Georgia Law Review

Volume 58 | Number 3 Article 4

6-3-2024

Do Elections Really Have Consequences?: Presidential Indifference, Attenuated Accountability, and Policy Paralysis Within the Administrative State

Ronald J. Krotoszynski Jr.
University of Alabama School of Law, rkrotoszynski@law.ua.edu

DO ELECTIONS *REALLY* HAVE CONSEQUENCES?: PRESIDENTIAL INDIFFERENCE, ATTENUATED ACCOUNTABILITY, AND POLICY PARALYSIS WITHIN THE ADMINISTRATIVE STATE

Ronald J. Krotoszynski, Jr.[*]

In theory, the Constitution vests all*, not "some" or "most," of the executive power in the President; the buck supposedly stops at the Resolute Desk. Yet current practice falls well short of this constitutional ideal. The conjunction of fixed terms of office, good cause removal limits, and partisan balance requirements for the heads of multi-member independent federal agencies, boards, and commissions can and does leave critically important federal agencies effectively unaccountable to the President. Such a state of affairs existed at the Federal Communications Commission (FCC) from January 20, 2021, until September 25, 2023—over half of President Biden's four-year term of office—because the agency featured a 2–2 partisan deadlock that prevented it from undertaking any contested policy initiatives. Worse still, this deadlock arose because of defeated-President Donald Trump's appointment of a Republican FCC Commissioner in December 2020. Nathan Simington's FCC appointment to a term of office that extends to 2024, and conceivably until January 2027, made a mockery of the idea that elections have policy consequences and effectively hobbled the FCC under President Biden until he*

[*] John S. Stone Chair, Director of the Program in Constitutional Studies & Initiative for Civic Engagement, and Professor of Law, University of Alabama School of Law. The University of Alabama Law School Foundation provided a generous summer research grant that supported the author's work on this project. With thanks to the participants at the 2023 Administrative Law Discussion Forum, hosted by the University of Paris (Dauphine). I wish to thank Professors Neal Devins, Sid Shapiro, Jack Beermann, and Peter Strauss for their helpful comments and suggestions on an earlier draft of this Article; this revised version of the Article reflects the benefit of their input. Finally, the usual disclaimer applies: Any errors, omissions, or mistakes are solely the responsibility of the author.

succeeded in appointing a fifth Democratic Party-affiliated commissioner.

A serious accountability problem arises when an Executive Branch agency is not subject to meaningful presidential control and oversight—an accountability problem that also raises serious separation of powers issues. When a multi-member federal agency lacks a majority of members who support the incumbent presidential administration's regulatory policies and priorities, it becomes entirely implausible to posit that the President can actually supervise its activities (and reprimand its failures to act as well). Worse still, such circumstances permit the President to have his cake and eat it too by blaming the agency's inaction on his lack of an effective ability to supervise the agency and its work. Even if such a state of affairs might be politically convenient for the President, it cannot be reconciled with a unitary executive model for the presidency. After all, the buck does not stop with the President if the President cannot exercise meaningful day-to-day control and supervision over an agency's work.

If we truly have a unitary executive, then the President must enjoy meaningful supervisory powers over, and hence accountability for, all major executive branch agencies that wield significant policymaking authority—and this authority should exist from day one of the President's term of office. Unfortunately, although the Federal Vacancies Reform Act (VRA) permits the President to name acting principal officers to cabinet departments and presidentially controlled agencies, the law expressly prohibits such acting appointments to any and all federal agencies that feature a multi-member head. This needs to change. Under the VRA, if the President may constitutionally appoint an acting Secretary of State or Attorney General who may exercise the vast, full powers of the office (despite lacking the Senate's advice and consent) no good reasons exist for denying the President an identical power with respect to multi-member federal agencies. Indeed, a single member of a multi-member agency cannot act alone for that agency—rendering such acting appointments more plausibly "inferior" in character—and thereby reducing any separation of powers concerns. Accordingly, Congress should reform the VRA to empower the President to make acting appointments to

independent federal agencies—and thus render it impossible for the President to disclaim the ability "to take Care that the Laws be faithfully executed."

TABLE OF CONTENTS

I. INTRODUCTION

This Article considers the problem, in terms of democratic accountability, of a President lacking control over a major policymaking entity within the Executive Branch. President Joe Biden took the oath of office on January 20, 2021.[1] Yet, for more than half of his four-year term of office, Biden lacked effective oversight powers and control over the Federal Communications Commission (FCC), the independent agency charged with regulating telecommunications services (including the airwaves that make all wireless telecommunications services possible).[2] He succeeded in installing a majority of Democratic Party-affiliated commissioners on September 25, 2023[3]—over two years and eight months into his four-year term of office.

This leaves the Biden Administration with a mere sixteen months in which to implement major new telecommunications policies,[4] such as the restoration of so-called "net neutrality" regulations.[5] Most Democratic Party voters support a policy of net neutrality,[6] which would require internet service providers to

---

[1] Camila Domonoske, *Watch: Biden Takes the Oath of Office,* NPR (Jan. 20, 2021), https://www.npr.org/sections/inauguration-day-live-updates/2021/01/20/958736520/watch-biden-takes-the-oath-of-office [https://perma.cc/VK97-URDC].

[2] *See About the FCC*, FCC, https://www.fcc.gov/about/overview [https://perma.cc/7SH7-VMF5] (explaining the functions and powers of the FCC).

[3] *See* BreAnna Bell, *Anna Gomez Sworn in as FCC Commissioner, Announces Staff*, VARIETY (Sept. 25, 2023, 5:33 PM), https://variety.com/2023/digital/news/anna-gomez-fcc-commissioner-staff-1235734742/ [https://perma.cc/C83T-LJ8X] (reporting the appointment of Anna Gomez as a new FCC Commissioner).

[4] *See* Cristiano Lima, *Senate Confirms Biden's FCC Nominee, Breaking Years-Long Deadlock*, WASH. POST (Sept. 7, 2023, 4:17 PM), https://www.washingtonpost.com/technology/2023/09/07/fcc-anna-gomez-confirmed-biden-nominee/ [https://perma.cc/7S2K-L2TJ] ("The Senate on Thursday confirmed Anna Gomez, President Biden's pick for the Federal Communications Commission, ending a lengthy partisan split at the regulatory agency and giving Democrats the power to carry out major agenda items.").

[5] *See* Steve Lohr, *Biden Administration Plans to Bring Back 'Net Neutrality' Rules*, N.Y. TIMES (Sept. 26, 2023), https://www.nytimes.com/2023/09/26/technology/net-neutrality-rules-broadband-internet-biden.html [https://perma.cc/9CM2-HUQ3] (documenting the Biden Administration's priority of restoring "net neutrality" rules via the FCC).

[6] Chris Teale, *More Than Half of Voters Still Back Net Neutrality Laws*, MORNING CONSULT (Apr. 27, 2022, 6:00 AM), https://pro.morningconsult.com/instant-intel/net-neutrality-survey [https://perma.cc/9RR9-VPFL] (documenting that 57% of Democrats support net neutrality rules).

refrain from favoring net traffic in which they have a financial interest.[7] And, in fact, FCC Chair Jessica Rosenworcel almost immediately announced a rulemaking initiative to restore the agency's net neutrality policies after Commissioner Anna Gomez was sworn into office (polices that the Trump Administration had abandoned).[8] Whether sufficient time exists between now and January 20, 2025 for the agency to complete this regulatory work is open to some rather serious doubts.

To be sure, the President's lack of oversight and control at the FCC has arisen in part because of the Senate's refusal to confirm a Biden nominee to an open fifth seat on the five-member independent agency.[9] Even so, however, under a unitary theory of the executive branch, what matters most is the lack of presidential oversight and control rather than the precise reason for this state of affairs.[10] On the other hand, however, the Senate also bears *some* measure of responsibility for President Biden's failure to have a working majority of Democratic Party-affiliated FCC commissioners for over half of his term of office. Even taking this into account, President Biden himself, who never made securing effective control over the FCC a White House priority,[11] is equally to blame.

Having a critically important federal agency, like the FCC, effectively offline with respect to making or revising any major new

---

[7] *See generally* Jan Krämer, Lukas Wiewiorra & Christof Weinhardt, *Net Neutrality: A Progress Report*, 37 TELECOMM. POL'Y 794 (2013) (explaining net neutrality policies and their effects on internet infrastructure).

[8] *See* Lohr, *supra* note 5 ("The move by Ms. Rosenworcel came after the Senate confirmed Anna Gomez as a fifth commissioner of the F.C.C. earlier this month. That gave the Democrats a majority on the commission, breaking a 2-2 partisan deadlock.").

[9] *See* Lima, *supra* note 4 (documenting the partisan deadlock in the FCC caused by Senate obstruction).

[10] *See* Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2203 (2020) (observing that the Framers adopted a framework for the federal government that would "divide power everywhere except for the Presidency, and render the President directly accountable to the people through regular elections" and explaining that "individual executive officials will still wield significant authority, but that authority *remains subject to the ongoing supervision and control of the elected President*" (emphasis added)).

[11] *See* Nihal Krishnan, *FCC Could Have Republican Majority, Thanks to Biden Delays*, YAHOO NEWS (Oct. 7, 2021), https://news.yahoo.com/fcc-could-republican-majority-thanks-183600903.html [https://perma.cc/ZH7Q-KSET] (recounting complaints from Democratic Party supporters that the Biden Administration had not made securing control of the FCC a priority during the first part of his administration).

telecommunications policies for over two and a half years demonstrates with crystal clarity how presidential indifference can significantly attenuate the practical effect of elections. It also shows quite clearly how presidential indifference can give rise to a rather serious problem of democratic accountability. Simply put, the President cannot be held accountable for the actions of an executive agency that he does not control, and this holds true regardless of whether the President's lack of control arises from presidential inaction, Senate inaction, or some combination of both.[12]

That the President might actually prefer lacking effective control over an executive branch agency is entirely beside the point. Article II establishes a unitary executive headed by the President, and this structure requires that the President both enjoy control over entities within the Executive Branch and be accountable to "We the People" for each and every federal executive agency's actions (or failures to act).[13] As Chief Justice John G. Roberts, Jr. wryly stated the point: "In its pursuit of a 'workable government,' Congress cannot reduce the Chief Magistrate to a cajoler-in-chief."[14] Accordingly, the President should not be able voluntarily to reduce himself to the "cajoler-in-chief" either—even if doing so might suit the President's perceived political needs of the day.

One might wonder if the Biden Administration's seeming indifference to taking the reins at the FCC for over half his term of office really matters all that much. It does. The FCC's portfolio is vast. The agency oversees critical components of the nation's information infrastructure, including the architecture of the internet, wireless telecommunications services, satellite

---

[12] *But cf.* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 496 (2010) (noting that "[w]ithout the ability to oversee the Board, or to attribute the Board's failings to those whom he can oversee, the President is no longer the judge of the Board's conduct," observing that, absent meaningful control and oversight, the President "can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member's breach of faith," and holding that this state of affairs "violates the basic principle that the President 'cannot delegate ultimate responsibility or the active obligation to supervise that goes with it,' because Article II 'makes a single President responsible for the actions of the Executive Branch.'" (quoting Clinton v. Jones, 520 U.S. 681, 712–13 (1997) (Breyer, J., concurring in judgment))).

[13] *See* U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."); *id.* art. II, § 3 (providing that the President "shall take Care that the Laws be faithfully executed").

[14] *Free Enter. Fund*, 561 U.S. at 502.

communications, cable services, and even interstate and international traditional wireline telephony.[15] Thus, the FCC's importance within the regulatory state cannot be gainsaid. Simply put, the FCC is not the regulatory equivalent of the U.S. Board on Geographic Names.[16]

Created in 1934,[17] the FCC's institutional importance has grown exponentially over time as technological advances have rendered the U.S. economy increasingly dependent on telecommunications networks to function.[18] Indeed, virtually no significant economic activity takes place in today's United States without the extensive use of telecommunications services.[19] Even so, between President Biden taking office on January 20, 2021[20] and Commissioner Gomez taking office on September 25, 2023,[21] no one had been minding the store at the FCC. The agency lacked the ability to undertake any contested Biden Administration telecommunications policy initiatives.[22]

---

[15] *See, e.g., What We Do*, FCC, https://www.fcc.gov/about-fcc/what-we-do [https://perma.cc/Q9RY-BTWK] (listing various responsibilities of the FCC in data infrastructure).

[16] *See* 43 U.S.C. § 364 (discussing the regulatory role of the U.S. Board on Geographic Names); *U.S. Board on Geographic Names*, U.S. GEOLOGICAL SURV., https://www.usgs.gov/us-board-on-geographic-names [https://perma.cc/P54U-Y8C9] ("The U.S. Board on Geographic Names (BGN) is a Federal body created in 1890 and established in its present form by Public Law in 1947 to maintain uniform geographic name usage throughout the Federal Government.").

[17] *See* Communications Act of 1934, Pub. L. No. 73-416, § 4, 48 Stat. 1064 (codified as amended at 47 U.S.C. § 151) (establishing the FCC).

[18] *See, e.g.*, FCC, FEDERAL COMMUNICATIONS COMMISSION STRATEGIC PLAN 2018-2022, at 5 (2018), https://docs.fcc.gov/public/attachments/DOC-349143A1.pdf [https://perma.cc/ZB72-LR84] (explaining the impact of FCC regulation and its growth alongside the rise of telecommunications).

[19] *See* Paravee Maneejuk & Woraphon Yamaka, *An Analysis of the Impacts of Telecommunications Technology and Innovation on Economic Growth*, 44 TELECOMM. POL'Y 1, 1 (2020) ("[T]elecommunications technology and innovation play a substantial role in driving globalization and the growth of the economy as well as making communications and commerce more transnational. Not only helpful for the economy, but it has become a part of the daily life of people.").

[20] *See* Domonoske, *supra* note 1 (documenting the inauguration of President Biden).

[21] *See* Bell, *supra* note 3 (discussing Gomez becoming the fifth commissioner).

[22] *See* Lima, *supra* note 4 ("The move returns the agency to full strength for the first time under Biden . . . . The impasse had left the agency without a democratic majority for the entirety of Biden's term until now.").

From the time President Biden took office until late September 2023, the FCC featured two Democratic Party-affiliated commissioners and two Republican Party-affiliated commissioners.[23] Because the FCC cannot function effectively with a deadlocked 2–2 partisan composition,[24] the voters of the United States suffered under a federal administrative agency that was unaccountable to the President and, by implication, also unaccountable to "We the People" for over two and a half years.[25] To be sure, during this period of partisan gridlock the FCC could and did undertake routine tasks, such as license renewals for television and radio stations.[26] On the other hand, the deadlocked agency could not undertake any contested new policy initiatives—including rolling back the Trump-Administration FCC's deregulatory agenda on matters such as net neutrality and imposing public trustee obligations on local television and radio broadcasters.[27]

President Biden bears substantial responsibility for this state of affairs. The President's multi-year refusal to abandon Gigi Sohn, an FCC nominee incapable of obtaining the Senate's approval, left the FCC deadlocked and hence gridlocked.[28] Elections should have major policy consequences—but an indifferent President coupled with a closely divided Senate can attenuate, if not zero out completely, those consequences. Worse still, when a President lacks effective control over an important administrative agency or

---

[23] *See* Lohr, *supra* note 5 (noting the 2–2 partisan deadlock at the FCC).

[24] *See infra* Part III (discussing the effect of partisan gridlock on the FCC).

[25] *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 513–14 (2010) ("The Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so. That power includes, as a general matter, the authority to remove those who assist him in carrying out his duties. Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else.").

[26] *See, e.g.*, FCC, FCC FACT SHEET 2 (2022) https://docs.fcc.gov/public/attachments/DOC-387027A1.pdf [https://perma.cc/4376-2TEC] (noting the commission's adoption of new TV allotments in October 2021).

[27] *See* Lima, *supra* note 4 ("During the Trump administration, the Republican-led FCC spearheaded sweeping efforts to deregulate the telecommunications sector, moves that Democrats are now expected to reverse.").

[28] *See id.* ("Consumer advocates said the 2½-year delay hampered the FCC's ability to carry out critical tasks aimed at protecting Americans from potential abuse by the telecom giants, including reinstating the Obama-era net neutrality regulations, which bar internet service providers from blocking or throttling content.").

department (such as the FCC), it makes it possible for a President to plausibly disclaim responsibility for the agency's policy failures.

The Constitution vests all of the executive power in the President;[29] the buck is supposed to stop at the Resolute Desk. Yet, when the President lacks effective oversight and control over an important independent government agency, he can have his cake and eat it too. Such circumstances permit the President to blame inaction on major policy initiatives on his lack of effective supervisory powers and the Senate's refusal to act on a pending nomination (even if the President has not done all he could conceivably do to establish effective oversight and control over a federal administrative agency).[30]

---

[29] *See* U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."); *id.* art. II, § 3 (providing that the President "shall take Care that the Laws be faithfully executed"); *see also* Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454, 1473–74 (2009) (asking why "the President should not have the power, in the first place, to direct and supervise that independent agency head in the exercise of his or her authority," and observing that "the President is vested with the executive power and yet actually exercises a relatively small slice of that power in certain critical areas of domestic policy"); Ronald J. Krotoszynski, Jr., Johnjerica Hodge & Wesley W. Wintermyer, *Partisan Balance Requirements in the Age of New Formalism*, 90 NOTRE DAME L. REV. 941, 954 (2015) (arguing that even if presidents acquiesce in significant limits on their ability to oversee the Executive Branch, thereby "abdicat[ing] their oversight responsibilities," it remains the case that "the separation of powers requires at least the *possibility* of active presidential oversight and control," and positing that "[t]he formal legal structure that governs presidential oversight of federal agencies must comply with the imperatives of a unitary executive (as specified in Article II)"); Saikrishna Bangalore Prakash, *Faithless Execution*, 133 HARV. L. REV. F. 94, 97 (2020) (observing that "imposing a duty on someone strongly implies that the duty-bearer has some means, often granted elsewhere, to satisfy the duty," and arguing that "[t]he duty to faithfully execute the office of the President, turns in large measure, on the personal efforts of the incumbent").

[30] A similar problem with fixing presidential accountability arises in the context of cooperative federalism programs. *See* Ronald J. Krotoszynski, Jr., *Cooperative Federalism, the New Formalism, and the Separation of Powers Revisited:* Free Enterprise Fund *and the Problem of Presidential Oversight of State-Government Officers Enforcing Federal Law*, 61 DUKE L.J. 1599, 1604, 1609 (2012) (positing that "[c]ooperative-federalism programs may offend separation-of-powers principles by encroaching on the president's duty to superintend the implementation of federal law," and observing that "if the Vesting and Take Care Clauses of Article II require that the president enjoy a meaningful ability to direct the execution of federal laws, then federal laws that export these duties to state and private entities raise serious separation-of-powers problems"). When the federal government commands state legislatures to adopt laws that implement federal programs, voters often find it difficult to fix the blame when they dislike the policies adopted and enforced by their state government. *See* New York v. United States, 505 U.S. 144, 168–69 (1992) (explaining that "where the Federal

In theory, elections and voting constitute apex rights because voting is the best means of preserving any and all fundamental rights.[31] In a democracy, voting confers democratic legitimacy on the subsequent actions of those persons who contest and win election to public office. Thus, regular free and fair elections convey democratic legitimacy to the President and members of Congress. This, in turn, serves as a principal justification for vesting them with wide law-making and policymaking powers.[32] When a national general election produces a change of partisan control at the White House, the House, or the Senate, downstream consequences should impact the operation of the administrative state.

In the context of independent agencies, with entrenched members serving fixed terms of office and often featuring partisan balance requirements,[33] elections have far less impact than they arguably should. If we truly have a unitary executive,[34] the

---

Government compels States to regulate, the accountability of both state and federal officials is diminished" and positing that "[a]ccountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation"). The same problem arises when the President lacks control over an administrative agency—even if the President actually *prefers* to lack control, and hence accountability, for the agency's actions; voters will be at a loss as to whether the blame for policy paralysis lies with the Senate or the White House.

[31] *See* Reynolds v. Sims, 377 U.S. 533, 561–62 (1964) (observing that "the right of suffrage is a fundamental matter in a free and democratic society" because the exercise of suffrage "in a free and unimpaired manner is preservative of other basic civil and political rights").

[32] *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–25 (1962) (describing the focus on the "power of the people" underlying the power of elected officials and distinguishing the federal courts, which Bickel argues suffer from a "countermajoritarian difficulty," from the elected branches, which possess a democratic imprimatur that legitimates their policymaking choices).

[33] *See* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 784–97 (2013) (discussing and describing how Congress has used fixed terms of office, multi-member agency heads, limitations on removal from office before the expiration of a principal officer's term of office ends, and partisan balance requirements to restrict, if not quite eliminate, presidential oversight and control of independent federal agencies and providing a comprehensive compendium of which federal agencies feature each of these devices to limit presidential power over Executive Branch agencies).

[34] *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 595 (1994) (opining that "[b]ecause the President alone has the constitutional power to execute federal law, it would seem to follow that, notwithstanding the text of any given statute, the President must be able to execute that statute, interpreting it and applying it to concrete circumstances"); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1207

President should enjoy meaningful supervisory powers over, and thus accountability for, all major Executive Branch agencies that enjoy significant policymaking authority.[35] What is more, the President must enjoy this authority from "day one"—not more than halfway through the President's four-year term of office. If limitations on the use of temporary, "acting" principal officers prevent the President from overseeing the operation of a major Executive Branch agency (like the FCC),[36] then Congress must enact reforms that make it impossible for the President to disclaim the ability "to take care that the laws be faithfully executed" (even if the President would find it politically expedient *not* to have effective supervisory authority over a particular administrative agency).[37]

If the Supreme Court intends to continue to uphold and enforce Congress's imposition of good cause removal protections, coupled with partisan balance requirements, for the principal officers[38] overseeing the operation of independent federal agencies within the Executive Branch,[39] the President must have the power to appoint

---

(1992) (arguing that "[t]he President could not possibly be said to have all of the executive power in order to be able to take care that the laws be faithfully executed if he could not tell his subordinates what to do").

[35] *But cf.* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 479 (2010) ("Such diffusion of power carries with it a diffusion of accountability.").

[36] *See infra* Part V (outlining limitations on the use of temporary acting principal officers and their implications for presidential oversight); *see also* Krotoszynski, Hodge & Wintermyer, *supra* note 29, at 954 (arguing that "Congress cannot legally estrange executive officers from the President").

[37] *See Free Enter. Fund*, 561 U.S. at 497 ("Perhaps an individual President might find advantages in tying his own hands. But the separation of powers does not depend on the views of individual Presidents . . . nor on whether 'the encroached-upon branch approves the encroachment.'" (quoting New York v. United States, 505 U.S. 144, 182 (1992))).

[38] For an explanation of the difference between "principal" and "inferior" officers within the Executive Branch, see Edmond v. United States, 520 U.S. 651, 662–63 (1997). The short version is that "[g]enerally speaking, the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President" and an officer "whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Id.* By way of contrast, a "principal officer" has no supervisor within the agency or department and reports directly to the President. *See id.* at 662 ("Whether one is an 'inferior' officer depends on whether he has a superior.").

[39] *See* Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2206 (2020) ("While we do not revisit *Humphrey's Executor* or any other precedent today, we decline to elevate it into a freestanding invitation for Congress to impose additional restrictions on the President's removal

acting principal officers to independent agencies to establish effective oversight and control, and hence accountability, for the administrative state. The unilateral power to appoint acting principal officers, however, must be carefully calibrated to ensure that it does not have the effect of eliminating the Senate's important advice and consent role.[40] The Take Care Clause requires the President to exercise meaningful oversight and control over all Executive Branch entities, but the Appointments Clause requires the Senate to play a meaningful role in the appointment of principal officers within the Executive Branch.[41] Neither clause can legitimately be read out of the Constitution.[42]

One possible solution would involve amending the Federal Vacancies Reform Act of 1998 (VRA)[43] to permit, during a presidential transition, the appointment of acting principal officers at independent federal agencies.[44] The VRA authorizes and normalizes the President making temporary appointments of "acting" principal officers in presidentially controlled departments and agencies—but, at present, not for principal officers serving within independent federal agencies.[45] To ensure that an incentive

---

authority."); *see id.* at 2212 (Thomas, J., concurring) ("But with today's decision, the Court has repudiated almost every aspect of *Humphrey's Executor*. In a future case, I would repudiate what is left of this erroneous precedent.").

[40] *See infra* text accompanying notes 139–147 (explaining the threat from presidential appointment power to the Senate's advice and consent role).

[41] *See* Ronald J. Krotoszynski, Jr. & Atticus DeProspo, *Squaring a Circle: Advice and Consent, Faithful Execution, and the Vacancies Reform Act*, 55 GA. L. REV. 731, 749–62, 812–14 (2021) (discussing the inherent tension between the Appointments and Take Care clauses).

[42] *See id.* at 739–40 ("The U.S. Constitution thus creates an inherent tension—or conflict—between the baseline process for appointing principal and inferior officers within the Executive Branch (namely, presidential nomination coupled with Senate approval) and the President's duty to ensure that all laws, presumably including the Constitution itself, are 'faithfully executed.' The federal courts must resolve this conflict in a way that gives meaningful effect to both clauses; an approach that reads either the Appointments Clause or the Take Care Clause out of the U.S. Constitution is simply unworkable.").

[43] Federal Vacancies Reform Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-611 (codified at 5 U.S.C. §§ 3345–3349d).

[44] *See infra* Part V (explaining the proposal for acting principal officers under the VRA).

[45] *See* 5 U.S.C. § 3349c(1)(A) (prohibiting acting appointments under the VRA for "any member who is appointed by the President, by and with the advice and consent of the Senate to any board, commission, or similar entity that . . . is composed of multiple members"); Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV. 613, 627 (2020) (noting that "[t]he Vacancies Act does not cover all 1,242 (by last official count) Senate-confirmed positions outside the federal courts" but instead "applies to roles in cabinet departments and agencies *that are not*

exists for the president to nominate and secure confirmation of permanent principal officers within independent agencies, suitable limitations on this authority would be necessary and might include temporal limits on an acting officer's service and a requirement that the president submit a nominee for the position to the Senate within a time certain in order for the acting appointment to remain valid.[46]

This Article will proceed in five main parts. Part I considers how the insulation of principal officers in independent federal agencies renders these agencies less accountable, and hence less responsible, to the President. Part II takes up a specific and salient example of this problem: President Biden's lack of effective control of the FCC well past the midpoint of his four-year term of office. Something is seriously wrong when a chief executive can go for more than two years of his four-year term without having the ability to implement administration policy in one of the most important sectors of the national economy. The problem involves both an inability to implement administration policy but also a pernicious concomitant ability to disclaim responsibility for the agency's actions—and, no less important, its *failures* to act. Part III then considers how entrenched principal officers, combined with partisan balance requirements, create conditions that largely negate any plausible claim that the President can "take care that the laws be faithfully executed"[47] with respect to many independent federal agencies with vast policymaking powers within the Executive Branch. Part IV considers potential solutions to this problem, including both presidential self-help and possible amendments to the VRA. Finally, Part V offers a brief summary and conclusion.

The Supreme Court repeatedly has emphasized that presidential control of federal agencies is vitally important to the separation of powers. This control, the Justices explain, both empowers a President to act and also renders the President accountable for an

---

led by multimember leadership teams" (emphasis added)); *see generally* VALERIE C. BRANNON, CONG. RSCH. SERV., R44997, THE VACANCIES ACT: A LEGAL OVERVIEW 2–13 (2022) (providing a comprehensive overview of the President's power to make acting appointments to Executive Branch agencies under the VRA and discussing the restrictions on who may serve and the time limits applicable to acting service under the VRA).

[46] *See* Krotoszynski & DeProspo, *supra* note 41, at 802, 802–09 (describing "creating a meaningful presidential incentive to nominate and secure Senate approval of principal officers").

[47] U.S. CONST. art. II, § 3.

agency's policy successes and failures.[48] However, independent federal agencies—featuring entrenched principal officers protected by good cause removal, coupled with partisan balance requirements that require the President to appoint political enemies to principal offices within the executive branch—seriously undermine the importance and efficacy of elections as a means of vesting "We the People" with control over the federal executive branch. If elections are to have consequences, then the person who wins the presidency must have the ability to staff principal offices with people who wish to see the President's agenda implemented rather than thwarted.

II. POWER WITHOUT ACCOUNTABILITY AND THE UNITARY EXECUTIVE BRANCH

Some sort of reform clearly is needed to ensure that a President enjoys meaningful control over the entire administrative state—and that such control exists from the hour he takes the oath of office on inauguration day. The Federal Vacancies Reform Act of 1998 resolves this problem for cabinet departments and administrative entities over which the President enjoys plenary control—meaning that he can remove a principal officer at will for a good reason, a bad reason, or no reason at all—by authorizing the President, within limits, to appoint an acting principal or inferior officer.[49] This law permits the President to vest the powers of both principal and inferior offices in an "acting" official who can exercise the position's full portfolio.[50]

---

[48] *See* Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2192 (2020) (holding "that the structure of the CFPB violates the separation of powers" because the CFPB's Director could exercise too much unilateral policymaking authority free and clear of meaningful presidential oversight). In order to address the separation of powers problem, the *Seila Law* majority, led by Chief Justice Roberts, held that "the CFPB Director's removal protection is severable from the other statutory provisions bearing on the CFPB's authority" and, accordingly, the CFPB "may therefore continue to operate, but its Director, in light of our decision, must be removable by the President at will." *Id.*

[49] *See* 5 U.S.C. § 3345(a)(2) (permitting and limiting the power of the president to appoint a person "to perform the functions and duties of the vacant office temporarily in an acting capacity").

[50] For thoughtful and comprehensive discussions of the VRA, see O'Connell, *supra* note 45. *See also* Nina A. Mendelson, *The Permissibility of Acting Officials: May the President Work Around Senate Confirmation?*, 72 ADMIN. L. REV. 533, 548–53 (2020) (discussing the VRA as the statutory authorization for acting officials). A serious separation of powers question exists regarding the ability of the President to appoint a principal officer without first obtaining the

No corresponding statutory power to appoint an acting principal officer within an independent agency exists and, in fact, the VRA expressly withholds the power to name acting members of multi-member independent agencies.[51] Accordingly, when combined with partisan balance requirements that mandate the appointment of political enemies of the President to principal offices within the Executive Branch, a new President enters office with important independent agencies that retain principal officers of the prior administration—often including a hostile partisan majority opposed to the new President's policy agenda.

Because the VRA does not apply to multi-member independent agencies, boards, and commissions, it often takes months for the President to secure a majority of his political supporters on the governing entity of an independent federal agency. During the period between the time when the President takes the oath of office and subsequently secures effective control of an independent agency, that agency is not meaningfully accountable to the President and need not seek to promote or implement the platform on which the administration sought and won election to office. In terms of elections having consequences for the administrative state, this approach makes little, if any, sense. At the same time, however, the organic acts that create federal independent agencies do not provide any work-around that would permit the President to establish effective control over the agency (for example, by firing carry-over members loyal to the opposition party incident to a presidential transition despite "good cause" removal limitations protecting incumbent agency members).

If partisan balance requirements meant that the partisans associated with the losing presidential candidate were partisans in

---

Senate's advice and consent. *See* NLRB v. SW Gen., Inc., 580 U.S. 288, 313 (2017) (Thomas, J., concurring) (arguing that unilateral presidential appointments to principal offices within the Executive Branch create a significant separation of powers problem "because the Appointments Clause forbids the President to appoint principal officers without the advice and consent of the Senate"); *see also* Krotoszynski & DeProspo, *supra* note 41, at 812 ("The VRA, as presidential administrations presently interpret and apply it, permits the President to unilaterally appoint principal officers of the United States. This practice cannot be reconciled with the text of the Appointments Clause—which requires that the Senate approve the appointment of any person holding a principal office.").

[51] *See* 5 U.S.C. § 3349c(1)(A) (codifying that the power to appoint acting principal officers "shall not apply" to "any board, commission, or similar entity" that is "composed of multiple members").

name only, this might not present much of an impediment to the President implementing his policy agenda. However, as a recent study shows,[52] the minority party members of independent agencies are increasingly genuine partisans and work aggressively to oppose the President's policy agenda.[53] These minority party members literally, to use Justice Antonin Scalia's apt turn of phrase, "ride with the cops [but] cheer for the robbers."[54]

Moreover, turning to separation of powers theory and doctrine, it is exceedingly difficult to reconcile this state of affairs with the President's duty to "take care that the laws be faithfully executed."[55] If the buck stops with the President, then the President, from day

---

[52] Brian D. Feinstein & Daniel J. Hemel, *Partisan Balance with Bite*, 118 COLUM. L. REV. 9, 72–82 (2018).

[53] *See id.* at 72 ("We can now say with some confidence that PBRs are more than paper tigers—that they do indeed lead Presidents to choose cross-party appointees with divergent ideological preferences."). For the record, Professors Feinstein and Hemel are, at the end of the day, rather sanguine about the net effects of partisan balance requirements: "Partisan sort may lead Presidents to select bona fide cross-party members, who in turn serve as in-house monitors and counterbalance tendencies that might drive groups to go to extremes." *Id.* at 82. This argument accords well with social science and cognitive psychology studies that show partisans will bend the rules with less alacrity if they know someone is watching. *See* Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 490 (2002) (arguing that "the psychology of individual decisionmaking biases and group decisionmaking dynamics suggests that judicial review does improve the overall quality of rules"). Seidenfeld argues that, in the context of rulemaking, "[agency] accountability, if properly structured, can significantly improve the quality of decisionmaking in the sense of minimizing the extent to which individuals unthinkingly rely on inappropriate decisionmaking rules or fall prey to psychological biases." *Id.* at 508. His conclusions accord well with studies of panel effects in the U.S. Courts of Appeals. *See*, *e.g.*, Pauline T. Kim, *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*, 157 U. PA. L. REV. 1319, 1330–31 (2009) (noting that on a Court of Appeals panel comprised of judges appointed by Presidents of different political parties the "judges in the majority vote differently (in a less stereotypically ideological fashion) than judges on a homogeneous panel"). Granting all of these points, whether partisan balance requirements can or do improve agency decisionmaking relates to the quality of an agency's work, and not (at all) to whether one can plausibly reconcile such structures and strictures with the Constitution's creation of a unitary executive that relies on meaningful presidential control and oversight as means of securing accountability to "We the People." *See* Free Ent. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 502 (2010) ("In its pursuit of a 'workable government,' Congress cannot reduce the Chief Magistrate to a cajoler-in-chief.").

[54] Rankin v. McPherson, 483 U.S. 378, 394 (1987) (Scalia, J., dissenting) ("I agree with the proposition, felicitously put by Constable Rankin's counsel, that no law enforcement agency is required by the First Amendment to permit one of its employees to 'ride with the cops and cheer for the robbers.'").

[55] U.S. CONST. art. II, § 3.

one, needs to have some ability to influence, if not control, the policy agenda of an agency like the FCC.[56] As Chief Justice Roberts explained in *Free Enterprise Fund*, "[t]he diffusion of power carries with it a diffusion of accountability."[57] It is difficult, arguably impossible, to reconcile presidential accountability with an independent federal agency that has featured a 2–2 partisan deadlock for over half of a President's term of office. The next Part considers how this state of affairs came into being and then persisted for such a long period of time.

III. THE SOURCE OF THE ACCOUNTABILITY DEFICIT AT THE FCC FOR MUCH OF PRESIDENT BIDEN'S TERM OF OFFICE: THE "MIDNIGHT" APPOINTMENT OF FCC COMMISSIONER NATHAN SIMINGTON BY A DEFEATED PRESIDENT AND LAME-DUCK SENATE

The FCC has five members[58] and, by law, no more than three members may belong to the same political party.[59] This means that, under a GOP President, no more than three members may be members of the Republican Party and the same rule holds true under a Democratic-Party President as well. In late 2020, an open seat existed on the FCC and Donald Trump, never one to waste an opportunity to exercise and enhance his influence, moved to fill it.[60]

---

[56] *See* Myers v. United States, 272 U.S. 52, 163–64 (1926) (holding "that Article II grants to the President the executive power of the Government, i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed"); *see also Free Ent. Fund*, 561 U.S. at 493 ("It is *his* responsibility to take care that the laws be faithfully executed. The buck stops with the President, in Harry Truman's famous phrase.").

[57] *Free Ent. Fund*, 561 U.S. at 497.

[58] *See* 47 U.S.C. § 154(a) (2018) ("The Federal Communications Commission . . . shall be composed of five commissioners appointed by the President . . . .").

[59] *See id.* § 154(b)(5) ("The maximum number of commissioners who may be members of the same political party shall be a number equal to the least number of commissioners which constitutes a majority of the full membership of the Commission.").

[60] *See* David Shepardson, *U.S. Senate Panel Votes to Approve Trump FCC Nominee*, REUTERS (Dec. 2, 2020, 10:51 AM) https://www.reuters.com/article/us-usa-tech-idUSKBN28C2DM/ [https://perma.cc/ZBC6-FLR8] ("The U.S. Senate Commerce Committee voted on Wednesday to approve the nomination of a senior Trump administration official involved in an effort to seek new social media regulations to a seat on the Federal Communications Commission.").

On September 16, 2020, President Trump nominated Nathan Simington to serve on the FCC as a GOP member; this action followed Trump's decision on August 3, 2020, to withdraw the nomination of Michael O'Rielly to serve another term over comments Commissioner O'Rielly made supporting the First Amendment rights of social media platforms.[61] The nomination thus preceded the voters' negative verdict on Donald J. Trump's service as president—which they rendered on Tuesday, November 3, 2020.

After Trump lost his bid for reelection, the action most consistent with the will of the voters would have been to shelve the nomination and await a nominee from the president-elect. However, this was not to be. Despite the electoral repudiation of Trump in both the popular and Electoral College vote,[62] Simington's confirmation hearing went forward a week after Trump's electoral defeat on November 10, 2020.[63] On December 8, 2020, the Senate, by a 49–46 vote, confirmed him to become the fourth member of the five-member FCC.[64] Simington took office on December 14, 2020.[65] Ironically perhaps, this date was also the day that the Electoral College met in each of the states' capitols to cast their ballots for President and Vice President, thereby cementing Joe Biden's victory in the 2020 presidential election.[66]

---

[61] *See* Ted Johnson, *Donald Trump Nominates Nathan Simington to FCC*, DEADLINE (Sept. 16, 2020, 2:25 PM) https://deadline.com/2020/09/donald-trump-fcc-nathan-simington-michael-o-rielly-1234578248/ [https://perma.cc/QEM9-2R2T] ("Nathan Simington has been nominated by Donald Trump to fill a vacancy on the FCC, after the White House withdrew Michael O'Reilly's nomination to serve another term on the commission.").

[62] *See U.S. Presidential Election Results 2020: Biden Wins*, NBC NEWS (Nov. 3, 2020), https://www.nbcnews.com/politics/2020-elections/president-results/ [https://perma.cc/X7NN-EGC5] (reporting that Trump lost both the popular and Electoral College vote and documenting the margins of Joe Biden's popular and Electoral College victories).

[63] Shepardson, *supra* note 60.

[64] *See* Tony Romm, *Senate Confirms Trump Nominee for FCC, Threatening Deadlock Under Biden*, WASH. POST (Dec. 8, 2020, 5:13 PM) https://www.washingtonpost.com/technology/2020/12/08/fcc-nathan-simington-senate/ [https://perma.cc/N5ME-7ZCL] ("The Senate on Tuesday confirmed Nathan Simington as a new Republican member of the [FCC] . . . .").

[65] David Shepardson, *Trump Nominee Takes Seat as U.S. Telecom Regulator*, REUTERS (Dec. 14, 2020, 10:25 AM) https://www.reuters.com/business/media-telecom/trump-nominee-takes-seat-us-telecom-regulator-2020-12-14/ [https://perma.cc/CPU4-KYLQ].

[66] *See* Jeremy Herb, *Electoral College Affirms Biden Win, Shaking Loose Fresh Republican Recognition*, CNN (Dec. 14, 2020, 9:00 PM) https://www.cnn.com/2020/12/14/politics/2020-election-electoral-college-vote/index.html (noting the meeting of the Electoral College to affirm Biden's victory in the 2020 election).

An FCC commissioner serves a statutory five-year term of office.[67] What's more, a sitting commissioner may continue to serve after his term of office expires "until a successor is appointed and has been confirmed and taken the oath of office."[68] The automatic extension of a sitting commissioner's term of office ends, however, after the expiration of the next sitting of Congress.[69]

For Commissioner Simington, whose five-year term of office runs from July 1, 2019 (based on the expiration of his predecessor's term of office), his regular term of office will expire on July 1, 2024 and, absent the confirmation of a new presidential appointee, could continue until the stroke of noon on January 3, 2027—when the next session of the following Congress concludes and a second successive Congress convenes. Thus, a lame-duck President and Congress conceivably have saddled the nation with an FCC commissioner until well into the term of office of the person who is elected president in November 2024.

Because the FCC's organic act, the Communications Act of 1934, features partisan balance requirements,[70] Commissioner Simington's midnight appointment had the (intended) effect of denying the Biden Administration effective control of the FCC from

---

[67] *See* 47 U.S.C. § 154(c)(1)(A) (providing that an FCC Commissioner "shall be appointed to a term of five years").

[68] *Id.* § 154(c)(1)(B).

[69] *See id.* § 154(c)(1)(C) ("[A commissioner] may not continue to serve after the expiration of the session of Congress that begins after the expiration of the fixed term of office of the commissioner.").

[70] *See id.* § 154(b)(5) ("The maximum number of commissioners who may be members of the same political party shall be a number equal to the least number of commissioners which constitutes a majority of the full membership of the Commission."). Because the FCC has five members, *id.* § 154(a), this means that no more than three of the five commissioners may be selected from the same party. For a general discussion of the separation of powers problems that arguably arise from the imposition of partisan balance requirements, see Krotoszynski, Hodge & Wintermyer, *supra* note 29, at 991–1008. A recent empirical study of the effects of partisan balance requirements makes clear that as partisan polarization has increased in the United States, the potential ill effects of partisan balance requirements for the heads of independent agencies have gone up as well. *See* Feinstein & Hemel, *supra* note 52, at 81–82 (observing that "[a]s ideology and party identification have become more closely correlated, Presidents have found it more difficult to identify competent cross-party appointees whose policy preferences they share" and noting that "with fewer of these creatures left in the wild, Presidents increasingly are compelled to select their ideological opponents for cross-party seats."). Simply stated, requiring a President to appoint an "ideological opponent" to a principal office within the Executive Branch is exceedingly difficult to reconcile with the unitary executive theory of the presidency.

the time President Biden assumed office until September 25, 2023 (when Commissioner Gomez took her seat on the FCC).[71] Simington's appointment also left the FCC deadlocked with two Democratic Party commissioners and two GOP commissioners.[72] In consequence, any contested major telecommunications policy initiative, such as restoring net neutrality rules that the Trump-controlled FCC repealed under Chairman Ajit Pai, required an FCC staffed with a majority of Democratic Party FCC commissioners.[73] Indeed, any seriously contested new telecommunications policy initiative was effectively dead in the water until President Biden ultimately succeeded in filling the fifth FCC seat.[74]

To be sure, the problem began in no small part because of the Biden Administration's failure to make fully staffing the FCC a priority—which, again, seems surprising given the central importance of communications to the health and well-being of the national and global economies. It bears noting that President Biden did not send an FCC nominee for the fifth seat to the Senate for its advice and consent until October 26, 2021—some nine months after he took the oath of office[75]—despite a 2–2 partisan deadlock. This, of course, says a lot about the Biden Administration's views of the importance of the FCC.

President Biden's nomination of consumer advocate Gigi Sohn to the fifth FCC seat proved to be highly controversial.[76] Several

---

[71] *See* Romm, *supra* note 64 (explaining how Simington's appointment was intended to cause deadlock during the early Biden Administration).

[72] *See* Lima, *supra* note 4 ("The move returns the agency to full strength for the first time under Biden, whose initial pick for the FCC role, Gigi Sohn, withdrew after a contentious 16-month confirmation battle. The impasse had left the agency without a Democratic majority for the entirety of Biden's term until now.").

[73] *See* Lohr, *supra* note 5 ("The Biden administration plans to bring back open internet rules that were enacted during the Obama administration and then repealed by the Trump administration.").

[74] *See* Lima, *supra* note 4 (observing that President Biden's inability to establish working control of the FCC seriously impeded the agency's "ability to carry out critical tasks aimed at protecting Americans from potential abuse by the telecom giants").

[75] *See* Brian Naylor, *Biden Makes 2 Key, Boundary-Breaking FCC Nominations*, NPR (Oct. 26, 2021), https://www.npr.org/2021/10/26/1049301069 [https://perma.cc/VBC3-N8GJ] (documenting Biden's nominations).

[76] *See* John Hendel, *FCC Nominee Gigi Sohn Withdraws After More than a Year of Fighting for Post,* POLITICO (Mar. 7, 2023, 3:12 PM), https://www.politico.com/news/2023/03/07/gigi-sohn-fcc-nominee-withdraws-00085918 [https://perma.cc/2SGG-7GQ5] (explaining the political discord following Sohn's nomination and her ultimate withdrawal).

different narratives have emerged for why this proved to be the case. Under one version, universal Senate GOP opposition stemmed from Sohn's status as an openly lesbian person and the entrenched homophobia of the GOP Senate caucus.[77] However, given that a dozen GOP senators voted to establish a statutory right to same-sex marriage during the pendency of Sohn's nomination,[78] anti-LGBTQ bigotry as an explanation for unified GOP opposition to Sohn's nomination to the FCC won't wash.

A second narrative: Sohn sent out mean tweets targeting Republican Executive Branch officials and members of Congress with harsh criticism.[79] As one reporter explains, "Republicans angling to stymie President Joe Biden's tech and telecom agenda are turning to an increasingly familiar tactic—dredging up his nominees' mean tweets."[80] Senator Ted Cruz (R-TX), in particular, took umbrage at Sohn's public criticisms of Fox News.[81] That said, sending out mean tweets has not proven deadly to all nominees, and there's also deep irony in anyone affiliated with the GOP objecting

---

[77] *See* Brooke Migdon, *LGBTQ Groups Condemn Identity-Based Attacks on Gigi Sohn, Urge Confirmation*, HILL (Feb. 6, 2023), https://thehill.com/policy/technology/3845719-lgbtq-groups-condemn-identity-based-attacks-on-gigi-sohn-urge-confirmation/ [https://perma.cc/RW8V-YJMH] (explaining that some groups have interpreted the attacks on Sohn to be motivated by her identity and sexuality).

[78] *See* Marianne Levine, *Same-Sex Marriage Protections Clear Critical Senate Hurdle*, POLITICO (Nov. 16, 2022), https://www.politico.com/news/2022/11/16/same-sex-marriage-bill-senate-gop-support-00067104 [https://perma.cc/5253-C2GD] (stating that, in a 62–37 vote, "[t]welve Republicans voted with all Democrats to move forward on the bill, after negotiators reached a bipartisan deal to include protections for religious liberty"). If all members of the GOP Senate caucus harbor prejudice against sexual minorities, this collective action by a dozen of them makes absolutely no sense. The same dozen GOP senators voted in favor of the Respect for Marriage Act. Zach Schonfeld, *Here Are the 12 Senate Republicans Who Helped Pass Same-Sex Marriage Bill*, HILL (Nov. 29, 2022, 8:06 PM), https://thehill.com/homenews/senate/3755544-here-are-the-12-senate-republicans-who-helped-pass-same-sex-marriage-bill/ [https://perma.cc/GWY9-FCWV].

[79] *See* John Hendel, *Never Tweet: Social Media Posts Haunt Biden's FCC and FTC Hopefuls*, POLITICO (Dec. 6, 2021, 10:47 AM), https://www.politico.com/news/2021/12/06/biden-fcc-ftc-nominees-republicans-tweets-523783 [https://perma.cc/63ZR-QDVD] (citing Sohn's tweets and discussing the GOP's reaction to her public online comments).

[80] *Id.*

[81] *See id.* ("Sohn's tweets, including one last year describing the right-leaning news network as 'state-sponsored propaganda,' are driving attacks on her from conservatives like Fox host Tucker Carlson. A *Wall Street Journal* op-ed by a former Trump acting attorney general also cited a 2020 tweet in which she accused the then-president of 'destroying the Constitution and this country.'").

to anyone's intemperate tweets, given their total acquiescence in Donald Trump's insulting, profane, and often racist and sexist tweets (before being kicked off the platform after using Twitter to foment the January 6, 2021 armed attack on the U.S. Capitol).[82] So, the mean tweets explanation bears indicia of being a mere makeweight.

A third, and easily the most plausible, explanation relates to Sohn's prior work as a consumer activist in the telecommunications sector. Big players in the telecom sector, such as wireless telephone providers, internet service providers (ISPs), social media companies, and broadcasters, feared that Sohn would bring an "activist" agenda to the FCC.[83] If one favors a deregulatory approach to federal telecommunications policy, opposition to Sohn's nomination would be a very logical position, given her decades of work calling for more pro-consumer FCC regulation across various telecommunication sectors.[84] It also bears noting that Sohn failed to achieve universal support within the Democratic-Party caucus in the Senate. Senator Joe Manchin (D-WV) publicly opposed her appointment, and Senators Mark Kelly (D-AZ), Jacky Rosen (D-NV), and Kyrsten Sinema (I-AZ) did not announce public support for Sohn before President Biden withdrew her nomination.[85]

On May 22, 2023, President Biden announced his intention to nominate Anna M. Gomez to the open seat and to re-appoint FCC Commissioners Geoffrey Starks and Brendan Carr to new full

---

[82] *See id.* ("No matter that former President Donald Trump . . . [r]egularly wielded social media to scorch his foes before the top platforms booted him off. Or that GOP lawmakers including Sen. Ted Cruz of Texas and Rep. Marjorie Taylor Greene of Georgia use their social media perches to spar with critics.").

[83] *See* Trenton Daniel, *Tanked Biden Pick Highlights Escalation of Dark-Money Forces*, AP NEWS (May 13, 2023, 3:13 PM), https://apnews.com/article/biden-nominees-dark-money-sohn-senators-election-56e18264a0478404ba04f54637b31085 [https://perma.cc/5SCJ-XCTT] (reporting that some "business groups pounced at the possibility of Sohn joining the FCC" and noting that the U.S. Chamber of Commerce, "the world's largest business federation," had "opposed Sohn's confirmation 'due to her longtime advocacy of overly aggressive and combative regulation of the communications sector'").

[84] *See* Makena Kelly, *President Joe Biden Wanted Gigi Sohn to Fix America's Internet—What Went Wrong?*, VERGE (July 20, 2023), https://www.theverge.com/2023/7/20/23800161/gigi-sohn-fcc-nomination-dark-money-campaign-net-neutrality-profile [https://perma.cc/ZN2W-Z4XM] (recounting Sohn's long career of advocating for pro-consumer FCC policies).

[85] *See id.* (documenting Senator Manchin's opposition to Sohn's nomination, as well as the lack of support from other Democratic senators).

terms.[86] Ms. Gomez was—and is—well-qualified to serve on the FCC. She served as the deputy administrator of the National Telecommunications and Information Administration during the Obama Administration and has a deep background in telecommunications law and policy in both government and the private sector (notably including a stint working with the Senate Commerce Committee as counsel).[87] It also bears noting that she is the first Hispanic FCC commissioner in over twenty years—a factor that probably did not hurt her prospects for Senate confirmation.[88]

Commissioner Gomez faced a considerably easier path to confirmation than Sohn[89]—the Senate Commerce Committee held a confirmation hearing on June 22, 2023[90] and reported her nomination out to the full Senate favorably on July 12, 2023.[91] On September 7, 2023, the Senate gave Gomez's nomination to the open FCC seat its advice and consent via a bipartisan 55–43 vote.[92] In sum, the Senate confirmation process went smoothly for a nominee who proved to be far less polarizing than Gigi Sohn. Accordingly, on

---

[86] *See President Biden Announces Federal Communications Commission Nominees*, WHITE HOUSE (May 22, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/22/president-biden-announces-federal-communications-commission-nominees/ [https://perma.cc/E8B8-FJ7R] (listing Biden's nominations for FCC commissioner).

[87] *Anna M. Gomez,* FCC, https://www.fcc.gov/about/leadership/anna-gomez [https://perma.cc/9U3A-VVY3].

[88] *See* Bell, *supra* note 3 (observing that "[a]fter being confirmed by the US Senate earlier this month, Anna Gomez was sworn in as the FCC's fifth commissioner on Monday, making her the first Latina to hold the position in over 20 years").

[89] *See* Jimm Phillips, Howard Buskirk & Monty Tayloe, *FCC Nominee Gomez Faces Easier Confirmation Process in Pairing With Carr, Starks*, COMM. DAILY (May 23, 2023), https://communicationsdaily.com/news/2023/05/23/fcc-nominee-gomez-faces-easier-confirmation-process-in-pairing-with-carr-starks-2305220065 [https://perma.cc/74YB-VVH5] (outlining Gomez's path to nomination and various endorsements).

[90] *FCC Nominations Hearing Before the S. Comm. on Com., Sci. & Transp.*, 118th Cong. (2023), https://www.commerce.senate.gov/2023/6/nominations-hearing-fcc [https://perma.cc/Q7C8-FRSH].

[91] *See* David Shepardson, *US Senate Committee Votes to Approve Key FCC Nominee*, REUTERS (July 12, 2023, 1:31 PM), https://www.reuters.com/legal/government/us-senate-committee-votes-approve-key-fcc-nominee-2023-07-12/ [https://perma.cc/GK4W-5BPH] ("The U.S. Senate Commerce Committee on Wednesday voted to approve President Joe Biden's nominee for a key fifth seat on the U.S. Federal Communications Commission (FCC), after Democrats have been stymied since 2021 from gaining a majority on the telecommunications regulator."); *see also* Lima, *supra* note 4 (noting that "[G]omez will become the first Latina to serve on the commission since Gloria Tristani stepped down from the agency in 2001").

[92] *See* Lima, *supra* note 4 (reporting the confirmation of Anna Gomez to the FCC).

September 25, 2023, two years and eight months into his four-year term of office, President Biden finally enjoyed effective—although mediated—control over the FCC.[93]

This state of affairs should be viewed as deeply problematic. President Biden may plausibly claim that whatever might have gone wrong with regard to regulation of the nation's telecommunications infrastructure from January 2021 to September 2023 was not—and is not—really his fault. After all, his team did not enjoy effective control over the FCC's policy and regulatory agenda during this time period. This lack of accountability enables the President to disclaim responsibility for policy failures and undermines elections as a principal means of securing democratic accountability.[94] At the end of the day, someone has to be minding the store; under Article II, that someone is supposed to be the President.[95]

It might well be that, all things considered, President Biden was quite content with this state of affairs for over half his term. If he was, and perhaps remains, ambivalent about unwinding the Trump Administration's deregulatory agenda for the telecommunications sector,[96] not having the ability to initiate any major policy changes that would require notice and comment rulemaking constitutes a benefit rather than a burden. However, consistent with a unitary executive theory of the federal executive branch, the President should not be able to escape responsibility, and accountability, for any federal executive entity that exercises non-trivial policymaking

---

[93] *See id.* (noting that Gomez's confirmation ended the partisan split in the FCC by creating a Democratic majority).

[94] *See* Symposium, *Ensuring Democratic Accountability in the Administrative State: Exploring Democratic Accountability in the Administrative State*, 21 GEO. J.L. & PUB. POL'Y 378–79 (2023) ("[A]dministrators only have constitutional authority to the extent the president has supervisory authority since the president is 'chosen by the entire nation'" (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 497–98 (2010))).

[95] *See* U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."); *see id.* art. II, § 3 (providing that the President "shall take Care that the Laws be faithfully executed").

[96] *See generally* John Hendel, *Trump's FCC Chief Leaves Legacy of Deregulation and 5G Fights*, POLITICO (Nov. 30, 2020, 12:35 PM), https://www.politico.com/news/2020/11/30/fcc-chief-ajit-pai-to-depart-agency-the-day-biden-is-sworn-in-441379 [https://perma.cc/KYS6-VJZ9] (discussing the Trump Administration's FCC, its chairman, Ajit Pai, and its distinctly deregulatory approach).

authority.[97] Plainly, reforms are needed to prevent a President from using the absence of effective control as a means of avoiding accountability for federal agencies located within the Executive Branch of the federal government.

IV. ELECTIONS WITHOUT CONSEQUENCES: PARTISAN BALANCE REQUIREMENTS COUPLED WITH FIXED TERMS OF OFFICE AND GOOD CAUSE REMOVAL PROVISIONS GIVE RISE TO A SERIOUS ACCOUNTABILITY PROBLEM

A common aphorism posits that "elections have consequences."[98] Then-Justice, and later Chief Justice, William H. Rehnquist observed, after a federal agency undertook a 180-degree turn on the question of requiring certain automobile passive safety features, that "[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations."[99] In his view, and speaking for four members of the Supreme Court, "[a]s long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration."[100] What is true of airbags and automatic seatbelts should hold no less true for net neutrality, a commitment to universal service programs, and the imposition of public trustee obligations on broadcasters (such as localism, providing educational children's television programming, and the fairness doctrine[101]).

---

[97] *See* United States v. Arthrex, Inc., 141 S. Ct 1970, 1988 (2021) (arguing that absolute removal power is necessary to ensure that "the President remains responsible for the exercise of executive power").

[98] *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) ("The agency's changed view of the standard seems to be related to the election of a new President of a different political party. It is readily apparent that the responsible members of one administration may consider public resistance and uncertainties to be more important than do their counterparts in a previous administration.").

[99] *Id.*

[100] *Id.*

[101] *See* MARTHA MINOW, SAVING THE NEWS: WHY THE CONSTITUTION CALLS FOR GOVERNMENT ACTION TO PRESERVE FREEDOM OF SPEECH, at xiv–xvii, 46–48, 64–68 (2021) (describing and discussing the public interest duties of broadcasters under the Communications Act of 1934 and proposing that these duties be extended by statute, regulation, or judicial decision to extend to dominant social media platforms); NEWTON N.

Of course, the accuracy of this aphorism depends critically on the ability of the administration to actually take in hand the reins of government—including effective control of both presidentially controlled and so-called "independent" federal agencies (like the FCC). In the case of the Biden Administration and the FCC, for far too long it was as if the 2020 general election did not happen.[102] This constitutes a significant separation of powers problem.[103]

Voters who supported Joe Biden for President in November 2020 should be disappointed, and perhaps also alarmed, that until almost October 2023, his administration was not able to reverse the Trump Administration's deeply deregulatory telecommunications policy agenda in favor of more consumer-friendly policies. To be sure, part of this relates to President Biden's failed, multi-year effort to obtain

---

MINOW & CRAIG L. LAMAY, ABANDONED IN THE WASTELAND: CHILDREN, TELEVISION, AND THE FIRST AMENDMENT 3–13, 58–104 (1995) (discussing the public interest standard and the statutory duty of commercial television broadcasters to produce and air programming that constitutes a public good, including news and information, programming focused on the local community, and children's educational programming); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 54–77, 81–88 (1993) (discussing in some detail the need for reliable production and distribution of public good programming on broadcast television and proposing potential reforms that might ensure a more reliable supply of high quality public interest programming by requiring broadcaster to take more seriously their public trustee duties and obligations); *see generally* CASS R. SUNSTEIN, #REPUBLIC: DIVIDED GOVERNMENT IN THE AGE OF SOCIAL MEDIA (2017) (discussing "information as a public good," explaining that market failure will mean that too little information gets produced and distributed within the body politic, and positing the consequent need for government action to secure its production and distribution). *But cf.* Ronald J. Krotoszynski, Jr., *The Inevitable Wasteland: Why the Public Trustee Model of Broadcast Television Regulation Must Fail*, 95 MICH. L. REV. 2101 (1997) (review essay) (arguing that commercial television broadcasters, most of which are responsible to shareholders to maximize their returns on investment, will inevitably and invariably attempt to shirk their public interest duties because such programming is not profitable and proposing a spectrum tax on commercial broadcasters with the proceeds to be used to subsize directly the production and distribution of programming that constitutes a public good, including children's educational programming, local news and information programming, and public affairs programming).

[102] *See* Lima, *supra* note 4 (noting that the partisan deadlock at the FCC caused a "[two-and-a-half]-year delay" in the Biden Administration's ability to pursue regulatory initiatives and innovations in the telecommunications sector of the economy).

[103] *See* Joshua C. Macey & Brian M. Richardson, *Checks, Not Balances*, 101 TEX. L. REV. 89, 104 (2022) (noting the Supreme Court's view that "congressionally imposed limitations on the President's removal power are a threat to the separation of powers because they immunize agency officials from presidential oversight").

Senate confirmation of Gigi Sohn to fill the fifth open FCC seat.[104] But, was this really the Biden Administration's only option for securing effective control of the agency? After all, conservative Republicans and Federalist Society jurists all regularly proclaim their commitment to the concept of a unitary executive.[105] How could voters plausibly hold the Biden Administration to account for telecommunications policy during the over two-year period that President Biden did not enjoy effective control over the FCC?

The Biden Administration's quixotic efforts to establish effective control over the FCC and go about implementing its vision for national and global telecommunications policy raise some serious questions about the relationship of elections to effective control over the administrative state. It is true that President Biden was able to name a new Chair at the FCC, Jessica Rosenworcel, first as acting chair in January 2021 and, after the Senate's advice and consent to her reappointment to another term, as Chair, on December 7, 2021, with a new five year term of office.[106]

One might well respond, "Well, so what—who cares if the President does not really control one of several dozen independent federal agencies?" Good reasons exist for caring about an FCC unable to undertake anything more than caretaker duties or uncontroversial regulatory initiatives. The FCC's regulatory portfolio is vast and encompasses trillions of dollars in communications services and infrastructure (notably including Universal Service policies aimed at making high speed broadband

---

[104] *See supra* notes 70–97 and accompanying discussion (explaining Biden's long struggle to fill the fifth FCC seat).

[105] *See* Calabresi & Prakash, *supra* note 34, at 595 ("[A]ll 'executive power' found in the Constitution is only vested in one individual, the President. If anyone else is ever to exercise federal executive power, it must be as a result of the explicit or tacit delegation and approval of the President."); Kavanaugh, *supra* note 29, at 1473 ("Why is it that the President should not have the power, in the first place, to direct and supervise that independent agency head in the exercise of his or her authority?"); Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1244–45 (2014) ("With the ability to remove at will, the President would have the possibility of directing subordinates who exercise the executive power.").

[106] *See* David Shepardson, *Senate Confirms Rosenworcel to New Term on U.S. FCC*, REUTERS (Dec. 7, 2021, 1:43 PM), https://www.reuters.com/world/us/senate-confirms-rosenworcel-new-term-us-fcc-2021-12-07/ [https://perma.cc/SBH6-AX7X] ("The U.S. Senate voted 68-31 on Tuesday to confirm Federal Communications Commission chair Jessica Rosenworcel to a new five-year term with the telecom regulator.").

fiberoptic and wireless service available to all).[107] The FCC licenses and regulates all terrestrial television and radio broadcasters.[108] It holds responsibility for regulation of much of the usable spectrum for non-governmental purposes—the airwaves used to facilitate any and all wireless forms of technology.[109] The agency also has jurisdiction over satellite communications, cablecasting, and even a significant portion of traditional wireline telephone service.[110] Given the importance of communications to the national and global economies, it is political malpractice for a new presidential administration, particularly when that administration brings about a change in partisan control of the White House, not to establish effective control and administrative oversight over the FCC as soon as possible.

There's also the embarrassment of the appointment of Nathan Simington to the FCC in the closing weeks of the Trump Administration by the lame-duck, GOP-controlled Senate.[111] For a just-defeated President to name an FCC commissioner to a five-year term, on November 10, with the nominee taking office on December 14, 2020, constitutes naked disregard, and disrespect, for the expressed will of the voters. Yet, this is precisely what happened; then-Majority Leader Mitch McConnell had no problem with the

---

[107] *See generally* FCC, 2023 BUDGET ESTIMATES TO CONGRESS (2022), https://docs.fcc.gov/public/attachments/DOC-381693A1.pdf [https://perma.cc/7DAR-AG48] (outlining the vast regulatory programs of the FCC, including Universal Service policies).

[108] *See What We Do*, FCC, https://www.fcc.gov/about-fcc/what-we-do [https://perma.cc/LP48-KMJE] ("The Federal Communications Commission regulates interstate and international communications by radio, television, wire, satellite and cable in all 50 states, the District of Columbia and U.S. territories.").

[109] *See* Allison Baker et al., *Economics at the FCC 2019–2020: Spectrum Policy, Universal Service, Inmate Calling Services, and Telehealth*, 57 REV. INDUS. ORG. 827, 827 (2020) ("The U.S. Federal Communications Commission (FCC) is an independent regulatory agency with responsibility for the telecommunications and electronic media sectors, including the allocation and management of all non-federal U.S. radio frequency spectrum.").

[110] *See generally Broadcast, Cable, and Satellite,* FCC, https://www.fcc.gov/general/broadcast-cable-and-satellite-guides [https://perma.cc/7GA8-KQ98] (providing several examples of FCC regulation of satellite and cable communications); *FAQS - Telephone*, FCC, https://www.fcc.gov/general/faqs-telephone [https://perma.cc/JH5U-ZZDR] (outlining the FCCs responsibilities with wireline telephones).

[111] *See Senate Confirms Republican Nathan Simington to FCC Over Democrats' Opposition*, S&P GLOBAL: MKT. INTEL. (Dec. 8, 2020), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/senate-confirms-republican-nathan-simington-to-fcc-over-democrats-opposition-61649308 [https://perma.cc/KXT5-2KZU] (outlining the appointment of Nathan Simington during the final weeks of the Trump Administration).

obvious and objectionable dead hand aspect of Commissioner Simington's appointment. A constitutional norm, or tradition, was simply not sufficient to stop a President on the way out of office from saddling his successor with a political opponent for his entire term of office.[112]

Upon taking office on January 20, 2021, President Biden might have modeled his behavior on Donald Trump's aggressive efforts to take full control over all facets of the executive branch. For better or worse, Biden took a different course. Using the Trumpian playbook would have involved firing midnight appointees like Commissioner Simington.[113] Had Biden taken this approach, the President would have broken the 2–2 deadlock at the FCC by immediately creating a 2–1 Democratic Party appointee majority.[114] But, as the next section will explain, serious downsides exist to taking the constitutional hardball[115] "self-help" option.[116] A better approach would involve reforms to the VRA that would permit a newly-elected President to name temporary appointees to

---

[112] *See* Ronald J. Krotoszynski, Jr., *The Conservative Idea that Would Let Biden Seize Control of Washington: It Might be Time for Biden to Show He Can Get Behind the Unitary Executive. Theory, Too*, POLITICO (Dec. 10, 2020, 6:00 PM), https://www.politico.com/news/magazine/2020/12/10/nathan-simington-christopher-waller-fcc-federal-reserve-appointments-unitary-executive-authority-444136 [https://perma.cc/8XS2-5XRT] ("By confirming a slew of last-minute Trump appointments to key posts within the administrative bureaucracy, Trump's imprint on the federal government could remain long after he and Melania have decamped from the White House.").

[113] *Id.*

[114] *See id.* (arguing that Biden could break the deadlock at the FCC by removing Simington).

[115] *See* Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523–26 (2004) (coining the phrase "constitutional hardball" and explaining that the it "consists of political claims and practices—legislative and executive initiatives—that are without much question within the bounds of existing constitutional doctrine and practice but that are nonetheless in some tension with existing *pre*-constitutional understandings," noting that constitutional hardball involves "playing for keeps in a special kind of way," and citing the Senate Democratic Party caucus's use of the filibuster to block President George W. Bush's judicial nominees in the early 2000s as a salient example of "constitutional hardball" in action).

[116] *See* Krotoszynski & DeProspo, *supra* note 41, at 740 (describing the "self-help" option of presidential removal as another means of establishing control over an Executive Branch agency but noting that the VRA largely obviates the need for recourse to this form of presidential self-help).

independent federal agencies—at least during a presidential transition period and perhaps more generally as well.[117]

V. REFORMS THAT WOULD ENSURE A PRESIDENT ENJOYS EFFECTIVE CONTROL OVER—AND ACCOUNTABILITY FOR—ALL EXECUTIVE BRANCH AGENCIES FROM DAY ONE

What, if anything, could be done to ensure that the buck stops with the President—even if the President's behavior and actions strongly suggest indifference to establishing control over a particular independent agency? Some sort of mechanism plainly is needed to ensure that a future president cannot disclaim responsibility for an administrative agency's mistakes and policy failures because his team lacked effective oversight and control over a particular independent agency—whatever the precise reason. The ideal solution would involve Congress enacting amendments to the VRA that would permit the appointment of principal officers to independent agencies who could serve on an acting basis—subject to sufficient limitations and constraints to ensure that an incentive would still exist for the President to submit a formal nominee to the Senate and then obtain the Senate's advice and consent to a permanent appointee.[118]

Self-help, of course, constitutes another possible approach. The Communications Act, which Congress enacted after *Myers v. United States*[119] and before *Humphrey's Executor v. United States*,[120]

---

[117] *See id.* at 749 ("[T]he VRA goes too far in authorizing presidential self-help by permitting the President to name acting principal officers whose scope of authority is indistinguishable from regular, Senate-confirmed principal officers. . . . [T]he best solution would be for the federal courts to embrace a saving construction of the VRA that effectively clips the policymaking wings of persons serving in principal offices by dint of a unilateral presidential appointment under the VRA.").

[118] *See id.* at 748–49, 802–09 (arguing that the VRA's authorization of acting principal officers must be carefully delineated and limited to preserve meaningful incentives for the President to nominate and obtain the Senate's approval of a permanent official, as well as positing that limits on the scope of an acting principal officer's powers to caretaker duties would render such appointments more plausibly "inferior" rather than "principal" in nature).

[119] *See* Myers v. United States, 272 U.S. 52, 176 (1926) ("[W]e must therefore hold that the provision of the law of 1876, by which the unrestricted power of removal of first class postmasters is denied to the President, is in violation of the Constitution, and invalid.").

[120] *See* Humphrey's Executor v. United States, 295 U.S. 602, 630–32 (1935) ("Whether the power of the President to remove an officer shall prevail over the authority of Congress to

actually does not contain an express "good cause" removal clause limiting the President's power to remove a sitting commissioner.[121] To be sure, the law does establish a five-year fixed term of office for FCC commissioners; one could imply "good cause" removal protection from a fixed term of years appointment for FCC commissioners.[122] Moreover, presidents also have generally acted as if FCC commissioners are insulated from at-will presidential removal.[123]

That said, however, an FCC Commissioner, strictly speaking, does not enjoy formal protection from being fired by the President. Given the current Supreme Court's announced commitment to textualism,[124] the absence of text in this instance should put a

---

condition the power by fixing a definite term and precluding a removal except for cause, will depend upon the character of the office . . . .").

[121] *See* Krotoszynski, *supra* note 112 ("[T]he Federal Communications Act does not expressly confer good-cause protection on members of the FCC . . . ."); Communications Act of 1934, 47 U.S.C. §§ 151–614 (1934) (lacking a good-cause provision for removal of the Federal Communications Commissioner).

[122] *See* Datla & Revesz, *supra* note 33, at 789–92, 834 (noting that a statutory fixed term of office "constrains presidential control over an agency even in the absence of a for-cause removal provision"); Krotoszynski, Hodge & Wintermyer, *supra* note 29, at 1005–06 (noting that, after the Supreme Court's decision in *Free Enterprise Fund*, which assumed for purposes of decision that the President could remove an SEC commissioner from office only for good cause despite the absence of an express statutory provision on point, "other indicia of independence, including fixed terms of office, can give rise to an implied 'good cause' removal limitation").

[123] Professor Marshall Breger, a former head of the Administrative Conference of the United States (ACUS), a well-regarded and highly influential government-sponsored think tank that works to improve the administrative process within the federal government, and his co-author, Professor Gary Edles, explain that:

> A reasonable argument can certainly be made that individuals at agencies whose statutes do not confer removal protection may be removed by the President for any reason. However, agencies whose statutes lack formal removal protection have been considered independent by both Congress and Presidents on much the same basis as those with formal statutory restriction. The FCC and SEC are perhaps the best known, but not the only, examples.

MARSHALL J. BREGER & GARY J. EDLES, INDEPENDENT AGENCIES IN THE UNITED STATES: LAW, STRUCTURE, AND POLITICS 161 (2015); *see also* Datla & Revesz, *supra* note 33, at 834 (noting that even though Congress created the FCC before *Humphrey's Executor*, Congress has amended the statutes "twenty-one times for the FCC since *Humphrey's Executor*" and still fails to amend to create an express "for-cause removal protection" for incumbent FCC commissioners).

[124] *See* Jonathan Skrmetti, *The Triumph of Textualism: "Only the Written Word is the Law,"* SCOTUSBLOG (June 15, 2020, 9:04 PM), https://www.scotusblog.com/

President affiliated with the Democratic Party on firm constitutional ground if he decides to fire one or more GOP-affiliated FCC commissioners (and vice-versa for a GOP President facing an FCC staffed with a majority of Democratic Party-affiliated commissioners). Thus, in this specific instance, President Biden could have embraced self-help by firing the midnight commissioner (Nathan Simington), thereby immediately establishing a 2–1 majority for the Democratic Party FCC appointees.[125] The idea of simply firing Commissioner Simington in order to create a pro-Biden majority at the FCC must have come to mind to someone in the West Wing.[126]

2020/06/symposium-the-triumph-of-textualism-only-the-written-word-is-the-law/ [https://perma.cc/XV32-6JDK] (discussing the Supreme Court's turn towards textualist legal interpretation); *see also* NEIL M. GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 25–28, 110–25, 133–36 (2019) (arguing that textualist originalism is the only legitimate approach to constitutional interpretation and rejecting dynamic interpretation, purposive interpretation, and other forms of "living constitutionalism" because, in his view, these approaches all vest too much discretion with judges and are essentially unprincipled). Justice Gorsuch argues that "[t]extualism fits with an insulated judiciary" because "[j]udges are more likely to fulfill their assigned mission of protecting disfavored persons from intemperate majorities when they can point to a neutral interpretive method to support their decisions," *id.* at 134, and categorically rejects a judicial power to "ratify and amend [the Constitution's] written terms," *id.* at 120.

[125] *See* Krotoszynski, *supra* note 112 (arguing that Biden could have simply fired Simington upon taking office in order to create immediately a Democratic majority).

[126] *See id.* ("Biden could adopt a theory advanced by conservative judges and legal academics, and long championed by The Federalist Society: The unitary executive theory. Under this theory, President Biden would be constitutionally empowered to remove executive-branch personnel who are opposed to his administration's policies and programs whether or not they hold a fixed term of office or enjoy statutory good-cause protection against removal."). It was certainly this author's intention to plant the seed of this idea during the period that the Biden Administration was preparing to assume office. And, with respect to relatively low-level positions that lack major, general policymaking powers, such as seats on the service academy boards, the Biden Administration adopted precisely this approach. *See* Chris Cameron, *White House Forces Out Trump Appointees from Boards of Military Academies*, N.Y. TIMES: POLITICS (Sept. 8, 2021), https://www.nytimes.com/2021/09/08/us/politics/trump-appointees-military-academy-boards.html [https://perma.cc/225Q-TTAQ] (highlighting the forced resignation or termination of Trump appointees on advisory boards to "ensure that . . . board members were . . . 'aligned' with [Biden's] values"); Felicia Sonmez, *18 Trump Appointees Have Either Resigned or Been Terminated from Military Service Academy Boards, White House Official Says*, WASH. POST (Sept. 10, 2021, 8:54 AM), https://www.washingtonpost.com/politics/trump-appointees-military-boards/2021/09/10/40d31b80-1232-11ec-bc8a-8d9a5b534194_story.html (detailing the advisory boards impacted).

Moreover, the FCC can operate with a quorum of three members and a majority of a quorum can conduct business.[127] It also bears noting that President Biden did unwind dozens of last-minute Trump appointments to various boards and commissions—including appointments to the governing boards of the military service academies.[128] Although these appointments were still important, their importance pales in comparison to that of the FCC.

So, why not simply encourage presidents to resort to self-help? The answer is arguably self-evident and strongly counsels against a self-help approach. Simply put, both legal and practical problems would arise if a President attempted to fire his way into control of an independent federal agency that lacks a majority of the President's partisan allies. Careful consideration of the question demonstrates that both sets of reasons cut against a President firing his way to establishing control over an independent federal agency.

First, serious legal problems would arise if the President fired principal officers of independent federal agencies where the agency's organic act clearly includes "good cause" protection from removal. It seems quite likely that discharged officials, taking a page from their predecessors Frank Myers (Portland, Oregon's local postmaster) and William Humphrey (an FTC commissioner), would lawyer up and challenge their removal in federal court.[129] And, despite being watered down in recent years, most recently in *Seila Law v. CFPB*, *Humphrey's Executor* remains the governing precedent on the constitutionality of good cause removal limitations for a multi-member executive branch agency.[130]

The near-certain legal challenges to presidential removal of principal officers serving on independent agencies, boards, and commissions would create doubts about the legal validity of any new policy initiatives undertaken by the agency in question. The sacked principal officers would invoke *Humphrey's Executor* and claim that the President's removal action was *ultra vires* and without legal effect. In consequence, the President's control over the independent

---

[127] *See* 47 U.S.C. § 154(h) ("Three members of the Commission shall constitute a quorum thereof.").

[128] *See supra* text accompanying note 126.

[129] *See supra* notes 112–117.

[130] *See* Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2206, 2210–11 (2020) (limiting *Humphrey's Executor* to its facts and declining to apply it where a single individual, protected from presidential removal absent good cause, "wield[s] significant executive power").

agency might prove to be more apparent than real—depending on how the federal courts resolve the legal challenges to the President's removal of incumbent hold-over principal officers.[131]

Perhaps, in the end, the President would ultimately prevail in the federal courts—but the ensuing litigation could take months, perhaps even years, to resolve. Meanwhile, effective control of the agency would remain open to constitutional doubts. Accordingly, presidential self-help, of a Trumpian stripe, does not present the best way forward—or even a plausible way forward. This approach comes with far too much legal uncertainty to work reliably as a mechanism for establishing presidential oversight and control over an independent agency. Were the Supreme Court to reverse squarely *Humphrey's Executor*, self-help might then constitute an effective and reliable presidential response, at least as against *legal* challenges to firing incumbent principal officers staffing independent agencies.[132]

---

[131] It bears noting that the *Seila Law* Court resolved a separation of powers problem involving insufficient presidential oversight and control of the CFPB's director by voiding the "good cause" removal protection and making the director removable at will by the President. *See id.* at 2211 ("While we have previously upheld limits on the President's removal authority in certain contexts, we decline to do so when it comes to principal officers who, acting alone, wield significant executive power. The Constitution requires that such officials remain dependent on the President, who in turn is accountable to the people."). The Supreme Court has not considered the problem of an independent agency staffed with hostile partisan carry-over officers who cannot be removed absent good cause. One could plausibly posit that the Supreme Court could find these circumstances relevant just as it found the single versus multiple person agency head controlling in *Seila Law*. Partisan balance requirements, when coupled with fixed terms of office and for cause removal protection, saddle the chief executive with principal officers hostile to the administration's policies and regulatory priorities. This outcome cannot easily be reconciled with the contemporary Supreme Court's strong, repeated emphasis on presidential oversight and control as essential means of securing presidential accountability to "We the People." *See* Krotoszynski, Hodge & Wintermyer, *supra* note 29, at 991 ("Statutory partisan balance requirements quite literally force Presidents to rely on political enemies to carry out their executive duties. In so doing, these provisions splinter the unitary executive."). By way of contrast, however, "[i]f Congress requires the President to appoint political opponents to an independent federal agency, but does not also entrench such persons with a fixed term of office or good cause protection against removal, it is difficult to see how a partisan balance requirement on these facts would significantly impede the President's ability to oversee and direct the agency's operations." *Id.* at 1002.

[132] *See* Krotoszynski, Hodge & Wintermyer, *supra* note 29, at 991–1007 (discussing how "partisan balance requirements significantly erode effective presidential control over independent agencies").

In addition to the legal risks that would invariably arise from resorting to presidential self-help, some practical risks would arise as well. If the President were to sack a member of the political opposition whose term has not expired, and who clearly enjoyed good cause removal protection in the agency's organic act, in order to create a partisan majority that matches the President's partisan label, it would hardly be surprising if the remaining out-of-power principal officers resigned. Such a resignation at the FCC would leave the agency without a quorum to do any business at all—even business of a routine or ministerial nature.[133] And, an independent agency that lacks a quorum to do business could not be fixed through presidential self-help (unless the President was prepared to make "take care" appointments[134] to independent federal agencies on his own constitutional authority and without the advice and consent of the Senate—which would take the President and administration into totally uncharted constitutional waters).

So too, enraged members of the opposition party in the Senate could retaliate by blocking presidential appointments going forward. It seems likely that the sacking of opposition members of independent federal agencies might trigger such a legislative response. Unless the President's party possesses sixty seats in the Senate, all appointments, and not just those to the affected agency or agencies, could grind to a halt. If the President decides to play constitutional hardball, there is little reason to believe that opposition party members in the Senate would not respond in kind. Thus, the President's attempt at self-help to establish control over an independent agency might well backfire and complicate the administration's ability to staff other executive branch positions.

The better approach would involve Congress establishing a statutory mechanism that authorizes temporary appointments to independent federal agencies. Indeed, the VRA effectively negates the problem of an unaccountable bureaucracy by authorizing the

---

[133] *See* O'Connell, *supra* note 45, at 623 ("[I]ndependent regulatory commissions and boards may be paralyzed if they lose their mandated quorum as they typically both lack access to acting officials and cannot rely on delegation.").

[134] *See* Krotoszynski & DeProspo, *supra* note 41, at 742–43, 743 n.41, 744 n.42, 765 n.147 (discussing the concept of "take care" unilateral presidential appointments, without the Senate's advice and consent, a concept that several Attorney Generals have endorsed over time and which the lower federal courts also have acknowledged without expressly approving).

President to name acting officers within cabinet departments—including both principal and inferior officers.[135] To be sure, serious separation of powers concerns exist with respect to the President's unilateral appointment of acting principal officers within presidentially controlled cabinet departments and administrative agencies.[136] These exact same concerns would apply with equal force to acting appointments of principal officers within independent federal agencies.

Even so, however, if it is constitutional for a President to name an acting Secretary of State (fourth in the line of presidential succession) or Attorney General (seventh),[137] it is difficult to see how or why the appointment of an acting FCC or SEC commissioner, merely one member of a five-member agency head, would give rise to unacceptable separation of powers problems. After all, a principal officer is a principal officer, regardless of whether that officer serves at the will of the President or, in theory, for a fixed term of years. Indeed, the separation of powers objections here are actually attenuated because the appointment of a temporary member of a multi-member board cannot exercise the full power of the agency. In this sense, a single member of a five-member board, considered alone, can more plausibly be characterized as an "inferior" officer for purposes of the Appointments Clause.[138]

Amendments to the VRA that expressly permit temporary "take care" presidential appointments to independent federal agencies

---

[135] *See supra* note 45–46 and accompanying text.

[136] *See* Krotoszynski & DeProspo, *supra* note 41, at 812 ("The VRA, as presidential administrations presently interpret and apply it, permits the President to unilaterally appoint principal officers of the United States. This practice cannot be reconciled with the text of the Appointments Clause—which requires that the Senate approve the appointment of any person holding a principal office."). For an extended discussion and explanation of precisely why unilateral presidential appointments of principal officers for significant time periods under the VRA violates the separation of powers—and more specifically the Appointments Clause, see *id.* at 776–88.

[137] *See* Presidential Succession Act, ch. 644, § 6(a), 62 Stat. 677 (1948) (current version at 3 U.S.C. § 19(d)(1)) (listing the Secretary of State and Attorney General as individuals who may be named as acting President).

[138] *See* Krotoszynski & DeProspo, *supra* note 41, at 800–02 (proposing limiting the scope of authority of acting principal officers in government agencies headed by a single person to caretaker duties, akin to the limits applicable to a caretaker Prime Minister in a parliamentary system of government, to "render the acting principal officer more plausibly inferior" and hence constitutionally eligible for unilateral presidential appointment consistent with the Appointments Clause).

would present the best, and most efficacious, way of solving this separation of powers problem. Such amendments, however, must not permit the Senate to shirk its duty to take shared responsibility for the persons who serve as principal officers in independent federal agencies. Meaningful incentives must remain for the President to submit a nomination to the Senate for a permanent agency member and for seeking and obtaining the Senate's advice and consent to that nomination.[139]

Removing the VRA's prohibition on naming acting principal officers to multi-member agencies[140] would present the most expedient and easiest way of establishing a mechanism that would permit a President, from day one, to establish effective oversight and control. This is especially so for agencies that feature carry-over principal officers with fixed terms of office, protected by good cause removal, and perhaps serving on an agency featuring a mandatory partisan balance requirement. In order to ensure that the President has an incentive to submit a nomination to the Senate for a permanent appointment to a term of office, a time limit on an acting independent agency member should apply.

Calculating maximum service under the VRA is notoriously difficult. Professor Anne Joseph O'Connell observes quite correctly that "[a]lthough the Vacancies Act's time limits are longer than those of prior statutes, determining precisely how long any given acting official can serve presents a puzzle fit for a math class."[141] As a general matter, absent a pending nomination for an open position within the Executive Branch, an acting officer, whether principal or inferior, may serve for a maximum of 210 days.[142] During a presidential transition, however, the maximum period of service for an acting officer is 300 days. This provision applies if the vacancy exists when the President takes office or occurs within the first 60 days in office.[143] These time limits are just the beginning, however.

---

[139] *See id.* at 802–09 (arguing that presidential power to name temporary principal officers must be coupled with effective incentives to motivate the President to nominate and seek the Senate's approval of a permanent principal officer because an unlimited power to name principal officers for indefinite periods of service would render the Appointments Clause entirely meaningless).

[140] *See* 5 U.S.C. § 3349c (prohibiting appointment of acting principal officers to agencies featuring a multi-member head).

[141] O'Connell, *supra* note 45, at 630.

[142] 5 U.S.C. § 3346(a)(1).

[143] *Id.* § 3349a(a)–(b).

As Professor O'Connell explains, "[n]ominations lengthen the permitted tenure of temporary leaders" and "[a]cting officials may serve during the pendency of two nominations to the vacant position."[144]

Thus, if a vacancy exists at an independent, multi-member agency, permitting the President to name an acting member for a period of 300 days during a presidential transition or for 210 days otherwise, would mirror the timelines already applicable to presidentially controlled federal agencies headed by a single principal officer. If this structure provides sufficient incentives for the President naming a permanent Attorney General or Secretary of State, it is difficult to see why extending it to allow acting appointments to entities like the FCC would permit the President to circumvent the Senate entirely.

Accordingly, no good reason would seem to exist for the flat ban against acting appointments to principal offices within independent agencies, particularly given that a single member of a multi-member board or commission cannot exercise the power of the agency on their own initiative; only a majority of a quorum can act for a multi-member independent agency.[145] In this sense, as noted before, acting appointments to multi-member boards and commissions can more plausibly be characterized as involving "inferior" offices rather than "principal" offices.[146] Simply put, an acting Secretary of Defense wields far more executive authority than a single member of the FCC or SEC can wield.

An amendment to VRA removing the prohibition on the appointment of acting members of multi-member agencies would greatly enhance and enable presidential accountability for the work of such administrative entities. If the President has the authority to staff up the FCC, and to establish a majority of his supporters on the body, through an acting appointment, but fails to exercise that authority, whatever regulatory failures or mishaps occur as a result

---

[144] O'Connell, *supra* note 45, at 630. For a discussion of how long an acting officer may serve under the VRA, see *id.* at 630–31.

[145] *See id.* at 682, 688 (discussing statutory quorum requirements in agencies' organic acts, explaining how only a quorum of a multi-member federal independent agency can officially act on behalf of the agency, and providing historical examples of agency failures to meet statutory quorum requirements over non-trivial periods of time).

[146] *See* Krotoszynski & DeProspo, *supra* note 41, at 748–49, 802–09 (arguing that limiting an acting principal officer's powers to caretaker duties would render such appointments more plausibly "inferior" rather than "principal" in nature).

of presidential inaction can and will be laid squarely on the President's shoulders. A President indifferent to taking responsibility for a particular independent agency would not have the luxury of doing nothing to establish effective oversight and control while, at the same time, disclaiming responsibility because the White House lacks legal authority to appoint a person sympathetic to the administration's regulatory policies and priorities.

Permitting acting appointments would also resolve the separation of powers problem without disturbing existing administrative structures that have been around for over 100 years. Congress could create "independent" agencies that feature carry-over officers holding fixed terms of office, protected against discharge by good cause removal protections, and perhaps also featuring partisan balance requirements.[147] Notwithstanding these limitations on direct forms of presidential oversight and control, however, the ability to make acting appointments to these administrative entities would ensure that the President can discharge his "Take Care" responsibilities.

In sum, if acting appointments to principal offices in presidentially controlled departments can be reconciled with the Appointments Clause,[148] such appointments to independent agencies should be equally consistent with the separation of powers doctrine. No good reason exists for permitting unilateral temporary presidential "acting" appointments for major cabinet department heads but not for members of multi-member federal agencies. Moreover, in both cases, the imperatives of presidential control, and hence accountability, under Article II remain *exactly* the same.

---

[147] *See* Datla & Revesz, *supra* note 33, at 784–812 (describing and discussing the tools and powers that Congress has devised to insulate "independent" federal agencies from direct forms of presidential oversight and control, which include, among other things, fixed terms of office, good cause removal protection, partisan balance requirements, independent litigation authority, and independent budget authority).

[148] *See* U.S. CONST. art. II, § 2, cl. 2 (providing that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."); Krotoszynski & DeProspo, *supra* note 41, at 750–53 (discussing and describing the operation of the Appointments Clause).

VI. CONCLUSION: ELECTIONS *SHOULD* HAVE CONSEQUENCES FOR *ALL* FEDERAL ADMINISTRATIVE AGENCIES

If elections are to serve their core purpose of rendering the federal government accountable to the people, the person winning the election must enjoy sufficient authority over the administrative state to make him plausibly responsible for each and every federal executive agency's successes and failures. From January 20, 2021, to September 25, 2023, however, the chief executive did not enjoy meaningful control and oversight over the FCC's policy agenda. The United States needs an effective mechanism that permits the President to assert control over independent federal agencies from their first day in office.

Insulated removal powers, coupled with partisan balance requirements, can and do have the effect of rendering Executive Branch agencies unaccountable to the President. From a separation of powers perspective, this outcome is not constitutionally acceptable. And, again, whether or not the President embraces their inability to exercise oversight and control over an Executive Branch agency should be entirely irrelevant to the separation of powers analysis.

The most expedient means of securing such accountability would involve sacking incumbent principal officers who do not share the President's regulatory vision and policy priorities—and permitting this action regardless of whether a statute protects such officers from removal save for "good cause." Judicial recognition of such a power of removal would, at a minimum, render the President clearly accountable for the failure to establish effective control over a particular independent agency. Even so, the likely political consequences of a President firing their way to control over an independent agency are both potentially significant and problematic—even if the federal courts were to green light resort to presidential self-help.

Accordingly, amending the VRA to permit acting appointments to multi-member federal agencies would constitute a better approach; permitting the President to make *temporary*, unilateral appointments of principal officers to independent agencies via an amended and improved VRA would solve the accountability problem that presently exists. Of course, the VRA reforms would need to include procedural and substantive protections designed to ensure

that the new provisions do not permit the Senate to shirk its duty to take on shared accountability for the appointment of principal executive officers. But existing temporal limits and incentives for sending a formal nomination to the Senate could be extended to acting appointments of members of agencies with collective leadership at the top.

No good normative or policy reasons exist for providing a statutory work-around for presidential oversight and control of cabinet departments, but not doing so for entities like the FCC. Carefully drafted amendments to the VRA could authorize short-term appointments to independent agencies, boards, and commissions that would ensure that a newly elected President does not face the prospect of an agency staffed with principal officers who seek to "ride with the cops and cheer for the robbers."[149] This would make presidential failures to engage in proper agency oversight transparent to "We the People" and render the President more readily accountable for shirking the office's constitutional duties and responsibilities.

For elections to have real policy and accountability consequences, presidential control, and presidential legal authority to establish such control, must exist from day one with respect to *both* presidentially controlled and independent federal agencies. Yet existing law fails to secure meaningful presidential control, from the moment a President takes office, over the full administrative state. This constitutes a democratic deficit that, if not resolved by Congress, needs to be addressed by the federal courts.

[149] Rankin v. McPherson, 483 U.S. 378, 394 (1987) (Scalia, J., dissenting).