

NOTE

CONGRESSIONAL CONTROL OF AGENCY EXPERTISE

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Congress relies on executive branch information to carry out its functions. When it creates a budget, the President's budget request and individual agency testimony are critical to understanding the effect of proposed changes. When it considers new legislation, government officials are asked to testify and share their views. When Congress is seeking information on emerging issues, agency reports are often the first—and most trusted—source of information. When the executive branch provides this information, it often does so through a coordinated process, managed by the Office of Management and Budget within the Executive Office of the President. As a result, the President has a say in what Congress hears regarding agency expertise. This Note explores the instances where Congress has explicitly shut the President out of this process, and the consequences of that decision. The provisions of federal law that limit presidential control of information, referred to as “independent-reporting requirements,” are one of the many ways that Congress can ensure agency independence. This Note collects and describes these provisions, exploring both their policy implications and their constitutionality. In addition, this Note argues that a more widespread use of these statutory tools would solve a significant problem currently facing Congress, namely the information imbalance between the elected branches.

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INTRODUCTION

Whenever Congress acts, it needs to be informed. Congress has two choices to obtain this information: develop the research it needs in house or look elsewhere for expertise. In the former case, Congress can turn to a variety of legislative branch entities, such as the Government Accountability Office (“GAO”) or the Congressional Research Service (“CRS”), for reliable information. When it looks outward, it can either seek information from private institutions—corporations, scholars, NGOs, and think tanks—or it can turn to other branches of government. As a practical

matter, executive branch information is vital to the legislative process. Agencies provide Congress with information through informal consultations, agency reports, congressional testimony, and budget submissions. Many of these reports are required by law, with the first such reporting statutes enacted by the first Congress.¹ The executive branch is also privy to content that could not be otherwise discovered, such as the internal deliberations and policy preferences of agency experts or sensitive national-security information. Given that this information simply is not available through other means, the executive is often the only source of information on a policy issue.

The Office of Management and Budget (“OMB”), housed within the Executive Office of the President (“EOP”), plays a vital role in facilitating and coordinating agency communication with Congress. OMB’s role is also one that ensures presidential control over congressional information access. It is this control, and the political concerns that come with it, that have led Congress to occasionally require that information be formally provided to Capitol Hill without prior consultation with or approval from the EOP. The efforts by Congress to control the information received from the executive branch, and thereby limit centralized review, are the focus of this Note. These provisions, known as “independent-reporting requirements” (or sometimes “bypass” provisions),² ensure that agencies can communicate their views without White House interference. The corollary is that they create the potential for dueling views from the executive branch on a given topic.³ As a result, these laws are a part of the broader

¹ See, e.g., Act to Establish the Treasury Department, ch. 12, § 2, 1 Stat. 65, 66 (1789) (requiring that a report by the Secretary of the Treasury be made to both chambers of Congress “respecting all matters referred to him”).

² For uses of this terminology, see Jim Monke et al., Cong. Research Serv., IN10715, When an Agency’s Budget Request Does Not Match the President’s Request: The FY2018 CFTC Request and “Budget Bypass” 2 (2017), <https://fas.org/sgp/crs/misc/IN10715.pdf> [<http://perma.cc/KS3F-WRHT>], and Memorandum from Jim Jukes, Assistant Dir. for Legislative Reference, Office of Mgmt. & Budget, to OMB Policy Officers and DADs [Deputy Associate Directors] regarding Agencies with Legislative and Budget “Bypass” Authorities – Information 1 (Feb. 20, 2001), <http://www.citizen.org/documents/OMBDocument1.pdf> [<http://perma.cc/4MS9-LFQTa>] [hereinafter Jukes Memorandum].

³ Disagreements among executive branch officials are common and inevitable. See Ashley S. Deeks, A (Qualified) Defense of Secret Agreements, 49 *Ariz. St. L.J.* 713, 778–80 (2018) (discussing the diversity of the players involved in decision making within executive agencies and providing examples where a single agency has manifested diverse viewpoints). These provisions make these disagreements public through formal requirements.

constitutional literature regarding agency independence from the President. This Note argues that Congress should consider a broader use of these laws to correct its current information gap.

This Note has three objectives. First, Part II will describe and categorize the independent-reporting provisions, explaining both their historic origin and current practice. This Part demonstrates that Congress uses this tool across the government, including in agencies not otherwise independent of the President, to solicit a wide range of content. Independent reporting is distinct from other mechanisms of procuring information from the executive branch, such as the congressional subpoena,⁴ and offers unique advantages. Rather than placing Congress in a reactive posture, it prospectively ensures expertise at the start of the policy process—expertise that may be contrary to the views of the White House. Part III then positions these provisions within the broader scholarship and debate concerning agency independence, dividing mechanisms of agency independence between personnel provisions, which relate to hiring and firing, and operational provisions, which involve functional independence in executing the law. Part III also discusses constitutional limits on the use of independent reporting, finding there are many applications available to Congress under current law. Part IV demonstrates why independent reporting is superior to its alternatives, including increased personnel independence. In addition, Part IV considers potential applications, revisiting legislation from the 1970s—proposed in the aftermath of Watergate by a Congress seeking to assert itself—to make independent reporting the default for the federal budget process. Even absent such a dramatic step, independent reporting of agency expertise can play an important role, revitalizing Congress and reasserting the legislative branch as a co-equal partner in American governance.

⁴ This Note is not principally concerned with the power of Congress to subpoena executive branch information in the proceedings of a congressional investigation. That area of law has led to a wide array of legal opinion, both in scholarship and case law. See generally Morton Rosenberg, *The Constitution Project, When Congress Comes Calling: A Study on the Principles, Practices and Pragmatics of Legislative Inquiry* (2017) (examining the various congressional oversight resources and presenting case studies of congressional investigations). While this area is outside the scope of this Note, many of the legal principles developed in that context bear on the legal environment of independent-reporting provisions.

I. THE INFORMATION GAP

Information is critical to effective policymaking. Decisionmakers need both raw data and the ability to analyze it. In both regards, there is a stark asymmetry between the executive and legislative branches. While one branch is thinly staffed and lacks access to much of the research bearing on a given policy question, the other is perhaps the most sophisticated source of information analysis in the world.⁵ This problem is not new,⁶ and it has only grown with the size of government. In a constitutional system where each branch is supposed to express a voice on matters of public policy and the legislature is expected to vigorously oversee the actions of the executive, this imbalance is problematic.⁷

The current asymmetry is well-documented in the literature. Some scholars have modeled why Congress would create a government with this imbalance in the first place, finding that it is required to ensure informed policymaking.⁸ Others have examined the effects of such an asymmetry, noting its effect on ongoing legal debates like presidential accountability, the proper way to enforce the separation of powers, or judicial review.⁹ These accounts differ on the extent to which they see the

⁵ See Kevin R. Kosar, Opinion, *The Legislative Branch's Big Oversight Problem*, *Pub. Admin. Times* (Sept. 15, 2015), <https://patimes.org/legislative-branches-big-oversight-problem/> [<http://perma.cc/4NSC-YCAK>]; *infra* note 12 and accompanying text. While many see the asymmetry between the branches as inherently problematic, Prof. Cass Sunstein argues that this concern should not lead to limitations on executive discretion. See Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 *U. Pa. L. Rev.* 1607, 1627–28 (2016). Rather than staking out a position on this debate, this Note instead focuses on how the information available to make decisions can be more properly balanced, perhaps buoying the argument that limits on discretion are not needed.

⁶ See Joseph Cooper, Foreword, *Strengthening the Congress: An Organizational Analysis*, 12 *Harv. J. on Legis.* 307, 341 (1975) (“Control of information, combined with Congress’ dependence on executive assistance has, in turn, impaired Congress’ ability to use the resources it does possess to modify presidential proposals, to initiate proposals of its own, and to review bureaucratic decisionmaking and performance.”).

⁷ For a recent example of concerns about congressional oversight in the foreign policy arena, see generally Linda L. Fowler, *Watchdogs on the Hill: The Decline of Congressional Oversight in U.S. Foreign Relations* (2015).

⁸ See Sean Gailmard & John W. Patty, *Learning While Governing: Expertise and Accountability in the Executive Branch* 137–39 (2013) (“[W]e present a theory that explains when members of Congress will have an incentive to concede information, and therefore ultimately power, to the president.”). Gailmard & Patty are primarily concerned with the information gap between bureaucrats and political actors (whether executive or legislative). *Id.* at 1–3.

⁹ See Eric A. Posner & Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* 25–26 (2010) (arguing that the separation-of-powers framework fails to account for

information gap as problematic, but all accept that the gap between the branches is real and widening.

As if the present challenge were not enough, both the executive and the legislative branches have recently seemed willing to undermine the traditional role of information provided from within the legislative branch, threatening to enlarge the already substantial gap between them. As the health care debates in the summer of 2017 demonstrate, the longstanding view that the Congressional Budget Office (“CBO”) serves as the final and uncontested view on matters of budget procedure is no longer secure. At different points throughout the debate, members of Congress and the White House suggested that CBO’s numbers were incorrect, even suggesting that the relevant executive branch agency, in this case the Department of Health and Human Services, provide a competing budget score for the legislation.¹⁰

Second, the size and financing of congressional staff—including those working for House and Senate committees or within GAO, CBO, and CRS—has not kept pace with the demands of the modern Congress and shows no signs of improving.¹¹ Many observers have noted the decline in congressional capacity in recent years and noted the difficulties this poses for maintaining a proper constitutional role *vis-à-vis* the executive

the executive’s dominance with regard to information); Heidi Kitrosser, *The Accountable Executive*, 93 Minn. L. Rev. 1741, 1766 (2009) (“The ability of the President or his proxies not only to influence administrators, but to do so without public or congressional knowledge, is a natural consequence of the presidency’s structural capacity for secrecy. This capacity has expanded substantially over time due to factors that include the vast resources of the administrative state. The President’s capacity to operate in secret is aided also by the practical availability of executive privilege claims, as well as more informal means to refuse or to stall in response to information requests.”); Sunstein, *supra* note 5, at 1608–11 (arguing for greater deference to the executive because of its superior knowledge).

¹⁰ Nathaniel Weixel, *Senate GOP May Not Use CBO to Score Cruz Amendment*, *The Hill* (July 13, 2017, 2:15 PM), <http://thehill.com/policy/healthcare/341904-senate-gop-may-not-use-cbo-to-score-cruz-amendment> [<http://perma.cc/6GB2-844F>].

¹¹ The fiscal year 2017 budget for the legislative branch, which includes these agencies and the salaries of staffers working for committees and individual members, is lower than the same appropriation for fiscal year 2007 after controlling for inflation. See Ida A. Brudnick, Cong. Research Serv., R43397, *Legislative Branch Appropriations: Frequently Asked Questions 1 tbl.1* (2017), <https://fas.org/sgp/crs/misc/R43397.pdf> [<http://perma.cc/XX4U-FAPU>]. This is often attributed to spending cuts that began in the 1990s after Republicans took control of Congress. See Paul Glastris & Haley Sweetland Edwards, *The Big Lobotomy: How Republicans Made Congress Stupid*, *Wash. Monthly*, June/July/Aug. 2014, at 49–50, <https://washingtonmonthly.com/magazine/junejulyaug-2014/the-big-lobotomy/> [<http://perma.cc/SYW2-G3YD>].

branch.¹² “In contrast to the dramatic growth in the size and influence of the executive branch over the past 40 years, congressional committee staffing levels are at an all-time low.”¹³ For many of these scholars, there is a connection between the information asymmetry between the two branches and the control of the policymaking process by the executive, which included a series of executive actions in President Obama’s second term that, while opposed by congressional leadership, went largely unchallenged.¹⁴

A number of solutions have been proposed to correct this asymmetry, including calls for increasing the size of congressional research staff,¹⁵ changing the committee structure,¹⁶ streamlining the information that comes from the executive branch through reduced overlap in executive functions,¹⁷ and improving the working environment of Congress to reward talented staffers and increase opportunities for advancement.¹⁸ The most ambitious reforms would require congressional approval of major regulatory actions¹⁹ or increase congressional use of detailees, which are executive branch officials who work for Congress on short-term appointments.²⁰

¹² See, e.g., Russell W. Mills & Jennifer L. Selin, Don’t Sweat the Details! Enhancing Congressional Committee Expertise Through the Use of Detailees, 42 *Leg. Studs. Q.* 611, 613–16 (2017); Lee Drutman & Steven Teles, A New Agenda for Political Reform, *Wash. Monthly*, March/April/May 2015, at 23, 25–26, <https://washingtonmonthly.com/magazine/maraprmay-2015/a-new-agenda-for-political-reform/> [<http://perma.cc/9V9T-DUV5>]; Kevin R. Kosar, How to Strengthen Congress, *Nat’l Affairs*, Fall 2015, at 48, 54–56, <https://nationalaffairs.com/publications/detail/how-to-strengthen-congress> [<https://perma.cc/HE8Q-L33D>]; Casey Burgat, Opinion, Free Ways for Congress to Address its Staffing Problem, *Inside Sources* (Sept. 6, 2017) <https://www.insidesources.com/free-ways-congress-address-staffing-problem/> [<http://perma.cc/LE3J-DJKT>]; Schuman & Alisha Green, Sunlight Foundation, Keeping Congress Competent: The Senate’s Brain Drain (2012), <https://sunlightfoundation.com/policy/documents/keeping-congress-competent-the-senates-brain-drain/> [<http://perma.cc/T7BU-GAZT>].

¹³ Mills & Selin, *supra* note 12, at 611.

¹⁴ See Kosar, *supra* note 12, at 48–49, 53–54.

¹⁵ *Id.* at 56.

¹⁶ See, e.g., Brian D. Feinstein, Congressional Government Rebooted: Randomized Committee Assignments and Legislative Capacity, 7 *Harv. L. & Pol’y Rev.* 139, 139 (2013) (arguing for a system of random committee portfolio assignments).

¹⁷ See Kosar, *supra* note 12, at 59.

¹⁸ See Burgat, *supra* note 12.

¹⁹ See Kosar, *supra* note 12, at 58.

²⁰ See Mills & Selin, *supra* note 12, at 612–13.

This literature shares a common premise: agency information belongs exclusively to the President. This premise is incorrect and leads to faulty assumptions. First, it suggests that the only way to remedy the imbalance is to increase Congress's information-generating capacity or somehow limit the executive. The first option may prove politically untenable, while the second ignores the good reasons that the executive was given such analytical capacity in the first place.²¹ Second, it implies that Congress must always be in a reactive posture with respect to the White House on a given question, using *ex post* tools like congressional investigations.

Both assumptions fall away if agency information does not belong solely to the President, empowering him or her to withhold with absolute discretion expertise that may be vital to Congress. Luckily, the law requires no such absolutism. While the Constitution imposes real limits on access to information in the executive branch, Congress has more power to set the terms of this relationship than it currently exercises. Congress can stem this tide by more actively managing the development and dissemination of agency expertise. If Congress can both require agencies to provide specific information and set effective limits on the influence political officials—including the President—can exercise over this information, then the asymmetry underlying much of the modern concern about interbranch accountability may be less drastic or even nonexistent. This Note advocates such an effort.

II. INDEPENDENT-REPORTING PROVISIONS IN FEDERAL LAW

Federal law is littered with provisions that prohibit agencies from seeking review in OMB, or elsewhere in the executive branch, before providing information to Congress. Some of these are very narrowly crafted, covering only individual reports or isolated testimony. Others are broad, shielding an entire agency or process from preclearance of their budget requests or views on pending legislation.²² These provisions take a variety of forms and were enacted by legislatures with different motivations. Some common threads can nonetheless be identified. First, the provisions operate *ex ante*, shielding review of an initial agency work product. This distinguishes them from congressional tools designed to discover

²¹ See generally Gailmard & Patty, *supra* note 8, at 137–226.

²² See, e.g., 12 U.S.C. § 250 (2012) (providing for independent reporting of legislative recommendations by the financial regulatory institutions).

information after Congress has already launched an investigation into a matter, such as the congressional subpoena or other reactive statutes, like the Freedom of Information Act (“FOIA”).²³ Second, the statutes prevent review by political actors, preserving assessments that are perceived to be independent of political influence. Third, independent-reporting requirements are enacted specifically to circumvent White House review, which is the default practice for federal agencies. For that reason, these provisions are best understood in their broader context, where centralized review is very much the norm. In practice, the executive branch provides rigorous review and coordination of communication with Congress in the vast majority of cases, excluding information that is contrary to policy objectives and ensuring consistency with White House priorities. To understand the significance of independent reporting, the centralized review default is a good place to start.

A. Centralized Review of Communication with Congress

The review of executive branch communications with Congress is largely coordinated through OMB. To standardize the review process, OMB has developed two guidance documents: Circular A-19, which governs the process of clearing legislative testimony,²⁴ and Circular A-11, which provides for similar clearance that is unique to the development of the President’s budget.²⁵ According to OMB, Circular A-19 is explicitly designed to ensure that communications to Congress reflect the prerogatives of the President:

OMB performs legislative coordination and clearance functions to (a) assist the President in developing a position on legislation, (b) make known the Administration’s position on legislation for the guidance of the agencies and information of Congress, (c) assure appropriate

²³ See David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. Pa. L. Rev. 1097, 1100–01 (2017); *infra* note 301 and accompanying text.

²⁴ Office of Mgmt. & Budget, Exec. Office of the President, Circular No. A-19: Legislative Coordination and Clearance (revised Sept. 20, 1979), https://obamawhitehouse.archives.gov/omb/circulars_a019/ [<http://perma.cc/H8UF-69JS>] [hereinafter Circular A-19].

²⁵ Office of Mgmt. & Budget, Exec. Office of the President, Circular No. A-11: Preparation, Submission and Execution of the Budget (2017), https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/a11_current_year/a11_2016.pdf [<http://perma.cc/RA4K-W342>] [hereinafter Circular A-11].

consideration of the views of all affected agencies, and (d) assist the President with respect to action on enrolled bills.²⁶

By its own terms, the guidance does not apply to “those agencies that are explicitly required by law to transmit their legislative proposals, reports, or testimony to Congress without prior clearance.”²⁷ OMB does, however, provide input to agencies that may request advice or input, notwithstanding these restrictions.²⁸ For agencies that fall within the scope of this guidance, submission to OMB is mandatory.²⁹

Circular A-11 includes similarly restrictive language, requiring submission of budget materials for all agencies not otherwise excused “by law or custom.”³⁰ As one might expect, given the complexity of the budget process, the requirements of Circular A-11 are intensive. The full document is more than 900 pages long, references eight different statutes that govern federal budgeting,³¹ and includes highly technical instructions, such as details on how to operate the specific government software used by OMB.³² A-11 also includes an entire section entitled “communications with the congress and the public and clearance requirements.”³³ This section labels all presidential decisions regarding the budget as “confidential” and describes these determinations as “pre-decisional” and “deliberative,” tracking the language used to withhold information under FOIA.³⁴ It also instructs witnesses to provide

²⁶ Circular A-19, *supra* note 24, § 3 (background).

²⁷ *Id.* § 4 (coverage).

²⁸ *Id.*

²⁹ *Id.* § 7(a) (“Before an agency transmits proposed legislation or a report (including testimony) outside the Executive branch, it *shall* submit the proposed legislation or report or testimony to OMB for coordination and clearance.” (emphasis added)).

³⁰ Circular A-11, *supra* note 25, § 25.1. This section includes a list of agencies that do not need to comply with the budget submission process. OMB’s list does not align with the statutory list compiled in Table 1 of the Appendix. *Id.*

³¹ *Id.* § 15.1. These statutes are the Budget and Accounting Act, the Congressional Budget Act, the Balanced Budget and Emergency Deficit Control Act (Gramm-Rudman-Hollings), the Statutory Pay-As-You-Go Act, the Antideficiency Act, the Impoundment Control Act, the GPRA Modernization Act, and the Federal Credit Reform Act. *Id.*

³² *Id.* § 79 (describing operation of the MAX budgeting system).

³³ *Id.* § 22.

³⁴ Freedom of Information Act, 5 U.S.C. § 552 (2012). In addition to borrowing this language, Section 22 also includes a subsection on how to apply the Freedom of Information Act’s (“FOIA”) protections from disclosure to budget information. See Circular A-11, *supra* note 25, § 22.5 (specifically referencing exemption 5 (codified at 5 U.S.C. § 552(b)(5)), which authorizes withholding of deliberative materials).

information to Congress only at the request of the full House or Senate, not “volunteer[] personal opinions that reflect positions inconsistent with the President’s program or appropriation request,” and “not provide [a] request to OMB or plans for the use of appropriations that exceed the President’s request.”³⁵ In addition to limiting information that is provided directly to Congress, the guidance also prohibits sharing budget-related information with the media without prior clearance.³⁶ Notably, this section includes numerous references to statutory exemptions from OMB review.

Both circulars A-11 and A-19 are designed to meet similar objectives. One is to ensure agency support of the President’s policy program. A second is to ensure that all the relevant agencies have an opportunity to offer views on an issue of shared concern and expertise. OMB centralization serves both roles, creating a standard means of soliciting comments and receiving input from political leadership. These measures can be highly effective in controlling federal policy. Through OMB budget review, officials within the EOP are able to exert considerable influence on the choices of departments and agencies. One recent work by Professor Eloise Pasachoff, which provides a thorough and enlightening survey of OMB’s role in reviewing agency budget submissions, found that the budget process is a central tool of executive control, comparable to review of agency regulatory initiatives.³⁷ As Pasachoff demonstrates, budget review provides for considerable control over not just funding decisions, but also policy initiatives throughout the government.³⁸

While OMB’s role certainly provides benefits in terms of coordination between agencies³⁹—one of the explicit goals of Circular A-11—it also raises a number of problems related to transparency.⁴⁰ For instance, Pasachoff’s work argues that the current process shields too many

³⁵ Id. § 22.2.

³⁶ Id. § 22.3.

³⁷ Eloise Pasachoff, *The President’s Budget as a Source of Agency Policy Control*, 125 *Yale L.J.* 2182, 2186–88 (2016).

³⁸ Id. at 2242. White House views on legislation are often expressed through Statements of Administration Policy (“SAPs”). For a discussion of this process, see generally Meghan M. Stuessy, *Cong. Research Serv.*, R44539, *Statements of Administration Policy* (2016), <https://fas.org/sgp/crs/misc/R44539.pdf> [<http://perma.cc/BY56-4MUT>].

³⁹ Pasachoff, *supra* note 37, at 2246–50. For a general discussion of the White House role in interagency coordination, see Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 *Harv. L. Rev.* 1131, 1173–81 (2012).

⁴⁰ Pasachoff, *supra* note 37, at 2251–62.

decisions from public scrutiny. Notably, her proposed solution focuses on personnel controls, arguing that Senate confirmation of more OMB officials would cure the defects.⁴¹ While she recognizes that additional information sharing may be helpful, she largely sees this option as untenable, because of the executive branch's unwillingness to share deliberative information and the additional restrictions on congressional testimony imposed by Circular A-19.⁴² In this respect, her work is part of a theme in administrative law scholarship that sees personnel independence as the most effective, and perhaps exclusive, means of removing presidential influence.⁴³ While she mentions the existence of independent-reporting provisions, she does not explore their potential for alleviating the concerns present in the current system.⁴⁴

It is against this backdrop, where presidential control and inter-agency coordination serve as a default, that independent-reporting requirements establish a degree of agency autonomy. By pulling agency communications with Congress outside of this established framework, agencies are limited in their contact both with centralized decisionmakers in the executive branch and other agencies that may have input on the issue at hand. From the vantage point of Congress, this creates a tradeoff between the independence of the information received and the potential for agencies with relevant expertise to weigh in on policy questions.

B. History and Development of Independent Reporting

The current independent-reporting requirements arose in the latter half of the twentieth century.⁴⁵ In many cases, the provisions were included in the organic act that created the relevant agency. Others were added during subsequent reforms. In the first context, these provisions simply track with the growth of the administrative state. As new agencies sprang into

⁴¹ *Id.* at 2282–85.

⁴² *Id.* at 2221–22.

⁴³ See, e.g., Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 *Ala. L. Rev.* 1205, 1209 (2014) (“I explain why a realistic understanding of administration lends greater urgency to constitutional questions and supports a formal framework of removal as necessary and sufficient for presidential control.”).

⁴⁴ Pasachoff, *supra* note 37, at 2220–23.

⁴⁵ See *infra* Table 1 (legislative history). The earliest provision identified in the Appendix was enacted in 1952.

existence, Congress included independent-reporting provisions as simply another mechanism of ensuring agency independence, along with for-cause removal for an officer or a partisan balance requirement for a commission.⁴⁶ The standalone independent-reporting statutes, however, can be understood as a response to a specific period in American history when tensions between the executive and legislative branches were particularly heightened.⁴⁷ The Watergate scandal, which played out during the early 1970s, undermined the confidence of the executive branch in the eyes of both the public and Congress.⁴⁸ It also contributed to a landslide victory for Democrats in the 1974 midterm elections.⁴⁹ This confluence of events led to an assertive and skeptical Congress, willing to push for novel limitations on the executive, and a presidency too politically weakened to resist their efforts. Out of this period of conflict came many new restrictions on agencies,⁵⁰ including a significant number of independent-reporting requirements.

⁴⁶ For instance, the Clean Air Act Amendments of 1990 both created the Chemical Safety and Hazard Investigation Board and provided it with budget and legislative reporting provisions. See Pub. L. No. 101-549, sec. 301, § 112(r)(6)(R), 104 Stat. 2399, 2569 (1990) (codified at 42 U.S.C. § 7412(r)(6)(R) (2012)). See also Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, sec. 101(a)(3), § 2(a)(9), 88 Stat. 1389, 1390–91 (1974) (codified at 7 U.S.C. § 2(a)(9)).

⁴⁷ See, e.g., Farm Credit Act of 1971, Pub. L. No. 92-181, § 5.18(3), 85 Stat. 583, 622 (1971) (codified as amended at 12 U.S.C. § 2252(a)(3) (2012)) (revamping the prior Federal Farm Board); Act of Oct. 28, 1974, Pub. L. No. 93-495, § 111, 88 Stat. 1500, 1506 (codified as amended at 12 U.S.C. § 250 (2012)) (requiring independent reporting for financial regulatory agencies).

⁴⁸ See generally Troy A. Zimmer, *The Impact of Watergate on the Public's Trust in People and Confidence in the Mass Media*, 59 Soc. Sci. Q. 743 (1979) (discussing this trend).

⁴⁹ See generally 1974 Elections: A Major Sweep for Democrats, CQ Almanac 1974 (1975), CQ Almanac Online Edition, <https://library.cqpress.com/cqalmanac/document.php?id=cqal74-1222893> [<http://perma.cc/FQ6T-7TWX>]. The Democrats who first won their seats in 1974 were known as the “Watergate Babies.” See John A. Lawrence, *How the ‘Watergate Babies’ Broke American Politics*, Politico (May 26, 2018), <https://www.politico.com/magazine/story/2018/05/26/congress-broke-american-politics-218544> [<http://perma.cc/37JH-BJXH>].

⁵⁰ A number of the major general management laws giving both Congress and the public increased opportunities to scrutinize executive action were passed in the 1970s. See, e.g., Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101; Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972); War Powers Resolution of 1973, Pub. L. No. 93-148, 87 Stat. 555 (codified at 50 U.S.C. §§ 1541 et seq.) (increasing congressional visibility into executive action by requiring the President to report any case in which the armed forces are introduced into hostilities without a declaration of war, among other reporting and consultation obligations).

The statute providing independent reporting for financial institutions is such an example:

No officer or agency of the United States shall have any authority to require the Securities and Exchange Commission, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Comptroller of the Currency, the Director of the Office of Thrift Supervision, the Director of the Federal Housing Finance Agency, or the National Credit Union Administration to submit legislative recommendations, or testimony, or comments on legislation, to any officer or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony, or comments to the Congress if such recommendations, testimony, or comments to the Congress include a statement indicating that the views expressed therein are those of the agency submitting them and do not necessarily represent the views of the President.⁵¹

This law began as part of the Depository Institution Amendments of 1974 and initially applied to the SEC, Federal Reserve, FDIC, Federal Home Loan Bank Board, and National Credit Union.⁵² According to the Senate Report, this language was included to “preserve and strengthen the independence of these agencies” and was expressly rooted in Congress’s concerns about “executive usurpation.”⁵³ In the view of the Ninety-third Congress, such a provision was necessary to clarify the independence that these agencies already had, although that proposition is contestable.⁵⁴ As this example demonstrates, the Congress during this period was not only creating new structures to limit the executive branch—such as inspectors

⁵¹ 12 U.S.C. § 250 (2012).

⁵² An Act of Oct. 28, 1974, Pub. L. No. 93-495, § 111, 88 Stat. 1500, 1506 (codified as amended at 12 U.S.C. § 250 (2012)).

⁵³ S. Rep. No. 93-902, at 10–11 (1974).

⁵⁴ *Id.* (“[I]t should not be inferred that the Committee believes the financial regulatory agencies are required by existing law to clear their congressional testimony with the Office of Management and Budget.”). For a discussion of customary independence and its role in modern interpretation, see Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 *Cornell L. Rev.* 769, 832–35 (2013) (discussing “implied for-cause removal protection”), and Adrian Vermeule, *Conventions of Agency Independence*, 113 *Colum. L. Rev.* 1163 (2013).

general⁵⁵ but also was taking steps to clarify and entrench agency independence, often through independent-reporting provisions.⁵⁶

The largest arena in which this interbranch fight played out was the federal budget process, especially during the impoundment debate. In the early 1970s, President Nixon claimed the right to impound (that is, not spend) money that Congress had appropriated for federal projects.⁵⁷ The ensuing conflict led to the Congressional Budget and Impoundment Control Act of 1974 (“CBICA”), which effectively limited the President’s authority to withhold funding without congressional approval.⁵⁸ This legislation went on to become the major governing statute for the federal budget process, imposing time limits and congressional procedures for review and passage of annual appropriations.

The legislative debate surrounding the CBICA is also important for those parts of the draft legislation that never made it into law. The final CBICA set forth both the responsibilities of the CBO in evaluating legislation and the role of the congressional budget and appropriations committees in allocating spending authority.⁵⁹ During the drafting of the law, Senator Lee Metcalf proposed a version that would have also greatly

⁵⁵ Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101. This Act both provided for enhanced responsibility and independence for inspectors general and created more than a dozen new inspector general positions in the federal government. The first inspector general created by statute was two years prior, in 1976, and was placed within the Department of Housing, Education, and Welfare. As discussed later, inspectors general have a unique form of direct reporting, in which they provide views to Congress without interference, but agency heads are permitted to add their own comments. See generally, S. Rep. No. 95-1071, at 9–10 (1978) (discussing reports to Congress in the broader context of balancing independence and effectiveness for inspectors general).

⁵⁶ See Monke et al., *supra* note 2 (“[M]any observers . . . perceived [the Budget and Accounting Act of 1921] as enabling the President to control the nature of information that agencies released to Congress and the public.”).

⁵⁷ See Josh Chafetz, *Congress’s Constitution: Legislative Authority and the Separation of Powers* 64–65 (2017); see also Bruce Bartlett, *The Ebb and Flow of Executive Power*, N.Y. Times: Economix (Feb. 18, 2014), <https://economix.blogs.nytimes.com/2014/02/18/the-ebb-and-flow-of-executive-power/> [http://perma.cc/U247-ANF6].

⁵⁸ Impoundment Control Act of 1974, Pub. L. No. 93-344, §§ 1001 et seq., 88 Stat. 297, 332–39 (creating process for the President to request the rescission of an appropriation); see also *Train v. City of New York*, 420 U.S. 35, 47–48 (1975) (reaching a similar conclusion on the basis of the specific EPA authorization at issue).

⁵⁹ See Congressional Budget Act of 1974, Pub. L. No. 93-344 §§ 201, 202, 88 Stat. 297, 302–04. The allocation for all discretionary spending is known as the 302(a) allocation, while the amounts for each appropriations subcommittee are 302(b) allocations.

expanded the use of independent reporting.⁶⁰ Under Senator Metcalf's proposal, independent reporting of agency budget submissions would have been the new governmentwide default, rather than a feature of specific agencies. The initial draft, known as the Congressional Budget and National Priorities Act of 1973, read:

Whenever *any officer or employee of any department* or establishment submits *any estimate or request for appropriations* to the President or the Office of Management and Budget, he shall concurrently transmit a copy of such estimate or request, together with copies of any documents submitted with such estimate or request, to the Congressional Office of the Budget. No officer or employee of the United States shall have authority to approve, or to require any department or establishment, or any officer or employee thereof, to submit any estimate or request for appropriations for approval, prior to the submission of such estimate or request to the Congressional Office of the Budget.⁶¹

This language was initially a standalone piece of legislation offered by Senator Edmund S. Muskie to specifically address the lack of information available to Congress. As Senator Muskie explained in introducing the legislation, "it is clear that information concerning original agency budget requests to [OMB] is not always available to the Congress."⁶² During the Senate's consideration of this legislation, the constitutional dimension of the proposal was debated at length, leading to one particularly fascinating exchange between Senator Muskie and the director of OMB, Roy Ash. Following Ash's assertion that Congress should only hear "one voice" from the executive, Senator Muskie responded, prompting a rather tense back and forth:

Senator Muskie: Are you asserting that as a constitutional principle?

⁶⁰ The Congress of this period imposed independent-reporting provisions in an ad hoc fashion, going agency by agency. See *infra* Table 1 (showing that the majority of provisions were enacted in the 1970s and 1980s).

⁶¹ Federal Budget Control by the Congress: Hearing Before the Subcomm. on Standing Rules of the S. Comm. on the Rules & Administration, 93d Cong. 107–08 (1974) (reprinting proposed legislation) (emphasis added); see also Staff of S. Comm. on Gov't Operations, 93d Cong., Congressional Budget and Impoundment Control Act of 1974, Legislative History 132, 163 (Comm. Print 1974) (including proposed text as an amendment in the nature of a substitute offered on September 26, 1973).

⁶² Amending the Budget and Accounting Act of 1921: Hearing Before the S. Comm. on Gov't Operations, 93d Cong. 16 (1973) (statement of Sen. Muskie, Member, S. Comm. on Gov't Operations).

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Mr. Ash: I am asserting that as a principle that derives out of the Budget and Accounting Act of 1921.

Senator Muskie: We will get to that.

. . .

Senator Muskie: I am asking you a very narrowly focused question. Are you asserting it as a constitutional principle that the President speaks on budget matters . . . with one voice until the budget has been presented? Is that a constitutional principle?

. . .

Senator Muskie: Answer the question. Are you asserting that the Congress on a constitutional matter has no right to hear from any voice in the executive branch except the President until the budget is presented?

Mr. Ash: I am asserting that for the better workings of this Government and under the [BAA] —

Senator Muskie: We will get to the [BAA]. . . . [I]f you are making a constitutional point . . . then I would like to know. If you are not, say so. If you are, say so.

. . .

Mr. Ash: I am making a constitutional point.

. . .

Mr. Ash: I am making the point . . . that the separation of powers allows and provides that the President speak with one voice. That is one point made simply. Another point made simply is that for other reasons and purposes in addition to the constitutional one, we believe it is desirable that the information available to you be made available to you after the President has spoken with one voice. Those are two quite separate points.

Senator Muskie: Let me put the question as simply as I can. It would really help if you could focus on the questions and respond to them. I am not trying to wrap up the whole hearing in one question. Are you saying there are constitutional objections to [this legislation] if I may get it down to that?

Mr. Ash: I am leaving it to the Justice Department to determine whether there is a constitutional objection to the whole of the bill. I am making one citation, relative to the constitutional rights of the President and one only.

Senator Muskie: Mr. Ash, you seem to have a horrible problem of answering a question. . . . Are you just uttering a lot of words that you are leaving the constitutional questions, if any, to the Justice Department, or do you have reason to believe there is a constitutional objection to [the legislation][?]⁶³

At this point in the exchange, Ash chose the more prudent course of directing legal questions to OMB's general counsel, who was also a witness at the hearing.⁶⁴ The Department of Justice did provide a response in writing to Senator Muskie's questions, but avoided the broader constitutional arguments.⁶⁵ Ultimately, a governmentwide default procedure for submitting budget requests to the President and the legislature at the same time did not move forward, either as standalone legislation or as a part of the final CBICA. This legislative failure carries important lessons. First, it suggests that Congress has been open to bolder uses of independent reporting in the past—uses that would, if implemented, greatly alter the executive control of congressional communications. Second, it shows that efforts to upend existing processes root and branch are likely to be met with both policy and legal objection. Third, the broader history demonstrates that these provisions are likely to receive attention at times of heightened institutional concerns for Congress, such as those that accompanied the impoundment controversy and the broader post-Watergate political environment.

⁶³ Id. at 24–26.

⁶⁴ Id. at 26. The full transcript has been edited for brevity, but it is worth reading in full. The back and forth between two key figures in this debate shows just how sensitive agency information access can be to both branches of government, as well as the common tendency to conflate constitutional, statutory, and policy arguments in assessing their legitimacy.

⁶⁵ Id. at 11–12 (including letter from Mike McKeivitt, the Assistant Attorney General, on the proposed legislation). The letter to Congress stated that the then-existing process “establishes a proper division of the constitutional responsibilities between President and Congress,” while the proposed legislation would “invite[] constitutional conflicts.” Id. at 12. On the face of this letter, it is not clear if the legislation itself, without further action by either branch, was understood to violate the Constitution.

C. Forms of Independent Reporting

Independent-reporting provisions are not “one size fits all.” As shown in the Appendix, there are more than forty direct-reporting provisions in federal law. This Section categorizes these provisions on three dimensions: reporting structure, type of agency, and type of information.

By organizing the provisions in this manner, a few conclusions come into view. First, Congress has developed two structures for independent reporting, with many statutes allowing for multiple contrasting views from the executive branch on a single question. To the extent that the main objection to these statutes is that the executive branch does not speak with a single voice, most of the laws are therefore implicated. Second, the provisions are more common for agencies traditionally understood as insulated from politics, such as independent boards and commissions. They are not exclusive to these agencies, however, and some exist in traditionally core areas of executive control, such as the Department of Defense. Finally, Congress has used independent reporting to obtain (arguably) apolitical information both in very specific contexts and as a general feature of an agency’s overall design. While most prevalent in the budget process, statutes have also been directed toward other areas of agency expertise, such as comments on pending legislation and individual program assessments. Therefore, independent reporting as it now stands cannot be understood as reinforcing any single legislative function; each law is instead tailored to meet specific needs.

1. Structure

Direct-reporting provisions take two forms. In one, agencies submit their own views on a subject directly to the Congress. This can be referred to as “direct submission.” Under this structure, the agency may be the only voice on the topic, or the White House may choose to provide its own view. In the second form, “indirect submission,” one executive actor (typically the President) is instructed to pass on the information of the agency without making any changes.⁶⁶

⁶⁶ A similar distinction is made in the Administrative Conference of the United States report, but they do not explore the implications of this distinction in detail. See David E. Lewis & Jennifer L. Selin, Admin. Conf. of the U.S., Sourcebook of United States Executive Agencies 113 (2012), https://www.acus.gov/sites/default/files/documents/Sourcebook-2012-Final_12-Dec_Online.pdf [<http://perma.cc/T48Z-ZXXY>]. Moreover, the focus of that report is agencies as a whole, so components of executive agencies with independent-reporting protection are not included. Id. at A-25 n.348.

Direct Submissions. The budget submission of the Federal Retirement Thrift Investment Board follows a standard direct submission structure: “The Board shall prepare and submit to the President, and, at the same time, to the appropriate committees of Congress, an annual budget of the expenses and other items relating to the Board which shall be . . . transmitted to the Congress under section 1105 of title 31.” Provisions like this are very common in the budget process and allow Congress to consider two proposals for funding levels: one from the President (acting through OMB) and one from the agency itself. Appropriators are able to consider each recommendation on its own merit, while also evaluating the changes between the two. Under such a structure, the executive branch is not speaking with one voice, but the President is still able to offer a perspective apart from that of the agency. The result is analogous to litigation in which an agency is permitted to advocate apart from the Department of Justice.⁶⁷

A similar result occurs whenever a statute bars review of legislative testimony or recommendations. The provision for financial regulators discussed above, for example, prevents any executive officer from requiring review of these agencies’ legislative submissions.⁶⁸ Importantly, nothing in this law, or others like it, restricts other officers’ ability to speak their own mind. OMB can still provide commentary on the ongoing legislative debate as it sees fit. The President may choose to weigh in through official Statements of Administration Policy or less formal public comments.⁶⁹ Some of the independent-reporting laws expressly contemplate differing executive branch views on the legislative agenda, requiring the agency to “include a statement indicating that the views expressed therein are those of the agency submitting them and do not necessarily represent the views of the President.”⁷⁰

⁶⁷ Independent litigating authority is discussed in greater detail in Section III.A.

⁶⁸ 12 U.S.C. § 250 (2012) (“*No officer or agency* of the United States shall have any authority to require [the financial regulatory agencies] to submit legislative recommendations, or testimony, or comments on legislation, *to any officer or agency* of the United States for approval, comments, or review, prior to [congressional] submission . . .” (emphasis added)).

⁶⁹ See White House, Statements of Administration Policy, <https://www.whitehouse.gov/omb/statements-of-administration-policy> (collecting SAPs) (last visited Sep. 22, 2018) [<http://perma.cc/UZ2N-DCZH>]. For a description of these statements, see Stuessy, *supra* note 38, at 1–4.

⁷⁰ 12 U.S.C. § 250.

Direct submission is also common for laws concerning agency program assessments. For instance, the Department of Health and Human Services is directed to provide Congress with a report on federal nursing programs. In doing so, “[t]he Office of Management and Budget may review the Secretary’s report . . . but . . . may not revise the report or delay its submission.”⁷¹ In similar contexts, the provision does not specifically reference OMB, instead it simply prevents any review outside the relevant department. Under this latter structure, the President could not get around the restriction by coordinating review in another component of the EOP.⁷² Like the legislative testimony context, nothing prevents the President or other officer from providing a different assessment. The President can speak, he just can’t speak alone.

Indirect Submissions. In the second context, the centralized review agency (likely OMB) must offer the agency viewpoint as a part of the President’s overall program, rather than as a competing perspective. The information provided by the agency is simply passed on to Congress with no change. An example is the statute applicable to budget submissions from the Court of Appeals for Veterans Claims⁷³: “The budget of the Court [] as submitted by the Court for inclusion in the budget of the President for any fiscal year shall be included in that budget without review within the executive branch.”⁷⁴ A similar provision is in place for the United States Postal Service, which is responsible for generating revenues each year to cover its own expenses (as well as those of the Postal Regulatory Commission).⁷⁵ In the budget context, these statutes ensure that the executive branch speaks with one voice, but that voice is not the President’s. This structure therefore raises heightened concerns about the

⁷¹ Special Health Revenue Sharing Act of 1975, Pub. L. No. 94-63, § 951, 89 Stat. 304, 367 (codified at 42 U.S.C. § 296 note (2012)).

⁷² See, e.g., Act of Dec. 8, 1983, Pub. L. No. 98-211, sec. 22, § 559(b), 97 Stat. 1412, 1419, (repealed 1988) (“Notwithstanding any other provision of law or regulation, such reports shall not be subject to any review outside of the Department of Education before their transmittal to the Congress . . .”).

⁷³ This Court is an Article I tribunal, meaning it is not part of the judicial branch, which is covered by a separate provision. See 31 U.S.C. 1105(b) (2012); 38 U.S.C. § 7282 (2012). For further discussion on the distinction between Article I and Article III tribunals and the respective branches’ authority over each, see *Ortiz v. United States*, 138 S.Ct. 2165, 2172–80 (2018) (concluding that courts-martial are congressional creations pursuant to Article I but subject to the Court’s appellate jurisdiction under Article III).

⁷⁴ 38 U.S.C. § 7282.

⁷⁵ See 39 U.S.C. § 2009 (2012).

President's role being displaced altogether. In practice, however, indirect submissions are rare, operating only in the budget context for entities that are relatively small.

2. Agencies

Agency classification is not a binary choice between independence and political control. Instead, the federal government comprises entities with varying levels of independence, both as a matter of statutory law and custom. Instead of choosing from a menu with offerings like “cabinet department” or “independent regulatory agency,” Congress often constructs a new component of the government *à la carte*.⁷⁶ A single entity might have both a leader with some independence from removal and be required to submit regulations for White House review, or vice versa.⁷⁷

Nonetheless, the federal government does lend itself to rough characterization. For instance, the United States Government Manual, developed by the Government Printing Office, divides the executive branch into four categories: (1) the “President,” which includes OMB, (2) the “Departments,” including their subcomponents, (3) the “Independent Agencies and Government Corporations,” and (4) the “Quasi-Official Agencies.”⁷⁸ As a constitutional matter, all of these are “executive” agencies.⁷⁹ The

⁷⁶ See Datla & Revesz, *supra* note 54, at 773 (“So, agencies do not fall neatly into two categories. If the binary view of agencies is incorrect, what is the correct view? The continuum view. Agencies fall along a continuum ranging from most independent from presidential influence to least independent. The so-called independent agencies are simply a type of executive agency. To be sure, they are insulated from presidential authority, but so are many executive agencies.”).

⁷⁷ See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 588 (2010) (Breyer, J., dissenting) (discussed at *infra* note 153). Appendix D of Justice Breyer’s opinion details agency leadership structures and whether an agency may bypass OMB review in submitting proposals to Congress.

⁷⁸ Office of the Fed. Register & Gov’t Publ’g Office, U.S. Government Manual (2017), <https://www.usgovernmentmanual.gov/?AspxAutoDetectCookieSupport=1> [<http://perma.cc/5SDW-HEX6>] [hereinafter Government Manual] (containing a “Browse by Category” dropdown menu allowing the user to browse by these categories) (last visited Sep. 22, 2018). The website’s “Browse by Category” dropdown menu also includes “Legislative Branch,” “Judicial Branch,” and “International Organizations” as browsing options. Strangely, the “Quasi-Official Agencies” is the only label not explicitly grouped into legislative, judicial, or international in label, though the agencies fall formally under the executive. See *infra* note 79.

⁷⁹ See Datla & Revesz, *supra* note 54, at 773–74. There is some debate over precisely what is meant by considering all of these agencies to be “executive,” with some still arguing for

Manual's categories are simply borrowed for this Section to provide a sketch of how independent reporting applies in different hierarchical contexts.

As one would expect, the vast majority of the federal government is comprised of either cabinet departments or independent agencies. In the Manual's formulation, the latter category is largely defined by autonomy from the former. The Manual considers an entity to be a board, commission, or committee if its "functions are not strictly limited to the internal operations of a parent department or agency" and it is "authorized to publish documents in the Federal Register."⁸⁰ For that reason, boards with a hierarchical relationship to a cabinet department are considered a part of that entity.⁸¹

While the Government Manual does not treat inspectors general as separate from the agencies they inspect, the federal law governing inspectors general has unique independent-reporting requirements. As such they are given separate treatment below. Finally, some statutes provide for independent reporting by other branches of government, which is also discussed separately.

Independent Agencies and Government Corporations. The majority of existing independent-reporting provisions are aimed where they may be most expected: the so-called "independent agencies," which have other hallmarks of political insulation, like for-cause removal.⁸² These reporting

distinctions specific to certain types of agencies. See, e.g., *PHH Corp. v. Consumer Financial Prot. Bureau*, 881 F.3d 75, 114–19 (D.C. Cir. 2018) (Wilkins, J., concurring) (noting that arguably the authority of the President to remove an officer turns on the nature of the functions performed).

⁸⁰ Government Manual, *supra* note 78, Resources: Boards, Commissions, and Committees, <https://www.usgovernmentmanual.gov/ReadLibrary-Item.ashx?SFN=+FG8vUAP++X7mtXAlvTS/Q==&SF=VHhnJrOeEAnGaa/rtk/JOg==> [<http://perma.cc/MD9L-9UNC>].

⁸¹ For instance, the Federal Aviation Administration is considered part of the Department of Transportation in the Manual, while the National Transportation Safety Board ("NTSB") is not. This is because "the Independent Safety Board Act of 1974 (49 U.S.C. [§] 1111) reestablished the NTSB as an independent agency outside the Department of Transportation." Government Manual, *supra* note 78, National Transportation Safety Board, <https://www.usgovernmentmanual.gov/Agency.aspx?EntityId=I0LeX9xNnXE=&ParentEId=+klubNhgV0o=&EType=jY3M4CTKVHY=> [<http://perma.cc/ANL7-KGM8>] (last visited on Sep. 22, 2018).

⁸² Compare *infra* Table 1, with Datla & Revesz, *supra* note 54, at 786 (listing a number of agencies with statutory for-cause removal protection, such as the Consumer Financial Protection Bureau, Federal Energy Regulatory Commission, NTSB, Chemical Safety and Hazard

provisions are often very broad, requiring autonomy in both the budget and legislative spheres. Many of these agencies sprang up in the New Deal era or during the later wave of federal regulation in the 1960s and 1970s.⁸³ It should be noted, however, that not all boards and commissions created since the New Deal have independent-reporting requirements. For instance, there is no such provision in the organic act of the Privacy and Civil Liberties Oversight Board (“PCLOB”). Following a recommendation by the 9/11 Commission, the PCLOB was created to “review actions the executive branch takes to protect the Nation from terrorism, ensuring that the need for such actions is balanced with the need to protect privacy and civil liberties,” and ensure that such concerns are considered in the policy development process.⁸⁴ Despite having an oversight purpose similar to other independent bodies, the statute is silent on this issue, leaving in place the default of centralized review. The PCLOB is required to report to Congress and make such reports public, but the level of review provided *ex ante* is not prescribed in the authorizing legislation.⁸⁵

Components of Cabinet Agencies. A less frequent use of independent reporting is in traditionally “executive agencies,” demonstrating once again that current practice does not establish a hard line between the independent regulators and everything else. One example applies to the FAA, housed within the Department of Transportation. The statute requires the FAA Administrator to “concurrently . . . submit a copy” of legislative recommendations or testimony to Congress whenever they have been submitted to OMB or the President.⁸⁶ This general provision is, however, somewhat anomalous. Components of cabinet agencies are more likely to be given independent-reporting obligations in the context of specific reports, rather than as a default for all communications, as discussed below.⁸⁷

Investigation Board, and the Federal Housing Finance Agency, all of which also have direct-reporting provisions).

⁸³ Stephen G. Breyer et al., *Administrative Law and Regulatory Policy: Problems, Text, and Cases* 22–23 (6th ed. 2006) (discussing how the later regulatory regimes differed from New Deal-era agencies).

⁸⁴ 42 U.S.C. § 2000ee(c) (2012).

⁸⁵ *Id.* § 2000ee(f).

⁸⁶ 49 U.S.C. § 48109 (1996).

⁸⁷ See *infra* Table 1 (showing components of cabinet departments as the only entities for which individual report independence was provided).

One interesting, and perhaps surprising, example in this group applies to the Joint Chiefs of Staff within the Department of Defense. Under the statute, “[a]fter first informing the Secretary of Defense, a member of the Joint Chiefs of Staff may make such recommendations to Congress relating to the Department of Defense as he considers appropriate.”⁸⁸ This is a particularly salient reporting provision because of the nature of the information at issue. The President is constitutionally assigned the role of Commander in Chief of the Armed Forces, a role that is frequently invoked to argue for presidential control over military operations.⁸⁹ As such, the constitutional concerns raised by this reporting provision, discussed in Section IV.B, are arguably heightened in the context of such a core function.

Senior military leadership also acts independently in the budget process. Every year, the head of each service branch provides Congress with an “unfunded priorities list” for that branch.⁹⁰ This list is provided to the defense committees of both chambers of Congress within ten days of the President’s submission.⁹¹ These reports include requests that, by their very definition, were not included in the President’s budget document.⁹²

Quasi-official Agencies. The Legal Services Corporation, State Justice Institute, and U.S. Institute for Peace submit their budget requests independently. These entities are created as private nonprofit corporations by federal law.⁹³ The budget autonomy given to these entities is simply a specific recognition of their general separation from the government. For

⁸⁸ 10 U.S.C. § 151(f) (1986). While beyond the scope of this Note, this provision also includes an interesting example of intrabranched direct reporting, wherein the Joint Chiefs are also permitted to report directly to the President without prior clearance from the Secretary of Defense. *Id.* § 151(d).

⁸⁹ See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 540 (2004) (“The Government responds that Hamdi’s incommunicado imprisonment as an enemy combatant seized on the field of battle falls within the President’s power as Commander in Chief under the laws and usages of war.”).

⁹⁰ 10 U.S.C. 222a (2012) (requiring such a list from the heads of the Army, Navy, Air Force, and Marine Corps, as well as the “commanders of the combatant commands”).

⁹¹ See Lynn M. Williams & Pat Towell, Cong. Research Serv., R44866, FY2018 Defense Budget Requests: The Basics 14 n.29 (2017).

⁹² See, e.g., U.S. Dep’t of Defense, Navy’s Fiscal Year 2018 Unfunded Priorities List (2017), <https://news.usni.org/2017/06/02/document-navys-fy-2018-unfunded-priorities-list> [http://perma.cc/JJS5-A6B7].

⁹³ See 42 U.S.C. § 10702(a) (2012) (State Justice Institute); 42 U.S.C. § 2996b(a) (2012) (Legal Services Corporation); 22 U.S.C. § 4603(b) (2012) (U.S. Institute for Peace). The provision for the U.S. Institute for Peace does not say that it is “private,” but does say that it is independent and liable for the actions of its agents. *Id.* § 4603(b), (d).

that reason, these laws are different in structure from other independent-reporting provisions. Instead of removing a review authority in OMB that is presumed as the default, these provisions affirmatively give OMB the authority to provide comments on the independent submissions of these quasi-official agencies, which may otherwise be in doubt.⁹⁴

Inspectors General. The Inspector General Act of 1978 includes a detailed provision for the budget requests of inspectors general. First, the inspector general is authorized to submit a request to the head of the executive department in which he or she is located.⁹⁵ Second, the agency head is required to provide the views of the inspector general on the final office budget directly to the president.⁹⁶ Finally, the President is required to submit the views of the inspector general to Congress as part of the federal budget.⁹⁷ Under this statute, inspectors general are given both intra- and interbranch autonomy in communicating their full budget needs. This is entirely consistent with the policies goals set forth in the text of the 1978 Act. In providing a statutory framework for inspectors general across the government, Congress was explicitly recognizing the need for “independent and objective units,” which would “provide a means for keeping the head of the establishment and the Congress fully and currently informed about problems and deficiencies” within their purview.⁹⁸

Legislative and Judicial Branches. The provisions for other branches of government are simply a matter of budget process housekeeping. Since the President is required to submit a budget with totals for the entire government, the other branches of government are included. Unlike the laws for executive agencies, the limitation on the President in this context is minimal. While, in principle, the President may not wish to convey the request, the amounts at stake are relatively small and the supporting

⁹⁴ See, e.g., 22 U.S.C. § 4608(a) (1984) (“Nothing in this chapter may be construed as limiting the authority of the Office of Management and Budget to review and submit comments on the Institute’s budget request at the time it is transmitted to Congress.”).

⁹⁵ 5 U.S.C. app. § 6(f)(1) (2012).

⁹⁶ Id. § 6(f)(2)(D) (requiring inclusion of “any comments of the affected Inspector General with respect to the proposal”).

⁹⁷ Id. § 6(f)(3)(E) (requiring inclusion of “any comments of the affected Inspector General with respect to the proposal if the Inspector General concludes that the budget submitted by the President would substantially inhibit the Inspector General from performing the duties of the office”). This provision creates a higher bar for communicating budget needs independently, but it still leaves that decision to the discretion of the IG, not OMB.

⁹⁸ Id. § 2(3).

materials are not developed by OMB.⁹⁹ Judicial branch officials, for instance, routinely testify before the relevant congressional committees with no attempt by the executive branch to review those communications.¹⁰⁰

3. *Type of information*

Independent-reporting laws are designed to elicit three types of information: budget information, recommendations on other legislation, and evaluations of specific programs. For each type, there is a different default process for centralized review, which these laws circumvent. In the first two contexts, budget information and legislative testimony, the default requirements are laid out in circulars A-11 and A-19, respectively. In the third category, regarding specific programs, the default may be no reporting at all, or a centralized evaluation through OMB.¹⁰¹ In these cases, Congress may require a report on a specific problem, such as the supply of registered nurses nationwide, and limit OMB's ability to alter the submission.¹⁰² These reports may be one-time or recurring.¹⁰³ In the case of a recurring and ongoing authority, the agency official may be able to report directly at their discretion, but only on a particular issue. The Department of Defense's "unfunded priorities" list, which applies to a limited range of issues, is one such example.¹⁰⁴

As discussed above, the provisions related to specific reports are used for "executive departments" that are typically subject to more political

⁹⁹ For examples of the amounts at stake, see Office of Mgmt. & Budget, Exec. Office of the President, Appendix: Budget of the U.S. Government, Fiscal Year 2019 1131 (listing appropriation requests for "Other Independent Agencies"), <https://www.whitehouse.gov/wp-content/uploads/2018/02/appendix-fy2019.pdf> [<http://perma.cc/3QFP-AS59>].

¹⁰⁰ See, e.g., Considering the Role of Judges Under the Constitution of the United States: Hearing Before the S. Comm. on the Judiciary, 112th Cong. 4–8 (2011) (including testimony from both Justice Scalia and Justice Breyer).

¹⁰¹ For instance, the Bush administration developed a centralized means of conducting program evaluations, known as the Program Assessment and Rating Tool ("PART"). See John B. Gilmour, Implementing OMB's Program Assessment Rating Tool (PART): Meeting the Challenges of Integrating Budget and Performance, 7 OECD J. on Budgeting 1, 4–6 (2007) (describing the development of PART).

¹⁰² See 42 U.S.C. § 296 note (2012).

¹⁰³ See *id.* (requiring one-time reports by the Comptroller General addressing nursing shortages); 26 U.S.C. § 7803(c)(2)(B)(ii)–(iii) (2012) (requiring annual reports by the National Taxpayer Advocate to the House Ways and Means Committee).

¹⁰⁴ See 10 U.S.C. § 222a (2012).

control.¹⁰⁵ This is likely because a broader direct-reporting provision, such as the statute applicable to financial regulatory institutions, is seen as subsuming the need for more limited reporting provisions. In other words, the fact that the Consumer Financial Protection Bureau (“CFPB”) can go to Congress and advocate for consumer protection legislation directly at odds with the White House’s position also means that it can send a report on the effects of predatory lending without White House clearance. The greater authority of a general provision includes any lesser authority to comment on specific matters. As a result, specific reporting provisions are a more targeted means of achieving the same outcome. If Congress were to consider ways to reassert control over agency information to revamp its own analytical environment (an idea explored in Part IV), these narrow statutes—ignored in other scholarship on this issue¹⁰⁶—could be the right place to start.

* * * *

Any attempt to categorize the existing reporting provisions is to some extent imprecise. While all of them have the same basic function, they do not take the same form. Some specifically limit OMB, while others prevent review from any other official in the executive branch. While the former allow for presidential attempts to locate review outside OMB, the latter do not. As mentioned above, some provisions (like the statute applicable to inspectors general) only allow for independent reporting if some other condition is met. Moreover, the survey in this Part only captures provisions that specifically reference review in another executive branch office, whether it be the executive department, the EOP, or the President directly. As such, they do not capture provisions that simply call for “independent analysis.”¹⁰⁷

Nonetheless, this overview suggests a number of historical practices that are relevant to both the constitutional limits on independent-reporting

¹⁰⁵ Even one of the “independent agencies” with a specific reporting provision, the General Services Administration (“GSA”), does not have other indicia of independence, such as a broader direct-reporting provision or for-cause removal protection. Nonetheless, the Government Manual classifies the GSA as an independent agency, and that classification has been followed here. See *infra* Table 1.

¹⁰⁶ See *infra* note 153. None of the sources in that footnote address specific reporting provisions.

¹⁰⁷ An example of such a provision is found at 7 U.S.C. § 4514(4) (2012). This provision requires the Secretary of Agriculture to provide “independent analysis” of the national dairy promotion program’s “effectiveness” to the relevant House and Senate committees. This provision does not specifically mention the possibility of OMB or White House review in developing this report.

laws and Congress's consideration of them as a policy tool. First, there is a practice of requiring (or allowing, depending on perspective) independent reporting across the government, even in traditionally "executive" areas. Moreover, the practice includes structures that allow Congress to hear multiple, potentially conflicting voices, as well as those that vest a single view outside the White House. Finally, these provisions come in both broad and narrow forms, ranging from exclusion from the entire budget process to the transmission of a single report on a particular issue. To put it simply, a congressional staffer with an eye toward acquiring agency expertise has many tools at her disposal.

D. Independent Reporting in Practice

While these trends may be of interest for purposes of legislative drafting or constitutional analysis, the historic practice has been limited, falling well short of the sort of generally applicable independent-reporting law proposed in the 1970s. This leads to an understandable temptation to dismiss these provisions, and the broader structure they envision, as both unimportant to Congress's current capacity and unlikely to be a source of reform. The latter objection is taken up in Part IV. As to the former, a number of recent events show that such dismissal may be unfounded. While these examples are necessarily anecdotal, they demonstrate that independent-reporting laws actually matter to the congressional information environment.¹⁰⁸ First, the independence of some agency budget submissions has led to very different requests in practice. In the most recent fiscal year, the request from the Commodity Futures Trading Commission ("CFTC") varied considerably from the figure for the Agency submitted in the President's budget.¹⁰⁹ While the administration hoped to keep funding flat for the financial regulator, the Agency itself sought an increase of more than \$31 million, out of a total budget of around \$250 million last year.¹¹⁰ Congress took note of this difference. The legislative research

¹⁰⁸ Many thanks to Clint Brass for bringing some of these events to my attention.

¹⁰⁹ Sarah N. Lynch, Update-1: U.S. CFTC Seeks Bigger Budget Than White House Proposal, *FinanceTime* (May 23, 2017, 12:52 PM), <http://www.financetime.org/update-1-us-cftc-seeks-bigger-budget-than-white-house-proposal> [<http://perma.cc/5VR7-QLHF>].

¹¹⁰ Monke et al., *supra* note 2, at 1–2 ("In effect, concurrent budget submission allows Congress to see this difference, if it exists, that otherwise may be less visible without the bypass opportunity. Any differences may provide an opportunity for Congress to conduct oversight,

arm, CRS, developed materials for Congress explaining the discrepancy, involving a discussion of the bypass provision that led to the dueling submissions.¹¹¹ This disagreement is particularly salient because of the role of the CFTC in implementing the Dodd–Frank financial reform legislation, which has been attacked by the current administration.¹¹²

Second, the presence (or absence) of independent-reporting requirements has played a significant role outside the budget process, affecting Congress’s ability to consider new legislation and review existing programs. The program assessments surrounding federal spending on vocational education provide an interesting case study of how important independent-agency expertise can be. Under the Carl D. Perkins Vocational and Applied Technical Education Act Amendments of 1998 (“Perkins III”), the federal government began to complete more rigorous reviews of federal spending on vocational education.¹¹³ Under Perkins III, the Secretary of Education was instructed to assemble an Independent Advisory Panel, which would “advise the Secretary on the implementation of the assessment[s]” called for in the law.¹¹⁴ This group, however, was also instructed to report “an independent analysis of the findings and recommendations resulting from the assessment” to congressional committees directly,¹¹⁵ without intervening action by the Secretary or other executive branch officials. Under this authority, the Independent Advisory Panel released a report to Congress in 2004 detailing the progress of the national

examine assumptions, and otherwise contrast differing perspectives on an agency’s resource needs.”).

¹¹¹ *Id.*

¹¹² Lynch, *supra* note 109 (“[The CFTC] has often struggled to convince the Republican-led Congress to boost its resources.”).

¹¹³ Marsha Silverberg et al., U.S. Dep’t of Educ., Office of the Undersecretary, Policy and Program Studs. Serv., National Assessment of Vocational Education: Final Report to Congress xvii, 206–07 (2004) [hereinafter *NAVE Report 2004*].

¹¹⁴ Carl D. Perkins Vocational and Applied Technology Education Amendments of 1998, Pub. L. No. 105-332, § 114(c)(2), 112 Stat. 3076, 3090–91 (1998) (codified at 20 U.S.C. § 2301 et seq. (2012)). For a more complete description of the Act and its requirements, as well as a compilation of the assessments to date, see U.S. Dep’t of Educ., Data & Res.: Evaluation of Programs: National Assessment of Vocational Education, <https://www2.ed.gov/rschstat/eval/sectech/nave/index.html> [<http://perma.cc/K4CU-F5WC>] (last modified Jun. 10, 2005).

¹¹⁵ § 114(c)(2), 112 Stat. at 3090–91. Similar independence was provided for subsequent assessments beyond 2004. See 20 U.S.C. § 2324(d)(1) (2012). Congress has also chosen not to enforce the requirements of the Federal Advisory Committee Act (“FACA”) for this particular panel. *Id.* § 2324(d)(1)(D).

vocational programs.¹¹⁶ The Panel's report expressly stated that the recommendations were developed independently, as required by law.¹¹⁷ In the report, the Panel noted that vocational education had contributed to increased earnings in the short and medium term for program participants,¹¹⁸ while also noting that the programs had not changed academic outcomes.¹¹⁹ Given these conflicted findings, a recipient of this information in Congress could reasonably conclude that the program was either a success or a failure, given her priorities. Empowered by the Panel's report, she would be able to see how the evidence tied to the outcome she thought was most important, earnings or academic outcome.

OMB also provided Congress with an assessment of the vocational education programs, taking a very different approach. In 2002, the George W. Bush administration developed the Performance Assessment and Rating Tool ("PART") to "assess the effectiveness of different types of executive branch programs."¹²⁰ Through this system, OMB was responsible for issuing a questionnaire to implementing agencies, assisting these agencies in providing answers, assigning a numeric score to each program, and sharing that information with the public and Congress as part of the budget process.¹²¹ At the end of this process, the information shared with the public is an "overall effectiveness rating," but the numerical score and raw data supporting that score are not disclosed.¹²²

When OMB provided a PART review for the vocational education programs, it assigned the program the lowest possible rating, "ineffective," and called for its termination.¹²³ In doing so, it relied on the same report from the Independent Advisory Panel, which had shown program success in helping enrollees obtain higher incomes.¹²⁴ The justification for

¹¹⁶ NAVE Report 2004, *supra* note 113, at xvii.

¹¹⁷ *Id.* at xvi.

¹¹⁸ *Id.* at 266 ("Several recent studies highlight the positive average effects of vocational course taking on annual earnings . . .").

¹¹⁹ *Id.* at 269 ("There is little evidence that vocational courses contribute to improving academic outcomes.").

¹²⁰ Clinton T. Brass, Cong. Research Serv., RL32663, *Summary to The Bush Administration's Program Assessment Rating Tool (PART) (2004)*.

¹²¹ *Id.* at CRS-5-7.

¹²² *Id.* at CRS-7.

¹²³ Clinton T. Brass et al., Cong. Research Serv., RL33301, *Congress and Program Evaluation: An Overview of Randomized Controlled Trials (RCTs) and Related Issues CRS-34 (2006)*.

¹²⁴ *Id.* at CRS-34 & n.111.

termination was instead based on the program's failure to lead to improved education outcomes. While the underlying report itself recognized the nuance in assessing these mixed outcomes,¹²⁵ the final recommendation from OMB simply picked one and called for the elimination of the program. Without the independence provided to the Panel in Perkins III, the independent report would have been only an input into OMB's evaluation, with the executive branch choosing which outcome was most important and basing subsequent decisions on that determination. Because of the independence provided by the statute, however, congressional staff were able to include the differences in the materials they provided to members.

Sometimes the importance of independent reporting is apparent when no such independence is in place. One illustrative episode occurred in the highly contentious debate surrounding the passage of Medicare Part D in the run-up to the 2004 presidential election. Part D provides optional prescription drug coverage to those enrolled in the Medicare program.¹²⁶ The program was created by the Medicare Prescription Drug, Improvement, and Modernization Act of 2003.¹²⁷ During the debate over the legislation, the CBO had scored the legislation as costing \$395 billion over ten years, a figure significantly lower than the \$540 billion requested by the Bush Administration to implement the program shortly after its signing.¹²⁸ While debating the legislation, Congress sought cost information from the executive branch through inquiries to the Chief Actuary of the Centers for Medicare and Medicaid Services ("CMS").¹²⁹ Notably, the Chief Actuary

¹²⁵ NAVE Report 2004, *supra* note 113, at 265 ("Whether the program as currently supported by federal legislation is judged successful depends on which outcomes are most important to policymakers.").

¹²⁶ See Kaiser Family Foundation, *The Medicare Part D Prescription Drug Benefit* (2017) <http://files.kff.org/attachment/Fact-Sheet-An-Overview-of-the-Medicare-Part-D-Prescription-Drug-Benefit> [<http://perma.cc/SE84-9TV8>].

¹²⁷ Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, §§ 101–11, 117 Stat. 2066, 2071–76.

¹²⁸ Robert Pear, *Inquiry Confirms Top Medicare Official Threatened Actuary Over Cost of Drug Benefits*, *N.Y. Times* (July 7, 2004), <https://www.nytimes.com/2004/07/07/us/inquiry-confirms-top-medicare-official-threatened-actuary-over-cost-drug.html> [<http://perma.cc/CX R2-P3WH>]; Union of Concerned Scientists, *Administration Hides True Cost Analysis Until After Passage of Medicare Prescription Drug Act*, <https://www.ucsusa.org/our-work/center-science-and-democracy/promoting-scientific-integrity/medicare-drug-bill.html#.W6aTYmhKjcc> [<http://perma.cc/M8PS-PL7H>] (last visited Sep. 22, 2018).

¹²⁹ Union of Concerned Scientists, *supra* note 128.

is a position created by federal law and includes both for-cause removal protection and a statutory qualification provision.¹³⁰

Congress's requests to the Actuary were not answered. It was later revealed that the Medicare Administrator had prevented the release of the Actuary's cost estimates, requiring that all information provided to Congress run through his office.¹³¹ According to the Actuary, the cost of Medicare Part D was \$551 billion over ten years, a nearly forty percent increase over the CBO figure.¹³² The Actuary at the time, Richard Foster, came forward with the story after the votes were cast, describing "a pattern of withholding information for . . . political purposes, which [he] thought was inappropriate."¹³³ While it is unclear the effect that this information may have had on the outcome, the vote was extremely close. When the bill was brought to the House floor in June of 2003, the initial vote had the measure being narrowly defeated by a tally of 215-218.¹³⁴ The vote was kept open until 6 a.m. as the House leadership lobbied Republican holdouts. The bill was ultimately passed by margin of 216-215, with one member voting "present" and securing its passage.¹³⁵ When the legislation came back from conference, the House vote was similarly

¹³⁰ See 42 U.S.C. § 1317(b)(1) (2012) ("The Chief Actuary shall be appointed from among individuals who have demonstrated, by their education and experience, superior expertise in the actuarial sciences. . . . The Chief Actuary may be removed only for cause."). Both of these are traditional tools of personnel independence and are discussed in greater detail below. See *infra* Section III.A.

¹³¹ Union of Concerned Scientists, *supra* note 128.

¹³² *Id.*

¹³³ Robert Pear, *Democrats Demand Inquiry into Charge by Medicare Officer*, N.Y. Times (Mar. 14, 2004), <https://www.nytimes.com/2004/03/14/us/democrats-demand-inquiry-into-charge-by-medicare-officer.html> [<http://perma.cc/G74H-UH7Y>]; see also Mary Agnes Carey, *Retiring Medicare Actuary Reflects on the Politics of Healthcare Spending and Why He Almost Quit*, Kaiser Health News (Jan. 28, 2013), <https://khn.org/news/foster-retiring-actuary-reflects> [<http://perma.cc/Z639-J5E6>].

¹³⁴ Jake Tapper & Dan Morris, *Just How Did Medicare Bill Get Passed?*, ABC News (Mar. 27, 2005), <http://abcnews.go.com/Nightline/story?id=128998&page=1> [<http://perma.cc/GB73-VP52>]; Sheryl Gay Stolberg, *Revamping Medicare: The Voting; In the Wee Hours, Votes Change as Arms Twist*, N.Y. Times (June 28, 2003), <https://www.nytimes.com/2003/06/28/us/revamping-medicare-the-voting-in-the-wee-hours-votes-change-as-arms-twist.html> [<http://perma.cc/LR62-U65G>].

¹³⁵ See H.R.1 - Medicare Prescription Drug, Improvement, and Modernization Act of 2003, *Actions Overview*, Congress.Gov, <https://www.congress.gov/bill/108th-congress/house-bill/1/actions> [<http://perma.cc/2XRD-NV8Y>] (noting recorded vote in the House at 216-215, 1 Present).

close at 220-215.¹³⁶ Much of the Republican opposition to the legislation came from the concerns about the cost of the legislation.¹³⁷

This episode helps to highlight a number of important themes for the evaluation of independent-reporting provisions. First, the official implicated in this incident, the Chief Actuary at CMS, had statutory independence embedded within his position. This, however, did not ultimately lead to the official disobeying an order from the Medicare Administrator to withhold his findings. Second, the budget information developed by the executive branch directly contradicted an estimate developed by Congress, suggesting that executive expertise can be relevant even in those areas where Congress has existing capacity. Third, members of both branches have considered increased reliance on executive branch projections of budget impact for pending legislation in recent years.¹³⁸ The Medicare Part D experience shows what may go wrong when independence is not embedded in budget projections.

Finally, the incident prompted a vigorous legal debate over the need for federal employees to respond to congressional information requests when there is no statute explicitly empowering them to do so. The view of the legislative branch, expressed through numerous members¹³⁹ and lawyers at CRS, was that employees have such a freestanding obligation.¹⁴⁰ As argued by CRS, “[E]xecutive agencies and their officers and employees do not have the right to prevent or prohibit their officers or employees . . . from presenting information to the United States Congress . . . concerning relevant public policy issues.”¹⁴¹ The CRS position was premised on two general arguments. First, the memorandum states that Congress has a right to receive information necessary to perform its

¹³⁶ *Id.* (noting conference report Agreed to by the Yeas and Nays: 220-215). The Senate vote on the conference report was similarly close. *Id.* (noting vote of 54-44).

¹³⁷ Tapper & Morris, *supra* note 134. (“But conservatives like Rep. Pat Toomey, R-Pa., thought even the Republican leadership’s \$400 billion price tag was too high.”).

¹³⁸ See *supra* note 10 and accompanying text.

¹³⁹ Minority Leader Tom Daschle suggested the actions of the CMS Administrator may have been criminal and called for an investigation. Similar requests were made by members of the House. See Pear, *supra* note 133.

¹⁴⁰ Memorandum from Jack Maskell, Legislative Attorney, Cong. Research Serv., to Hon. Charles Rangel, Ranking Member, House Committee on Ways and Means, regarding Agency Prohibiting a Federal Officer from Providing Accurate Cost Information to the United States Congress CRS-1-2, M-042604, (April 26, 2004), <https://fas.org/sgp/crs/crs042604.pdf> [<https://perma.cc/7JBZ-S6CB>] [hereinafter Maskell Memorandum].

¹⁴¹ *Id.*

legislative functions, and no separation-of-powers concerns can infringe on that right.¹⁴² While agency regulations can direct how such information may be collected and provided (for instance, the complex *Touhy* regulations for compelling government witnesses¹⁴³), these procedures cannot be used to deny information altogether.¹⁴⁴ Second, the statutory provision known as the “anti-gag rule,” enacted as part of each year’s annual appropriation measure,¹⁴⁵ bars executive officials from preventing information sharing with Congress.¹⁴⁶

As one may expect, the executive branch took a different view of the episode. In an opinion issued in May of 2004, the Office of Legal Counsel (“OLC”) responded directly to the CRS memorandum, finding that it improperly discounted separation-of-powers concerns and failed to account for the demands of executive privilege.¹⁴⁷ On the OLC’s view, deliberative process information,¹⁴⁸ along with classified information, falls within

¹⁴² *Id.* at 2–3.

¹⁴³ The authority to establish such regulation stems from the Supreme Court’s holding in *Touhy v. Ragen*, 340 U.S. 462 (1951). Agencies now promulgate rules governing the release of agency information known simply as “*Touhy* regulations.” See Maskell Memorandum, *supra* note 140, at CRS-2.

¹⁴⁴ Maskell Memorandum, *supra* note 140, at CRS-2–3.

¹⁴⁵ The most recent anti-gag rule was enacted for fiscal year 2017 and reads “[n]o part of any appropriation contained in this or any other Act shall be available for the payment of the salary of any officer or employee of the Federal Government, who— (1) prohibits or prevents, or attempts or threatens to prohibit or prevent, any other officer or employee of the Federal Government from having any direct oral or written communication or contact with any Member, committee, or subcommittee of the Congress in connection with any matter pertaining to the employment of such other officer or employee . . . in any way . . . ; or (2) removes, suspends from duty without pay, demotes . . . [or otherwise retaliates] with respect to such other officer or employee, by reason of any communication or contact of such officer or employee with any Member, committee, or subcommittee of the Congress” Financial Services and General Government Appropriations Act, 2017, Pub. L. No. 115-31, Division E, § 713, 131 Stat. 326, 379–380. As this language makes plain, the provision is intended to sweep very broadly.

¹⁴⁶ Maskell Memorandum, *supra* note 140, at CRS-3–6.

¹⁴⁷ See Authority of Agency Officials to Prohibit Employees from Providing Information to Congress, 28 Op. O.L.C. 79, 80–83 (2004) <https://www.justice.gov/file/18866/download> [<http://perma.cc/D5BQ-M4BX>].

¹⁴⁸ In the FOIA context, “deliberative process privilege” shields disclosure of information that is both “predecisional,” meaning ““antecedent to the adoption of an agency policy,”” and “deliberative,” reaching material that ““makes recommendations or expresses opinions on legal or policy matters.”” See Office of Info. Policy, U.S. Dep’t of Justice, Guide to the Freedom of Information Act: Exemption 5, 15 (2014), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption5.pdf> [<http://perma.cc/C9E2-UULZ>] (quoting *Ancient Coin*

the ambit of executive privilege.¹⁴⁹ Moreover, executive privilege extends to deliberate process information developed government-wide, as opposed to being limited to the context of presidential decision making.¹⁵⁰ An investigation by the inspector general for the Department of Health and Human Services (“HHS”) later agreed that the actions had not violated the law.¹⁵¹ Given the legal uncertainty that applies in situations involving general obligations, such as that provided in the “anti-gag rule,” efforts to codify independence may be necessary in contexts where Congress is particularly wary of executive interference.

As these examples demonstrate, executive branch expertise in areas of budget, legislation, and federal programs is relevant to Congress and susceptible to political influence through centralized review.

III. INDEPENDENT REPORTING AND THE CONSTITUTION

While independent-reporting provisions are frequent and varied, the constitutional limits on these laws are not fully developed. The Supreme Court has never had occasion to directly assess their constitutionality. This is likely the result of justiciability doctrines, although (as discussed in Section IV.B) the barriers of these doctrines may not be as insurmountable as they seem. Executive branch interpretations often avoid the constitutional issues raised by these statutes, construing the provisions to allow for White House review or to permit OMB comment if the executive official does not comply with the recommendations.¹⁵²

An expansion on existing practice would push these constitutional questions to the fore. This Part tackles the constitutional question regarding independent reporting in two steps. First, it identifies and evaluates the doctrines that apply to Congress’s action with regard to executive

Collectors Guild v. U.S. Dep’t of State, 641 F.3d 504, 513 (D.C. Cir. 2011); Vaughn v. Rosen, 523 F.2d 1136, 1143–44 (D.C. Cir. 1975) [hereinafter FOIA Guide].

¹⁴⁹ Authority of Agency Officials to Prohibit Employees from Providing Information to Congress, *supra* note 147, at 81 (concluding that authority to withhold is “not limited to classified information, but extended to all deliberative process or other information protected by executive privilege.”).

¹⁵⁰ *Id.* at 82–83. This position relied upon a large number of prior executive branch legal positions to develop the argument. These arguments are discussed in greater detail below. See *infra* Section III.B.

¹⁵¹ Union of Concerned Scientists, *supra* note 128.

¹⁵² See Constitutionality of the Direct Reporting Requirement in Section 802(e)(1) of the Implementing Recommendations of the 9/11 Comm’n Act of 2007, 32 Op. O.L.C. 27, 31–33 (2008).

information. Independent reporting is often considered a feature of agency design. Since the federal courts have never specifically addressed an independent-reporting provision, the doctrines surrounding agency independence, discussed in Section III.A, offer one potential limit on Congress. Moreover, there are some constitutional doctrines that are specific to information control, such as executive privilege and the congressional subpoena, which are explored in Section III.B. Finally, Section III.C considers how these two limits bear on existing practices and more ambitious proposals.

A. The Limits of Agency Design

Independent-reporting laws are part of an agency's overall design. By requiring information sharing with Congress, they limit presidential control over a specific aspect of an agency's operations.

Running a government, just like running any organization, requires some level of hierarchical control. One clear means of maintaining this control is through personnel. The ability to select subordinates from a wide pool of applicants and dismiss those who underperform is essential to any manager, whether in a local coffee shop or a major corporation. In addition, a manager can maintain control by imposing certain operational requirements, such as the need to report up the chain or seek approval for certain decisions. These basic choices, familiar to every workplace, are at the core of presidential control over the federal government.

While the President has incentives to exercise this control in every way possible (and often asserts the constitutional right to do so), Congress has devised a number of responses to ensure that agencies have the freedom to act independently in limited contexts. Many of these are codified in statutory law. While the classifications vary, the different mechanisms fall into essentially two camps: those that involve personnel decisions (personnel independence) and those that do not (operational independence).¹⁵³

¹⁵³ For example, CRS released a report categorizing "indicia of independence." Jared P. Cole & Daniel T. Shedd, Cong. Research Serv., R43562, *Summary to Administrative Law Primer: Statutory Definition of "Agency" and Characteristics of Agency Independence* (2014). These indicia include (1) for-cause removal protection, (2) board or commission structure, (3) bypass of Office of Management and Budget legislative clearance, (4) exemption from centralized review of agency rulemaking, (5) budget submission requirements, and (6) independent litigation authority. *Id.* at 1–7. Likewise, Justice Breyer has collected a variety of independence provisions. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S.

Both types are crucial to understanding the structure (and criticisms) of the modern administrative state, although the latter is much less developed than the former, especially in the case law.¹⁵⁴ When Congress wants an arm of the government under direct presidential control, it may refrain from imposing these restrictions; when it is concerned with presidential influence, it may choose to impose some combination of personnel or operational constraints on executive authority.

Importantly, Congress's actual practice in enacting these provisions—or leaving them absent—contradicts a common binary understanding of government entities as either executive departments, wholly at the whim of the President, or independent agencies, which are structurally protected from presidential oversight.¹⁵⁵ The picture on the ground is much more complex, where agencies are governed by a mix of provisions, often with no discernable pattern. Moreover, the decision to include “independence” somewhere in the statutory description does not often correlate with functional separation from presidential influence. For instance, the Peace Corps has an explicit statement of independence, but no other statutory removal from the President's oversight.¹⁵⁶ Because government agencies cannot be properly sorted into two discrete camps, each restraint imposed by statute must be analyzed in turn.

477, 588 (2010) (Breyer, J., dissenting) (listing (1) multimember structure, (2) bipartisan requirements, (3) statutory eligibility criteria, (4) OMB bypass, (5) litigation authority, and (6) explicit statements of agency independence in statute). Kirti Datla and Professor Richard Revesz have compiled a similar list, which includes: (1) removal protection, (2) specified tenure, (3) multimember structures, (4) partisan balancing requirements, (5) litigation authority, (6) congressional comments, legislation, and budget authority, and (7) adjudication authority. Datla & Revesz, *supra* note 54, at 784–812. Finally, the Administrative Conference of the United States has produced a similar work, describing features of agency independence. Lewis & Selin, *supra* note 66, at 98–116.

¹⁵⁴ Some scholarship has explored the effect of operational provisions in greater detail. See Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 *Tex. L. Rev.* 15, 30–37 (2010) (discussing OIRA review at length). Moreover, some scholars argue that personnel questions are dispositive of the constitutional questions raised by independent agencies. See, e.g., Rao, *supra* note 43, at 1208–09.

¹⁵⁵ This point is captured by Kirti Datla and Professor Richard Revesz, who have noted, “The structural features associated with independence are present in many executive agencies, and an agency's practical degree of independence from presidential influence depends on many functional considerations.” Datla & Revesz, *supra* note 54, at 824.

¹⁵⁶ See *Free Enter. Fund*, 561 U.S. at 588, 592 (2010) (Breyer, J., dissenting).

Both personnel and operational constraints have been the subject of a fierce academic debate that has persisted for many decades.¹⁵⁷ On one end of the spectrum, advocates of presidential control have asserted that the President is empowered under the Constitution to take any action that could be taken by a subordinate in the executive branch.¹⁵⁸ At the other extreme are advocates of a broad authority to structure the federal government in innovative ways, subject to narrow limits: “A President can take any action with respect to an agency (assuming it is within his Article II powers) unless Congress has prohibited that action by statute (in a manner that does not encroach upon the President’s Article II powers).”¹⁵⁹ Between these positions lies considerable nuance, with arguments derived from constitutional text and structure, practical implications, and tradition.

The Supreme Court has never definitively taken a side on this debate, instead opting for a more functional approach. For much of the twentieth century, questions of agency independence often turned on whether the statute at issue prevented the President from carrying out “constitutionally assigned functions.”¹⁶⁰ While this inquiry has changed somewhat in recent years, the Court has still declined to adopt a single theoretical position.

This Note likewise does not advocate for a particular view of the Article II Vesting Clause found in the academic literature. Instead, the following analysis has two aims. First, it explores the current “indicia of independence,” focusing on how independent reporting compares to other forms of operational independence. Second, this Section explores the doctrine (or lack thereof) that has developed for each specific area of agency design. While some issues have been resolved through the application of specific textual provisions, like the Appointments Clause, others have spurred a deeper inquiry into separation-of-powers principles. Since the Court has never directly addressed the limitations imposed by

¹⁵⁷ A useful, if somewhat dated, discussion of the debate is provided in Professor Steven Calabresi and Kevin Rhodes’s seminal work comparing congressional power to restrict both the executive and judicial branches. Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 Harv. L. Rev. 1153, 1165–71 (1992).

¹⁵⁸ See Lee S. Liberman, *Morrison v. Olson: A Formalistic Perspective on Why the Court Was Wrong*, 38 Am. U. L. Rev. 313, 315–16 (1989).

¹⁵⁹ Datla & Revesz, *supra* note 54, at 769. Notably, this approach, which ostensibly would find few constitutional violations in statutory restrictions, would also argue against inferring independence not explicitly provided in the statute. *Id.* at 832–42.

¹⁶⁰ See, e.g., *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 443 (1977).

independent-reporting requirements, these themes would become important if Congress were to make more aggressive use of that mechanism. When faced with a new question of agency structure, the principles drawn from more frequently litigated areas of law are used to resolve the open question. An example comes from the OLC, which argued that “the political branches have long recognized that statutes imposing [independent-reporting] requirements merit the same constitutional analysis as statutes that impose removal restrictions on Executive Branch officers.”¹⁶¹

1. Personnel Independence

Issues of personnel independence have long dominated the literature on separation of powers and agency design.¹⁶² In one sense, this is a natural result of the Constitution itself, which is preoccupied with what are essentially personnel rules, many of which are familiar staples of any civics course. For instance, the Constitution restricts members of Congress from serving as executive officers,¹⁶³ ensures presidential compensation is not decreased,¹⁶⁴ provides that the President is the Commander-in-Chief of the military,¹⁶⁵ structures the appointment of officers in the federal

¹⁶¹ See Constitutionality of the Direct Reporting Requirement in Section 802(e)(1) of the Implementing Recommendations of the 9/11 Comm’n Act of 2007, *supra* note 152, at 32–36 (reviewing the Supreme Court’s personnel decisions, including *Myers v. United States*, 272 U.S. 52 (1926), *Wiener v. United States*, 357 U.S. 349 (1958), and *Morrison v. Olson*, 487 U.S. 654 (1988), to support its conclusion that direct-reporting provisions are generally unconstitutional).

¹⁶² By way of an illustration, two of the leading casebooks on administrative law devote considerable attention to these issues. For instance, Professor Gary Lawson’s discussion of “agencies and Article II,” which reviews presidential control of the administrative state, devotes seventy-four of seventy-six pages to either appointment or removal issues. Gary Lawson, *Federal Administrative Law 187–263* (7th ed. 2016). Another leading casebook includes a wider range of issues in its discussion of presidential control under the Constitution, such as regulatory review, but it is predominantly concerned with cases and discussion focused on the President’s authority to remove executive branch officials from their posts. See Steven G. Breyer, et al., *Administrative Law and Regulatory Policy: Problems, Text, and Cases 74–122* (6th ed. 2006) (including *Myers*, *Wiener*, and *Bowsher v. Synar*, 478 U.S. 714 (1986), as main cases). This emphasis is not just confined to the casebooks. In a leading OLC memorandum on separation of powers, thirty-five pages are devoted explicitly to personnel, while fewer than ten are devoted to other concerns, including operational independence. The Constitutional Separation of Powers Between the President and Congress, 20 Op. O.L.C. 124, 139–71, 175–76 (1996).

¹⁶³ U.S. Const. art. I, § 6, cl. 2.

¹⁶⁴ *Id.* art. II, § 1, cl. 6.

¹⁶⁵ *Id.* art. II, § 2, cl. 1.

government,¹⁶⁶ and sets qualification for constitutional posts, such as the Presidency,¹⁶⁷ among many others.

The structure of presidential appointments, governed by the Appointments Clause, is a good example of analysis based on a specific textual command. The Appointments Clause provides that the President must appoint “Officers of the United States” with the advice and consent of the Senate, while the President, the head of a department, or a court of law can appoint “inferior Officers” without any congressional involvement. The federal courts have been interpreting this provision since the landmark decision of *Buckley v. Valeo*.¹⁶⁸ For instance, there is case law related to what makes a principal officer different from an inferior one,¹⁶⁹ or what distinguishes an officer from a mere government employee.¹⁷⁰ This issue remains a live one, with active judicial involvement and a disagreement among the federal courts of appeals.¹⁷¹ The debates over this clause, however, are limited. Because the Constitution speaks carefully on this issue, the resolution of any particular question does not say much about other limits on agency structure.¹⁷²

¹⁶⁶ Id. art. II, § 2, cl. 2.

¹⁶⁷ Id. art. II, § 1, cl. 5.

¹⁶⁸ 424 U.S. 1, 124–27 (1976).

¹⁶⁹ *Edmond v. United States*, 520 U.S. 651, 661–66 (1997) (finding that “inferior officers” can be identified as those who are directed and supervised by Presidential appointees); *Morrison v. Olson*, 487 U.S. 654, 670–73 (1988) (finding that the Independent Counsel was an “inferior officer” such that appointment by a court of law was appropriate).

¹⁷⁰ See, e.g., *Freytag v. Comm’r*, 501 U.S. 868, 880–82 (1991) (looking to authority, discretion, and significance of duties in distinguishing officers from other government employees).

¹⁷¹ Compare *Bandimere v. Sec. & Exch. Comm’n*, 844 F.3d 1168, 1170 (10th Cir. 2016), with *Landry v. Fed. Deposit Ins. Corp.*, 204 F.3d 1125, 1132–34 (D.C. Cir. 2000) (disagreeing over the status of administrative law judges).

¹⁷² This is not to say that broader principles are not at work in the Appointments Clause cases. For instance, the general principle that Congress cannot place its own officers and agents in the executive branch has at times been used to resolve particular Appointments Clause issues. See, e.g., *Fed. Election Comm’n v. NRA Political Victory Fund*, 6 F.3d 821, 827 (1993) (“The Commission argues that Congress intended *ex officio* membership to fulfill this coordinating function by having the Secretary and the Clerk play a mere ‘informational or advisory role’ in agency decision-making. Advice, however, surely implies influence, and Congress must limit the exercise of its influence, whether in the form of advice or not, to its legislative role What the Constitution prohibits Congress from doing, and what Congress does in this case, is to place its agents ‘beyond the legislative sphere’ by naming them to membership on an entity with executive powers.”).

All personnel issues, however, are not grounded strongly in the constitutional text. They instead implicate broader provisions—some of which are not solely concerned with personnel—like the Take Care Clause, the Vesting Clause, or the Commander-in-Chief Clause. The most notable, and well-explored, issue in this group is statutory limits on removing executive branch officers. The Court has also resolved a number of cases in which Congress sought to insert its own officers into executive roles.¹⁷³ Congress, however, also seeks to impose limits on who can be selected for the job in the first place.¹⁷⁴ These laws create statutory qualifications for certain offices, limiting the pool of available applicants. For instance, Congress recently created an independent member of the Financial Stability Oversight Council as part of the Dodd–Frank financial reform legislation. In making a selection, the President is required to select someone who “has insurance expertise.”¹⁷⁵ Similar provisions require that officers be civilians, instead of members of the military,¹⁷⁶ or members of certain political parties.¹⁷⁷ There is presumably some point at which such a provision would cross a constitutional line, effectively selecting the officer by statute. The Supreme Court has not defined such a limit, nor taken a case directly on this issue. The greatest elaboration of the broader principles of agency independence therefore emerges from the removal issue and the use of congressional officers.¹⁷⁸

Looking to these cases, it becomes clear that the Court evaluates agency design on two doctrinal tracks. When a specific provision, like the

¹⁷³ *Buckley*, 424 U.S. at 127–29; *NRA Political Victory Fund*, 6 F.3d at 827.

¹⁷⁴ See generally Henry B. Hogue, Cong. Research Serv., RL33886, *Statutory Qualifications for Executive Branch Positions* (2015) (describing some of the limits Congress has placed on who can be selected for executive roles).

¹⁷⁵ 12 U.S.C. § 5321(b)(1)(J) (2012).

¹⁷⁶ Hogue, *supra* note 174, at CRS-20. See, e.g., 10 U.S.C. § 113(a) (2012). This statute establishes qualifications for the Secretary of Defense, requiring that “[a] person may not be appointed as Secretary of Defense within seven years after relief from active duty as a commissioned officer of a regular component of an armed force.” *Id.* Congress recently provided an express exemption for retired General James Mattis to avoid this restriction. Connor O’Brien & Jeremy Herb, House passes Mattis waiver 268-151, *Politico* (Jan. 13, 2017, 3:51 PM), <https://www.politico.com/story/2017/01/james-mattis-defense-secretary-waiver-233611> [<http://perma.cc/7Z5T-YYDM>].

¹⁷⁷ See, e.g., 52 U.S.C. § 30106(a) (Supp. II 2012).

¹⁷⁸ The two are not entirely unrelated. For instance, Justice Brandeis’s dissent in *Myers v. United States* argued that the tradition of statutory qualification provisions supported congressional authority to limit removal in certain situations. 272 U.S. 52, 262–65 (1926) (Brandeis, J., dissenting).

Appointments Clause, is at issue, the analysis is confined to that provision. When a more general concern with executive control is raised, the Court develops general principles to resolve the dispute at hand.¹⁷⁹ Both removal and the use of congressional agents to enforce the law fall into this latter group. Each line of cases therefore reveals important principles that apply to all features of agency independence, including independent reporting.¹⁸⁰

First, Congress has at times sought to empower its own officers to exercise executive functions. In *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, the Court was faced with a statute that would have placed individual members of Congress on a “Board of Review,” which was empowered to veto actions by the Metro Authority’s board of directors.¹⁸¹ In invalidating the scheme, the Court elected not to apply its Appointments Clause precedents, but instead to find the scheme a violation of broader separation-of-powers principles.¹⁸² This argument, concerned with the “extensive expansion of the legislative power beyond its constitutionally confined role,”¹⁸³ is not limited to any particular provision of the Constitution. A similar concern was raised by

¹⁷⁹ This two-track approach to separation-of-powers case law has been explicitly acknowledged by the Supreme Court. See *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 484–86 (1989) (Kennedy, J., concurring in the judgment) (“In some of our more recent cases involving the powers and prerogatives of the President, we have employed something of a balancing approach, asking whether the statute at issue prevents the President ‘from accomplishing [his] constitutionally assigned functions’ . . . In a line of cases of equal weight and authority, however, where the Constitution by explicit text commits the power at issue to the exclusive control of the President, we have refused to tolerate *any* intrusion by the Legislative Branch. . . . The justification for our refusal to apply a balancing test in these cases, though not always made explicit, is clear enough. Where a power has been committed to a particular Branch of the Government in the text of the Constitution, the balance already has been struck by the Constitution itself.” (quoting *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 443 (1977)). The OLC characterizes this as the “general separation of powers principle,” asking whether the statute “undermine[s] the . . . ability to carry out . . . [constitutionally assigned] functions.” See *The Constitutional Separation of Powers Between the President and Congress*, supra note 162, at 176.

¹⁸⁰ Some have argued that the analysis of these particular issues does not have bearing on broader questions of agency design. See, e.g., Rao, supra note 43, at 1230–33. The Supreme Court has not adopted such a position, however, and the principles announced in these cases are presented in more general terms.

¹⁸¹ 501 U.S. 252, 252, 276–77 (1991).

¹⁸² *Id.* at 277 & n.23 (disclaiming any determination of the statute’s permissibility under the Appointments Clause).

¹⁸³ *Id.* at 277.

Bowsher v. Synar, where Congress had vested the Comptroller General with authority to implement the federal budget process.¹⁸⁴ The Comptroller General was both selected by the Congress and subject to removal by Congress.¹⁸⁵ The question in these cases is whether the statute at issue expands the power of a branch of government beyond its appropriate limits; this is a concern commonly known as “aggrandizement.” It is familiar to separation-of-powers analysis and would likely bear on any structure, like broad independent-reporting requirements, that seeks to reorient the administrative state from an agent of the President to an adjunct of the Congress.¹⁸⁶

The case law on removal suggests that aggrandizement is not the only limit on agency design, however. Protection from at-will removal by the President is a very prominent feature of agency independence¹⁸⁷ and is often seen as the determining factor in classifying an agency as “independent” at all.¹⁸⁸ Competing approaches to the issue, raised by the first Congress, range from a constitutional requirement that the President be able to remove officers at will, to a process that mirrors that of the Appointments Clause, to a much more permissive view that would allow for any removal process provided by statute. Two early cases on this question

¹⁸⁴ 478 U.S. 714 (1986).

¹⁸⁵ *Id.* at 720. The concurrence did opt to rely on a specific textual provision to invalidate the statute, although it was not the Appointments Clause. Writing for himself and Justice Marshall, Justice Stevens found that the statute was unconstitutional because the Comptroller General was exercising legislative power in a manner not consistent with the requirements of Bicameralism and Presentment in Article I. *Bowsher*, 478 U.S. at 755–57 (Stevens, J., concurring in the judgment) (citing *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 951 (1983), for the proposition that Congress may only exercise legislative power through passage in both chambers and presentation to the President). The concern also arose in *Buckley* itself, since the Federal Election Commission included members of Congress. *Buckley* 424 U.S. at 136 (“[T]he legislature cannot engraft executive duties upon a legislative office, since that would be to usurp the power of appointment by indirection.”) (quoting *Springer v. Gov’t of the Phil. Is.*, 277 U.S. 189, 202 (1928)).

¹⁸⁶ A broader description of the aggrandizement principle, including discussion of these cases and similar challenges, is provided in *The Constitutional Separation of Powers Between the President and Congress*, *supra* note 162, at 131, 175.

¹⁸⁷ *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 549 (2010) (Breyer, J., dissenting) (Appendix A). See also Geoffrey P. Miller, Symposium: The Independence of Independent Agencies, 1988 *Duke L.J.* 215, 217 (1988) (discussing the implications of different removal structures on presidential authority).

¹⁸⁸ See Lawson, *supra* note 162, at 7 (describing removal protection as the basis for distinguishing executive and independent agencies).

arrived at seemingly different conclusions.¹⁸⁹ The first of these was *Myers v. United States*, wherein the Court invalidated a scheme that required congressional approval for the removal of postmasters.¹⁹⁰ After thoroughly reviewing the history and constitutional text, the Court determined that this restriction infringed upon the President's obligations, namely the requirement that he or she "take care that the laws be faithfully executed."¹⁹¹ Shortly thereafter, the Court upheld a for-cause removal provision for members of the Federal Trade Commission in *Humphrey's Executor v. United States*.¹⁹² The rationale for distinguishing *Myers* was the difference between purely executive and quasi-legislative or quasi-judicial bodies.¹⁹³

While neither *Myers* nor *Humphrey's Executor* has ever been explicitly overruled, this synthesis of the two cases has changed. The Court in *Morrison v. Olson*, while upholding a for-cause removal provision for the Independent Counsel,¹⁹⁴ expressly rejected the idea that presidential control is more essential in some areas of government than in others. Instead, the *Morrison* court reconciled the cases by looking to the specific statutes at issue and the role that Congress reserved for itself in the removal process. In *Myers*, Congress created a scheme under which it was responsible for approving a decision to remove an officer. The provision in place for the Independent Counsel, however, involved no such role. For the Court in

¹⁸⁹ There were earlier discussions of the removal power, notably at the Constitutional Convention. See Saikrishna Bangalore Prakash, *Imperial from the Beginning: The Constitution of the Original Executive 196–97* (2015). The two decisions discussed above, however, are cited by subsequent cases as starting the modern debate. See, e.g., *Wiener v. United States*, 357 U.S. 349, 351–52 (1958).

¹⁹⁰ 272 U.S. 52, 176 (1926).

¹⁹¹ *Id.* at 117 ("As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, in the absence of any express limitation respecting removals, that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible.").

¹⁹² 295 U.S. 602, 632 (1935).

¹⁹³ *Id.* at 627–28 (distinguishing *Myers* because "[a] postmaster is an executive officer restricted to the performance of executive functions" whereas the FTC "cannot in any proper sense be characterized as an arm or an eye of the executive").

¹⁹⁴ The office was created by the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824.

Morrison, the former was invalid not because of its restriction of the President, but because of its aggrandizement of congressional power.¹⁹⁵

This focus on aggrandizement cannot, however, explain the most recent removal case, *Free Enterprise Fund v. PCAOB*.¹⁹⁶ The Court in *Free Enterprise Fund* was faced with the question of whether two layers of for-cause removal protection violated separation-of-powers principles.¹⁹⁷ Given the precedent of *Humphrey's* and the subsequent description of its holding by the Court in *Morrison*, proponents of the scheme may have thought that the statute was on firm ground. After all, neither layer of removal protection involved any corresponding role for the Congress, such that any aggrandizement concerns were off the table.¹⁹⁸ Nonetheless, the Court invalidated the scheme on broad separation-of-powers principles, grounding the opinion in the Vesting Clause of Article II. Under this rationale, the Vesting Clause, which places all of the executive power in the hands of a single individual, has independent analytical content. The meaning of Article II's Vesting Clause has been the subject of longstanding disagreement, but this decision marks the first time that the Court expressly relied on it in invalidating a restriction on the President's authority to direct a government entity.¹⁹⁹ While this opinion emerged in the specific context of removal limitations, the rationales that underlie this theory, such as a concern about political accountability, could have much

¹⁹⁵ An additional means of reconciling the cases was provided by then-Judge Kavanaugh in *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 5–6 (D.C. Cir. 2016), where he found that *Humphrey's* created a limited exception to *Myers* for the context of multimember boards. On this reading, for-cause removal protections are only valid in that specific context under current law.

¹⁹⁶ 561 U.S. 477 (2010).

¹⁹⁷ *Id.* at 492.

¹⁹⁸ In fact, the first layer of protection, given to the members of the Securities and Exchange Commission, is not provided in statute at all and was simply assumed by the Court in *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.* Instead, it is based on a historical inference that good cause is required for the Securities and Exchange Commission because of its status as an independent agency. As stated below, this is a potentially unjustified position. See *infra* Section III.C.

¹⁹⁹ A few years after *Free Enterprise Fund*, the Court was once again faced with an argument that the Vesting Clause of Article II provided an independent basis for invalidating a statute that restricted the President, this time in the context of foreign affairs. While the majority expressly disclaimed any conclusion on that issue, Justice Thomas wrote separately to state his view that the Vesting Clause provided a sufficient basis for invalidating the scheme. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2096–98 (2015) (Thomas, J., concurring in the judgment in part and dissenting in part).

broader application.²⁰⁰ This would potentially include provisions that restrict presidential oversight of information sharing. The specific arguments made by the *Free Enterprise* majority—and their implications for independent reporting—are discussed below in Section III.C.

2. Operational Independence

A cursory glance through the United States Reports or a standard casebook on administrative law may lead to the conclusion that personnel independence is the only kind of agency independence that matters. Recent events, however, demonstrate that this is not the case. While appointment and removal are the most frequently discussed and litigated, thus serving as a springboard for broader discussions of constitutional theory, Congress routinely imposes operational separation between the White House and the administrative state. While these practices offer little in the way of applicable doctrine, largely because of nonjusticiability, they do help illustrate the broader context in which independent reporting operates. They also offer important lessons regarding the tradeoffs associated with independence, such as that between collaboration and autonomy.

The regulatory process is one context in which operational separation is an important feature of independence. OMB centralized regulatory review through the Office of Information and Regulatory Affairs (“OIRA”). By promulgating guidance and reviewing certain regulations,²⁰¹ OIRA serves a function that is comparable to that served by OMB in the budgetary context. Guidance on regulatory review is disseminated through Executive Order 12,866, originally promulgated during the Reagan administration and subsequently updated.²⁰² Through this guidance, OIRA

²⁰⁰ I have presented an argument about how best to read this theory in a separate work, in which I contrast the “diffusion” concern of *Free Enterprise Fund* with the prior concern of aggrandizement. See Daniel Richardson, *Agency Design and the Zero-Sum Argument*, 104 Va. L. Rev. Online 136 (2018).

²⁰¹ OIRA review applies to all “significant rules,” which are those that have annual economic impacts of more than \$100 million, affect federal fiscal policy, risk interfering with actions of other agencies, or raise novel legal and policy issues. See Maeve P. Carey, Cong. Research Serv., R41974, *Cost-Benefit and Other Analysis Requirements in the Rulemaking Process* 3–5 (2014). This review is enhanced for rules that meet the \$100 million economic impact threshold. *Id.*

²⁰² See Exec. Order No. 12,291, 3 C.F.R. 127 (1982). President Clinton later updated President Reagan’s directive. Executive Order 12866, Regulatory Resource Center, Center for Effective Government, <https://www.foreffectivegov.org/node/224> [<http://perma.cc/HD2R-D2HL>] (last visited Oct 14, 2018).

exercises effective control over significant rules and imposes requirements on agencies conducting regulatory action. Perhaps the most significant is the requirement that agencies engage in cost-benefit analysis, quantifying the effects of their rules to ensure they have a net benefit.²⁰³ This is often a highly contentious area, posing difficult challenges of valuation. For instance, agencies are instructed to calculate a “value of statistical life” to measure rules with human-health effects²⁰⁴ and are currently grappling with how best to quantify intangible moral benefits.²⁰⁵ This form of presidential control is frequently debated, with some arguing that it leads to an anti-regulatory bias.²⁰⁶ Under Executive Order 12,866, OMB does not review the regulations of “independent regulatory agencies.”²⁰⁷ To define this class, the order references the provision of the U.S. Code listing these agencies for purposes of the Paperwork Reduction Act, a law that requires OMB approval for new information-collection burdens imposed by agencies.²⁰⁸ While this list has many of the agencies

²⁰³ These requirements are a part of the current guidance, Exec. Order No. 13,563, 3 C.F.R. 215 (2012), reprinted in 5 U.S.C. § 601 (2012), and were part of prior OIRA guidance documents as well. Exec. Order No. 12,866, 3 C.F.R. 638 (1994).

²⁰⁴ See, e.g., Memorandum to Secretarial Officers & Modal Administrators from Molly J. Moran, Acting Gen. Counsel of U.S. Dep’t of Transp., & Carlos Monje, Assistant Sec’y for Transp. Policy of U.S. Dep’t of Transp., regarding Guidance on Treatment of the Economic Value of a Statistical Life (VSL) in U.S. Department of Transportation Analyses – 2016 Adjustment 1 (Aug. 8, 2016), <https://www.transportation.gov/sites/dot.gov/files/docs/2016%20Revised%20Value%20of%20a%20Statistical%20Life%20Guidance.pdf> [<http://perma.cc/2CTK-DAJA>].

²⁰⁵ See Eric A. Posner & Cass R. Sunstein, *Moral Commitments in Cost-Benefit Analysis*, 103 *Va. L. Rev.* 1809 (2017).

²⁰⁶ This is not the consensus, however. Professors Michael Livermore and Richard Revesz have argued that increased cost-benefit analysis can serve pro-regulatory ends by showing that ambitious regulations are often justified. Richard L. Revesz & Michael A. Livermore, *Retaking Rationality: How Cost-Benefit Analysis Can Better Protect the Environment and Our Health* 155 (2008).

²⁰⁷ Exec. Order No. 12,866, 3 C.F.R. 638, § 3(b) (1994) (citing 44 U.S.C. § 3502(10)). OMB still includes the cost-benefit analysis of these agencies in its annual reports. See Office of Information & Regulatory Affairs, Office of Mgmt. & Budget, Exec. Office of the President, 2016 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act 82–84 (2016) [hereinafter 2016 Draft Regulation Cost-Benefit Report].

²⁰⁸ See Paperwork Reduction Act of 1995, Pub. L. No. 104–13, § 3502(5), 109 Stat. 163, 164–65 (1995) (codified at 44 U.S.C. § 3502(5) (2012)). While the Paperwork Reduction Act (“PRA”) established the Office of Information and Regulatory Affairs, *id.* §§ 3503–04, and centralized functions in OMB, *id.* § 3510, exclusion from PRA burdens is not frequently listed

commonly understood as “independent” in some important respect, such as the financial regulators, it is not coextensive with other indicia of independence.²⁰⁹

Another area where some agencies have operational independence from the executive is litigating authority. The standard practice for federal agencies is that the government speaks with one voice in litigation. Unlike regulatory issues, the coordinator of federal litigation policy is the Department of Justice (“DOJ”), not OMB.²¹⁰ The DOJ’s authority extends to any “litigation in which the United States, an agency, or officer thereof is a party,” “[e]xcept as otherwise authorized by law.”²¹¹ In limited circumstances, Congress has seen fit to provide such an exception. This independent authority cuts across both subject matter and stage of litigation.²¹² For instance, agencies can be given authority to litigate on all issues to which they are a party or only on some.²¹³ Likewise, agencies may be given authority to litigate only at the district court level or also in the courts of appeals.²¹⁴ Independent authority to litigate at the Supreme Court is possible, although rare.²¹⁵ In providing for this authority, Congress divorces the President, acting through the Attorney General, from decisions regarding the rights and obligations of the U.S. government. In doing so, these provisions allow federal attorneys to take divergent positions, sometimes in the same case. While these exceptions to presidential control clearly give rise to constitutional arguments, the DOJ’s views in this area

as a measure of independence in its own right, apart from the regulatory clearance requirements. See *supra* note 153.

²⁰⁹ This further supports the contention that the binary approach to agency classification is misguided. See *supra* note 153 (detailing the argument set forth by Datla & Revesz, *supra* note 54).

²¹⁰ See Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 Cal. L. Rev. 255, 263 (1994) (“The Attorney General’s authority to manage government litigation is the norm, not the exception.”).

²¹¹ 28 U.S.C. § 516 (2012).

²¹² See Devins, *supra* note 210, at 264.

²¹³ Compare 52 U.S.C. § 30107(a)(6) (2012 & Supp. III 2016) (FEC), with 7 U.S.C. § 228(a) (2012) (Dep’t of Agriculture). See also Devins, *supra* note 210, at 264.

²¹⁴ See, e.g., 26 U.S.C. § 7452 (2012) (allowing for Internal Revenue Service representation before the Tax Court).

²¹⁵ See *The Attorney General’s Role as Chief Litigator for the United States*, 6 Op. O.L.C. 47, 57 (Jan. 4, 1982) (“However, even agencies to which Congress *has* granted independent litigating authority may be prohibited from conducting their own litigation in the Supreme Court.”). For an example of the federal government arguing two sides of the same case before the Supreme Court, see *infra* note 234 and accompanying text.

have traditionally focused on statutory concerns and the need to read any exception to the Attorney General's authority narrowly.²¹⁶ While arguing that the Attorney General's "plenary authority is circumscribed only by the duty imposed on the President . . . to take Care that the Laws be faithfully executed," the DOJ has recognized that litigation control can be offset by "clear legislative directives to the contrary."²¹⁷

Independent-reporting requirements fall squarely within this category of operational separation. Instead of either limiting whom the President may select or the conditions on which he may remove them, these statutes provide for carrying out a discrete function without presidential interference. Much like exclusion from OIRA regulatory review, independent-reporting prevents presidential control of policy outcomes. Rather than limiting control of agency policymaking directly, they limit presidential control over an input to Congress's policymaking process. Likewise, these provisions are similar to independent litigating authority in allowing for multiple, competing positions offered by the government at one time. Notably, both of these concerns—coordination and unitariness—are the core aims of OMB in requiring budget and legislative clearance.²¹⁸ Much like the other areas of operational independence, there is no case law clearly demarcating the boundaries. Rather, the executive branch has offered most of the legal analysis on the question. These views, however, have not always been consistent, as discussed in Section III.B.

3. Non-Statutory Independence

While statutory law provides the basis for much of the independence in the modern administrative state, it is by no means the only way in which agencies and officers are insulated from presidential pressure.²¹⁹ In some cases, agencies argue that they are legally entitled to certain autonomy because of their character and history. In other cases, practical

²¹⁶ See, e.g., *Litigating Authority of the Office of Federal Inspector, Alaska Natural Gas Transportation System*, 4B Op. O.L.C. 820, 820–21 (1980).

²¹⁷ *The Attorney General's Role as Chief Litigator for the United States*, supra note 215, at 48 (internal quotation marks omitted).

²¹⁸ See Circular A-11, supra note 25, § 22.2–§ 22.3; Circular A-19, supra note 24, § 6(e), § 9.

²¹⁹ See Barkow, supra note 154, at 58–64 (discussing the effect of political factors on agency independence).

considerations and traditions impose political constraints on the extent to which the White House is able to direct outcomes.

In the former category, the *Free Enterprise Fund* case provides an illustrative example. The Court assumed in that case that the Securities Exchange Commission (“SEC”) had for-cause removal protection, which was essential to its conclusion that two layers of such protection—one for the SEC and one for the Public Company Accounting Oversight Board (“PCAOB”)—were unconstitutional.²²⁰ There is, however, no such for-cause removal restriction in the SEC’s organic act. Instead, the argument is based on precedent finding that for-cause removal protection can be inferred from the other structural features of an agency, such as appointments for a definite term. The first of these cases was *Wiener v. United States*, which found such an inference appropriate for the now-defunct War Claims Commission.²²¹ The Court subsequently reached similar conclusions for the Federal Election Commission and SEC.²²² As Kirti Datla and Professor Richard Revesz note, this reasoning is problematic, given the discrepant and ad hoc nature of different structural provisions in administrative law. As both their work and other efforts bear out, Congress has not adopted an all-or-nothing approach to agency independence.²²³ Nonetheless, unspecified restrictions like these are embedded in executive branch documents, such as Circular A-11.²²⁴ The OMB memorandum

²²⁰ See *Free Enter. Fund*, 561 U.S. 477, 487 (2010). (“The parties agree that the Commissioners cannot themselves be removed by the President except under the *Humphrey’s Executor* standard . . . and we decide the case with that understanding.”).

²²¹ 357 U.S. 349, 356 (1958) (finding that the removal power should not be inferred, either in the Constitution or the organic act, because the War Claims Commission was an “adjudicatory body”).

²²² See Datla & Revesz, *supra* note 54, at 832–33.

²²³ *Id.* at 833–35. See also *supra* note 156 and accompanying text (discussing the difference between the “independent” label assigned to the Peace Corps and its lack of actual functional removal from presidential control).

²²⁴ Circular A-11, *supra* note 25, at § 25.1 (“If your agency appears in the following list, it is not subject to Executive Branch review by law or custom. That means that the requirements for submitting materials in support of your budget request do not apply to you.”). For Circular A-19, the requirements apply to “[a]ll executive branch agencies . . . except those agencies that are specifically required by law to transmit their legislative proposals, reports, or testimony to the Congress without prior clearance.” Circular A-19, *supra* note 24, at § 4. This would presumably exclude from clearance only agencies that either have a statutory exemption or for which a court has inferred such an exemption.

listing agencies with “bypass” authority also includes those for which bypass is provided as a matter of custom, not as a statutory requirement.²²⁵

In the latter category, norms function to greatly constrain the practical options available to the President. For instance, the Federal Bureau of Investigation has long been understood as operationally distinct from the DOJ and therefore less subject to presidential control,²²⁶ just as the Internal Revenue Service has long been understood as requiring insulation from the White House in carrying out enforcement actions.²²⁷ Both of these norms have recently been tested, with political fallout stemming from their real or perceived violation.²²⁸ Likewise, informal norms govern White House interactions with agencies that do not have substantial independence otherwise provided by statute. For instance, many observers objected to President Obama’s public statements in support of net neutrality.²²⁹ At the time the statements were made, the Federal Communications Commission was preparing a rulemaking to that effect,²³⁰ and while no statute limits the President’s authority to speak on matters of public

²²⁵ See Jukes Memorandum, *supra* note 2, at 18–21. This webpage includes older versions of the report as well, which have been cross-checked to capture any agencies that may have been removed from the list.

²²⁶ See generally Scott Bomboy, *How Independent Is the FBI Director and Can He Be Removed from Office?*, Nat’l Constitution Center: Constitution Daily (/blog) (Mar. 21, 2017), <https://constitutioncenter.org/blog/how-independent-is-the-fbi-director-and-can-he-be-removed-from-office> [<http://perma.cc/X9N8-AMH3>] (noting that while the Director of the Federal Bureau of Investigation can be removed at will, the Agency “is known as one of the most independent offices of the executive branch, due to the nature of its work”).

²²⁷ Teresa Tritch, *Is the I.R.S. an Independent Agency?*, N.Y. Times: Taking Note (May 14, 2013, 6:28 PM), <https://takingnote.blogs.nytimes.com/2013/05/14/is-the-i-r-s-an-independent-agency/> [<http://perma.cc/W2ML-BC2R>] (“By law and by practice, the Treasury keeps an arms-length relationship with the I.R.S. on matters of tax administration, enforcement and ‘process,’ which basically means that it doesn’t ask the I.R.S. for information about taxpayers.”).

²²⁸ See, e.g., Staff of H. Comm. on Oversight and Gov’t Reform, 113th Cong., *The Internal Revenue Service’s Targeting of Conservative Tax-Exempt Applicants: Reports of Findings for the 113th Congress* (Comm. Print 2014) (criticizing the Internal Revenue Service for investigating applicants for politically motivated reasons).

²²⁹ Ryan Knutson, *FCC Chairman Says Obama’s Net Neutrality Statement Influenced Rule*, Wall St. J. (Mar. 17, 2015, 6:34 PM), <https://www.wsj.com/articles/fcc-chairman-says-obamas-net-neutrality-statement-influenced-rule-1426616133> [<http://perma.cc/YL6E-28X8>].

²³⁰ *Id.* The policy was contained in the Commission’s Open Internet Order, released in March of 2015. In the Matter of Protecting and Promoting the Open Internet, FCC 15-24, 30 FCC Rcd. 5601 (2015).

policy, the statements were seen as undue influence by many, which led to scrutiny of the decision by lawmakers following the agency action.²³¹

While the effect of these limits is very real and the limits matter tremendously for the integrity and accountability of public decision making, they are not within the scope of this Note and are not included in the Appendix. This Note explores the legality of statutes that are in place and considers their vitality as a model to solve Congress's current problems, and, as a result, it disregards practices that do not present a statutory question.

* * * *

The foregoing discussion suggests that many questions of agency independence remain unresolved, especially outside the realm of personnel constraints. Moreover, the areas that have been addressed by the Court are sometimes the subject of disagreement and inconsistent results. The precedents in this area, however, do suggest a number of principles that would bear on the legality of enhanced efforts by Congress to control the development and review of executive branch expert opinion. The first is the concern with congressional aggrandizement. The Court has consistently scrutinized statutory structures that not only limit the authority of the executive, but also enhance that of Congress. Such analysis has emerged not only in the removal cases mentioned above, but also in litigation involving modifications to existing offices.²³² Second, the Article II Vesting Clause is an independent limit on agency constraints. Its recent application in *Free Enterprise Fund* suggests that the clause can function as a bar to even those statutory schemes that do not aggrandize congressional power and that novel agency arrangements should be approached with greater skepticism.²³³ Third, the Court has seemed willing to accept operational separations that allow for divergent views from the executive branch, including different litigating positions. In fact, the Court heard a case just last year in which the government was heard on both sides of the dispute during oral argument.²³⁴ Given that practice, the fact that direct-reporting

²³¹ Knutson, *supra* note 229.

²³² *Weiss v. United States*, 510 U.S. 163, 173–76 (1994) (citing *Shoemaker v. United States*, 147 U.S. 282 (1893)) (finding that separate appointment of military judges was not required following modification to existing posts).

²³³ *Free Enter. Fund*, 561 U.S. at 505. For a critical examination of this presumption, see Leah M. Litman, *Debunking Antinovelty*, 66 *Duke L.J.* 1407 (2017).

²³⁴ See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1618 (2018) (“Jeffrey B. Wall, for the United States as amicus curiae . . . supporting the petitioners in Nos. 16–285 and 16–300 and respondents in No. 16–307.”).

requirements allow for a splintered executive view on a single topic may not be independently problematic. Fourth, the lack of centralized policy control has not been seen as an independent constitutional bar to agency independence in other contexts, such as OIRA regulatory review, although there are policy objections to the resulting lack of coordination. Finally, the legitimacy of provisions as applied to one agency should suggest that the application of those same provisions governmentwide is permissible. The Court has rejected arguments that would allow greater independence for quasi-judicial or quasi-legislative entities. There are good reasons to doubt that certain agencies are inherently entitled to independence by virtue of their historic origins and practices, or that some are presumptively immune from separation. As the next Section argues, Congress has broad latitude—but not complete freedom—in structuring the production and review of agency expertise.

B. Limits Specific to Information

Independent reporting is about more than an agency's structural insulation; it is also about executive branch information. The Constitution imposes some information-specific limits on congressional regulation of the executive. The most important of these come from privileges enjoyed by the executive branch. In addition, some have argued that more particular provisions of the Constitution, such as the State of the Union Clause, impose others, although these arguments have not been pressed to or accepted by the courts. Finally, Congress has authority to subpoena executive branch officials for information. For reasons set forth below, this authority likely has no bearing on the constitutionality of independent-reporting provisions.

The constitutional text is thin when it comes to information developed within the government. The Opinions Clause, for instance, contemplates independent views from agency officials, but it does not speak directly to Congress's right to access this information.²³⁵ Article II requires that the President "give to the Congress [i]nformation of the State of the Union," as well as recommend measures "he shall judge necessary and expedient."²³⁶ This provision suggests the Constitution envisions a President

²³⁵ This provision is often invoked to make broader points about agency independence from the President. See Prakash, *supra* note 189, at 192–93.

²³⁶ U.S. Const. art. II, § 3.

who is both required to inform the Congress of important matters and given the discretion to make independent policy determinations.²³⁷ As the OLC has recently argued, this constitutional clause prohibits Congress from either forbidding or requiring the President from expressing policy views.²³⁸ A conclusion that the President has discretion in presenting their own recommendations does not necessarily imply that the President has unfettered discretion to direct the views of executive branch subordinates. Instead, such limitations must be assessed on their own terms. Unfortunately, independent-reporting requirements do not have a rich history of case law to draw on in defining the appropriate boundaries of congressional action. As a result, the legal status of these provisions has been most frequently explored in legal opinions, often focusing on specific statutes and events, rather than their existence writ large.

The President frequently asserts an atextual right to control executive branch information, however, in the form of different privileges that prevent the release of information. These limitations are both statutory and constitutional, although the line between them is sometimes unclear. For instance, the deliberative process privilege allows for the withholding of information that is both predecisional and involves some opinion or assessment. This protection, both enshrined in FOIA²³⁹ and also used to withhold information from congressional requests,²⁴⁰ is based on “the valid need for protection of communications between high government officials.”²⁴¹ In essence, it shields from release information which, if disclosed, may chill government actors from making effective policy choices. While this limitation on information access is very real and frequently invoked, it does not pose a barrier to the release of final agency analysis. Simply put, presidential intervention, whether personally or through OMB, is not necessary for a decision to no longer be deliberative.

²³⁷ See Prakash, *supra* note 189, at 246–47 (“The Recommendations Clause merely requires some executive exhortation, leaving the president the option of being more or less active and explicit.”).

²³⁸ Application of the Recommendations Clause to Section 802 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, 40 Op. O.L.C. 1 (2016), <https://www.justice.gov/sites/default/files/olc/opinions/attachments/2017/01/19/2016-08-25-recommendations-clause-mma.pdf> [<http://perma.cc/JG4B-ZN76>].

²³⁹ 5 U.S.C. § 552(b)(5) (2012).

²⁴⁰ See Authority of Agency Officials to Prohibit Employees from Providing Information to Congress, *supra* note 147, at 82–83.

²⁴¹ *United States v. Nixon*, 418 U.S. 683, 705 (1974).

As the Department of Justice guidance on FOIA notes, “[a] document is ‘predecisional’ if it is ‘generated before the adoption of an *agency* policy.’”²⁴² The case relied on by the DOJ for this proposition notably involves a request for information of the Food and Drug Administration regarding an action not subject to presidential review and approval. As a result, an agency can reach a final determination, and concurrently lose the privilege, whether or not White House review (or other executive review) has taken place. The effect is to make the privilege run with the nature of the legal authority.²⁴³ If a lower-level official is authorized by statute to make a final policy decision, that decision becomes subject to FOIA. If a higher-level official is required to make the final decision, the lower-level official’s memorandum advising his superior might be subject to FOIA’s predecisional exception. The result is that the deliberative process privilege does not prevent information sharing prior to review elsewhere in the executive.²⁴⁴

A more serious limitation on independent reporting is provided by a separate component of executive privilege known as the presidential communication privilege.²⁴⁵ While this privilege has never been firmly established with respect to Congress or the courts,²⁴⁶ it allows the President to withhold information “when asked to produce documents or other materials that reflect presidential decisionmaking and deliberations and that the President believes should remain confidential.”²⁴⁷ This privilege

²⁴² FOIA Guide, *supra* note 148, at 14, 16 (emphasis added) (quoting Judicial Watch, Inc. v. Food & Drug Admin., 449 F.3d 141, 151 (D.C. Cir. 2006)).

²⁴³ See FOIA Guide, *supra* note 148, at 23 (“[C]ourts have considered the nature of the decisionmaking authority vested in the office or person issuing the document.”).

²⁴⁴ *Id.* at 23–24. Some scholars argue that the Vesting Clause of Article II allows the President to act in the place of any executive officer. See, e.g., Liberman, *supra* note 158, at 315; Peter L. Strauss, Foreword, *Overseer, or the Decider: The President in Administrative Law*, 75 *Geo. Wash. L. Rev.* 696, 697 n.3 (collecting various academic perspectives). While such a position would obviously change this analysis, this view does not prevail under current doctrine.

²⁴⁵ This privilege was noted by the OLC as a reason that certain applications of independent reporting may be found unconstitutional. See *Constitutionality of the Direct Reporting Requirement in Section 802(e)(1) of the Implementing Recommendations of the 9/11 Commission Act of 2007*, *supra* note 152, at 43–45.

²⁴⁶ See generally Prakash, *supra* note 189, at 235 (arguing that “there is little warrant for supposing that the president has a constitutional power to shield conversations and documents from either Congress or the courts.”).

²⁴⁷ *In re Sealed Case*, 121 F.3d 729, 744 (D.C. Cir. 1997).

extends to communications by presidential advisors.²⁴⁸ Unlike deliberative process privileges, the scope of this privilege does not turn on the legal authority provided by law and is based on the nature of relationships between the President and their staff that are outside of congressional control. The privilege is grounded both in the general separation of powers and the need to promote candor among presidential advisers. The privilege is qualified. Under the landmark case of *United States v. Nixon*, the power of this privilege is a function of many variables, such as the nature of the information at issue,²⁴⁹ the protection from disclosure afforded by the recipient,²⁵⁰ and the particular importance of the information to the courts (or presumably to Congress).²⁵¹

Finally, the congressional subpoena power may appear to implicate the constitutional limits on independent reporting. Both involve attempts by Congress to gain access to executive branch information. Both have led to objections grounded in executive privilege.²⁵² Nonetheless, it is unlikely that the scope of this power is relevant to the constitutionality of *statutes* that aim to do the same thing. When Congress subpoenas the executive branch, it is relying on inherent powers, which follow from the English tradition and are justified by the need for Congress to carry out investigations.²⁵³ When Congress asserts its rights to information under an independent-reporting provision, on the other hand, it is pointing to a validly enacted statute. To borrow Justice Jackson's tripartite framework in *Youngstown Sheet & Tube v. Sawyer*, this is the difference between acting in direct contradiction to a statute and acting in the "zone of twilight."²⁵⁴ For that reason, it is unlikely that legislative argument would be

²⁴⁸ See, e.g., *U.S. Dep't of Treasury v. Pension Benefit Guar. Corp.*, 249 F. Supp. 3d 206, 209 (D.D.C. 2017).

²⁴⁹ 418 U.S. 683, 706 (1974) (referencing "military, diplomatic, or sensitive national security" matters as warranting heightened protection).

²⁵⁰ *Id.* at 706 (mentioning the "in camera inspection with all the protection that a district court will be obliged to provide" as a reason for finding the privilege defeated (emphasis omitted)).

²⁵¹ *Id.* at 713 (finding the privilege overcome by the needs of justice in a criminal trial). Professor Josh Chafetz has argued that the series of holdings surrounding the Watergate scandal, which involved both congressional and judicial subpoenas, resulted in a diminished role for Congress in investigating executive misconduct. See Chafetz, *supra* note 57, at 192-95.

²⁵² See, e.g., *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 732 (D.C. Cir. 1974).

²⁵³ Chafetz, *supra* note 57, at 153-179.

²⁵⁴ 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

bolstered by reference to this inherent authority. Likewise, there is no reason to think that just because executive privilege can overcome Congress's unilateral need for information by subpoena in some situations²⁵⁵ that has any bearing on the validity of a statutory command.

C. Drawing the Constitutional Line

The constitutional limits on independent reporting have long been a source of disagreement between the branches of government. The executive branch position on independent reporting has varied over time. While the OLC under the Reagan administration was generally hostile,²⁵⁶ the Clinton administration did not see any constitutional objection to their use.²⁵⁷ These positions have each reemerged since, both inside and outside the executive branch. The arguments against these provisions are grounded in both the agency design doctrine and notions of executive privilege. The narrower privilege-based objection focuses on the possibility that an independent-reporting provision will infringe specific privileged records. This objection does not apply to independent reporting generally, but instead to particular applications of those provisions.

Executive privilege, specifically the presidential communication privilege elaborated in *Nixon*, does in fact limit the reach of congressional information access. For example, Congress would run up against the privilege in passing a hypothetical law that read: "the Attorney General shall report to the Judiciary Committee the contents of any conversation with the President within one week. This report shall not be subject to review or approval by any officer of the executive branch or the President." As a practical matter, however, this limit is unlikely to restrain the reach of

²⁵⁵ See *Senate Select Comm. on Presidential Campaign Activities*, 498 F.2d at 733 ("We conclude that the need demonstrated by the Select Committee in the peculiar circumstances of this case, including the subsequent and on-going investigation of the House Judiciary Committee, is too attenuated and too tangential to its functions to permit a judicial judgment that the President is required to comply with the Committee's subpoena.").

²⁵⁶ See *Constitutionality of Statute Requiring Executive Agency to Report Directly to Congress*, 6 Op. O.L.C. 632, 632–39 (1982). This opinion noted that the direct reporting was "inconsistent" with the separation of powers and employed the canon of constitutional avoidance to allow for review.

²⁵⁷ See *The Constitutional Separation of Powers Between the President and Congress*, supra note 162, at 173–74. This opinion found that "concurrent reporting requirements are best analyzed under the general separation of powers principle" and tolerated the existence of independent-reporting provisions, so long as they did not infringe upon "constitutionally assigned functions" like foreign affairs or national defense. *Id.* at 174–75.

independent-reporting provisions. First, the privilege is limited to core presidential powers, which are “non-delegable.”²⁵⁸ The President cannot then simply reclassify executive branch actions to extend the privilege’s scope. Second, the privilege only extends to advisers within the “operational proximity” of the President, meaning that it covers documents “solicited or received” by White House advisors.²⁵⁹ As shown in Part II, most of the independent-reporting provisions involve delegable functions and require information sharing prior to communication with the President or other components of the EOP. Given this structure, most requirements of independent reporting, whether they focus on individual program assessments, budget figures, or legislative testimony, will not implicate the privilege at all. Even broader uses of independent reporting, such as those that would make concurrent submissions to Congress the default, would not run afoul of this privilege in the vast majority of its applications. In total, the narrow privilege-based objection is legally accurate but practically inapplicable.

The broad argument, grounded in agency design, asserts that independent reporting infringes on the President’s constitutional prerogatives to supervise subordinates in the executive branch as a general matter. This view commonly falls under the broad rubric of Unitary Executive theory, although that label masks considerable nuance.²⁶⁰ Nonetheless, the basic structure of the argument relies on a few simple propositions. One, the Constitution vests the entire executive power in a single figure, the President. Two, this vesting of power includes, and requires, the authority to control the acts of subordinates. Third, congressional efforts to infringe on this control are unconstitutional. As discussed in Part III, this theory has never gained widespread judicial adoption, but it does influence the Court’s approach to decisions that are not governed by more specific

²⁵⁸ See Rosenberg, *supra* note 4, at 39–40.

²⁵⁹ *Id.* at 40.

²⁶⁰ One such nuance involves whether unitariness implies inherent executive power, which some argue is not necessarily the case. See generally Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush 3–19* (2008) (discussing the Unitary Executive Theory and asserting that certain types of inherent executive power lack foundation in the Framers’ decision to create a unitary executive). For a discussion of competing theories on Article II’s vesting of the “executive power,” see Prakash, *supra* note 189, at 68–71.

textual provisions.²⁶¹ Many of the executive branch opinions claiming authority to withhold information otherwise required by Congress borrow heavily from this argument.

The OLC made a forceful iteration of this position against independent reporting in 2008, collecting many prior opinions sharing this view.²⁶² This analysis shares common features with those that came before it. First, it grounds the constitutional argument in an analogy to personnel decisions, particularly those involving removal limitations.²⁶³ Second, it construes the statute at issue to allow for separate executive office comment, even if the final agency communication does not include those views.²⁶⁴ Third, the opinion finds that there would be serious constitutional problems with a scheme that prevented the agency from incorporating OMB or White House feedback.²⁶⁵ The OLC argument considers both review of the policymaking process and management of subordinate employees to be constitutional functions of the Presidency. Finally, the opinion rejects the notion that the constitutional analysis of independent reporting should be context-specific, allowing for greater limitation when Congress has an exceptional need for the information.²⁶⁶ This reinforces that independent reporting raises concerns distinct from privileges, which, under current doctrine, do proceed along such a balancing test.²⁶⁷

While this opinion makes a strong case for presidential control, there are good reasons to think that current doctrine provides more leeway or is less problematic than the opinion argues. First, many of the direct-reporting provisions can achieve their function even if OMB or the White House

²⁶¹ See *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 484–86 (1989) (Kennedy, J. concurring in the judgment).

²⁶² See *Constitutionality of the Direct Reporting Requirement in Section 802(e)(1) of the Implementing Recommendations of the 9/11 Commission Act of 2007*, supra note 152, at 28–33 (2008). While the opinion suggests a long history of executive branch opposition to direct reporting, *id.* at 36–39, there have been instances of the OLC finding this practice constitutional. See *The Constitutional Separation of Powers Between the President and Congress*, supra note 162, at 173–74.

²⁶³ See *Constitutionality of the Direct Reporting Requirement in Section 802(e)(1) of the Implementing Recommendations of the 9/11 Commission Act of 2007*, supra note 153, at 33–36.

²⁶⁴ *Id.* at 32.

²⁶⁵ *Id.* at 43.

²⁶⁶ *Id.* at 41. The OLC did argue in the alternative that a balancing approach would favor the executive in this particular case, which involved a direct-reporting requirement within the Department of Homeland Security (an “executive” department). *Id.* at 41–42.

²⁶⁷ See *Nixon*, 418 U.S. at 707 (finding that “the legitimate needs of the judicial process may outweigh Presidential privilege”).

is permitted to offer a different opinion; in fact, this difference of views is often the whole point. The benefits of independent reporting only exist when the agency (or component) disagrees with political leadership in the executive branch. Second, many of the provisions only amend an agency's *statutory* obligations. For instance, an independent-budget provision simply amends the agencies' relationship with the President concerning the budget process. Presidential control over the budget is itself rooted in the Budget and Accounting Act. While there are certain core presidential functions that precede any statutory authority, like directing the military, independent-reporting provisions do not frequently touch on these concerns. It is easy to imagine ways that Congress could test this limit—perhaps by requiring direct reporting of pardon recommendations or independent reporting for CIA views on the wisdom of specific covert operations—but these hypotheticals are not reflected in current practice.

The more substantial question is whether independent-reporting provisions impose an unconstitutional limit on presidential control as such, regardless of the particular policy issue. On the OLC's view, this problem would arise when the agency is either required to report its findings before seeking review or when the agency is prevented from incorporating feedback. The 2008 OLC memorandum anticipates a constitutional limit on presidential control grounded not in aggrandizement, but in a freestanding need to direct the executive branch under Article II. Such a limit has now arrived with *Free Enterprise Fund*.²⁶⁸ As a result, the Court's opinion in that case provides the clearest doctrinal instruction on how to answer the questions raised by agency design, including independent-reporting laws.

The decision in *Free Enterprise Fund* was motivated by three rationales that bear on independent reporting. First, the Court was particularly attuned to the connection between the Vesting Clause and political accountability. As the Court saw the issue, the primary concern with the scheme was “a Board that is not accountable to the President, and a President that is not responsible for the Board.”²⁶⁹ Second, the Court gave special weight to established practices and corresponding skepticism toward novelty. This position, characterized as the anti-novelty canon” in

²⁶⁸ 561 U.S. 477, 483–98 (2010).

²⁶⁹ *Id.* at 495–96. Likewise, the Court noted 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.” *Id.* at 496.

subsequent literature,²⁷⁰ suggests that analysis premised on the Vesting Clause as an independent limitation has more force when the congressional scheme is new. This “canon” is perhaps best articulated in then-Judge Kavanaugh’s dissent from the decision of the D.C. Circuit in *Free Enterprise Fund*, which was quoted in full by the majority’s opinion: “Perhaps the most telling indication of the severe constitutional problem . . . is the lack of historical precedent.”²⁷¹ Third, the Court’s reasoning was based in part on the conclusion that the decrease in presidential power led to a corresponding increase in congressional power.²⁷² This reading sees agency design as a zero-sum affair, in which agencies are not an independent “fourth branch” of power, but instead a tool of interbranch conflict. There is nothing in these arguments that is inherently restricted to personnel control; therefore, they could bear on questions in the operational context.²⁷³

Taking each of these justifications in turn, there is still little reason to think that independent reporting unconstitutionally undercuts the President’s authority. First, these provisions are not novel; they have been a feature of the administrative state for many decades, applied to a wide range of agencies (and executive departments) for a wide range of functions. The executive branch has complied with them, adjusting guidance documents and internal memoranda to reflect this independence.²⁷⁴ Second, they do not implicate the accountability of the President for final agency action. Take the budget process. The president is still given the authority, in this case the duty, to present a comprehensive fiscal plan for the government. Even in the most restrictive settings, where the President is instructed to include an agency request in the President’s budget without alteration, the President is in no way limited from expressing a

²⁷⁰ Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 Harv. L. Rev. 2109, 2145–46 (2015); Litman, *supra* note 233.

²⁷¹ *Free Enter. Fund*, 561 U.S. at 505 (quoting *Free Enter. Fund*, 537 F.3d at 699 (Kavanaugh, J. dissenting)).

²⁷² *Id.* at 500 (“[T]he multilevel protection that the dissent endorses ‘provides a blueprint for extensive expansion of the legislative power.’” (quoting *Metro. Wash. Airports Auth.*, 501 U.S. at 277)).

²⁷³ On the novelty issue, Professor Leah Litman has persuasively argued that such a presumption is ill-advised. See Litman, *supra* note 233, at 1427–28. The merits of this question are beyond the scope of this analysis, which takes the doctrine as it is.

²⁷⁴ See, e.g., Circular A-11, *supra* note 25, at § 25.1; Jukes Memorandum, *supra* note 2.

contrary view.²⁷⁵ On the facts of *Free Enterprise Fund* itself, the Court did not seem bothered by the for-cause removal restriction for the SEC, which certainly allows for divergent views between the President and members of the Commission. Therefore, it is reasonable to conclude that “unitariness,” at least as expressed by the Court, does not bar executive branch disagreement as long as the President is able to express a view to which he or she can be held to account. Moreover, the concerns regarding political accountability that motivated that decision are essentially a commentary on the proper functioning of a democratic system. It requires that the voting public have the knowledge of who is responsible for an action and the power to hold them accountable through democratic means. Disclosure of information, particularly to a coordinate branch of government, does not implicate this concern. Rather than structuring the relationship between the executive branch and the public—like personnel restrictions or regulatory review do—this context involved a wholly interbranch relationship. While it may occasionally lead to the disclosure of information, that has not previously been thought to implicate separation-of-powers concerns (beyond the privilege issues discussed above).

The final concern in *Free Enterprise Fund*—shifting of power from the President to the Congress—is more squarely presented by independent reporting. The reference to this concern in *Free Enterprise Fund*, however, is not accompanied by any new test or framework for assessing the underlying question; to the contrary, the principle seems no different from the longstanding role of the Court to police the boundary between the branches, ensuring that the President can accomplish his “constitutionally assigned functions.”²⁷⁶ Moreover, the facts of the case did not implicate the traditional concern with aggrandizement, whereby Congress is given direct control over the executive. If this is true, there is little reason to see independent reporting as a threat in the vast majority of potential applications. While the President’s ability to exercise constitutional functions would be inhibited by legislation intruding into presidential decision making, that would be invalid under current doctrine regarding privileges. Likewise, this concern may prevent a wholesale eradication of the

²⁷⁵ See, e.g., Press Release, U.S. Dep’t of the Treasury, Bush Administration Announces Principles for Postal Reform (Dec. 8, 2003), <https://www.treasury.gov/press-center/press-releases/Pages/js1044.aspx> [<http://perma.cc/2P2X-4WK5>] (recommending changes to postal financing despite the U.S. Postal Service’s authority to submit budget requests to Congress without change).

²⁷⁶ *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 443 (1977).

President's authority to offer a unified budget or comment on proposed testimony and government programs. As they currently stand, however, independent-reporting provisions offer no such threat, nor would their expanded use. Even if every agency or department had the authority to bypass OMB, the President would still be able to express a separate view, to which he or she would be accountable. The sharing of information is antecedent to the enactment of any policy, and diverse viewpoints on the front end do not necessitate splintered administration on the back end.

Finally, independent-reporting laws are consistent with the current operation of the federal government. As with many disputes between Article I and Article II, the question of information access is easy at the extremes. Congress could not require independent reporting of all memoranda prepared by senior White House staff. If there were a constitutional defect with any attempt to obtain information in this way, however applicable across all agencies, it is unclear where such reasoning would stop. It is not clear why the President's constitutional right to screen and amend information would not assume an authority to deny information sharing altogether. On this view, the President could prevent officers from testifying before Congress or withhold every report that may be useful for oversight. If the President's ability to carry out constitutionally assigned functions is really impaired by independent reporting, then it follows that the contents of the material being shared is part of the President's decision-making process. The natural result of this position is that *all* government documents are deliberative until the moment the President deems them otherwise. Followed to its conclusion, all operational independence would be suspect, including the OIRA review. After all, it would be a strange outcome if the White House could prevent an agency from sharing a report calling for more stringent screening of experimental drugs, but not limit them from promulgating a rule to that effect. In the information-sharing context, the duty to review would become the authority to withhold. Such a position would amount to a radical reworking of existing practice²⁷⁷ and is contrary to the longstanding belief that the Constitution protects Congress's right to access government information to inform the legislative process. Luckily, there is no constitutional text or judicial doctrine necessitating such a significant change to government practice.

²⁷⁷ This position could also result in a radical reconsideration of the scope of both FOIA and Congress's subpoena power.

IV. WHY AGENCY INFORMATION MATTERS

Viewed from the vantage point of the executive, independent-reporting requirements threaten political control. By presenting Congress with information not approved by the White House, or in some cases directly at odds with the White House's position, these provisions allow for a fragmented statement of policy or assessment of existing research. Depending on their structure, they can also prevent the development of a centralized and standardized stream of communication between the two elected branches. At another level, however, it is difficult to see independent information sharing as particularly troubling. Providing information to Congress does not affect the enforcement of the law—apart from the law that called for the information in the first place—and does not prevent the White House from developing and advocating for contrary views. In this respect, it does not pose the threat to actual policymaking that may accompany an agency head who is not removable by the President or a regulatory development that takes place outside of OIRA. Moreover, discrepant views from the executive branch are not uncommon and have been tolerated as both a practical and legal matter. Given that administrative agencies often insulate officials from removal by the President at will, the authority to express a different view or present unreviewed findings to a coordinate branch of government for a limited range of communications seems like a much smaller barrier to presidential control. This blend of characteristics makes independent reporting not only consistent with current constitutional limits, but also well-suited to Congress's present needs.

Today's Congress is vastly outmatched by the capabilities of the executive branch in collecting and analyzing vital information. The staff of Congress is smaller and less well compensated than it once was. Likewise, significant portions of congressional resources are devoted to functions outside the policy development or oversight process, such as constituent service. Over the past few decades, congressional staffers have shifted from committees, which coordinate policy and oversight functions, to member offices, which are more focused on the needs of individual districts.²⁷⁸ As Congress's capacity has diminished, the capabilities of the executive branch have grown more prominent. This has created disparities for both government oversight and legislating. The national security

²⁷⁸ See Lara E. Chausow et al., Cong. Research Serv., R43947, *Summary to House of Representatives Staff Levels in Member, Committee, Leadership, and Other Offices, 1977–2016* (2016).

apparatus is producing more and more confidential information than ever before, creating concerns for oversight committees, such as the high-profile dispute between the Senate Intelligence Committee and the Central Intelligence Agency (“CIA”) over rendition programs in the War on Terror.²⁷⁹ On the domestic front, there are common calls that agencies are suppressing information, such as reports on the impacts of climate change during the Obama administration²⁸⁰ or the economic benefits of refugees during the Trump administration.²⁸¹ These high-profile examples are indicative of the broader consequences that come from the increased asymmetry between the two branches. Moreover, congressional actors themselves have at times suggested an interest in placing greater reliance on executive branch information.²⁸²

Given the current mismatch in expertise between the branches, there are a few possible avenues to breaking the status quo. First, Congress could seek to make executive branch agencies more independent through the traditional tools of personnel independence. In this scenario, Congress would not directly gain any information capacity, but would limit the President’s ability to control agency policymaking. Second, Congress could rely on public scrutiny of executive branch information to ensure that the inputs to the policymaking process are reliable. FOIA provides the most likely avenue for such corrections. As explained below, neither of these approaches is likely sufficient. Many of those concerned about the decline of congressional expertise have recommended a third approach: increased funding to enhance the capacity and personnel within the legislative branch. Through a more robust GAO and CRS, the argument goes, Congress can reassert its position *vis-à-vis* the executive branch, generating independent content to challenge the information

²⁷⁹ See, e.g., David B. Buckley, Office of Inspector Gen., Cent. Intelligence Agency, Report of Investigation: Agency Access to the SSCI Shared Drive on RDINet (2014) (describing a dispute between the Senate Select Committee on Intelligence and the CIA over legislative branch access to information related to the CIA’s rendition, detention, and interrogation programs).

²⁸⁰ Declan McCullagh, EPA May Have Suppressed Report Skeptical of Global Warming, CBS News (June 26, 2009, 11:09 PM), <https://www.cbsnews.com/news/epa-may-have-suppressed-report-skeptical-of-global-warming/> [http://perma.cc/9K5S-AX68].

²⁸¹ Jon Sharman, Trump White House ‘Suppressed’ Report Showing Economic Benefits of Admitting Refugees, The Independent (Sept. 19, 2017, 5:26 PM), <http://www.independent.co.uk/news/world/americas/us-politics/trump-white-house-refugee-report-economic-benefits-stephen-miller-policy-adviser-a7955066.html> [http://perma.cc/BJE2-LXHZ].

²⁸² See Weixel, *supra* note 10 and accompanying text.

received from agencies. While this is hypothetically interesting, there is nothing to suggest a modern congressional appetite for such an effort.

Instead of trying to balance the expertise between the political branches—a project that would take significant increases in federal spending and considerable time to implement—Congress is better served by simply asserting its authority over the production, review, and dissemination of agency expertise. In other words, Congress should not so readily accept that agency information is by definition part of the President's arsenal. While not a panacea for the challenges of the modern Congress, a concerted effort to increase access to divergent agency views would combat many of the problems that currently plague oversight and policy development. It would also do so in a manner consistent with the President's authority, as articulated in current doctrine. The weaknesses of competing solutions and tradeoffs of independent reporting are discussed in turn, before turning to some potential applications.

A. The Inadequacy of Alternatives

Any change to the existing status quo concerning the agency–Congress relationship is likely to pose its challenges. For that reason, it is worth taking a moment to consider whether alternatives may be more effective at meeting Congress's perceived needs. Instead of increasing the operational separation between the President and the agencies, Congress may consider three other courses: (1) continued reliance on traditional tools of personnel independence; (2) increased reliance on private sources of information, empowered by FOIA to access executive branch records; and (3) renewed reliance on their own staff, which could be expanded to fill the need. As this Section demonstrates, each is fraught with its own complications.

1. The Uncertainty of Personnel Independence

While personnel protections have long been the measure of agency independence, there are reasons to think that those protections may not be up to the task in the modern era. Some areas of the law are fairly well settled, with additional attempts by Congress to exert authority unlikely to succeed. First, Congress does not frequently challenge the constitutional requirement that the President appoint high-level government

officials.²⁸³ Similarly, the ability to empower legislative branch officials with executive responsibilities is clearly unconstitutional.²⁸⁴ In other areas, the longstanding congressional practices regarding both the removal and appointment of agency personnel are under attack. For instance, the D.C. Circuit recently considered a challenge to for-cause removal protection for the director of the CFPB.²⁸⁵ Similarly, the courts of appeals are currently entertaining challenges to the practice of selecting administrative law judges outside the structure of the Appointments Clause, an issue that may soon reach the Supreme Court.²⁸⁶ These challenges argue that administrative law judges (“ALJs”) are not properly considered employees and are instead “inferior officers” who must be selected by the President, a court of law, or the head of a department.²⁸⁷ When it comes to personnel control, Congress currently finds itself playing defense in the federal courts. If the status quo is insufficient, including the current legal

²⁸³ One notable recent example is the legislation enacted in response to the Puerto Rican government-debt crisis. The Puerto Rico Oversight, Management and Economic Stability Act, or PROMESA, includes the appointment of board members by members of Congress directly, which poses significant separation-of-powers concerns, even if the officials are not “Officers of the United States” within the meaning of the Appointments Clause. See Pub. L. No. 114–187, § 101(e)(2)(A), 130 Stat. 549 (2016) (providing for appointments to the Financial Oversight and Management Board by the congressional leadership). While this would seem to run up against the long line of cases suggesting Congress cannot preserve a role for itself in executive appointments, Congress explicitly included a provision in PROMESA stating that it was enacted pursuant to Article IV powers over the territories. This has not yet been tested in the Court, although there is reason to think the outcome should not change depending on whether Congress is acting through its Article I or Article IV powers. See Gary Lawson & Guy Seidman, *The Constitution of Empire: Territorial Expansion and American Legal History* 129–79 (2004).

²⁸⁴ See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 714–26 (1986).

²⁸⁵ *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 5–38 (D.C. Cir. 2016). The director of the CFPB is in the rare position of enjoying for-cause removal protection without being part of a multi-member board.

²⁸⁶ Compare *Bandimere v. Sec. & Exch. Comm’n*, 844 F.3d 1168, 1182 (10th Cir. 2016) (holding that an SEC administrative law judge (“ALJ”) was an inferior officer, not an employee, reasoning that final decision-making power is not dispositive to the issue), with *Landry v. Fed. Deposit Ins. Corp.*, 204 F.3d 1125, 1134 (D.C. Cir. 2000) (concluding that SEC ALJs are employees, not inferior officers, because they cannot render final decisions). The Supreme Court may grant certiorari in *Raymond J. Lucia Cos., Inc. v. SEC*, which asks whether the SEC ALJs are “officers” under the Appointments Clause. 832 F.3d 277, 280 (D.C. Cir. 2016). The Supreme Court’s most recent foray into this issue was *Lucia v. SEC*, but the case did little to change the law because the court found the case controlled by *Freytag*. *Lucia v. Sec. & Exch. Comm’n*, 138 S. Ct. 2044, 2047 (2018).

²⁸⁷ See *Bandimere*, 844 F.3d at 1170–71.

landscape of appointment and removal, then these personnel protections are unlikely to provide a durable foundation for new assertions of congressional control.

Second, there are practical considerations, such as the inability of Congress to enforce these protections, which limit their effectiveness. Recently, the President has simply ignored personnel limitations, such as statutory qualification provisions for appointed posts.²⁸⁸ Even when the provisions are followed in the first instance, Congress may be limited in its ability to enforce them when they are violated down the line. For instance, the major cases involving for-cause removal protections have involved plaintiffs outside the legislative branch, such as an improperly removed officer²⁸⁹ or a regulated party.²⁹⁰ Any attempt by Congress to enforce such a protection would be no different from any other suit to require enforcement of the law. As such, it would be susceptible to the existing limits on legislative standing.²⁹¹ Moreover, these restrictions empower the individual officer, but they do nothing to create an obligation to provide information to Congress. An agency might have incentives that are separate from either the President or Congress. Traditional tools of independence only address the first relationship, not the latter. Even when these provisions are successful, the employee has no greater loyalty or obligation to Congress. While these protections may be useful in ensuring

²⁸⁸ A recent example is the nomination of Sam Clovis to be the new Under Secretary for Research, Education and Economics at the Department of Agriculture (“USDA”). As prescribed in statute, this position is to be “appointed by the President . . . from among distinguished scientists with specialized training or significant experience in agricultural research, education, and economics.” 7 U.S.C. § 6971(b) (2012). This position is the “Chief Scientist” of USDA. Id. § 6971(c). Mr. Clovis is not, under a reasonable construction of these terms, a scientist. While this issue led to congressional opposition from the minority, it did not prevent Mr. Clovis from securing the support of senior leadership in the Senate majority, particularly on the Agriculture Committee, where he enjoyed the support of Senator Chuck Grassley. See Amy Mayer, *Trump’s Nominee to Be USDA’s Chief Scientist Is Not a Scientist*, NPR (Sept. 4, 2017, 6:00 AM), <http://www.npr.org/2017/09/04/547934012/trumps-nominee-to-be-usdas-chief-scientist-is-not-a-scientist> [<http://perma.cc/CW9S-UNS9>]. Mr. Clovis ultimately withdrew his nomination for other reasons.

²⁸⁹ See, e.g., *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 618 (1935) (claim brought by estate of officer); *Myers v. United States*, 272 U.S. 52, 106 (1926) (same).

²⁹⁰ See, e.g., *PHH Corp.*, 839 F.3d at 7.

²⁹¹ See, e.g., *Raines v. Byrd*, 521 U.S. 811, 814, 818 (1997). This restriction should also be limited by the unavailability of a cause of action in Congress, which is a distinct inquiry. See John Harrison, *Legislative Power, Executive Duty, and Legislative Lawsuits*, 31 J.L. & Pol. 103, 103 (2015).

compliance with separate independent-reporting provisions, they are not therefore enough on their own to correct for Congress' deficiencies.

As these problems demonstrate, congressional efforts to place control on certain offices may be limited. Congress has, however, also put in place some measures that allow independent reporting by all government employees. For instance, personnel can often be given independence through either whistleblower protections²⁹² or prohibitions on executive branch gag rules.²⁹³ These provisions are intended to prevent retaliation against employees who communicate with Congress and other overseers, such as inspectors general. While these mechanisms serve an important function in federal employment, they are unlikely to address the specific problem of congressional expertise. First, they do nothing to create an obligation to share information. Instead, they only protect information once it has been disclosed. Further, the statutes are often read to allow withholding of a broad range of information. For instance, when the Chief Actuary withheld budget estimates in the Medicare Part D debate, the executive branch argued that the government was under no obligation to provide the information in the first instance, despite the presence of a gag-rule prohibition.²⁹⁴

2. *The Unavailability of FOIA*

In one classic formulation, congressional oversight activities can be divided between police patrols and fire alarms. In the first, Congress plays the role of the beat cop, examining acts on its own. In the second, which includes FOIA, Congress creates tools for private persons to pull the alarm when a violation is found.²⁹⁵ If Congress does not look to the executive for information, it could also try to empower private parties to

²⁹² See Whistleblower Protection Act of 1989, 5 U.S.C. § 1201 et seq. (2012). The Whistleblower Protection Act created the Office of Special Counsel to investigate prohibited personnel practices, such as gross mismanagement, gross waste of funds, or abuses of authority. *Id.* § 1212. The Special Counsel is also given authority to carry out disciplinary actions if disclosure were improper. *Id.* See also 5 U.S.C. § 7211 (2012) (“The right of employees . . . to petition Congress . . . may not be interfered with or denied.”).

²⁹³ See, e.g., Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, §§ 618, 620, 118 Stat. 354, 354–55.

²⁹⁴ Authority of Agency Officials to Prohibit Employees from Providing Information to Congress, *supra* note 147, at 79.

²⁹⁵ Mathew D. McCubbins & Thomas Schwartz, Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms, 28 *Am. J. Pol. Sci.* 165, 166 (1984).

discover executive branch information. While not bolstering congressional capacity, this could at least prevent the executive branch from shielding information that is vital to the policy process, such as the consideration of Medicare Part D discussed above. The traditional tool used by citizens to access government information is FOIA,²⁹⁶ which creates a default presumption that information is public unless shielded by a specific exemption.²⁹⁷ It might be thought that increased use of FOIA would allow for more executive disclosure, without altering the current relationship of the agencies *vis-à-vis* Congress.

Both the legal and practical limitations of FOIA prevent this from being true. First, much of the information that Congress wants is predecisional, just as it was in the Medicare Part D debate.²⁹⁸ As it happens, predecisional information is already exempted from FOIA disclosure.²⁹⁹ In a similar vein, the executive branch might keep decisions beyond the reach of FOIA by avoiding the creation of federal records at all. This was recently a concern with the development of benefits estimates at the Environmental Protection Agency (“EPA”).³⁰⁰ Moreover, much of the information Congress and the public may want to know about would not otherwise be noticed without an independent-reporting provision in the first instance. As the vocational education example demonstrates, the absence of these provisions would mean that Congress never knew that the agency view differed from the OMB report. A private person suing under FOIA would certainly not have a greater insight than that of Congress on executive operations in the standard situation.³⁰¹ As it stands now, FOIA is a very blunt instrument for informing Congress.

²⁹⁶ 5 U.S.C. § 552 (2012).

²⁹⁷ *Id.* § 552(a)–(b).

²⁹⁸ See Authority of Agency Officials to Prohibit Employees from Providing Information to Congress, *supra* note 147, at 82–83.

²⁹⁹ See 5 U.S.C. § 552(b)(5).

³⁰⁰ Coral Davenport & Eric Lipton, Scott Pruitt Is Carrying Out His E.P.A. Agenda in Secret, Critics Say, *N.Y. Times* (Aug. 11, 2017), <https://www.nytimes.com/2017/08/11/us/politics/scott-pruitt-epa.html> [<http://perma.cc/KPU6-H26M>] (“While federal records laws prohibit senior officials from destroying records, they could evade public scrutiny of their decision-making by simply not creating them in the first place.”).

³⁰¹ A thorough discussion of FOIA’s structural weaknesses is provided by Professor David Pozen. David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 *U. Pa. L. Rev.* 1097 (2017). In this work, Professor Pozen notes that FOIA is designed to be reactive, which inhibits “participatory policymaking.” *Id.* at 1097, 1148.

3. The Implausibility of Congressional Funding Increases

The most natural response to information asymmetry between the President and Congress may simply be to increase congressional staffing, whether through member and committee staff or through the budgets of the legislative research agencies. This would likely solve much of the problems raised by the current environment and would do so in a manner that preserves the existing structure of agency independence. The reasons for discounting this approach are not its merits, but its implausibility. Concerns about the size of congressional staff are not new, nor is the need for more resources at GAO and CRS. Nonetheless, the necessary appropriation to rectify these issues has not been forthcoming.

The explanation is not surprising. Faced with scarce resources, an increasing national debt, and a variety of stakeholders to satisfy, it is unlikely that appropriators on the Legislative Branch subcommittee will find themselves with extra money in their committee allocations.³⁰² An increase in congressional staffing serves no immediate interest group or stakeholder. To the extent it increases government employment, it does so in a manner no more effective than funding other agencies that do provide a more direct and tangible benefit. It does not take a sophisticated understanding of politics to see why increased funding is unlikely, especially with longtime fans of the congressional research agencies no longer at the helm.³⁰³ This helps to explain why many of the current advocates for increased congressional capacity have looked beyond staff size, proposing changes to increase current employee satisfaction or the use of detailees.³⁰⁴

B. The Tradeoffs of Controlling Agency Expertise

Given the dearth of alternative means to correct Congress's information deficiency, additional efforts to require expert and impartial

³⁰² The amount given to each appropriations subcommittee, which includes the Legislative Branch Subcommittee, is known as a 302(b) allocation, which stems from the provisions of the Congressional Budget Act.

³⁰³ Senator Tom Coburn of Oklahoma retired from the Senate in January of 2015. Senator Coburn was a longtime proponent of cutting waste in the executive branch and a strong supporter of increased funding for legislative agencies. See Ed O'Keefe, Coburn Report Pans GAO Budget Cuts, Wash. Post (Nov. 17, 2011), https://www.washingtonpost.com/politics/coburn-report-pans-gao-budget-cuts/2011/11/17/gIQA3JHfVN_story.html?utm_term=.aba49b0f7bf0 [<http://perma.cc/6V2N-MHWA>].

³⁰⁴ See *supra* note 12 and accompanying text.

information from the agencies are worth considering. Not only are these provisions budget-neutral and prospective, correcting for many of the problems of other reforms; they also have a number of other benefits. First, they can be enforced directly by Congress. Second, they may help address other problems, such as the decline of committee responsibility in Congress or the interests of private persons in the FOIA regime. This approach would not be costless, however. A greater use of independent reporting would limit the quality of the expertise shared with Congress and could alter existing incentives in structuring the administrative state.

1. Enforceability in the Courts

Justiciability might seem like an odd place to start in a discussion of the separation of powers. The ability of legal constraints to work effectively between the branches is a subject of some debate, and recently scholars have suggested that the law is basically irrelevant in checking presidential control.³⁰⁵ Such a view, however, rests on the assumption that politics and law are entirely distinct. To the contrary, the two are related, such that the law is “the most potent weapon” to enforce “executive restraint.”³⁰⁶ Apart from the political weight of “lawfulness,” however, some interbranch disputes can be resolved through litigation. Congressional subpoenas, discussed below, are one such example. The impoundment controversy is another. While Congress did not directly bring claims to force President Nixon to spend money, other litigants did. The result was that an interbranch dispute over spending was heard in the courts, and the President lost.³⁰⁷ As such, the restrictions in the Congressional Budget Act have renewed force; the President must act with the knowledge that

³⁰⁵ See generally Posner & Vermeule, *supra* note 9, at 4 (arguing that “in the modern administrative state the executive governs, subject to legal constraints that are shaky in normal times and weak or nonexistent in times of crisis”).

³⁰⁶ Benjamin Kleinerman, “The Executive Unbound: After the Madisonian Republic” by Eric A. Posner and Adrian Vermeule, *Lawfare: Book Reviews* (July 9, 2011, 12:24 PM), <https://www.lawfareblog.com/executive-unbound-after-madisonian-republic-eric-posner-and-adrian-vermeule> [http://perma.cc/PU7A-A45Z]. See also Chafetz, *supra* note 57, at 36–37 (rejecting the distinction between legal and political constraints on the executive).

³⁰⁷ See *Train v. City of New York*, 420 U.S. 35, 35, 47–48 (1975). A few decades later, another budget process statute, the Line Item Veto Act, was litigated in federal court. The President once again lost. *Clinton v. New York*, 524 U.S. 417, 417–418 (1998). As both experiences demonstrate, the justiciability of an interbranch dispute can greatly alter the power balance between the branches, apart from any purely political tools at each branch’s disposal.

deviations from the statute will not only lead to political opprobrium, but litigation.³⁰⁸

Independent-reporting laws have the same feature, allowing for both political and legal discipline. Unlike impoundment, however, there are good reasons to think that, under current doctrine, independent-reporting provisions can also be enforced by Congress directly. Much of separation-of-powers case law emerged as the result of private challenges,³⁰⁹ such as regulated entities or government employees and their beneficiaries.³¹⁰ This is because, even if Congress had wanted to enforce a for-cause removal provision or a statutory qualification, these claims would likely be barred in court. For provisions such as these, which vest independence in some third party, typically an agency official, the barrier to congressional claims is two-fold: first, the duty to enforce these provisions does not run to Congress; second, members of Congress would have difficulty establishing standing to sue.³¹¹

Although untested,³¹² both of these barriers should be inapplicable to independent-reporting provisions, which are structured to make Congress the beneficiary of executive information. Typically, legislative lawsuits based on failure to enforce the law are problematic, because Congress attempts to argue for enforcement of the law as applied to someone else. Since the duty to enforce the law does not run to Congress, legislators lack a cause of action, just like a failed tort claim for which there is no duty owed to the plaintiff. In the independent-reporting context, a member of Congress—say the Chair of Senate Appropriations—is promised a report

³⁰⁸ See generally Chafetz, *supra* note 57, at 64–66 (listing *Train*, 420 U.S. 35 (1975), as one example of litigation successfully restricting presidential impoundments through statute).

³⁰⁹ See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 487 (2010).

³¹⁰ See, e.g., *Humphrey's Ex'r v. United States*, 295 U.S. 602, 618 (1935).

³¹¹ While often conflated under the rubric of “legislative standing,” these are actually two discrete concerns. Professor Harrison clarifies this point, Harrison *supra* note 291, at 103 (2015) (“Although the federal courts have generally assessed the constitutionality of lawsuits by legislators as such under the Supreme Court’s Article III standing doctrine, the genuinely important question involves causes of action, not the authority of the federal judiciary.”). Professor Harrison’s article also uses a private-law tort analogy to develop the point. *Id.* at 106. This position accepts that a duty can run to the legislature when the issue is the “official acts that affect the validity of legislative enactments.” *Id.* at 110 (discussing *Coleman v. Miller*, 307 U.S. 433 (1939), which is frequently discussed in the context of legislative standing).

³¹² See Constitutionality of the Direct Reporting Requirement in Section 802(e)(1) of the Implementing Recommendations of the 9/11 Comm’n Act of 2007, *supra* note 152, at 36 (arguing that direct reporting has not been litigated “presumably for justiciability reasons”).

that is never delivered (at least in the form the statute requires). In this context, the chairman would not be suing as a member of Congress concerned with enforcement as to another, but simply as a person given a statutory right, for which the corresponding duty in the executive was violated.

Likewise, the structures of these statutes bring the issue outside the usual debates regarding legislative standing. Typically, legislative standing is assessed as an alternative to individual standing on behalf of the legislator; when it is found, it is an expansion of that person's standing to sue that resulted from their status as a legislator. For example, six members of the 104th Congress sued the director of OMB to challenge the constitutionality of the Line Item Veto Act.³¹³ Even though the statute expressly contemplated this challenge, the Court rejected the challenge for failure to plead standing by the individual members.³¹⁴ This conclusion rested on the basis that the legislators did not have a "personal stake" in the dispute and were instead suing simply to enforce the law.³¹⁵ The doctrines of legislative standing are not, however, a limitation on standing that exists otherwise. It is clear that someone who is entitled to receive government information, even under a statute that does not name her specifically as a recipient, has standing to sue for the information.³¹⁶ There is no reason that courts should disregard this baseline principle for members of Congress. If a statute were to say that "the agency shall provide a report to John Smith, owner of the local car dealership," Smith would have standing to sue. There is no principled reason for a different outcome when it states that "the agency shall provide a report to the Chair of Senate Appropriations," who happens to be John Smith. The longstanding practice of allowing claims to enforce congressional subpoenas illustrates this point.³¹⁷ One recent example is *Committee on Oversight and Government*

³¹³ See *Raines v. Byrd*, 521 U.S. 811, 814 (1997).

³¹⁴ *Id.* at 829–30.

³¹⁵ *Id.* at 830.

³¹⁶ See *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998) ("The 'injury in fact' that respondents have suffered consists of their inability to obtain information."). The Court in *Akins* distinguished the case, which involved a statutory disclosure requirement, from other cases where individuals had sought access to government information on the basis of a constitutional provision. *Id.* at 21–22 (discussing *United States v. Richardson*, 418 U.S. 166 (1974), which involved a claim under the Accounts Clause).

³¹⁷ See, e.g., *United States v. AT&T*, 551 F.2d 384, 391 (D.C. Cir. 1976) ("It is clear that the House as a whole has standing to assert its investigatory power, and can designate a member to act on its behalf."). See generally Rosenberg, *supra* note 4, at 13–32 (discussing the

Reform v. Holder, where the Court distinguished cases that restrict legislative standing from those where Congress seeks information to which it is legally entitled.³¹⁸ While other claims failed, because the individual members did not allege particularized injury, those concerns are not present in the independent-reporting context. To the contrary, “[i]t is well established that a legislative body suffers a redressable injury when that body cannot receive information necessary to carry out its constitutional responsibilities.”³¹⁹ This does not suggest that the legislators bringing these suits would prevail, only that the traditional bars to Congress appearing in the courtroom would not apply.

2. *Practical Benefits*

Even if independent reporting is both constitutional and enforceable, it might be objectionable on the grounds that it simply will not alter executive behavior. After all, an independent officer, protected from removal at will, may share information with Congress willingly, while a removable counterpart may not, regardless of the statutory structure governing his relationship with Congress. Moreover, the mechanism may not be a functional limit on presidential policy control, particularly in the budget process, where the coordination of OMB exerts considerable influence.

This seems to be the conclusion of Professor Eloise Pasachoff’s recent and insightful work on OMB, where she notes that while “bypass” provisions may “somewhat weaken[] the force” of presidential control, they do not stop the President from exerting considerable control over the budget process.³²⁰ Given the focus of her work—control over agency policy—this conclusion is likely correct, at least in the context of a single budget cycle. This conclusion, however, addresses the effect of these provisions as they currently exist. As Part II demonstrated, the present use of this tool is limited and sporadic. More importantly, Congress has not decided

ability of both the House and the Senate to enforce subpoenas through civil action). In fact, Congress’s subpoena powers are so broad that many of the concerns with the process stem from the ability of Congress to infringe on the rights of individuals caught up in these investigations. See Christopher F. Corr & Gregory J. Spak, *The Congressional Subpoena: Power, Limitations and Witness Protection*, 6 *BYU J. Pub. L.* 37, 37–38 (1992).

³¹⁸ 979 F. Supp. 2d 1, 20 (D.D.C. 2013).

³¹⁹ *Id.* (quoting *U.S. House of Representatives v. U.S. Dep’t of Commerce*, 11 F. Supp. 2d 76, 86 (D.D.C. 1998) (alterations omitted)).

³²⁰ Pasachoff, *supra* note 37, at 2222.

to import independent reporting as the default for either the budget or legislative testimony process, despite calls for such action. Moreover, when independent-reporting provisions operate alongside other indicia of independence, they can function to preserve a culture of independence within the agency and shield the agency from external influence. According to an Administrative Conference of the United States study, independent reporting of budget requests is a common feature of the most “durable” federal agencies because “[t]here are . . . fewer opportunities to eliminate these agencies since they often bypass OMB . . . review.”³²¹ While not directly related to the congressional information environment, the expanded use of these provisions may help to further entrench agencies from structural changes initiated at the behest of the President or OMB.

Apart from altering agency independence or ultimate policy outcomes, an expanded use of independent reporting can also help revamp the congressional information environment. First, there will be times when the independent analysis contrasts with other executive branch views. In these situations, Congress will be able to identify points of disagreement without internal analysis. Second, there will be times when independent reporting leads to information sharing that would not otherwise take place. As explored in Part I, the current Congress is often frustrated by its inability to access executive branch analysis, resorting to *ex post* requests through committees. These requests are frequently ignored or denied. Independent-reporting laws alter this scenario in two important ways. First, they prospectively identify analysis that is of use to Congress, creating an obligation to share information without need for an after-the-fact investigation. Second, this obligation is statutory and, for reasons set forth above, enforceable in court.

Finally, independent-reporting provisions also provide ancillary benefits to the operations of Congress, because they have the potential to empower both committees and minority party members. Congress is in the midst of a long-term shift in control away from the committees and toward political leadership. In fact, the Trump Administration recently announced a policy of not responding to *ad hoc* requests for information from minority members of Congress at all, limiting the traditional role of

³²¹ Lewis & Selin, *supra* note 66, at 96–97.

ranking members.³²² Rather than information moving through the party leadership, often exclusively the leadership of the majority party alone, independent-reporting provisions can be structured to provide information directly to both committee chairs and ranking members. If the current environment on Capitol Hill is one where minority members and committees get short shrift, then statutes saying otherwise may be a good place to start.

3. *Practical Costs*

Increased independence comes with decreased collaboration. If agencies must share information prior to interagency review, then the benefits of that exchange are not captured in the product given to Congress. These exchanges can often be highly productive, facilitating conflict and cooperation between actors with varied institutional interests.³²³ When officials have to defend views in an interagency process, they are required to provide more support and are more accountable for their position. The cost of losing this collaboration may not be problematic when Congress regulates a highly specialized report, say on national nursing programs prepared by HHS.³²⁴ The practice could be problematic for issues that cut across agency expertise. For instance, both the FTC and CFPB have a consumer-protection role. A report on the harms caused by predatory lending may be incomplete without both voices. This would only be magnified when the issue implicates many governmental functions, such as climate change.

In considering this objection, however, it is important to understand the structure of these laws. An independent-reporting provision does not prevent a different view being expressed by the White House; in fact, these

³²² Burgess Everett & Josh Dawsey, *White House Orders Agencies to Ignore Democrats' Oversight Requests*, Politico (June 2, 2017, 5:11 AM), <https://www.politico.com/story/2017/06/02/federal-agencies-oversight-requests-democrats-white-house-239034> [<http://perma.cc/KZJ9-WBUY>].

³²³ See Deeks, *supra* note 3, at 776. See also Cass R. Sunstein, *Deliberative Democracy in the Trenches*, 146 *Daedalus* 129, 129–32 (2017) (observing that “a great deal of information is likely to be exchanged” between agencies with different concerns and viewpoints); Sunstein, *supra* note 5, at 1619–20.

³²⁴ 42 U.S.C. § 296 note (2012) (Information Respecting Supply and Distribution of and Requirements for Nurses; Determination Procedures; Surveys and Collection of Dates; Annual Report to Congress on Determinations, Etc.; Review by Office of Management and Budget of Report Prior to Submission).

provisions often require it, like in the budget process. Moreover, there is no reason a provision could not be structured to allow interagency review while still preventing OMB or White House review. If Congress is particularly concerned with these costs, it can develop schemes to minimize them. Once again, regulatory review provides a useful example, where joint rulemakings between multiple agencies are common, even when OIRA is prevented from reviewing the product.³²⁵

A second cost of this approach is the incentives it may create. Knowing such a provision is in place might affect personnel selection by the President. If the President is aware that a valid operational restraint is in place on a government post, she might seek out a person with ideological agreement to manage that post, limiting the risk of divergent views. To the extent that selections on the basis of ideological agreement are problematic, for instance if they come at the expense of expertise, this may be a cost to their expanded use. After all, independent reporting is more useful to Congress when the White House (or another potential reviewer) disagrees with the initial product. When it comes to comparing two products, these provisions offer no benefit against a completely unified executive. Of course, if the provision leads to information sharing that would otherwise not occur, it can still have value in this situation.

Finally, there is some risk that independent-reporting provisions could limit the capacity of the executive branch to develop expertise in the first place, at least in those situations where Congress's desire to obtain independent views causes tension between agency experts and agency policymakers. The development of expertise within the executive requires that the ultimate policymaker trust the source of the information.³²⁶ This partly explains why Congress is willing to cede capacity to the executive: doing so leads to informed decisions.³²⁷ If independent reporting creates space between experts and policymakers, the incentive to develop this expertise declines and decisions become less informed. In situations where the information is sought directly from a decisionmaker, such as an independent agency, this is not a problem. If it is sought from an expert underneath a decisionmaker, however, it should be considered. For example, if independent reporting were used to obtain the report of the Medicare Actuary

³²⁵ See, e.g., 2016 Draft Regulation Cost-Benefit Report, *supra* note 207, at 83, n.142 (including, in a list of independent agency regulations, three joint rulemakings between the SEC and CFTC).

³²⁶ Gailmard & Patty, *supra* note 8, at 137–40.

³²⁷ *Id.* at 138.

during the Part D debate, there would have been a risk that the expertise provided by the Actuary would decrease for future policy, because the trust between the executive branch agent (the Actuary) and their principle may be diminished. Fully understanding this dynamic would involve empirical work beyond the scope of this project. It is worth noting this feature, however, because it suggests that an expanded use of independent reporting, which makes agency information not solely presidential information, could alter how independent analysis is viewed by executive branch officials.

C. Potential Applications

As this Part has sought to demonstrate, independent-reporting provisions can serve as a useful tool for Congress, leveraging executive branch expertise to improve its posture *vis-à-vis* the White House. These laws also can do so in a way that allows for the continued growth of the executive branch and is less limiting on the President than other methods of ensuring agency independence. If this is true, it is worth briefly considering some ways in which this tool can be put to use. One straightforward and minor application might be the expansion of existing practices. For instance, when Congress authorizes new reports from cabinet agencies or establishes new agencies, it might be wise to consider whether the agency should be required to provide the information to both Congress and OMB or political leadership concurrently. Congress may also wish to require that certain specific forms of information be shared independently. As an illustration, there are currently controversies swirling over many executive agencies, such as staffing vacancies at the State Department or suppressed science at the EPA. It is easy to imagine a statutory provision that could have prevented each of these controversies by providing Congress with adequate information *ex ante*.

Bolder and further-reaching changes are also possible. Whether the issue is budget preparation, legislative testimony, or program assessments, independent reporting is currently the exception, not the rule. This does not need to be so. As Senator Muskie's proposal during the budget debates of the 1970s illustrates, independent reporting may be the appropriate subject of a general management law. In many areas, such as use of external advisors, disclosure of government records, procurement, or financial management, Congress has chosen to create new agency defaults that set

the terms of legal obligations of agencies writ large.³²⁸ This would work a dramatic change on the operations of the government, reorienting the agencies toward Congress and limiting presidential control. This shift, however, is not novel. The Inspector General Act of 1978, for instance, greatly changed the orientation of executive departments *vis-à-vis* the Congress.

Finally, independent reporting may have a role to play in other initiatives that shift responsibilities from the legislature to the executive. For instance, if Congress decided to push budget scoring to agencies, ensuring the independence of the estimates may be an effective compliment. Similar provisions could be included in statutes that displace functions of other legislative branch agencies as well, such as GAO program evaluations. Under this approach, the decline of congressional staffing, both as a raw number and relative to executive branch growth, might not need to exacerbate the information disparity between the President and Congress.

V. CONCLUSION

The modern Congress faces what could seem an impossible challenge. With diminishing internal resources, Congress is asked to legislate over an ever-expanding array of federal issues, about which agencies of the government produce an overwhelming amount of data. As Congress competes with the President to implement its policy preferences, this asymmetry threatens to undermine the balance of power. This prediction, however, rests on a faulty premise: agency information is solely the President's information. As direct-reporting requirements demonstrate, that need not be so. While Congress has only chosen to require independent information sharing in limited contexts, this structure could easily be duplicated and expanded. While this course of action may be subject to certain public-policy objections or qualifications, there is good reason to think it is both constitutional and enforceable.

In a broader sense, a commitment to expanding this mechanism may encourage the greater use and study of operational independence controls. If constitutional doctrine is shifting in the direction of greater personnel control for the President, reasonable limits on the review and control

³²⁸ See generally Clinton T. Brass, Cong. Research Serv., RL30795, *General Management Laws: A Compendium* (2004) (listing and describing the Federal Advisory Committee Act, the Freedom of Information Act, the Federal Acquisition Streamlining Act, and the Antideficiency Act, among many others).

exercised over those employees during their tenure may present a desirable means of maintaining balance over a large and complex federal government. Moreover, targeted operational provisions are an effective way of balancing Congress's policy preferences with the President's need to carry out executive functions. This Note has suggested that such a change is desirable in one context that is often overlooked, but with additional study there may be many others. This effort should, at a minimum, reinforce that our legislature has a role to play in public administration—a role it can only play if it is properly informed.

APPENDIX

This Appendix collects independent-reporting provisions in federal law. For purposes of this Note, a provision was included if and only if it met the following criteria: (1) it required that agency information be communicated to Congress without prior approval by the President or other executive branch entity that provides for coordination consistent with presidential policy, and (2) it identified specific information that was not subject to clearance. As a result, this list does not include any agencies that assert an “implied” bypass authority, although OMB complies with these practices in some circumstances. Moreover, this list does not include any whistleblower-style protections, in which the law works retroactively to shield an employee from retaliation. Finally, this list does not include any reference to the congressional subpoena power.

These provisions were identified through the use of OMB internal documents, which were made public through a FOIA request made by the nonprofit organization Public Citizen.³²⁹ The OMB list, however, is only focused on “bypass provisions,” and therefore does not include more specific provisions, such as those for individual reports or recurring specific acts (like the Department of Defense's unfunded priorities list). The OMB list was therefore supplemented with lists contained in other secondary sources,³³⁰ as well as searches of Westlaw for provisions using similar language to those contained in the OMB memorandum.

For each provision reported below, the table also includes the (1) statutory citation, (2) applicable agency or entity, (3) classification of that

³²⁹ Jukes Memorandum, *supra* note 2, at 7–8. This webpage includes older versions of the report as well, which have been cross-checked to capture any agencies that may have been removed from the list.

³³⁰ See *supra* note 153 and accompanying text.

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entity in the Government Organization Manual, (4) type of information covered (see typology in Subsection II.C.3), and (5) legislation that created the requirement.

Table 1

Provision	Agency or Entity	Classification	Independent Reporting Subject	Statute
10 U.S.C. § 222a	Department of Defense	Executive Department	Budget/Report	2016 (Pub. L. No. 114-328)
15 U.S.C. § 78ee(m)(1)	Securities and Exchange Commission	Independent Agency	Budget	2010 (Pub. L. No. 111-203) Dodd–Frank
19 U.S.C. § 2232	International Trade Commission	Independent Agency (separate list)	Budget	1975 (Pub. L. No. 93-618)
22 U.S.C. § 4608	United States Institute for Peace	Quasi-Official	Budget	1984 (Pub. L. No. 98-525)
25 U.S.C. § 4043(c)(5)	Special Trustee for American Indians	Executive Department (Interior)	Budget	1994 (Pub. L. No. 103-412)
31 U.S.C. § 1105(b)	Judicial and Legislative Branches (including agencies arguably executive, GAO, LOC, AOUSC)	Other Branch	Budget	1982 (Pub. L. No. 97-258)
38 U.S.C. § 7282	Court of Appeals for Veterans Claims	Unlisted	Budget	1988 (Pub. L. No. 100-687)

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39 U.S.C. § 2009	US Postal Service	Independent Agency	Budget	1974 (Pub. L. No. 93-328)
39 U.S.C. § 2009	Postal Regulatory Commission	Independent Agency	Budget	2006 (Pub. L. No. 109-435)
42 U.S.C. § 10704(c)	State Justice Institute	Quasi-Official	Budget	1984 (Pub. L. No. 98-620)
42 U.S.C. § 2996d(e)	Legal Services Corporation	Quasi-Official	Budget	1974 (Pub. L. No. 93-355)
45 U.S.C. § 712(f)*	United States Railway Association (defunct)	n/a (defunct)	Budget	1974 (Pub. L. No. 93-236)
5 U.S.C. § App. 3 Sec. 6	Inspectors General	n/a	Budget	1978 (Pub. L. No. 95-452)
15 U.S.C. § 2076(k)	Consumer Product Safety Commission	Independent Agency	Budget & Legislative	1972 (Pub. L. No. 92-573)
16 U.S.C. § 470r*	Advisory Council on Historic Preservation (repealed)	Boards, Commissions, and Committees	Budget & Legislative	1976 (Pub. L. No. 94-422) Repealed in 2014 (Pub. L. No. 113-287)
42 U.S.C. § 7412(r)(6)(R)	Chemical Safety and Hazard Investigation Board	Boards, Commissions, and Committees	Budget & Legislative	1990 (Pub. L. No. 101-549)

45 U.S.C. § 231(f)	Railroad Retirement Board	Independent Agency	Budget & Legislative	1983 (Pub. L. No. 98-76)
49 U.S.C. § 1303(d)	Surface Transportation Board	Independent Agency	Budget & Legislative	1995 (Pub. L. No. 104-88)
49 U.S.C. § 48109	Federal Aviation Administration	Executive Department (Trans.)	Budget & Legislative	1994 (Pub. L. No. 103-272)
49 U.S.C. § App. 1113(c)	National Transportation Safety Board	Independent Agency	Budget & Legislative	1994 (Pub. L. No. 103-272)
5 U.S.C. § 1205(j)	Merit Systems Protection Board	Independent Agency	Budget & Legislative	1978 (Pub. L. No. 95-454)
5 U.S.C. § 8472	Federal Retirement Thrift Investment Board	Independent Agency	Budget & Legislative	1986 (Pub. L. No. 99-509)
52 U.S.C. § 30107(d)	Federal Election Commission	Independent Agency	Budget & Legislative	1974 (Pub. L. No. 93-443)
7 U.S.C. § 2(a)(10)	Commodity Futures Trading Commission	Independent Agency	Budget & Legislative	1974 (Pub. L. No. 93-463)
10 U.S.C. § 151(f)	Department of Defense	Executive Department	Legislative	1986 (Pub. L. No. 99-433)
12 U.S.C. § 2252(a)(3)	Farm Credit Administration	Independent Agency	Legislative	1971 (Pub. L. No. 92-181)

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12 U.S.C. § 250	Federal Deposit Insurance Corporation	Independent Agency	Legislative	1974 (Pub. L. No. 93-495)
12 U.S.C. § 250	Federal Housing Finance Board	Independent Agency	Legislative	1974 (Pub. L. No. 93-495)
12 U.S.C. § 250	Federal Reserve Board of Governors	Independent Agency	Legislative	1974 (Pub. L. No. 93-495)
12 U.S.C. § 250	National Credit Union Administration	Independent Agency	Legislative	1974 (Pub. L. No. 93-495)
12 U.S.C. § 250	Office of the Comptroller of the Currency	Executive Department (Treasury)	Legislative	1974 (Pub. L. No. 93-495)
12 U.S.C. § 250*	Office of Thrift Supervision (defunct)	Executive Department (Treasury)	Legislative	1974 (Pub. L. No. 93-495)
12 U.S.C. § 250	Securities and Exchange Commission	Independent Agency	Legislative	1974 (Pub. L. No. 93-495)
12 U.S.C. § 5492(c)(4)	Consumer Financial Protection Bureau	Independent Agency	Legislative	2010 (Pub. L. No. 111-203)
12 U.S.C. § 4511,* 106 Stat. 3672 (repealed)	Office of Federal Housing Enterprise Oversight	Independent Agency	Legislative	1992 (Pub. L. No. 102-550, § 1313(e))
15 U.S.C. § 634f	Small Business Administration	Independent Agency	Legislative	1976 (Pub. L. No. 94-305)

42 U.S.C. § 7171(j)	Federal Energy Regulatory Commission	Executive Department (Energy)	Legislative	1977 (Pub. L. No. 95-91)
42 U.S.C. § 8820(c)	Office of Alcohol Fuels (possibly defunct)	n/a (defunct) (was Department of Energy)	Legislative	1980 (Pub. L. No. 96-294)
47 U.S.C. § 154(k)	Federal Communications Commission	Independent Agency	Legislative	1952 (Pub. L. No. 554)
5 U.S.C. § 1217	Office of Special Counsel	n/a	Legislative	1989 (Pub. L. No. 101-12)
6 U.S.C. § 142	Department of Homeland Security	Executive Department	Report	2007 (Pub. L. No. 110-53)
12 U.S.C. § 4602(d)(2)	Federal National Mortgage Assoc. (Fannie Mae)	Independent Agency (FHFA)	Report	1992 (Pub. L. No. 102-550)
20 U.S.C. § 3808(b),* 97 Stat. 1419 (repealed)	Department of Education	Executive Department	Report	1983 (Pub. L. No. 98-211)
26 U.S.C. § 7803(c)(2)(B)(iii)	Office of the National Taxpayer Advocate	Executive Department (Treasury)	Report	1996 (Pub. L. No. 104-168)
42 U.S.C. § 296 note	Health and Human Services	Executive Department	Report	1975 (Pub. L. No. 94-63)
50 U.S.C. § 1701 note	General Services Administration	Independent Agency	Report	2007 (Pub. L. No. 110-174)

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12 U.S.C. § 4602(d)(2)	Federal Home Loan Mortgage Corp. (Freddie Mac)	Independent Agency (FHFA)	Report	1992 (Pub. L. No. 102-550)
15 U.S.C. § 3721(m)(3)	Independent auditor	Executive Department (Commerce)	Report	2011 (Pub. L. No. 111-358)

* Agency has been eliminated or independent-reporting provision has been repealed.