



THE C. BOYDEN GRAY

Center for the Study  
of the Administrative State

ANTONIN SCALIA LAW SCHOOL • GEORGE MASON UNIVERSITY

---

# Submerged Independent Agencies

Brian D. Feinstein & Jennifer Nou

CSAS Working Paper 22-04

*Agency Independence After Seila and Collins*



ANTONIN SCALIA  
LAW SCHOOL

## SUBMERGED INDEPENDENT AGENCIES

Brian D. Feinstein and Jennifer Nou\*

*Forthcoming, University of Pennsylvania Law Review*

*Independent agencies are in the judicial crosshairs. Scholars criticize their efficacy—while still puzzling over how to define the form. By and large, this attention focuses on the top of the agency hierarchy, the extent to which agency heads are insulated from presidential control. What this perspective misses, however, is that power is also exercised by tenure-protected civil servants below. This phenomenon exists not because Congress has delegated them authority, but because executive branch actors have. Consequently, there exists another species of independent agency that requires a reckoning: call them “submerged independent agencies.” These entities are “agencies” because they wield discretionary governmental authority. They are “independent” because they are headed by career staff removable only for cause. And they are “submerged” in that they are relatively unknown to scholars, judges, and sometimes even agency heads themselves.*

*This Article introduces the concept of submerged independent agencies, sheds light on their scope, and reflects upon the resulting normative implications. Using over forty years of data drawn from the Federal Register, the analysis reveals that when political appointees delegate their statutory authority, the majority of these powers go to civil servants rather than fellow appointees. Once granted, they are rarely revoked. This behavior appears to be driven by strategic political considerations. Most notably, subdelegations to civil servants in executive agencies occur more frequently during the midnight period before a presidential transition — perhaps indicating an effort to entrench preferences. In addition, subdelegation may be less common during periods of divided party control between the presidency and House. This behavior may reflect*

---

\* Assistant Professor, The Wharton School of the University of Pennsylvania; Professor of Law, University of Chicago Law School, respectively. For helpful comments and conversations, thanks to Robert Glicksman, Daniel Hemel, William Howell, William Hubbard, Aziz Huq, Christine Jolls, Hal Krent, Jonathan Masur, Gillian Metzger, Michael Morse, Donald Moynihan, Richard Murphy, Anne O’Connell, Nick Parrillo, Jon Rogowski, Roberta Romano, Susan Rose-Ackerman, Ruth Bloch Rubin, and David Strauss [more acknowledgments to come]. Thanks also to participants in the C. Boyden Gray Center’s Agency Independence Roundtable; AALS Conversations on the Administrative State series; University of Chicago American Politics workshop and Law School Works-in-Progress workshop; and Yale’s Law, Economics, and Organization workshop. Thanks also to Courtney Butterworth, Michael Christ, Conor Ferrall, David Lamb, James Morrison, Abraham Moussako, Jacob Pavlecic, Jason Petty, Jessica Trafimow, Daniel Wang, and Jessica Yuan for excellent research assistance. The authors acknowledge the Gray Center’s generous financial support of this research.

*an attempt to avoid provoking congressional ire by reassigning powers that Congress had bestowed on others.*

*These findings raise several legal and normative concerns. Many submerged independent agencies are vulnerable to constitutional challenge and raise difficult statutory questions. Whether the phenomenon is ultimately desirable for the administrative state is an open, empirical question. On the one hand, subdelegations raise the prospect of agency burrowing and entrenchment, and thus diminish political accountability. On the other hand, they can foster expertise and reduce ossification by dispersing decision-making authority within an agency. Accordingly, we consider various institutional mechanisms to help political actors navigate these tradeoffs, such as processes for reviewing actions taken pursuant to delegated authority; regular sunsets of such authority; and a more robust process of revisiting subdelegations during presidential transitions.*

Introduction .....	2
I. Executive Branch Agency Design.....	10
A. Independent “Agencies” .....	10
B. Identifying Delegations.....	20
II. Findings .....	24
A. Delegators and Delegates .....	24
B. Trends.....	29
1. Initial Delegations.....	30
2. Revocations.....	36
C. Midnight Subdelegations .....	39
D. Congressional-Executive Dynamics .....	42
III. Implications .....	46
A. Legality .....	46
B. Tradeoffs .....	56
C. Oversight.....	59
Conclusion.....	61
Appendices .....	63

## INTRODUCTION

Debates about agency independence focus on agency heads: the secretaries, administrators, commissioners, and board members that lead the federal bureaucracy. The central question is whether individuals in those positions can be removed by the President at will or only for cause. In other words, can the President dismiss an agency’s leader for any reason at all, or do statutes require him to furnish one? If the former, then some consider the agency to be “executive” in nature, while the latter

renders the agency “independent.”<sup>1</sup> The basic idea is that when top personnel serve at the President’s pleasure, executive control over that agency is at its height. By contrast, when Congress limits the President’s ability to fire, it seeks to shield the agency from presidential influence.

Some have pushed back on this “binary” view of agencies, however, to insist that agency independence is instead a matter of degree.<sup>2</sup> From this perspective, what matters are not removal restrictions in isolation, but rather a number of factors bearing on the President’s ability to dictate policy. Think, for example, of multimember structures, partisan balancing requirements, or specified terms of tenure. The more robust each of these features are, the more difficult it is for the White House to call the shots. More effort, that is, is required to convince many agency heads instead of one; to convince those from a different party; and to remove someone entitled to a definite term. Because agencies possess these individual features to varying degrees, agency independence must be understood along a spectrum.<sup>3</sup>

Note that this perspective also looks to the top of the administrative hierarchy. This focus is understandable given that Congress typically grants final decision-making authority to agency heads. But the buck does not always stop with secretaries and commissioners.<sup>4</sup> Rather, these leaders often relinquish their decision-making authority to their subordinates. In other words, they subdelegate their power — not only to fellow political appointees, but often to tenure-protected career staff.<sup>5</sup> These subdelegations are sometimes legally enforceable, but even when they are not, norms

---

<sup>1</sup> See Jacob Gersen, *Designing Agencies*, in DANIEL FARBER & ANNE JOSEPH O’CONNELL EDS., RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 333, 347 (2010) (“Independence is a legal term of art in public law, referring to agencies headed by officials that the President may not remove without cause. Such agencies are, by definition, independent agencies; all other agencies are not.”).

<sup>2</sup> See Kirti Datla & Richard Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769 (2013). See also Rachel Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEXAS L. REV. 15 (2010); Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 6 (2013) Geoffrey Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41 (1986); David Lewis & Jennifer Selin, *Political Control and the Forms of Agency Independence*, 83 GEO. WASH. L. REV. 1487, 1504-5 (2015); Jennifer Selin, *What Makes An Agency Independent?* 59 AM. J. POL. SCI. 971 (2015). Judges have also made similar observations. See, e.g., *See Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 547 (2010) (Breyer, J., dissenting) (arguing that agency independence depended on a number of factors, including its separate budgeting and litigating authority and, “above all, a political environment, reflecting tradition and function, that would impose a heavy political cost” upon a President seeking to remove without cause).

<sup>3</sup> See sources cited *supra* note 2.

<sup>4</sup> See Daniel Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1150, 1160 (2014) (challenging the conventional wisdom that considers agency heads as the “presumed decision makers” and sees administrative power placed in the hands of a “fixed cast of players”).

<sup>5</sup> See Jennifer Nou, *Subdelegating Powers*, 117 COLUM. L. REV. 473 (2017). As used here, the term “subdelegation” refers only to internal delegations within agencies. We do not explore the distinct but related phenomenon in which the President delegates statutorily-granted authority to various agency heads or when Congress delegates to internal units within a conventional agency.

and resource constraints often result in final, discretionary authority below.<sup>6</sup> And these delegations to civil servants, as this Article will show, are more common than previously understood.

Not only are such delegations pervasive, but they are also often substantial in scope. They are decidedly not garden-variety requests to fetch coffee and make copies, figuratively speaking, but rather decisions that affect third parties' legal rights and obligations. Take, for example, the Administrator of the National Highway Traffic Safety Administration (NHTSA)'s decision to assign rulemaking authority to a careerist associate administrator.<sup>7</sup> The action gave the civil servant the authority "to exercise the powers and perform the duties of the Administrator" to "issue motor vehicle safety and theft prevention standards" as well as "average fuel economy standards."<sup>8</sup> Notably, the NHTSA Administrator reserved the authority to issue, amend, or revoke final rules concerning safety and fuel-economy standards,<sup>9</sup> but did not do so for theft-prevention standards.<sup>10</sup>

Accordingly, NHTSA's Associate Administrator for Rulemaking — again, a tenure-protected civil servant — has made consequential use of this delegated authority. In recent years, the Associate Administrator has invoked it to grant exemptions to automakers from a theft-prevention regulation;<sup>11</sup> issued notices of proposed rulemakings concerning fuel-economy calculations and safety standards;<sup>12</sup> and delayed, for a year or more, the effective date of more rigorous safety regulations

---

<sup>6</sup> *Id.*

<sup>7</sup> 50 Fed. Reg. 7345-01 (Feb. 22, 1985); *see also* U.S. SENATE COMM. ON GOV'T AFFAIRS, POLICY AND SUPPORTING POSITIONS 150-51 (1984) (identifying the administrator and associate administrator for rulemaking as, respectively, a presidential appointment and career appointment).

<sup>8</sup> *Id.* (codified at 49 CFR § 501.8)

<sup>9</sup> *Id.* (citing 49 CFR § 501.7 (providing these exemptions for the issuance, amendment or revocation of rules under, most notably, 49 U.S.C. chs. 301 (safety) and 329 (fuel economy))).

<sup>10</sup> *See* 49 CFR § 501.7 (not mentioning theft-prevention or 49 U.S.C. ch. 331 among the administrator's reservations of authority). The version of 49 CFR § 501.7 in effect at the time of the 1985 subdelegation contained a substantial similar list of reservations of authority, *see* <https://babel.hathitrust.org/cgi/pt?id=mdp.39015023113296&view=1up&seq=41&skin=2021>.

<sup>11</sup> <https://www.federalregister.gov/documents/2020/08/12/2020-17596/petitions-for-exemption-from-the-federal-motor-vehicle-theft-prevention-standard>;  
<https://www.federalregister.gov/documents/2020/05/11/2020-10028/petitions-for-exemption-from-the-federal-motor-vehicle-theft-prevention-standard>;  
<https://www.federalregister.gov/documents/2013/04/09/2013-08225/petition-for-exemption-from-the-vehicle-theft-prevention-standard-bmw-of-north-america-llc>

<sup>12</sup> <https://www.federalregister.gov/documents/2005/08/30/05-17006/average-fuel-economy-standards-for-light-trucks-model-years-2008-2011> (fuel economy);  
<https://www.federalregister.gov/documents/2002/12/16/02-31522/light-truck-average-fuel-economy-standards-model-years-2005-07> (fuel economy);  
<https://www.federalregister.gov/documents/2005/08/23/05-16661/federal-motor-vehicle-safety-standards-roof-crush-resistance> (roof safety);  
<https://www.federalregister.gov/documents/2019/02/28/2019-03181/federal-motor-vehicle-safety-standards-electric-powered-vehicles-electrolyte-spillage-and-electrical> (post-crash electric shock prevention in electric cars); <https://www.govinfo.gov/content/pkg/FR-1994-07-08/html/94-16493.htm> (anti-theft).

concerning many auto parts.<sup>13</sup> Indeed, the Associate Administrator’s website takes public credit for the agency’s actions, stating that the careerist’s “office is responsible for setting the nation’s vehicle safety standards, fuel economy regulations, anti-theft and consumer information regulations.”<sup>14</sup>

Consider another high-profile devolution of authority that has been in place for over twenty years. In 1990, Congress instructed the Secretary of Health and Human Services (HHS) to issue a recall upon finding that a medical device “would cause serious adverse health consequences.”<sup>15</sup> The Secretary promulgated a rule delegating this authority to the Food & Drug Administration (FDA) Commissioner,<sup>16</sup> who then passed that final decision-making authority down in 2001 to sixteen separate FDA career executives, all directors and deputy directors of various FDA offices and centers.<sup>17</sup> Many of the resulting recalls have been high-profile and controversial.<sup>18</sup> More broadly, a recent study found that career employees issued “almost all” of the 1,889 FDA rules published from 2001 to 2018.<sup>19</sup> In other words, virtually every final rule issued by the FDA over an almost twenty-year period was signed by a civil servant. Indeed, we find that FDA is the agency with the most published subdelegations in our dataset.

Multimember commissions devolve their authority too, though the dynamics can be more complex, especially with partisan balancing requirements. In 2011, for example, a Democratic-dominated Federal Communications Commission delegated authority to its Wireless Telecommunication Bureau (WTB) — headed by a career executive — to resolve disputes arising out of a rule governing domestic data

---

<sup>13</sup> See, e.g., <https://www.federalregister.gov/documents/2008/08/28/E8-19837/federal-motor-vehicle-safety-standards-lamps-reflective-devices-and-associated-equipment> (headlights); <https://www.federalregister.gov/documents/2006/12/13/E6-21207/federal-motor-vehicle-safety-standards-brake-hoses> (brake parts); <https://www.federalregister.gov/documents/2004/03/12/04-5691/federal-motor-vehicle-safety-standards-bus-emergency-exits-and-window-retention-and-release> (bus emergency exits).

<sup>14</sup> Ryan Posten, NHTSA Leadership, <https://www.nhtsa.gov/nhtsa-leadership/ryan-posten>

<sup>15</sup> Safe Medical Devices Act of 1990, § 8; 21 U.S.C. § 360h(e).

<sup>16</sup> 61 Fed. Reg. 59004-01 (Nov. 20, 1996).

<sup>17</sup> 66 Fed. Reg. 30992-01 (June 5, 2001). These officials include the Director and Deputy Director for the Office of Compliance and the Director and Deputy Directors of the Center for Biologics Evaluation and Research, among other similarly situated officials.

<sup>18</sup> See, e.g., *Heart Device Parts Recalled*, N.Y. TIMES (Dec. 15, 2011), <https://www.nytimes.com/2011/12/16/business/fda-recalls-faulty-leads-in-heart-device.html?searchResultPosition=1> (recalling a defibrillator implanted in approximately 79,000 patients); Denise Grady, *Riddled With Metal by Mistake in a Study*, N.Y. TIMES (Mar. 21, 2011), <https://www.nytimes.com/2011/03/22/health/22breast.html> (FDA approves a temporary silicone breast implant following an abbreviated test period, then issues a recall due to metal fragments being left in breast tissue, and is subject to heavy criticism).

<sup>19</sup> See ANGELA ERICKSON & THOMAS BERRY, BUT WHO RULES AND RULEMAKERS: A STUDY OF ILLEGALLY ISSUED REGULATIONS AT HHS 20 (2019), available at <https://pd.pacificlegal.org/HHSReport>.

roaming.<sup>20</sup> The delegation was made after a 3-2 vote along party lines.<sup>21</sup> Three years later, the head of the WTB granted a petition in favor of T-Mobile’s interpretation of the rule with which the sitting Republican commissioners disagreed.<sup>22</sup> The Republican commissioners publicly called on the chair to bring the matter to a full commission vote, which never occurred.<sup>23</sup> One of the commissioners protested that he “didn’t just go through the confirmation process in order to have bureaus and advisory committees make decisions that should be made by Commissioners.”<sup>24</sup> Notwithstanding the commissioner’s complaint, the WTB’s decision stands.<sup>25</sup>

Examples like these reflect a bureaucracy overseen by civil servants and hidden in plain sight. It hums along even when the agency is beset by vacancies at the top or otherwise helmed by acting officials.<sup>26</sup> Even when presidentially-appointed, Senate-confirmed officials are in place, some are unaware that subdelegated authority is even being exercised below.<sup>27</sup> In his advice to new commissioners, for example, a former commissioner of the Securities & Exchange Commission (SEC) told of his experience: “from time to time, you might read in a newspaper about a ‘Commission action,’ and you will have no idea what it is about.”<sup>28</sup> That is often because “the staff has taken action pursuant to the more than 376 separate rules where the Commission previously granted delegated authority to the SEC staff.”<sup>29</sup> His tone of resignation reflects not only the magnitude of subdelegated authorities, but also the costs of learning about them.

Notably, the subdelegations studied here are created through relatively entrenched grants of power by executive actors. First, they are sticky because they are published in the Federal Register and then codified in the Code of Federal Regulations (CFR). The Federal Register is the federal government’s official daily publication for rules, including the internal rules of agency practice and procedure delegating authorities.<sup>30</sup> The CFR, in turn, is the government’s “codification of the general and

---

<sup>20</sup> Roaming Order (2011), [https://docs.fcc.gov/public/attachments/FCC-11-52A1\\_Rcd.pdf](https://docs.fcc.gov/public/attachments/FCC-11-52A1_Rcd.pdf)

<sup>21</sup> *Id.*

<sup>22</sup> *See* In the Matter of Reexamination of Roaming Obligations of Com. Mobile Radio Serv. Providers & Other Providers of Mobile Data Servs., 29 F.C.C. Rcd. 15483, 15485–86 ¶7 (2014).

<sup>23</sup> <https://www.fcc.gov/document/comms-pai-and-orielly-joint-stmt-abuse-delegated-authority> [<https://perma.cc/K9XR-RR9E>]

<sup>24</sup> *Id.*

<sup>25</sup> <https://perma.cc/G4LX-BQUZ> (last updated June 6, 2019).

<sup>26</sup> *See* Anne Joseph O’Connell, *Actings*, 120 COLUM. L. REV. 613 (2020).

<sup>27</sup> *See infra*

<sup>28</sup> Luis Aguilar, *Commissioner Aguilar’s (Hopefully) Helpful Tips for New SEC Commissioners* (Nov. 30, 2015), <https://www.sec.gov/news/statement/helpful-tips-for-new-sec-commissioners.html>.

<sup>29</sup> *Id.*

<sup>30</sup> Federal Register, 1936-present, <https://www.govinfo.gov/help/fr#about> (describing the Federal Register as “the official daily publication for rules, proposed rules, and notices of Federal agencies and organizations, as well as executive orders and other presidential documents”).

permanent rules published in the Federal Register.”<sup>31</sup> Both are highly formal venues that require attention to drafting conventions and review by the Office of Federal Register. <sup>32</sup> Second, as we will show, executive actors often issue subdelegations during the midnight period before a presidential transition; as a result, reversal can be costly for new administrations given their competing priorities and steep learning curves. Finally, these delegations can also become functionally entrenched as various interests coalesce around them.<sup>33</sup> Indeed, our study reveals that, once granted, these more formal delegations are rarely revoked.<sup>34</sup>

As such, there exists another species of independent agency that demands a reckoning. Call these *submerged independent agencies*. Submerged independent agencies are headed by civil servants that exercise authority originally delegated by Congress. They are “agencies” under almost any definition of the term: their heads exercise discretionary governmental authority.<sup>35</sup> As a result, there are often elaborate bureaucracies that arise to support this decision-making. <sup>36</sup> And these agencies are “independent” under either the binary or non-binary view: They are headed by tenure-protected officials. They also exist on a spectrum featuring heads with varying degrees of independence, from members of the Senior Executive Service to lower-level career staff. <sup>37</sup> Finally, these agencies exist below the surface, in that they are relatively unknown to the scholarly literature and the public more broadly. As mentioned, sometimes they are even unknown to political appointees themselves.<sup>38</sup>

This Article introduces the concept of submerged independent agencies, sheds light on their scope, and reflects upon the resulting normative implications. Previous scholarship on subdelegations draws on disjointed examples to paint an incomplete picture of the phenomenon, while some of the legal analyses are already outdated.<sup>39</sup>

---

<sup>31</sup> Code of Federal Regulations, <https://www.govinfo.gov/app/collection/cfr/> (“The Code of Federal Regulations (CFR) annual edition is the codification of the general and permanent rules published in the Federal Register by the departments and agencies of the Federal Government.”).

<sup>32</sup> Office of the Federal Register, Document Drafting Handbook, <https://www.archives.gov/federal-register/write/handbook>

<sup>33</sup> See *infra*

<sup>34</sup> See *infra*

<sup>35</sup> See *infra* Part II.B.

<sup>36</sup> The Center for Biologics Evaluation and Research, for example, has numerous offices and staff that rival more familiar organizational charts at agencies like the Food, Drug Administration, of which it is a part. See <https://www.fda.gov/about-fda/center-biologics-evaluation-and-research-cber/center-biologics-evaluation-and-research>

<sup>37</sup> Schedule C. See *infra* Part II.A.

<sup>38</sup> See *supra* notes 27-29 and accompanying text.

<sup>39</sup> See Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 898 (2009); Nou, *supra* note 5. Previous legal scholarship, for example, has examined questions of statutory interpretation: whether Congress explicitly permitted the delegation and, if not, how to understand legislative silence or ambiguity. See, e.g., Nathan Grunstein, *Subdelegation of Administrative Authority*, 13 GEO. WASH. L. REV. 144 (1944) (describing the question “to be probed” as the extent to the question of the extent to which the power to subdelegate authority may be implied when Congress has not explicitly done so); Jason Marisam, *The Interagency Marketplace*, 96 MINN. L. REV. 886, 891 (2012) (noting that “[t]he question of whether Congress has authorized subdelegation is a matter of statutory interpretation”);



Building on and updating this work, our contributions are both conceptual—synthesizing themes of agency independence—and empirical. One of its main advances is to document systematically the extent and nature of subdelegations to civil servants through a new dataset. This dataset also has the potential to open new lines of scholarship akin to the decades of work on congressional delegation. Our descriptive findings, in turn, will likely generate further hypotheses for testing in future work, some of which is already in progress.<sup>40</sup>

More broadly, the lens we offer intervenes in several other existing literatures. For example, it complicates work on the “internal separation-of-powers,” which often portrays civil servants and political appointees as competitors and rivals.<sup>41</sup> When appointees grant power to aligned civil servants, especially in midnight periods, these two groups act in concert to perpetuate an administration’s preferences. In this sense, these dynamics involve a separation of parties rather than powers.<sup>42</sup> Finally, our findings further reinforce the descriptive observation that the executive branch is hardly unitary. While many have noted that the executive branch is a “they” and not an “it,”<sup>43</sup> submerged independent agencies show just how much delegated power civil servants wield.

The topic is also timely in light of the Trump Administration’s outgoing efforts to subject these agencies to greater political control.<sup>44</sup> President Trump’s executive order prohibited career staff from authorizing regulations, required that any rules be signed by a “senior appointee,” only allowed senior appointees to initiate rulemakings, and prohibited any future subdelegations of sign-off authority to staff.<sup>45</sup> Given its

---

Note, *Subdelegation by Federal Administrative Agencies*, 12 STAN. L. REV. 808 (1960). Related issues are the extent to which the President has an inherent constitutional authority to delegate, or whether the non-delegation doctrine demands congressional authorization. See Thomas Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2175 (2004). Still other scholars have proposed that judicial deference to agency interpretations should only extend to those signed-off by agency heads, rather than their subordinates. See David Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 238. In the context of acting officials and the Vacancies Act, Anne O’Connell explores many of the legal issues arising from delegated authority, which she argues functions as a “substitute” for acting leaders. See O’Connell, *supra* note 26, at 658, 682-89. See also Daniel Farber & Anne Joseph O’Connell, *Agencies as Adversaries* 1447-50 (2017) (analyzing subdelegation’s legal issues in context of agencies acting as adversaries).

<sup>40</sup> See, e.g., Brian Feinstein & Jennifer Nou, *Subdelegation with Partisan Alignment* (working draft finding that political appointees subdelegate to civil servants when preferences align).

<sup>41</sup> See Jon Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227, 235 (2016); see also Michaels, *Enduring, Evolving*, *supra* note\_; Gillian Metzger, *The Interdependent Relationship between Internal and External Separation of Powers*, 59 EMORY L.J. 423 (2010); Katyal, *supra* note\_.

<sup>42</sup> Cf. Daryl Levinson & Richard Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

<sup>43</sup> See, e.g., Cass R. Sunstein & Adrian Vermeule, *The Law of “Not Now”: When Agencies Defer Decisions*, 103 Geo. L.J. 157, 161 (2014) (the “Executive Branch is a ‘they, not an it.’”).

<sup>44</sup> See Exec. Order No. 67,631, 84 Fed. Reg. 67,631 (Oct. 21, 2020); Exec. Order 13,979, 86 Fed. Reg. 6813 (Jan. 18, 2021).

<sup>45</sup> Exec. Order 13,979, *supra* note 44.

lame-duck timing, however, the order seemed more symbolic than substantive and was revoked about a month later by President Biden. The issue, however, is sure to reemerge during the next Republican administration. In addition to these hints of greater presidential scrutiny, private parties have already begun to challenge agency subdelegations as unconstitutional.<sup>46</sup> Once the extent of the phenomenon is better known, there is likely to be even more political attention and litigation.

The Article proceeds in three parts. Part I introduces the concept of submerged independent agencies. It situates the idea amidst empirical efforts to define the “agency” as a meaningful unit of analysis. While such efforts often rely on rule-like definitions, we offer a functional account grounded in legal theory and doctrine: An administrative agency is an entity that exercises discretionary governmental authority. Among other things, this principle helps to answer the question of when subunits within government should be treated separately. The Part then details our method for isolating independent agencies using forty years of data drawn from the Federal Register.

Part II then uses these data to present an empirical portrait of submerged independent agencies. It begins with the observation that the majority of internal delegations of governmental authority are grants from political appointees to civil servants, rather than other appointees. At first glance, the finding is perplexing: why would decision-makers voluntarily abdicate their power to tenure-protected staff over whom they have less control? To shed light on this question, we seek to understand time trends as well as any underlying political dynamics. First, we find a gradual decline in the frequency of subdelegations over the last four decades. Potential explanations include a decline in the stock of statutory authority available to delegate or an increasing preference not to publish delegated authorities. Subdelegations also tend to occur more frequently during the final three months of an outgoing presidential administration. Finally, some models show that they are less common during periods of divided party control between the presidency and House of Representatives. Consistent with a broader literature, this finding suggests that submerged independent agencies emerge as the result of strategic political calculations.<sup>47</sup>

Part III then takes a step back to consider the legal and normative implications. Submerged independent agencies raise constitutional and statutory issues. Because civil servants are entrusted with significant governmental authority, they may be improperly appointed. Because these same civil servants are removable only for cause, the subdelegations may also interfere with the President’s ability to “take care” that the laws are faithfully executed. That said, agencies may be able to cure the constitutional defects through prospective and *ex post* ratification and review procedures.<sup>48</sup> More broadly, submerged independent agencies reanimate classic debates in administrative law that have long surrounded the form. On the one hand, they likely facilitate the development and incorporation of expertise within the executive branch. On the other hand, they suffer from familiar concerns about political

---

<sup>46</sup> See, e.g., *Moose Jooce et al. v. FDA*. <https://pacificlegal.org/case/vape-litigation/>

<sup>47</sup> See, e.g., DAVID LEWIS, *PRESIDENTS AND THE POLITICS OF AGENCY DESIGN* (2003).

<sup>48</sup> See Part III.A, *infra*.

accountability. Accordingly, we explore institutional mechanisms to assist political actors in navigating this tradeoff. For instance, we recommend that political actors consider establishing a process for reviewing actions taken pursuant to delegated authority; sunseting these delegations; and requiring more review of the delegated authorities themselves, especially around presidential transitions.

## I. EXECUTIVE BRANCH AGENCY DESIGN

It is well-known that Congress and the President design agencies.<sup>49</sup> Scores of studies attempt to understand when and why they do so.<sup>50</sup> Less known, however, is the fact that lower-level executive officials — agency heads and other political appointees — design agencies as well. Like Congress, they sometimes choose the independent agency form. This observation raises a number of questions mirroring those from one level up: which agencies engage in this practice, how often, and why? This Part lays the foundation needed to address these questions. The first section isolates the relevant unit of empirical analysis, the “agency,” which we functionally define as the exercise of discretionary governmental authority. The second section then operationalizes the concept and describes the method used to generate our dataset.

### A. Independent “Agencies”

Debates about independent agencies focus more on what it means to be “independent” rather than on what it means to be an “agency.” The term “agency,” in the administrative sense, means different things for different purposes.<sup>51</sup> The definitional issue often arises when the boundaries of a governmental entity are ambiguous, for example, when an organization straddles the border between the public and private sectors or between federal and state governments.<sup>52</sup> But these contested

---

<sup>49</sup> See, e.g., Roberta Romano, *Does Agency Structure Affect Agency Decisionmaking? Implications of the CFPB’s Design for Administrative Governance*, 36 YALE J. REG. 273 (2019); Brian D. Feinstein, *Designing Executive Agencies for Congressional Influence*, 69 ADMIN. L. REV. 259 (2017); Patrick Corrigan & Richard Revesz, *The Genesis of Independent Agencies*, 92 N.Y.U. L. REV. 637 (2017); William Howell & David Lewis, *Agencies by Presidential Design*, 64 J. POL. 1095 (2002).

<sup>50</sup> Cites. *Id.*

<sup>51</sup> See Christopher Berry & Jacob Gersen, *Agency Design and Political Control*, 126 YALE L.J. 1002, 1019 (2017) (observing that the term “agency” has several meanings in political science and is a term of art in administrative law”); Anne Joseph O’Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 894 (2014) (observing that “an agency for constitutional purposes does not mirror an agency for statutory purposes, and an entity can be an agency under one statute but not another”); JENNIFER SELIN & DAVID LEWIS, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES, ADMIN. CONF. OF U.S. 14 (2nd ed).

<sup>52</sup> O’Connell, *supra* note 51, at 842 (describing “boundary” organizations).

borders can also exist *within* an organization. For instance, is the Public Company Accounting Oversight Board (PCAOB) within the SEC a standalone “agency?” What about the Wireless Telecommunications Bureau within the Federal Communications Commission? One possible intuition is that lower-level units that exercise some threshold level of policymaking discretion should be thought of as separate agencies. For example, commentators often treat the Federal Energy Regulatory Commission as a separate entity,<sup>53</sup> even though it is technically within the Department of Energy.<sup>54</sup> The same goes for the FDA, housed within the Department of Health & Human Services or the Internal Revenue Service within the Department of Treasury.<sup>55</sup>

Social scientists, for their part, have been surprisingly imprecise when faced with these questions. What counts as an “agency” often depends on decisions made in pre-existing datasets, often with limited explanation.<sup>56</sup> But some data sources contain about 100 agencies,<sup>57</sup> while others count over 600.<sup>58</sup> This disparity is a problem for those who wish to compare findings and study the administrative state in a systematic way. Perhaps the most thoughtful attempt to define the concept for empirical purposes comes from Jennifer Selin and David Lewis.<sup>59</sup> They define an “agency” as any “federal executive instrumentality directed by one or more political appointees nominated by the President and confirmed by the Senate.”<sup>60</sup>

As for the question of which units within an agency to include, Selin and Lewis also incorporate “political[ly] important” bureaus and other subunits if they (1) issue a rule to Congress reported under the Congressional Review Act; (2) are listed in data sources as reporting to an under-secretary or equivalent; or (3) are excluded for national security reasons.<sup>61</sup> These criteria lead them to generally exclude Offices of

---

<sup>53</sup> See, e.g., Datla & Revesz, *supra* note 2, at 784 n. 90 (explaining why they included FERC, an agency “housed within” another agency).

<sup>54</sup> Federal Energy Regulatory Commission, <https://www.usa.gov/federal-agencies/federal-energy-regulatory-commission> (describing FERC as “Executive Department Sub-Office/Agency/Bureau” and listing the Department of Energy as the “parent agency”).

<sup>55</sup> See, e.g., SELIN & LEWIS, *supra* note 51 (explaining why they include the FDA and IRS in their analysis “given the political importance of many agency bureaus”).

<sup>56</sup> See, e.g., Berry & Gersen, *supra* note 51, at 1019 (drawing from the Federal Assistance Award Data System and stating that they “focus on the highest possible level of aggregation in the data and, therefore, analyze spending flows from the Department of Interior rather than from sub-units like the Bureau of Land Management,” though they “plan to focus on spending patterns by these smaller units within larger agencies.”); Ahrum Chang, *Resource Stability and Federal Agency Performance*, 51 AM. REV. PUB. ADMIN. 393 (2001) (studying 52 agencies based on availability of Performance Accountability Reports). Datla & Revesz, *supra* note 2, at 784 (drawing initial agencies from the U.S. Government Manual without explanation as to why).

<sup>57</sup> Department of Justice, Data, <http://www.foia.gov/data.html>. See SELIN & LEWIS, *supra* note 55, at 12 (discussing disparities in definitions and resulting counts)

<sup>58</sup> *Id.*

<sup>59</sup> SELIN & LEWIS, *supra* note 51, at 13-14.

<sup>60</sup> Gen. Servs. Admin., A-Z Index of U.S. Government Departments and Agencies, <https://www.usa.gov/federal-agencies/a>. See Selin & Lewis, *supra* note 59.

<sup>61</sup> SELIN & LEWIS, *supra* note 51, at 14-15.

Public Affairs and General Counsel Offices, but to include bureaus like the Department of Defense’s National Security Agency and the Department of Energy’s National Nuclear Security Administration.<sup>62</sup> In doing so, Selin and Lewis should be lauded for offering a definition that rigorously synthesizes normative and empirical concerns.<sup>63</sup> Many observers care about the political dynamics of agencies. So Selin and Lewis sensibly focus on indicia of oversight by political actors, such as congressional review. Perhaps implicit in their definition is an emphasis on political salience, for which presidential-nomination and Senate-confirmation serves as a proxy.

Whereas Selin and Lewis offer a politically-informed definition of agencies, we present a more functional, legally-grounded one. Instead of focusing on political resonance, we ask whether an administrative unit exercises discretionary governmental authority. In other words, we look at whether it is empowered to act independently of other officials.<sup>64</sup> This more functional conception is intended to track a range of constitutional and statutory concerns about the exercise of delegated power by administrative actors. To be sure, there are subtle differences between various legal definitions of the “agency” that matter in fact-specific constitutional or statutory disputes. Nonetheless, we argue that there is a common conceptual core that is possible to recognize in service of isolating administrative units within larger ones. The hope is that this alternative definition will inform future empirical work on administrative agencies more broadly.

Consider, for example, constitutional disputes about the President’s removal power: an oft-cited hallmark of agency independence.<sup>65</sup> While the caselaw sometimes refers to the “agency” at issue,<sup>66</sup> the Supreme Court does not meaningfully grapple

---

<sup>62</sup> *Id.* at 15, nn. 55 & 56.

<sup>63</sup> Cf. Robert M. Fishman, *Rethinking Dimensions of Democracy for Empirical Analysis: Authenticity, Quality, Depth, and Consolidation*, 19 ANN. REV. POL. SCI. 289 (2016) (observing, in the context of disagreements over how to define “democracy,” that “[i]t is only through conceptual work simultaneously oriented toward both normative concerns and empirical research that progress toward such a consensus can be made.”).

<sup>64</sup> To be sure, the concept of “authority” is a nuanced one. We seek to give it content by reference to examples and other verbal formulations. It can also be useful to think of it in Joseph Raz’s terms, that is, as the exercise of reason-displacement as grounds for action. See, e.g., Joseph Raz, *Authority and Justification*, 14 *Philosophy & Public Affairs* 3 (1985) (“The fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should exclude and take the place of some of them.”).

<sup>65</sup> See, e.g., Breger & Edles, *supra* note 1, at 1138 & n.131 (“The critical element of independence is the protection-conferred explicitly by statute or reasonably implied against removal except ‘for cause.’”); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2376 (2001) (defining the President’s removal power as “the core legal difference” between independent and executive agencies); Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 330 (1989) (“The condition that makes the independent agency truly independent is a statutory restriction on removal for cause.”).

<sup>66</sup> See, e.g., *Collins v. Yellen*, 141 S. Ct. 1761, 1784 (2021) (“The FHFA (like the CFPB) is an *agency* led by a single Director, and the Recovery Act (like the Dodd-Frank Act) restricts the President’s removal power.”) (emphasis added).

with the concept as such in removal cases. Rather, what matters is that the “officer” exercise discretionary executive authority.<sup>67</sup> For example, *Morrison v. Olson* — which upheld removal restrictions on the Independent Counsel — never characterizes the Independent Counsel as an “agency.” Instead, what made the office an appropriate unit of constitutional analysis was the fact that the role was “executive” in the sense that it entailed “law enforcement functions that typically have been undertaken by officials within the Executive Branch.”<sup>68</sup> Most importantly, the Independent Counsel exercised discretionary authority in carrying out these executive functions.<sup>69</sup>

In a later case implicating removal restrictions, *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Court missed an opportunity for further clarification, while planting seeds for future development.<sup>70</sup> The case considered a double-for-cause removal scheme: the President could not remove members of the SEC at will; the SEC, in turn, could not fire members of PCAOB without cause.<sup>71</sup> PCAOB was a “private ‘non-profit’ corporation” modeled on “private self-regulatory organizations in the securities industry.”<sup>72</sup> In severing PCAOB’s removal restrictions, the Court did not analyze whether the entity was an “agency” for constitutional purposes or not. Instead, it merely relied on a party stipulation that PCAOB members are “part of the Government.”<sup>73</sup> The citation the Court invoked, however, suggests that it was clarifying that PCAOB was a governmental, rather than private, entity for constitutional purposes. It was not addressing the hierarchical question of whether PCAOB exercised sufficient discretion distinct from the SEC in ways pertinent to the analysis.<sup>74</sup>

---

<sup>67</sup> See Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. 1779, 1819 (2006) (“Structurally, regarding the President’s removal power as limited to only executive officers makes good sense.”)

<sup>68</sup> *Id.* at 691.

<sup>69</sup> *Morrison*, 487 U.S. at 696 (acknowledging that “the counsel is to some degree “independent” and free from executive supervision to a greater extent than other federal prosecutors”).

<sup>70</sup> See *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 486 (2010).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 484. See also O’Connell, *Bureaucracy at the Boundary*, *supra* note\_, at 858-59 (classifying PCAOB as an “agency-related nonprofit corporation”).

<sup>73</sup> *Free Enter.*, 561 U.S. at 485-86.

<sup>74</sup> In relying on the party’s stipulation, the Court cited *Lebron v. Nat. R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995). That case considered whether Amtrak, a “Government-created” corporation” was a governmental “agency” for First Amendment purposes. The *Lebron* Court concluded that it was — Congress had created Amtrak by statute for the “furtherance of governmental objectives” while retaining the authority to appoint a majority of its directors. *Id.* at 974–75 (holding that when “as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment”).

The Supreme Court revisited the question ten years later, this time in the context of asking whether Amtrak was also an agency for the purposes of a non-delegation analysis. The Court again concluded that it was since Amtrak exhibited the “practical reality of federal control and supervision.” *Dep’t of Transp. v. Ass’n of Am. Railroads*, 575 U.S. 43, 55 (2015) (“*Lebron* teaches that, for purposes of Amtrak’s status as a federal actor or instrumentality under the Constitution, the practical reality of federal control and supervision prevails over Congress’ disclaimer of Amtrak’s governmental status.”).

For that inquiry, the Court relied on another stipulation that PCAOB’s members were “executive officers,” specifically, “inferior officers” for Appointments Clause purposes.<sup>75</sup> Inferior officers are those actors that “exercise significant authority pursuant to the laws of the United States.”<sup>76</sup> The Court acknowledged, though did not hold, that civil servants traditionally do not fall in this category since they do not exercise significant legal authority, that is, authority that grants meaningful discretion.<sup>77</sup> Elsewhere, the Court referred to the powers of PCAOB as that of “determin[ing] the policy and enforcement of the laws of the United States.”<sup>78</sup> In this manner, the relevant unit of analysis for removal purposes is that of an executive officer that exercises discretionary governmental authority.

Similar emphasis on the exercise of discretionary governmental authority informs congressional and judicial attempts to define an “agency” for statutory purposes.<sup>79</sup> Take the Administrative Procedure Act (APA), which defines an “agency” as “each authority of the Government of the United States, whether or not it is within or subject to review by another agency.”<sup>80</sup> The definition, by its terms, contemplates that what are traditionally thought of as sub-agencies, such as the FDA, are “agencies,” since they are “within” or “subject to review” by another agency. The same goes for organizational units like offices and bureaus. When confronted with such internal entities, courts have further clarified that an agency is “any administrative unit with

---

In doing so, the Court rejected the D.C. Circuit’s efforts to distinguish between individual-rights-protecting provisions like the First Amendment and constitutional separations-of-power: “The structural principles secured by the separation of powers protect the individual as well.” *Id.* at 55.

Both *Free Enterprise Fund* and *American Railroads* implicated entities that straddle the public/private divide. So an inquiry into whether there was sufficient “federal control and supervision” to constitute a governmental entity seems sensible. But arguably different issues arise when the boundary is not horizontal – across the public/private divide – but vertical, that is, between different organizational levels.

<sup>75</sup> 561 U.S. at 506.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 507 (“Nothing in our opinion, therefore, should be read to cast doubt on the use of what is colloquially known as the civil service system within independent agencies.”).

<sup>78</sup> *Id.* at 483-84. (“May the President be restricted in his ability to remove a principal officer, who is in turn restricted in his ability to remove an inferior officer, even though that inferior officer determines the policy and enforces the laws of the United States?”).

<sup>79</sup> To be sure, Congress has used different textual formulations across different statutes. *See* Congressional Research Service, *supra* note 35, at 1 (observing that “the term ‘agency’ can mean different things in different contexts, depending on what statute is at issue). These different formulations can result in different applications, particularly when the entity in question overlaps with external bodies, such as private actors or state governments. *Id.*

<sup>80</sup> 5 U.S.C. § 551. The provision excludes Congress and the judiciary, as well courts martial, military commissions, and military authorities in time of war or in the field. *Id.* This definition is cross-referenced in a number of other statutes. *See, e.g.,* the Negotiated Rulemaking Act, the Regulatory Flexibility Act, and the Congressional Review Act. *See* Congressional Research Service, *supra* note Administrative Law Primer: Statutory Definitions of “Agency” and Characteristics of Agency Independence (May 22, 2014), [https://www.everycrsreport.com/files/20140522\\_R43562\\_9723a447364a5019efb1e2115b8231fdd3599743.pdf](https://www.everycrsreport.com/files/20140522_R43562_9723a447364a5019efb1e2115b8231fdd3599743.pdf).

substantial independent authority in the exercise of specific functions.”<sup>81</sup> In *Soucie v. David*, for example, the D.C. Circuit held that the Office of Science & Technology qualifies as a separate agency — despite being a unit of the Executive Office of the President — because it exercises “independent function[s] of evaluating federal programs,” that is, functions granting it discretion apart from the President.<sup>82</sup>

In this manner, our legally-informed definition of the agency focuses on discretionary governmental authority. This conception encompasses both traditional executive functions, as well as quasi-adjudicative and quasi-legislative ones that are nevertheless executive in nature.<sup>83</sup> Focusing on this functional definition allows us to locate units of analysis that track a range of normative concerns, such as the relative accountability or expertise of those that exercise collective, coercive power. Most importantly, it also elucidates how authority delegated from Congress to a political appointee and then delegated again to a civil servant results in a species of agency in its own right.

This claim requires us to show how the recipient of a subdelegation exercises *independent* discretion, despite her lower position in the administrative hierarchy. After all, one could argue, couldn’t the initial delegator simply reverse any decision made pursuant to the subdelegation? In other words, just because someone delegates to perform a function, it does not always mean they cannot subsequently undo a later performance of that function. While this premise may be true in some contexts,<sup>84</sup> it is less likely to be so for the class of subdelegations that we study: those that have been published in the Federal Register as rules and then, subsequently, in the CFR.

As an initial matter, when an agency official subdelegates their authority as a published rule in the CFR, that subdelegation may become judicially enforceable due to the *Accardi* doctrine, which requires an agency to follow its own rules.<sup>85</sup> In the paradigm cases invoking *Accardi*, a lower-level agency official acts pursuant to a subdelegated power. After a higher-level official overrules or otherwise reverses the decision, an adversely affected litigant brings suit arguing that the delegation should be enforced and the delegator’s decision nullified. The litigant, in other words, argues that the higher-level official has violated *Accardi* by failing to follow the entity’s own

---

<sup>81</sup> See, e.g., *Soucie v. David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971).

<sup>82</sup> *Id.* at 1084-75. A Senate report during the drafting of the APA also offered that an agency was “any officer or board” that “has authority to take final and binding action with or without appeal to some superior administrative authority.” S. Doc. No. 248, 79th Cong., 2d Sess. 13 (1945).

<sup>83</sup> *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1982 (2021) (“The activities of executive officers may “take ‘legislative’ and ‘judicial’ forms, but they are exercises of—indeed, under our constitutional structure they must be exercises of—the ‘executive Power,’ ” for which the President is ultimately responsible. 210 L. Ed. 2d 268 (2021)”). Specifically, *Arthrex* note that “[w]hile the duties of [Administrative Patent Judges] ‘partake of a Judiciary quality as well as Executive,’ APJs are still exercising executive power and must remain ‘dependent upon the President.’” *Id.* (citations omitted).

<sup>84</sup> For example, when a parent delegates the task of choosing a movie to a child and the child picks an unsatisfactory one, the parent can overrule the child.

<sup>85</sup> See *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954). See generally Thomas W. Merrill, *The Accardi Principle*, 74 GEO. WASH. L. REV. 569 (2006).



procedural rule.<sup>86</sup> Under these circumstances, courts will look at the language and form of the internal delegation to determine whether or not that rule should be enforced.

Indeed, this was the outcome of *Accardi* itself, which featured a subdelegation published in the CFR from the Attorney General to the Board of Immigration Appeals (BIA).<sup>87</sup> Joseph Accardi sought a discretionary suspension of deportation.<sup>88</sup> After initial proceedings before an agency adjudicator, but before his case reached the BIA, the Attorney General announced that he planned to deport Accardi and circulated a list with Accardi's name on it to members of the BIA, who affirmed the denial of the suspension of deportation.<sup>89</sup> The Supreme Court eventually found in Accardi's favor, however, citing the Attorney General's violation of the published subdelegation.<sup>90</sup> As the Supreme Court later characterized this holding, "so long as the Attorney General's regulations remained operative, he denied himself the authority to exercise the discretion delegated to the Board even though the original authority was his and he could reassert it by amending the regulations."<sup>91</sup> Other judicial decisions feature analogous facts: a delegator of authority attempts to overrule the delagatee, only to have a judge reverse the decision on the principle that an agency must abide by its own rules, including procedural rules subdelegating authority.<sup>92</sup>

Regarding the language of the delegation, one critical issue in these cases is how a judge interprets the rule subdelegating authority: did the delegator intend to divest themselves of that authority? Indeed, to ensure that an agency abides by its own rules under *Accardi*, the court has to interpret those rules.<sup>93</sup> Sometimes delegators are explicit about this intent. For example, one subdelegation from the Secretary of Commerce to the Director of the Census Bureau regarding population tabulations made clear that "[t]he determination of the Director of the Census shall not be subject

---

<sup>86</sup> See, e.g., *Accardi*, 347 U.S. 260; *Service v. Dulles*, 354 U.S. 363, 386 (1957); *Chevron Oil Co. v. Andrus*, 588 F.2d 1383 (5th Cir. 1979); *Skokomish Indian Tribe v. Gen. Servs. Admin.*, 587 F.2d 428 (9th Cir. 1978).

<sup>87</sup> 347 U.S. at 266 (explaining that the rule stated that "in considering and determining appeals, the Board of Immigration Appeals shall exercise such discretion and power conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case").

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 262.

<sup>90</sup> *Id.*

<sup>91</sup> *United States v. Nixon*, 418 U.S. 683, 696 (1974). The *Nixon* Court also observed that later cases "reaffirmed the basic holding of *Accardi*." *Id.* (citing *Seaton*, 359 U.S. 535, 79 (1959) and *Vitarelli v. Seaton*, 359 U.S. 535, 79 (1959)).

<sup>92</sup> See, e.g., *Service*, 354 U.S. at 386 (overturning a Secretary's decision to discharge an individual from the State Department based on previous regulations subdelegating the decision to the Deputy Under Secretary who had decided that the individual should not be discharged).

<sup>93</sup> *Nou*, *supra* note 5, at 521 (noting that "even when subdelegation takes the form of a legislative rule, courts must then engage in regulatory interpretation to determine whether the rule indeed divested the agency head of her authority").

to review, reconsideration, or reversal by the Secretary of Commerce.”<sup>94</sup> In other words, the delegator expressly stated that she would not disturb the decision of the delegatee. Another common formulation of this intent to divest authority is when the subdelegation makes clear that the delegatee’s decision will be “final.” Under these circumstances, a court will likely invoke *Accardi* against a Secretary who seeks to later reverse the Census Director’s decision.

Delegators can also be explicit in the other direction: that is, to make clear that they do not divest themselves of authority. Most commonly, agency heads explicitly “reserve” authority to exercise the delegated power themselves. Sometimes they issue blanket reservations of authority. The Secretary of Transportation, for example, declares that “except as otherwise provided,” she “may exercise powers and duties delegated or assigned to officials other than the Secretary.”<sup>95</sup> Alternatively, subdelegations can also specify reservations for individual grants of power. The Secretary of Agriculture specifically reserves authority from a delegation to the Under Secretary for Trade and Foreign Agricultural Affairs on issues “related to foreign agriculture” and for “[a]pproving export controls.”<sup>96</sup> Under these circumstances, courts generally decline to apply *Accardi* since the rule itself retains authority in the initial delegator.<sup>97</sup>

Between these two poles are a host of delegations that are ambiguous: they lack both clear reservations of authority and explicit intent to divest authority completely. Unfortunately, our dataset does not capture which delegations fall into each of these categories given the challenges of collecting and coding data on reservations of authority. Reservations, whether blanket or individual, are often placed in different parts of the Code of Federal Regulations and have idiosyncratic appearances in the Federal Register. They must be matched, often manually, with each delegated power through cross-references. Nevertheless, to try to get some sense of

---

<sup>94</sup> Department of Commerce, Report of Tabulations of Population to States and Localities Pursuant to 13 U.S.C. 141(c) and Availability of Other Population Information, 65 FR 59713-02 (Oct. 6, 2000); 15 C.F.R. § 101.1 (2001). Interestingly, the subdelegation was not without ambivalence. On the one hand, the Secretary refused to “review, reconsider[], or rever[se]” the decision below. *Id.* At the same, he also stated that the rule does not relieve[] the Secretary of Commerce of responsibility for any decision made by the Director of the Census pursuant to this delegation.” *Id.* It is unclear what the Secretary meant when he said that he still had “responsibility” for the decision even if he could not disturb it. Perhaps he was stating that he was still on the hook for the initial delegation itself.

<sup>95</sup> *See, e.g.*, 49 C.F.R. § 1.2, Reservations of Authority to the Secretary of Transportation (“All powers and duties that are not delegated by the Secretary in this part, or otherwise vested in officials other than the Secretary, are reserved to the Secretary. Except as otherwise provided, the Secretary may exercise powers and duties delegated or assigned to officials other than the Secretary.”); 7 C.F.R. § 780.3, Reservations of Authority (“Nothing contained in this part shall preclude the Secretary, or the Administrator of FSA, Executive Vice President of CCC, the Chief of NRCS, if applicable, or a designee, from determining at any time any question arising under the programs within their respective authority or from reversing or modifying any decision made by a subordinate employee of FSA or its county and State committees, or CCC.”).

<sup>96</sup> 7 C.F.R. § 2.26.

<sup>97</sup> *Chevron Oil Co. v. Andrus*, 588 F.2d 1383 (5th Cir. 1979) (allowing delegator to overrule delegate based on delegation’s language); *Skokomish Indian Tribe v. General Services Administration*, 587 F.2d 428 (9th Cir. 1978) (same).

magnitude, we drew a random sample of 200 of the delegations in our dataset and found only two for which explicit reservations were present in the same Federal Register entries. Further, none of the 200 delegations in this sample included an express statement of divestment within the same entry. For these more ambiguous rules, judges will defer to the agency after deploying the ordinary tools of regulatory interpretation.<sup>98</sup>

When an internal delegation is interpreted to grant a subordinate unreserved discretion, *Accardi* can thus give a subdelegation its teeth. This is especially true when the delegation’s form also suggests a binding intent. Indeed, one rationale for the doctrine is that when an agency issues a rule with the force of law — a “legislative rule” — such a rule is also binding on the agency.<sup>99</sup> Thus, if the rule is deemed legislative,<sup>100</sup> then a court can enforce the delegation: if the delegatee and the delegator disagree on an outcome, the delegatee’s decision can stand.

Even if a court classifies a rule as “non-legislative,” however, it may still enforce the rule against the agency. In *Morton v. Ruiz*, for example, the Court invalidated a Bureau of Indian Affairs regulation for failure to abide by a provision in an internal manual stating that such regulations should be published in the CFR.<sup>101</sup> The most coherent rationale under these circumstances is that of due process.<sup>102</sup> If the rule was intended to protect individual rights and an individual is harmed or otherwise relied on the rule, due process concerns may require that the agency decision that violated the procedure be struck down.<sup>103</sup> This justification would likely be most persuasive in the adjudicatory context.<sup>104</sup>

Separately, courts have sometimes also invoked the APA’s demand for reasoned explanation if the agency does not comply with its own rules. Failure to explain why the agency did not abide by the rule, in this view, is “arbitrary” and allows

---

<sup>98</sup> See *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (giving “controlling” weight to an agency interpretation so long as it is not “plainly erroneous or inconsistent with the regulation”); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2404 (2019) (stating that “a court should not afford *Auer* deference unless, after exhausting all the “traditional tools” of construction, the regulation is genuinely ambiguous”).

<sup>99</sup> See *Merrill*, *supra* note 85, at 597 (observing that “a strong duty of compliance attaches when the agency promulgates a ‘legislative rule’ ..... [which] are universally acknowledged as ‘binding’ on the agency and its personnel”).

<sup>100</sup> If the agency issues a subdelegation as a non-legislative procedural rule, which they often do, courts ask whether the rule “encodes a substantive value judgment or puts a stamp of approval or disapproval on a given type of behavior.” *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987). Alternatively, if the subdelegation is presented as an interpretive rule, then judges examine indicia such as whether the agency has invoked its general legislative authority, otherwise possesses an adequate legislative basis, amended a previous rule, or published the rule in the CFR. *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106 (D.C. Cir. 1993). CFR publication weighs in favor of treating the rule as binding and thus more judicially enforceable than had the rule not been published. See, e.g., *Health Ins. Ass’n of Am. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994).

<sup>101</sup> See, e.g., *Morton v. Ruiz*, 415 U.S. 199 (1974) (invalidating a regulation for failure to abide by a provision in an internal manual stating that such regulations should be published in the CFR).

<sup>102</sup> *Merrill*, *supra* note 74, at 581 (“Sometimes, if the regulation is designed to protect individual rights and the individual can show reliance or prejudice, a rule violation may implicate due process.”).

<sup>103</sup> *Id.*

<sup>104</sup> See *Londoner v. Denver*, 210 U.S. 373 (1908).

a court to vacate and remand the decision that violated the procedural rule.<sup>105</sup> For example, consider a case concerning an HHS Secretary's decision to overrule the FDA's determination to make Plan B available over-the-counter.<sup>106</sup> The judge explicitly took notice of the Secretary's subdelegation to the FDA commissioner regarding over-the-counter product approvals.<sup>107</sup> He observed that the HHS Secretary had not reserved the right to review or otherwise "intervene" in the FDA's decision-making.<sup>108</sup> As a result, the court characterized HHS' departure from agency practice as arbitrary and capricious.<sup>109</sup> In this manner, *Accardi* and ordinary arbitrariness review helps to furnish discretion on officials exercising subdelegated authority.

Discretion, however, not only arises *de jure*, but also from *de facto* considerations. The most important are information costs, that is, the resources required to learn about existing subdelegated authorities as well as what decisions are made pursuant to them. Because it is costly for delegator to learn about how delegates are exercising their authority, delegates often exercise great discretion in practice. In the words of the previously-mentioned SEC commissioner:

During my tenure, the staff has improved at giving Commissioners a "heads-up" about notable actions that the staff plans to take using its delegated authority. Nevertheless, there are still times when the staff acted based on delegated authority on important matters (or, at least, important to one or more Commissioners) without notice to the Commissioners.<sup>110</sup>

As a result, it is often extremely difficult for agency heads to learn about decisions made pursuant to delegated authority until after the fact. These information costs are particularly high for new political appointees with steep learning curves.

Finally, there are also norms or conventions that develop over time, which further allow the delegatee to exercise discretion independent of the preferences of the initial delegator.<sup>111</sup> Consider, once again, the FDA Commissioner. The FDA, by statute, is "established in" the Department of Health and Human Services (HHS).<sup>112</sup> The HHS Secretary explicitly has the authority to "provid[e] overall direction" and "prescribe" actions for the FDA Commissioner, who is removable at will.<sup>113</sup> Nevertheless, HHS rarely overturns FDA decisions under FDA's myriad subdelegated authorities, which helps explain the outcry over the aforementioned Plan B decision.

---

<sup>105</sup> *Id.* at 598.

<sup>106</sup> *Tummino v. Hamburg*, 936 F. Supp. 2d 162 (E.D.N.Y. 2013).

<sup>107</sup> *Id.* at 195 (noting that the relevant "delegation of authority is highly relevant to the discussion of the power of the Secretary and the scope of review").

<sup>108</sup> *Id.* at 186 (noting that the relevant subdelegation "includes a reservation of the Secretary's right to approve FDA regulations in some circumstances," but that there was "no reservation of any right to intervene in over-the-counter product approvals").

<sup>109</sup> *Id.* at 187 ("[I]t is hardly clear that the Secretary had the power to issue the order, and if she did have that authority, her decision was arbitrary, capricious, and unreasonable.").

<sup>110</sup> Aguilar, *supra* note 28.

<sup>111</sup> Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1207 (2013).

<sup>112</sup> 21 U.S.C. § 393(a).

<sup>113</sup> 21 U.S.C. §393(d)(2)(A).

As a result, an “unbroken practice of deference to the FDA seemed to have developed at the HHS level, and there were some grounds for thinking that the practice had hardened into a convention.”<sup>114</sup> Similar dynamics are also true for administrative law judges<sup>115</sup> and inspectors general, many of whom have been subdelegated authority. Under these circumstances, when the initial delegator attempts to overturn the decision of the delegatee, she will face pushback from both the delegatee and other political actors as well.

For these reasons, these CFR-published subdelegations to civil servants can be understood as delineating agencies that are important features of the administrative state. Their conceptual underpinnings mirror those of more traditional agencies frequently studied: like the Department of Transportation, for example, NHTSA’s Office of Rulemaking makes discretionary decisions pursuant to authority originally granted by Congress but delegated down. These subunits are usually bureaucracies in their own right. NHTSA’s Office of Rulemaking, for example, requested a budget last year of \$22.59 million.<sup>116</sup> As previously mentioned, the office takes public responsibility for NHTSA’s rules.<sup>117</sup> These submerged independent agencies should thus be included in future efforts to map and study the executive branch. The legal and conceptual basis provided here aims to sharpen what appear to be inchoate intuitions in the literature about which sub-administrative bodies are worthy of examination as separate units of analysis.

## B. Identifying Delegations

In this manner, there is a class of agencies exercising governmental authority with discretion independent of the delegator. Those headed by civil servants are particularly important to study in isolation because they are abiding, persistent features of the administrative state in two senses: (1) the subdelegations themselves are relatively entrenched;<sup>118</sup> as are (2) the delegateses — the career civil servants — carrying them out. Civil servants, that is, tend to remain in government through presidential transitions.<sup>119</sup> This is not, however, a story of the “permanent

---

<sup>114</sup> Vermeule, *supra* note 111, at 1208

<sup>115</sup> *Id.* at 1211-13.

<sup>116</sup> [https://www.nhtsa.gov/sites/nhtsa.gov/files/documents/fy\\_2021\\_nhtsa\\_congressional\\_justification.pdf](https://www.nhtsa.gov/sites/nhtsa.gov/files/documents/fy_2021_nhtsa_congressional_justification.pdf)

<sup>117</sup> *See supra* note 14 and accompanying text.

<sup>118</sup> *See infra* Part II.B.2. *See also* Nina Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before A New President Arrives*, 78 N.Y.U.L. REV. 557, 589 (2003) (characterizing “administrative policy entrenchment” as a “decision [that] is likely to be reversible at least as a procedural matter, [but] it is probable that the change will be costly”); *See* Daryl Levinson & Benjamin Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 408 (2015) (“At the most general level, ‘entrenchment’ means that political change has been made more difficult than it otherwise would (or should) be.”).

<sup>119</sup> *See* Alexander Bolton, John M. de Figueiredo, and David E. Lewis, *Elections, Ideology, and Turnover in the U.S. Federal Government*, 31 J. PUB. ADMIN. RESEARCH & THEORY 451, 463-64

bureaucracy” wresting control. Rather, these powers have been granted by political appointees themselves. In other words, the President’s agents have *chosen* to abdicate their authority when creating submerged independent agencies. The questions are why, to what extent, and where in the federal bureaucracy this behavior occurs.

To shed light on these inquiries, we used Westlaw’s searchable Federal Register database to locate final rules containing subdelegations of authority. Specifically, we isolated all entries on which the stem words “delegat-” and “authori-” appeared in the same paragraph. We chose this approach based on our qualitative reading of dozens of subdelegations and the ways in which they are usually drafted.<sup>120</sup> To corroborate this approach, we conducted a validity check using the Securities and Exchange Commission, which places its subdelegations consecutively in the CFR.<sup>121</sup> That placement makes locating the full set of SEC delegations in that agency more straightforward. We identified 206 SEC delegations in the Federal Register. The CFR sections in which SEC delegations are located also contain these same 206 delegations (as well as other delegations that occurred outside our study period). These 206 delegations in the CFR are cross-referenced with the Federal Register entries that we identified. Accordingly, we have strong reason to believe that we have collected essentially all of the subdelegations printed in the Federal Register during the study period.

With a team of research assistants, we then coded the search results for a number of variables. For each subdelegation, we recorded the codified text of the delegation; the positions delegating and receiving the authority; whether those positions are occupied by political appointees or civil servants; the dates on which the subdelegation was announced and went into effect; whether further redelegation is authorized; and whether the entry revokes a previous subdelegation. To identify civil servant versus political appointee status, we used the “Plum Book,” a quadrennial publication that lists over 7,000 executive-branch leadership positions that may be subject to noncompetitive (or political) appointment.<sup>122</sup> We classified an office as a political appointment if, in the most recent Plum Book published prior to the delegation, the type of appointment is listed as a presidential appointment with or without Senate confirmation; non-career, limited term, limited emergency, or Schedule C appointment; or an appointment excepted by statute. Career appointments and positions not listed in the relevant Plum Book are classified as civil service positions.

---

(2020) (finding varying degrees of stability in the career civil service after federal elections, but “negligible responsiveness to transitions” for lower-level career staff).

<sup>120</sup> Specifically, we used a variety of alternative search terms—e.g., “assign-” or “transfer” instead of “delegat-”—and read a sample of the Federal Register entries that these Westlaw searches returned to identify relevant entries. The only relevant entries that these alternative search terms returned would also have been obtained via our favored search terms.

<sup>121</sup> See 17 C.F.R. § 200.30 (listing SEC delegations).

<sup>122</sup> United States Government Policy and Supporting Positions (Plum Book), <https://www.govinfo.gov/collection/plum-book?path=/GPO/United%20States%20Government%20Policy%20and%20Supporting%20Positions%20%2528Plum%20Book%2529>

The process yielded 1,389 relevant Federal Register entries from June 14, 1979 through August 31, 2019. Because many of these entries contain multiple subdelegations, we then disaggregated them by each specific authority granted.<sup>123</sup> In all, the dataset initially contained 5,549 discrete subdelegations. We then used a machine-learning classification approach to isolate delegations of discretionary governmental authority — our main criterion for distinguishing those that demarcate agencies from those that do not.<sup>124</sup> A subdelegation furnishes discretion on the delegatee if it does not require the assent or review of the delegator. Examples of governmental authority include the power to promulgate regulations,<sup>125</sup> impose penalties,<sup>126</sup> grant or deny waivers of regulatory requirements,<sup>127</sup> and settle litigation to which the agency is a party.<sup>128</sup> By contrast, subdelegations that grant discretion to the delegatee but do *not* involve the exercise of governmental authority include ministerial or consultative tasks, such as providing nonbinding assistance,<sup>129</sup> issuing

---

<sup>123</sup> Ordinarily, multiple subdelegations within a given Federal Register entry are placed within separate CFR subsection revisions near the end of the Federal Register entry. On rare occasion, RAs had to make judgment calls regarding whether, e.g., the statement that “the authority to determine Subjects A and B is delegated to Office 1” contains one or two delegations. Determining the precise number of delegates for a given delegation sometimes proves impossible. For instance, in 1981 the Small Business Administration delegated the authority to enter into loan guarantees to an unspecified number of district-level personnel holding certain positions. 46 Fed. Reg. 34309-02 (July 1, 1981).

<sup>124</sup> Our use of machine-learning techniques places this Article within a growing cluster of scholarship studying legal texts with computational methods. *See, e.g.*, Julian Nyarko, *Stickiness and Incomplete Contracts*, 88 U. CHI. L. REV. 1 (2021); Jonathan Choi, *An Empirical Study of Statutory Interpretation in Tax Law*, 95 N.Y.U. L. REV. 363 (2020); Gabriel Rauterberg & Eric Talley, *Contracting out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers*, 117 COLUM. L. REV. 1075 (2017).

<sup>125</sup> *See, e.g.*, 60 Fed. Reg. 47267-01 (delegating authority to the director of the FDA Center for Devices and Radiological Health to “promulgate regulations under which the Director may withdraw approval of [mammography facility] accreditation bodies”).

<sup>126</sup> *See, e.g.*, 58 Fed. Reg. 34212-01 (delegating authority to the FDA’s Deputy Commissioner of Operations “in all administrative civil money penalties proceedings ... to issue the final decision for the Commissioner, which constitutes final agency action” under several drug, medical device, and vaccine safety laws).

<sup>127</sup> *See, e.g.*, 80 Fed. Reg. 81178-01 (delegating authority to the Director of FERC’s Office of Enforcement to, inter alia, “deny or grant ... requests for waiver of the requirements of [several] forms, data collections, and reports” concerning natural gas market participants).

<sup>128</sup> *See, e.g.*, 83 Fed. Reg. 61309-01 (delegating authority to the NTSB General Counsel the authority to “compromise, settle, or otherwise represent the Board’s interest in judicial or administrative actions to which the Board is a party or in which the Board is interested”).

<sup>129</sup> *See, e.g.*, 53 Fed. Reg. 18253-01 (delegating from the Secretary of Agriculture and others to the Chief of the USDA Soil Conservation Service to, inter alia, “[p]rovide technical assistance on soil and water conservation technology”).

informational notices,<sup>130</sup> communicating with others,<sup>131</sup> and authenticating documents for use in adjudications.<sup>132</sup>

Applying this criterion, we then hand-coded a set of 1,400 subdelegations for whether each involves the exercise of discretionary governmental authority. We then divided this set into a “training” batch with 1,200 subdelegations and a “test” batch with the remaining 200 items. Next, we ran a series of machine-learning classifiers on the training data. Although the details differ by classifier, each classifier searches for patterns of words or syllables that are associated with the classification of a subdelegation in the training batch as authoritative or not, and then uses the appearance of these patterns in the test batch to predict the significance of each item in that batch.<sup>133</sup> We then selected the classifier that achieved the highest F<sub>1</sub> score—a combined measure of precision and recall<sup>134</sup>—on the test batch.<sup>135</sup> This classifier accurately predicted 95% of all subdelegations and achieved an F<sub>1</sub> score of 0.78, which is comparable with other classifiers applied to legal texts.<sup>136</sup> This process led us to eliminate 2,191 subdelegations from the remaining analyses, leaving us with 3,358 subdelegations of discretionary governmental authority.

---

<sup>130</sup> See, e.g., 66 Fed. Reg. 30992-01 (authorizing several civil-service positions in the FDA Center for Food Safety and Applied Nutrition “to issue notices of confirmation of effective date of [several categories of] final regulations”).

<sup>131</sup> See, e.g., 49 Fed. Reg. 9565-01 (delegating authority to the Assistant Secretary of Defense for Manpower, Installations, and Logistics to “[c]ommunicate with other government agencies, representatives of the legislative branch, and members of the public”).

<sup>132</sup> 55 FR 11167-01 (delegating authority to the Director of the SEC Office of Applications and Reports Services to “authenticate all Commission documents produces for administrative or judicial proceedings”).

<sup>133</sup> To identify the optimal classifier, we ran classifiers with every possible combination of the following two features: (1) preprocessing method: 3-grams & words, 3-grams, 4-grams, 5-grams, or English-language Lemmatization; and (2) classifier algorithm: naïve Bayes or k-nearest neighbor. These options produce 10 possible combinations, each of which we ran. For all ten, we removed punctuation and unusual characters, replaced upper-case with lower-case letters, and analyzed the first 500 words in each subdelegation (in practice, the entire text). We then ran each classifier using WordStat software and selected the one that generated the highest F<sub>1</sub> score. See *infra* note\_.

<sup>134</sup> *Precision* measures how many positive predictions that the classifier makes are correct (correctly predicted positive cases divided by total number of predicted positive cases). *Recall* measures how many true positives in the dataset the classifier found (correctly predicted positive cases divided by the actual number of positive cases in the dataset). F<sub>1</sub> is the harmonic mean of precision and recall.

<sup>135</sup> This specification has the following attributes. We preprocessed the test batch by breaking the text of each delegation into 3-word sequences known as trigrams or 3-grams. We then employed a naïve Bayes classifier with a multinomial distribution. We also tried many other combinations of preprocessing methods and classifiers, and selected the combination that generated the highest F<sub>1</sub> score. The average precision for our model is 0.80 and the average recall is 0.76.

<sup>136</sup> See Choi, *supra* note\_, at 402 (reporting scores of 0.76 and 0.71 in analyses of judicial opinions); Jennifer Nou & Julian Nyarko, *Regulatory Diffusion*, 74 STAN. L. REV. \_\_, \*14 n.69 (forthcoming) (0.83 score for analysis of regulatory text).



## II. FINDINGS

This Part now uses our novel dataset to present a descriptive portrait of submerged independent agencies. The first section looks at which officials are likely to be delegators versus delegates of congressionally-granted authority. The second examines trends in subdelegations over time and across presidential administrations. The final section then looks at the timing of the practice and finds that it is more likely to occur during the midnight period before a presidential transition in power.

### A. Delegators and Delegates

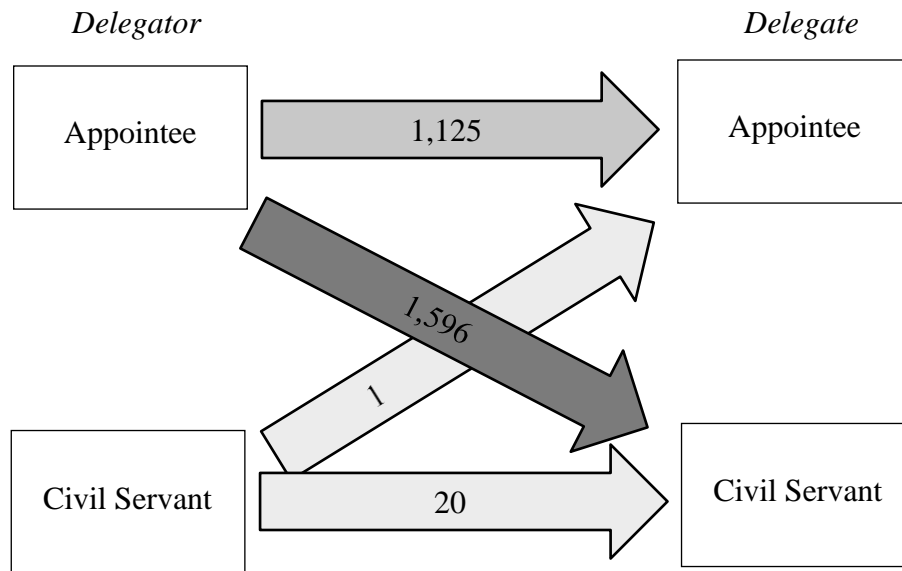
Virtually all of the subdelegations in our database identify the official with whom power is initially vested — the *delegator*, in our parlance — and the *delegatee* to whom the power is assigned. Most delegates in this subset are individuals, though there are also transfers to states, other subnational units, and other federal agencies. Appendix A presents additional information about these delegators and delegates. Most subdelegations devolve power down the organization chart: from higher-level appointees to lower-level ones, or from appointees to civil servants.<sup>137</sup> As Figure 1 shows, almost all of the delegators — 99 percent — are political appointees.<sup>138</sup> Civil servants comprise a majority of the delegates: 59 percent. This subset of delegations from appointees to career staff are the focus of this study.

---

<sup>137</sup> In most cases, delegators do not appear to retain authority to also exercise the subdelegated power. Analysis of a random sample of 200 subdelegations in our dataset reveals only two subdelegations in which the delegator reserved the right to exercise concurrent authority with the delegatee concerning the entire power in question. *See* 49 Fed. Reg. 46527-02 (Nov. 27, 1984) (“No [sub]delegation prescribed herein shall preclude the [delegatee] ... from exercising any of the powers or functions [described in the subdelegation].”); 46 Fed. Reg. 60414-01 (Dec. 10, 1981) (identical provision). Notably, both subdelegations concern the USDA’s Packers and Stockyards Administration, which is by chance overrepresented in our random sample, with two out of fifty entries. For each of the 200 subdelegations in this analysis, we examined whether the Federal Register entry containing the subdelegation also included an express reservation of authority. Due to data limitations, we did not examine whether relevant reservations, either pertaining specifically to the subdelegation in question or to agency subdelegations in general, were included in separate Federal Register entries.

<sup>138</sup> The numbers of subdelegations in the figure do not sum to the total number of delegations involving agency-like authority because some delegations do not list the delegator; list both appointee and civil servant delegates; or list another type of delegatee, e.g., a state or local government.

**Figure 1:**  
**Transfers of Authority to and from Appointees and Civil Servants**



At first glance, that most subdelegations are from appointees to civil servants seems surprising. Why would political appointees cede authority to civil servants over whom they have limited control? After all, civil servants have tenure protections. They cannot be easily fired if recalcitrant. Why not just use them as advisors rather than final decision-makers? If the motivation is merely to save resources, then why not delegate to a more loyal appointee instead? These questions become all the more pressing in light of our finding, discussed further below, that once these delegations are granted to a civil servant, they are infrequently revoked.<sup>139</sup>

Perhaps part of the answer is that a substantial number of these civil servants are members of the Senior Executive Service (SES) and therefore more subject to political control, at least relative to line career staff.<sup>140</sup> The SES was created under the Civil Service Reform Act of 1978 (CSRA) to “ensure that the government ... is responsive to the needs, policies and goals of the Nation.”<sup>141</sup> The hope was to create a

<sup>139</sup> See *infra* Part II.B.2.

<sup>140</sup> Forty-four percent of the civil-servant delegates in our dataset are listed in the Plum Books as career appointees, all of whom are SES members. Another 36 percent of civil-servant delegates are not listed in the Plum Book, which means they are either positions in the general service or SES members in career-reserved SES positions. Presumably, some positions within this latter group are held by SES members. (Positions listed in the Plum Book as being held by career appointees could alternatively be held by non-career appointees, at agency leaders’ discretion and subject to several limitations. Career-reserved positions must be held by an SES member of the career civil service. Because agency leaders cannot slot noncareer appointees into career-reserved positions, these positions do not appear in the Plum Books.)

<sup>141</sup> 5 U.S.C § 3131.

more experienced “interface” between political appointees and civil servants with often-clashing objectives and worldviews.<sup>142</sup> Accordingly, the statute allowed agency heads more mechanisms to control SES members, while still furnishing the SES with protections against arbitrary firings and reassignments.<sup>143</sup>

Political supervisors, for example, can reassign career SES members to other SES positions within the same agency or transfer them to SES positions in other agencies.<sup>144</sup> Career SES members with performance reviews below a certain threshold can be reassigned to another SES position; members with even lower performance reviews must be removed from the SES and placed into the regular civil service.<sup>145</sup> These tools of control may help explain why a delegator would grant authority to them over a non-SES civil servant, but it does not fully explain the substantial number that run to ordinary line staff as well.

Returning to our initial descriptive account, a broad and diverse set of actors create submerged independent agencies. Appointees occupying 66 distinct offices are represented as delegators in our dataset. Delegators’ positions include cabinet secretaries, administrators of important subagencies, various undersecretaries and assistant secretaries, and independent regulatory commissioners.<sup>146</sup> Table 1 lists the ten delegator positions with the most subdelegations to civil servants.

---

<sup>142</sup> See Anne Joseph O’Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913 (2009). The CSRA prohibits political appointees from occupying more than 10 percent of the total number of SES positions and more than 25 percent of the SES positions within a single agency. It also classifies some positions as “career reserved,” meaning that only protected civil servants can occupy them. 5 U.S.C. § 3132-4.

<sup>143</sup> Government Accountability Office, *Senior Executive Service: Opportunities for Selected Agencies to Improve their Career Reassignment Processes*, Sept. 16, 2020, <https://www.gao.gov/products/gao-20-559>. Career SES members retain some important employment protections. For instance, they cannot be involuntarily reassigned within the first 120 days following the installation of a new agency head or politically appointed supervisor. 5 U.S.C. § 3395(e). Further, various procedural requirements provide career SES members under threat of removal with due-process protections; the process of removing a career SES member includes several notice requirements and, in most circumstances, the member’s right to request an informal hearing before an official designated by the Merit Systems Protection Board. 5 CFR 359.502. This informal hearing is distinct from a full hearing before the Board, and the disposition of the informal hearing is not appealable to the Board. *Id.* at 359.504. Two exceptions to this general rule are that career SES members who are removed based on a reduction in force have greater procedural protections, *Id.* at 359.601-359.608, and career SES members who are removed during their probationary period hold fewer procedural protections. *Id.* at 359.401-359.407. Importantly, removal from the SES—the most severe action that appointees can undertake against SES members in ordinary circumstances—merely returns the former SES member back to a regular civil-service position. *Id.* at 359.701-259.705.

<sup>144</sup> 5 U.S.C § 3395(a). Transfers must be approved by the receiving agency. *Id.*

<sup>145</sup> 5 U.S.C § 4314(b). Agencies have even wider latitude to remove employees from the SES during the employee’s probationary period. See 5 CFR 359.402 & 359.403.

<sup>146</sup> These 66 delegator offices are situated within 28 distinct cabinet-level departments, independent agencies, and other government entities.

Table 1: Most Common Officials Subdelegating Authority to Civil Servants

Delegator’s Position	% of Total Subdelegs.
Commissioner, Food & Drug Admin. (HHS)	17%
Secretary of the Department of Agriculture (USDA)	10%
Administrator, Rural Electrification Admin. (USDA)	8%
Commissioners, Federal Maritime Commission	6%
Administrator, Small Business Admin.	6%
Board of Directors, Federal Deposit Insurance Corp.	6%
Commissioners, Securities & Exchange Commission	5%
Commissioners, Federal Communication Commission	4%
Board of Governors, Federal Reserve System	3%
Board Members, Surface Transportation Board <sup>147</sup>	3%

As the table shows, the FDA Commissioner leads the field concerning subdelegations, with two officials in the Department of Agriculture—the Secretary and the Administrator of the USDA’s Rural Electrification Administration (REA)—occupying the second and third positions, respectively. Beyond these three, officials with jurisdiction over an eclectic set of programs and policies are represented, with a tilt toward independent regulatory commissioners over officials in executive departments. Eight of the top ten delegators are the top-level official (or multi-member board of officials) in the agency.

Greater examination of two of the most-frequent delegators — the FDA Commissioner and Rural Electrification Administrator — may shed light on why appointees willfully cede power. The FDA’s status as the agency with the most published subdelegations can likely be explained by the heightened scrutiny it faces over whether decisions there are made for political or science-based reasons. More than most agencies, its power to engage in pre-market interventions stems from its reputation.<sup>148</sup> As Daniel Carpenter has persuasively argued, this public face is that of

<sup>147</sup> Figure includes delegations from the commissioners of the now-defunct Interstate Commerce Commission, which was abolished in 1995 with many of its functions transferred to the nascent Surface Transportation Board. See U.S. Government Manual, 2020 ed., 88, <https://www.govinfo.gov/app/details/GOVMAN-2020-11-10>.

<sup>148</sup> See generally DANIEL CARPENTER, REPUTATION AND POWER: ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REGULATION AT THE FDA 11 (2010) (“The regulatory power of the [FDA] stems in large measure from a reputation that inspires both praise and fear.”). Carpenter defines an “organizational reputation” as “a set of symbolic beliefs about the unique or separable capacities, roles, and obligations of an organization, where these beliefs are embedded in audience network.” *Id.* at 45.

a “protector of patient and consumer safety” as well as that of “scientific accuracy.”<sup>149</sup> Subdelegation to more expert civil servants can bolster this reputation: it can operate as a tool for increasing legitimacy and public confidence in the agency’s decisions.

Witness this dynamic at work in a recent controversy one level up, between HHS and the FDA. As discussed earlier,<sup>150</sup> the HHS Secretary has the statutory authority to “prescribe” actions for the FDA commissioner who lacks tenure protections. Nevertheless, in 2020, HHS Secretary, Alex Azar faced an outcry when he issued an internal memo prohibiting the FDA from signing any new rules and reserving that power to himself.<sup>151</sup> While Azar’s chief-of-staff said the memo was merely a “housekeeping matter” aimed at “good governance,” many feared that the memo “could contribute to a public perception of political meddling in science-based regulatory decisions” — at a time when a global pandemic was still raging.<sup>152</sup>

To revive the FDA’s reputation, the Biden Administration’s HHS Secretary, Xavier Becerra, published a notice in the Federal Register explicitly “revok[ing]” Azar’s previous memo, “reinstat[ing] any delegations to FDA rescinded” and making clear his intent to “delegate” to the FDA Commissioner “the authority vested in the Secretary to issue all regulations of the FDA,” with some limited reservations of that authority.<sup>153</sup> The move seemed to have worked, as reflected by former Trump FDA Commissioner Scott Gottlieb’s comment that the subdelegation “restore[d] an essential element of FDA’s independent judgement and [will] allow the agency to act faster.”<sup>154</sup> In this manner, a published subdelegation had the effect of restoring the agency’s expert-driven bipartisan bona fides.

Among other lower-level officials included in the table above, the REA Administrator within the USDA also merits greater discussion. The Administrator is the head of a relatively obscure, now-defunct USDA subagency dealing with rural electrification that is nonetheless responsible for eight percent of subdelegations in our dataset. All of the subdelegations from this official are, unusually, contained in one Federal Register entry – an outlier in our dataset.<sup>155</sup> Although a definitive account of why the Administrator subdelegated 121 discrete powers on a single day in April 1994 remains elusive, the historical context may provide some clues. The REA had been

---

<sup>149</sup> *Id.*

<sup>150</sup> See *supra* notes 112-115 and accompanying text.

<sup>151</sup> See Sheila Kaplan, *In ‘Power Grab,’ Health Secretary Azar Asserts Authority Over F.D.A.*, N.Y. TIMES (Sept. 19, 2020), available at <https://www.nytimes.com/2020/09/19/health/azar-hhs-fda.html?action=click&module=RelatedLinks&pgtype=Article>.

<sup>152</sup> *Id.*

<sup>153</sup> 86 Fed. Reg. 49337, 49337 (Sept. 2, 2021).

<sup>154</sup> Bloomberg News, *FDA Regains Rulemaking Authority in Reversal of Trump-Era Move* (Sept. 21, 2021), available at <https://news.bloomberglaw.com/health-law-and-business/fda-regains-rulemaking-authority-in-reversal-of-trump-era-move>

<sup>155</sup> 59 Fed. Reg. 21623-01 (Apr. 26, 1994). As a robustness check, we re-ran all of the analyses in this Part excluding the REA subdelegations contained in this Federal Register entry. The only material change is that the coefficient estimate concerning midnight subdelegations (Table 2, Model 1) is larger and significant at the more demanding  $p < 0.01$  level.

subject to bipartisan calls to reduce its budget throughout the early 1990s.<sup>156</sup> In December 1993, an internal whistleblower’s accusations of waste, potential fraud, and mismanagement at the REA generated headlines<sup>157</sup> — perhaps bringing it more directly into policymakers’ sights. In October 1994 — six months after the subdelegations were published — President Clinton signed into law a bill that, *inter alia*, transferred REA’s programs to a new entity within USDA and limited the potential set of positions to whom the holder of a newly established undersecretary position with authority over these programs could subdelegate this authority.<sup>158</sup>

This context suggests two possible explanations for why the REA administrator subdelegated this large number of powers in one fell swoop. First, familiarly, he may have intended this action to be a good-government measure, placing authority in the hands of civil servants that were viewed as neutral experts in an effort to reform a scandal-plagued organization. Second, he may have also anticipated legislative changes to the REA (if not its demise), and thus strategically assigned functions to aligned civil servants that he expected would be costly for successors to reverse. These explanations—which we present merely as conjectures to inform more general hypotheses—suggest possible reasons why political actors willingly abnegate their own authority.

## B. Trends

Turning from the actors involved, we now look at dynamics over time and across presidential administrations. The hope is to motivate further thinking as to how, when, and why the executive branch devolves power. The first section looks at initial delegations of authority, while the second looks more closely at revocations.

---

<sup>156</sup> See, e.g., Bill Clinton, State of the Union Address, Feb. 17, 1993, <https://www.govinfo.gov/content/pkg/WCPD-1993-02-22/pdf/WCPD-1993-02-22-Pg215-2.pdf> (singling out the agency as President Clinton’s *only* concrete example of proposed cuts in federal spending); Marcy Gordon, *Rural Electric Cooperatives on the Defensive*, WASH. POST, Dec. 25, 1990, <https://www.washingtonpost.com/archive/politics/1990/12/25/rural-electric-cooperatives-on-the-defensive/705e357e-1f83-42ac-adb4-a10783092d00/> (noting that Republican administrations since Nixon had “tried to gut the REA”).

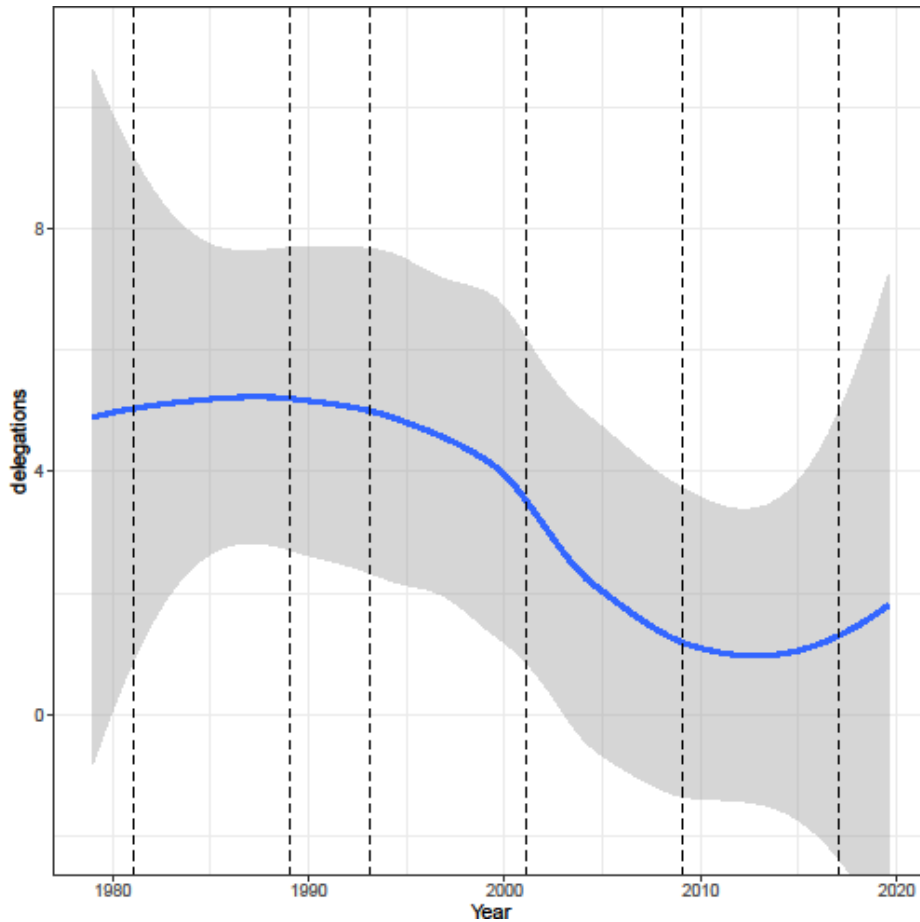
<sup>157</sup> Kevin Merida, *Whistle-blower Zaps REA Management*, WASH. POST, Dec. 22, 1993, <https://www.washingtonpost.com/archive/politics/1993/12/22/whistle-blower-zaps-rea-management/01802c2b-df12-4a84-a95a-25fb80d3e141/>.

<sup>158</sup> Federal Crop Insurance Program and Department of Agriculture Reorganization Act of 1994, Pub. L. 103-354, 108 Stat. 3219 § 232, 7 U.S.C. § 6942 (former provision); *id.* at 108 Stat. 3218 § 231(e), 7 U.S.C. § 6941(e) (latter provision). Interestingly, the House Agriculture Committee chair had introduced the bill in Congress only four days before the date on which the agency’s administrator subdelegated these 121 powers, see H.R. 4217, <https://www.congress.gov/bill/103rd-congress/house-bill/4217/actions?r=3>, although the as-introduced version of the bill did not include the aforementioned provisions. See <https://www.congress.gov/bill/103rd-congress/house-bill/4217/text/ih?r=3>.

## 1. Initial Delegations

How do initial grants of power to career staff vary over time? Figure 2 displays the number of new subdelegations to civil servants per month, along with a lowest curve in blue and associated 95 percent confidence interval in gray. Dashed lines signify changes in presidential administration. In general, the figure shows a declining number of new subdelegations to civil servants throughout our 1979-2019 time period, perhaps with a slight uptick around 2012 (although the large confidence intervals around the lowest line stymie firm conclusions). By contrast, the number of new subdelegations to other appointees has remained essentially flat during this study period.<sup>159</sup>

Figure 2: Subdelegations to Civil Servants per Month



<sup>159</sup> To be sure, the number of subdelegations does not necessarily correspond to their scope or significance, but we use it as a proxy for estimating the magnitude of subdelegated authority.

One possible explanation for the downward trend is that there is a relatively fixed stock of statutes delegating regulatory power.<sup>160</sup> As appointees subdelegate their powers over time, there is increasingly less statutory authority to grant. As a result, the rate of internal delegations would decrease over time.<sup>161</sup> By a similar logic, the slight increase in subdelegations in 2012 may be attributable to the passage of two major new statutes, the Affordable Care Act and Dodd-Frank Act, two years earlier. Another possible explanation is that officials have shifted to subdelegating their authority in different forms. Rather than publishing subdelegations in the Federal Register, they may opt for less transparent means such as staff manuals hosted on internal agency servers.<sup>162</sup> If this is correct, then the trend only speaks to the subset of subdelegations that are published in the Federal Register. (We offer both possible explanations with a note of caution, however, given the size of the confidence intervals in the figure.)<sup>163</sup>

Next, we examine whether presidential administrations differ in their propensity to delegate to civil servants.<sup>164</sup> Figure 3 shows the number of subdelegations to civil servants during each full-term presidential administration during our study period. The figure suggests the possibility that subdelegations activity declines for each successive consecutive term in which a party holds the presidency, perhaps because targets for advantageous subdelegations are exhausted over time.

---

<sup>160</sup> See Jody Freeman & David Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 15-16 (arguing that “the current partisan and ideological makeup of Congress renders such action much less likely, all else equal, than at any time in the modern regulatory era”). Freeman and Spence also note that “the parties have grown steadily farther apart ideologically since the 1970s, making bipartisan action to address important problems significantly more difficult.” *Id.* at 14.

<sup>161</sup> As a necessarily preliminary look at this relationship between statutory authority and subdelegation, we regress the number of subdelegations as a function of a time measure (a proxy for the month) as an independent variable. The analysis is “preliminary” in the sense that a more robust look would use some measure of statutory authority, which is currently unavailable, but could be constructed in the future. In the meantime, the time measure assumes an overall declining stock of statutory authority and attempts to pick up whether this time trend matters. This analysis finds a statistically significant, slightly negative relationship between subdelegations and time. Simply put, as our study period progresses, agencies tend to subdelegate less, even controlling for potential exogenous features.

<sup>162</sup> See Nou, *supra* note 5 (discussing delegations manual hosted only on non-public EPA servers obtained only through Freedom of Information Act request).

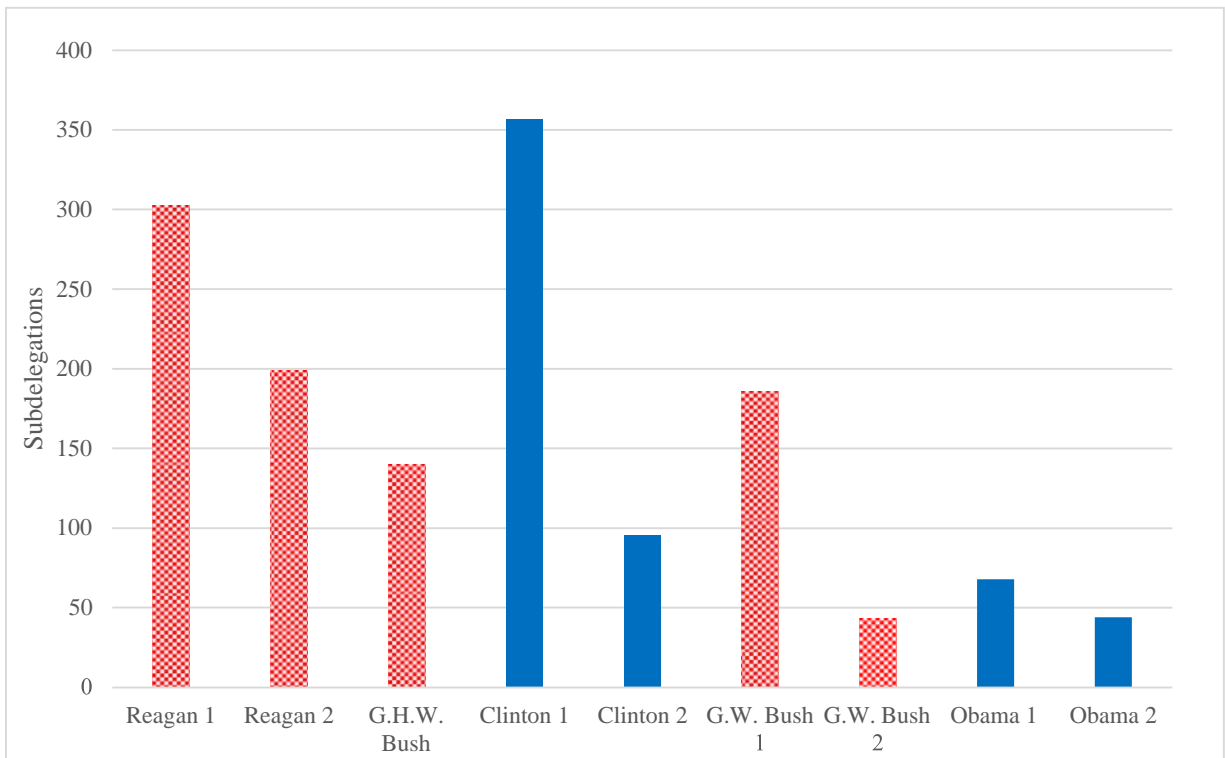
<sup>163</sup> At the same time, these explanations are admittedly incomplete. They do not explain another one of our findings, which is that the number of new subdelegations per month to *appointees* has remained steady during the same period as the number to *civil servants* declined. If the supposed increased scarcity of new powers to subdelegate or the possibility that officials shifted their subdelegations to different forms completely explains the decrease in new subdelegations to civil servants, the question remains why subdelegations to appointees are immune from these forces. To shed further light on these divergent trends in subdelegations to civil servants versus appointees, we will be examining the choice-of-(sub)delegate question in future work.

<sup>164</sup> This analysis assumes that political control switches on inauguration day. Because presidential control over agencies operates on a continuum, *see* Datla & Revesz, *supra* note\_, the extent to which this assumption holds varies by agency. As a validity check, we also produce a version of the figure that includes only subdelegations within agencies that feature either of the following structures: removal protection for the agency head(s) or, for multi-member agencies, partisan-balance requirements concerning board members’ appointments. This figure appears substantially similar to the figure included below.



(The exception, as discussed *infra*, is that subdelegations are more frequent during the “midnight” period in the closing three months of a presidential administration.<sup>165</sup>). Another possibility is that there is a burst of subdelegations at the start of administrations due to vacant offices and lags in presidential nominations and Senate confirmations.<sup>166</sup>

**Figure 3: Total Subdelegations to Civil Servants, by Presidential Administration**



Presidents Reagan and Obama stand out among presidential administrations. The Reagan administration witnessed substantially greater subdelegations activity: a mean of 62.8 subdelegations per year, versus a mean of 35.1 subdelegations per year in the other administrations in our study period. By contrast, the Obama administration cut back drastically on new subdelegations, with a mean of 14.0 subdelegations per year, versus 48.1 subdelegations per year in the other administrations. (The latter number is higher now because it is an average across other administrations, including the higher Reagan years). Both differences in means are statistically significant at conventionally accepted levels.<sup>167</sup>

<sup>165</sup> See *infra* Part \_\_\_.

<sup>166</sup> O’Connell, *supra* note 142.

<sup>167</sup> For the 27.1 subdelegations-per-year difference in means during the Reagan administration versus other administrations:  $t = 2.40$ ,  $p\text{-value} = 0.022$ . For the -34.1 difference in means for the Obama administration versus other administrations,  $t = -2.96$ ,  $p\text{-value} = 0.006$ . For the other administrations in

These observations are puzzling along at least one dimension: President Reagan was known as a fierce critic of the bureaucracy — and yet his appointees empowered civil servants via relatively frequent subdelegations. President Obama lacked this reputation — and yet his appointees assigned powers to civil servants at a lower rate than appointees in other administrations. Further, it is decidedly not the case that a small number of conservative-leaning or otherwise outlier delegators drive these results. Instead, a wide variety of agencies exhibit greater subdelegation activity during Republican administrations; many others exhibit near-parity in subdelegations during Republican versus Democratic administrations.<sup>168</sup>

Next, we aggregate across presidential administrations to examine whether the two parties *generally* differ in their relative propensities to subdelegate. We find that agencies subdelegate a mean of 44 powers per year during Republican administrations versus 37.2 powers during Democratic ones.<sup>169</sup> It is important to caution, however, that this estimated greater Republican propensity to subdelegate does not achieve conventionally accepted levels of statistical significance.<sup>170</sup>

These results are, once again, likely to surprise some. The practice of transferring legal authority to civil servants seems at odds with Republicans' embrace, at least since the Reagan administration, of the theory of the unitary executive.<sup>171</sup> This theory generally holds that the President is constitutionally vested with all executive

---

our sample, none of the corresponding differences in means approaches conventionally accepted levels of statistical significance.

<sup>168</sup> Despite the fact that partisan control of the White House is roughly evenly divided during our study period, subdelegations are more common under Republican leadership at executive agencies including HHS, Justice, Transportation, and Veterans Affairs, and financial regulators including the CFTC, FDIC, FHFA (including its predecessor agency), and SEC.

<sup>169</sup> In light of this variation across parties presidential administrations, we also explore the relationship between subdelegations and divided government, that is, periods in which the President is of a different party than at least one house of Congress. Agencies have reason to fear sanctions from congressional overseers, *see* Feinstein, *supra* note, at 1206, particularly when the opposition party (to the President) controls that branch. *See generally* Daryl Levinson & Richard Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

Given that agency heads are likely to be especially inclined to avoid congressional oversight during periods of divided government, we hypothesize that divided government discourages subdelegations, because the act of reassigning authority bestowed by Congress on appointees may provoke congressional ire — particularly when the opposition party controls Congress. A battery of regression models testing this hypothesis yields mixed results. We observe a negative and statistically significant (at least at  $p < 0.10$ , and usually at  $p < 0.05$ ) in approximately 30 percent of models concerning House/President divided party control, and in approximately 20 percent of models concerning Senate/President control. Given these model-dependent results, we cannot reject the null hypothesis that the presence or absence of divided government has no bearing on subdelegations activity.

<sup>170</sup> Test statistic for Welch's two-sample t-test = -0.40; p-value = 0.70.

<sup>171</sup> *See* STEVEN CALABRESI & CHRISTOPHER YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 30* (2008).

authority and should exercise it accordingly.<sup>172</sup> Conveying that authority to tenure-protected career staff, however, is arguably in tension with this view. After all, some of the strongest unitarians argue that tenure-protected agency heads exercising statutory authority are unconstitutional.<sup>173</sup> Presumably, tenure-protected career staff exercising the same authority would be similarly worrisome, perhaps even more so. Moreover, Republican appointees and civil servants are often perceived as antagonists — as illustrated by President Trump and his allies’ rhetoric about the “deep state.”<sup>174</sup> Conservatives also generally seek to reduce the size of government, which is often at odds with the self-interest of civil servants. For these reasons, it is unexpected that the partisan differences in the practice are not statistically significant; if anything, one could have reasonably expected to find evidence that Republicans subdelegate less, than Democrats whereas the estimates we uncover suggest that they subdelegate more.

Perhaps this finding is due to the limitations of our approach in counting subdelegations, rather than alternative measures that better capture the scope or significance of each delegation. Once deployed, these alternative measures could in theory reveal that Democratic administrations indeed delegate much more consequential and salient issues down to civil servants, relative to Republican administrations that focus on more minor issues. However, we were unable to conceive of a satisfying measure of scope or significance.<sup>175</sup> As a second-best approach, we attempted to better understand the substance of the subdelegations in the hopes of shedding some light. Specifically, we employ a structural topic model in a systematic attempt to understand the kinds of powers granted.

To shed additional light on these differences across administrations, we use a structural topic model to examine the substance of these subdelegations. Unsupervised

---

<sup>172</sup> See Christopher Yoo et. al., *The Unitary Executive in the Modern Era, 1945-2004*, 90 IOWA L. REV. 601, 604 (2005) (characterizing the “unitary executive” as one “in which all executive authority is centralized in the president”).

<sup>173</sup> See CALABRESI & YOO, *supra* note 172, at 428 (arguing that “a removal power and a power to control subordinates” are the central features of the “Reagan era concept of the unitary executive”); *id.* at 420 (asserting that “historical practices under our Constitution show[] that all forty-three presidents —each of them an interpreter of the Constitution—have vigorously exercised and defended an unlimited presidential removal power”).

<sup>174</sup> See Rebecca Ingber, *Bureaucratic Resistance and the National Security State*, 104 IOWA L. REV. 139, 151 n.31 (2018) (collecting citations)

<sup>175</sup> One possibility we considered, but rejected as impractical, was somehow trying to map the significance of a subdelegation to the significance of the underlying statutory authority redelegated. Some political scientists, for example, use a dataset collected by David Mayhew characterizing “important legislation” based on newspaper accounts informed by historians and political observers. See, e.g., DAVID EPSTEIN & SHARON O’HALLORAN, *DELEGATING POWERS* (1999). The data are discussed in DAVID MAYHEW, *DIVIDED WE GOVERN* (1991), available at <https://campuspress.yale.edu/davidmayhew/datasets-divided-we-govern/>. A few problems with that approach here, however, are that Mayhew’s list ends in 1990, whereas our dataset extends to 2019. In addition, statutory authority is recorded in the Federal Register in non-standardized ways rendering a matching exercise technically infeasible without manually recoding and researching over a thousand subdelegations. Even then, the exercise would be incomplete because many times, only certain aspects of a particular statute are subdelegated, which would require a separate measure of significance.

topic modeling is used to identify natural groups of words within a corpus. Importantly, the method classifies words into categories automatically, without human judgments concerning either which words to group in particular categories or the optimal number of categories.<sup>176</sup> Here, the method identifies twenty categories as the optimal number of topics.<sup>177</sup>

For some of these categories, glancing at the words that the model bundles together suggests obvious themes. For instance, the words that appear most frequently in one topic include *counsel*, *claim*, and *compromis*\*. The “lift words”—i.e., words that appear more in Topic 10 relative to the other topics—for this topic include these three terms as well as *settl*\*. These words evince a common theme: delegations in this topic tend to concern litigation authority.

Having classified the text of delegations into twenty topics, we then examine how delegations concerning these topics vary based on the party in power.<sup>178</sup> Four topics exhibit greater prevalence, with the difference being statistically significant, in subdelegations during Republican administrations: food and drug regulation (54% more prevalent in Republican agencies); closely-related categories concerning drug approval (47%), medical devices (37%) and FDA citizen petitions (56%); and financial regulation (35%). Among the relatively obscure topic related to rural electricity projects and lending is 435% more prevalent in Democratic administrations, whereas a second category concerning lending is 125% more prevalent.

The Republican tilt concerning pharmaceuticals may be a response to decades-long conservative critiques of the length of FDA review periods.<sup>179</sup> Under this view, conservatives’ enduring critique that the FDA drug approval process is too slow may push them to favor greater subdelegations of authority to speed decisions in this area by eliminating one or more layer of additional sign-offs before a decision can be reached. Subdelegations, in other words, streamline the decision-making process, eliminating higher-level review and thus reducing the time to a decision for potentially life-saving medical and pharmaceutical products. During Democratic administrations,

---

<sup>176</sup> See Justin Grimmer, *A Bayesian Hierarchical Topic Model for Political Texts: Measuring Expressed Agendas in Senate Press Releases*, 18 POL. ANALYSIS 1, 2 (2010). Given the novelty of our dataset, one must be especially cautious not to impose one’s own presumptions regarding which types of transfers of authority should be classified together. See Justin Grimmer & Brandon Stewart, *Text as Data: The Promise and Pitfalls of Automatic Content Analysis Methods for Political Texts*, 21 POL. ANALYSIS 267 (2013) (“Unsupervised methods are valuable because they can identify organizations of text that are theoretically useful, but perhaps understudied or previously unknown.”).

<sup>177</sup> We identified 20 as the optimal number of categories because it combines a high held-out likelihood, high semantic coherence, and low residuals. In making this assessment, we conducted these diagnostic tests for 7-30 categories, remaining mindful that there is no “perfect” number of categories. See Grimmer & Stewart, *supra* note\_, at 270-71; see also Roberts, et al., *supra* note\_, at 12 (introducing the *searchK* function).

<sup>178</sup> Differences calculated using the *plot.estimateEffect* command in the STM package in R, with *method=*“difference”.

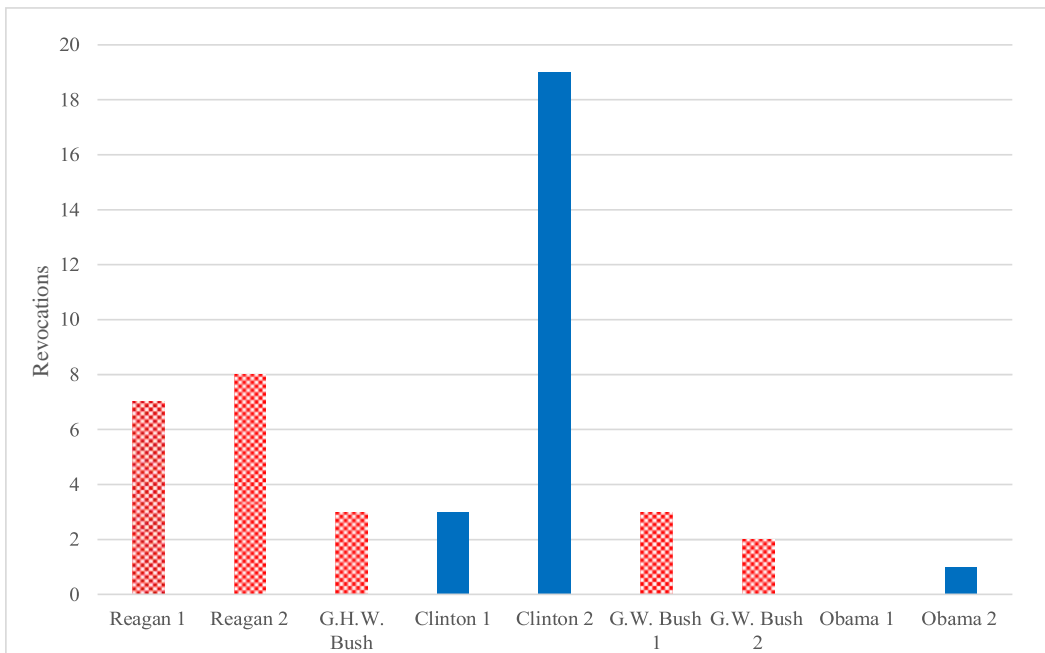
<sup>179</sup> See CARPENTER, *supra* note 148, at 3-4, 8. 731-732 (describing a pattern of *Wall Street Journal* editorials on that subject since the 1980s as well as numerous hearings and reform rhetoric over the years).

the far greater prevalence of topics concerning rural-electrification and lending almost certainly is attributable to the outlier observation discussed earlier; the administrator of the USDA’s Rural Electrification Administration, which provided loans to rural utilities, subdelegated 121 distinct powers in a single Federal Register entry in 1994.<sup>180</sup>

## 2. Revocations

If published delegations decline over time, a natural follow-up question is how frequently those delegations are rescinded. In the aggregate, our dataset includes 1,596 appointee-to-civil servant subdelegations, while only 48 revocations are of this type. In other words, approximately one appointee-to-civil servant subdelegation is revoked for every thirty-three granted.<sup>181</sup> To give a sense of changes across administrations, Figure 4 displays the number of revocations during each full-term presidential term in our study period.

Figure 4: Revocations of Authorities from Civil Servants, by Presidential Administration



<sup>180</sup> See *supra* note 155-157 & associated text.

<sup>181</sup> As an example, in 1982 the Federal Home Loan Bank Board withdrew a previous delegation to civil service-protected principal supervisory agents to permit certain federally insured financial institutions to change their capital requirements. 51 Fed. Reg. 15876-03 (Apr. 29, 1986). The Board believed that placing this power back in its hands would “ensure a uniform national policy.” Other revocations are justified based on changes in an agency’s organizational chart. See, e.g., 64 Fed. Reg. 58355-01 (Oct. 29, 1999) (rescinding authority over motor-carrier regulation from the Federal Highway Administrator and placing it with the director of the new Office of Motor Carrier Safety).

Several features of Figure 4 are notable. First, President Clinton's second term stands out for its relatively high number of revocations. The nineteen in that term were published in six different Federal Register entries, on six different dates between 1997 and 1999, and concern five different entities: the Departments of Agriculture, Health & Human Services, and Transportation, the Securities & Exchange Commission, and the Federal Reserve. One possible reason for the second-term increase is the greater familiarity the Clinton administration may have had with the scope of delegated authority by this point.

Second, setting aside President Clinton's second term, revocations in general are low in number with some secular decline. What, then, explains the relative endurance of delegated authority, that is, the low rate of revocations? Subdelegations are not entrenched as a matter of law. Executive branch actors that delegate authority in the Federal Register can revoke the delegations with minimal process. Because they are usually promulgated as procedural rules exempt from notice-and-comment,<sup>182</sup> agencies do not need to engage in public comment when reversing them.<sup>183</sup> Even in the few instances when delegators do engage in notice-and-comment,<sup>184</sup> an Office of Legal Counsel memorandum suggests that the same procedure is not necessary to revoke the subdelegation.<sup>185</sup> Alternatively, it is possible that arbitrariness review could prevent the mass promulgations or revocations of subdelegations without explanation, but the question has yet to be tested in the courts.<sup>186</sup>

The relative durability of subdelegations, however, lends credence to alternative explanations. First, there are practical resource costs that likely prevent some revocations. By statute, agencies must "publish in the Federal Register" procedural and substantive "rules," which can be amended by another "rulemaking," that is another "rule" published in the Federal Register.<sup>187</sup> As a result, a subdelegation published in the Federal Register requires another published rule to revoke it. Publication, however, requires agency fees, but beyond that, also demands time and

---

<sup>182</sup> See, e.g., 79 Fed. Reg. 44101-01 (July 30, 2014).

<sup>183</sup> Agencies are specifically exempt from notice and hearing requirements for "rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(3)(A). In addition, the APA's notice-and-comment requirements for rulemaking do not apply to "matter[s] relating to agency management or personnel." 5 U.S.C. § 553(a)(2).

<sup>184</sup> See, e.g., 65 Fed. Reg. 38,370 (2000) (proposed rule); 65 Fed. Reg. 59,713-16 (2000) (comments and responses, final rule).

<sup>185</sup> See Off. of Legal Counsel, *Applicability of APA Notice and Comment Procedures to Revocation of Delegation of Authority* (Feb. 14, 2011), available at [https://www.justice.gov/sites/default/files/olc/opinions/2001/02/31/op-olc-v025-p0099\\_0.pdf](https://www.justice.gov/sites/default/files/olc/opinions/2001/02/31/op-olc-v025-p0099_0.pdf).

<sup>186</sup> 5 U.S.C. § 706.

<sup>187</sup> 5 U.S.C. § 552 ("Each agency shall separately state and currently publish in the Federal Register for the guidance of the public rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations"); 5 U.S.C. § 551(5) (defining a "rule" "rule making" means agency process for formulating, amending, or repealing a rule"). These requirements are judicially enforceable upon a showing of harm. See *Lake Mohave Boat Owners Ass'n v. Nat'l Park Serv.*, 78 F.3d 1360, 1368 (9th Cir. 1995) ("[A]n individual may not raise an FOIA claim based on an agency's failure to publish a rule or regulation, unless he makes an 'initial showing' that 'he was adversely affected by the lack of publication ' " (citing *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1018 (9th Cir.1987)).

effort to draft the Federal Register entry.<sup>188</sup> One might think that these costs are minimal, but some agencies perceive them as onerous enough to revoke all of their published subdelegations in favor of putting them on their website instead. For instance, in 2002, the Federal Deposit Insurance Corporation explicitly made this choice in “order to provide the maximum amount of flexibility and efficiency.”<sup>189</sup> In other words, this agency perceived the costs of recording subdelegations in the Federal Register as a costly barrier to desirable revocations and changes.

Political appointees can also “functionally” entrench a delegation by mobilizing supporters and other interest groups to fend off subsequent attempts at repeal.<sup>190</sup> The Federal Register and CFR are both highly structured, which make it easier for external monitors, such as interest groups and lobbyists, to track them and thus know who holds decision-making authority. To illustrate, return to HHS Secretary Alex Azar’s memo prohibiting the FDA from signing any new rules and reserving that power to himself.<sup>191</sup> Various interest groups publicly objected,<sup>192</sup> albeit often on good governance grounds. Perhaps reacting to such fire alarms, a congressional subcommittee released a report decrying the measure.<sup>193</sup> In this manner, subdelegations can persist due to a kind of interest group endowment effect.

---

<sup>188</sup> Government Printing Office, OFR Publishing Services, <https://www.gpo.gov/how-to-work-with-us/agency/services-for-agencies/ofr-publishing-services> (“All agencies that publish material in the Federal Register are charged at a per column rate (published columns),” for Word documents, at “\$151/column”).

<sup>189</sup> 67 Fed. Reg. 79246, 79246 (Dec. 27, 2002).

<sup>190</sup> See Magill, *supra* note 39, at 894 (noting that agency heads “could empower an internal agency unit with predictable views to be in charge of the agency choice,” thus rendering it “more difficult for political opponents to oppose the effort or to dislodge it once it is in place”); Levinson & Sachs, *supra* note 156, at 482 (describing methods of “functional” entrenchment involving the “strengthening political allies or weakening political opponents,” “changing the composition of the political community,” and “empowering a different governmental institution and consequently a different set of political actors and groups”).

<sup>191</sup> See Sheila Kaplan, *In ‘Power Grab,’ Health Secretary Azar Asserts Authority Over F.D.A.*, N.Y. TIMES (Sept. 19, 2020), available at <https://www.nytimes.com/2020/09/19/health/azar-hhs-fda.html?action=click&module=RelatedLinks&pgtype=Article>. Note that to the extent that Azar’s memo was an attempt to revoke subdelegations in previously published in the Federal Register, his use of an unpublished internal memo was likely improper. The APA defines a rule as “the whole or a part of an agency statement . . . describing the organization” or “procedure.” 5 U.S.C. 551(5). A “rule making,” in turn, “means agency process for formulating, amending, or repealing a rule.” *Id.* The pre-existing subdelegations were likely procedural rules, which would thus require another rule to repeal. The pre-existing subdelegations were likely procedural rules, which would thus require another rule to repeal. Agencies are required to “publish in the Federal Register for the guidance of the public . . . rules of procedure.” 5 U.S.C. § 552. Failure to do so could be the basis of a lawsuit as long as a party could show that they were adversely harmed. See *Lake Mohave Boat Owners Ass’n v. Nat’l Park Serv.*, 78 F.3d 1360, 1368 (9th Cir. 1995).

<sup>192</sup> See, e.g., Kelly Lienhard, *Pew To HHS: Reverse Azar Memo, Seek Bill On FDA Diagnostic Oversight* (Apr. 28, 2021), <https://insidehealthpolicy.com/daily-news/pew-hhs-reverse-azar-memo-seek-bill-fda-diagnostic-oversight>

<sup>193</sup> See Select Subcommittee on the Coronavirus, *The Trump Administration’s Pattern of Political Interference in the National’s Coronavirus Response*, <https://www.politico.com/f/?id=00000174-e9b3-db77-abfe-edbb27190002>

Finally, there are also internal procedural costs to revoking subdelegated authority through the Federal Register. Such decisions require sign-off and negotiation between multiple internal actors, usually involving a structured clearance process.<sup>194</sup> The dynamics become even more complicated — and thus costly — at multimember agencies, which usually require majority votes among partisan-balancing requirements.<sup>195</sup> Recall the previous example involving the FCC’s subdelegation regarding domestic data roaming.<sup>196</sup> That subdelegation passed a bare majority vote on party lines. When a different partisan configuration of commissioners later objected to the subdelegation, they did not possess enough votes to revoke the grant of power to civil servants.<sup>197</sup> In this manner, decision cost within an agency can prevent the revocation of subdelegated authority.

### C. Midnight Subdelegations

The prospect of durable subdelegations amidst political dynamics, in turn, raises a key opportunity for strategic behavior: creating submerged independent agencies in the waning days of a presidential administration. We hypothesize that subdelegations to civil servants are more common immediately prior to presidential transitions, especially when there is a new incoming party. Presidents recognize the value of pursuing durable policy and personnel changes immediately prior to leaving office. For instance, during the final three months of a presidential administration, agencies tend to promulgate more rules<sup>198</sup> — particularly rules with highly traceable upfront costs<sup>199</sup> — and submit a greater number of economically significant regulations to OIRA.<sup>200</sup> Political appointees also hire and promote ideologically aligned personnel into civil-service positions during the interregna between presidential elections and the inauguration of a new president.<sup>201</sup>

Subdelegating authority to civil servants is a similar means of potential presidential entrenchment. By devolving authority to aligned civil servants prior to a transition, appointees can preemptively strip their successors of power, placing them,

---

<sup>194</sup> See Jennifer Nou & Edward H. Stiglitz, *Regulatory Bundling*, 128 YALE L.J. 1174, 1199 (2019) (discussing process).

<sup>195</sup> *Id.* at 1198 (“Like legislatures drafting statutes, agencies drafting rules require the agreement of multiple internal actors. This dynamic is especially true in multimember commissions, which normally require a majority vote to approve a rule.”)

<sup>196</sup> See *supra* notes 20-24 and accompanying text

<sup>197</sup> *Id.*

<sup>198</sup> Anne Joseph O’Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 923 (2008).

<sup>199</sup> Stuart Shapiro & John Morrall III, *The Triumph of Regulatory Politics: Benefit-Cost Analysis and Political Salience*, 6 REG. & GOVERNANCE 189, 198 (2012).

<sup>200</sup> Patrick McLaughlin, *The Consequences of Midnight Regulations and Other Surges in Regulatory Activity*, 147 PUB. CHOICE 395, 405 (2011).

<sup>201</sup> Mendelson, *supra* note \_\_\_, at 563-64.



at least temporarily, in the hands of sympathetic civil servants. We test this theory by regressing the number of appointee-to-civil servant transfers in a given agency and month on whether that month falls within the last three months preceding a presidential transition.<sup>202</sup> We run separate regressions for executive and independent entities, which we operationalize according to whether the heads are removable for-cause.<sup>203</sup> Our hypothesis is that presidents hold more limited control over officials in the latter category, and are thus less likely to be able to entrench power there.

We include several control variables to account for other influences on subdelegation decisions. First, agencies may have different propensities to engage in the behavior. For instance, those that exercise a large set of powers have greater opportunities to subdelegate, i.e., they have a larger “denominator” of statutory powers that could be subdelegated. Other agencies may have long-established cultures or norms regarding civil servants, leading to greater or less subdelegations. To account for these and other agency-specific features, all regression models include agency-level fixed effects. Second, as Figure 3 shows, different presidential administrations exhibit distinct propensities to subdelegate. Thus, some of our models include presidency-level fixed effects. Third, in light of the modest downward trend in subdelegations over time shown in Figure 2, other models also include a running

---

<sup>202</sup> Jack M. Beermann, *Midnight Rules: A Reform Agenda*, 2 MICH. J. ENVTL. & ADMIN. L. 285, 287 (2013) (defining “midnight rules as agency rules promulgated in the last ninety days of an administration”).

<sup>203</sup> As discussed in Part I, the definition of an “independent” agency is a contested one. See Selin & Lewis *supra* note 51 at 42 (“There is no general, widely accepted definition of an independent agency across all government officials, practitioners, and scholarly disciplines.”). While we are more sympathetic to the functional approach, for purposes of empirical analysis, we focus only those entities headed by agency officials with for-cause removal. One reason is that we seek a minimal, conceptually conservative, measure of presidential independence. Another is that choosing just one indicia of independence may facilitate the interpretation of any statistically significant results.

An alternative set of models operationalize “independent agencies” as possessing *either* for-cause removal protection or multi-member partisan-balance requirements. Whereas the former provision limits the President’s *ex post* control over agency officials, the latter restricts her *ex ante* ability to appoint favored personnel to these positions. Further, expanding this operationalization to include agencies with partisan-balance requirements allows us to include several entities that are conventionally considered “independent agencies” but lack formal removal protection. *See* Datla & Revesz, *supra* note, at 797 (listing the CFTC, EEOC, FCC, FDIC, FEC, NCUA, and SEC, among other entities, as possessing partisan-balance requirements but not for-cause removal protection). The results of these alternative model specifications are materially identical to those reported in Models (3) and (4) in Table 2.

variable denoting the year in which the observation is situated.<sup>204</sup> Table 2 below reports the results.<sup>205</sup>

Table 2: Midnight Subdelegations

	(1)	(2)	(3)	(4)
Last 3 Months of Presidency	1.684 * (0.806)	1.236 * (0.622)	0.181 (0.736)	0.246 (0.885)
Agency Fixed Effects?	Y	Y	Y	Y
Presidency Fixed Effects?	Y	N	Y	N
Time	—	-0.059 ** (0.020)	—	-0.134 ** (0.042)
Observations	8,136 agency-mos.		4,972 agency-mos	
Included Entities	Executive Entities		Independent Entities (with for-cause removal)	

Model: negative binomial regression with robust standard errors clustered at the agency level. Unit of analysis: agency-month. Dispersion parameter  $\alpha$  in Model 1 = 22.76 (SE=4.31); in Model 2: 23.57 (4.27); Model 3: 51.12 (24.55); Model 4: 56.33 (26.69). McFadden's pseudo-R<sup>2</sup>: 0.02 (Model 1), 0.18 (Model 2); 0.14 (Model 3); 0.12 (Model 4). \*\*\* signifies  $p < 0.001$ , \*\*  $p < 0.01$ , \*  $p < 0.05$ , †  $p < 0.10$ .

<sup>204</sup> Because presidency-level fixed effects and our time measure vary collinearly, we omit models containing both covariates from the regression table below. Nonetheless, we describe the results of models containing both covariates, *infra* note 206. In models containing a year variable and presidency fixed effects, the variance-inflation factor (VIF) for the former is 26.3 and the VIFs for the latter range from 37.6 for Carter to 138.6 for Reagan. As a general rule of thumb, VIF values above 5 or 10 are taken to indicate substantial multicollinearity. See Jose Dias Curto and Jose Castro Pinto, *The Corrected VIF*, 38 J. APP. STAT. 1499, 1500 (2011); Trevor Craney and James Surles, *Model-Dependent Variance Inflation Factor Cutoff Values*, 14 QUALITY ENGIN, 391, 392 (2002). Accordingly, including both measures in the same model is associated with a sizable reduction in the precision with which the relative effects of these variables can be measured. See Kevin Arceneaux and Gregory Huber, *What to Do (And Not Do) with Multicollinearity in State Politics Research*, 7 ST. POL. & POL'Y Q. 81, 83 (2007).

<sup>205</sup> Because the dependent variable, both here and in all subsequent models, is a count of the number of subdelegations per agency and unit of time, we estimate an event-count model. Specifically, we use negative binomial models, which are appropriate where, as here, the dependent variable is over-dispersed. The notes presented in the bottom row of tables report the associated dispersion parameter  $\alpha$ . In all models, these values indicate that variance of the distribution of the dependent variable is sufficiently larger than its mean to warrant a negative binomial model.

As predicted, Models (1) and (2) report positive and statistically significant coefficient estimates for the *Last 3 Months of Presidency* covariate for executive entities.<sup>206</sup> Put plainly, for entities over which the president has direct control, these results suggest that presidential administrations pursue midnight subdelegations. By contrast, Models (3) and (4) show null results for those entities over which White House control is more limited.<sup>207</sup> Because the substantive magnitude of estimates in a negative-binomial model are not intuitive, we also generate simulated first differences for several agencies. For the Department of Agriculture, which is the agency with the most subdelegations in our dataset, these simulated first differences for Model 1 reveal an expected 1.170-unit increase in the number of USDA subdelegations per month during the midnight period. Similar analysis for HHS, which is the second-most active agency in the dataset, shows an additional 1.031 HHS subdelegations per month during the midnight period. For comparison, the mean monthly subdelegations across the study period for USDA and HHS are, respectively, 0.940 and 0.770 per month.<sup>208</sup>

#### D. Congressional-Executive Dynamics

Given evidence that there are variations within presidential administrations as well as across parties, we next explore the relationship between subdelegations and divided government, that is, periods in which the President is of a different party than at least one house of Congress. Legislators have access to considerable information from agencies; they receive thousands of statutorily mandated reports from the executive branch each year and hold hundreds of oversight hearings.<sup>209</sup> When Congress learns of agency action that it opposes, it can utilize several mechanisms to sanction the offending agency, from embarrassing the agency head at an oversight hearing to enacting agency-disfavored statutory or budgetary changes.<sup>210</sup> Agency

---

<sup>206</sup> For interested readers, a third model that includes agency fixed effects, presidency fixed effects, and the time variable reports a coefficient estimate for *Last 3 Months of Presidency* that is positive and statistically significant at the  $p < 0.10$  level ( $\beta=1.046$ ,  $SE=0.631$ ). We do not report this model in the table due to severe multicollinearity issues when all of these independent variables are included. See *supra* note 204.

<sup>207</sup> Alternative model specifications—e.g., expanding our conception of entities insulated from the White House to include not only entities headed by an appointee with for-cause removal protection, but also to include multi-member commissions with partisan balance requirements—report similar results. Likewise, a model containing agency fixed effects, presidency fixed effects, and the time variable also returns null results for this estimate.

<sup>208</sup> Simulated first differences generated from Model 1.

<sup>209</sup> See William T. Egar, *Congressionally Mandated Reports: Overview and Considerations for Congress*, CRS REP. May 14, 2020, at 1 (annual reporting requirements figure); Brian D. Feinstein, *Congress in the Administrative State*, 95 WASH. U. L. REV. 1189, 1192 n. 13 (2018) (annual hearings figure).

<sup>210</sup> See Feinstein, *supra* note, at 1206 (describing these sanctions).

officials face a much less forgiving Congress when the opposition party (to the President) controls that branch.<sup>211</sup>

Since agency heads are likely to be especially inclined to avoid congressional oversight during periods of divided government,<sup>212</sup> we hypothesize that divided government discourages subdelegations. The act of reassigning authority bestowed by Congress on appointees may provoke congressional ire — particularly when the opposition party controls Congress. To test this hypothesis, we examine the relationship between subdelegations activity and divided control of each chamber of Congress and the White House. We examine divided party control of the House and Presidency and of the Senate and Presidency separately for two reasons. First, the chambers may utilize different mechanisms for monitoring, influencing, or sanctioning executive-branch actors. Namely, the Senate’s constitutional role in appointment provides it a lever that is unavailable to the House, whereas the House tends to engage in more frequent oversight,<sup>213</sup> perhaps as an alternative means of influencing the executive branch. Second, the Senate’s norms and rules promote, in different situations and during different eras, some combination of unanimity or supermajoritarian or bipartisan consensus.<sup>214</sup> These norms and rules cloud any decision about what party ratio qualifies as partisan “control” of that body. To mitigate these concerns, we examine each chamber separately.<sup>215</sup>

Model 1 in Table 3 below regresses the number of subdelegations per year in executive entities on whether different parties controlled the House and presidency. (As explained above, we also run companion regression models concerning divided party control of the Senate and presidency, and report the results of these models in the text below.) As in the midnight-subdelegations analysis, Model 1 includes agency and presidency fixed effects, Model 2 includes agency fixed effects and a time measure.<sup>216</sup>

---

<sup>211</sup> See generally Daryl Levinson & Richard Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

<sup>212</sup> For a discussion of how Congress uses oversight hearings to discredit or embarrass the President and her appointees, and how this activity is particularly common during divided government, see Feinstein, *supra* note., at 1207.

<sup>213</sup> See DOUGLAS KRINER & ERIC SCHICKLER, *INVESTIGATING THE PRESIDENT* 18 (2016)

<sup>214</sup> See Barbara Sinclair, *The New World of U.S. Senators*, in LAWRENCE C. DODD & BRUCE I. OPPENHEIMER, EDS., *CONGRESS RECONSIDERED* 6 (2009).

<sup>215</sup> We further note that, as a practical matter, there is not much difference between separating out the House and Senate versus the alternative of considering “divided government” to exist whenever different parties control the White House and at least one chamber of Congress. During our study period, Senate/Presidency control is divided but House/President control is unified only from June 2001 through the end of 2002. At all other times, a measure of House/President divided control is equivalent to a measure of divided control between either chamber and the President.

<sup>216</sup> Once again, the table does not include a model with all three controls due to substantial multicollinearity issues when one includes all of these covariates. Specifically, the variance inflation factor is 3.3 for *House/President Divided Control*, 48.7 for *Year*, and, for the presidency fixed effects, range from 15.0 for Carter to 91.2 for Reagan. Suffice it to say, a “full” model with all covariates return null results concerning the divided control covariate.

Table 3: Subdelegations during Divided vs. Unified Government Control of the House and Presidency

	(1)	(2)	(3)	(4)
House / President Divided Control	-1.149 † (0.658)	-0.507 (0.385)	-1.000 * (0.506)	-0.706 (0.917)
Agency Fixed Effects?	Y	Y	Y	Y
Presidency Fixed Effects?	Y	N	Y	N
Time	—	-0.072 ** (0.024)	—	-0.165 *** (0.035)
Observations	702 agency-years		585 agency-years	
Included Entities	Executive Entities		Independent Entities (with for-cause removal)	

Model: negative binomial regression with robust standard errors clustered at the agency level. Unit of analysis: agency-year. Dispersion parameter  $\alpha$  in Model 1: 3.38 (SE=0.36); Model 2: 3.38 (0.38); Model 3: 6.18 (3.43); Model 4: 6.42 (3.70). McFadden’s pseudo- $R^2$ : 0.24 in Models 1-2; 0.19 in Models 3-4.. \*\*\* signifies  $p < 0.001$ , \*\*  $p < 0.01$ , \*  $p < 0.05$ , †  $p < 0.10$ .

Models 3 and 4 report similar regression results for independent agencies. The imperative to avoid antagonizing Congress may be particularly acute for these independent agencies. Some argue that Congress holds greater sway over these agencies than executive agencies.<sup>217</sup> The Supreme Court has adopted that view, asserting: “independent agencies are sheltered not from politics but from the President, and ... their freedom from Presidential oversight (and protection) has simply been replaced by increased subservience to congressional direction.”<sup>218</sup> Accordingly, if Congress is able to exert greater relative influence on independent agencies than executive agencies, we would expect any reduction in subdelegations during divided government to be even greater for independent agencies. As before, we operationalize “independence” as the presence of for-cause removal protection for the agency’s head.<sup>219</sup> At the same time, we assume that the party of the independent agency is the

<sup>217</sup> See, e.g., Steven Calabresi & Saikrishna Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 582-83 (1994); Peter Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984); Barry Weingast & Mark Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983).

<sup>218</sup> FCC v. Fox Television Stations, 556 U.S. 502, 523 (2009).

<sup>219</sup> Unreported models use an alternative operationalization: whether its leadership possesses for-cause removal protection *or* it is a multi-member body for which the President must reserve some seats for her ideological opponents. Essentially, this alternative specification captures entities with a substantial limitation on either the President’s appointment or removal authority. See Brian Feinstein & Daniel

party of the President in power due to the president’s influence over appointments, particular that of the chair.<sup>220</sup>

Overall, Table 3 suggests a potential negative relationship between subdelegations activity and divided party control of the House and Presidency. That finding holds for both executive (Model 1) and independent entities (Model 3).<sup>221</sup> We present this possible negative relationship between subdelegations and divided control of the House and Presidency, however, with caution. The coefficient estimate is statistically significant at the conventionally accepted  $p < 0.05$  level for independent entities and at the  $p < 0.10$  level for executive ones — but only in models with presidential fixed effects. Models with only a time variable yield null results.<sup>222</sup> In this manner, our hypothesized link between subdelegations and divided party control of the House and Presidency is model-dependent. Similar models regressing subdelegations activity on divided control of the *Senate* and White House yield null results as well.

One possible interpretation of these findings is that Congress as a body is not generally aware of agency delegation decisions — even when they are published in the Code of Federal Regulations. Given that Congress often relies on “fire-alarm” oversight, interest groups may not bring them to legislative attention, particularly when they stand to benefit from them. Alternatively, agency heads may make subdelegation decisions primarily due to exogenous considerations, such as internal agency alignment or resource considerations. In other words, the decision to grant power to a civil servant may be more a function of preference convergence or the desire to expedite agency decision-making, rather than congressional avoidance.

---

Hemel, *Partisan Balance with Bite*, 118 COLUM. L. REV. 9 (2018) (showing that requirements that presidents appoint their genuine ideological opponents to seats that a nominee of the President’s own party is barred from filling). Unreported models use an alternative operationalization: whether its leadership possesses for-cause removal protection *or* it is a multi-member body for which the President must reserve some seats for her ideological opponents. Essentially, this alternative specification captures entities with a substantial limitation on either the President’s appointment or removal authority. These unreported models yield materially identical results to those reported.

<sup>220</sup> See ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND* 57 (2010) (noting various mechanisms to explain why “empirical work suggests that the heads of independent agencies and executive agencies tend to have common preferences and beliefs, both aligned with those of the resigning president”).

<sup>221</sup> To provide a sense of the magnitude of these relationships, simulated first differences reveal that divided government is associated with an expected 3.6 fewer subdelegations per year at the USDA, 2.9 fewer at HHS, and 1.0 fewer at both the FDIC and Federal Maritime Commission (FMC). These entities correspond to the two cabinet-level entities and two other entities with the greatest proportion of subdelegations in our dataset. See Table 1, *supra*. By comparison, mean subdelegations per year overall are 11.1 at the USDA, 8.3 at HHS, 2.2 at FMC, and 1.4 at FDIC. Note that FMC commissioners possess for-cause removal protection but FDIC commissioners do not. Both commissions have partisan-balance requirements. See Datla & Revesz, *supra* note \_\_, at 798.

<sup>222</sup> Further, additional models containing agency fixed effects, presidency fixed effects, and a time variable—which we do not report due to substantial multicollinearity concerns, as previously discussed—also yield null results.

### III. IMPLICATIONS

The findings in the previous Part — namely, the predominance of appointee-to-civil servant subdelegations and the political and strategic dynamics surrounding the practice — raise important legal and normative implications. The first section of this Part considers constitutional and statutory questions that submerged independent agencies raise. The upshot of this section is that some, but not all, submerged independent agencies are likely unconstitutional — especially under prevailing doctrinal trends. Agencies may be able to cure the potential constitutional defects, however, through the ratification of decisions exercised through delegated authority.

The second section assesses the broader normative desirability of the phenomenon. Specifically, it explores how the practice can foster investment in expertise, but at the same time undermine political accountability. Subdelegation also has related implications for presidential and congressional control over the administrative state. Finally, the third section considers institutional mechanisms to help the executive branch navigate between these two poles in a transparent manner.

#### A. Legality

The specter of tenure-protected officials exercising discretionary governmental authority raises constitutional worries about their appointment and removal, as well as statutory concerns with the practice of agency officials redelegating authority that Congress assigned to another. This section addresses these matters in turn.

1. *Appointments.* — The Constitution provides that the President “shall nominate” and the Senate confirm all “Officers of the United States,” though Congress can “by law vest[]” the appointment of “inferior officers” in the President, “court[] of law,” or a department head.<sup>223</sup> By referring to governmental “Officers,” the clause implicitly recognizes that there are non-Officers, or employees. Employees can be hired through a wide variety of means involving non-constitutional actors. Recent Supreme Court decisions have provided some guidance on the dividing line between employees and officers, though the precise contours are highly fact-specific.

In *Lucia v. Securities & Exchange Commission*,<sup>224</sup> the Court considered the status of SEC administrative law judges, concluding that they are Officers. The majority’s analysis centered on two dimensions: first, Officers occupy “continuing and permanent” positions rather than “occasional or temporary” ones.<sup>225</sup> More specifically, “an individual must occupy a ‘continuing’ position established by law to

---

<sup>223</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>224</sup> 138 S. Ct. 2044, 2051 (2018).

<sup>225</sup> *Id.* (quoting *Germaine*, 99 U.S. at 511)

qualify as an officer.”<sup>226</sup> This test suggests that Congress must have created the specific role occupied by the delegatee or else allowed the agency head to create the position.<sup>227</sup> The latter criterion requires statute-specific interpretation for particular submerged independent agencies.<sup>228</sup> It is worth noting that many positions in our database were created by agency heads under statutory authority permitting them to do so.<sup>229</sup>

One open issue is how courts should approach positions created through executive action, such as internal procedural rules, rather than explicitly by statute.<sup>230</sup> The question is whether such executive actions reflect decisions by Congress to allow executive officials to create those positions since the Appointments Clause requires that offices must be “established by law.” It is first worth noting that many organic statutes contain “general authorizations that might suffice to justify the heads of agencies or departments to delegate their functions and to appoint persons to carry out those functions.”<sup>231</sup> For instance, Congress explicitly grants the Secretaries of Agriculture, Education and Transportation the authority to appoint officers to carry out their department’s duties.<sup>232</sup> William Funk also raises the intriguing possibility that the Civil Service Reform Act of 1978 itself could furnish the requisite authority — especially for SES members that occupy many of the delegated roles — though he concludes that it likely does not.<sup>233</sup> How courts resolve these issues will likely turn in part on “pragmatic” considerations<sup>234</sup> or a desire to engage in constitutional avoidance. Insofar as courts generally allow agencies to organize their own internal affairs, they may also be willing to grant them *Chevron* deference on the matter — an issue we discuss in more detail below.

Second, constitutional Officers exercise “significant authority pursuant to the laws of the United States.”<sup>235</sup> According to the *Lucia* Court, the “inquiry ... focuse[s]

---

<sup>226</sup> *Id.*

<sup>227</sup> See O’Connell, *supra* note 26, at 683 (citing *Pennsylvania v. Dep’t of Health & Human Servs.*, 80 F.3d 796, 804-05 (3d Cir. 1996)) (Article II “does not require that a law specifically provide for the appointment of a particular inferior officer.”).

<sup>228</sup> *Id.* (“Outside the acting leadership context, courts have generally relied on agency organic statutes to find the requisite authority for the executive branch’s creation of positions”) (collecting cases).

<sup>229</sup> See, e.g., 49 U.S.C. § 106(l)(1) (authorizing NHTSA’s administrator to “appoint ... such officers and employees ... as may be necessary”).

<sup>230</sup> See, e.g., *Changes to Regulations to Reflect the Role of the New Environmental Appeals Board in Agency Adjudications*, 57 Fed. Reg. 5320-22 (Feb. 13, 1992). This example comes from William Funk’s legal analysis of the Environmental Appeals Board within the EPA. See William Funk, *Is the Environmental Appeals Board Unconstitutional or Unlawful?* 49 ENV’T L LAW 737 (2019).

<sup>231</sup> *Id.* at 743.

<sup>232</sup> *Id.* (citing statutes).

<sup>233</sup> *Id.* at 743-746.

<sup>234</sup> *Id.* at 750.

<sup>235</sup> *Lucia*, 138 S. Ct. at 2051 (quoting *United States v. Germaine* for the first criterion and *Buckley v. Valeo* for the second).



on the extent of power an individual wields in carrying out his assigned functions.”<sup>236</sup> The majority declined to clarify further, but it is worth noting that the government’s briefs in the case proposed criterion such as the extent to which the individual exercising authority has “the power to bind the government or third parties on significant matters” or to undertake other “important and distinctively sovereign functions.”<sup>237</sup> This standard closely mirrors the one we used to isolate agency authority, thus suggesting that most, if not all, the subdelegations in our dataset are constitutionally significant. Previous cases have also clarified that Officers engage in rulemaking, final adjudication, and traditional enforcement functions<sup>238</sup> — all of which are sometimes conducted under subdelegated authority, as our dataset reveals.

Some examples of likely significant authority include the subdelegation of rulemaking powers to civil servants. The Nuclear Regulatory Commission, for instance, delegated the authority to promulgate rules concerning, *inter alia*, nuclear reactor safety to the Commission’s Executive Director for Operations, with certain exceptions.<sup>239</sup> The FDA Commissioner has assigned to the Director of the Center for Devices and Radiological Health the authority to issue rules governing decisions to withdraw approval of mammography facility accreditation organizations.<sup>240</sup> A 1999 delegation tasks a career appointee in the Department of Transportation with “promulgat[ing] ... necessary regulations” concerning inspections of commercial interstate trucks’ noise levels.<sup>241</sup> Finally, 2002 subdelegation assigns to the Chief of the Federal Communications Commission’s Media Bureau a wide variety of

---

<sup>236</sup> *Id.* Because ALJs basically utilized “nearly all the tools of federal trial judges,” their authority was significant, thus rendering them Officers. ALJs “take testimony,” “[r]eceive[e] evidence and [e]xamine witnesses at hearings,” “take pre-hearing depositions,” “conduct trials,” “administer oaths, rule on motions,” “generally regulat[e] the course of a hearing,” “rule on the admissibility of evidence,” and “have the power to . . . punish all [c]ontemptuous conduct.” *Id.*

<sup>237</sup> *Id.* at 2051-52.

<sup>238</sup> Officers, for example, issue regulations and orders, see *Collins*, 141 S. Ct. at 1785-86; *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2200 (2020); final decisions awarding relief in administrative adjudications, *Seila*, 140 S. Ct. at 2200.; as well as exercise criminal and civil law-enforcement functions with respect to private individuals and entities, *See Springer v. Gov’t of Philippine Islands*, 277 U.S. 189, 202 (1928) (“Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions.”).

<sup>239</sup> 47 Fed. Reg. 11816-02 (Mar. 19, 1982). The Commission reserves to itself the power to promulgate rules “involving significant questions of policy” and rules concerning several discrete subjects, most notably rules of practice for domestic licensing proceedings and rules concerning international trade in nuclear materials. The Executive Director also must exercise these subdelegated powers “[s]ubject to general policy guidance from the Commission.” *Id.* The authorities cited in the subdelegation include 5844(b)(2) (establishing an office focused on, *inter alia*, “safety and safeguards” of nuclear facilities and materials); *see also* PLUM BOOK 130 (1980) (omitting the Executive Director for Operations from the listed “plum” positions).

<sup>240</sup> 60 Fed. Reg. 47267-01 (Sept. 12, 1995); *see also* PLUM BOOK 71 (1992) (listing the Director of the Center for Devices and Radiological Health as a career appointment).

<sup>241</sup> 64 Fed. Reg. 56270-01 (Oct. 19, 1999),

rulemaking and enforcement functions regarding broadcast media ownership, programming, and technical standards.<sup>242</sup>

All of these examples of delegated rulemaking authority would likely be understood as significant governmental authority. So would many others in our dataset given the overlap of the constitutional test with our definition of an agency. Moreover, most of the submerged independent agencies we have identified presumably were created under statutes that permit subdelegation. For these reasons, the civil servants heading these submerged independent agencies are likely constitutional Officers. The problem, however, is that none of them are appointed by the President, a court of law, or department head. To the contrary, civil servants are generally hired through a merit-based process regulated by the Office of Personnel Management.<sup>243</sup> For career SES in particular, an agency in conjunction with the Office of Personnel Management publishes a job announcement for an SES position, rates and ranks eligible applicants, and approves of the candidate's qualifications.<sup>244</sup>

As a result, some submerged independent agencies likely violate the Appointments Clause. That many of the civil servants exercising subdelegated authority may qualify as principal Officers exacerbates the problem. Principal Officers, according to the Constitution, must be presidentially-nominated and Senate-confirmed. Last Term, the Court in *United States v. Arthrex* clarified that identifying principal Officers “calls for ... an appraisal of how much power an officer exercises free from control by a supervisor.”<sup>245</sup> Again, this assessment requires a case-specific inquiry; rather than a mechanistic look at an agency's organizational chart,<sup>246</sup> courts must also assess whether the individual's “work is directed and supervised *at some level*” by a principal officer.<sup>247</sup> As previously discussed, however, many subdelegations are exercised with very little oversight or review. Because civil servants are tenure-protected, they also cannot be fired unilaterally by the agency head, usually a principal officer.<sup>248</sup> As a consequence, many of the submerged independent agencies in our dataset are likely headed by principal Officer that are not presidentially-appointed and Senate-confirmed and thus unconstitutional.

---

<sup>242</sup> 67 Fed. Reg. 13216-01 (Mar. 21, 2002) (citing 47 C.F.R. § 0.61).

<sup>243</sup> CONG. RESEARCH SERV., THE SENIOR EXECUTIVE SERVICE: BACKGROUND AND OPTIONS FOR REFORM 7 (Sept. 6, 2012), <https://sgp.fas.org/crs/misc/R41801.pdf>

<sup>244</sup> Both the agency and the SES Qualifications Review Board (QRB), administered by OPM, must review and approve the qualifications of the candidate.

<sup>245</sup> 141 S. Ct. 1970, 1982 (2021) (citing *Edmond*, 520 U.S. at 659, 663).

<sup>246</sup> *Arthrex*, 141 S. Ct. at 1982 (“The dissent would have the Court focus on the location of an officer in the agency organization chart, but as we explained in *Edmond*, it is not enough that other officers may be identified who formally maintain a higher rank, or possess responsibilities of a greater magnitude”).

<sup>247</sup> *Edmond*, 520 U.S. at 662 (emphasis added). Concerning the administrative patent judges at issue in *Arthrex*, the fact that no higher-ranking officer could directly review their decisions weighed heavily in the holding that their appointment to an inferior office was incompatible with the Appointments Clause. 141 S. Ct. at 1985.

<sup>248</sup> See *Morrison v. Olson*, 487 U.S. 654 (1988) (identifying removal as a factor to determining whether an officer is principal or inferior).

Recent case law, however, suggests that ratification by an agency head may cure the constitutional defect—provided that the agency head also possessed the authority to exercise the authority at the time of the delegated decision. The doctrine of ratification provides that an individual’s affirmance of another’s prior act that was avowedly taken on the former individual’s account serves to bind that individual.<sup>249</sup> Thus, *post hoc* ratification remedies an otherwise constitutionally invalid decision by an improperly appointed official.<sup>250</sup> Even the issuance of a final rule—one of the most consequential actions that agencies undertake—promulgated by an improperly appointed civil servant can be cured of that defect via ratification.<sup>251</sup>

Accordingly, an agency head’s periodic review and approval of subordinates’ decisions made pursuant to subdelegated authority would cure Appointments Clause problems (without conceding that any such defect exists).<sup>252</sup> As mentioned, however, an important limitation concerns the timing of ratifications: the ratifying official must possess authority to undertake the act *both* at the time the act was done and at the time the ratification was made.<sup>253</sup> Many subdelegations in our dataset, however, do not seem to reserve authority explicitly to the delegator or otherwise make the exercise of authority concurrent.<sup>254</sup> Under such circumstances, the rule of meaningful variation could suggest that, absent such express reservations, the delegator intended to divest themselves of authority. If a court interprets the delegation accordingly, then these submerged independent agencies would continue to be unconstitutional.

Going forward, agency heads and their general counsels seeking to avoid Appointments Clause problems would do well to draft their subdelegations to reserve authority concerning agency actions. Even if the delegator never exercises this concurrent authority in practice, this language can help mitigate litigation risk should the use of a subdelegated power be subject to constitutional challenge. Further, they should also consider implementing a process whereby agency heads or other properly appointed officials periodically review and sign off on subordinates’ decisions.<sup>255</sup> This process should also encourage agency leaders to review the corpus of subdelegated powers in their respective agencies. This periodic review can potentially help uproot

---

<sup>249</sup> Restatement (Second) of Agency § 82 (1958). Although the doctrine is grounded in common law, courts deciding public-law cases also apply ratification concerning governmental principal-agent relationships. *See, e.g.*, *Fed. Election Comm’n v. NRA Pol. Victory Fund*, 513 U.S. 88, 98 (1994) (ratification doctrine is apposite, but the particular ratification at issue in this case was untimely); *Wilkes-Barre Hosp. Co., LLC v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (ratification cures a quorum violation).

<sup>250</sup> *See* *Moose Jooce v. Food & Drug Admin.*, 981 F.3d 26, 28 (D.C. Cir. 2020), cert. denied, 141 S. Ct. 2854 (2021) (“Even assuming ... issuance of the ... [r]ule violated the Appointments Clause ... [a principal Officer’s] ratification cured any Appointments Clause defect.”).

<sup>251</sup> *Id.*

<sup>252</sup> *See id.*

<sup>253</sup> *NRA Pol. Victory Fund*, 513 U.S. at 98.

<sup>254</sup> *See supra* Part I.A.

<sup>255</sup> *See Arthrex*, 141 S. Ct. at 1987 (concluding that, as a remedy to an Appointments Clause violation, “review by the Director better reflects the structure of supervision within the [Patent and Trademark office] and the nature of [administrative patent judge’s] duties”).

previous appointees’ “burrowed” subdelegations—a prospect we discuss in more detail later.<sup>256</sup>

2. *Removal.* — Turning from appointments to the removal of agency officials, the Constitution vests “executive [p]ower” in the President and requires the President to “take [c]are” that the laws are “faithfully executed.”<sup>257</sup> The Supreme Court infers from these provisions that the President has the right to fire certain agency officials at will. However, the Court allows Congress to place removal restrictions on certain actors as long as they were not “of such a nature that they impede the President’s ability to perform his constitutional duty.”<sup>258</sup> Recall that submerged independent agencies are headed by civil servants who are only removable for cause. First, their constitutionality could be called into question if they are characterized as single-headed agencies helmed by principal officers. Second, even if led by inferior officers, they may still be unconstitutional if contained within another agency headed by officials who themselves have removal protections.

On the first issue: In *Collins v. Yellen*, the Supreme Court considered the Federal Housing Finance Agency, which was headed by a single Director removable only for cause.<sup>259</sup> It held the removal restriction unconstitutional largely based on a previous precedent decided just the year before, *Seila Law v. Consumer Financial Protection Bureau*.<sup>260</sup> In *Seila Law*, the Court severed a good-cause protection placed on the single director of the Consumer Financial Protection Bureau.<sup>261</sup> It reasoned that a single-headed agency concentrated power in one individual unchecked by fellow members of a multimember body.<sup>262</sup> When that single head with “significant administrative and enforcement authority” was also removable for cause, the scheme became unconstitutionally tethered from presidential control.<sup>263</sup> *Collins* expanded on *Seila Law*’s logic, insisting that the analysis does not “hinge[]” on “the nature and breadth of an agency’s authority,” in particular, whether the agency directly regulated third party rights.<sup>264</sup>

---

<sup>256</sup> See *infra* Part III.C, which discusses the benefits of periodic affirmative review of subdelegations in greater detail.

<sup>257</sup> U.S. CONST., Art. II.

<sup>258</sup> *Morrison*, 487 U.S. at 691.

<sup>259</sup> 141 S. Ct. 1761, 1770 (2021).

<sup>260</sup> 140 S. Ct. 2183, 2191 (2020).

<sup>261</sup> *Id.* 2192 (holding that CFPB’s removal restrictions unconstitutionally “concentrate[e] power in a unilateral actor insulated from Presidential control”).

<sup>262</sup> *Id.* at 1765 (declaring that “the nature and breadth of an agency’s authority is not dispositive in determining whether Congress may limit the President’s power to remove its head”).

<sup>263</sup> *Seila*, 140 S. Ct. at 2203 (“The CFPB’s single-Director structure contravenes this carefully calibrated system by vesting significant governmental power in the hands of a single individual accountable to no one.”).

<sup>264</sup> *Collins*, 141 S. Ct. at 1784.

Some submerged independent agencies have superficial similarities with the structure of the CFPB and FHFA. Single delegates exercise delegated executive powers and have limitations on their removal. That civil-service protections differ from the for-cause removal protection at issue in *Seila* may be of little consequence, as the “Constitution prohibits even modest restrictions on the President’s power to remove the head of an agency with a single top officer.”<sup>265</sup> For the subset of submerged independent agencies that are headed by a single, principal officer, their passing resemblance to the structure that confronted the *Seila* and *Collins* Court arguably render them constitutionally vulnerable.<sup>266</sup>

*Seila Law*, however, also emphasized the novelty of the CFPB’s structure as prime evidence of its unconstitutionality.<sup>267</sup> That structure’s novelty was “[p]erhaps the most telling indication” of its unconstitutionality.<sup>268</sup> There is, by contrast, nothing novel about submerged independent agencies. As we show, they are remarkably common, with 1,596 new appointee-to-civil servant subdelegations during the 1979-2019 period. The practice persists during Democratic as well as Republican administrations and in independent as well as executive agencies. The Federal Register records the first subdelegation on March 27, 1936, which is the tenth day of the Federal Register’s existence.<sup>269</sup> The practice of recording subdelegations in the Federal Register persisted throughout the mid-twentieth century.<sup>270</sup> There is therefore good

---

<sup>265</sup> *Id.* at 1785. Further, civil servants arguably enjoy *greater* job protection than principal officers with for-cause removal protection, because a for-cause removal provision “can easily be read to allow the President to terminate [a principal officer] who disobeys a lawful order about how to exercise the agency’s (limited) policy discretion”). Brief for Court-Appointed Amicus Aaron Nielson, *Seila Law LLC v. CFPB*, at 41.

<sup>266</sup> The holding in *Seila* is limited to principal officers, *see Seila*, 140 S. Ct. at 2192, which likely encompasses only a subset of civil-servant delegates. Cf. *Collins*, 141 S. Ct. at 1802 (Kagan, J., concurring in the judgment) (predicting that the majority’s logic in *Collins* may place the removal-protected, singular Social Security Administrator “next on the chopping block”). Justice Kagan’s prediction proved accurate. *See* Lisa Rein, *Biden Fires Head of Social Security Administration, a Trump Holdover Who Drew the Ire of Democrats*, WASH. POST (July 11, 2021).

<sup>267</sup> *See Seila*, 140 S. Ct. at 2201 (“The question [before us] ... is whether to extend those precedents to the new situation before us.”); *id.* (“Perhaps the most telling indication of a severe constitutional problem ... is a lack of historical precedent to support it. An agency with a structure like that of the CFPB is almost wholly unprecedented.”). *See also* Peter Conti-Brown & Brian Feinstein, *The Contingent Origins of Financial Legislation*, \_ WASH. U. L. REV. \_ \*16 n.66 (forthcoming)

(collecting citations of other recent Supreme Court separation-of-powers cases that deploy this anti-novelty doctrine).

<sup>268</sup> *Id.* at 2201.

<sup>269</sup> 1 Fed. Reg. 75, 77 (Mar. 27, 1936) (subdelegating the authority to, *inter alia*, accept contracts for the acquisition of real property, to the Resettlement Administration’s Assistant Administrator of Land Utilization, and authorizing the further subdelegation of this authority). That day’s edition also contained several additional subdelegations.

<sup>270</sup> *See, e.g.*, 8 Fed. Reg. 291, 296 (Jan. 8, 1943) (subdelegation to the Rubber Director of the War Production Board regarding the allocation of rubber to military and civilian uses); 13 Fed. Reg. 127, 129 (Jan 9, 1948) (subdelegation to several civil servants in the USDA Sugar Branch regarding setting quotas for imported sugar); 20 Fed. Reg. 3841, 3853 (June 2, 1955) (subdelegation to the Director of the Fish & Wildlife Service regarding certain purchasing decisions).

reason to think that submerged independent agencies are not unconstitutional, at least under one premise in *Seila Law*.

As for the second front, even if submerged independent agencies are not vulnerable as single-headed agencies with for-cause removal restrictions, they may still be so when they are contained within other agencies headed by officials with for-cause removal protection. In *Free Enterprise Fund*, the Supreme Court held that such double for-cause removal restrictions violate the Constitution. To be sure, Chief Justice Roberts, for the majority, was adamant that the case did not decide the question of SES or civil service constitutionality.<sup>271</sup> Nevertheless, Justice Breyer in dissent pointed out that the majority's logic was difficult not to apply to these positions.<sup>272</sup> Justice Breyer's observation is even stronger if civil servants are also deemed to be constitutional officers, rather than mere employees.<sup>273</sup> As previously discussed, many subdelegated authorities are significant in character, which makes this conclusion likely.

If a judge were to find unconstitutional the removal restrictions on a civil servant exercising subdelegated authority, the question of remedy would be case- and statute-specific. Courts have sometimes severed the offending removal restrictions,<sup>274</sup> but the inquiry as to whether to do so turns on perceived congressional intent. Given that the purpose of the civil service laws was to insulate civil servants, it is unlikely that severance would be the correct remedy in this context. Rather, depending on the case facts and whether relief is prospective or retrospective, courts may consider alternative remedies such as ratification or simply deeming the action *ultra vires* as to the parties.<sup>275</sup>

One complication to the above analyses is the fact that the potential removal issue only arises in this context because of an executive-branch actor's decision to subdelegate authority. The President, through control over that actor, could always revoke the subdelegation if exercised in an undesirable way. This fact pattern arguably distinguishes it from the Court's removal cases, which involve *congressional* grants of power to tenure-protected actors that cannot be stripped by the President. Thus, one could argue, the "President's ability to perform his constitutional duty" is not undermined by shadow independent agencies.<sup>276</sup> Note, however, that this claim is only

---

<sup>271</sup> See *Free Enter.*, 561 U.S. at 506 ("We do not decide the status of other Government employees, nor do we decide whether lesser functionaries subordinate to officers of the United States must be subject to the same sort of control as those who exercise significant authority pursuant to the laws.")

<sup>272</sup> See *id.* at 538 (Breyer, J., dissenting).

<sup>273</sup> *Id.* at 506 ("The parties here concede that Board members are executive 'Officers,' as that term is used in the Constitution. We do not decide the status of other Government employees, nor do we decide whether lesser functionaries subordinate to officers of the United States must be subject to the same sort of control as those who exercise significant authority pursuant to the laws.")

<sup>274</sup> See David Zaring, *Toward a Separation-of-Powers Realism*, 37 *YALE J. REG.* 708, 714 (2020); Kent Barnett, *To the Victor Goes the Toil—Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 *N.C. L. REV.* 481, 527 (2014).

<sup>275</sup> See *Collins*, 141 S. Ct. at 1795 (Gorsuch, J., concurring).

<sup>276</sup> *Morrison*, 487 U.S. at 691.

convincing if one agrees that a potential Article II violation could be cured ex post by the revocation of subdelegated authority — a possibility that current case law could be read not to support, though the issue has not been directly addressed.<sup>277</sup>

Moreover, the President’s removal authority is also arguably compromised when the subdelegation in question is judicially enforceable under *Accardi*.<sup>278</sup> In these situations, the President would be constrained from both removing the subordinate as well as from overturning the decision itself. Any efforts to later revoke the subdelegation, in turn, could not change the subordinate’s judicially-enforceable decision. This is also likely to be true in the adjudicatory context, where due process norms have long constrained the ability of the President to interfere in a pending decision, even if the President could remove the adjudicator after the decision had been made.<sup>279</sup>

3. *Statutory constraints.* Turning from constitutional to statutory issues, Congress can control the extent to which authority is redelegated after its initial delegation to an agency head simply by clearly saying so. When the statute is ambiguous, however, courts apply *Chevron*’s familiar two-step framework.<sup>280</sup> First, they ask whether Congress clearly answered the question as to whether a statutory delegate can redelegate her authority. If the answer is no, then courts defer to an agency’s reasonable statutory construction.<sup>281</sup> This inquiry would require a statute-by-statute analysis of the subdelegations in our dataset.

That said, it is worth noting that courts do not appear to calibrate their analysis based on the form of the delegation. A Ninth Circuit decision upholding an NLRB delegation to its General Counsel, for example, was recorded only in internal meeting minutes.<sup>282</sup> Nevertheless, the court engaged in an interpretation of the statute under *Chevron*’s two steps, but did not consider the informal nature of the mechanism through which authority was granted.<sup>283</sup> In doing so, the Ninth Circuit did not apply the *Mead* doctrine, which holds that *Chevron* deference is due when Congress has delegated authority “to make rules carrying the force of law,” and the agency has

---

<sup>277</sup> Cf. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 504 (2010) (declaring that “altering the budget or powers of an agency as a whole is a problematic way to control an inferior officer” while noting that the “Commission cannot wield a free hand to supervise individual members if it must destroy the Board in order to fix it.”).

<sup>278</sup> See *supra* Part I.A.

<sup>279</sup> See *Myers v. U.S.*, 272 U.S. 52 (1926). “[T]here may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control.”437 T

<sup>280</sup> *Nou*, *supra* note 5, at 517.

<sup>281</sup> See, e.g., *Halverson v. Slater*, 129 F.3d 180, 181 (D.C. Cir. 1997) (holding that “[p]ursuant to the first step of the familiar *Chevron* analysis, . . . [the act] limits delegation” to a third party based on the text of the statute).

<sup>282</sup> *Frankl v. HTH Corp.*, 650 F.3d 1334 (9th Cir. 2011).

<sup>283</sup> *Id.*

acted pursuant to that authority when interpreting the statute.<sup>284</sup> More specifically, *Mead* conditions deference on the extent to which Congress provides for a “relatively formal administrative procedure” that fosters “fairness and deliberation.” such as notice-and-comment rulemaking or formal adjudication.<sup>285</sup>

More broadly, courts generally presume that Congress allowed the agency to delegate authority internally, absent a statutory prohibition.<sup>286</sup> That said, courts currently treat internal and external agency delegations asymmetrically. While delegations to an internal actor are presumptively valid absent express statutory proscription, those to actors outside of the agency are not.<sup>287</sup> In other words, when statutes are otherwise silent, judges generally read such silence to permit internal subdelegation, but to prohibit redelegation to another entity — whether another agency, private party, or a state.<sup>288</sup> The relevant cases usually justify this approach with one of two rationales. First, accountability with internal delegations purportedly remains with the federal agency, while external delegations “blur” the lines of responsibility.<sup>289</sup> Second, delegations to external entities also increase the likelihood that they will be pursued by actors with different interests; as one court put it, they “aggravate[] the risk of policy drift inherent in any principal-agent relationship.”<sup>290</sup>

Because the subdelegations at issue in this study are all internal ones to civil servants, courts would likely extend *Chevron* deference to the agency’s interpretation of the statute that the agency claims permits the subdelegation. Even if *Mead* were to apply, courts could take note that the subdelegations were published in the CFR as some indication of formality and deliberation. In light of the constitutional issues analyzed above, however, courts may be loathe to allow particular delegations of final authority if they impede on the President’s Article II executive powers.<sup>291</sup> In other

---

<sup>284</sup> See U.S. v. *Mead*, 533 U.S. 218, 226–27 (2001).

<sup>285</sup> *Id.* at 203.

<sup>286</sup> U.S. Telecom Ass’n v. F.C.C., 359 F.3d 554, 566 (D.C. Cir. 2004) (stating that “while federal agency officials may subdelegate their decision-making authority to subordinates absent evidence of contrary congressional intent, they may not subdelegate to outside entities—private or sovereign—absent affirmative evidence of authority to do so”); See also O’Connell, *supra* note 26, at 687 (2020) (observing that courts “presumptively” permit “subdelegation to a subordinate federal officer or agency ... absent affirmative evidence of a contrary congressional intent”).

<sup>287</sup> See, e.g., U.S. v. *Giordano*, 416 U.S. 505, 513-14 (1974) (asserting “[a]s a general proposition” Congress “vesting a duty in [an agency or officer] . . . evinces no intention whatsoever to preclude delegation to other officers in the [agency]”); *Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation v. Board of Oil & Gas Conservation of the State of Montana*, 792 F.2d 782, 796 (9th Cir. 1986); *Shook v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 132 F.3d 775, 783-84 (D.C. Cir. 1998); U.S. Telecom Ass’n v. FCC, 359 F.3d 554, 565 (D.C. Cir. 2004); *Louisiana Forestry Assoc. v. Sec. of U.S. Dept. of Labor*, 745 F.3d 653, 671 (5th Cir. 2014).

<sup>288</sup> See F. Andrew Hessick & Carissa Byrne Hessick, *The Non-Redelegation Doctrine*, 55 WM. & MARY L. REV. 163; Marisam, *supra* note 39, at 891 (terming the prohibition against external delegations “the anti-redelegation doctrine”).

<sup>289</sup> See U.S. Telecom Ass’n v. F.C.C., 359 F.3d 554, 565–66 (D.C. Cir. 2004).

<sup>290</sup> *Id.*

<sup>291</sup> U.S. v. *Arthrex*, 141 S. Ct. 1970, 1982 (2021). See notes 245-255 and accompanying text.



words, judge are more likely to exercise constitutional avoidance to prohibit delegations that would raise such concerns.

## B. Tradeoffs

Apart from their legality, the normative desirability of submerged independent agencies depends on where one sits. From the President's perspective, the prospect of subdelegated authority may be a blessing or a curse depending on which administrative actor is initiating it: the President herself or the agency head. President-directed subdelegations can strategically entrench preferences to aligned civil servants, especially before a presidential transition. Alternatively, presidents can utilize subdelegations to ensure that an agency continues to function in the face of vacancies in appointed leadership positions<sup>292</sup> Relatedly, delegations can also serve as a means of bypassing Senate confirmation in favor of a civil servant with aligned preferences.<sup>293</sup>

By contrast, subdelegations initiated *sua sponte* by the agency head can be deployed as a means of "resistance" against the White House. Sometimes, presidents and agency heads' hold divergent preferences, due, for instance, to bureaucratic capture, civil-servant influence, or pressure from Congress.<sup>294</sup> Under these circumstances, an agency head can subdelegate authority to an aligned civil servant as a mean of achieving a policy goal at odds with the prevailing President, while disclaiming responsibility for the decisions. If she reserves authority to herself, the delegation provides option value. The same is true when the agency is faced with congressional pushback or broader accusations of politicizing a matter. In these circumstances, subdelegating to a civil servant may signal agency neutrality and expertise.<sup>295</sup>

The normative valence of each of these strategies depends on exogenous views about the broader merits of presidential control.<sup>296</sup> If one believes that the presidential control model has been a valuable, even necessary, development for legitimizing the administrative state, then subdelegation as a means of bureaucratic autonomy is worrisome. All the more so when bureaucratic power is submerged at the civil servant level. On the other hand, if one believes that presidential interference is

---

<sup>292</sup> O'Connell, *supra* note 26, at 658 ("Delegation often fully substitutes for acting leaders.").

<sup>293</sup> See Christina Kinane, *Control without Confirmation: The Politics of Vacancies in Presidential Appointments*, 115 AM. POL. SCI. REV. 599 (2021).

<sup>294</sup> See Brian Feinstein & Abby Wood, *Divided Agencies*, \_\_ S. CAL. L. REV. \_\_ (2022) (reporting agency heads' heterogeneous views); Michael Levine & Jennifer Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. Econ. & Org. 167, 169 (1990) (discussing role of industry and public interest groups); E. Donald Elliott, *TQM-ing OMB: Or Why Regulatory Review Under Executive Order 12,291 Works Poorly and What President Clinton Should Do About It*, 57 LAW & CONTEMP. PROBS. 167, 176 (1994) (discussing White House-appointee divergence).

<sup>295</sup> See GREGORY HUBER, *THE CRAFT OF BUREAUCRATIC NEUTRALITY* (2007).

<sup>296</sup> See, e.g., Kagan, *supra* note 65, at 2376–77.

unwise, even illegal under statutes that explicitly delegate authority to the agency head, then subdelegation can be a welcome tool to combat preference interference and vindicate congressional preferences.<sup>297</sup>

Taking a step back to consider the practice's implications for the administrative state as a whole, the prospect that political appointees can use subdelegations to entrench their preferences—and thus raise the costs to future presidents to implement their democratically ratified agenda, is normatively troubling for those that believe that administrative legitimacy stems from political accountability.<sup>298</sup> Given the heated contexts in which the practice often occurs, the prospect is especially concerning in an age of increased political polarization and regulatory oscillation.<sup>299</sup>

By empowering insulated civil servants, political appointees may sacrifice democratic responsiveness.<sup>300</sup> If they had instead retained the authority, they would be subject to more potential oversight by a President who faces elections.<sup>301</sup> After all, policy-motivated civil servants presumably value the exercise of delegated authority only to the extent that authority enables them to move policy from what it would otherwise be. If civil servants' preferences differ from their principals' views, then delegations generate policy drift.<sup>302</sup> Where appointees and civil servants are generally in agreement, delegations to civil servants—with job protections and long career horizons—enable appointees to project their preferences into the future.<sup>303</sup> In this way, subdelegations can facilitate partisan entrenchment.<sup>304</sup>

When the next president comes into power, however, she possess the constitutional imperative to “faithfully execute” the laws.<sup>305</sup> When some of that

---

<sup>297</sup> Kevin Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 295 (2006)

<sup>298</sup> See CHARLES FRIED, *ORDER AND LAW* 153 (1991) (arguing that “lines of responsibility should be stark and clear, so that the exercise of power can be comprehensible, transparent to the gaze of the citizen subject to it”).

<sup>299</sup> See Cynthia Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 COLUM. L. REV. 1689, 1691 (2015) (addressing agency legitimacy problems in an era of political polarization); Gillian E. Metzger, *Agencies, Polarization, and the States*, 115 COLUM. L. REV. 1739, 1762–65 (2015) (discussing the impact of political polarization on administrative agencies).

<sup>300</sup> See generally Francis Rourke, *Responsiveness and Neutral Competence in American Bureaucracy*, 52 PUB. ADMIN. REV. 539 (1992); but see Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53 (2003) (left-leaning civil servants, in combination with more extreme liberal or conservative appointees, can pull the executive branch towards the median voter).

<sup>301</sup> On the other hand, an election-oriented President may favor subdelegations to civil servants, particularly on politically contentious issues that could divide the governing coalition.

<sup>302</sup> See Kenneth Shepsle, *Bureaucratic Drift, Coalitional Drift, and Time Consistency*, 8 J.L. ECON. & ORG. 111 (1992).

<sup>303</sup> Cf. Matthew McCubbins, Roger Noll & Barry Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989) (positing that other agency structures and processes can be marshalled to guard against future drift).

<sup>304</sup> To be clear, we do not contend that partisan entrenchment is the sole explanation for subdelegations. Subdelegations can serve a range of purposes, see Nou, *supra* note\_.

<sup>305</sup> U.S. CONST. Art. II, cl. 1.

authority has been delegated to civil servants through the Federal Register, it can be challenging for new appointees to revoke and exercise that authority as previously discussed. For example, there is an information problem. The learning curve for inexperienced government officials is steep. Locating and appreciating the scope of subdelegated authority takes up further time, so may be deprioritized. Second, revoking a published delegation requires another publication in the Federal Register to that effect. Drafting and formatting that revocation takes more resources. Further, the subdelegation could also be “functionally” entrenched: it empowers lower-level officials who can mobilize supporters and other interest groups to fend off subsequent attempts at repeal.<sup>306</sup>

On the other side of the ledger, there are many reasons why submerged independent agencies should be potentially celebrated and preserved. Most importantly, credible, entrenched delegations can encourage civil servants to develop expertise.<sup>307</sup> Social scientists have long recognized that an important function of delegation is to motivate effort and information acquisition.<sup>308</sup> Essentially, when a civil servant knows that her decision will be the final one, she is much more willing to invest time and expertise into making it.<sup>309</sup>

Moreover, the prospect of exercising delegated authority serves as a form of compensation to civil servants. Because motivated job applicants will value delegated authority-as-compensation more than unmotivated ones, delegation offers a screening mechanism to attract a high-quality workforce.<sup>310</sup> In addition, by tying their own hands, political appointees can credibly commit to a more stable policy choice; greater regulatory stability that, in turn, can engender greater investment and economic

---

<sup>306</sup> See Levinson & Sachs, *supra* note 156, at 482 (describing methods of “functional” entrenchment involving the “strengthening political allies or weakening political opponents,” “changing the composition of the political community,” and “empowering a different governmental institution and consequently a different set of political actors and groups”); Magill, *supra* note 39, at 894 (noting that agency heads “could empower an internal agency unit with predictable views to be in charge of the agency choice,” thus rendering it “more difficult for political opponents to oppose the effort or to dislodge it once it is in place”).

<sup>307</sup> See SEAN GAILMARD & JOHN PATTY, *LEARNING WHILE GOVERNING* 25-27 (2013); Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1423, 1422-27 (2011).

<sup>308</sup> See, e.g., Philippe Aghion & Jean Tirole, *Formal and Real Authority in Organizations*, 105 J. POL. ECON. 1, 3 (1997) (observing that the “transfer of formal authority to an agent credibly increases the agent’s *initiative* or *incentive* to acquire information”); Ryan Bubb & Patrick Warren, *Optimal Agency Bias and Regulatory Review*, 43 J. LEGAL STUD. 95 (2014); Stephenson, *supra* note.

<sup>309</sup> Cf. Margaret Lemos, *The Consequences of Congress’s Choice of Delegate*, 63 VAND. L. REV. 363, 372-73 (2010); (similar rationale for why Congress grants discretion to agencies); Daron Acemoglu, et al., *Technology, Information, and the Decentralization of the Firm*, 4 Q. J. ECON. 1759 (2007) (similar rationale for why managers delegate to employees); Thomas Gilligan & Keith Krehbiel, *Collective Decisionmaking and Standing Committees*, 3 J. L. ECON. & ORG. 287 (1987) (similar rationale for why Congress limits its own ability to amend its committees’ proposals).

<sup>310</sup> See Sean Gailmard & John Patty, *Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise*, 51 AM. J. POL. SCI. 873 (2007).

growth.<sup>311</sup> Finally, subdelegation can also free up resources for political appointees to pursue higher-priority tasks. By declining decision-making authority, agency heads can focus more time and attention on more important matters.<sup>312</sup>

\*\*\*

To summarize, submerged independent agencies can foster expertise and generate higher-quality decision-making. But they also may yield less democratically responsive policies. Accountability is weakened both to the extent that civil servants' preferences differ from the views of politically accountable appointees and to the extent that current appointees subdelegate to entrench their preferences and constrain future appointees. How one weighs these competing considerations may vary by agency or policy issue, or even by diverging first principles about constitutional and administrative law. There are also difficult empirical questions that must be resolved before deciding whether submerged independent agencies are, on net, desirable for the administrative state.

### C. Oversight

Given the competing values that submerged independent agencies serve, an important question is which institutional actor is best situated to evaluate this tradeoff. At first glance, it might be tempting to call upon judicial actors to resolve the competing concerns in fact-specific circumstances. Perhaps courts could police partisan entrenchment through the *Accardi* doctrine, which, recall, compels agencies to follow their own rules. In this view, a judge could refuse to enforce rules delegating authority if a litigant can convincingly show evidence that partisan entrenchment motivated the subdelegation.

A well-developed literature in the election-law context, however, suggests that political actors may be better equipped than judges to police against entrenchment.<sup>313</sup>

---

<sup>311</sup> Jacob Gersen & Adrian Vermeule, *Delegating to Enemies*, 112 COLUM. L. REV. 2193, 2223 (2012); Douglass North & Barry Weingast, *Constitutions and Commitment: The Evolution of Institutional Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803, 819 (1989)

<sup>312</sup> See James P. Pfiffner, *Political Appointees and Career Executives: The Democracy-Bureaucracy Nexus in the Third Century*, 47 PUB. ADMIN. REV. 57, 62 (1987) (arguing that a certain level of subdelegations to civil servants may improve agency functioning and, thus, better enable the agency to achieve appointee objectives).

<sup>313</sup> See Heather Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 517–18 (2004) (“Lacking a sound framework for adjudicating political process claims, the Supreme Court’s election law opinions often lack analytic coherence and thus provide little guidance to lower courts or other political actors.”); Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 630–45 (2002) (discussing the Supreme Court’s “constitutional entanglement” with the redistricting process and “intrusi[ons] into state political arrangements”); Samuel Issacharoff & Richard Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 644–45 (1998) (criticizing the Supreme Court’s failure to “articulate a . . . highly functional account of what features of democratic politics should be the focus

To start, entrenchment does not admit to an obvious judicially manageable standard.<sup>314</sup> The concept of raising the costs of repeal or amendment, for example, raises normative baseline questions. For instance, how many allies created as a result of the delegation is too many? How much greater must the marginal costs of repeal be to qualify as too much? Such questions also require difficult inquiries regarding mixed motives: Did the agency head intend to entrench power or merely motivate internal expertise?<sup>315</sup> For these reasons, along with more familiar separation-of-power concerns, courts have historically been deferential to agency heads' judgments of how to manage their internal resources and affairs, especially when such decisions are not fixed by statute.<sup>316</sup>

Political actors, by contrast, have tools as well as stronger incentives to root out delegations to internal agency actors that are no longer aligned with current preferences. The subdelegations that we study here are all published in the Federal Register and the Code of Federal Regulations. But publication by itself is often insufficient to garner limited presidential or legislative attention.<sup>317</sup> To increase the salience of subdelegations, Congress should consider requiring agencies to submit existing internal delegations after presidential and congressional transitions to the relevant congressional committees or the Government Accountability Office. Similarly, new Presidents-elect should review these delegations as part of transition planning.

Both the legislature and executive branch should consider implementing *ex post* review mechanisms akin to the Congressional Review Act and OIRA review. Both of these mechanisms require agencies to affirmatively bring certain actions to the attention of political actors. A similar congressional or White House mechanism for proposed subdelegations could help to ensure that accountable actors consider the appropriate tradeoffs that each delegation presents. The overarching idea of these processes would be to review the scope of delegated authority as well as the exercise of authority pursuant to them

Finally, Congress or the President could go even further by passing legislation or drafting an executive order automatically sunseting all internal agency subdelegations — thereby requiring incoming agency heads to affirmatively review

---

of constitutional analysis”).

<sup>314</sup> See Nathaniel Persily, *The Place of Competition in American Election Law*, in *The Marketplace of Democracy: Electoral Competition and American Politics* 171, 172–74 (Michael McDonald & John Samples eds., 2006) (noting “[d]ifferent election laws will have different competition-related effects, and maximizing competitiveness along one dimension might diminish it on another”).

<sup>315</sup> See Michael Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 542 (1997) (“Even if one agrees that entrenchment problems have significant antimajoritarian implications and that they are not sufficiently self-correcting, one still might reject an anti-entrenchment theory of judicial review if the task it prescribes for courts is unmanageable.”).

<sup>316</sup> See Gillian Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1872 (2015) (citing *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 891 (1990) ((stating that individuals “cannot seek wholesale improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally mad”))).

<sup>317</sup> Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 896–99 (2006).

and ratify them. Such measures would help to ensure that subdelegations to lower-level officials do not persist due to inertia and simple path dependence. The major drawbacks to this approach, however, are that it could result in the revocation of socially beneficial subdelegations and could have a chilling effect on the exercise of delegated authority.

## CONCLUSION

This Article has argued that an unrecognized form of independent agency is ensconced within the administrative state. These entities exercise discretionary governmental authority. They are headed by civil servants possessing removal protection and subject to varying degrees of political control. Their authority can be judicially enforceable. It is often exercised under the radar due to information costs and resource constraints on the political appointee above.

Our empirical findings suggest that submerged independent agencies have been created by Republican and Democratic administrations alike across a variety of agencies. The practice is pervasive, particularly during the midnight period. Partisan differences in overall behavior are not obvious, though perhaps unsurprisingly, there are differences in subject matter. An important limitation on our analysis is that it necessarily relies on subdelegation counts as a proxy for magnitude and significance. But of course, two different delegations can vary along both dimensions. Thus, future work should attempt to formulate alternative measures of a delegation's scope and salience as a validity check and basis of further illumination.

Many questions remain for the research agenda established and motivated by our descriptive findings and dataset. Among them is the important question of what factors inform an appointee's choice to delegate to a civil servant relative to a political appointee. Does it vary according to the level of expertise required or perceived preference alignment? Another question is what influences a delegator's choice of form: When does it make sense to publish the subdelegation in the CFR versus an internal manual or not at all? Does it depend on the monitoring environment, the number of interest groups engaged on an issue, or other factors? Further, in light of our findings concerning presidential transitions and party control of Congress, more fine-grained work remains concerning the political circumstances under which subdelegations occur; for instance, do we observe heightened activity preceding *congressional* transitions?<sup>318</sup> Finally, more work should be done to understand what kinds of actions are taken by civil servants pursuant to these subdelegations.

Independent agencies are already in the judicial crosshairs. Those identified here are unlikely to be an exception. The heated rhetoric over this administrative form, however, should be tempered by more careful consideration of their costs and benefits. Executive branch actors have been creating submerged independent agencies for

---

<sup>318</sup> Cf. Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 NW. L. REV. 471, 503 (2011) (finding that agencies "rush to complete rules before a change in control of Congress").

decades, suggesting that they serve an important function and perceived need. Accordingly, our hope is that the future of submerged independent agencies will depend not on soundbites, but rather on careful empirical work to better understand the motivations and consequences of the phenomenon.

APPENDICES

**Appendix A: Delegator and Delegatee Characteristics**

To provide a more comprehensive overview on our new subdelegations dataset, the following two tables report information on the identities of the delegators and delegatees. For the delegatee table, the pool expands from appointees and civil servants to include other governmental actors: states and other subnational government entities, other federal agencies, and inspectors general.<sup>319</sup>

Table A.1 : Delegator Characteristics

	Total	Mean / Year (SD)	Median / Year (MAD)	Mean / Agency- Yr (SD)	Median / Agency-Yr (MAD)
Appointees	3,292	80.3 (71.1)	68.0 (60.8)	9.2 (21.7)	3.0 (3.0)
PAS Appointees	2,783	67.9 (65.8)	57.0 (50.4)	8.9 (22.6)	3.0 (3.0)
Other Appointees	509	12.4 (13.1)	8.0 (7.4)	8.6 (10.4)	5.0 (5.9)
Civil Servants	66	1.6 (2.8)	1.0 (1.5)	1.3 (1.7)	1.0 (1.5)

Some values are slightly higher than the total number of civil servant-to-appointee and civil servant-to-civil servant delegations reported in Table 1 because the identities of some delegatees are unknown. Figure includes one delegation from the USDA’s inspector general, a PAS appointee who is nonetheless considered independent of other appointees within the departmental hierarchy. Other appointees category includes presidential appointments not requiring Senate confirmation, noncareer appointments, Schedule C appointees, and appointments excepted by statute. Civil servants category includes career appointments, positions not listed the most recent Plum Book published prior to the relevant delegation, and military officers (excluding those listed in the Plum Book).

<sup>319</sup> Although inspectors general are PAS appointees, they enjoy a measure of operational and budgetary autonomy from other agency officials. See Robin Kempf and Jessica Cabrera, *The De Facto Independence of Federal Offices of Inspector General*, 49 AM. REV. PUB. ADMIN. 65, 67 (2019). An inspector general is delegator concerning one subdelegation in our dataset.



Table A.2 : Delegatee Characteristics

	Total	Mean / Year (SD)	Median / Year (MAD)	Mean / Agency-Yr (SD)	Median / Agency-Yr (MAD)
Appointees	1,128	26.9 (27.3)	17.5 (17.1)	6.6 (14.5)	2.0 (1.5)
PAS Appointees	705	16.8 (20.6)	11.5 (12.6)	5.5 (11.9)	2.0 (1.5)
Other Appointees	423	10.1 (17.3)	4.0 (4.4)	5.0 (11.6)	1.5 (0.7)
Inspectors General	21	0.5 (1.4)	0	0.5 (1.2)	0
Civil Servants	1,621	40.5 (49.7)	28.0 (32.6)	6.5 (16.7)	2 (1.5)
Article I Judges	8	0.19 (0.46)	0	0.002 (0.05)	0
State, Local, & Tribal Govt	467	11.4 (12.3)	8.0 (7.4)	10.4 (12.0)	6.0 (7.4)
Other Fed. Agencies	29	0.7 (1.4) (1.71)	0	0.7 (1.2)	0

Notes: Some values are slightly higher than the total number of appointee-to-appointee and civil servant-to-appointee delegations reported in Table 1 because the identities of some delegatees are unknown. Other appointees category includes presidential appointments not requiring Senate confirmation, noncareer appointments, Schedule C appointees, and appointments excepted by statute. Inspectors general are a subset of PAS appointees. *See supra* note 319. Civil servants category includes career appointments, positions not listed the most recent Plum Book published prior to the relevant delegation, and military officers (excluding those listed in the Plum Book). Values are slightly higher than the total number of appointee-to-civil servant and civil servant-to-civil servant delegations reported in Table 1 because the identities of several delegators are unknown. Article I Judges includes six subdelegations administrative law judges (ALJs) and two subdelegations to the Justice Department’s Chief Immigration Judge. Immigration Judges, along with some other types of judges within the executive branch, are legally distinct from ALJs. *See* Kent Barnett & Russell Wheeler, *Non-ALJ Adjudicators in Federal Agencies*, 53 GA. L. REV. 1 (2018).

Within the largest of these new categories, intergovernmental subdelegations, all but four of the 467 are EPA conveyances to states and other subnational units to implement two pollution-control standards under the Clean Air Act.<sup>320</sup> A majority of interagency subdelegations involve either the DOJ assigning the ability to respond to legal claims to the targeted agency or the General Services Administration authorizing other agencies to undertake certain leasing and procurement decisions.<sup>321</sup>

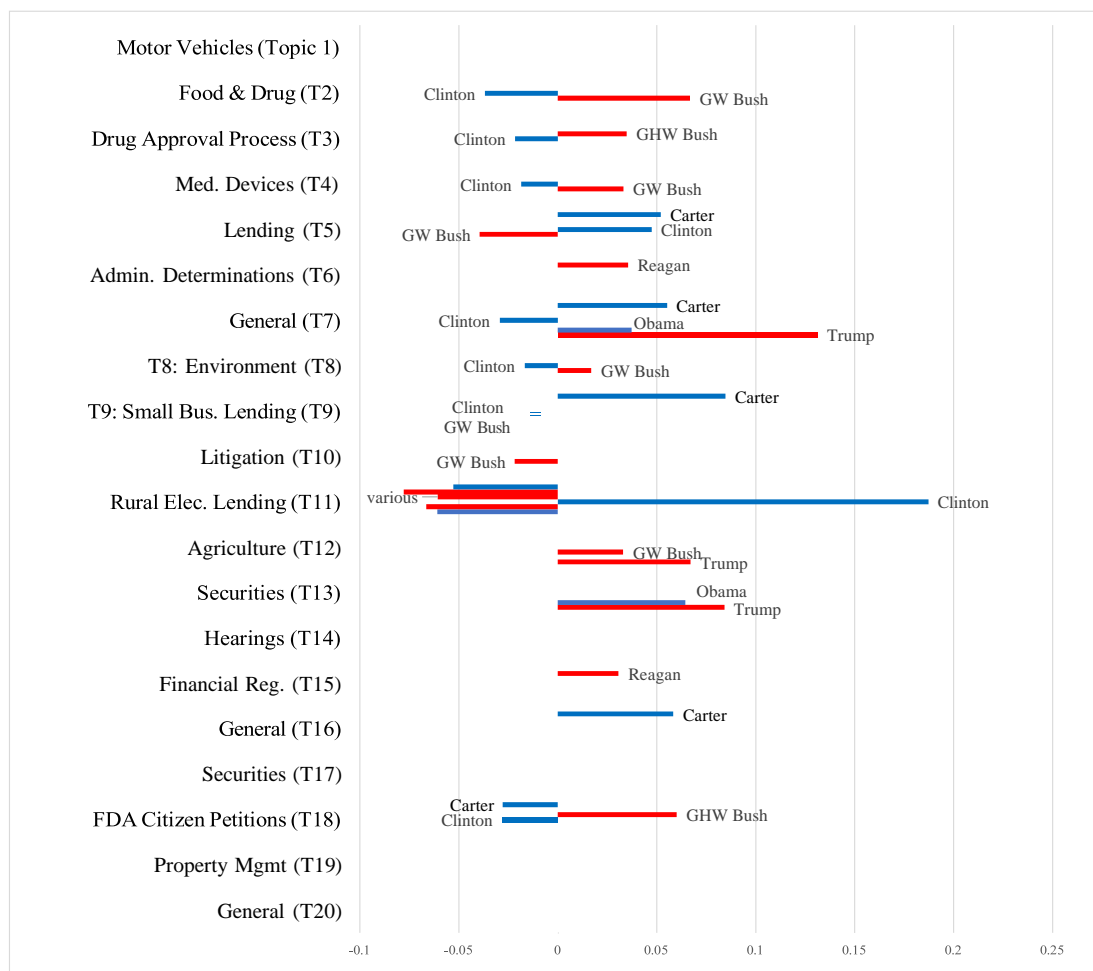
<sup>320</sup> For an example of one such EPA intergovernmental delegation, see 66 Fed. Reg. 48211-01 (Sept. 19, 2001)

<sup>321</sup> 73 Fed. Reg. 70278-01 (Nov. 20, 2008) (DOJ delegation to Secretary of Veterans Affairs to settle administrative torts claims for up to \$300,000); 58 Fed. Reg. 40592-01 (July 29, 1993) (GSA expansion of delegated authority for other agencies to lease space in private buildings).

## Appendix B: Frequent Topics of Subdelegations

As discussed in Part II.B, we use structural topic modeling to gain insights into which concepts tend to be grouped to together in the text of subdelegations. Figure B.1 illustrates differences in the prevalence of each topic in each presidential administration, from Carter to Trump, relative to its prevalence in the other administrations during our study period. For instance, the first bar in the figure shows that food-and-drug-related subdelegations (Topic 2) are 3.7 percent less common during the Clinton administration than in other administrations during the 1979-2019 period. For simplicity, the figure only displaces differences in topic prevalence that are statistically significant at the  $p < 0.05$  level.

Figure B.1: Difference in Topic Prevalence by Presidency



The most notable feature of the figure is the substantially greater prevalence of subdelegations concerning rural utility lending (Topic 11) during the Clinton administration, and corresponding substantially lower prevalence in many other administrations. This result is almost entirely attributable to a single Federal Register entry in 1994; as discussed *supra* Part II, this outlier entry subdelegated dozens of discrete powers within the REA.