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Agencies as Adversaries

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Agencies as Adversaries

Abstract

Conflict between agencies and outsiders—whether private stakeholders, state governments, or Congress—is the primary focus of administrative law. But battles also rage within the administrative state: federal agencies, or actors within them, are the adversaries. Recent examples abound, such as the battle between the Federal Bureau of Investigation and the Department of Defense over hacking the iPhone of one of the San Bernandino shooters, the conflict between the State Department and the Central Intelligence Agency over classifying some aspects of Hillary Clinton's emails, and the sharp conflict between the Republican and Democratic members of the Federal Communications Commission on net neutrality.

This Article draws on rich institutional accounts to illuminate and classify the plethora of agency conflict and dispute resolution mechanisms. Then, by applying social scientific work on agency and firm design as well as constitutional theory, we aim to explain the creation of such conflict, largely by Congress and the White House but sometimes by the courts, and also evaluate its desirability. We assess the characteristics of conflict against economic, political, and philosophical criteria to suggest lessons for institutional design in the modern administrative state. In contrast to much of the existing literature, we focus on the potentially positive contribution of agency conflict to effective democratic governance.

Finally, we use our descriptive, positive, and normative work on agency conflict to contribute to long-standing legal debates and to flag important legal issues that have generated little attention. For instance, we investigate the constitutional limits of congressionally or judicially created conflict within the Executive Branch, the application of deference doctrines when agencies disagree in the administrative record, and the ability of agencies to take conflicting positions directly or indirectly in the courts themselves.

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Introduction

Beneath the surface of the administrative state are constant battles, between and within agencies. These conflicts can emerge in litigation or public submissions, though they are often more hidden. Recent examples abound:

- *The San Bernardino Shooter's iPhone:* While the Federal Bureau of Investigation (FBI) fought in court to force Apple to hack the iPhone of a perpetrator of the 2015 mass shooting in San Bernardino, California, it also faced resistance within the government. Other agencies expressed grave concerns about weakening encryption technologies. The Defense Department and other intelligence agencies worried that techniques to defeat encryption could be used against the United States.[1] The State Department argued China or Egypt could use them to repress their own citizens.[2] The White House claimed that the Obama Administration had a "clear" encryption policy, but did not explain how that policy resolved these conflicts.[3]
- *Hillary Clinton's Emails:* Freedom of Information Act requesters are pushing the State Department to release emails Hillary Clinton sent through a private server while Secretary of State. That struggle triggered a dispute within the government over which emails should be marked as classified.[4] The State Department has successfully resisted some efforts by intelligence agencies and their Inspectors General (IGs) to classify portions of Clinton emails touching on their work.[5] For example, the Central Intelligence Agency (CIA) wants references to its drone operations labeled Top Secret, even though the program has been widely discussed in the media.[6]
- *Releasing Guantánamo Bay Detainees*: President Obama may not have been drawn into the battle over classifying Secretary Clinton's emails, but he actively participates in fights between the State and Defense Departments over whether particular detainees should be released from the Guantánamo Bay military prison. He typically has sided with the State Department, in favor of release. The State Department negotiates laboriously to persuade foreign countries to accept a detainee. Once it succeeds, however, a new struggle with the Defense Department begins. For several years, Congress has mandated that the Secretary of Defense certify various stringent security requirements are met.[7] A former State Department official compared negotiations with Defense to "punching a pillow."[8] The Defense Department's

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[1] Michael D. Shear & David E. Sanger, *Competing Interests on Encryption Divide Top Obama Officials*, N.Y. TIMES, March 5, 2016, at A1.
[2] *Id*.
[3] *Id*. (stating that the government "firmly supports" strong encryption, but also stating that it "poses a grave challenge for our national security and law enforcement professionals.").
[4] Steven Lee Myers & Mark Mazzetti, *Agencies Battle Over What Is "Top Secret" in Hillary Clinton's Emails*, N.Y. TIMES, Feb. 5, 2016, at A1; *see generally* Robert O'Harrow Jr., *How Clinton's Email Scandal Took Root*, WASH. POST, March 27, 2016, at A1.
[5] O'Harrow, *supra* note 4.
[6] Myers & Mazzetti, *supra* note 4.
[7] National Defense Authorization Act of 2012, § 1028(b)(1)(E) (including that the country receiving the detainee "has taken or agreed to take such actions as the Secretary of Defense determines are necessary to ensure that the individual cannot engage or reengage in any terrorist activity").
[8] Charles Levinson & David Rohde, *Pentagon Thwarts Obama's Efforts to Close Guantanamo*, REUTERS, Dec. 28, 2015, http://www.reuters.com/article/us-usa-gitmo-release-special-report-idUSKBN0UB1B020151228. He

resistance to these releases contributed to Secretary Chuck Hagel's firing, and to President Obama personally "upbraiding" Hagel's successor, Ashton Carter.[9]

Fights are not limited to core Executive Branch agencies. The Securities and Exchange Commission (SEC) and Commodity Futures Trading Commission (CFTC) have long tussled over jurisdiction, including early disputes over which agency should regulate futures contracts based on securities.[10] Initial drafts of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act would have tasked the agencies with extensive joint regulation over swaps.[11] The enacted version imposes some joint regulatory responsibilities, but allocates most tasks to only one agency.[12] The law includes dispute resolution mechanisms for the shared and divided rulemaking responsibilities. If the two agencies cannot agree on their shared duties, they can ask the Financial Stability Oversight Council (FSOC) to mediate. For divided duties, if one agency thinks the other has encroached on its assigned turf, the statute authorizes it to sue the other in the U.S. Court of Appeals for the District of Columbia, which is to give no deference to either agency's interpretation.[13]

Finally, conflict often occurs within agencies. In late 2011, before President Obama's re-election, the Commissioner of the Food and Drug Administration (FDA) was prepared to approve a petition seeking "over-the-counter access to Plan B One-Step, the one-pill emergency contraceptive product, for all ages."[14] The Commissioner had found "adequate and reasonable, well-supported, and science-based evidence that Plan B One-Step is safe and effective."[15] But the Commissioner *denied* the petition anyway, at the direction of the Secretary of Health and Human Services.[16] President Obama endorsed the Secretary's position,[17] but a district court judge ordered the FDA to allow girls of all ages to buy Plan B without a prescription. The judge drew on materials outside the administrative record about the conflict and found "a strong showing of bad faith and improper political influence."[18]

The FDA-HHS spat is arguably not intra-agency, since FDA has a distinctive stature of its own. Battles within a single decision-making body also occur.[19] The Federal Election Commission (FEC) must have equal numbers of Democrats and Republicans, and thus is often

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described meetings at which Pentagon officials "would not make a counterargument" to State's case for release, but "then nothing would happen." *Id*.

[9] *Id*.

[10] Donald N. Lamson & Hilary Allen, *SEC and CFTC Joint Rulemakings Under Dodd-Frank—A Regulatory Odd Couple?*, 43 SECURITIES REG. & L. REPORT 495 (2011).

[11] *Id*.

[12] *Id*.

[13] Dodd-Frank Wall Street Reform and Consumer Protection Act § 712; *see also* Lamson & Allen, *supra* note 10. Conflict can also arise between executive and independent agencies. The Department of Labor and the SEC have recently sparred over Labor's rulemaking placing a fiduciary duty on financial advisors for retirement planning. *See* Ed Beeson, *SEC, DOL Sparred Over Proposed Fiduciary Rule, Report Says*, LAW360, Feb. 24, 2016.

[14] Tummino v. Hamburg, 936 F.Supp.2d 162, 166–67 (E.D.N.Y. 2013). Previously, only females 17 years and older could buy Plan B without a prescription.

[15] *Id.*

[16] *Id*. at 167.

[17] Pam Belluck & Michael D, Shear, *U.S. to Defend Age Limits on Morning-After Pill Sales*, N.Y. TIMES, May 1, 2013.

[18] Tummino, 936 F.Supp.2d at 196–99. For more on this example, see Lisa Heinzerling, *The FDA's Plan B Fiasco: Lessons for Administrative Law*, 102 GEO. L.J. 927 (2014).

[19] For an interesting recent treatment of dissent within independent regulatory commissions developed independently to our work, see Sharon Jacobs, Administrative Dissents (working paper on file with the authors).

deadlocked. In 2015, two of the Democrats tried a creative workaround: formally petitioning their own agency to adopt new campaign finance disclosure rules![20] The FEC is unusual, as almost all agencies with party balancing mandates have an odd number of decision-makers. Recently, the Federal Communications Commission's (FCC) final net neutrality rule, after a public appeal by the President,[21] and the National Labor Relations Board's (NLRB) final union election timing rule came after party-line 3-2 votes of their leaders.[22]

Agency conflict—spanning rulemaking, individual-level adjudication, and more general policymaking—is, of course, not new. Nor is it unfamiliar to scholars. Political scientists have long studied agency battles as part of bureaucratic politics.[23] Legal scholars, too, have discussed agency clashes over turf.[24] But much of this literature sees conflict within the administrative state as mostly negative: it is a problem to be solved.[25] The ideal is a harmonious, orderly division of authority, or at least the harmonious resolution of conflicting authority.

Administrative law scholars have described, and often celebrated, agency cooperation. They have explored joint rulemaking, such as the Environmental Protection Agency (EPA) and Department of Transportation (DOT) collaborating on fuel standards.[26] They have discussed coordination in individual-level adjudication, such as DOJ and the Department of Homeland Security (DHS) working together in cases involving persons without proper documentation.[27] And they have analyzed agency collaboration in shaping policy in complex and novel areas, such as work by DHS and the National Security Agency (NSA) to combat cyber threats.[28] Some research considers intra-agency coordination, such as between civil servants and political appointees.[29]

We are reluctant to join the celebration of agency coordination, at least not without substantial critical commentary. Coordination is not always desirable, and conflict among and within agencies can provide substantial political, social welfare, and legitimacy benefits. Like

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[20] Colby Itkowitz, *Corporations Are People. But Are FEC Commissioners People Too?*, WASH. POST: POWERPOST (June 18, 2015), http://www.washingtonpost.com/news/powerpost/wp/2015/06/18/corporations-are-people-but-are-fec-commissioners-people-too/ [http://perma.cc/Y5CZ-E8P3].

[21] White House, Net Neutrality: President Obama's Plan for a Free and Open Internet, https://www.whitehouse.gov/net-neutrality.

[22] Press Release, Federal Communications Commission, FCC Adopts Strong, Sustainable Rules to Protect the Open Internet (Feb. 26, 2015); Press Release, National Labor Relations Board, NLRB Issues Final Rule to Modernize Representation-Case Procedures (Dec. 12, 2014).

[23] *See, e.g.*, FRANCIS E. ROURKE, BUREAUCRATIC POLITICS AND PUBLIC POLICY (2d ed.) (1984) (treatment of agency battles).

[24] For early treatments, see Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 2001 (2007); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006); Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CAL. L. REV. 1655 (2006).

[25] *See, e.g.*, Jacobs, *supra* note 19; Tejas N. Narechania, *Patent Conflicts*, 103 GEORGETOWN L.J. 1483 (2015) (discussing methods of preventing conflicts between agencies over patent validity); Hari M. Osofsy & Hannah J. Wiseman, *Dynamic Energy Federalism*, 72 MARYLAND L. REV. 773 (2013) (discussing methods of preventing conflicting decisions in energy policy); *cf*. Gersen, *supra* note 24 (providing more nuanced view); O'Connell, *supra* note 24 (arguing for redundancy).

[26] Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1168–72 (2012).

[27] Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805, 832 (2015).

[28] Dapha Renan, *Pooling Powers*, 115 COLUM. L. REV. 211, 213–14 (2015).

[29] Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421, 439–40 (2015).

adversarial criminal procedure and competitive markets,[30] conflict in the administrative context has benefits and costs. To be sure, we do not deny coordination is often valuable, for example, to enhance agencies' power to regulate powerful and recalcitrant companies.[31] Sometimes statutes even require agencies to cooperate.[32] But conflict plays an important and often productive role in the functioning of the modern administrative state. We document the prevalence of adversarial relationships between administrative actors to better understand why such relationships arise, and identify situations where administrative conflict may be desirable—where conflict is "a feature, not a bug."

This Article's contributions can be summarized as descriptive, positive, normative, and legal. First, drawing on rich institutional details, we aim to broaden scholarship of agency conflict beyond its current focus on competition over jurisdiction. In addition, we direct attention to conflict resolution mechanisms, including both well-known devices and some that surprised us, such as forced mediation. Agency conflict and the methods used to resolve it vary greatly, but can be organized along several important structural dimensions.

Second, by using social science work on agency and firm design, we aim to explain the use of conflict, as a positive matter, and evaluate its desirability in the administrative context. We assess the characteristics of conflict against economic, political, and philosophical criteria to suggest lessons for institutional design. The idea that administrative redundancy can improve social welfare or democratic legitimacy is not new.[33] But studies of overlapping authority largely ignore important characteristics of modern government institutions. For example, some reduce the purpose of competition between agencies to belt-and-suspenders redundancy that ensures key government functions are performed even if one agency fails. Others see competition between agencies primarily as preventing each from shirking. We agree these are important functions of overlapping and adversarial agency relationships, but see additional benefits and complexities that merit attention.

Finally, we use our descriptive, positive, and normative work on agency conflict to contribute to long-standing legal debates and flag important legal issues that have generated little attention. Administrative law clings tightly to the image of a single agency actor. As we have argued previously, this ignores much of the reality of modern agency practice.[34] Our goal is not to resolve enduring disputes over particular doctrines, but rather to enrich the discussion by showing how doctrine and agency conflict can interact.

The Article proceeds as follows. In Part I, we lay some groundwork with a typology of conflict in federal agency relationships, relying on real-world examples. Our typology is built around agency type (that is, level of independence from the White House) and the structure of the relationship in which conflict occurs—hierarchical, advisory, or horizontal. In Part II, we

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[30] *See, e.g.*, David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1686–88 (2009) (describing arguments for the adversarial system).
[31] Keith Goldberg, *FERC-DOJ Teamwork Sets Stage for Increased Enforcement*, LAW360, April 7, 2016, http://www.law360.com/articles/780801/ferc-doj-teamwork-sets-stage-for-increased-enforcement.
[32] Evan Weingerger, *FDIC, OCC, FHFA Deliver Own Banker Bonus Rules*, LAW360, April 26, 2016, http://www.law360.com/articles/788995/fdic-occ-fhfa-deliver-own-banker-bonus-rules.
[33] *See* RICHARD A. POSNER, PREVENTING SURPRISE ATTACKS: INTELLIGENCE REFORM IN THE WAKE OF 9/11 (2005); Gersen, *supra* note 24; Katyal, *supra* note 24; O'Connell, *supra* note 24.
[34] Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1142, 1150–52 (2014).

classify mechanisms by which conflicts between and within agencies are resolved. Only some involve the courts. Conflicts within hard hierarchical relationships generally have resolution mechanisms that are clear in theory—the top actor decides. However, various factors often constrain her power over subordinates; actors outside the formal chain of command may also influence the decision. Resolution mechanisms in advisory and competitive relationships are more varied, and include agency agreements, voting rules, and mediation, among others.

Part III assesses the models of interactions among agencies developed in Parts I and II, in both positive and normative terms. For each model, we consider the political roots of the intended conflict and then assess that conflict on social welfare and legitimacy criteria. We examine how each model might predict agency behavior and consider specific examples of desirable and undesirable interactions. Adversarial agencies can help reduce informational asymmetries, allow wider participation of varied interests, and slow down administrative action.

In Part IV, we consider the law's role in conflictual relationships. We first return to an old administrative law debate: whether the President can direct an agency to take a particular action when Congress has delegated authority directly to the agency, rather than the President. Then we consider several other separation of powers issues, including congressional limitations on whom the President may name to various Executive Branch positions and then legislative reporting mandates, as well as an agency's ability to subdelegate its authority. Finally, we address legal issues stemming from direct judicial treatment of agency conflicts. We examine how deference doctrines apply when agencies conflict, nonadministrative law issues in the litigation process, and the justiciability of disputes between agencies. The implications of interagency conflict for the courts have been underexplored ground, with the exception of the question of deference to agency actions (to which we contribute a different perspective). Part V concludes.

I. Typology of Adversarial Relationships

We begin as taxonomists of adversarial agencies. But before we survey the modern manifestations of agency conflict, we define our terms and boundaries. By adversary or conflict, we do not contemplate mortal enemies, but rather objectives that are more at odds than aligned. These objectives neither necessarily remain unchanged nor govern the entire agency. The same agencies could have both adversarial and nonadversarial relationships, turning on the issues, political environments, personalities, and other factors. In addition, while we recognize there are discontinuities, even sustained ones, we demand that the conflict exist (or potentially exist) a good amount of the time. This definition lacks precision, but its spirit is hopefully clear.

A few words about our focus: We limit ourselves to conflicts within the federal administrative state. We do not train on conflict with other branches or levels of government. We also target intentional conflict as opposed to situations where a clash between agencies seems fortuitous. Often—and we suspect, most often—these are not accidental conflicts.

Administrative conflict takes many forms, though administrative law scholarship has focused on only a few. Our categorization of administrative conflicts begins by distinguishing between conflicts entirely within the Executive Branch and those involving independent regulatory commissions and quasi agencies. This distinction is significant because intra-executive disputes are potentially subject to settlement by the President; whereas, the others are not. We also separate conflicts within an agency from those between agencies. To some extent, the difference is only one of scale, but the boundaries between agencies may affect the intensity

and scale of interactions between actors, the degree to which they share or do not share a common organizational culture, and treatment by courts.

Our classification also distinguishes conflicts based on the relationship between the adversarial agencies. We break these relationships into four rough categories. In the first, there is a hard hierarchical relationship: one actor can veto actions by the other or substitute its own binding decision on another agency. In the second category, there is also a substantive power relationship, but there are limits on the dominant agency's control; we refer to this mix of control attributes as "soft hierarchy." In the third category, one agency makes the decision, but the other is authorized to monitor, demand information, or offer formal advice, sometime creating legal or political obstacles. In the fourth category, the actors operate in parallel—for instance, they both claim jurisdiction over the same subject, or both must agree to make a decision. This last form of conflict has probably received the most attention in the literature, but prior scholarship has primarily emphasized how to smooth over conflicts rather than on the possible benefits.

We take each of these four relational categories in turn. Within each, we consider the two additional dimensions of whether the involved agencies are entirely within the Executive Branch or more independent, and whether the conflict is between agencies or within an agency.

A. Agency Conflict in the Context of Formal Hierarchy or Veto Power

Our first group includes adversarial actors in a formal hierarchical relationship. When the "inferior" actor has different goals than the "superior" one and some ability to operate independently, conflict is easily generated, even if it can be ultimately resolved because of the superior entity's power.

1. Formal Hierarchies Between Executive Agencies

Hierarchical relationships abound between executive agencies. One formal hierarchy within the Executive Branch established through presidential directive—and its attendant conflicts—has generated considerable attention. Executive Order 12,866, promulgated by President Clinton (though rooted in earlier directives) and maintained by his successors, requires that an agency receive permission from the Office of Information and Regulatory Affairs (OIRA), part of the White House Office of Management and Budget (OMB), before issuing "significant" regulations. Although OIRA can effectively veto proposed regulations (at least most of the time), supposedly on cost-benefit grounds, it is less able to force agencies to take specific action.[35] Additionally, OIRA's authority is limited largely to "significant" rulemakings, with many other important types of agency actions outside its authority—for instance, agency adjudications and spending decisions.[36] More generally, OMB serves as a clearinghouse for both executive agency budget submissions and congressional testimony.[37]

Congress also creates formal hierarchies between agencies, yielding strife. Most wide-ranging, the DOJ controls most executive agency litigation, at every level.[38] Because DOJ looks

[35] *See* Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489, 1494–95 (2002) (noting use of prompt letters by President George W. Bush's OIRA and calling for more such actions).
[36] *See* Farber & O'Connell, *supra* note 34, at 1162.
[37] *See* Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 YALE L.J. (forthcoming).
[38] 28 U.S.C. § 516 ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General."). This authority includes critical control over whether a lower-court loss will be appealed. Mark

out for the government's interests as a whole in making litigation choices, conflict can arise with the action agency.[39] Recently, Justice Kagan asked in oral argument why HHS, which lacks independent litigating authority, had not signed onto the government's brief on behalf of the agency.[40]

In addition, under the Endangered Species Act, agencies are required to "consult" with the Fish and Wildlife Service (FWS) (or the National Marines Fisheries Service) whenever a government project may impact an endangered species.[41] FWS then must issue a Biological Opinion "explaining how the proposed action will affect the species or its habitat" and marking out mandatory steps for the agency to take.[42] The EPA regulates other environmental actions by federal agencies themselves, often producing tension with the Defense Department in particular.[43] The EPA can also reverse regulatory decisions by the Army Corps of Engineers that govern private parties.[44]

The legislature also establishes hierarchies through agency placements. In 2002, for example, it moved the Federal Emergency Management Agency (FEMA) into DHS, making the head of FEMA report to the new cabinet secretary.[45] The first officials in those new arrangements, Michael Brown and Tom Ridge, battled fiercely over turf, money, and personnel.[46] These hierarchies reflect deliberate choices. For instance, Congress shifted FDA into HHS after previously locating it within the Agriculture Department and the Federal Security Agency. As described in the Introduction, when the FDA wanted to allow access to the morning after pill to teenage girls without a prescription, the HHS Secretary could (and did) overrule the decision.[47] Because these two last examples involve entities within a larger cabinet department, they could also be viewed as legislatively created intra-agency disputes.

2. Interagency Hierarchies and Quasi-Independent Agencies

Formal hierarchies sometimes involve federal actors outside classic executive agencies—the independent agency is often the subordinate, but can be on the top.[48] Most common is DOJ

B. Stern & Alisa B. Klein, *The Government's Litigator: Taking Clients Seriously*, 52 ADMIN. L. REV. 1409, 1411 (2000).

[39] *See* Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 CARDOZO L. REV. 273 (1993).

[40] *See* Section IV.A.2.b, *infra*.

[41] 16 U.S.C. § 1536. This duty to consult is broad—required "so long as the agency has 'some discretion' to take action for the benefit of a protected species." NRDC v. Jewell, 749 F.3d 776 (9th Cir. 2014) (en banc) (duty applies to renewal of a private contract).

[42] Bennett v. Spear, 520 U.S. 154, 158 (1997).

[43] *See* Mark P. Nevitt, *Defending the Environment: A Mission for the World's Militaries*, 36 U. HAW. L. REV. 27 (2014). The EPA (and the FWS) lack enforcement authority, however, unless the DOJ agrees to represent the agency in court.

[44] *See* Mingo Logan Coal Co. v. EPA (D.C. Cir. July 19, 2016) (affirming EPA's revocation of an ACE-issued Clean Water Act permit).

[45] Susan B. Glasser & Michael Grunwald, *Department's Mission Was Undermined from the Start*, WASH. POST, Dec. 22, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/12/21/AR2005122102327.html. The head of FEMA resigned, prompting Michael Brown's elevation to the top agency post. *Id*.

[46] Michael Grunwald & Susan B. Glasser, *Brown's Turf Wars Sapped FEMA's Strength*, WASH. POST, Dec. 23, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/12/22/AR2005122202213.html

[47] *See supra* notes 14–18 & accompanying text.

[48] *See* DAVID E. LEWIS & JENNIFER L. SELIN, ADMIN, CONFERENCE OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 127–29 tbl. 18 (listing agencies that need another agency to approve before they can act).

litigation authority over independent regulatory commissions, particularly at the Supreme Court.[49] As with executive agencies, tension easily arises between DOJ and these independent agencies. Far less common is an independent agency calling the shots, as the (former) Interstate Commerce Commission and the Postal Service (USPS), a quasi agency since 1971, have done in terms of shipping rates for federal agencies.[50]

There are also hierarchical relationships entirely between independent and quasi agencies. For instance, the USPS must submit proposed rates to the Postal Rate Commission (PRC), an independent regulatory commission, for approval.[51] These agencies do not always agree, and an early battle in federal court also generated a dispute between the USPS and DOJ over whether the latter agency controlled the former's litigation.[52] Today, the two independent agencies seem to generate several cases a year in the D.C. Circuit—most recently, USPS lost a fight with PRC over the price of postage on Netflix's return envelopes.[53]

3. Hierarchies Within the Agency

Hard hierarchies within agencies can also create conflict. We consider two sub-groups: conflict between political appointees and conflict between appointees and careerists.

a. Between Different Politically Accountable Agents

At the most general level, an agency head can typically overrule a political underling. A cabinet secretary (or administrator) therefore can reverse an assistant secretary (or assistant administrator). The EPA's Assistant Administrator for Air, for instance, focuses on a narrower set of topics, by design, than the EPA Administrator. Agency heads are not the only superiors within an agency, of course. Within DOJ, the Solicitor General (SG) controls a number of key decisions, including whether the government can appeal from a trial court or seek certiorari in the Supreme Court.[54] Sometimes, the hierarchies are paired with other requirements to foster different perspectives, beyond conflict that may arise from a broader and narrower mission. For example, by statute, the Director of the NSA must be a military officer with at least a three-star rank; by convention, the agency's Deputy Director, by contrast, must be a technically experienced civilian.[55]

b. Between Political Officials and Civil Servants

There has been considerable discussion about the tensions between political appointees and careerists within agencies.[56] In principle, political officials control civil servants. There are some formal constraints, however, on this control. For example, careerists generally can be fired only for cause. [57] There are also considerable informational constraints. Careerists outlast, on

[49] 28 U.S.C. § 516; *see generally* Devins, *supra* note 39.
[50] *See* United States v. Interstate Commerce Commission, 337 U.S. 426 (1949) (assuming the ICC rates applied to the government but involving an Army challenge because the agency had off-loaded the shipment).
[51] *See* Devins, *supra* note 39, at 306–10.
[52] *Id*.
[53] U.S. Postal Service v. Postal Rate Commission, 816 F.3d 883 (D.C. Cir. 2016).
[54] *See* Devins, *supra* note 39.
[55] Department of Defense Directive 5100.20.
[56] *See, e.g.*, Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515 (2015); Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032 (2011).
[57] *See* DAVID E. LEWIS, THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE (2008).

average, political appointees,[58] and often have an informational or expertise advantage.[59] Thus, conflicts between appointees and careerists remains endemic, with permanent staff utilizing some significant levers to frustrate the efforts of their political "masters."[60]

A canonical administrative law case, *Universal Camera Corp. v. National Labor Relations Board*,[61] involved conflict between civil servants and political appointees. The hearing examiner (the lower-level decision-maker) and the Board (the ultimate decision-maker) came to different factual conclusions regarding the reason for terminating an employee.[62] Reversing the Second Circuit, the Supreme Court held that the Board could, of course, overrule the examiner but the courts would decide if that call was reasonable, considering both levels of decision-making.[63]

B. Agency Conflict in the Context of Mixed Relationships (Combining Hierarchical and Advisory Components)

Our second group includes adversarial actors in a mixed hierarchical and advisory relationship. While the actors have separate interests, as with the first category, here the "higher"-level actor has less formal control over the "lower"-level one. Specifically, the control has both hard and soft components.

1. Mixed Relationships Between Executive Agencies

Mixed relationships occur between executive agencies. Consider DOJ's Office of Legal Counsel (OLC). By the Attorney General's delegation, OLC provides "authoritative legal advice" to executive agencies.[64] Unlike more purely advisory relationships, agencies cannot ignore OLC advice.[65] Recently, DHS wanted its Deferred Action for Parents program to extend to parents of "dreamers," children who themselves were granted deferred action in a previous program.[66] OLC refused on legal grounds, and DHS restricted the program to parents of children who are citizens or legally permanent residents.[67]

In a structure involving fewer agencies than OLC advice, the Director of National Intelligence (DNI)—a position established a decade ago after the 9/11 Commission excoriated the decentralized, conflicting structure of the intelligence community—has both hierarchical and advisory authority over the community's members. [68] The DNI controls the newly established National Counterterrorism Center.[69] Regarding already existing intelligence agencies, the DNI

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[58] *See id*.
[59] *See* SEAN GAILMARD & JOHN W. PATTY, LEARNING WHILE GOVERNING: EXPERTISE AND ACCOUNTABILITY IN THE EXECUTIVE BRANCH (2013).
[60] *See infra* notes 117–119 and accompanying text.
[61] 340 U.S. 474 (1951).
[62] *Id*. at 491–92.
[63] *Id*. at 497.
[64] The United States Department of Justice, Agencies: Office of Legal Counsel, https://www.justice.gov/olc.
[65] Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1455–56 (2010).
[66] Office of Legal Counsel, The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others (Nov. 19, 2014), at 1–2, https://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf.
[67] *Id*. at 31–33.
[68] Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-408, 118 Stat. 3638 (2004) [hereinafter IRA]; O'Connell, *supra* note 24.
[69] IRA §§ 1011, 1021, 118 Stat. at 3649, 3673.

has some budgetary and personnel authority but not complete control.[70] The DNI also must concur in selecting the heads of many intelligence agencies.[71] The complex relationship between the DNI and intelligence agencies has produced repeated conflict.[72]

2. Interagency Mixed Relationships and Quasi-Independent Agencies

Adversarial mixed hierarchical and advisory examples involving nonexecutive agencies are harder to find. FSOC, created by Dodd Frank to identify and address risks to financial stability, and comprised of heads of executive and independent financial regulatory agencies, qualifies.[73] It can vote to call on a financial agency to adopt more stringent regulations, after providing prior notice and comment.[74] The agency then needs to comply or explain its refusal to Congress.[75] FSOC took a preliminary vote in 2012, for example, to push the SEC to regulate money market mutual funds;[76] the SEC, with some opposition, eventually promulgated rules.[77] FSOC also provides advice to financial agencies.

3. Mixed Relationships within the Agency

This mix of hard and soft control also exists within agencies and produces strife. We consider three sub-groups: conflict between political appointees with no reporting obligations to Congress, conflict between appointees and IGs, and conflict between chairs and members of multimember agencies.

a. Between Different Politically Accountable Agents Entirely within Agency

An agency's general counsel (GC) typically plays this mixed role with other internal agency units. The GC usually has the final word on legal interpretations within the agency.[78] Agency leaders may also require the GC to sign off on various policy decisions. Most significantly, Congress created an independent GC in NLRB and gave the GC "alone . . . the authority to make certain decisions," "including the power to issue complaints."[79] As with OLC,

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[70] O'Connell, *supra* note 24, at 1667–68.
[71] IRA § 1014, 118 Stat. at 3664.
[72] O'Connell, *supra* note 24, at 1669.
[73] *See generally* Jacob E. Gersen, *Administrative Law Goes to Wall Street: The New Administrative Process*, 65 ADMIN. L. REV. 689 (2013).
[74] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act § 120(c)(2), 124 Stat. at 1409 (2010) (codified at 12 U.S.C. § 5330); Gersen, *supra* note 73, at 701.
[75] 12 U.S.C. § 5330(c)–(d).
[76] Financial Stability Oversight Council, Proposed Recommendations Regarding Money Market Mutual Fund Reform, (Nov. 13, 2012), http://www.treasury.gov/initiatives/fsoc/Documents/Proposed%20Recommendations%20Regarding%20Money%20Market%20Mutual%20Fund%20Reform%20-%20November%2013,%202012.pdf; *see generally* Michael S. Barr, *Comment: Accountability and Independence in Financial Regulation: Checks and Balances, Public Engagement, and Other Innovations*, 78 L. & CONTEMP. PROBS. 119, 124 (2015) (providing background).
[77] Securities & Exchange Commission, SEC Adopts Money Market Fund Reform Rules (July 23, 2014); Comm'r Daniel M. Gallagher, Speech, Bank Regulators at the Gates: The Misguided Quest for Prudential Regulation of Asset Managers: Remarks at the 2015 Virginia Law and Business Review Symposium, https://www.sec.gov/news/speech/041015-spch-cdmg.html. We thank Adam White for pointing us to this example. For a similar, more recent conflict between FSOC and SEC, see Ed Beeson, *SEC Guards Fund Industry Turf with New Derivatives Rules*, LAW360, Dec. 11, 2015, http://www.law360.com/articles/737057/sec-guards-fund-industry-turf-with-new-derivatives-rules.
[78] *See* Magill & Vermeule, *supra* note 56, at 1060.
[79] *Id*. at 1059, 1072.

the typical GC is unauthorized to conduct the action. Tension can then erupt between the lawyers and on-the-ground policymakers.[80]

b. Between Politically Accountable Agents and IGs

Over seventy agencies—spanning a range of agency structures—have an IG. The IG has dual masters: the agency leader and Congress.[81] By statute, IGs, who are supposed to be chosen without regard to partisanship, have "access to all" information relating to programs under their authority, and report findings to both principals.[82] While the IG typically has formal access to information within the agency and can issue reports identifying agency problems, the IG lacks authority to fix the problems.[83] The IG-agency relationship is often adversarial.[84] Since 2010, the FBI has tried to withhold certain records from its parent agency's IG.[85] Last year, OLC ruled in favor of the FBI regarding wiretap information "that have either an attenuated or no connection with the conduct of the Department's criminal law enforcement programs or operations," and disclosures under the Fair Credit Reporting Act "that have either an attenuated or no connection with the approval or conduct of foreign counterintelligence investigations."[86]

c. Between Chairs and Members of Multi-Member Agencies

Although independent regulatory commissions generally require a majority of their multiple leaders to agree before undertaking much action, there are also hierarchies within their leadership slate. Commission and board chairpersons often have additional authority—over staffing, budgeting, relations with Congress and the White House, and even how internal dissent is expressed.[87] In many instances, the chair, unlike the other members who can be removed only for cause, serves in that position at the pleasure of the President.[88] For example, in the controversy over storing nuclear waste at Yucca Mountain, there was substantial conflict between the chairs of the Nuclear Regulatory Commission (NRC) chosen by President Obama (a long-time opponent of the plan) and the agency's licensing board and some other commissioners. According to one report, one of these chairs was able to successfully terminate the project without holding a formal vote.[89]

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[80] *See, e.g.*, Thomas O. McGarity, *The Internal Structure of EPA Rulemaking*, LAW & CONTEMP. PROBS., Autumn 1991, at 57, 82.
[81] See PAUL C. LIGHT, MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY (1993); Baryl H. Davis, Gov't Accounting Office, Inspectors General: Oversight of Small Federal Agencies and the Role of the Inspectors General—Testimony Before the Subcommittee on Financial and Contracting Oversight, Committee on Homeland Security and Governmental Affairs, U.S. Senate (2014) (GAO-14-503T).
[82] *See* LIGHT, *supra* note 81, at 50.
[83] *Id*.
[84] *See* Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027 (2013) (providing several examples in the natural security space).
[85] Michael E. Horowitz, *Give Inspectors General Access to the Records They Need to Do Their Job*, WASH. POST, (Oct. 18, 2015), https://www.washingtonpost.com/opinions/give-inspectors-general-access-to-the-records-they-need-to-do-their-jobs/2015/10/18/54942f30-738a-11e5-9cbb-790369643cf9_story.html.
[86] Office of Legal Counsel, The Department of Justice Inspector General's Access to Information Protected by the Federal Wiretap Act, Rule 6(e) of the Federal Rules of Criminal Procedure, and Section 626 of the Fair Credit Reporting Act (July 15, 2015), at 3.
[87] *See* Daniel Ho, *Measuring Agency Preferences: Experts, Voting, and the Power of Chairs*, 59 DEPAUL L. REV. 333, 360 (2010); Jacobs, *supra* note 19, at 18.
[88] *See* LEWIS & SELIN, *supra* note 48, at 110 tbl. 12 (2012).
[89] Adam J. White, *Yucca Mountain—A Post Mortem*, THE NEW ATLANTIS, Fall 2012, at 1, 13; *see also* Jacobs, *supra* note 19, at 18 (noting that "the authority of the commission chair has tended to increase across time").

C. Agency Conflict in the Context of Advisory and Monitoring Relationships

Our third group turns to arenas for conflict in which formal decision-making power rests entirely with one agency or official, but another agency or official has only a "soft" participatory or overseer role. We focus on established channels for advising.[90]

1. Advisory and Monitoring Relationships Between Executive Agencies

These soft advisory and monitoring relationships permeate the Executive Branch.[91] Some arrangements focus on the agency tasked with soliciting advice; others emphasize a particular advisor. As to the former, there are formal mechanisms for obtaining comments from agencies about proposed actions by other agencies. Under the National Environmental Policy Act (NEPA), agencies must obtain comments from any agency with environmental expertise or authority.[92] EPA is a frequent commentator.[93] For instance, it pushed the State Department to revise its analysis of the Keystone XL pipeline, sharply criticizing a draft of the environmental impact statement.[94]

As to the latter, some advisory relationships within the government are specifically designed to give representation to underrepresented interest groups outside the government. Since 1976, the Small Business Administration (SBA) has contained an independent Office of Advocacy, which represents (by statute) the interests of small business within the government, often through comments in the rulemaking process.[95] As part of its commenting role, the agency even holds its own "listening sessions" and takes submissions.[96] The Office also has the unusual authority in the administrative state to file an amicus brief in federal court in challenges to another agency's rulemaking.[97] The Office of Advocacy's agenda of regulatory flexibility is thus

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[90] To be sure, there is considerable conflict that arises from informal monitoring.

[91] In the classic administrative law case, *Overton Park*, the relevant statutes commanded the Secretary of Transportation to "cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, nn.2–3 (1971).

[92] *See* 40 C.F.R. § 1503.1(a). Agencies then have to respond. *Id*. at § 1503.2. The EPA has a specific statutory duty to respond under 42 U.S.C. § 7609(a).

[93] Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies,* 33 HARV. ENV. L. REV. 1, 43–44 (2009).

[94] Lenny Bernstein & Juliet Eilperin, *EPA Wants State Dept. to Rework Analysis of Keystone XL Pipeline*, WASH. POST (April 22, 2003), https://www.washingtonpost.com/national/health-science/epa-wants-state-dept-to-rework-analysis-of-keystone-xl-pipeline/2013/04/22/1c6e9812-ab9f-11e2-b6fd-ba6f5f26d70e_story.html.

[95] 5 U.S.C. § 601–612; U.S. Small Business Administration, *Office of Advocacy*, https://www.sba.gov/advocacy. An archive of the agency's comments, dozens per year, is available on its website. *See* U.S. Small Business Administration, https://www.sba.gov/category/advocacy-navigation-structure/legislative-actions/regulatory-comment-letters. Critics argue, however, the SBA represents the view of big business at the expense of its formal mission. *See* Center for Effective Government, Gaming the Rules: How Big Business Hijacks the Small Business Review Process to Weaken Public Protections 4–5, 13 (Nov. 2014), http://www.foreffectivegov.org/files/regs/gaming-the-rules-exec-summary.pdf (discussing SBA's role in selecting business representatives for review panels).

[96] *See Labor Department Publishes New Overtime Rule*, AUTO DEALER MONTHLY, May 19, 2016.

[97] *See* 5 U.S.C. § 612.

often in considerable tension with the missions of the regulatory agencies it seeks to influence.[98] Some members of Congress are pushing to expand the Office's role into agency adjudications.[99]

By contrast, sometimes there are assigned peer reviewers that share expertise with the agency's staff. [100] Occasionally, these reviewers help set priorities of another agency. For instance, the National Institute of Occupational Safety and Health, part of HHS, advises OSHA, within the Labor Department, on occupational health and safety standards.[101]

OIRA, whose role in cost-benefit analysis was discussed earlier as a hierarchical relationship between the White House and an executive agency, also acts as a clearinghouse for other agencies' comments on rules.[102] SBA's advisory role often plays out at OIRA's doorstep; it is the agency that most frequently meets with OIRA. Former OIRA Administrator Cass Sunstein emphasizes OIRA's role in helping "collect widely dispersed information—information that is held throughout the executive branch."[103] According to Sunstein, "most of OIRA's day-to-day work is usually spent not on costs and benefits, but on working through interagency concerns, promoting receipt of public comments (for proposed rules), ensuring discussion of alternatives, and promoting consideration of public comments (for final rules)."[104] This other role of OIRA produces its own tensions. [105] Agencies such as the Departments of Transportation, Energy, and Defense often resist new regulations that would apply to their own activities.[106]

Similar functions in pooling information and giving voice to other interest groups may be served by multiagency groups such as the Trade Policy Review Group (TPRG).[107] By Executive Order, recommendations of this group (primarily composed of cabinet officers) should guide the U.S. Trade Representative in her negotiations with other countries.[108] The Representative must also inform the group about the progress of negotiations.[109] Notably, while the list of participating cabinet-level agencies excludes EPA, an environmental review process is layered

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[98] *See, e.g.*, Bryan Koenig, *SBA Office Warns of FCC Privacy Rule's Impact on Small ISPs*, LAW360, June 28, 2016; Juan Carlos Rodriguez, *Independent Unit of SBA Hits EPA* Over Water Rule, LAW360, Oct. 2, 2014.
[99] *See* S. 1536, §5 (114th Cong.); H.R. 527, §5 (114th Cong.).
[100] *See* Wendy E. Wagner, *A Place for Agency Expertise: Reconciling Agency Expertise with Presidential Power*, 115 COLUM. L. REV. 1001, 1009 (2005).
[101] *See* Keith Bradley, *The Design of Agency Interactions*, 111 COLUM. L. REV. 745, 753 (2011) ("OSHA takes its priorities for rulemaking partly from the recommendations that NIOSH provides it and may also follow the specific substantive recommendations NIOSH offers.").
[102] Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENVTL. L. REV. 337, 342 (2014).
[103] Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1840 (2013).
[104] *Id*. at 1842.
[105] Heinzerling, *supra* note 102, at 343.
[106] RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 34 (2004). For a discussion of why an agency might be willing to take part in a consultation process, see Jason Marisam, *Interagency Administration*, 45 ARIZ. ST. L.J. 183, 191–98 (2013).
[107] The TPRG is chaired by the U.S. Trade Representative and consists of six cabinet members, an Assistant to the President; and the Executive Director of the Council on International Economic Policy. 15 C.F.R. § 2002.0. The overall process involves multiple levels of interagency consulting and dispute resolution that ultimately goes up to the National Economic Council chaired by the President. James Salzman, *Executive Order 13,141 and the Environmental Review of Trade Agreements*, 95 AM. J. INT'L L. 366, 372 (2001).
[108] Exec. Order No. 11846 (Administration of the Trade Agreements Program), 40 Fed. Register 14,291 (1975).
[109] *Id*.

onto the interagency coordination process,[110] with both the Representative and the Council on Environmental Quality responsible for overseeing implementation of the guidelines for these reviews.[111]

2. Interagency Advisory and Monitoring Relationships and Quasi-Independent Agencies

These advisory and monitoring relationships sometimes involve nonexecutive agencies. For instance, the Advisory Council on Historic Preservation, a quasi agency with federal, state, and local officials, makes recommendations regarding agency programs, and agencies must give it an opportunity to comment about specific projects.[112]

The Government Accountability Office (GAO) exemplifies another type of monitoring relationship that does not exist entirely within the Executive Branch.[113] GAO, which acts under the supervision of the Comptroller General, initially focused on financial auditing of federal agencies, but its mandate expanded to include other types of program evaluation, including investigation of agency programs and making recommendations to Congress.[114] Its authority extends to both independent and executive agencies (with the possible exception of the CIA), and it can force agencies to hand over records.[115] Because GAO reports almost always flag problems with agency programs, conflict is rife between the agency and its objects of investigation. Under congressional pressure, GAO now allows agencies to preview their reports and provide comments to be included in the final version.[116]

3. Advisory and Monitoring Relationships Within the Agency

As with the other categories, these soft control adversarial relationships also arise within agencies. We discuss two sub-groups: employees within an agency and agency advisory boards.

a. Employees Within Agencies

Employees within an agency can sometimes disclose agency behavior to a wider audience, even though they cannot control that behavior. Specifically, the Whistleblower Protection Act immunizes federal employees from retaliatory personnel actions taken for a series of actions, including communications with the IG or agency head about serious agency misconduct.[117] There has been sharp criticism of the statute's ability to protect whistleblowers.[118]

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[110] Office of the United States Trade Representative, Environmental Reviews, https://ustr.gov/issue-areas/environment/environmental-reviews.
[111] United States Trade Representative and Council on Environmental Quality, Guidelines for Environmental Review of Trade Agreements, https://ustr.gov/sites/default/files/guidelines%20for%2013141.pdf
[112] National Historic Preservation Act, § 202 (codified at 54 U.S.C. §304102); Advisory Council on Historic Preservation, About the ACHP: General Information, http://www.achp.gov/aboutachp.html.
[113] The Supreme Court has classified GAO as an instrument of Congress because Congress can remove the Comptroller General for cause by joint resolution (subject to presidential veto). Bowsher v. Synar, 478 U.S. 714 (1986). But the D.C. Circuit recently termed a related entity, the Library of Congress, an executive "department" for Appointments Clause purposes for its supervisory role over the Copyright Royalty Board. Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Bd., 684 F.3d 1332 (D.C. Cir. 2012).
[114] FREDERICK KAISER, CONG. RES. SERV., RL30349, GAO: GOVERNMENT ACCOUNTABILITY OFFICE AND GENERAL ACCOUNTING OFFICE 1–2 (2008); Anne Joseph O'Connell, *Auditing Politics or Political Auditing?* 1–2 (2007), ssrn.com/abstract=964656.
[115] O'Connell, *supra* note 114, at 5 n.1, 6.
[116] *Id*. at 1–2.
[117] 5 U.S.C. § 2302(b).

Notwithstanding these possible flaws, "soft whistleblowing", including leaks, remains a common adversarial mode within an agency.[119] Agencies sometimes formalize other channels for dissenting low-level officials to make their views known above the heads of their immediate superiors.[120]

b. Advisory Boards for Agencies

Some agencies have advisory boards. Most formally, there is the Joint Chiefs of Staff within the Defense Department: outside of the command structure and now lacking operational control, the members advise the Secretary of Defense, among others.[121] Under the Clean Air Act, EPA must obtain reviews from the Clean Air Scientific Advisory Committee (CASAC) in developing air quality rules.[122] The EPA Administrator appoints the seven-person board, which must include at least one member of the National Academy of Sciences, one physician, and one person representing state air pollution control agencies.[123] Other examples include EPA's more general Science Advisory Board,[124] and an advisory board on childhood vaccines within HHS.[125] More generally, the Federal Advisory Committee Act governs how agencies can use groups to provide needed information or act as a sounding board in the policymaking process.[126]

Despite the temptation to tilt the membership of advisory boards in favor of agency policies, fear of public disclosure and congressional displeasure seems to have minimized such conduct, generally preserving the boards' independence.[127] One possibility, clearly, is that these boards' findings might conflict with the agency's determinations;[128] another is that the findings might conflict with the preferences of White House reviewers.[129] These peer reviewers are powerless to block contrary administrative decisions. Nevertheless, EPA must explain any decision to deviate from CASAC's scientific findings, and conflict can make judicial review

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[118] *See* Garcetti v. Ceballos, 547 U.S. 410, 440–41 (2006); Mark Hertsgaard, Op-Ed, *Whistle-Blower, Beware*, N.Y. TIMES, May 26, 2016.

[119] Amanda C. Leiter, *Soft Whistleblowing*, 48 GA. L. REV. 425 (2014) (detailing range of mechanisms employees can use when upset about policy choices, as opposed to actual malfeasance).

[120] Neal Katyal provides a particularly interesting example—the State Department's "Dissent Channel," which provides a safe space for lower-level officials who dissent from the decisions of their superiors. Katyal, *supra* note 24, at 2328–29. An "award is given out every year to the Foreign Service officer who makes the best use of it." *Id*. at 2329. Most recently, over four-dozen employees used the Dissent Channel to encourage military strikes in Syria. Mark Landler, *51 U.S. Diplomats Urge Strikes Against Assad in Syria*, N.Y. TIMES, June 16, 2016.

[121] Daniel Wilson, *DOD Reform Plan Opens Doors for Broader Overhaul*, LAW360, April 11, 2016.

[122] Wagner, *supra* note 100, at 1029.

[123] 41 U.S.C. § 7409(d). The board currently consists of five academics, a representative of state regulators, and an industry representative. *See* United States Environmental Protection Agency, EPA Clean Air Scientific Advisory Committee, http://yosemite.epa.gov/sab/sabpeople.nsf/WebExternalCommitteeRosters?OpenView&committee=CASAC&secondname=Clean%20Air%20Scientific%20Advisory%20Committee.

[124] *See* 42 U.S.C. § 4365. Notably, the Administrator is required to appoint a special subcommittee for measures relating to agriculture, with input from the Secretary of Agriculture. *Id*. § 4365(2)(b)(2).

[125] 42 U.S.C. § 300aa-14.

[126] WENDY GINSBERG, CONG. RESEARCH SERV., R44232, CREATING A FEDERAL ADVISORY BOARD IN THE EXECUTIVE BRANCH (Oct. 19, 2015).

[127] Wagner, *supra* note 100, at 1009–10.

[128] *See, e.g.*, Bonnie Eslinger, *EPA Science Panel rebukes Agency's Fracking-Water Study*, LAW360, Jan. 8, 2016, http://www.law360.com/articles/744191/epa-science-panel-rebukes-agency-s-fracking-water-study.

[129] Wagner, *supra* note 100, at 1007.

more difficult.[130] Similarly, if the vaccine advisory board makes a recommendation to HHS, "the secretary must either conduct a rulemaking in accordance with the recommendations or publish a 'statement of reasons' for refusing to do so in the Federal Register."[131] Outside the courts, conflict can generate media attention, political embarrassment, and pressure for agency change.

D. Agency Conflict in Symmetrical Relationships

Our final group concerns what may be the most classic examples of agency conflict: when more than one agency has, or at least claims to have decision-making authority over the same topic but no agency dominates.

1. Symmetrical Relationships Between Executive Agencies

There are many examples of adversarial executive agencies with overlapping turf. We began our Article with three recent examples of such conflict: encrypting iPhones, classifying Clinton's emails as Secretary of State; and releasing Guantánamo Bay detainees.[132] Some earlier work examining the benefits of horizontal adversarial arrangements has examined the jurisdictional redundancy within the intelligence community.[133] Examples abound outside the national security context. Taking just one agency's foes, FDA fights with the Agriculture Department fight over food and with the Drug Enforcement Administration over drugs.[134]

2. Interagency Symmetrical Relationships and Quasi-Independent Agencies

Similar turf battles exist with independent agencies. Sometimes the clashes involve only independent regulatory commissions. As described in the Introduction, SEC and CFTC parry over various issues.[135] CFTC also fights with the Federal Energy Regulatory Commission (FERC) over energy markets.[136] And the Federal Trade Commission (FTC) and FCC skirmish over privacy, among other issues.[137]

Independent regulatory commissions also clash with executive agencies. One longstanding adversarial relationship is between FTC and DOJ's Antitrust Division, which tussle

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[130] The D.C. Circuit has emphasized that the EPA must give a "sound scientific reason" or an explicit policy justification for rejecting CASAC's recommendation. Mississippi v. E.P.A., 744 F.3d 1334, 1355 (D.C. Cir. 2013).
[131] Adrian Vermeule, *The Parliament of Experts*, 58 DUKE L.J. 2231, 2239 (2009) (citing 42 U.S.C. §300aa-14(c)(2)).
[132] *See supra* notes 1–9 & accompanying text.
[133] *See* POSNER, *supra* note 22; O'Connell, *supra* note 22. This work is in some tension with the 9/11 Commission, which concluded the intelligence community's redundant structure had contributed to intelligence failures.
[134] *See* Richard A. Merrill & Jeffrey K. Francer, *Organizing Federal Food Safety Regulation*, 31 SETON HALL L. REV. 61 (2000); Kate Traynor, *FDA Advisers Support Rescheduling of Hydrocodone Products*, AJHP NEWS, March 1, 2013.
[135] *See supra* notes 10–13 & accompanying text.
[136] *See* Hunter v. FERC, 711 F.3d 155 (D.C. Cir. 2013) (CFTC intervened in the case against FERC over which agency had jurisdiction to prosecute manipulation of commodity futures markets); Keith Goldberg, *Lawmakers Must Help FERC, CFTC Discord, Norris Says*, LAW360, Sept. 9, 2013, http://www.law360.com/articles/469687/lawmakers-must-help-end-ferc-cftc-discord-norris-says.
[137] *See* Michael O'Rielly & Maureen K. Ohlhausen, Op-Ed, *The Consequences of a Washington Internet Power Grab*, WALL ST. J., Aug. 6, 2015, http://www.wsj.com/articles/the-consequences-of-a-washington-internet-power-grab-1438903157 ("Our two agencies, the FCC and FTC, are on a collision course that could severely hamper how the Web works."). The agencies recently entered into a MOU involving consumer protection. Press Release, Federal Communications Commission, FCC and FTC Sign Memorandum of Understanding for Continued Cooperation on Consumer Protection Issues (Nov. 16, 2015), https://www.ftc.gov/news-events/press-releases/2015/11/ftc-fcc-sign-memorandum-understanding-continued-cooperation.

over who reviews a particular merger or goes after a specific antitrust violation.[138] More recently, the Treasury Department and Federal Deposit Insurance Corporation had different takes on the financial crisis.[139] The Patent and Trademark Office (PTO), within the Department of Commerce, has battled with FCC over providing the location of 911 cell phone calls.[140]

3. Symmetrical Relationships Within the Agency

As with all the other categories, these relationships exist within an agency. We discuss two groups: entities within executive agencies, and leaders of independent regulatory commissions.

a. Between Sub-Agencies in Executive Agencies

Much like the conflict between agencies, subagencies can clash. The intradepartment version of the iPhone encryption conflict between the CIA and FBI are the three services—Army, Navy, and Air Force—within the Defense Department that share duties to defend the country.[141] Outside of national security, there are FWS and Bureau of Land Management entities within the Interior Department with overlapping duties regarding federal lands.[142]

b. Between Representatives in Multi-Member Organizations

Multimember leadership teams of independent agencies also conflict internally, as noted in the Introduction. Formal split votes appear to be increasing.[143] Party-balancing requirements dominate selections for such teams—including the Consumer Products Safety Commission,[144] FCC,[145] FTC,[146] SEC,[147] to name a few.[148] The balancing mandate generally requires that no more than a bare majority of individuals from the President's party can hold top positions.[149] In SEC's case, the order of appointments should alternate between the two parties "as nearly as may be practicable."[150] Experience requirements—either numerical requirements or a general balance mandate—can also build conflict into agency interactions. The Public Company Accounting Oversight Board, established by the Sarbanes-Oxley Act after the Enron accounting scandal,

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[138] *See* Kylie Cooper & Adrienne C. Dedjinou, *Antitrust Violations*, 42 AM. CRIM. L. REV. 179, 208 (2005).
[139] SHEILA BAIR, BULL BY THE HORNS: FIGHTING TO SAVE MAIN STREET FROM WALL STREET AND WALL STREET FROM ITSELF (2012).
[140] Narechania, *supra* note 25, at 1485.
[141] For example, all three have air components. *See generally* HERMAN S. WOLK, REFLECTIONS ON AIR FORCE INDEPENDENCE (2007) (history of the conflict between the Air Force and the Army).
[142] Biber, *supra* note 93.
[143] *See* Ed Beeson, *SEC's Gallagher Blames Dodd-Frank for Politicizing Agency*, LAW360, Aug. 4. 2015, http://www.law360.com/articles/687055/sec-s-gallagher-blames-dodd-frank-for-politicizing-agency. Such conflict is not, however, new. It generated a classic case on ex parte communications that appears in all main Administrative Law casebooks, Professional Air Traffic Controllers Organization v. Federal Labor Relations Board, 685 F.2d 547 (D.C. Cir. 1982) (basically, member Frazier publicized member Applewhaite's communications, generating PATCO's lawsuit).
[144] 15 U.S.C. § 2053(c).
[145] 47 U.S.C. § 154.
[146] 15 U.S.C. § 41.
[147] 15 U.S.C. § 78(d).
[148] Ronald J. Krotoszynski et al., *Partisan Balance Requirements in the Age of New Formalism*, 90 NOTRE DAME L. REV. 941, 1009–1017. (2015) (cataloging partisan balance mandates across independent regulatory commissions, cabinet departments, and Article I and III courts).
[149] There are a few agencies—the FEC and the International Trade Commission—with equal party representation. 2 U.S.C. § 437c(a)(1); 19 U.S.C. § 1330.
[150] 15 U.S.C. § 78(d).

must have two (and only two) certified public accountants.[151] Some of these agencies, such as FERC, display their considerable internal conflict through separate statements.[152]

E. Providing a Unified Typology

To provide a sense of the frequency and diversity of conflicting relationships within the administrative state, we have provided many examples in each of the four categories. We now bring these examples into a single table to summarize our classification.

[151] 15 U.S.C. § 7211(e)(2).

[152] *See* Daniel E. Ho, Congressional Agency Control: The Impact of Statutory Partisan Requirements on Regulation 8 (2007) (unpublished manuscript). Jacobs has recently argued that this conflict is not driven by partisanship. Jacobs, *supra* note 19, at 6.

	Intra-Executive Branch (between agencies)	**Intra-Executive Branch (within agency)**	**Independent Agency Involvement (between agencies)**	**Independent Agency Involvement (within agency)**
Formal Hierarchical	OIRA v. agency (rulemaking) OMB v. agency (budget, testimony) DOJ v. agency FWS v. agency EPA v. agency DHS v. FEMA HHS v. FDA	Secretary/ Administrator v. Assistant Secretaries/ Assistant Administrators SG v. other units in DOJ NSA Head/Deputy Appointees v. civil servants	DOJ v. agency ICC v. agency USPS v. agency PRC v. USPS	Commission/Board v. examiner Appointees v. civil servants
Mixed Hierarchy and Advisory	OLC v. DHS DNI v. intelligence agencies	SG v. DOJ units GC v. other units IG	FSOC v. members	GC v. NLRB IG Chairpersons v. Commissioners/ Board members
Advisory/ Monitoring	NEPA comment process SBA v. EPA NIOSH v. OSHA OIRA TPRG	CASAC/SAB v. EPA Joint Chiefs v. DOD FACA groups Whistleblowers	ACHP v. agency GAO v. agency	FACA groups Whistleblowers
Symmetrical	CIA v. FBI DOD v. DOS FDA v. USDA FDA v. DEA	Services within DOD FWS v. BLM	SEC v. CFTC FERC v. CFTC FTC v. FCC FTC v. Antitrust Treasury v. FDIC PTO v. FCC	Party-balancing mandates Experience-balancing mandates

We make a few observations about this admittedly varied set of relationships between administrative actors. To begin, these relationships manifest in all forms of decision-making: rulemaking, adjudication, and program-level policy. Administrative law scholars tend to focus on rulemaking.[153] For that reason, relationships between OIRA and regulatory agencies usually receive more extensive scholarly attention than many others in the table. But rulemaking is only

[153] *See* Shah, *supra* note 27 (collecting cites).

a small sliver of the modern administrative state's activities, and conflicts are also widespread in the broader sphere of activities.

The matrix emphasizes institutional structure as an important part of how these relationships play out—in their design, any resolution, and consequences. Formal structure, however, is only part of the dynamics. Agencies may find allies elsewhere in the federal bureaucracy, sympathetic members or committees of Congress, White House staff, the media, and interest groups. Opposition can also come from all those sources. A full treatment of adversarial agencies would flesh out these informal dynamics in ways not possible within a single Article.

We turn next, in a considerably briefer fashion, to classifying dispute resolution mechanisms. Then, we can consider the political roots of adversarial relationships (and their resolution) and their desirability on social welfare and legitimacy grounds.

II. Mechanisms of Conflict Resolution

We continue our taxonomic work by considering how conflict gets resolved. Not all conflict needs resolution, of course. But often action must be taken one way or another. In this part, we examine conflict resolution mechanisms outside and within the courts. According to the Congressional Research Service, coordination mechanisms among agencies "appear to be growing."[154] Although these mechanisms cut across agency types and categories of adversarial relationships, there are some connections to the preceding section's typology.

In considering the rich diversity of mechanisms used to resolve conflicts, it is helpful to distinguish between vertical and horizontal relationships of adversarial interaction. The vertical nature of a relationship allows for forms of dispute resolution unavailable to horizontal relationships by their very nature. At least formally, hard hierarchical relationships seem to have clearer resolution mechanisms—the principal. But there are both formal arbiters and informal powers at play, and these may not always jibe. Although in theory the principal simply resolves disputes in hard hierarchical relationships, in practice the mechanisms involved in soft hierarchical relationships may come into play.

In what we have called soft vertical relationships, involving monitoring or advising, there is also the possibility of resolution by the principal—the actor with formal power over the decision. Additionally, other actors such as congressional committees might use information from monitoring and advising to influence the agency decision-maker.

We will not reprise the detailed discussions of dispute resolution already found in the literature.[155] Instead, we will try to bring a fresh perspective, based on our view of the potentially healthy benefits of conflict among administrative actors. A conflict-resolution mechanism would ideally take advantage of the ability of adversarial relationships to foster fuller development of information and debate, along with broader representation for conflicting interests. In contrast, a poor conflict-resolution mechanism would screen out additional information and voices of some

[154] FREDERICK M. KAISER, CONG. RESEARCH SERV. R41803, INTERAGENCY COLLABORATIVE ARRANGEMENTS AND ACTIVITIES: TYPES, RATIONALES, CONSIDERATIONS (May 31, 2011), at 1.

[155] The problem of dispute resolution in horizontal relationships has been the subject of extensive scholarly discussion—understandably so, since most scholars have emphasized the value of coordination, which brings with it the need to iron out conflicts. *See, e.g.*, Keith Bradley, *The Design of Agency Interactions*, 111 COLUM. L. REV. 745, 787 (2011); Freeman & Rossi, *supra* note 26; Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 182 (2011); Jason Marisam, Interagency Administration, 45 Ariz. St. L.J. 183 (2013); Shah, *supra* note 27.

interest groups while disincentivizing those groups from participating and developing such information. As always, there is a trade-off between the benefits of adversarialism and decision-making efficiency. We consider that trade-off at more length in Part III, along with an exploration of the often-overlooked benefits of conflict.

With these issues in mind, we turn first to conflict-resolution mechanisms outside the courts and then very briefly to the courts as arbitrators of conflict. In some sense, the courts can weigh in on many conflicts, as we describe in Part IV. But we do not classify the courts as a conflict-resolution mechanism unless their decision is the initial resolution of the conflict.

A. Outside the Courts

When agency conflict is ironed out, the forum is generally not judicial. We discuss three primary forms of such nonjudicial mechanisms: resolution through negotiation and mediation; adjudication; and formal voting and consensus rules.

1. Negotiation and Mediation

Negotiation and mediation often resolve conflicts in horizontal and monitoring/advisory relationships. As in the private sector, negotiation is a crucial method of addressing intergovernmental disputes. Memorandums of understanding (MOUs) between agencies are "[p]erhaps the most pervasive instrument of coordination in the federal government."[156] They differ widely in subject matter and level of specificity.[157] The FDA website gives a sense of the ubiquity and variety of these agreements even for one relatively small agency. It lists over a hundred MOUs, almost all with other federal agencies, on subjects ranging from information sharing to division of regulatory or enforcement authority.[158] The Antitrust Division of DOJ and FTC have long negotiated complex MOUs dividing their overlapping jurisdiction.[159]

Despite the frequent use of MOUs across the federal government, there seem to be no government-wide policies regarding their use. MOUs are used to clarify issues of overlapping jurisdiction, such as dividing up authority over administering energy efficiency programs,[160] coordinating nine agencies in decisions over siting multistate transmission lines,[161] and setting rules for enforcement in consumer protection. [162] Although these agreements may be officially voluntary, the White House often plays a guiding role in rationalizing the allocation of authority.[163] Indeed, sometimes the White House itself announces the coordinated solution.[164]

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[156] Freeman and Rossi, *supra* note 26, at 1161.
[157] *Id*.
[158] *See* U.S. Department of Health and Human Services, About FDA: Memoranda of Understanding—Domestic MOUs, http://www.fda.gov/AboutFDA/PartnershipsCollaborations/MemorandaofUnderstandingMOUs/DomesticMOUs/.
[159] GENERAL ACCOUNTING OFFICE, GAO-01-188, JUSTICE'S ANTITRUST DIVISION: BETTER MANAGEMENT INFORMATION IS NEEDED ON AGRICULTURE-RELATED MATTERS 14 n.18 (April 2001) (agreements date back to 1938).
[160] Freeman and Rossi, *supra* note 26, at 1162.
[161] *Id*. at 1164.
[162] Margaret Harding, *FCC Teaming Up with FTC on Consumer Protection,* LAW360, Nov. 16, 2015.
[163] Bradley, *supra* note 155, at 787. For example, in July 2015, the White House "ordered" the EPA, USDA and FDA to "simplify the government's Coordinated Framework for the Regulation of Biotechnology." Kurt Orzeck, *White House Orders Updated GMO Rules Amid Criticism*, LAW360, July 2, 2015.

These MOUs have normative and legal implications. On one hand, they may shut down important voices in agency decision-making.[165] On the other, they may create greater efficiency. We take up these possibilities in Part III. MOUs also may present separation of powers concerns if they divide authority in ways not designed by Congress,[166] an issue we take up in Part IV.

In addition to negotiation directly among agencies, mediators can play a role. We normally think of alternative dispute resolution (ADR) as occurring entirely outside the administrative state, or with at least one private party. But such techniques sometimes apply wholly within the federal bureaucracy. A 2005 directive signed by the heads of the Council on Environmental Quality and OMB instructs agencies to use ADR for conflicts "over the use, conservation, and restoration of the environment, natural resources, and public lands."[167] A similar 2012 directive strengthens the preference for ADR.[168] This mechanism is often used for disputes including both federal agencies and other stakeholders, but in about one-seventh of cases, only federal agencies were involved in the process, with the Department of the Interior as the agency involved most frequently.[169] As a specific example, a third-party facilitator successfully led four agencies to agree on issues relating to pesticide registration and the Endangered Species Act.[170]

Administrative negotiation and mediation are not always successful, sometimes bringing other actors into play. For instance, Congress required that CFTC and FERC enter into an MOU governing exercise of their authority over energy markets, but they had failed to do so a full eight years later.[171] This led to a request from FERC's chair for congressional resolution of the dispute.[172] Three Senators then intervened to urge the agencies to settle the dispute, which led to the completion of the MOU about a year later.[173]

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[164] *See, e.g.*, Council on Environmental Quality, Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews (Aug. 1, 2016).

[165] For example, the FDA and the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) have agreed ATF is solely responsible for labeling alcoholic beverages with limited advice from FDA. Marisam, *supra* note 155, at 213. The concern is that the agency that most represents regulatory beneficiaries is largely shut out of the regulatory process.

[166] For instance, NRC and OSHA have divided authority over workplace safety issues, so NRC has sole authority over radiation hazards to workers while OSHA regulates other hazards. Marisam, *supra* note 155, at 213.

[167] The directive can be found at http://www.udall.gov/documents/Institute/OMB_CEQ_Memorandum_2005.pdf.

[168] OMB and CEQ, Joint Memorandum on Environmental Collaboration and Conflict Resolution (2012), http://energy.gov/sites/prod/files/OMB_CEQ_Env_Collab_Conflict_Resolution_20120907-201,2.pdf

[169] U.S. Institute for Environmental Conflict Resolution, Environmental Collaboration and Conflict Resolution (ECCR) FY 2013, at 5, https://www.udall.gov/documents/ECRReports/2013/DepartmentoftheNavy(DON)FY2013ECCRReport.pdf.

[170] *Id*. at 7.

[171] Keith Goldberg, *Lawmakers Must Help FERC, CFTC Discord, Norris Says*, LAW360, Sept. 9, 2013, http://www.law360.com/articles/469687/lawmakers-must-help-end-ferc-cftc-discord-norris-says.

[172] *Id*.

[173] David McAfee, *CFTC, FERC Settle Energy Markets Jurisdiction, Info Sharing*, LAW360, Jan. 2, 2014, http://www.law360.com/articles/498411/cftc-ferc-settle-energy-markets-jurisdiction-info-sharing. In a similar effort to settle an interagency dispute, the House passed legislation in October 2015 to bar DOL from implementing a fiduciary standard for retirement advisors until the SEC takes similar action. Daniel Wilson, *House Oks Bill to Delay Contentious DOL Fiduciary Standard*, LAW360, Oct. 27, 2015, http://www.law360.com/articles/719185/house-oks-bill-to-delay-contentious-dol-fiduciary-standard.

2. Adjudication of Administrative Disputes

Adjudication is another device to resolve conflicts, primarily in horizontal and advisory relationships but sometimes in hierarchical relationships. Primary adjudicators in the administrative state include higher-level officials within an agency, OLC, and the White House.

Within an agency, higher-level officials generally can resolve conflicts among lower-level officials. There are sometimes formal agreements about elevating and resolving such conflict.[174] For example, when a particular program office, the Office of Legislative Affairs, and the General Counsel at EPA disagree about interpreting a statute, the Deputy Administrator will usually first decide the dispute, but it can then be elevated to the Administrator if necessary.[175]

OLC can attempt to mediate, and if necessary adjudicate disputes between executive agencies over legal matters.[176] OLC can also decide intra-agency disputes. A recent example, discussed above, involved an OLC opinion about the right of the Justice Department's IG to access certain wiretapping information, a matter disputed between the Department (in the person of the Attorney General) and the IG.[177]

Finally, the White House is a dominant adjudicator (or mediator).[178] Under E.O. 12,866, the Vice President (and ultimately the President) is to resolve conflicts between an agency and OIRA.[179] And OIRA itself can play a central role in resolving conflicts between agencies.[180] Outside the regulatory review process, the White House can always step in to adjudicate (or mediate) conflicts. There are particular institutions within the White House that perform this function. For instance, White House offices dealing with specific subjects such as drug control, AIDS, or climate change may take charge of coordinating multiple agencies.[181] In addition, the Council on Environmental Quality mediates disputes when EPA objects to agency projects.[182]

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[174] Marisam, *supra* note 155, at 206–08.
[175] Nou, *supra* note 29.
[176] Office of Legal Counsel, *supra* note 64; Freeman and Rossi, *supra* note 26, at 1175–76. The decisions on whether intelligence agencies could engage in "enhanced interrogation techniques," including waterboarding, provide a high-profile example. *See* HAROLD H. BRUFF, BAD ADVICE: BUSH'S LAWYERS IN THE WAR ON TERROR (2009); JACK L. GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION (2007).
[177] U.S. Department of Justice, Office of Legal Counsel, Memorandum for Sally Yates, Deputy Attorney General, Re: The Department of Justice Inspector General's access to information Protected by the Federal Wiretap Act, Rule 6(e) of the Federal Rules of Criminal Procedure, and Section 626 of the Fair Credit Reporting Act (2015). More generally, DOJ was established, in part, as a coordinating mechanism. *See* Susan M. Olson, *Challenges to the Gatekeeper: The Debate over Federal Litigating Authority*, 68 JUDICATURE 71, 75 (1984).
[178] The distinction between adjudicating and mediating (more the topic of the preceding section) is subtle, dependent on formal and informal authority.
[179] E.O. 12866, § 7.
[180] The Executive Order gives OIRA the most authority for "significant" regulatory actions. Although much commentary on these actions focuses on the first criterion—the $100 million threshold—an action that "create[s] a serious inconsistency or otherwise interfere[s] with an action taken or planned by another agency" also falls in the significant category. E.O. 12,866, § 3(f)(2).
[181] Freeman and Rossi, *supra* note 26, at 1177.
[182] 42 CFR 1504.3(2). Notably, the agency also has the power to make its own recommendation on the matter, and if necessary, forward the recommendation to the President for action, thereby elevating the dispute to the highest level. 42 CFR 1504.3(6), 1504.3(7).

3. Voting and Consensus

Voting and consensus mechanisms are frequent conflict-resolution mechanisms. While negotiation and mediation are typically agency driven and adjudication is White House driven, this final section primarily focuses on devices Congress chooses to govern horizontal and hierarchical conflicts.[183]

Probably the most prominent example of formal voting is FSOC's authority to veto regulations proposed by the Consumer Financial Protection Bureau, which requires a two-thirds vote of the nine agencies regulating the financial system.[184] FSOC takes a number of other actions by two-thirds vote, such as determining whether a nonbank financial company's failure could pose a threat to financial stability and imposing appropriate restrictions on the company, and issuing nonbinding recommendations to "feuding agencies under its jurisdiction" once it has been asked to step in by at least one agency.[185]

Another example of voting relates to the Endangered Species Committee, which can override statutory protections for particular projects that may jeopardize an endangered species.[186] The Committee consists of six cabinet-level agency heads plus a representative, appointed by the President, of the affected state.[187] The exemption is conditioned on certain findings adopted with the votes of at least five of the seven members.[188] It might be more accurate to say "five members plus one nonmember," because the Secretary of State can block the exemption based on treaty obligations.[189]

Consensus requirements can also be seen as a type of voting rule—one requiring unanimity. Such consensus may be required, for instance, when agencies agree, voluntarily or under presidential or congressional direction, to conduct joint rulemakings or concur on policy.[190] A notable example was the working group convened by the President to establish Executive-Branch-wide guidance on the social cost of carbon.[191] There are also soft consensus requirements, such as the directive that SEC, CFTC, and bank regulators coordinate to the extent possible on rulemakings and orders dealing with swaps.[192]

Such soft consensus requirements can result in forming an interagency working group to draft regulations, as in the case of regulations implementing the Volcker rule, where the diversity of viewpoints represented is said to have benefitted the design of the regulation.[193] But there are also clear efficiency costs to this kind of effort, exemplified by a joint rulemaking between the

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[183] To be sure, Congress may create some conflicts in anticipation of White House resolution. *See* Part III, *infra*.
[184] Marisam, *supra* note 155, at 213.
[185] Michael S. Barr, *Comment: Accountability and Independence in Financial Regulation: Checks and Balances, Public Engagement, and Other Innovations*, 78 L. & CONTEMP. PROBS. 119, 124-25 (2015); Gersen, *supra* note 73, at 693–96.
[186] ESA § 7(e), 16 U.S.C. 1536(e).
[187] ESA § 7(e)(3), 16 U.S.C. 1536(e)(3).
[188] ESA § 7(h)(1), 16 U.S.C. 1536(h)(1).
[189] ESA § 7(i), 16 U.S.C. 1536(i).
[190] *See* Freeman and Rossi, *supra* note 26, at 1197.
[191] *See id*. at 1198–99 (with OIRA apparently playing a convening and mediating role); *supra* note 164.
[192] U.S. GOVERNMENT ACCOUNTABILITY OFFICE, DODD-FRANK REGULATIONS: REGULATORS' ANALYTIC AND COORDINATION EFFORTS 15 (2014).
[193] *Id*. at 31–32. The upshot was that "SEC and the banking regulators adopted a joint Volcker rule regulation and the CFTC adopted a separate regulation with text and supplementary information that, except for information specific to CFTC or other regulators, are substantially the same." *Id*. at 32.

Comptroller of the Currency, Federal Reserve, and FDIC, where the difficulty of achieving consensus led to a delay of over a year on the seemingly simple question of how to define a "small" bank.[194] Similar consensus requirements may exist within agencies in the form of sign-off authority reposing in multiple offices.[195]

B. The Courts

In some rare cases, the courts function as the primary dispute-resolution mechanism, in both horizontal and vertical relationships. The Attorney General, who has delegated authority to the SG, typically controls litigation in the administrative state.[196] In the usual case, then, the DOJ resolves the conflict. Congress has sometimes given specific agencies independent litigating authority. More often, Congress provides for such authority only in the lower courts—for example, as mentioned above, the authority given to SEC and CFTC in Dodd Frank to bring disputes to the D.C. Circuit.[197] Notably, independent regulatory commissions typically control their litigation in the lower courts.[198]

Beyond this general exception, however, there is no "unified vision of [such agencies'] independent litigation authority."[199] Independent agencies rarely control litigation before the Supreme Court, but there are exceptions.[200] For instance, the FCC and NRC have independent litigating authority before the Court.[201] For other agencies—like the FTC—the authority extends to Supreme Court litigation only when the SG declines to participate.[202]

We address the legal issues created by these congressional choices, including Article II and Article III concerns, in Part IV.

III. Positive and Normative Assessment of Adversarial Relationships

To this point, we have largely described and classified various categories of adversarial agency relationships and conflict-resolution mechanisms. We now examine larger theoretical and normative issues, drawing on social science models and democratic theory. For each major category above (collapsing the middle two), we turn first to why political actors might choose to create such relationships—a positive political theory approach. We then pivot to some of the social welfare and democratic legitimacy implications. While we note some key disadvantages, we seek to draw out the possible benefits adversarial relationships can generate. We conclude with some overarching issues from the positive and normative angles explored.

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[194] Marisam, *supra* note 155, at 212.
[195] Nou, *supra* note 29.
[196] *See* 28 U.S.C. §§ 516–519.
[197] *See supra* note 13 & accompanying text.
[198] *See* Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CAL. L. REV. 255, 269, 273; Olson, *supra* note 177, at 73.
[199] Devins, *supra* note 198, at 273. The rules governing IRC litigation authority are "often an outgrowth of political conflict." *See id.* at 264, 269. Olson argues that the "patchwork quality of the distribution of authority to litigate" reflects "[t]urf concerns within Congress itself or other issues only marginally related to regulatory litigation." *See* Olson, *supra* note 198, at 75, 85. Sometimes, the independent litigating authority results from "dissatisfaction outside the executive branch with the DOJ's handling of cases." Linda R. Cohen & Matthew L. Spitzer, *The Government Litigant Advantage: Implications for the Law*, 28 FLA. ST. U.L. REV. 391, 402 (2000).
[200] Devins, *supra* note 198, at 273.
[201] *Id*. at 274–75; O'Connell, *Bureaucracy at the Boundary*, U. PENN. L. REV. 841, 921 (2014).
[202] Devins, *supra* note 198, at 274–75.

A. Hard Vertical Relationships

The principal-agent model, which has a long history in the social sciences, describes a hard vertical adversarial relationship.[203] In the administrative state, such designs allow the development of expertise with clear lines of accountability. They also make outside participation more difficult than other designs. In a positive light, we may get efficient decision-making without many opportunities for capture. But in a negative light, we may get rushed outcomes from tunnel vision and the lack of input of differing perspectives.

1. Design Choices: Centralizing Control

When the political branches do not want to vest the entire decision-making process in one actor—for instance, because that one actor lacks the necessary resources, is too diffuse to control, or is too powerful—political actors turn to hierarchical relationships, if they want a clear line of authority to the principal. FEMA gets placed in the new DHS for better emergency responses; DOJ gets established to oversee individual U.S. Attorneys; OIRA gets created to approve big EPA regulations before they are issued. At their best, the agent brings expertise, and the principal brings control.

Congress is less keen on hierarchical adversarial relationships across agencies, compared to advisory or horizontal relationships, though it often creates them internally within an agency. Because of the fragmented committee system, a hierarchical design has to overcome often-fierce committee turf battles.[204] A strong congressional committee (and, in turn, likely a strong interest group) can push for such an arrangement. In addition, at times, Congress desires hierarchical relationships to make accountability lines transparent or to respond to public pressure, as in the case of the creation of the Defense Department at the end of World War II and the DNI after the 9/11 attacks.[205]

By contrast, the President and agency leaders often turn to such designs. It is no surprise that all Presidents after Ronald Reagan have kept OIRA. Regulatory review allows more control over agencies, while drawing on agency expertise and delegated authority. Unlike Congress as a designer, the President can choose herself (or someone very close to her such as the Vice President) as the principal in the hierarchical relationship. In some ways, DOD's role in the release of detainees from Guantánamo Bay, which we allude to above and discuss in Part IV, is a congressional attempt to bring the agency closer to Congress than the White House, functioning more like the principal.[206]

By their nature, control is never complete in principal-agent models and may be even less so in the administrative context. For example, OIRA cannot directly set EPA's budget, and firing presidential appointees risks causing a political fuss while civil servants often cannot be fired at all. The agents in the federal bureaucracy may use the slack to shirk, following the classical economic model,[207] but in adversarial relationships instead often try to express dissent over

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[203] Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).
[204] *See* DAVID C. KING, TURF WARS: HOW CONGRESSIONAL COMMITTEES CLAIM JURISDICTION 144 (1997); O'Connell, *supra* note 24.
[205] NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT (2004) [hereinafter 9/11 COMMISSION].
[206] *See* Section IV.A.2.a, *infra*.
[207] Mathew D. McCubbins, *The Legislative Design of Regulatory Structure*, 29 AM. J. POL. SCI. 721 (1985).

policy decisions. The FDA, for example, announced that it opposed the Secretary's decision in the Plan B decision.[208] The EPA can go to the Vice President or President to try to override OIRA and obtain more stringent regulation. The courts can also back up the agent—most commonly, by assessing the principal's reasons for disagreeing with the agent, or more rarely, by seeking the agent's input directly.[209]

2. Normative Implications: Power of the President

Hierarchical adversarial relationships have important implications for social welfare and democratic legitimacy. Most critically for the former, the mechanism to resolve conflict is clear: the principal wins. In addition, the conflict is more contained than other forms of adversarial relationships, making decision-making quicker. With fewer access points, the decision-maker also may possess more independence from interest groups compared to situations where multiple agencies have independent input.[210] Finally, the principal can coordinate decisions across hierarchical relationships of which it is a part.[211] At the end of the day, the attractiveness of the speed or uniformity of decision-making depends on other normative priorities.

For democratic legitimacy, the mechanism of conflict resolution provides clear accountability—within government (for example, for members of Congress and the White House) and outside. Many hierarchical relationships give power to the President. For the unitary executive theorists, such arrangements better match the Vesting and Take Care clauses than more diffuse designs.[212] For others, the President is more accountable than other branches of government.[213] Turning from the ends to the means, such relationships also often restrict who gets to participate, shutting out particular perspectives. To the extent that wider participation legitimates agency action, these arrangements may undermine democratic governance.

B. Advisory and Monitoring Relationships

Several models apply to the next set of relationships, where one agency has decision-making power but another agency or set of officials has independent authority to advise the agency or report on its activities. For instance, principal-agent models govern relationships when the monitoring or advisory agency is subject to its advisee's control. But many monitoring arrangements involve a monitor that does not fall under the recipient's control. In such settings, political scientists have distinguished between two types of monitoring methods: police patrols and fire alarms.[214] Each encourages certain types of oversight: we discuss the specific attractions to institutional designers below.

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[208] *See supra* notes 14–18 & accompanying text.
[209] *See* Sections IV.A.2.b & IV.C.2, *infra*.
[210] Freeman & Rossi, *supra* note 26.
[211] Sunstein, *supra* note 103.
[212] Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23 (1994); Saikrishna B. Prakash, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991 (1993).
[213] *Cf.* Jide Nzelibe, *Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217 (2006) (questioning assumption).
[214] An accessible introduction to the models can be found in Mathew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989).

As to their desirability, advisory and monitoring designs in the federal bureaucracy allow for more input in decision-making but keep a clear decision-maker, though one who can be more easily overturned.

1. Design Choices: Generating Information

Monitoring's largest draw is its information-generating capacity, which political actors and the courts can use to shape or oversee policy decisions. We discuss why political actors might choose principal-agent models above; those insights apply equally here. As for police patrols and fire alarms, each has its particular enticements.[215] Police patrols—requiring regular reporting from an agent about its activities or directing particular investigations into likely problems—give Congress or the White House more control over the information-generating process.[216] Fire alarms—providing a mechanism for some third-party with access to information to notify the political branches (and the courts) of problems—are more economical for the designer, who does not need to pay attention to the conduct of agencies except when notified of problems, but they are less directed.

Political scientists largely claim that Congress greatly prefers fire alarms to police patrols, presuming that interest groups are well dispersed to make the less costly device effective.[217] But actual institutional designs belie such a stark conclusion. To be sure, considerable agency design feeds into a fire alarm model, which to be effective, requires access to information and an incentive to complain about the agent. Such an incentive exists when the third-party has preferences different from the agency decision-maker. The role of SBA as a commenter on EPA's regulatory proposals fits neatly with this model. Protections for whistleblowers also clearly match this category.

Congress also actively chooses police patrols, as we describe in Part I. Indeed, when an agency has to solicit views before undertaking a project with consequences for the environment or historical preservation,[218] the "police" do not even need to walk the block. Rather, the agency has to come to the guardhouse. Sometimes, Congress creates arrangements with elements of both police patrols and fire alarms. GAO and IGs, for instance, have specific mandated reports from Congress and can investigate other issues on their own as well.[219]

The White House also creates monitoring and advisory relationships on its own—from White House staffers to the OIRA coordination process.[220] According to Gillian Metzger, Presidents may also have an incentive to foster independence by lower-level officials to improve the government's efficacy, on the theory that Presidents themselves are judged on this basis.[221]

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[215] A possible third strategy involves persuading the actors in question to voluntarily disclose information. Gailmard and Patty show that in these cases, the principal may want to appoint an agent whose preferences are closer to those of the actors than the principal, thereby persuading agents it is safe for them to engage in greater disclosure. *See* GAILMARD & PATTY, *supra* note 59, at 228–29.

[216] It also seems to describe the relationship between GAO and Congress, with GAO as the police patrol. *See* O'Connell, *supra* note 114.

[217] Mathew McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked. Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984).

[218] *See supra* notes 92, 112 & accompanying text.

[219] O'Connell, *supra* note 114; Gillian Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 444–45 (2009).

[220] *See supra* note 103 & accompanying text.

[221] Metzger, *supra* note 219.

Through deference doctrines, courts indirectly establish such external and internal arrangements as well. In rare circumstances, courts make more direct moves such as asking an agency without litigating authority to give its views. We address these judicial actions in detail in the next Part.

These choices do more than foster the transmission of information. Most fundamentally, they may shape substantive outcomes. Specifically, the threat of oversight from political actors or the courts can influence an agency's choices. An independent judgment from experts unlikely to share in the agency's biases, such as scientific advisory boards, makes it hard for the agency to veer too far from that judgment without a good explanation. Even without ex-post review by some branch, these arrangements may hard-wire commitment to the delegator's intentions.[222]

In addition, these arrangements may reward particular interest groups. The assignment of soft oversight may be a sop to an interest group with less political clout. But it can also represent the dominant coalition's effort to establish fire alarms if the agency should veer away from its intended trajectory. The relevant interest groups may be represented by different congressional committees with jurisdiction over legislation, or the interest group may even be a committee itself seeking to maintain some toehold in an issue domain.

A particularly clear example of this dynamic involves FERC's issuance of licenses for hydroelectric dams. In determining the degree of ecological harm from the dam and possible mitigation measures, FERC must consult FWS, National Marine Fisheries Service, and the state's fish and wildlife commission.[223] The major congressional oversight committee supervising FERC had no interest in further emphasizing environmental matters, but the environmental subcommittee headed by an influential member of Congress successfully forced adoption of this provision.[224] The committee reports on the provision clarify that it was intended to force both FERC and license applicants to work with these other, environmentally oriented agencies.[225] Notably, the provision also requires that "FERC develop a dispute-resolution process to resolve its disagreements with other agencies; and that the Commission give reasons for not adhering to their recommendations."[226] A careful empirical study concluded that as a result of this provision, state and federal agencies frequently participated in these proceedings and affected the outcomes.[227]

2. Normative Implications: Internal Checks and Balances

These arrangements are not always appropriate but may yield the best mix of social welfare and democratic legitimacy consequences in many circumstances. As to their efficiency, adversarial advisors and monitors generate conflicting information, which works to prevent

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[222] *See* Leiter, *supra* note 119, at 51, 53; Metzger, *supra* note 219; *cf*. Jacob E. Gersen & Adrian Vermeule, *Delegating to Enemies*, 112 COLUM. L. REV. 2193, 2232 (2012) (arguing that "there is no a priori reason to insist that Congress either does or should prefer to grant power to friendly institutions," so that "many core ideas about how Congress and the bureaucracy perform in the administrative state are simply built on a faulty premise").
[223] 16 U.S.C, § 823a(c).
[224] J. R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217, 2259 (2005) (finding evidence that that "an intercommittee struggle between pro-environmental committees and pro-energy committees—or at least a struggle among individual members—was occurring in the background of the statutory drafting").
[225] See *id*. at 2260.
[226] *Id.* at 2263. For example, FERC may refer certain disputes to mediation, specifically, the "Commission's Dispute Resolution Service," which must issue an advisory opinion within 90 days. 16 USCA § 823d.
[227] Deshazo & Freeman, *supra* note 224, at 2266.

"group think".[228] In turn, informational counterbalancing may produce better decisions, assuming the quality of the decision turns, in part, on the quality of information and the decision-making process. The "Dissent Channel" in the State Department, for example, is premised on this rationale.[229] On the other hand, advisors and monitors may shift the outcome in socially undesirable ways, adding "bad" information or slowing down a welfare enhancing action.

"Soft" oversight and participation designs have several consequences for democratic governance. To start, they may indirectly give relevant interest groups some voice in decisions. The SBA's role (and considerable authority) comes from concerns that small businesses may be unable to effectively represent their own interests. This normative justification harkens back to Richard Stewart's interest representation model of administrative law.[230] But as the case of SBA advocacy shows, these efforts to empower marginalized groups may be coopted by more powerful ones.[231] Hardwiring, through appointments restrictions for instance, might help to counteract such an outcome.

Most critically, these arrangements may make administrative decisions more legitimate. Specifically, given the difficulty of checking administrative discretion, soft oversight may provide some safeguards against abuse of power. The application of Madisonian separation of powers principles within the Executive Branch has been a matter of discussion among administrative law scholars.[232] The checking function of these monitors and advisors assumes that their voices can claim the attention of actors with harder forms of power, including Congress and the courts.

Finally, to the extent that it results in increased transparency, soft oversight may promote democratic norms. Monitors may provide information to "hel[p] citizens (and others) assess and attempt to change their government's performance." [233] In particular, IGs and the GAO buttress transparency—their reports can generate significant media attention.

C. Horizontal Relationships

Horizontal relationships include three categories—collective decision-making, independent decision-making, and competitive decision-making—each with a corresponding set of social science work.[234] We focus on the varied objectives of the participants in the first two

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[228] *See* Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 118 (2000).
[229] Neal K. Katyal, Op-Ed, *Washington Needs More Dissent Channels*, N.Y. TIMES, July 1, 2016.
[230] Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).
[231] *See supra* note 95.
[232] *See* Katyal, *supra* note 24, at 2346 (arguing "[o]verlapping jurisdiction, civil-service protections and promotion, and the invigoration of the agency bureaucrat as an elite force will produce modest internal checks" on presidential power); Metzger, *supra* note 219, at 429–30 (pointing to "the presence of independent agency watchdogs, such as [IGs]"); O'Connell, *supra* note 24, at 1722 (suggesting that "redundancy may be more necessary to promote democratic values if the same party controls Congress and the White House").
[233] O'Connell, *supra* note 24, at 1717.
[234] Collective decision-making occurs when agencies with different information or preferences share control over decisions, as in FSOC, created by Dodd Frank. Social choice models, which involve aggregating preferences, would apply. Independent decision-making involves agencies with different preferences (deriving, for example, from different missions as in the SEC-CFTC conflict), which seek to achieve what each regards as a favorable outcome where entities have no formal authority over another, and which (like collective decision-making) may foster diverse perspectives. Here, multiple player games from International Relations and the fire alarm models from the preceding section would be relevant. Competitive decision-making, unlike independent decision-making, concerns agencies with similar preferences competing for resources, perhaps like the intelligence components of each of the military

sets. In short, the arrangements provide wider perspectives, with bite. With actors wielding more power in the decision-making process, conflict resolution becomes trickier, if it is not specified in the design stage.

Congress and the White House have different incentives for this form of institutional design as a positive matter, which we discuss. In terms of normative consequences, there is often less accountability but more participation.

1. Design Choices: Creating Competition

As Ken Shepsle wisely noted, "Congress is a they, not an it."[235] The committee structure of Congress largely drives horizontal arrangements. Overlapping committee turf is prevalent in the legislature.[236] With jurisdiction over an agency, a committee can shape the agency's outcomes.[237] It is therefore unsurprising that committees logroll and produce multiple delegations or similar internal structures.[238] FSOC, for instance, draws on varying expertise and answers to multiple congressional committees.[239] In addition, Congress as a whole may prefer such logrolls as the expected policy outcome may be closer to the median member, if any particular committee is an outlier.[240]

Congress also chooses arrangements in a separated powers system. Horizontal competition prevents an agency closer to the White House from wielding too much power.[241] In addition, if Congress is at an informational disadvantage compared to the President, informational counterbalancing may be a rational strategy. Finally, members think temporally. Today's majority will be some tomorrow's minority. Horizontal conflict within an agency allows each party to always retain some authority.[242] It also provides a mechanism for congressional oversight.[243] In some cases, such internal conflict is intended to make it harder for the agency to function.[244]

Although the Executive Branch is also a they, not an it, one person sits at the top. The President is also held to account more than any member of Congress for agency actions.[245] The President therefore may seek horizontal arrangements, such as a cabinet of rivals, to motivate agencies so as to improve performance as well as to acquire information more easily. Presidents

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services in this setting. Tournament models from labor economics would be pertinent. To some degree, the fire alarm and police patrol models of the preceding section apply to all three groups as well.

[235] Kenneth A. Shepsle, *Congress is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L & ECON. 239 (1992).

[236] KING, *supra* note 204.

[237] KENNETH A. SHEPSLE & MARK S. BONCHEK, ANALYZING POLITICS: RATIONALITY, BEHAVIOR, AND INSTITUTIONS 325 (1997).

[238] *See* Abbe R. Gluck & Anne Joseph O'Connell, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789 (2015).

[239] ROBERT G. KAISER, ACT OF CONGRESS (2013).

[240] *See* DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS (1999).

[241] Michael M. Ting, *A Strategic Theory of Bureaucratic Redundancy*, 47 AM. J. POL. SCI. 274, 286 (2003).

[242] Krotoszynski and his coauthors have found that "[s]ince 1989, approximately 950 bills have been introduced in Congress that propose to create some new federal administrative body with a mandated split in political party representation among its members." Krotoszynski et al., *supra* note 148, at 979.

[243] Jacobs, *supra* note 19, at 21

[244] Terry M. Moe, *The Politics of Bureaucratic Structure*, *in* CAN THE GOVERNMENT GOVERN? 267, 267 (John E. Chubb & Paul E. Peterson eds., 1989).

[245] *See* DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN 4 (2003).

may also favor conflict when they do not exercise control over the ultimate decision or as a means of escalating important issues to their attention. Party balancing requirements, of course, favor the sitting President. But party control of the White House also shifts, allowing the minority seats to remain with the outgoing party.

2. Normative Implications: Benefits and Costs of Redundancy

One of us detailed the normative consequences of "redundant" institutional design (for both effectiveness and democratic legitimacy) a decade ago.[246] We focus here on a few considerations. With regard to social welfare, horizontal adversaries may produce better outcomes.[247] The mechanisms include working "harder and more creatively, generating a race to the top in performance" and motivating "one entity to correct mistakes by another entity."[248] This story of beneficial competition is not without its critics. The primary concern is the cost of seemingly duplicative efforts.[249] Another concern is missing beneficial opportunities for cooperation. For instance, the 9/11 Commission found that adversarial relationships among intelligence agencies had hurt national security.[250] This lack of cooperation could extend to regulated entities as well, playing off one agency with another.

What is key to recognize is that agencies have "strategic interdependencies."[251] The CFTC and the SEC are not separate airplane engines operating without regard to the other.[252] According to Michael Ting, shirking is worse when multiple agencies have similar objectives to Congress.[253] Horizontal arrangements with more dispersed missions may help prevent collective action failures, but the costs will have to be considered. Conflict resolution mechanisms are also likely critical.

In terms of democratic governance, the discussion on internal separation of powers above applies here as well. For horizontal arrangements, the powers within the federal bureaucracy are more equivalent than in softer adversarial relationships. Thinking of interest groups, it is harder for one faction to capture the policy area.[254] Arguably, horizontal arrangements come closest of the categories to Mark Seidenfeld's civic republicanism defense of the administrative state.[255] At the state level, Chris Berry and Jake Gersen argue that "unbundled" arrangements "produce

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[246] O'Connell, *supra* note 24; *see also* Gersen, *supra* note 24 (independent treatment at same time); Katyal, *supra* note 24 (same). Many similar treatments followed. Of course, the theory has a long history in the social sciences. OLIVER E. WILLIAMSON, CORPORATE CONTROL AND BUSINESS BEHAVIOR 110–53 (1970); Martin Landau, Redundancy, *Rationality, and the Problem of Duplication and Overlap*, 29 PUB. ADMIN. REV. 346 (1969).
[247] Alexander V. Hirsch & Kenneth W. Shotts, *Competitive Policy Development*, 105 AM. ECON. REV. 1646 (2015).
[248] O'Connell, *supra* note 24, at 1677. When over four dozen national security officials recently penned a letter saying Donald Trump was not qualified to be President, they wrote, in part: "In our experience, a President must be willing to listen to his advisers and department heads; must encourage consideration of conflicting views; and must acknowledge errors and learn from them." Statement by Former National Security Officials, August 8, 2016, at 2, https://assets.documentcloud.org/documents/3007589/Nationalsecurityletter.pdf.
[249] FREDERICK M. KAISER, CONG. RESEARCH SERV. R41803, INTERAGENCY COLLABORATIVE ARRANGEMENTS AND ACTIVITIES: TYPES, RATIONALES, CONSIDERATIONS (May 31, 2011), at i. A related concern is fractured oversight. *Id*. at 17–21.
[250] *See* 9/11 COMMISSION, *supra* note 205.
[251] Ting, *supra* note 241, at 275–76.
[252] *Id*.
[253] *Id*.
[254] *See* Bradley, *supra* note 101.
[255] Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511 (1992)

political outcomes closer to public preferences."[256] On the other hand, at the federal level where there are no elections for leaders of the bureaucracy, fragmentation may weaken political control and therefore political accountability.

Dissent is often integral to democracy. Jacobs, however, argues that horizontal dissent within an agency can undermine legitimacy.[257] For instance, separate opinions in an independent regulatory commission may make the agency's reasoning hard to follow.[258] They may also capture judicial attention, preventing the courts from doing their own hard look.[259] If agencies are defended primarily on expertise grounds, conflict among experts may undercut that rationale.[260]

We find critiquing internal horizontal arrangements on legitimacy grounds when party balancing requirements have often been explicitly chosen by Congress somewhat discomforting. In any event, the restrictions appear to have practical consequences for governance, in the form of higher failure rates of nominations and longer confirmation delays compared to other agencies.[261] To be fair, other factors besides statutory appointment restrictions may drive these failed nominations and longer confirmation processes. But some research does suggest partisan balance requirements contribute to these issues.[262] On the other hand, such restrictions may force members of Congress to compromise, through logrolling. Congress has in recent decades actively engaged in "batching" appointments to independent regulatory commissions, processing a Democrat and a Republican together.[263] Batching has its own ambiguous implications: producing more polarized appointments but also allowing positions to be filled (so the agency can act).

D. Takeaways

We are unable to provide definitive statements about the benefits of adversarialism, though we do want to stress the potential for the decision-making process as well as for ultimate decisions. But neither can scholars touting wholesale cooperation advance determinative conclusions. Nonetheless, we offer some larger reflections. To start, judging the attractions and costs of adversarial relationships among and within agencies requires a benchmark: compared to what? If we are indeed in an era of gridlock (fed by party polarization), Madison's checks and

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[256] Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHIC. L. REV. 1385, 1387 (2008).
[257] Jacobs, *supra* note 19, at 39.
[258] *Id*. at 44.
[259] *Id*. at 28.
[260] *See id*. at 40.
[261] Anne Joseph O'Connell, *Shortening Agency and Judicial Vacancies through Filibuster Reform? An Examination of Confirmation Rates and Delays from 1981 to 2014*, 64 DUKE L.J. 1645 (2015). Krotoszynski and his coauthors argue these practical effects could be legally problematic. Krotoszynski et al., *supra* note 148, at 996. We do not take on that claim but do discuss legal considerations in Part IV.
[262] Neal Devins & David E. Lewis, *Not-So-Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 BOSTON UNIV. L. REV. 459, 473–74 (2008).
[263] Daniel E. Ho, Congressional Agency Control: The Impact of Statutory Partisan Requirements on Regulation (working paper 2007). In turn, the President now often nominates a slate for an independent regulatory commission at one time. *See* Ed Beeson, *Obama Taps Law Pro and Ex-Senate Aide to Join SEC*, LAW360, Oct. 20, 2015, http://www.law360.com/articles/716645/obama-taps-law-pro-and-ex-senate-aide-to-join-sec.

balances among the branches may not be workable.[264] We lean toward a benchmark of political feasibility.[265] But if you care most about democratic theory, feasibility may be unappealing.

Putting the comparator to the side, the visibility of adversarialism may shape its implications. What is the difference between the SBA submitting a formal comment to another agency's rulemaking and having an ex parte meeting with that agency? On one hand, the former is guaranteed to be in the administrative record for any judicial review.[266] Many commentators critique OIRA for not disclosing oral communications of meetings with agencies.[267] On the other hand, vigorous debate among national security agencies may need to be closed off, at least to the public. Outside the national security context, closed deliberations may produce more frank input.[268] At the least, creative solutions should be encouraged, for example, the publication of OLC opinions and critical input to rulemakings, once finalized.

Most interesting to explore in more depth, perhaps, is the choice of resolution mechanism. Fragmented horizontal authority with no strong coordinator is different than split authority with a powerful coordinator. For instance, the benefits to having DOJ control most agency litigation (for instance, the closeness of the SG and AG to the President, coordination across courts, and arguably more objectivity on legal issues) probably outweigh the costs (specifically, duplication of agency expertise and preventing the courts from considering true agency views).[269]

In addition, not all resolution devices are alike. Catherine Sharkey prefers the courts;[270] Bijal Shah likes the White House.[271] A former Deputy Secretary has recently suggested that although the White House should be involved, instead of "trying to quarterback . . . harmonization" with "short-staffed and non-expert . . . offices," it should "empower[r] high-level accountable cabinet or sub-cabinet officials and their deep staffs from one or two agencies to lead complex, multi-agency implementation efforts."[272] This debate highlights an important point: constitutional debates notwithstanding, the President's inability to personally supervise the entire executive apparatus means that delegation of this function elsewhere is inevitable.

Further, if the identity of the decision-maker depends on presence of conflict, that could shape agency interaction. For instance, under recently released presidential policy guidance on drone strikes, "if the top lawyers and leaders of the departments and agencies on the National Security Council agree that a proposed strike would be lawful and appropriate, the Pentagon or the Central Intelligence Agency can proceed."[273] But if they do not agree, "or if the person to be targeted is an American citizen, the matter must go to the president for a decision."[274]

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[264] Gluck & O'Connell, *supra* note 238.
[265] *See* Farber & O'Connell, *supra* note 34 (also adopting pragmatic approach).
[266] *Cf.* Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981) (political ex parte conversations need not be disclosed).
[267] Farber & O'Connell, *supra* note 34.
[268] *See* Jordan v. United States Dep't of Justice, 591 F.2d 753, 774 (D.C. Cir. 1978) (en banc) (deliberative process privilege).
[269] Mark B. Stern & Alisa B. Klein, *The Government's Litigator: Taking Clients Seriously*, 52 ADMIN. L. REV. 1409, 1415 (2000) (some of the advantages); Olson, *supra* note 177, at 79–80 (both sides).
[270] Catherine M. Sharkey, *Agency Coordination in Consumer Protection*, 2013 U. CHI. LEGAL F. 329, 330.
[271] Shah, *supra* note 27, at 854
[272] David J. Hayes, *The White House Needs to Learn When to Delegate*, WASH. MONTHLY, July 15, 2015.
[273] Charlie Savage, *U.S. Releases Rules for Airstrike Killings of Terror Suspects*, N.Y. TIMES, Aug. 6, 2016, at A1.
[274] *Id*.

More work clearly remains to be done. But it is important work. Congressional choices to create conflict appear to be increasing.[275] Polarization and divided government drive both conflict between agencies and within agencies—primarily through statutory delegation and nomination batching, respectively.[276] In addition, adversarial relationships raise interesting legal issues, to which we now turn.

IV. The Legal Dimension of Agency Conflict

Adversarial agencies implicate a range of constitutional and statutory issues. We consider a range of those issues here, from the familiar (*Chevron* deference when multiple agencies have jurisdiction) to the more novel (litigation between agencies or the implications for joinder of agency conflicts). Throughout, drawing on recent examples of adversarial agencies, we aim to show how accounting for agency conflict illuminates, and in some cases reframes, important doctrinal issues.

A. Presidential Control Over the Bureaucracy

The White House, as discussed, functions sometimes solely as an adversary, sometimes only as a resolver of conflict among executive agencies, and sometimes both. These roles raise some interesting legal questions. To start, we revisit the classic administrative law debate over whether the President can command an agency to do something against its will when Congress has delegated to the agency and not to the President. We also discuss three modern examples to show the potential and practical limits of presidential control in dealing with adversarial executive agencies. In short, although the President wields considerable power, it is not as vast as imagined by the strong executive power side of the debate—in part due to congressional choices and agency resistance.

1. Classic Debate in New Form

There is a well-framed, though unresolved, debate in administrative law over how much decision-making power the President has when Congress delegates work to an agency head (as opposed to the President herself)—what we term, a hierarchical adversarial relationship. To summarize briefly, some authorities interpret such statutes as permitting the President to direct the designated official (or at least those in non-independent agencies); others, taking a more traditional tack, read them as barring the President from exercising such control.[277]

Unitary executive theorists take the former approach, arguing the Constitution's Vesting Clause requires that the President have control over agency choices.[278] Then-professor, now-Justice Elena Kagan endorses a modified version of this approach, positing that the President can exercise directive power over executive agency leaders—but not leaders of independent regulatory commissions—if Congress has not explicitly specified otherwise.[279] To justify her

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[275] Sean Farhang & Miranda Yaver, *Divided Government and the Fragmentation of American Law*, 60 AM. J. POL. SCI. 401, 408 (2016).

[276] *Cf.* McGarity, *supra* note 80 (finding "team model" and not "adversarial model" predominates in agency decision-making)

[277] To be fair, while much ink has been spilled on this debate, the practical differences are thin, as agency officials will rarely take action contrary to a presidential

[278] *See, e.g.*, Calabresi & Prakash, *supra* note 212, at 596 & n.210; Prakash, *supra* note 212, at 991–94.

[279] Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2251, 2320, 2326–27 (2001). Kagan contrasts her position from that of unitary executive theorists. *Id*. at 2326 ("The original meaning of Article II is insufficiently precise and, in this area of staggering change, also insufficiently relevant to support the Unitarian

stance, Kagan distinguishes statutes granting authority directly to the President from those delegating to agency officials: the former allow the President to choose which agency head will administer the statute; the latter do not.[280] But, she contends, "when Congress delegates to an executive official, it in some necessary and obvious sense also delegates to the President."[281] When statutes grant authority to an independent regulatory commission, by contrast, Kagan concludes that "Congress must be thought to intend the exercise of that power to be independent," as "making the heads subordinate in this way would subvert the very structure and premises of the agency."[282] Finally, she provides a normative justification for her position. Because presidential control over executive agency leaders "usually advances accountable and effective administration, then Congress should have to manifest any intent to limit that control."[283]

Other scholars take the opposing position, maintaining that statutes delegating to an agency official but silent concerning the President should be construed to exclude presidential control.[284] Kevin Stack, directly challenging Kagan's interpretive approach, holds that the President only has directive authority when Congress expressly confers that power.[285] Pointing to what he calls "mixed agency-President statutes," some longstanding, that give authority to either an executive official or the President, but subject that individual to the direction, control, involvement, or approval of the other,[286] Stack argues it would be unnecessary for Congress to delegate to the President, subject to an officer's direction, if simply delegating to that official had the same effect.[287] In addition, while Kagan sees a blurry line between removal and directive control, Stack contends the powers are clearly distinct—specifically, that because the political costs of firing an official are higher than directing an agency head to implement a particular policy, officials may be more willing to defy the President's directions when they view their discretion as independent of the President's.[288] Finally, Stack too justifies his position on normative grounds. He contends the President already has sufficient tools to manage the regulatory state,[289] and because Congress has less incentive to constrict the President's power than the President does to expand it, "Kagan's view may be overly optimistic as to the constraints that Congress will impose in future legislation."[290]

Scholars have lined up on both sides of the presidential control debate. But the debate largely assumes Congress has tasked only one agency. Does the debate change if Congress delegates to multiple agencies, anticipating the agencies will not always agree? The unitary executive theorists would not budge. If anything, such delegation would provide additional

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position. . . . The cases sustaining restrictions on the President's removal authority . . . are almost certain to remain the law.").

[280] *Id*. at 2326–27.

[281] *Id*. at 2327. While Kagan concedes these mechanisms differ from directive power, she claims that the subtle distinction suggests Congress did not intend to separate them. *Id.* at 2328.

[282] *Id*. at 2327.

[283] *Id.* at 2330–31.

[284] Like Kagan, these scholars also reject the unitary executive theorists' view of the Constitution.

[285] Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 267 (2006).

[286] *Id.* at 276, 278–280, 282.

[287] *Id.* at 284.

[288] *Id.* at 295–296.

[289] *Id.* at 319.

[290] *Id.* at 320–21. A third position is possible: that there is no presumption either way about presidential control when statutes are silent, and that the issue must be determined using the normal tools of statutory interpretation.

normative justification (along the lines of Kagan's concerns of efficiency and accountability), which would presumably be greater in the multiple-agency context, to their constitutional argument.[291]

Kagan's statutory and constitutional arguments become more complicated, however, in the context of agency conflict. On one hand, statutes delegating to multiple executive agencies, with no mention of the President's role, could be the product of messy legislative practices, such as omnibus bills that bundle multiple committees' assignments almost by accident.[292] On the other hand, Abbe Gluck and Lisa Bressman's surveys of congressional staffers show that multiple agency delegation (typically forming horizontal potentially adversarial relationships) is often explicitly chosen.[293] But that congressional intent could be driven either by desire that the agencies exercise their own judgments—independent of the President—or by the goal that both sides of an issue should be fully explored before reaching a decision with presidential (or congressional) input. In some situations, it may be important to have a method for resolving agency conflict, but as we saw in Part II, presidential intervention is not the only available technique.

Stack's normative claims also look different in the context of multiple agencies. Multiple agencies may make the President's job harder, permitting more points of pushback from Congress or agencies. Congressional choices therefore might even the playing field between the two political branches. Indeed, multiple agencies might demonstrate the power of congressional committees, which are largely ignored in the discussion here but which we address in Part III as major players in agency design.

Finally, on the conventional terms of the debate (delegation to one executive agency), if Congress intends that agency to have different views from the White House—and we have discussed many reasons why it may desire such an arrangement—it would seem Congress is not implicitly delegating control to the White House. Nevertheless, some of the mechanisms Congress may use to create a different perspective—for example, statutory expertise requirements for the agency's leaders, which we consider in more detail below—may support both sides.[294]

In sum, both sides of the debate may be implicitly assuming away too much of the actual complexity of the modern administrative state. In our view, a more granular analysis of particular statutory delegations is needed, particularly in settings where multiple agencies are involved. We now turn from this debate about the legalities of presidential control to consider how, in a variety of legal settings, centralized control over the federal bureaucracy actually operates (or fails to do so) in the context of adversarial relationships.

2. Centralized Control Over Agencies and Its Limits

We discuss several recent examples, including the congressionally created conflict between the White House and Defense Secretary over the release of detainees from Guantánamo

[291] Calabresi, *supra* note 278.
[292] *Cf.* Gluck & O'Connell, *supra* note 238.
[293] Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation and the Canons: Part I*, 65 STAN. L. REV. 901, 1006–10 (2013).
[294] For Kagan, these nomination restrictions may blur the boundary between selecting and controlling agency leaders. For Stack, the constraints may demonstrate Congress's desire that the agency exhibit certain independence.

Bay; dissenting agency voices in litigation even when Congress has given the SG control over litigation; and presidential task forces in the absence of reorganization authority from Congress.

a. Guantánamo Bay

As noted in the Introduction, recent annual defense authorization legislation has included procedures to follow before the United States can release a detainee from Guantánamo Bay to a foreign country, outside of a court order.[295] Specifically, the Secretary of Defense must supply a "written certification" to Congress, "with the concurrence of the Secretary of State and in consultation with the Director of National Intelligence" that the destination country will take "effective actions to ensure that the individual cannot take action to threaten the United States, its citizens, or its allies in the future," among other items.[296]

Congress expected conflict within the Executive Branch over these decisions and decided to elevate the agent in relation to the principal. The State Department and White House more often favor release, for diplomatic reasons, than the Defense Department, which focuses more on security concerns. For example, according to the *Guardian*, the Defense Department blocked for some time "the return of UK permanent resident Shaker Aamer and two other longtime Guantánamo Bay detainees for whom the US Department of State has completed diplomatic deals to transfer home."[297] Eventually, DOD's opposition gave way, and Aamer was released. Congress considered the need for an independent judgment by DOD important enough to raised in the confirmation hearing of the current Secretary, [298] and he has apparently refused to commit to a faster procedure on releases proposed by the National Security Council in a high-level meeting.[299] The previous Secretary, Chuck Hagel, also resisted White House timelines on the release of detainees.[300]

In this setting, Stack's position (no implied presidential directive power) seems the more persuasive. Clearly, Congress intended these officials to exercise independent judgment. Although the President's directive power clearly does not operate in this context as Kagan or the unitary executive theorists might hope, there is still the removal power. Although the cost to firing may be high, as Stack suggests, Presidents sometimes do remove top officials. Hagel's resistance to Guantánamo Bay transfers supposedly played a role in his firing.[301] In short, we see here that the principal-agent model of Part III can get flipped, or at least turned sideways for a time, with DOD being able to operate in conflict with the White House due to congressional direction. And short of dismissal, Presidents have other ways of making their displeasure felt

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[295] JENNIFER K. ELSEA & MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., R42143, WARTIME DETENTION PROVISIONS IN RECENT DEFENSE AUTHORIZATION LEGISLATION, at i (May 28, 2015).
[296] National Defense Authorization Act of 2012, § 1028.
[297] Spencer Ackerman, *Pentagon blocking Guantánamo deals to return Shaker Aamer and other cleared detainees*, THE GUARDIAN (Aug. 13, 2015), http://www.theguardian.com/us-news/2015/aug/13/pentagon-blocking-guantanamo-transfer-shaker-aamer.
[298] Charlie Savage, *Obama's Plan for Guantánamo Is Seen Faltering*, N.Y. TIMES, July 21, 2015, http://www.nytimes.com/2015/07/22/us/politics/obamas-plan-for-guantanamo-is-seen-faltering.html?_r=0.
[299] *Id*.
[300] Laura Koran, *Hagel: Gitmo transfers caused friction with some at White House*, CNN (Jan. 31, 2015), http://www.cnn.com/2015/01/30/politics/hagel-guantanamo-bay-transfers-white-house-friction/.
[301] Helene Cooper, *Hagel Resigns Under Pressure as Global Crises Test Pentagon*, N.Y. TIMES, Nov. 24, 2014, http://www.nytimes.com/2014/11/25/us/hagel-said-to-be-stepping-down-as-defense-chief-under-pressure.html; Levinson & Rodhe, *supra* note 8.

such as budget cuts or shifting authority over other issues elsewhere or simply denying the official in question "presidential facetime."

b. Solicitor General

The debate over presidential directive power seems focused on the situation where the President personally dictates the Executive Branch's position, or attempts to do so. But far more often, control over executive actions devolves to a lower-level official. For instance, when it comes to controlling litigation of executive agencies, Congress has explicitly given DOJ power. By statute and internal agency delegation, the SG is the executive agency's lawyer at the Supreme Court (and the lawyer for most independent agencies as well),[302] filing briefs and participating in oral arguments. While the intent seems that the Executive Branch should speak with a single voice—that voice being the SG's—the reality is sometimes different. Thus, even when Congress and the President combine to centralize control within the Executive Branch, taking advantage of the hierarchical relationship, their ability to do so is not without limits.

Typically, in any filing by the SG to the Supreme Court, the relevant executive agency's lawyers are also listed. But sometimes, they are not. And Justice Kagan, who previously served as SG, has taken note of the absence.[303] In *Armstrong v. Exceptional Child Center*, which involved whether Medicaid providers lack a cause of action to challenge a state's reimbursement rates (and, thus, whether only the federal government can enforce the Medicaid Act), no one from HHS was listed on the SG's merits brief, which took the side of the states.[304] Former HHS officials filed an amicus brief, by contrast, taking the providers' view. The following exchange occurred in oral argument between the former and current SGs:

> JUSTICE KAGAN: Judging from the—the names on the brief, I take it that HHS does not agree with that statement.
>
> MR. KNEEDLER: former officials. Yes—
>
> JUSTICE KAGAN: your brief—
>
> JUSTICE KAGAN: Those are—those were Judging from the names on Oh, I'm sorry.—or the absence of names on your brief, I take it that HHS does not agree with that statement.[305]

Kneedler did not answer her question.[306]

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[302] *See* Section C.4, *infra*. Even for independent agencies without litigating authority, the issues are more complicated than for executive agencies.

[303] *See* William Baude, *Argument Analysis: Working Out the Broader Implications of a Medicaid Suit*, SCOTUSBLOG (Jan. 22, 2015, 10:01 AM), http://www.scotusblog.com/2015/01/argument-analysis-working-out-the-broader-implications-of-a-medicaid-suit/; Richard Re, *When Agencies Don't Appear on the SG's Briefs*, PRAWFSBLAWG (Jan. 22, 2015), http://prawfsblawg.blogs.com/prawfsblawg/2015/01/when-agencies-dont-appear-on-the-sgs-briefs.html.

[304] Apparently, when the issue was first flagged in an earlier case, Douglas v. Independent Living Center, 132 S.Ct. 1204 (2012), HHS officials did join an SG brief recommending that cert be denied. When the Court granted cert, HHS officials did not sign onto the merits brief.

[305] Armstrong v. Exceptional Child Center, Oral Argument Transcript at 21, http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-15_f2bh.pdf.

[306] *Id*. Sometimes agencies without explicit litigating authority go even further. The Tennessee Valley Authority, for example, has represented itself in the lower courts and even submitted letters to the Supreme Court, without DOJ

Sometimes the message is not one to the Court. The State Department's legal adviser John Bellinger signed every amicus brief submitted by the SG on the Alien Tort Statute during President George W. Bush's administration. By contrast, when the SG filed an amicus brief in 2012 in *Kiobel v. Royal Dutch Petroleum*, arguing the Act did not apply extraterritorially in the case at hand, then-legal advisor to State, Harold Koh, did not list his name on the brief. According to Bellinger: "That seemed to be a not-so-subtle message—more to the human rights community than the Supreme Court—that State did not agree with the Justice Department position. The Obama Administration was in a tight spot in this one."[307] And sometimes the message is to the lower courts.[308]

The courts sometimes go further than Justice Kagan's questioning.[309] According to coverage by Reuters, after the SG and FTC filed an amicus brief urging the Seventh Circuit to rehear, en banc, a case decided Judge Posner, the original panel sent a letter to two cabinet departments that failed to sign the brief, asking their views.[310] After the SG replied that no further submission by the United States was contemplated, the panel then *ordered* the SG to disclose the names of the official with whom he consulted and the nature of the consultation.[311] The panel withdrew the order the next day but did send a subsequent *request* for information to the SG, claiming a response would increase the credibility of the amicus brief "filed with your approval by the *FTC and the antitrust division*"—pointedly declining to call it a brief of the United States.[312]

Judge Posner is not alone. The Federal Circuit, believing the PTO to have different views than DOJ, has repeatedly reached out to the PTO for its views on pending matters.[313] Once, the Federal Circuit ordered the PTO and DOJ (representing the United States) to file independently or "submit a joint brief, if they so choose."[314] A similar proposal was made for oral argument.[315] According to Ben Picozzi, "[u]ltimately, the agencies chose to submit a joint brief, and an attorney from the DOJ's Civil Appellate Section represented both agencies during oral argument." We doubt the PTO voluntarily "chose" this option.[316]

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permission. *See* TVA v. Whitman, 336 F.3d 1236 (11th Cir. 2003); *TVA Warns It Will Reverse Justice Department's NSR Defense in Lower Court*, INSIDE THE EPA, June 20, 2008.

[307] Alison Frankel, *Kiobel Brief Shows State/DOJ Split over Human Rights Litigation*, REUTERS, June 15, 2012, http://blogs.reuters.com/alison-frankel/2012/06/15/kiobel-brief-shows-statedoj-split-over-human-rights-litigation/; *see also* John Bellinger, *Kiobel: Obama Administration Supports Shell, Argues ATS Should Not Apply to Aiding-and-Abetting Suits Against Foreign Corporations, Leaves Open Possibility of Suits Against U.S. Corporations*, LAWFARE (June 13, 2012), https://www.lawfareblog.com/kiobel-obama-administration-supports-shell-argues-ats-should-not-apply-aiding-and-abetting-suits.

[308] In *Association for Molecular Pathology v. Myriad Genetics, Inc.*, PTO refused to sign onto DOJ's amicus brief, which claimed that genomic DNA could not be patented – a view the PTO did not share. Ben Picozzi, *The Government's Fire Dispatcher: The Solicitor General in Patent Law*, 33 YALE L. & POL'Y REV. 427, 436 (2015). In an "unprecedented" move, the SG himself argued the government's position in the case. *Id*.

[309] We learned about this case from Richard Re's post on the topic.

[310] Alison Frankel, *Judge Posner backs down (for now) in antitrust policy duel with U.S.*, REUTERS, July 2, 2014, http://blogs.reuters.com/alison-frankel/2014/07/02/judge-posner-backs-down-for-now-in-antitrust-policy-duel-with-u-s/.

[311] Motorola Mobility LLC v. AU Optronics Corp, et al., No. 14-8003, 2014 WL 1243797 (7th Cir. Mar. 28, 2014).

[312] Frankel, *supra* note 310.

[313] Picozzi, *supra* note 308, at 427.

[314] Order, Consumer Watchdog v. Wis. Alumni Research Found. At 1, No. 13-1377 (Fed. Cir. Dec. 4. 2013).

[315] Picozzi, *supra* note 308, at 427 n.2.

[316] *Id*.

Richard Re has suggested the executive agency's signature on the SG's filings is a "significant bargaining chip" for the agency.[317] We do not assess whether it is significant, but it is historically contingent on recent SGs centralizing the government's positions and tamping down contrary views.[318] After all, under President Carter's administration, the Attorney General allowed the Secretary of Interior to take an opposing view to the Justice Department's in *Tennessee Valley Authority v. Hill* at the Supreme Court.[319]

It is also clear the SG cannot control every aspect of executive agency litigation, even within DOJ. Apparently, the Environmental and Civil Divisions took different positions on prudential standing, with the former often refusing to raise it as a defense and the latter using the defense.[320] D.C. Circuit Judge Silberman called out this discrepancy, speculating that the Environmental Division was reflecting the political views of EPA, leading to dramatic (for example, a DOJ attorney fainting under questioning) and embarrassing conflicts in cases argued within days of each other. [321] For Silberman, the uniformity and quality rationales for DOJ's control of executive agency litigation are not served when "one division of the Justice Department [can] subordinate [this] interest to the desires of one agency."[322]

These incidents demonstrate that the United States does not always speak in one voice in court, even when only executive agencies are involved. Some judges view unresolved conflicts as a source of useful information; others may regard unresolved conflicts within the Executive Branch as somewhat scandalous, along the lines of Judge Posner and Judge Silberman. A related question, to which we turn later, is whether the courts have any role in resolving conflicts between different agencies of the U.S. government.

c. Presidential Reorganization

In the previous section, we discussed a situation where Congress supported centralization of executive power in the office of the SG. In our final example, Congress initially supported centralization but subsequently withdrew its delegated authority to the President. Between 1932 and 1981, Congress periodically granted the President reorganization power; this authority allowed the President to reorganize parts of the Executive Branch, often subject to constraints like not abolishing or establishing certain kinds of agencies.[323] Congress could reject the President's plans by use of a legislative veto.[324] Presidents submitted 126 reorganization plans, of which 33 were vetoed by Congress.[325] Presidential "successes" included creating EPA and FEMA.[326]

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[317] Richard Re, *When Agencies Don't Appear on the SG's Briefs*, PRAWFSBLAWG (Jan. 22, 2015), http://prawfsblawg.blogs.com/prawfsblawg/2015/01/when-agencies-dont-appear-on-the-sgs-briefs.html.
[318] *Cf*. Devins, *supra* note 317, at 288–90, 301–303.
[319] *Id*. at 263.
[320] The Supreme Court recently dismissed the prudential standing doctrine, casting it as a statutory analysis. Lexmark Intern., Inc. v. Static Control Components, Inc., 134 S.Ct. 1377 (2014).
[321] Association of Battery Recyclers v. EPA, 716 F.3d 667, 674, 678 (D.C. Cir. 2013) (Silberman, J., concurring).
[322] *Id*. at 678–79.
[323] HENRY B. HOGUE, CONG. RESEARCH SERV., R42852, PRESIDENTIAL REORGANIZATION AUTHORITY: HISTORY, RECENT INITIATIVES, AND OPTIONS FOR CONGRESS (2012), https://www.fas.org/sgp/crs/misc/R42852.pdf.
[324] Under some statutes, the veto was one-house; under others, it required both chambers. *Id*. at 3, 20, 30.
[325] *Id*. at 4 tbl. 1. If you remove President Hoover, all of whose plans were rejected, the success rate improves. *Id*.
[326] *Id*. at 2.

In 1983, the Supreme Court invalidated the legislative veto under the Constitution's bicameralism and presentment mandates.[327] Congress subsequently amended the operating reorganization authority statute to require a joint resolution (and presidential signature, absent an override of a veto) to approve any presidential plan to reshape the administrative state.[328] No plan was submitted before the amended authority expired.[329] Since then, President Clinton recommended and Presidents George W. Bush and Obama formally requested, without success, that Congress restore the reorganization authority.[330] For instance, under President Obama's proposal, reorganization plans would receive fast-track treatment, so Congress would have to vote on a presidential plan, without the chance for filibuster or amendment.[331]

What the President may no longer do under formal statutory authority,[332] she may do functionally, at least in part. Daphna Renan recently posited that pooling—an informal mechanism through which "the executive augments capacity by mixing and matching resources dispersed across the bureaucracy"—provides an alternative to reorganization authority.[333] As an example, "Team Telecom" (comprised of three cabinet agencies) advises the FCC on licensing applications involving foreign ownership and negotiates with the applicant over security agreements.[334] In terms of legality of these coordination arrangements, in many ways Renan follows Kagan in "understand[ing] presidential authority over pooling to be defeasible by Congress."[335]

In addition to providing coordination mechanisms outside explicit congressional delegation, these arrangements also create opportunities for conflict. And these opportunities are designed by the White House and not Congress. At the same time, these arrangements are not reorganizations of agency structures permitted by statute. They thus suggest Presidents see limits —at least in practice—to their authority.

The history of presidential reorganization power shows that Congress has significant power to shape the President's effective control over the bureaucracy, unitary executive theory notwithstanding. Congress has also limited the President's ability to reshape the landscape of agency conflict, for instance, transforming horizontal conflicts into vertical ones by placing one agency under another. In the next section, we consider some legal dimensions of the congressional role.

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[327] INS v. Chadha, 462 U.S. 919, 957–59 (1983).
[328] HOGUE, *supra* note 323, at 31.
[329] *Id*. at 3, 31.
[330] *Id*. at 31–34.
[331] Donald Wolfensberger, *Obama's Reorganization Plan Faces Long Odds*, WILSON CENTER (March 8, 2012), https://www.wilsoncenter.org/publication/obamas-reorganization-plan-faces-long-odds. The proposed Act never became law. *See* Eric Pianin, *Why Obama's Pitch for Government Reform Hit a Wall*, THE FISCAL TIMES, Feb. 20, 2013, http://www.thefiscaltimes.com/Articles/2013/02/20/Why-Obamas-Pitch-for-Government-Reform-Hit-a-Wall. The Reforming and Consolidating Government Act is available at https://www.whitehouse.gov/sites/default/files/omb/legislative/letters/reorg-authority-letter-and-legislation-to-speaker-of-the-house.pdf.
[332] Of course, under the presidential power strand of the previous directive debate, Presidents arguably do not need statutory authority for some of the contemplated reorganizations.
[333] Renan, *supra* note 28, at 213, 238.
[334] *Id*. at 214.
[335] *Id*. at 282.

B. Congress and Adversarial Administrative Relationships

We focus here on congressional action in creating restrictions on who can serve as agency leaders, imposing reporting and access requirements on agency officials, and controlling the timing of agency action.[336] The examples here are not exclusive.[337] We also consider when agencies (as opposed to the White House) shift congressional delegation to others. In short, we worry some that Congress may push the limits of its constitutional authority in creating some of the agency conflicts, and agencies may infringe on congressional power in trying to eliminate them.

1. Appointments Restrictions

Although there are few constitutional imperatives on who can be picked to fill top agency positions, there are many statutory restrictions.[338] As discussed in Parts I and III, some—such as party balancing and experience requirements—foster conflict within agencies.[339] Conflict also results from creating meta-agencies, staffed with existing agency leadership positions tied to particular missions, such as FSOC. Left to their own devices, Presidents might well prefer to limit adversarial relationships by choosing candidates only from their own party or avoiding candidates with particular professional experiences. We focus here on the legal dimensions of these statutory restrictions on appointments.

In simplified form, the Constitution contemplates only the Senate will have a role in confirming principal officers, as well as inferior officers when Congress has not chosen a permitted alternative mechanism. Nevertheless, both chambers of Congress restrict presidential choice by jointly enacting these statutory restrictions. Recent Presidents have complained in signing statements that certain appointments restrictions are unconstitutional, though they rarely point to party balancing mandates, emphasizing instead experience requirements.[340] President George H.W. Bush stated that he understood a slew of qualifications requirements of a quasi-agency, including a party-balancing mandate for some trustees, "as precatory."[341] Similarly, President George W. Bush challenged a post-Katrina statute imposing substantial experience requirements on the head of FEMA for unduly limiting presidential selection authority[342]

OLC, unsurprisingly, has taken a similar stance. A recent survey of the history of OLC memos concluded the office "has not consistently branded partisan balance requirements as unconstitutional" but has "consistently asserted that limits on the President's appointment power

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[336] All of these issues, in this section and the preceding one, involve the interaction of Congress and the President. Thus, in some sense, the division of topics is arbitrary.

[337] For instance, Congress may use deadlines to circumvent executive control. *See* Envtl. Def. Fund v. Thomas, 627 F. Supp. 566, 571 (D.D.C. 1986).

[338] William G. Howell & David E. Lewis, *Agencies by Presidential Design*, 64 J. POL. 1095, 1098–99 (2002) (finding that over 70 agencies established by legislation between 1946 and 1995 (40 percent of agencies created by legislation in that period) had restrictions on who could serve in leadership positions and, by contrast, finding only 20 agencies created unilaterally by the White House (8 percent of all such agencies) had similar mandates).

[339] Although the NLRB lacks such a requirement in its statutes, appointments to the Board now follow the mandate in practice. William B. Gould IV, *Politics and the Effect on the National Labor Relations Board's Adjudicative and Rulemaking Processes*, 64 EMORY L.J. 1501, 1507 (2015).

[340] Krotoszynski et al., *supra* note 148, at 975–76.

[341] *Id*.; *see also* Statement on Signing the Morris K. Udall Scholarship and Excellence in National Environmental and Native American Public Policy Act of 1992, 28 Weekly Comp. Pres. Docs. 483, 507 (Mar. 23, 1992).

[342] President's Statement on H.R. 5441, the "Department of Homeland Security Appropriations Act, 2007" (Oct. 4, 2006).

are constitutionally suspect."[343] Many commentators also attack these statutory restrictions, basing their arguments on the Vesting or Take Care Clauses.[344] Most recently, Ronald Krotoszynski and his coauthors posited the combination of partisan mandates, fixed terms, and restriction of removal to good cause is problematic under the Court's recent decision in *Free Enterprise Fund v. Public Company Accounting Oversight Board*.[345]

Despite these complaints, largely emanating from the Executive Branch, courts have not directly engaged the issues.[346] In the early twentieth century, the Supreme Court did declare "[t]here is . . . no doubt of the power of Congress to create . . . an office" with party balancing requirements,[347] which some see as an endorsement of such mandates. The courts generally dismiss direct challenges to statutory mandates on standing or other reviewability doctrines[348]

In our view, using a functionalist interpretation of separation of powers principles, these requirements, which often foster intra-agency horizontal conflict, generally do not aggrandize the legislative branch or dilute the President's authority under Article II, though they present some worry.[349] Most notably, these mandates are longstanding, suggesting historical acceptance of their utility.[350] A statutory qualifications requirement, however, would raise constitutional concerns if it aggrandized Congress's role in the administrative state or significantly interfered with the President's authority to "take care that the laws be faithfully executed."[351] These constraints place some general limits on qualifications requirements. Most importantly, qualifications requirements cannot narrow the pool of potential officeholders so drastically that only a handful of people can be nominated. If the pool is so small, Congress—and not the President—has taken over selecting officials. The restrictions creating agency conflict we have discussed do not rise to this level.

It is important to consider both the position on which the mandate is attached and the content of the requirement.[352] As to position, restrictions on offices closer to core Executive Branch areas, such as foreign relations and defense, will need more justification than mandates

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[343] Krotoszynski et al., *supra* note 148, at 981.

[344] *See, e.g.*, Donald J. Kochan, *The Unconstitutionality of Class-Based Statutory Limitations on Presidential Nominations: Can a Man Head the Women's Bureau at the Department of Labor?*, 37 LOYOLA U. CHI. L.J. 43, 44 (2005); Saikrishna Prakash, *Regulating Presidential Powers*, 91 CORNELL L. REV. 215, 238 (2005); Jamie B. Raskin, *"A Complicated and Indirect Encroachment": Is the Federal Election Commission Unconstitutionally Composed?*, 52 ADMIN. L. REV. 609 (2000); Richard P. Wulwick & Frank J. Macchiarola, *Congressional Interference with the President's Power to Appoint*, 24 STETSON L. REV. 625, 643–45 (1995).

[345] Krotoszynski et al., *supra* note 148, at 942.

[346] *See* Peter L. Strauss, *Overseer or 'The Decider'? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007).

[347] Shurtleff v. United States, 189 U.S. 311, 313 (1903).

[348] *See* Krotoszynski et al., *supra* note 148, at 972, 990.

[349] Some scholars see these restrictions as clearly constitutional. *See, e.g.*, HAROLD J. KRENT, PRESIDENTIAL POWERS 224 (2005); Note, *Congressional Power Under the Appointments Clause After* Buckley v. Valeo, 75 MICH. L. REV. 627, 647 (1977).

[350] *See* Michael J. Gerhardt, *The Federal Appointments Process as Constitutional Interpretation*, *in* CONGRESS AND THE CONSTITUTION (Neal Devins & Keith E. Whittington, eds. 2005), at 110, 119–20 (citing work by David Currie and Edward Corwin).

[351] Mistretta v. United States, 488 U.S. 361, 382 (1989); Morrison v. Olson, 487 U.S. 654 (1988).

[352] Gerhardt examines the nature of the positions, but not in combination with the content of the restrictions. Gerhardt, *supra* note 350, at 534–35. We do not agree with his analysis.

for positions farther from executive power, such as in independent regulatory commissions.[353] Similarly, constraints on higher-level positions will need more defense than lower-level positions.[354] As to the type of restriction, constraints on party arguably interfere more with the President's oversight duties.[355] Together, we should not be deeply concerned about party balancing mandates in independent regulatory commissions and most built-in expertise conflicts. But party balancing mandates in executive agencies and expertise conflicts in core executive areas may be more troubling.

2. Reporting and Access Requirements

As described briefly in Parts I and III, Congress also creates conflict within agencies—establishing mixed hierarchical-advisory relationships—by requiring certain agency officials to report to it, often about agency problems. Some reporting raises no legal issues. Although not spelled out in the Constitution, Congress has broad oversight powers as part of its Article I duties.[356] To the extent that Congress requires an executive agency official to testify at a hearing, or mandates that an agency submit a report on its activities—and allows the White House to review the testimony or report—there is no legal problem.

Other reporting raises more difficult issues. In certain circumstances, Congress has required agency officials to report concurrently to it and to other executive officials. For instance, as described in Part I, IGs must ensure both their agencies and Congress are "fully and currently informed" about fraud and other issues.[357] Specifically, IGs must "submit[t] detailed semiannual reports to Congress as well as notif[y] Congress seven days after reporting any particularly serious problems to their agencies."[358] Congress has tried to propose that IGs submit such reports "without clearance or approval by the agency head or anyone else in the executive branch," but then took out such language after OLC objected.[359] More recently, the Implementing Recommendations of the 9/11 Commission Act of 2007 mandated that the Chief Privacy Officer (CPO) of DHS submit her reports "directly to the Congress . . . without any prior

[353] President Clinton's Office of Legal Counsel took a similar approach. *See* 20 Op. Office of Legal Counsel 279, 280–81 (1996).
[354] *See* Hanah Volokh, *The Two Appointments Clauses: Statutory Qualifications for Federal Officers*, 10 U. PA. J. CONSTL. L. 745 (2008); 13 Op. Office of Legal Counsel 248, 250 (1989). The case law and commentary on removal is suggestive in analyzing the "position" dimension. *See, e.g.*, Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994) (detailing four relevant categories of officers to analyze removal restrictions). Courts and many scholars accept restrictions, explicit or implicit, on the President's ability to remove principal officers in independent regulatory commissions or agencies in the judicial branch, such as the Sentencing Commission as well as removal limits over inferior officers that do not significantly interfere with the President's take care authority. *See* Humphrey's Executor v. United States, 295 U.S. 602 (1935); Mistretta v. United States, 488 U.S. 361 (1989); Morrison v. Olson, 487 U.S. 654 (1988). They do not, however, permit restrictions over principal officers in core executive positions. *See* Myers v. United States, 272 U.S. 52 (1926).
[355] Krotoszynski et al., *supra* note 148, at 987 (arguing that experience requirements go more to "competence of the appointee, without transgressing the separation of powers" than party balancing mandates).
[356] McGrain v. Daugherty, 273 U.S. 135, 174 (1927); *see also* Watkins v. United States, 354 U.S. 178, 187 (1957) (sweeping description of congressional investigative power).
[357] Inspector General Act of 1978 §§ 4(a)(5), 5(d). *See also supra* notes 81–86 & accompanying text.
[358] Sinnar, *supra* note 84, at 1034.
[359] Office of Legal Counsel, Constitutionality of Direct Reporting Requirement in Section 802(e)(1) of the Implementing Recommendations of the 9/11 Commission Act of 2007 (Jan. 29, 2008), at 8, 9.

comment or amendment by the Secretary, Deputy Secretary, or any other officer or employee of the Department or of the Office of Management and Budget."[360]

These mandates, particularly that restricting the CPO of DHS from review by her superiors, raise separation of powers issues. OLC has concluded that concurrent reporting requirements "clearly implicate 'the President's performance of his constitutionally assigned functions' and impair the Constitution's great principle of unity and responsibility in the Executive department."[361] We take less of a hard line on these concurrent reporting mandates. IGs might be considered a distant cousin to the special prosecutor upheld by the Supreme Court in *Morrison v. Olson*,[362] having the similar function of providing a more impartial officer to investigate possible legal violations. They also resemble Congress's ability to compel officials to testify directly before it. Restrictions on executive interference with the IG are therefore perhaps an easier case: because the IG lacks actual enforcement power, the intrusion into executive power is much less severe, and it makes functional sense for Congress to limit executive interference in the IG's ability to disclose questionable conduct. But the intrusion into the functioning of the Executive Branch is more significant in the case of the CPO mandate, and thus would require a stronger justification. In the case of the CPO mandate, in light of its general view, OLC opined that statute did not bar review of *draft* reports.[363] That opinion seems wrong as a matter of statutory interpretation, but it does get around what could be a real constitutional problem.

3. Sub-Delegation

We pivot now from congressional choices to agency decisions that can raise separation of powers issues. Specifically, agencies delegate work to private entities, the states, and other agencies, the last of which we consider. In addition, agencies allot work internally, such as requiring that particular offices participate. This subdelegation can produce or destroy adversarial relationships.

Turning first to the elimination of conflict, Bijal Shah recently documented how agencies have transferred their authority to adjudicate administrative claims to other agencies who arguably do not have the same jurisdiction, though who operate in similar issue spaces."[364] She describes, for example, how OSHA and EPA, which share missions in workplace hazards though do not share the same explicit authority over specific claims, have nonetheless agreed to "transfer workplace hazard claims back and forth to each other, or take on cases themselves . . . ."[365] What was a horizontal adversarial relationship disappears, or becomes significantly weaker.[366] Shah also discusses how DHS had "transferred its authority to adjudicate H-2B nonimmigrant seasonal worker visas to DOL."[367] Under the statute, DHS is required to "consult"

[360] 6 U.S.C. § 142(e)(1).
[361] Office of Legal Counsel, *supra* note 359, at 10 (citing multiple OLC memos).
[362] 487 U.S. 654 (1988).
[363] Office of Legal Counsel, *supra* note 359, at 2.
[364] Bijal Shah, *Interagency Transfers of Adjudication Authority*, 34 YALE J. ON REG. (forthcoming 2017).
[365] *Id*. at 22–23.
[366] To compare, the FTC and FCC recently penned an agreement preserving each agency's enforcement authority. *See supra* notes 137 & 162 & accompanying text.
[367] Shah, *supra* note 364, at 14.

with DOL before ruling on applications but retains decision-making authority.[368] Thus, DHS had transformed an advisory relationship into a hierarchical one.

On the other hand, delegation within an agency can create conflict. Jennifer Nou has examined how agency leaders manage their organizations' work flow.[369] She noted, for instance, how the CFTC has delegated to both the GC and the Chief Economist overseeing the agency's cost-benefit analysis.[370] Such delegation creates a horizontal adversarial relationship.

Subdelegation within the federal government has constitutional and other legal implications. As to the Constitution, Shah suggests these "interagency transfers of adjudication authority" within the federal government could violate the nondelegation doctrine.[371] Because the nondelegation doctrine (assuming a federal agency) focuses on the existence of an intelligible principle, rather than the object of delegation, the concern might be better cast in broader separation of powers terms.[372] Commentators have largely discussed this in the context of presidential control: as discussed earlier, if Congress delegates to one agency, all but the extreme unitary executive theorist would agree the President cannot assign the agency's task to another agency.[373] If that is true, and Congress delegates to one agency, then the *agency* cannot give that authority to a different agency. But what if Congress delegates to multiple agencies, which then consolidate authority in one entity? That circumstance seems less legally troubling, assuming the consolidation does not violate any statutory language, but still raises some concerns if Congress meant to create redundancy or fruitful interactions between agencies with different perspectives.

Aside from the Constitution, subdelegation raises statutory and common law issues related to division of power. The Tenth Circuit struck down the DHS-DOL transformation described above on statutory grounds.[374]Across agencies, the Economy Act permits "agency-to-agency delegation" only if "(1) the agency 'retains responsibility' over the tasks; (2) the tasks are not part of the agency's primary administrative functions; and (3) the tasks do not involve significant decision-making authority."[375] Within agencies, leaders have considerable freedom under current case law; their actions carry a presumption of regularity and so long as they sign off on statutory mandated tasks, they can rely heavily on their subordinates.[376] In addition, leaders can generally change agency procedures that do not have a substantive effect on the public without prior notice and comment.[377] Nonetheless, if agency leaders do not retain control or if internal agency changes are arbitrary, statutory challenges—if they can get in the courthouse door—could succeed. Given our views of the potential benefits of adversarial relationships between agencies, we do not view violating the statutory requirements as innocuous since they may cleanse the process of even the potential for fruitful clashes between agencies.

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[368] *Id*. at 14–15.
[369] Nou, *supra* note 29.
[370] *Id*.
[371] Shah, *supra* note 364, at 43, 52.
[372] *See id*. at 43 (seeing issue more broadly than nondelegation).
[373] Kagan, *supra* note 279, at 2326–27.
[374] G.H. Daniels III & Associates, Inc. v. Perez, 626 Fed.Appx. 205 (2015).
[375] 31 U.S.C. § 1535; Jason Marisam, *The Interagency Marketplace*, 96 MINN. L. REV. 886 (2012); Shah, *supra* note 364, at 47.
[376] National Nutritional Foods Association v FDA, 491 F.2d 1141 (2d Cir. 1974).
[377] 5 U.S.C. § 553(a)–(b).

C. Courts as Conflict Resolution

We turn finally to legal issues emanating from the courts acting as arbitrators of agency conflict—mostly stemming from horizontal agency relationships but from other forms as well. We start by considering deference doctrines through the lens of agency conflict. We then turn to the litigation process, considering how adversarial agencies play into joinder and privilege issues. We conclude by examining the most direct form of judicial resolution: when agencies sue each other in court. In brief, we call for courts to treat conflict more favorably in reviewing agency decisions, though we also worry about forcing agencies to fight it out as litigants.

1. Chevron *with Multiple Agencies*

This section on the application of *Chevron* has several similarities with the previous discussion on the role of presidential direction when Congress delegates to an agency. There is a considerable literature on whether courts should defer to agency interpretations of an ambiguous statutory framework when Congress delegates to more than one agency.[378] The case law provides no clear resolution (though the reasons for this lack of clarity differ; for example, the preceding section raised constitutional issues while this one engages with statutory ones). Most notably, the Supreme Court has yet to directly address the issue.[379] As before, we try to contribute to a well-developed literature by focusing on adversarial relationships among agencies. Unlike the presidential control debate, however, we do take a firmer stance here.[380]

Courts and commentators take three primary approaches to the question of *Chevron* deference with multiple agency interpreters. First, and most dominant in the case law, the court chooses one agency from the set of possible interpreters and defers to that agency. This approach of choosing one agency for a particular interpretative area—no matter on what criteria—also comports with a "balkanization strategy" where agencies "create separate, non-overlapping spheres of authority."[381]

Settling on one agency has its own complexities. Many look to the agency most suited to make the interpretation.[382] In examining the Occupational Safety and Health Act of 1970, which delegated authority to both the Secretary of Labor and Occupational Safety and Health Review Commission, the Supreme Court found only the Secretary had "interpretative power" because the Secretary was "the administrative actor in the best position to develop [various] attributes."[383] Similarly, in assessing the Controlled Substances Act, the Supreme Court determined the Secretary of HHS, and not the Attorney General, had the authority to make "medical

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[378] Gersen, *supra* note 24; Emily Hammond Meazell, *Presidential Control, Expertise, and the Deference Dilemma*, 61 DUKE L.J. 1763 (2012); Sharkey, *supra* note 270, at 356; *cf.* Shah, *supra* note 364 (discussing whether courts should defer to an agency's statutory interpretation when another agency has delegated the authority to administer that statute to the interpreting agency).

[379] Gersen, *supra* note 24; Sharkey, *supra* note 378.

[380] We do not address a related issue, preclusion at the federal level—specifically, how courts should treat interpretations of federal statutes that conflict with other federal statutes. *See, e.g.*, POM Wonderful LLC v. Coca-Cola Co., 134 S.Ct. 2228, 2241 (2014) ("An agency may not reorder federal statutory rights without congressional authorization.").

[381] Sharkey, *supra* note 270.

[382] *See* Gersen, *supra* note 24; Sharkey, *supra* note 270.

[383] Martin v. OSHRC, 499 US. 144, 153 (1991). We note that this was technically not a *Chevron* case, since the issue was interpreting an ambiguous regulation, not an ambiguous statute. *See id*. at 149.

judgments."[384] This preference for the most expert agency was at play in the recent decision on whether the Affordable Care Act's subsidies apply to federal exchanges as well as state exchanges. The Court, in declining to apply *Chevron* deference, noted the statutory interpretation came from the IRS: "It is especially unlikely that Congress would have delegated this decision to the *IRS*, which has no expertise in crafting health insurance policy of this sort. This is not a case for the IRS."[385]

Some judges prefer, however, to empower the agency closest to the President rather than the agency with the most expertise, in effect elevating the accountability justification for *Chevron* over the implied-delegation justification. In a recent case the D.C. Circuit dismissed on ripeness grounds, Judge Kavanaugh concurred to acknowledge the "overlapping statutory responsibilities" between the Department of Energy and NRC concerning nuclear waste disposal at Yucca Mountain. Even though the statute gave NRC "the final word," he stated Article II would leave that decision with the President.[386] The same reasoning would suggest that, in case of statutory ambiguity, DOE rather than NRC should receive deference. More generally, Justice Kagan has argued deference should be given only when "presidential involvement rises to a certain level of substantiality."[387] For Kagan, the justification depends less on Article II than on the policy benefits from presidential involvement.[388] The logic extends to multiple agencies: if there are multiple agencies charged with a statute, *Chevron* deference should be given to the one taking the most direction from the White House.

Rather than choosing a single agency for *Chevron* deference, a second approach favors no judicial deference if there are multiple interpreters. The D.C. Circuit has "generally" held that "where multiple agencies are charged with administering a statute," "a single agency's interpretation is not entitled to *Chevron* deference" but should instead be reviewed de novo.[389] Alternatively, the Second Circuit has provided something less than *Chevron* deference but more than de novo review.[390] To some extent, this approach of no or minimalized deference overlaps with the first: the courts will defer to one agency, but not multiple entities. Both approaches fit nicely with the "lost world" of administrative law doctrine, where the Administrative Procedure Act (APA) and key cases assume a single agency.[391]

Under a third approach, the court should defer only if the multiple agencies agree. Sharkey proposes the following: "[W]hen faced with an interpretation by an agency that operates in shared regulatory space, courts would solicit input from the other relevant agencies. And, to the extent that there is agreement among the different agencies, *Chevron* deference would be

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[384] Gonzales v. Oregon, 546 U.S. 243, 265, 267 (2006) ("[T]he authority claimed by the Attorney General is both beyond his expertise and incongruous with the statutory purposes and design.").
[385] King v. Burwell, 135 S.Ct. 2480, 2489 (2015) (original emphasis).
[386] In re Aiken Country, 645 F.3d 428, 439–40; *see generally* Meazell, *supra* note 378 (discussing case at length).
[387] Kagan, *supra* note 279, at 2376–77.
[388] *Id*. at 2339, 2341, 2344.
[389] New Life Evangelistic Center, Inc. v. Sebelius, 753 F.Supp.2d 103, 122–23 (D.D.C. 2010) (citing various D.C. Circuit cases).
[390] 1185 Ave. of Ams. Assoc. v. Resolution Trust Corp., 22 F.3d 494, 497 (2d Cir. 1994). Some prior authority in the D.C. Circuit was more nuanced. *See, e.g.*, Prof'l Reactor Operator Soc. v. U.S. Nuclear Regulatory Comm'n, 939 F.2d 1047, 1051 (D.C. Cir. 1991) (holding that "reviewing courts do not owe the same deference to an agency's interpretation of statutes that, like the APA, are outside the agency's particular expertise and special charge to administer").
[391] Farber & O'Connell, *supra* note 34 .

especially warranted (regardless of whether all of those agencies were parties before the court) . . . ."[392] For Sharkey, this model makes the court an "agency coordinator" that "exploits (rather than constrains) overlapping agency jurisdiction."[393] She would not apply the approach to statutes that task many agencies, such as the Freedom of Information Act.[394] In this view, although the single agency approach provides "clearer lines of accountability," the existence of agreement signals "great expertise, greater innovation, and great consistency among agencies in a shared space."[395]

But there is a fourth approach that countenances the possibility of deferring to all agencies, even when interpretations conflict. In a case involving SEC approval of certain futures contracts under a statute also administered by the CFTC, the Seventh Circuit said it would be possible to defer to the decisions of both agencies, which would in effect mean the financial instrument could not be marketed unless both agencies agreed.[396]

In our view, adopting any ironclad rule about handling cases of multiple agency involvement is misguided. We reject the view that deference should automatically be denied simply because multiple agencies have authority. To the extent that *Chevron* prioritizes congressional intent, multiple interpreters are often actively chosen. As Gluck and Bressman documented through dozens of in-depth interviews of congressional staffers, Congress actively desires to delegate to multiple agencies in many statutes.[397] Chief Justice Roberts commented in his *City of Arlington* dissent that such statutes "'may be the norm, rather than an exception.'"[398] Requiring the Court to always choose one agency (or none) mistakenly assumes Congress could not have intended to choose multiple interpreters.[399] Admittedly, however, in choosing one agency, the agency closest to the President may better reflect the realities of modern administrative law, where the President plays a large coordination role, and the accountability rationale of *Chevron*.[400]

In addition, requiring agreement among agencies may undermine congressional intent. Congress may not want agreement. As Sharkey concedes, when there are conflictual agencies, the agreement approach "may be contrary to congressional intent and counterproductive."[401] Imagine Congress delegates to two agencies with different preferences. The agencies' individual interpretations may "alig[n] outcomes more closely with the preferences of Congress" than a

[392] Sharkey, *supra* note 270, at 330.
[393] *Id*.
[394] *Id*. at 344.
[395] *Id*. at 356.
[396] Bd. of Trade of City of Chicago v. S.E.C., 187 F.3d 713, 719 (7th Cir. 1999). The court did not have to decide on the applicability of *Chevron*, however, as it held the statute was not ambiguous. *Id*.
[397] Bressman & Gluck, *supra* note 293, at 1006–10.
[398] City of Arlington v. FCC, 133 S.Ct. 1863, 1883 (2013) (Roberts, J., dissenting) (quoting Gersen, *supra* note 24, at 208).
[399] Weaver, *supra* note 378, at 38; Note, *supra* note 378, at 299.
[400] Farber & O'Connell, *supra* note 34.
[401] Sharkey, *supra* note 270, at 356. Her alternative, however, is to use the first approach—choosing a single agency—in such instances.

joint interpretation.[402] The DOJ (whether the SG or OLC), which often has not been delegated interpretative authority, may also force executive agencies to agree.[403]

As we show in Part I, there are many ways to structure multiagency involvement, and even within each category; each situation involves its own history, policy constellation, and operational characteristics. The court's function is to work out what allocation of interpretative authority makes the most sense. The first step is to determine—given the agency's role—whether it is reasonable to assume Congress would have given it interpretative authority. Sometimes it may turn out that only one agency was intended to have interpretative authority. But we agree with the Seventh Circuit that the possibility of deferring to conflicting interpretations should not be ruled out. Moreover, in cases without actual conflict between agencies, we think courts should presume in favor of deferring to whichever agency's interpretation comes before the court. It is possible to imagine a race to get an agency to rule first and then get to the courthouse, but if this occurs, the courts remain free to rethink if another (or even the same) agency takes a contrary position, given the Supreme Court's *Brand X* decision that opinions upholding agency interpretations lack precedential value.[404] A rule giving deference to agency decisions unless they are actively contested by another agency enables agencies to engage in fruitful dialogue.

What about cases of actual conflict between agencies when each would have a plausible separate claim to interpretative authority? Again, the issue is how Congress would have wanted interpretative authority allocated.[405] As the Seventh Circuit pointed out, in some cases Congress may have wanted both interpretations to be given effect, thereby requiring both agencies to agree before some action becomes legal. On the other hand, it may have seemed less plausible this would be true in *Martin*, where giving effect to both views would mean an employer could only be sanctioned if OSHA and OSHRC agreed about the interpretation of the law, expanding OSHRC's powers beyond what Congress seemingly intended. We favor a soft presumption that *Chevron* applies when multiple agencies with plausible interpretative authority have jurisdiction, and in *Martin* the presumption may have been overcome.[406]

If we keep *Chevron* as the background default rule in the face of multiple agencies with interpretative authority, Congress can always specify a different rule. In Dodd Frank, for example, Congress did two interesting things with regard to deference. First, it specified that the new Consumer Financial Protection Bureau should be treated as if it "were the only agency authorized to apply, enforce, interpret, or administer the provisions of . . . Federal consumer financial law."[407] Second, it provided that the SEC and CFTC should get no deference for conflicting interpretations of certain statutory authority.[408] The potential litigation clash between the two agencies raises constitutional concerns, which we turn to below.

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[402] Gersen, *supra* note 24; *see also* O'Connell, *supra* note 24, at 1703 fig. 3.
[403] *See* Sonia Mittal, *OLC's Day in Court: Judicial Deference to the Office of Legal Counsel*, 9 HARV. L. & POL'Y REV. 211, 226–27 (2015) (discussing potential "coercion" by OLC in the *Chevron* context).
[404] 545 U.S. 967 (2005); Gersen, *supra* note 24, at 227.
[405] *See* Gluck & O'Connell, *supra* note 238, at 1852.
[406] For example, in DeNaples v. Office of Comptroller of Currency, 706 F.3d 481 (D.C. Cir. 2013), the court pointed to compelling reasons to foreclose the possibility of conflicting interpretations because violation carried criminal penalties. *Id*. at 488 (citations omitted).
[407] 12 U.S.C. § 5512(b)(4)(B); *see generally* Meazell, *supra* note 378, at 1792–1793 (discussing this example)
[408] Gersen, *supra* note 24.

If *Chevron* does apply to multiple agencies, differing interpretations by those agencies may suggest that the statute is ambiguous.[409] We do not take a firm view on this—after all, conflict among federal judges on a statute's meaning is not currently a relevant factor in the application of *Chevron*. Nevertheless, agencies are arguably both more expert and accountable than courts. At the extreme, large differences in interpretation or changes in multiple interpretations may undercut the application of *Chevron*.[410]

A similar *Chevron* issue arises for interagency conflict—whether courts should defer less to the legal interpretation when agency leadership is split in multi-member bodies over the proper interpretation. In deciding on its final rule on election timing in 2015, for example, the NLRB split 3-2 on whether the labor laws permitted the agency to regulate as a general matter the conditions under which union elections could occur.[411] Jacobs suggests that this split may suggest ambiguity.[412] Internal horizontal splits may be less telling, however, than divisions across institutions for a *Chevron* analysis. Internal division probably does have a role to play in how the court addresses the decision as a *policy* matter under *State Farm*, which we turn to next.

Finally, litigants may creatively use adversarial agencies to generate seemingly run-of-the mill *Chevron* challenges. In a recently filed complaint to DOL's fiduciary rule for retirement advisors, the Chamber of Commerce alleges in its first count that DOL has exceeded its statutory authority "by seeking to regulate institutions and products in ways that conflict with the regulatory mandates and judgments of the SEC and FINRA, in areas where those entities have primary regulatory authority."[413]

2. State Farm *with Adversarial Agencies*

Less attention has been paid to how multiple agencies or internal agency conflicts play into judicial review of agency policy decisions outside the *Chevron* context, although this issue arises more frequently because *Chevron* is generally limited to agencies with explicit delegated authority to act with the force of law.[414]

A preliminary issue arises as to whether an agency can engage with other agencies in making its decision. The primary issue involves how other agencies' participation in the decision-making process gets incorporated into judicial review. As with the Plan B example in the Introduction, negative feedback from other agencies can contribute to a finding that the agency action is arbitrary and capricious. Here, the explicitness of the reaction is critical. Such feedback can also influence an agency decision for reasons outside the statutory framework. By contrast, this reaction is often not transparent, making challenges harder to succeed, particularly if the interactions are shielded from public view by executive privilege or a FOIA exemption. A final issue concerns conflict within an agency: with increasing split votes in independent regulatory commissions, courts need to consider whether such modern division is like the traditional hierarchical conflict portrayed in the *Universal Camera* cases. What attention has been paid to these issues suggests courts should give less deference in the face of agency

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[409] *Cf.* Eric A. Posner & Adrian Vermeule, The Votes of Other Judges (making a similar argument for multiple judges' views on a statute's meaning) (working paper) (Jan. 2016).
[410] *See* Encino Motorcars v. Navarro (2016), slip. op. at 9–10.
[411] *See supra* note 22 & accompanying text.
[412] Jacobs, *supra* note 19, at 40.
[413] Complaint, Chamber of Commerce v. Perez, Civil Action No. 16-cv-1476 (N.D. Texas June 1, 2016), ¶ 155; *see also id*. ¶ 158.
[414] *But see* Magill & Vermeule, *supra* note 56; Vermeule, *supra* note 131; Jacobs, *supra* note 19.

conflict—whether in advisory or horizontal capacities.[415] Here, too, we fight against convention, positing that the level of deference should not be affected by split votes.

Classic administrative law—through the APA and important cases—trains attention on a single agency.[416] Can that agency even seek the views of other agencies? Another agency could easily qualify as an "interested person" banned from ex parte communications in a formal proceeding, and allowing such behind-the-scenes input could conflict with the independence Congress has attempted to give ALJs.[417] Additionally, another agency could be prevented from engaging in ex parte communications in an informal proceeding, under the Due Process Clause, if the proceeding targeted "competing claims to a valuable privilege."[418] But as a general matter, as we describe in Part I, an agency can look to other agencies for input.[419] Sometimes, Congress encourages or demands this explicitly.[420] And when Congress does not indicate an agency can consult, "an implicit ban on interagency consultation and coordination" cannot be "read into that statutory silence."[421] According to the D.C. Circuit, such a ban would not only be undesirable but would also "raise significant constitutional concerns."[422]

Once agencies are involved, other legal issues arise. To start, other agencies could officially comment in informal rulemaking, and the agency conducting the rulemaking must respond if the comment is "materially cogent."[423] A marquee case for the paper record requirements of notice and comment rulemaking actually features conflictual agencies, though casebooks ignore this feature. In *U.S. v. Nova Scotia Food Products Corporation*, [424] not only the subject of the enforcement action submitted tough comments to the FDA, but so did the Department of Interior's Bureau of Commercial Fisheries, and the court found that the agency's failure to answer the Bureau's comments violated the APA.[425]

More commonly, adverse reactions by other agencies can make it harder for the acting agency to survive an arbitrary and capricious challenge under the APA.[426] At the least, the agency must respond to relevant reactions. Opposing reactions may also contribute to the court finding the action is arbitrary and capricious. In *National Resource Defense Council v. EPA*,[427] the record contained a letter protesting EPA's handling of the issues from eight members of its Science Advisory Board and six members of a National Academy of Sciences committee charged with investigating the issue (water pollution from ballast water).[428] The letter charged

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[415] Vermeule argues that courts should not defer to agency factual determinations that conflict with the consensus of experts "unless they can give a valid second-order reason to think that the consensus or majority view of experts as to matters of fact is not epistemically reliable." Vermeule, *supra* note 131, at 2235.
[416] Farber & O'Connell, *supra* note 34.
[417] 5 U.S.C. § 557(d). The President here raises tricky issues under Article II.
[418] *See* Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 224 (1959).
[419] *See supra* Section I.C; Shah, *supra* note 364, at 39–40.
[420] *See supra* Section I.C; *see also* Emerson Elec. Co. v. Schelsinger, 609 F.2d. 898 (8th Cir. 1979) (citing 42 U.S.C. § 2000e-4(g)(1)) (indicating the EEOC "shall have power . . . to cooperate with and, with their consent, utilize . . . other agencies" under the Civil Rights Act).
[421] Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243, 249 (D.C. Cir. 2014).
[422] *Id*.
[423] Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1031 (D.C. Cir. 1978).
[424] 568 F.2d 240 (2d. Cir. 1977).
[425] *Id*.
[426] *See* Vermeule, *supra* note 131, at 2241–42.
[427] 804 F.3d 149 (3d. Cir. 2015).
[428] *Id*. at 155–56. One letter writer belonged to both groups. *Id.* at 156 n. 13.

EPA with unduly limiting the scope of their investigation and actively thwarting their efforts to consider a broader class of technologies for treating the pollution.[429] "In light of these facts," the court said, "we cannot credit EPA's assertion" that relevant information was unavailable.[430] The court also faulted EPA for an inadequate response to another advisory board comment,[431] and referred to another portion of the board's report as "supporting our conclusions" that a distinction made by EPA was arbitrary and capricious.[432] Presumably, positive reactions from other agencies could buttress an agency's action, if in the record.[433]

Courts seem to treat adversarial agencies similarly under statutes besides the APA. An intriguing 1990 study concluded that "[w]here agencies with environmental expertise raised serious questions about the merits of particular projects or about the quality of environmental analysis of those projects, courts have readily found NEPA violations."[434] On the other hand, "when the agency comments reflected no serious opposition or supported a project, courts generally found NEPA compliance, despite the opposition of one interest group or another."[435] A 2012 follow-up study found a more ambiguous pattern of results, but nevertheless concluded the earlier study's general conclusions still held true.[436]

Explicit agency conflict that does not factor centrally into the legal analysis may still be used by courts and litigants as rhetorical flourish. In *Utility Air Regulatory Group v. EPA*, the Court struck down the EPA's regulation of greenhouse gas emissions largely on *Chevron* grounds, but the majority explicitly noted early in its opinion that other agencies disagreed with the EPA's policy decision, even quoting adversarial comments from the Departments of Agriculture, Commerce, Transportation, and Energy, the Council of Economic Advisers and Office of Science and Technology Policy, and SBA.[437] In the recent complaint against Labor's fiduciary rule, the Chamber of Commerce explicitly flags objections to the rule by a SEC commissioner and SEC staff.[438]

Other issues arise when agency conflict shapes an agency's policy decision in ways not listed in the operating statute. In *Massachusetts v. EPA*, the Court reviewed EPA's decision to refuse to engage in rulemaking on greenhouse gas emissions, which the agency did in part

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[429] *Id*. at 166.
[430] *Id*.
[431] The court said that in choosing one standard, "EPA overlooked crucial portions of the SAB report" and in choosing a standard, EPA "should have first looked at the available ballast water technologies as identified by the SAB Report." *Id*. at 163. On another point, the court said, "the SAB and NAS Committee scientists concluded that 'EPA should conduct a comprehensive analysis. . . .'" EPA choose not to do so for time reasons, but the court did "not find that answer compelling." *Id*. at 168.
[432] *Id*. at 170.
[433] *See* Am. Trucking Ass'ns v. EPA, 283 F.3d 355, 367 (D.C. Cir. 2002) (giving weight to CASAC's agreement when upholding EPA NAAQS regulation); Vermeule, *supra* note 131, at 2250–51.
[434] Michael C. Blumm and Stephen R. Brown, *Pluralism and the Environment: The Role of Comment Agencies in NEPA Litigation*, 14 HARV. ENV. L. REV. 277, 278 (1990). For instance, in Natural Resources Defense Council v. Hodel, 865 F.2d 288 (D.C. Cir. 1988), the court ordered the agency to revise its oil and gas leasing plan in part because of its failure to respond persuasively to EPA's critique. *Id*. at 299.
[435] *Id*. at 278.
[436] Michael C. Blumm & Marla Nelson, *Pluralism and the Environment Revisited: The Role of Comment Agencies in NEPA Litigation*, 37 VT. L. REV. 5, 44 (2012).
[437] 134 S. Ct. 2427, 2436 n.2 (2014).
[438] Complaint, Chamber of Commerce v. Perez, Civil Action No. 16-cv-1476 (N.D. Texas June 1, 2016), ¶¶ 96, 106.

because of policy concerns about using the Clean Air Act to address climate change.[439] The Court held that the agency should not have turned to these broader concerns.[440]

What if the priorities come from other agencies? If the statute explicitly bars these priorities, the answer is easy. But if the statute is silent, on a strict reading of *Massachusetts v. EPA*, an agency cannot not consider policies beyond those included in the statute. Perhaps, as some subsequent lower courts opinions suggest, the reading should not be so strict.[441] In any event, the role these other priorities played in an agency decision may be hidden. Sometimes, agencies will submit official comments, but not always. Under *Sierra Club v. Costle*, agencies do not have to disclose political considerations in the record.[442] If the priorities are articulated in writing during the OIRA review process, the Executive Order requires disclosure at the time of the final rule, but many agencies do not follow that mandate, and there is no judicial review to enforce it.[443]

Within-agency conflict also can raise judicial concern. Classic doctrine requires that conflict among actual decision-makers be included in the record for review, even if a higher-level adjudicator can reverse an underling's ruling.[444] That conflict, in turn, will likely make it at least marginally harder to uphold the ultimate decision by the agency. More complicated issues arise when conflict does not come from a decision-maker. For instance, staff may disagree with the political appointee who has the authority to take the action. Scholars have found that criticism from the agency's own staff can also give rise to judicial suspicion and lead to intervention in a NEPA case.[445] Judge Williams, dissenting in part in the recent decision upholding the FCC's net neutrality rule, noted "[t]he silent treatment given to three of its former chief economists."[446]

Moreover, in independent agencies with plural leadership, the "decision-maker" is the majority of members.[447] As noted earlier, split decisions by these entities appear to be on the rise, with the FCC's final net neutrality rule and NLRB's final election timing rule, for example, coming on 3-2 votes of the agencies' leaders.[448] The D.C. Circuit in its *Business Roundtable* decision remarked that the SEC's proxy rule being reviewed was done on a 3-2 vote and summarized the dissenting commissioners' views.[449] Such notice could be rhetorical, as in the *UARG* case, but it could also play a role in the review. In the recent dispute over whether FERC could regulate regional transmission organizations and independent systems operators, the D.C. Circuit and the Supreme Court reached different conclusions about whether the agency's treatment of a dissenting commissioner was arbitrary and capricious.[450]

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[439] 549 U.S. 497, 529–34 (2007).
[440] *Id*. at 533.
[441] For further discussion of these issues, see Daniel A. Farber, *Taking Costs into Account: Mapping the Boundaries of Judicial and Agency Discretion*, 40 HARV. ENVTL. L. REV. 87 (2016).
[442] 657 F.2d 298 (D.C. Cir. 1981); *see generally* Heinzerling, *supra* note 102; Gluck & O'Connell, *supra* note 238.
[443] Farber & O'Connell, *supra* note 34.
[444] Universal Camera Corp. V. NLRB, 340 U.S. 474 (1951).
[445] Pac. Rivers Council v. U.S. Forest Serv., 689 F.3d 1012, 1117, 1028, 1033–34 (9th Cir. 2012).
[446] US Telecom Ass'n v. FCC (D.C. Cir. June 14, 2016), dissenting slip op. at 43.
[447] *See* Free Enterprise Fund v. Public Company Accounting Oversight Board, 561 U. S. 477 (2010).
[448] *See supra* note 22 & accompanying text.
[449] Business Roundtable v. SEC, 647 F.3d 1144, 1147–48 (D.C. Cir. 2011).
[450] Electric Power Supply Ass'n v. FERC, 753 F.3d 216, 225 (D.C. Cir. 2014), *reversed by* 136 S.Ct. 760 (2016).

Thinking about all these issues, we make one primary observation and several suggestions. As a descriptive matter, the courts seem more skeptical of agency decisions when other agencies or individuals within the agency disagree. As a normative matter, we are not sure changing the intensity of scrutiny is the correct response. To the extent that doctrines require agency responsiveness to expressed concerns, we would not treat federal government actors differently from other categories of commenters. The Bureau of Commercial Fisheries is thus equivalent to Nova Scotia under rulemaking mandates in our (and the courts') view. In addition, for vertical conflicts, there is longstanding support for courts taking a closer look, dating back to *Universal Camera*. But for horizontal conflicts, articulated tension may demonstrate the agency action was thoroughly debated as a process matter. It may also be the result of political choices (and elections), fostering an accountability story. To be sure, an expertise story might cut the other way. In light of that, we would not argue for *more* deference in the face of horizontal or monitoring conflict. Just as legislation passed by a close margin is treated similarly to unanimous legislation, we favor equal treatment of agency action.[451] The burden is on the agency, of course, to provide a reasoned explanation of its decision based on the record, including reasoned responses to internal and external critics where appropriate.

3. Procedural Issues: Rule 19 and Discovery

Outside of agencies suing each other, which we turn to next, and beyond classic administrative law doctrines, the litigation process raises issues in the adversarial agency context. Rule 19 provides an extreme remedy for parties facing considerable agency conflict. When the EEOC sued the lessor of coal mines on Navajo and Hopi reservations for Title VII violations, the lessor argued its preference for hiring Navajo workers was put in the lease at the the Secretary of Interior's demand.[452] The Ninth Circuit dismissed the damage claim, finding the Secretary was a required party to be joined since it would be unconscionable for Peabody to pay damages for a clause DOI had required, and that the Secretary was infeasible to be joined, as the EEOC cannot sue the Secretary under its statutory authority.[453] Thus, if agencies (typically in horizontal adversarial relationships) cannot sue each other, when the conflict is great enough, Rule 19 may come into play. But note the court did allow a claim for injunctive relief to go forward, on the theory that Peabody could have brought an interpleader action between DOI and EEOC to resolve its rights.[454]

The implicit assumption was that DOI and EEOC, even though both are federal entities, are not bound by judgments in litigation involving one but not the other. There seems to be some tension between this assumption and the concept of a unitary executive (or even that the United States is a single entity). But, even Justice Scalia —a staunch a supporter of the unitary executive—once opined that different executive agencies, both responsible to the President, are not bound by judgments against another agency.[455]

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[451] Separately, we agree with a recent Third Circuit decision on waiver, which held that a dissenting commissioner sufficiently flagging an issue is similar to a private commenter doing so, if the statute requires the agency to have the "opportunity to pass" on an issue before it is raised in court. *See* Prometheus Radio Project v. FCC (3d Cir. May 25, 2016), slip op. at 50–51.

[452] EEOC v. Peabody Western Coal Co., 610 F.3d 1070, 1074, 1080 (9th Cir. 2010).

[453] *Id*. at 1082–83.

[454] *Id*. at 1085–86.

[455] In Lujan v. Defenders. of Wildlife, 504 U.S. 555 (1992), Justice Scalia's plurality opinion argued that a suit against the Secretary of the Interior would not redress the plaintiffs' injury, which would have resulted from the

Parties have also tried to use agency conflict to their advantage in discovery and under the Freedom of Information Act. Specifically, parties have argued agency disagreement waives the government's privileges. In *Menasha Corporation v. DOJ*, defendants in a massive Superfund case sought internal DOJ communications, maintaining the conflict between environmental enforcement and defense sections (with the former often representing EPA and the latter often representing the Army Corps of Engineers) in the Department waived the work product protection.[456] The Seventh Circuit described the claim: "The enforcement and defense sections are adversaries; communications between adversaries are not privileged."[457] The court rejected the claim, holding that "[t]he United States, represented by the Justice Department, is the only federal party and the lawyers in the enforcement and defense sections have no authority to determine its negotiating aim and strategy."[458] The court also noted EPA and the Corps were not parties to the case.[459] But if a court saw separate agencies (perhaps because of independent litigating authority, which we turn to next), their communications may not be privileged.

4. Agencies Suing Each Other

The most direct form of courts resolving agency conflict arises when Congress allows agencies to sue each other.[460] Most of these suits involve agencies in horizontal relationships but some include agencies in hierarchical ones. At least some of these disputes are justiciable, as the Supreme Court has repeatedly found.[461] Lower courts have heard more such cases,[462] though overall such disputes are rare.[463] But suits between agencies raise statutory and constitutional issues. Agencies must have statutory authority to sue. As discussed in Parts I and II, the DOJ generally litigates on behalf of federal agencies, but Congress sometimes makes exceptions.

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funding of oversees projects by other agencies, since those agencies would not be bound by the potential judgment requiring the Secretary to consult for foreign projects. *See id*. at 569. We are not sure this is correct since those agencies, even if considered independent legal entities for purposes of litigation, might have been in privity or bound by an injunction as "persons acting in concert" with DOI under Rule 65(d)(2)(C).

[456] 707 F.3d 846, 849 (7th Cir. 2013).

[457] *Id*. at 850.

[458] *Id*.

[459] *Id*.

[460] *See* Section II.B, *supra*.

[461] United States v. ICC, 337 U.S. 426 (1949) (ICC v. DOI); United States ex rel. Chapman v. Federal Power Commission, 345 U.S. 153 (1953) (DOI v. FPC); United States v. Nixon, 418 U.S. 683 (1974) (President v. special prosecutor); Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144 (1996) (DOL v. OSHRC); *see generally* Joseph W. Mead, *Interagency Litigation and Article III*, 47 GEORGIA L. REV. 1217, 1238–42 (2013) (describing these four cases). Through a proxy appointed at the request of the SG, the Court also heard a challenge to the IRS's policy of refusing tax breaks to private schools that discriminate on race, which pitted the proxy for the Treasury Department against DOJ. Bob Jones Univ. v. United States, 461 U.S. 574 (1983); *see generally* Devins, *supra* note 317, at 276.

[462] *See e.g.*, Department of Interior v. FERC, 952 F.2d 538 (D.C. Cir. 1992); *see also supra* note 53 & accompanying text.

[463] *See* Mead, *supra* note 461, at 1242–49. By contrast, disputes between state agencies in state court are more frequent. *Id*. at 1220; Meazell, *supra* note 378, at 1797 n.11; Note, Judicial Resolution of Administrative Disputes between Federal Agencies, 62 HARV. L. REV. 1050, 1050 (1949). For a recent example that involves agency conflict one slight step removed, see Hunter v. FERC, 711 F.3d 155 (D.C. Cir. 2013). In that case, FERC had found a violation by a hedge fund trader of its anti-manipulation rule. The trader challenged FERC's jurisdiction, arguing that only the CFTC could prosecute manipulation of gas futures prices. CFTC, which had begun its own action against the trader, intervened. In the end, the D.C. Circuit sided with the trader (and the CFTC).

A modern example of such congressional permission—involving advisory relationships—is the authority given to the SBA's Chief Counsel for Advocacy to file an amicus brief "in any action brought in a court of the United States" on her views "with respect to compliance with [the Regulatory Flexibility Act], the adequacy of the rulemaking record with respect to small entities and the effect of the rule on small entities."[464] The SBA has used this full authority only once.[465]

Even if agencies possess litigation authority independent from DOJ, it is not obvious such authority is constitutional under Article II or Article III. Indeed, the DOJ has opposed the SBA's efforts, though authority to file an amicus brief is arguably different than authority to represent the agency as a party.[466] As in the preceding discussion on whether the President can direct an agency's actions when Congress delegates to the agency and not the President, similar issues arise regarding litigation control. For Michael Herz, the "pristine model of the unitary executive has no relation to political or constitutional reality," and consequently, "[i]nteragency litigation is not inherently or per se inconsistent with the functioning of the executive branch."[467]

There presumably are some limits under Article II. Herz suggests Article II could bar an interagency policy dispute, in that the Executive Branch cannot ask the courts to decide how to execute the law.[468] What counts as a policy dispute seems very hard to determine, however. If that dispute involved independent agencies, such as the CFTC and SEC under Dodd Frank, it seems courts could decide between conflicting statutory interpretations.[469] But agencies within a cabinet department, such as the FWS and BLM, present a more difficult question.[470]

Under Article III, there must be a case or controversy.[471] It is generally accepted that a person cannot sue herself. Courts and commentators, however, have also recognized that "[t]he "talismanic 'a person cannot sue herself' collapses . . . when the 'person' is the United States government."[472] For Herz, the capacities of the dueling agencies are critical. If the suit is between a regulating agency and regulated agency, Article III is not a bar.[473] By contrast, for Joseph Mead, justiciability "depends on whether the interests asserted by the competing parties are sovereign or proprietary."[474] Specifically, he argues claims by governmental entities alleging

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[464] 5 U.S.C. § 612.

[465] *See* Northwest Min. Ass'n v. Babbitt, 5 F.Supp.2d 9 (D.D.C. 1998) (agreeing with issues raised by SBA and remanding the regulation to DOI); Lehigh Valley Farmers v. Block, 640 F.Supp. 1497, 1499 (E.D. Pa. 1986) (noting that the Chief Counsel withdrew his motion to intervene "without explanation"). But a past Chief Counsel of the agency testified in 2002 that in "other instances", "the mere threat of using our amicus authority has been sufficient for an agency to reconsider its position." Testimony by Thomas Sullivan to House Committee on Small Business (March 6, 2002), https://www.sba.gov/sites/default/files/files/test02_0306.pdf.

[466] *Cf.* Susan P. Thurm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1373–74 (1991).

[467] Michael Herz, *United States v. United States: When Can the Federal Government Sue Itself?*, 32 WM. & MARY L. REV. 893, 895, 930 (1991).

[468] Herz, *supra* note 467, at 973.

[469] *See supra* notes 10–13 & accompanying text.

[470] *Cf.* Herz, *supra* note 467, at 988 (contending such litigation might be plausible as a constitutional matter, though it has never occurred).

[471] Many believe that Article III requires an actual dispute between adverse parties. *See* James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. 1346, 1355 (2015) (questioning conventional wisdom and arguing that the Constitution also permits federal courts to "entertain applications from parties seeking to assert . . . a legal interest under federal law").

[472] Herz, *supra* note 467, at 900.

[473] *Id*. at 959–61.

[474] Mead, *supra* note 461, at 1254.

proprietary injuries are permitted, but those by two agencies both asserting sovereign interests are not.[475] Thus, for Mead, it is Article III, not Article II, that bars litigation over a policy determination, even if both agencies are independent regulatory commissions. For both, the agency's structure—it being an independent regulatory commission or cabinet department—is not determinative.[476]

Though we recognize the difficulty of the issue, we are more open than Mead to the constitutionality of a provision like the one in Dodd Frank authorizing judicial resolution of the CFTC-SEC conflict. In part, our disagreement stems from a more restrained interpretation of the cases on which he relies.[477] For instance, we read one of the cases—*Newport News Shipbuilding & Dry Dock Co.*—as based on statutory grounds rather than constitutional grounds, and as acknowledging the validity of interagency suits to protect a sovereign interest when authorized by Congress.[478]

Although at first blush, litigation between two government agencies over the scope of their powers seems a questionable basis for federal jurisdiction, we are inclined to believe such suits generally are constitutional under Article III when authorized by Congress. Consider the case of two agencies that have taken contradictory positions regarding their regulatory jurisdiction or adopted inconsistent regulations regarding the same transaction. A private party such as the regulated entity would presumably have standing to obtain a judicial ruling on which agency had jurisdiction or which regulation was valid, using the APA to challenge these final actions and letting the two agencies fight out their legal claims.[479] The Title VII case discussed previously suggests an interpleader action under Rule 22 would be appropriate, and whether or not this is technically correct in a given case, the litigation would have the flavor of an interpleader action: the plaintiff is caught between the two other parties, who take positions adverse to each other. The basis for interpleader is that the dispute is at least in part between the defendants, with the plaintiff as an innocent bystander. There seems no reason why the Constitution should block the more direct mechanism of a suit directly between those parties, provided the suit is authorized by statute.[480] As noted, even Justice Scalia seemed to acknowledge that different executive agencies are distinct legal entities for litigation purposes.[481] Thus, we are inclined to think Article III does not categorically exclude litigation between agencies with inconsistent legal positions on regulatory matters.

Direct suits also raise particular issues for internal agency conflict. Courts have allowed agencies to sue their employees in particular circumstances. Long ago, Congress permitted the

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[475] *Id*. at 1254–55.
[476] *Cf.* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 541 (1965) (suggesting that the President is the "logical forum" for disputes between officers directly controlled by her).
[477] Mead, *supra* note 461, at 1256.
[478] *See* Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 133 (1995) ("Those two cases certainly establish that Congress *could* have conferred standing upon the Director without infringing Article III of the Constitution; but they do not at all establish that Congress did so.").
[479] See the discussion of the *Peabody* case in Section IV.C.3, *supra*.
[480] In at least some cases, when both parties must be represented by the Attorney General, that could be a signal that Congress intended disputes to be settled internally, with the Executive Branch taking a unified position, rather than having access to the courts.
[481] Our discussion focuses on Article III. We do not exclude the possibility that a statute authorizing such litigation might sometimes interfere with the President's control of the Executive Branch sufficiently to raise an Article II barrier.

Postmaster General, a core executive official, "to cause a suit to be commenced" against a deputy postmaster who was behind in sending in revenue to the federal government.[482] And employees can bring suit against their agencies through qui tam litigation.[483] Litigation authority for agencies can also shape internal agency conflict. Giving an agency litigation authority "changes the dynamics between general counsels and other professionals *within* the agency" because agency personnel are less likely to oppose general counsels, and sole responsibility leads to blame or credit.[484]

In sum, while direct judicial resolution of agency conflict may be an attractive design choice to congressional committees that cannot agree or to a Congress skeptical of resolution by the White House, litigation between agencies presents vexing constitutional issues. Until recently, such design choices were rather rare. To the extent that more conflict will be thrown to the courts, these issues may be harder to avoid. We generally prefer to deemphasize Article III concerns about the identity of the parties.[485] We would instead encourage courts to look carefully at whether intra-executive litigation is consistent with congressional intent and to consider requirements that agencies exhaust administrative remedies where available, so courts are not in the position of deciding disputes that could have been resolved by OLC or the SG.[486]

Intra-executive litigation is undoubtedly awkward, but as we have emphasized throughout, conflict can have its benefits. We have already seen a variety of mechanisms for resolving disputes between adversarial agencies, and litigation is not necessarily the best. On the other hand, the very possibility of litigation may force agencies to account for perspectives of other agencies in ways they might not otherwise do. We view that as a healthy effect.

V. Conclusion

We will not attempt to reprise the entire Article, but simply make a few key points To start, conflict within the administrative state seems ubiquitous at all levels, both vertically (White House versus agencies; political appointees versus civil servants) and horizontally (agencies versus agencies, commissioners versus commissioners). We emphasize, as we have throughout, that cooperation and accommodation are also important; the government could not function without them. But conflict is far from aberrational.

Conflict can be a design feature, not just an unfortunate lapse. We have discussed models of bureaucracy in which conflict stems naturally from differences in the incentives of different actors. Moreover, involving actors with different objectives and information can improve the

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[482] 1 Stat. 232, 238 (1794); *see also* Mead, *supra* note 461, at 1236.
[483] David Freeman, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913 (2014).
[484] Magill & Vermeule, *supra* note 56, at 1060–61 (emphasis added).
[485] Putting aside the intrabranch nature of the litigation, there are other issues relating to justiciability, such as whether the issues are sufficiently concrete to warrant court resolution, whether the suit is feigned, or whether there are judicially manageable standards, all of which should apply fully to intra-executive litigation. One special situation that may require separate treatment is where the authority to make final decisions for both agencies resides in the President. If so, the litigation seems to come at least uncomfortably close an advisory opinion to the President; or to put it another way, the cases comes very close to a suit by the President against herself. As observed earlier, however, all but the most fervent believers in the unitary executive would agree there are significant situations falling outside of this category.
[486] *Cf.* JAFFE, *supra* note 476, at 99.

system in various ways, much as the adversary system in litigation ensures different interests are fairly represented and provides incentives to develop fully the relevant facts and arguments.

Understanding the appropriate place of conflict in the administrative state leads us to be more accepting of agency tension in important legal settings. Unlike some judges and commentators, we support a presumption of *Chevron* deference even when agencies have overlapping jurisdictions. We also are open to the possibility of litigation between agencies, although we suggest some safeguards. Efforts to suppress conflicts between agencies can deprive both decision-makers and the public of valuable insights.

There is much more to be learned about adversarial agencies. We have had to give short shrift to the role of interest groups and congressional committees, and our exploration of the legal issues has necessarily been tentative and incomplete. For now, we hope at least to open a research avenue for others and augment the substantial body of work already addressed to agency cooperation. A full picture of bureaucratic relationships will need to include both.