice in which members of Congress act to maximize their interests).

[76] *See* Stephenson, *supra* note 35, at 295.

[77] *See supra* p. 1828.

[78] 5 U.S.C. §§ 801–808 (2006).

[79] Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2163 (2009) (internal quotation marks omitted).

[80] Beermann, *supra* note 17, at 84.

[81] *See* Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456, 463 (explaining limitation riders as amendments that prevent funding from being used for a certain purpose).

[82] The additional challenge presented when one must opt in instead of opt out is well documented. *Cf.* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1447–48 (1995). The continued choice in favor of legislation in most cases indicates that Congress cannot accomplish all aims through riders.

[83] *See* William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541, 562 (1988). However, as discussed above, these rules may be ignored. *See* Rose-Ackerman, *supra* note 30, at 193.

[84] *See* Stephen F. Ross, *Statutory Interpretation as a Parasitic Endeavor*, 44 SAN DIEGO L. REV. 1027, 1042 (2007).

leader, power to veto bills, and constitutional duty to recommend to Congress "such Measures as he shall judge necessary and expedient."[85] However, the challenges of enacting legislation apply here as well.

B. Oversight

Oversight from Congress and the President is an important influence on independent agencies and, along with appointment, explains why the President continues to hold sway over independent agencies even without removal power. Though oversight power still exists over self-funded agencies, this power is likely to be less effective.

To influence agencies on a day-to-day basis, members of Congress can privately cajole agency officials or publicly push the agency through hearings, speeches, or strategic use of the media.[86] Even when an agency is subject to appropriations, it may dismiss general oversight attempts as political posturing.[87] Nevertheless, the SEC case study illustrates that these oversight activities can be powerful when combined with budgetary threats.[88] When an agency is self-funded, oversight activity could still carry influence through publicity, through threats to a bureaucrat's future opportunities, or by providing the agency with useful information.[89] Still, self-funding deprives Congress of a powerful tool for punishing or rewarding agencies.

The President can similarly use general oversight activity to influence traditional independent agencies and has a constitutional right to demand the agencies' opinions through the Opinions Clause.[90] Many scholars find that the President's general oversight power, along with his appointment power, explains why limiting removal does not end

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[85] U.S. CONST. art. II, § 3; *see also* M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1132, 1148–49 (2000) (analyzing the impact of the veto power and the dispersal of legislative power). The President's proposal power, used sparingly in the nineteenth century, is now a significant source of power. *See* Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1818–19 (1996).

[86] *See* Ramirez, *supra* note 11, at 518 (noting that, by making life unpleasant for agency officials, "Congress informally can curtail agency independence even without legislating"); Weingast & Moran, *supra* note 34, at 769 (listing ways that oversight committees are influential).

[87] *See* Stephenson, *supra* note 35, at 295 (noting that "these devices are less powerful, and it is not entirely clear why, or to what degree, they actually influence agency behavior"). Similarly, Professor Haoran Lu argues that appropriations and statutes are generally deemed more effective than incentive structures and oversight hearings. *See* Lu, *supra* note 8, at 51.

[88] *See supra* pp. 1830–31.

[89] *See* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 586 (1984) (identifying ways in which agency officials' behavior may be affected by political pressures); Weingast & Moran, *supra* note 34, at 769 (arguing that oversight committees can "embarrass agency heads, hurt future career opportunities, and foil pet projects").

[90] U.S. CONST. art. II, § 2, cl. 1 (allowing the President to demand from each executive office an opinion "upon any Subject relating to the Duties of" that office).

the President's influence over independent agencies.[91] However, like its impact on congressional power, self-funding weakens presidential oversight by removing an incentive for agencies to cede to presidential pressure. Nevertheless, as compared to Congress, the President may retain more oversight ability because "with 535 members of Congress, [congressional oversight is] much more complicated."[92] Moreover, even when the agency is self-funded, the President can provide "assistance in dealing with other agencies, legal services, office space, and advice on national policy."[93] Thus, self-funded agencies may be subject to some oversight, particularly from the President, but such oversight is likely to be weaker than that of traditional independent agencies.

C. Appointment

Given the high cost of legislative action and the limitations of general oversight, the most powerful remaining tool for the President and Congress (or, more accurately, the Senate) is appointment, as shown by the ex ante influence of appointment on the judiciary.[94] The relative powers of the President and Senate are debated, though it is evident that both are important.[95] The President and the Senate seek to install individuals who share their preferences in order to shape the direction of the court or agency.[96] The power of this tool is clear: even the mere ability to select the party of a nominee influences future decisions.[97] However, appointment suffers from two deficiencies relative to appropriations: its effectiveness may be limited by an agency's structure and, more importantly, it functions only as an ex ante tool of control.

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[91] *See, e.g.*, Bressman & Thompson, *supra* note 13, at 600; Farina, *supra* note 42, at 503; Strauss, *supra* note 89, at 583.

[92] Strauss, *supra* note 89, at 594.

[93] *Id.*

[94] *See* Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 BYU L. REV. 827, 838 (expecting that judicial decisions will be "heavily influenced by the intellectual orientation and political inclinations that [judges bring] with them to the bench"); Terri Peretti, *A Normative Appraisal of Social Scientific Knowledge Regarding Judicial Independence*, 64 OHIO ST. L.J. 349, 355 (2003) (finding that liberal judges "are significantly more likely to vote in favor of civil rights and civil liberties claims").

[95] *See* David C. Nixon, *Separation of Powers and Appointee Ideology*, 20 J.L. ECON. & ORG. 438, 454 (2004) (finding that "the ideology of an appointee was often the result of a tug-of-war between the president and the Senate").

[96] *See id.* at 439 ("Appointee ideology is systematically related to the policy preferences and bargaining positions of presidents and senators."); *see also* Emerson H. Tiller & Frank B. Cross, *A Modest Proposal for Improving American Justice*, 99 COLUM. L. REV. 215, 218 (1999).

[97] *See* Cass R. Sunstein et al., Essay, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 305 (2004) (finding that the President's party "is a fairly good predictor of how individual judges will vote"); Tiller & Cross, *supra* note 96, at 215 (noting that ideologically imbalanced judicial panels create outcomes that "reflect partisan interests").

While the House has no official role in the appointment process, the Senate can use the process to shape agencies through the advice-and-consent requirement, which requires the President to obtain majority Senate approval.[98] Minority groups in the Senate can also exercise influence by preventing a nomination from reaching the floor or by filibustering.[99] The Senate can also influence the nomination itself, directly by convincing the President[100] or indirectly by implicitly compelling the President to nominate only confirmable individuals.[101]

The President wields significant influence through appointments because the President has the power to nominate.[102] Additionally, the President can bypass the Senate through recess appointments,[103] though this approach may carry political costs.

1. Structural Obstacles. — The agency's structure may limit the power of appointment. As most agency employees do not change between administrations, the existing bureaucracy may constrain the appointee.[104] Furthermore, the nominee may hold limited power because he or she sits on a multimember board,[105] or the President and Senate may be unable to select the nominee of their choice because of statutorily mandated partisan balancing.[106]

2. Ex Post Weakness. — A more critical weakness of appointment is that it serves only as an ex ante tool of control. Unlike the budget, which is passed every year and can always be used as a threat, appointment matters most at the time of selection, after which the appointee's actions may deviate from the expectations of the President and Senate.[107] For example, in judicial appointments the party of the

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[98] *See* U.S. CONST. art. II, § 2, cl. 2; *see also* Beermann, *supra* note 17, at 110 (describing the Senate approval requirement); *cf.* Lloyd N. Cutler & David R. Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395, 1410 (1975) (arguing that "few Presidents have used [the power to appoint agency members] effectively").

[99] *See* Beermann, *supra* note 17, at 110.

[100] *See id.* at 111.

[101] *See* Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 89 (2002) (contending that courtesy to the Senate may constrain the President); Stephan O. Kline, *The Topsy-Turvy World of Judicial Confirmations in the Era of Hatch and Lott*, 103 DICK. L. REV. 247, 256 (1999) (quoting Abner Mikva, former White House Counsel, for the idea that the White House will abandon candidates who are sufficiently controversial); *see also* Nixon, *supra* note 95, at 439.

[102] *Cf.* Farina, *supra* note 42, at 504 ("[T]he confirmation process has, by custom, rarely interfered with [the President's] preferences.").

[103] *See* Nixon, *supra* note 95, at 440.

[104] *See* Farina, *supra* note 42, at 504 n.226 (identifying the barrier of entrenched staff); *cf.* Strauss, *supra* note 89, at 590 ("Even in executive agencies, the layer over which the President enjoys direct control of personnel is very thin . . . .").

[105] *See* Barkow, *supra* note 2, at 37–38 (discussing the constraint created by a multimember board).

[106] *See* Strauss, *supra* note 89, at 589 (arguing that bipartisan appointment requirements "doubtless[ly] lower[] the political temperature").

[107] *See* Sunstein et al., *supra* note 97, at 305–07 (finding that judges appointed by Democratic Presidents issue liberal votes in only fifty-one percent of cases, *id.* at 307).

President who nominated the judge is probative, but personal preferences account for a large amount of variation in judicial voting.[108] Though the nominee could be chosen for those preferences, preferences change or are undisclosed, and life tenure provides some safety for judges to depart from their known preferences at the time of nomination.[109] Furthermore, the nominee may have other ties beyond the President and Senate that prevent the nominee from following the path expected at the time of appointment.[110] Only when appointment creates a debt of gratitude or a personal tie is it likely to function as more than an ex ante control mechanism.

D. Case Study: The Fed

As arguably the most powerful independent agency, and one with self-funding, the Fed illustrates that budgetary independence leaves Congress and the President with less effective tools to control agencies.[111] To a limited degree, Congress, and more significantly the President, have influenced the Fed through oversight and appointment. However, the Fed's self-funding has provided more autonomy than that of a traditional independent agency. Though some of this autonomy stems from the belief that politics should not unduly interfere with monetary policy,[112] this explanation alone is not sufficient because history reveals multiple congressional and presidential attempts at influencing the Fed. Rather, the Fed's independence also rests upon the weaknesses of tools of control. This section examines how the Fed has thwarted attempts at control by exploring the weaknesses of legislative reforms and oversight. The section concludes by discussing the influence of appointment.

1. Thwarting Legislative Reforms. — The Fed has defeated numerous attempts at legislative influence. For example, during the 1970s, dissatisfaction with interest rates and inflation led to the "most intense congressional battles of the Fed's history."[113] The Fed stopped the

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[108] *See* Peretti, *supra* note 94, at 356–57 (citing studies that show "ample evidence that those [judicial decisionmaking] patterns are the product of personal ideology," *id.* at 356).

[109] *Cf.* Harold H. Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207, 234 (1984) (highlighting that, with regard to agency appointees, "[n]ot all appointees closely conform to the President's views" and tying nominee independence to removal restrictions).

[110] *See id.* (noting that "[a]ppointments often appease interest groups" and that "administrators who have a constituency of their own enjoy some political protection").

[111] *See* KETTL, *supra* note 13, at 4 (discussing removal protection); Ramirez, *supra* note 11, at 523 ("It is difficult to conceive of an administrative agency with more power and more political independence than the Fed.").

[112] *See* KETTL, *supra* note 13, at 1–3 (outlining the origins of the Fed and the desires to insulate it from politics); Bressman & Thompson, *supra* note 13, at 616 (noting that in 1935, Congress changed the membership of the Fed to minimize political control).

[113] KETTL, *supra* note 13, at 143.

threatening proposals, and Congress ultimately enacted only a formalized reporting requirement, which the Fed made ineffectual through rolling targets and wide projections.[114] Likewise, in the 1970s, the Fed obtained Government in the Sunshine Act exemptions that "rivaled those for national security."[115] Similarly ineffectual congressional attempts occurred in the 1920s and early 1990s,[116] and the push in 2010 to audit the Fed only resulted in "watered-down" legislation.[117]

One way that budgetary independence gave the Fed power to defeat these efforts was that the Fed was able to play the branches off of one another. For instance, in the early 1980s, Congress sought monetary ease, so the Fed aligned itself with the President, who supported monetary tightness.[118] This tactic would have been less effective without financial independence because of the President's inability to prevent congressional punishment through the budget.[119]

2. *Oversight.* — Overall, the Fed does not display a consistent responsiveness to attempted oversight by Congress or the President. Looking first at attempted congressional influence, the federal funds rate has only varied (and only to a limited degree) with the number of times that senators mentioned state-of-the-economy concerns in Hearings on the Conduct of Monetary Policy, but has not correlated to House of Representatives hearings.[120] This pattern of limited correlation to Senate hearings and no correlation to House hearings is consistent with scholarship suggesting that self-financing has provided the Fed with substantial autonomy.[121] Were the Fed dependent on appropriations, it would have been responsive to both House and Senate signaling.

Presidential oversight elicits a similarly inconsistent responsiveness. Instead of correlating with executive branch threats, the Fed's respon-

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[114] *Id.* at 145–49 (analyzing how the Fed defeated the proposals and noting that Congress passed the weak, formalized reporting requirement as the Federal Reserve Reform Act of 1977); *see also* BERNARD SHULL, THE FOURTH BRANCH 155 (2005) ("During the late 1970s and early 1980s, the Federal Reserve seemed to be in serious jeopardy . . . [but the Fed] again prevailed . . . .").

[115] KETTL, *supra* note 13, at 158.

[116] THOMAS HAVRILESKY, THE PRESSURES ON AMERICAN MONETARY POLICY 17 (2d ed. 1995) (providing numerous examples of failed attempts at congressional influence).

[117] Jennifer Liberto, *Fed Scores Wins in Wall Street Reform*, CNNMONEY (May 13, 2010, 3:42 AM), http://money.cnn.com/2010/05/12/news/economy/Fed_Wall_Street_Reform/index.htm.

[118] *See* HAVRILESKY, *supra* note 116, at 187.

[119] *See supra* p. 1828.

[120] *See* HAVRILESKY, *supra* note 116, at 20; *see also* Ramirez, *supra* note 11, at 529–30 (noting that Congress has been unable to utilize its general oversight powers effectively).

[121] *See, e.g.*, KETTL, *supra* note 13, at 3 (linking the Fed's vague mandate and its self-financing to limited congressional oversight); Seligman, *supra* note 55, at 255–56 (arguing that the Fed's self-funding is "the key to . . . its ability to withstand political pressures," *id.* at 255).

siveness has been more correlated to the ideology of the Chairman,[122] supporting the proposition below that appointment has been the primary influence. However, the Fed has also been responsive to presidential oversight to gain support. In recent years, Chairman Ben Bernanke and Treasury Secretary Timothy Geithner "worked together so often that they often appeared as a duo in the media,"[123] which was likely a tool for Bernanke to "obtain the support of the financial-services sector, the public, and Congress."[124] This instrumental responsiveness supports the proposition that presidential oversight of self-funded independent agencies is important, though likely less so than oversight of traditional independent agencies.

3. Appointments. — The most significant factor in the Chairman's responsiveness to attempted oversight was the Chairman's "partisan, personal or ideological allegiances" with the President;[125] thus, more than the oversight itself, the initial appointment shaped the tie between the Chairman and the President.[126] However, the expectations at the moment of nomination were not fully predictive, as evinced by the subsequent deviations of Chairman Bernanke from those expectations.[127] Some of this unpredictability likely came from responsiveness to subsequent presidential or congressional concerns, but Chairman Bernanke has also pushed back against presidential and congressional desires for more oversight.[128] Appointment is likely the most substantial tool of control over the Fed, but it reserves less control for Congress and for the President than if the Fed were subject to the appropriations process.

III. CONSEQUENCES OF REMOVAL PROTECTION WITH SELF-FUNDING

This Part argues that, in addition to increased autonomy, the other primary consequences of self-funding for congressional and presidential control will be greater relative presidential influence and increased importance of appointment. The increased importance of appointment

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[122] *See* HAVRILESKY, *supra* note 116, at 19, 134–35.

[123] Bressman & Thompson, *supra* note 13, at 629.

[124] *Id.* at 631.

[125] *See* HAVRILESKY, *supra* note 116, at 19.

[126] *See* Richard Dennis, *The Policy Preferences of the US Federal Reserve*, 21 J. APPLIED ECONOMETRICS 55, 75 (2006) (hypothesizing that variances in policy during the pre-Volcker era were due to changing Chairmen and their new policy regimes); George A. Krause, *Federal Reserve Policy Decision Making: Political and Bureaucratic Influences*, 38 AM. J. POL. SCI. 124, 140 (1994) (finding that appointment combined with persuasion alters the Fed's responsiveness).

[127] *See* Anne M. Khademian, *The Pracademic and the Fed: The Leadership of Chairman Benjamin Bernanke*, 70 PUB. ADMIN. REV. 142, 143 (2010).

[128] *See id.* at 145; *see also* ETHAN S. HARRIS, BEN BERNANKE'S FED 37–50 (2008) (arguing that the Fed under Bernanke continues to be one of the most independent institutions).

will likely lead to deadlock and confirmation fights unless the agency rests upon a strong political consensus. This Part concludes by discussing the CFPB.

A. Relative Influence of the President

In addition to reducing external influence, providing an independent agency with self-funding alters the traditional balance of power between the President and Congress over the agency. Normally, independent agencies are designed to limit presidential influence. Budgetary control comports with this goal as Congress has greater influence than the President over allocating agency funding. However, where appointment instead of appropriations is the primary means of control, the President has more relative influence because, unlike appropriations where the President has little ability to prevent congressional punishment, the President holds a substantial amount of power over appointments. Though less important, the President has greater oversight control because the President is likely to have more to offer the agency. Congress probably has more power than the President over legislation as it can overcome a presidential veto, but legislation remains a costly, blunt tool.

B. Focus on Appointment and Deadlock

Additionally, an exemption from appropriations is likely to increase the importance of appointment and the probability of deadlock and confirmation battles. Judicial nominations illustrate that a lack of ex post control leads to more focus on the appointments process.[129] Changes that enlarge the influence (or recognition of influence) of nominations increase the focus on the confirmations. For example, constitutional courts of other countries illustrate that "[s]horter terms mean that judicial appointments are less consequential and therefore attract less attention."[130] Similarly, when it is easier to control judges or end their terms, political branches treat appointment as less important.[131]

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[129] Judicial nominees are an apt comparison to appointees to self-funded independent agencies. First, Article III judges, and many other judges, have removal protection in the form of life tenure. *See, e.g.*, U.S. CONST. art. III, § 1. Moreover, Congress faces substantial obstacles to altering this protection — it must amend the Constitution to do so. Though altering protection for self-funded independent agencies is certainly easier than passing a constitutional amendment, it still involves the costs of passing new legislation. This section thus focuses on federal judges, but also includes studies of nonfederal judges because of the probative data.

[130] Richard A. Posner, *The Supreme Court, 2004 Term — Foreword: A Political Court*, 119 HARV. L. REV. 31, 81 (2005); *see also* Cutler & Johnson, *supra* note 98, at 1405 n.30 (noting that if a single appointment is unlikely to change a multimember body, "Presidents conclude that such appointments do not warrant close attention").

[131] *See* Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 12 (1993) (analogizing a greater focus on appointment to more elaborate premarital courtship when divorce is difficult).

But when divisive issues are linked to court decisions, the stakes of appointment grow.[132] In the same way, removing budgetary control is likely to increase the focus on appointment because it will be relatively more important. Historically, the Senate has actively used appointment to control officers that it deems influential, which illustrates the Senate's awareness of when appointment is a powerful tool.[133]

When a nomination is viewed as a key point of control, appointment likely will become more contentious, with a high risk of political deadlock. Just as less frequent Supreme Court turnover leads to "bitter and protracted" confirmation fights,[134] appointments to self-funded agencies are likely to be more contentious. For the judiciary, the consequence has been massive delays for judicial confirmations, which in turn have led to "judicial emergencies"[135] and a "vacancy crisis."[136] This high number of current vacancies[137] has caused delay for litigants and may also be shaping the substantive outcomes of cases.[138] For an agency, the consequences of a failed or stalled nomination are likely to be inaction and a lack of leadership.

C. Case Study: The CFPB

The story of the CFPB, a recently created self-funded independent agency,[139] supports the proposition that an exemption from appropria-

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[132] *See* Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 978 (2007) (connecting divisive court decisions to intense confirmation battles); Mark Tushnet, *The Supreme Court, 1998 Term — Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 56–57 (1999) (arguing that the Warren Court era witnessed the heightened politics of appointment).

[133] *See* Beermann, *supra* note 17, at 111 ("Congress has insisted that the appointment of important presidential advisors . . . [be] subject to the advice and consent of the Senate . . . .").

[134] Posner, *supra* note 130, at 80. Recognizing that confirmations influence case outcomes, the Senate has turned recent judicial confirmations to "battle[s] royal." Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 279 (2005).

[135] Letter from Chief Judge Alex Kozinski and Judges of the Ninth Circuit to Senate Leaders 2 (Nov. 15, 2010), *available at* http://www.legaltimes.typepad.com/files/111510-letter-from-9th-circuit.pdf (writing that "we would be greatly assisted if our judicial vacancies — some of which have been open for several years and declared 'judicial emergencies' — were to be filled promptly") (internal quotation marks omitted).

[136] Bruce Moyer, *The Judicial Vacancy Crisis Continues*, FED. LAW., Sept. 2011, at 8, 8.

[137] *See id.* ("Judicial vacancies on the federal bench remain a persistent, aggravating problem . . . . Over 10 percent of the federal bench is empty.").

[138] *See* Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109, 1138 (2011) (arguing that vacancies may shape the "actual outcomes" of cases); Carl W. Tobias, *Postpartisan Federal Judicial Selection*, 51 B.C. L. REV. 769, 770 (2010) (noting that vacancies impede the timely and "fair disposition of cases").

[139] Each year, the CFPB Director can request a "reasonably necessary" amount of funding from the Fed, up to a statutory cap. Dodd-Frank Act, 12 U.S.C. § 5497(a)(1) (Supp. IV 2011). The Fed, the President, and Congress have no influence. *See id.* § 5497(a)(1), (a)(2)(C), (a)(4)(A).

In contrast to the vast majority of self-funded independent agencies, the CFPB has a broad mandate. *Compare id.* § 5481(6)(A) (giving the CFPB the power to regulate, with some exceptions increases the relative influence of the President and the importance of appointment, thereby heightening the risk of deadlock.

Backers of the CFPB deliberately selected self-funding as a tool for reducing congressional influence. It is unsurprising that Congress would create a traditional independent agency, over which it retains relatively more power than the President. In contrast, when Congress also provides an independent agency with self-funding, it opts to reduce its own power. However, the CFPB's congressional supporters likely chose to reduce their own control because they expected future preference divergence and sought to limit the influence of future Congresses.[140] The legislative history shows this concern.[141] Additionally, the voting was partisan, with only four of the 282 votes in favor from Republicans.[142] Though these votes were on the entire Dodd-Frank Act, they show the reasonableness of the Democratic majority's belief that a future Republican-controlled Congress would weaken or dismantle the CFPB. Congress ultimately chose to shift the balance toward presidential influence, deviating from the general premise that independent agencies provide insulation from the President.

Additionally, supporters of the CFPB faced difficulty in confirming a Director. President Obama believed that he could not successfully nominate Professor Elizabeth Warren, the architect of the agency, so in July 2011 he nominated former Ohio Attorney General Richard Cordray.[143] Some Republican members of Congress sought to derail Cordray's nomination, claiming that they would not confirm a nominee until the powers of the CFPB — in particular the self-funding

tions, anyone who "engages in offering or providing a consumer financial product or service"); *with supra* p. 12 (identifying the narrow mandates of other self-funded independent agencies). The CFPB also has rulemaking power under existing federal consumer financial laws and to prevent any "unfair, deceptive, or abusive acts or practices in connection with . . . a consumer financial product or service." 12 U.S.C. § 5531(b).

140 *Cf.* David E. Lewis, *The Adverse Consequences of the Politics of Agency Design for Presidential Management in the United States: The Relative Durability of Insulated Agencies*, 34 BRIT. J. POL. SCI. 377, 382 (2004) (noting that Congress seeks to limit presidential influence when it believes that the preferences of future Presidents will deviate from those of the current Congress).

141 *See, e.g.*, S. REP. NO. 111-176, at 163–64 (2010) (Committee on Banking, Housing, and Urban Affairs report arguing for self-funding as necessary to preserve agency independence).

142 156 CONG. REC. S4078 (daily ed. May 20, 2010) (Senate vote); 155 CONG. REC. H14,804 (daily ed. Dec. 11, 2009) (House vote).

143 *See* Jim Puzzanghera, *Consumer Bureau Nominee Richard Cordray Backed by 37 State AGs*, L.A. TIMES (Oct. 18, 2011), http://latimesblogs.latimes.com/money_co/2011/10/consumer-bureau-nominee-richard-cordray-attorneys-general.html; Alain Sherter, *Why Liz Warren Won't Be Leading the Consumer Financial-Protection Charge*, CBS NEWS (July 18, 2011, 1:50 PM), http://www.cbsnews.com/8301-505123_162-43554840/why-liz-warren-wont-be-leading-the-consumer-financial-protection-charge.

provision — were scaled back.[144] The structure of the agency, rather than Cordray, was the issue.[145] Consequently, President Obama took the drastic move of appointing Cordray via a recess appointment even though Congress was holding pro forma sessions, a procedure traditionally viewed as sufficient to block recess appointments.[146]

The story of the CFPB is likely to be shared by other agencies should Congress employ the self-funded independent agency model in the future. Although appointments of the Fed Chairman have not faced similar deadlock,[147] the experience of the Fed is likely to be repeated only by agencies that also rest on a strong political consensus.

Key features of the Fed make it unique and nongeneralizable. First, one broad goal of the Fed, to "keep[] the currency stable by managing the nation's supply of money and credit,"[148] is a goal on which there is common agreement. Although most goals can be framed at a level at which there is agreement, the Fed is unique in that there is also interparty agreement on when the Chairman is successful.[149] Furthermore, senators risk economic disruption should they create deadlock and prevent the Fed from having a new Chairman's leadership.[150] In contrast, in these respects, the CFPB resembles a

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[144] *See* Maya Jackson Randall, *Consumer Bureau Adds to Its Roster*, WALL ST. J., Oct. 20, 2011, at A6 ("Senate Republicans, who say the bureau has too much power, have stalled the nomination . . . .").

[145] Puzzanghera, *supra* note 143 ("Republicans have said they have no particular problem with Cordray, but simply want the consumer bureau to be more accountable.").

[146] *See* Laura Litvan, *Republican Senators Question Holder on Cordray Appointment*, BLOOMBERG BUSINESSWEEK (Jan. 12, 2012), http://www.businessweek.com/news/2012-01-12/republican-senators-question-holder-on-cordray-appointment.html.

[147] Appointments of the Chairman have displayed low levels of dissent and high continuity between parties. For example, Chairman Alan Greenspan was nominated by President Ronald Reagan and renominated by President George H.W. Bush, President Bill Clinton, and President George W. Bush. R.W. HAFER, THE FEDERAL RESERVE SYSTEM 183 (2005). Chairman Bernanke was first appointed by President George W. Bush over a lone dissenter. HARRIS, *supra* note 128, at 1. Chairman Bernanke easily survived his renomination by President Barack Obama, with dissenters divided between the parties. *See* 156 CONG. REC. S317 (daily ed. Jan. 28, 2010).

The same has not been true for nominees to the Fed's Board of Governors. Nobel Prize–winning Professor Peter Diamond withdrew his name from consideration after President Obama's third nomination attempt failed. Bernie Becker, *Federal Reserve Board Nominee Withdraws, Blasts Confirmation Process*, HILL (June 6, 2011), http://thehill.com/blogs/on-the-money/banking-financial-institutions/164831-fed-nominee-withdraws-blasts-confirmation-process.

[148] KETTL, *supra* note 13, at 1; *see also* HAFER, *supra* note 147, at xvi (identifying a key purpose of the Fed as avoiding financial panics and economic downturns); SHULL, *supra* note 114, at 17 (tying the Federal Reserve Act to the experience of failed banks and financial panic).

[149] *See* sources cited *supra* note 147.

[150] HAFER, *supra* note 147, at 184 (linking Greenspan's actions to preventing a financial panic in 1987); HARRIS, *supra* note 128, at 1 (discussing the power of a speech by the Fed Chairman); KETTL, *supra* note 13, at 193 (tying the Fed's power over the economy to the Chairman).

typical regulatory agency, with disagreement over goals,[151] likely leadership change with new administrations,[152] and fewer consequences for a delayed nomination.[153]

CONCLUSION

The accountability of nominally independent agencies through the budget is clear. Similarly clear is the increased autonomy of self-funded independent agencies. Self-funding will reduce the total level of control, increase the President's relative influence, and create greater focus on appointment. Far less clear is the desirability of such a scheme. Looking at the SEC, the Fed, and the CFPB and theorizing about combining removal protection with self-funding reveals a conflicted case. The SEC's lack of financial independence contributed to weak rules for accounting firms,[154] which were tightened after the collapse of Enron.[155] The Fed prevented inflation in the 1980s by using its independence to ward off congressional pressure for monetary ease.[156] However, the CFPB's self-funding likely contributed to confirmation deadlock, and deadlock in other agencies could lead to a lack of leadership and regulatory stagnation. Furthermore, criticisms of the autonomy of traditional independent agencies are likely to be exacerbated when the independent agency also has self-funding.

Similarly, while the increased relative influence of the President might be desirable for agencies where cooperation between the administration and the agency leads to better policy, it also reverses the traditional narrative of independent agencies — that some agencies should be less accountable to the President, but will be accountable to Congress. Given these consequences, the appropriateness of combining self-funding with removal protection for various types of agencies deserves more analysis and should be a topic for future scholarly debate.

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[151] *See, e.g.*, STEINZOR & SHAPIRO, *supra* note 26, at 43 (describing Republican criticism of "protector agencies").

[152] *See, e.g.*, B. Dan Wood & Richard W. Waterman, *The Dynamics of Political Control of the Bureaucracy*, 85 AM. POL. SCI. REV. 801, 822 (1991) (providing examples of multiple agencies changing course after an appointment by a new President).

[153] For example, when Cordray's nomination was stalled, critics complained that the CFPB was without its full powers, but the critics did not warn of a financial crash should the delay continue. *See, e.g.*, Puzzanghera, *supra* note 143.

[154] *See supra* p. 1830.

[155] *See* Sarbanes-Oxley Act of 2002, 15 U.S.C. § 78j-1(g) (2006 & Supp. IV 2011) (outlining prohibited activities for auditors).

[156] *See supra* p. 1837.