Essay

Self-Funding and Agency Independence

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Abstract

Self-funded agencies are a rarity in administrative law. Their freedom from both congressional budgetary approval and the congressional appropriations process, however, gives self-funded agencies a unique degree of political independence. Working from the premise that self-funded agencies are free from any meaningful congressional control, this Essay examines whether and how self-funded agencies are also removed from direct Executive oversight. The answer is not simple; just as there is no off-the-shelf design for an administrative agency, so too does every self-funded agency have a unique structure. Nevertheless, this Essay finds that, as a group, self-funded agencies are independent of direct Executive control in a number of important ways, leading to the conclusion that self-funded agencies are likely the most structurally—if not necessarily politically—independent agencies in the federal government

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INTRODUCTION

Administrative law is rarely a headline-grabbing topic. It was therefore somewhat surprising when, in the early days of post–Great Recession financial reform, Senators Chris Dodd and Mitch McConnell managed to make headline news out of agency structure.[1] The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank")[2] created the Consumer Financial Protection Bureau ("CFPB" or "Bureau"), a nominally independent agency tasked with regulating a variety of consumer financial products and services.[3] The political fight over the CFPB's structure was largely focused on the Bureau's for-cause-protected, single-member head, which Congress combined with the Bureau's exclusion from the congressional appropriations process.[4] Although for-cause removal protection has long

1 *See* John H. Cushman, Jr., *Senate Stops Consumer Nominee*, N.Y. TIMES, Dec. 9, 2011, at B1 (describing Senator McConnell's objection to the CFPB's single-member head and self-funded structure); Robert G. Kaiser, *How a Crusade to Protect Consumers Lost Its Steam*, WASH. POST, Jan. 31, 2010, at G1 (noting that Senator Dodd "want[ed] consumer protection to have a dedicated source of funding to better insulate it from budget pressures").

2 Dodd-Frank Wall Street Reform and Consumer Protection ("Dodd-Frank") Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 12 and 15 U.S.C.).

3 *See* 12 U.S.C. § 5491(a) (2012).

4 The CFPB's funding comes from "the combined earnings of the Federal Reserve Sys-

been the subject of debate,[5] what was remarkable about the CFPB fight is that it brought to the forefront the subject of agency self-funding,[6] a topic previously relegated to passing scholarly references rather than front-page news.[7]

Self-funding's prior insignificance in administrative law scholarship is, in one sense, not surprising. Until the CFPB, and with the longstanding exception of the Federal Reserve Board of Governors (of which the CFPB is technically a component), Congress has utilized self-funding in only a limited number of "narrowly-focused" independent agencies such as the Federal Deposit Insurance Corporation ("FDIC"), National Credit Union Administration ("NCUA"), Farm Credit Administration ("FCA"), Federal Housing Finance Agency ("FHFA"), Public Company Accounting Oversight Board

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tem" in an "amount determined by the [CFPB's] Director to be reasonably necessary to carry out the authorities of the Bureau," but in an amount that is capped at twelve percent of the Fed's operating expenses. *Id.* § 5497(a)(1)–(2). The CFPB's funding is expressly exempt from review by the House and Senate Appropriations Committees. *Id.* § 5497(a)(2)(C). Likewise, although the CFPB is required to provide the Director of the Office of Management and Budget ("OMB") with a copy of the Bureau's financial operating plans, the CFPB is under no "obligation . . . to consult with or obtain the [OMB's] consent or approval" of the Bureau's budget. *Id.* § 5497(a)(4)(E). Finally, if, in the CFPB Director's determination, the Bureau's funding from the Fed would not be enough to fulfill the Bureau's functions in the coming year, Congress has pre-authorized the Bureau to collect $200,000,000 upon the Director's submission to the President and Congress of a statement that a funding shortage exists. *Id.* § 5497(e)(1)–(2).

5 Modern removal controversies go back to at least *Myers v. United States*, 272 U.S. 52 (1926). Questions over the President's authority to remove agency heads, however, are as old as the Republic. *See* Patricia L. Bellia, *PCAOB and the Persistence of the Removal Puzzle*, 80 GEO. WASH. L. REV. 1371, 1377–99 (2012) (tracing debates over the President's removal power from 1789 to the present day).

6 Congress has empowered a number of agencies to collect fees and fines that the agencies then use to fund their operations. For instance, Congress has authorized the Federal Communications Commission ("FCC") to "assess and collect regulatory fees to recover the costs" of the FCC's enforcement and rulemaking activities. 47 U.S.C. § 159(a)(1) (2006). That authority, however, is then tempered by the requirement that the FCC collect fees "if, and only in the total amounts, required in Appropriations Acts." *Id.* § 159(a)(2). In other words, although the FCC is self-funded in the sense that it funds its operations from the fees it collects, the FCC may only collect and use fees in an amount authorized by Congress. In contrast, the Fed is simply authorized to "levy semiannually upon the Federal reserve banks . . . an assessment sufficient to pay its estimated expenses and the salaries of its members and employees." 12 U.S.C. § 243 (2012). This Essay uses the term "self-funded" in the latter sense—that is, to describe an agency whose funding source is not only independent of Congress, but whose authority to *use* those funds is not conditioned on congressional budgetary approval.

7 *See, e.g.*, Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 611 (2010) (listing self-funding as one indicator of independence); Steven A. Ramirez, *Depoliticizing Financial Regulation*, 41 WM. & MARY L. REV. 503, 517 (2000) (noting that "it is surprising that most proposals for regulatory reform have not focused on" the source of an agency's funding).

("PCAOB"),[8] and a handful of others.[9] In another sense, however, the lack of scholarly attention to self-funding is surprising, because self-funding, unlike any other single structural feature of agency independence, effectively severs an agency from an entire branch of government. Thus, when Congress combines self-funding with other traditional indicia of agency independence—typically, structural features that insulate an agency from executive control—Congress creates what are likely the most structurally independent agencies in the federal government.

The creation of the self-funded CFPB, which contains some traditional features of executive independence,[10] has renewed the importance of self-funding as a topic of study. The Bureau's architects chose to remove the CFPB from the traditional appropriations process because they believed that self-funding would be "absolutely essential" to the CFPB's independence.[11] Stated more bluntly, the CFPB's congressional framers chose to give up their own power over the CFPB's funding in order to lessen the chance that future Congresses, controlled by another party, might, through the appropriations process, weaken the agency.[12]

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8 Congress has attempted to further insulate some self-funded agencies, such as the PCAOB, by establishing them as non-profit corporations rather than as entities within the federal government. *See, e.g.*, 15 U.S.C. § 7211(b) (2006) ("[The Board] shall not be an agency or establishment of the United States Government . . . . No member or person employed by, or agent for, the [PCAOB] shall be deemed to be an officer or employee of or agent for the Federal Government by reason of such service."). Nonetheless, this Essay assumes that such entities are government agencies. *See* Donna M. Nagy, *Playing Peekaboo with Constitutional Law: The PCAOB and Its Public/Private Status*, 80 NOTRE DAME L. REV. 975, 982 (2005) (concluding that Supreme Court precedent requires that "the PCAOB must be considered a public entity—the 'government itself'—for purposes of constitutional law"); *see also* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3147–48 (2010) (treating the PCAOB as a federal agency for purposes of the Constitution's Appointments Clause).

9 *See* Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 HARV. L. REV. 1822, 1823 n.12 (2012) [hereinafter *Independence, Congressional Weakness, and the Importance of Appointment*].

10 The CFPB's structure gives the Bureau independence from direct Executive oversight in at least three ways: (1) the Bureau is headed by a for-cause protected director; (2) it has independent litigation authority; and (3) it is permitted to officially communicate with Congress without first obtaining approval from the Office of Management and Budget ("OMB"). *See infra* Part II.B; Appendix.

11 S. REP. NO. 111-176, at 163 (2010). Indeed, the Senate Committee on Banking, Housing, and Urban Affairs drew from the example of another post-Great Recession self-funded agency—the FHFA—whose self-funding was intended to remedy the problems of its predecessor agencies, "which [were] subject to repeated Congressional pressure because [they were] forced to go through the annual appropriations process." *Id.*

12 As a recent note published in the *Harvard Law Review* illustrates, the almost strictly

The self-funding issue newly revived by the CFPB likely is not confined, however, to the discrete realm of banking regulation. For instance, the Securities and Exchange Commission ("SEC") has regularly sought the authority to fund its own operations and control its own budget.[13] If the CFPB proves successful, and if future Congresses are similarly inclined to entrench their policy preferences into administrative agencies, self-funding will continue to be an important consideration in the design of new agencies—indeed, self-funding is perhaps the ultimate weapon of legislative entrenchment and, given our increasingly polarized politics, worthy of further study.[14]

This Essay attempts to advance that discussion. The literature on agency self-funding is relatively minimal,[15] meaning that a thorough discussion of self-funding would require empirical research that is be-

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party-line voting on the Dodd-Frank Act "show[s] the reasonableness of the Democratic majority's belief that a future Republican-controlled Congress would weaken or dismantle the CFPB." *Independence, Congressional Weakness, and the Importance of Appointment*, *supra* note 9, at 1841.

[13] *See* Luis A. Aguilar, *Creating Reform That Is Sustainable for Investors*, 10 J. INT'L BUS. & L. 115, 121–22 (2011) (proposing, as part of financial regulatory reform, that the SEC be allowed to self-fund its operations so that the Commission's resources can better match its needs); Joel Seligman, *Self-Funding for the Securities and Exchange Commission*, 28 NOVA L. REV. 233, 259 (2004) ("Self-funding would reduce the risk of misalignment between the SEC's staff size and statutory functions."); Ronald D. Orol, *Five SEC Chairmen and Schumer Push for Self-funded SEC*, WALL ST. J. MARKETWATCH (Apr. 15, 2010, 3:50 PM), http://articles.marketwatch.com/2010-04-15/economy/30801872_1_funding-schumer-previous-sec-chairmen (noting that five former SEC chairmen support self-funding for the SEC and quoting Senator Chuck Schumer as saying that, "[s]elf-funding would allow the SEC to plan for the long-term and keep up with innovation in the markets."). Notably, although the SEC remains reliant on the congressional budgetary process, the PCAOB—an entity *within* the SEC—is self-funded. *See* 15 U.S.C. § 7219(d)(1) (2006).

[14] This issue is distinct from the phenomenon of agency entrenchment, in which an agency, rather than Congress, attempts to build a bulwark against future policy changes. *See generally* Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557 (2003). To the contrary, the law governing formal legislative entrenchment—that is, the power of one legislature to prevent, as a matter of law, future legislatures from taking certain actions—goes back to at least Blackstone and is generally thought to be unlawful. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *90 ("Because the legislature, being in truth the sovereign power, is always of equal, always of absolute authority; it acknowledges no superior upon earth which the prior legislature must have been, if its ordinances could bind a subsequent parliament."). The contemporary law is a bit more equivocal. *See, e.g.*, Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1848–51 (2012) (describing this debate). Nonetheless, by removing Congress's power over an agency's source of revenue, self-funding can result in effective entrenchment of the current Congress's policy preferences while avoiding the thornier legal questions involved with formal legislative entrenchment. *See Independence, Congressional Weakness, and the Importance of Appointment*, *supra* note 9, at 1831–32 (discussing how congressional control over agency action is much more difficult to achieve through substantive legislation than it is through the budgetary process).

[15] *See supra* note 7 and accompanying text.

yond the limited confines of this Essay. Given that backdrop, this Essay's goal is more modest; it aims to be more descriptive than prescriptive. Part I discusses congressional control over agency funding by presenting the thesis of a recent note in the *Harvard Law Review* ("*Harvard* Note") to which this Essay ultimately responds.[16] Using the *Harvard* Note's thesis, Part I describes how agency self-funding may change the balance of power between the President and Congress by giving the President—at least as an initial matter—more control over an independent agency vis-à-vis Congress. Part II then describes factors of independence that separate an agency from direct executive control and proceeds to examine the small number of self-funded agencies to determine which, if any, of those factors of independence they possess.

Finally, this Essay will offer some tentative conclusions, namely that focusing solely on self-funding, as the *Harvard* Note does, ignores other structural features that, at least in theory, should lead to lessened executive influence. This Essay concludes that, as an initial matter, the *Harvard* Note is correct: self-funding alters the balance of power between Congress and the President by shifting more control to the President. The *Harvard* Note, however, does not consider the full picture; as a general matter, self-funded agencies are not only unmoored from Congress's largest lever of power—its power over agency funding—but they are also often independent of the President in a number of important ways. The result is an agency structure that, at least in theory if not necessarily in practice, is the purest form of independence in the federal government.

I. The Initial Effect of Self-Funding: Shifting Control over Independent Agencies from Congress to the President

Although it may use any of its constitutional powers to affect the workings of independent agencies, Congress's most basic power is its power of the purse.[17] Professor Barkow has stated the issue poign-

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16 *See generally Independence, Congressional Weakness, and the Importance of Appointment*, *supra* note 9.

17 The use of Congress's appropriations power to achieve substantive ends is nothing new; only the context has changed. Madison recognized that the House

> in a word hold[s] the purse; that powerful instrument by which we behold . . . an infant and humble representation of the people, gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of government. This power over the purse, may in fact be regarded as the most compleat [sic] and effectual

antly: "If you want to locate power in Washington . . ., you must follow the money. This holds true for agency authority as well."[18] That Congress can use the budgetary process to control agencies has long been recognized.[19] Congress's appropriations tools range from the blunt (the starve-the-agency approach) to the more nuanced (the use of earmarks and riders).[20] And, of course, in the absence of any formal legislation, congressional posturing (the mere *threat* of budgetary reductions) may often be enough to make an agency change course.[21] Thus, tethering an agency to the congressional purse allows Congress to condition the use of its funding on the agency undertaking—or refraining from undertaking—certain actions.[22]

> weapon with which any constitution can arm the immediate representatives of the people.

THE FEDERALIST NO. 58, at 394 (James Madison) (James E. Cooke ed., 1961). Despite this tremendous fount of power, Congress's appropriations power has been little studied. *See generally* Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1346–63 (1988) (developing "a general theory of Congress's appropriations power").

18 Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 42 (2010).

19 *See, e.g.*, RICHARD F. FENNO, JR., THE POWER OF THE PURSE: APPROPRIATIONS POLITICS IN CONGRESS 292 (1966) ("Agency officials obey the [Appropriations Committee] reports in a negative sense because they may be punished if they do not. But, in a more positive sense, they feel that obedience to the Committee's informally expressed desires will help to build the all-important ingredient of Committee confidence."); STEPHEN HORN, UNUSED POWER: THE WORK OF THE SENATE COMMITTEE ON APPROPRIATIONS 10, 175–76 (1970) (noting that "during the 1960s members of the [Senate] Appropriations [Committee] were almost unanimous in considering their committee 'Number 1 in the Senate'" and that members of the Appropriations Committee "fel[t] they 'are at the crucial point where [they] can direct the activities of government for good or ill,' because 'no matter how much you legislate, the main ingredient is money and whatever type of program you have, its success is dependent on adequate financing'") (quoting unnamed members of the Senate Appropriations Committee in 1966).

20 *Independence, Congressional Weakness, and the Importance of Appointment*, *supra* note 9, 1825–27 (outlining these dominant methods of appropriations control over agencies).

21 *See* Daniel P. Carpenter, *Adaptive Signal Processing, Hierarchy, and Budgetary Control in Federal Regulation*, 90 AM. POL. SCI. REV. 283, 298 (1996) (arguing that "the control over regulatory programs exercised by elected authorities through agency budgets may best be characterized as signaling influence" that represents "powerful political signals from elected authorities to the agencies"); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 793 (1983) (observing that "on the surface, little ostensible activity by Congress may mask more subtle but nonetheless strong congressional influence" and that this pressure need not come from the entire Congress, "but rather the specific committees"); *see also* Orol, *supra* note 13 (quoting former SEC chairman Arthur Levitt advocating a self-funded SEC: "All too many times Congress has held the SEC captive when constituent pressures call for them to oppose very important rulemaking by the commission with threats of taking away the funding.").

22 *See, e.g.*, Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, § 11(a), 108 Stat. 1691, 1696 (codified at 15 U.S.C. 57c note (2006)) (preventing the Federal Trade Commission from "us[ing] any funds which are authorized to be appropriated to carry out

Each method of appropriations control may be useful to achieve various goals for various political ends,[23] the contours of which are beyond the scope of this Essay. Rather, the point is that by making an agency self-funded, Congress gives up its most effective tool of agency control. To be sure, Congress is always free to pass non-appropriations legislation intended to constrain an agency, and members of Congress may also channel their frustrations through oversight hearings or public scrutiny. The process of passing substantive legislation is often more politically difficult, however, than the process of passing appropriations legislation.[24]

Self-funding thus creates an administrative agency paradox, because removing Congress's most direct method of agency control is contrary to the traditional view of *why* Congress creates independent agencies in the first place. According to the traditional model, independent agencies were intended to shift power away from the President and towards Congress.[25] Indeed, the Supreme Court first upheld

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the [FTC Act]" for various fiscal years "for the purpose of submitting statements to, appearing before, or intervening in the proceedings of, any Federal or State agency or State legislative body concerning proposed rules or legislation that the agency or legislative body is considering" without first advising certain congressional committees).

23 For example, because efforts by congressional Republicans to "rein in" elements of Dodd-Frank with substantive legislation have not been successful, congressional opponents of the Act's provisions have channeled their efforts towards "depriving certain agencies of the funds they need to carry out their new Dodd-Frank responsibilities." Laura Meckler & Victoria McGrane, *Parties Seek Edge As Pick Is Blocked*, WALL ST. J., Dec. 9, 2011, at A5. Because this option is unavailable for a self-funded agency such as the CFPB, however, congressional Republicans were forced to focus on blocking the confirmation of the Bureau's director. *See id.*; *see also Independence, Congressional Weakness, and the Importance of Appointment*, *supra* note 9, at 1824 (arguing that self-funding channels political fights into the confirmation process).

24 *Independence, Congressional Weakness, and the Importance of Appointment*, *supra* note 9, at 1831–32 (noting that "the budget imposes far fewer costs on Congress because the budget is determined by a standardized annual process and because the President's veto is not an effective tool for preventing budget cuts"). Of course this ignores the recent political climate, in which both types of legislation have ground to a halt. *See, e.g.*, Jonathan Weisman, *In Congress, Gridlock and Harsh Consequences*, N.Y. TIMES, July 8, 2013, at A3 (noting that "in [July] 2011, Congress had passed 23 laws on the way toward the lowest total since these numbers began being tracked in 1948. [As of July 2013] 15 [laws] had been passed [in 2013].").

25 *See* 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 77 (5th ed. 2010) ("The largest single factor influencing Congress' decision [to make an agency independent] is its belief that independent agencies are likely to be somewhat more receptive to preferences expressed by members of Congress."). This has long been Congress's understanding of its relationship to at least some of the independent agencies, such as the FTC. *See* Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1136 n.126 (2000) (giving examples in which members of Congress have sought assurances that FTC chairmen understood the Commission's role as being, in the words of Speaker Sam Rayburn, "an arm of the Congress [that] belong[s] to us") (citations and internal quotation marks omitted).

the cornerstone of agency independence—for-cause removal protection—on the understanding that independent agencies were in some sense congressional adjuncts.[26]

Self-funding alters that dynamic. Because the President generally must nominate "all . . . Officers of the United States,"[27] power over an agency's head will typically originate with the President,[28] even if the nomination is then subject to the Senate's Advice and Consent.[29] Thus, self-funding means that once the Senate has given its advice and consent for the individual or individuals who will lead an agency, Congress's role as an active and direct participant in agency control is significantly reduced until a new vacancy arises in the agency. The effect of this shift in the balance of power was summarized in the *Harvard* Note:

> [W]here appointment instead of appropriations is the primary means of control, the President has more relative influence because, unlike appropriations where the President has little ability to prevent congressional punishment, the President holds a substantial amount of power over appointments. Though less important, the President has greater oversight control because the President is likely to have more to offer the agency.[30]

In sum, removing Congress's power over agency funding leaves the President with more relative control through his power to appoint the agency's head. Assuming a Congress not of the President's party,[31] Congress will have lost its most effective means of agency con-

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26 *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 628 (1935) (noting that, among its functions, the FTC was intended to make investigations and create reports for Congress); *see also* Breger & Edles, *supra* note 25, at 1138 ("[For-cause] protection continues to be the critical criterion by which scholars typically distinguish between 'independent' and executive branch agencies."). Of course, legally limitless removal power does not equal politically limitless removal power. *See* Richard J. Pierce, Jr., *Saving the Unitary Executive Theory from Those Who Would Distort and Abuse It: A Review of* The Unitary Executive *by Steven G. Calabresi and Christopher S. Yoo*, 12 U. PA. J. CONST. L. 593, 604–05 (2010) (book review).

27 U.S. CONST. art. II, § 2, cl. 2.

28 This is not always true in the case of some self-funded agencies. *See, e.g.*, 15 U.S.C. § 7211(e)(4) (2006) (requiring that the SEC appoint the members of the PCAOB after consultation with the Chairman of the Fed and the Secretary of the Treasury).

29 *See* U.S. CONST. art. II, § 2, cl. 2 (requiring the President to appoint "Officers of the United States" with the "Advice and Consent" of the Senate, but allowing Congress to determine the procedures for appointment of "inferior officers").

30 *Independence, Congressional Weakness, and the Importance of Appointment*, *supra* note 9, at 1839. From this shift in power, the *Harvard* Note predicts future appointment holdups of the sort that have plagued the CFPB. *Id.* at 1839–40.

31 If the President and Congress are of the same political party, Congress's checking function envisioned by the Framers is less likely to operate in a manner that would weaken an agency

trol. All other things being equal,[32] the agency will likely have moved along the continuum from "independent agency" to an entity that bears a closer resemblance to a traditional executive agency.[33] The potential result, especially in an agency that has a single-member head such as the CFPB, is an agency whose priorities may fluctuate with the party of the appointing President.[34] This potential feature is anathema to the goal of stable policymaking that underlies many independent agencies.[35]

In the short-term, this type of agency structure may be an effective method of entrenching congressional policy preferences. However, just as all good things must come to an end, so too does an agency director's term eventually expire. If that vacancy occurs during the administration of a President whose party is different from that of the appointing President,[36] and if Congress's ability to influence the agency through appropriations is non-existent, then the nominally independent, self-funded agency is now more subject to the

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supported by the President. *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2315 (2006) (recognizing that "the degree and kind of competition between the legislative and executive branches vary significantly, and may all but disappear, depending on whether the House, Senate, and Presidency are divided or unified by political party" and "reenvisioning the law and theory of separation of powers by viewing it through the lens of party competition").

32 See *infra* Part II for a discussion of other factors that might change the balance of power.

33 *See* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (And Executive Agencies)*, 98 Cornell L. Rev. 769, 773 (2013) (arguing that "[a]gencies fall along a continuum ranging from most independent from presidential influence to least independent" and that "so-called independent agencies are simply a type of executive agency").

34 *See* Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 718 (2007) (noting that, subject to some political realities, "the President's place as leader of his party and patron of appointees assures strong incentives to follow his wishes. Ordinary instincts of political loyalty will subordinate questions of legal authority in many contexts. One who values her job and understands that the President can send her home at any time, for any reason, or that the success of her operations depends on the support of the White House at budget time, may also feel strong reasons beyond a sense of legal duty to follow his lead."); Pierce, *supra* note 26, at 603 (identifying "three reasons [for executive branch officers] to act in accordance with the President's policy preferences independent of the President's removal power. . . . [A]greement with the President on policy issues . . ., long-time loyalty to the President's political party, and/or personal loyalty to the President"). *But see* Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 465 (2008) (observing that Congresses worried about the impact of future Presidents tend to arm agencies with more insulating features).

35 *See* Barkow, *supra* note 18, at 24.

36 For instance, the Director of the CFPB has a five-year term. 12 U.S.C. § 5491(c)(1) (2012). Thus, because Richard Cordray was confirmed as Director of the CFPB in 2013, his term will end during the administration of a new President. *See* Jonathan Weisman & Jennifer Steinhauer, *Senate Strikes Filibuster Deal at Last Minute*, N.Y. TIMES, July 17, 2013, at A1.

policy predilections of the new appointing President.[37] Likewise, even in the case of a multi-member agency, Professors Neal Devins and David Lewis have demonstrated that, from the Harding Administration to the second Bush Administration, "[p]residents were able to obtain a majority on each [independent] commission in all cases except one," typically within "nine or ten months."[38] At the end of this process, the self-funded agency now looks more like an executive agency that has been untethered from any significant congressional control. This conclusion seems contrary to the entire rationale for independent agencies' existence; instead of being devoid of politics, the self-funded agency appears to be subject to more executive control than Congress likely ever intended.

This potential problem exists, however, only if one narrowly focuses on certain indicia of agency independence. Self-funding is no doubt a critical indicator of independence; however, it is not everything. As Professor Barkow notes, "the lesson with respect to funding independence—as it is with all elements of agency design—is that no one particular feature can be viewed in isolation. It is critical to assess the overall structure of the agency."[39] The remainder of this Essay therefore considers additional factors of agency independence that exist alongside self-funding, with the goal of gaining a better understanding of what features of agency design, when combined with self-funding, might counteract the potential for excessive executive influence.[40]

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37 This assumes, of course, that the agency has not sufficiently "burrowed" itself. *See* Mendelson, *supra* note 14, at 559–64 (describing this phenomenon); *see also* Devins & Lewis, *supra* note 34, at 468 ("If the current President and a majority in Congress worry about losing power, creating a commission and stacking it with sympathetic appointees is one way of protecting policies well into the future.").

38 Devins & Lewis, *supra* note 34, at 469; *see also* Datla & Revesz, *supra* note 33, at 820 (noting that "Presidents gain control over independent agencies more quickly than a formal reading of the enabling statutes would predict.").

39 Barkow, *supra* note 18, at 45. The proper way to consider agency independence, according to Professor Barkow, is "from the perspective of what independence is trying to accomplish." *Id.* at 79.

40 This Essay does not consider the question of whether the proper way to offset a decrease in congressional control is to also decrease executive control. Doing so risks turning a self-funded independent agency into the "headless fourth branch of the Government" that so worries some critics. *See, e.g.*, City of Arlington v. FCC, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) ("The collection of agencies housed outside the traditional executive departments . . . is routinely described as the 'headless fourth branch of government,' reflecting not only the scope of their authority but their practical independence."); PRESIDENT'S COMM. ON ADMIN. MGMT., ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES 36 (1937) ("[Independent agencies] are in reality miniature independent governments set up to deal with the railroad problem, the banking problem, or the radio problem. They constitute a

II. Features of Executive Independence in Self-Funded Agencies

This Part examines a number of self-funded agencies to demonstrate how self-funding is often coupled with other features of agency structure that could possibly counteract the potential problem described at the end of Part I—that is, whether self-funded agencies contain structural features that might tend to balance out the possibility of excessive executive control. It is important, however, to note this Part's limited scope at the outset. There are relatively few self-funded agencies in the federal government and, of that number, not all are endowed with the same degree of policy control. For example, the Federal Reserve Board of Governors ("Fed")—the original self-funded agency—exercises considerably more control over policy than the Bureau of Engraving and Printing—another self-funded agency.[41] Accordingly, this Essay's selection of self-funded agencies is limited. At the same time, however, it aims to be representative while laying the groundwork for future study of the topic.

A. *Indicia of Agency Independence*

The traditional model of agency independence has always begun with for-cause removal protection.[42] Building on that foundation, a number of structural features might also help an agency achieve executive independence. For instance, a multi-member board is typically mentioned in the same breath as for-cause protection.[43] To those features, many scholars add a bipartisan balance requirement.[44] From that point, the list varies widely. For instance, Professor Revesz and Kirti Datla include specified tenure, litigation authority (both in the

headless 'fourth branch' of the Government, a haphazard deposit of irresponsible agencies and uncoordinated powers. . . . The Congress has found no effective way of supervising them, they cannot be controlled by the President, and they are answerable to the courts only in respect to the legality of their activities."); *see also* Synar v. United States, 626 F. Supp. 1374, 1398 (D.D.C. 1986), *aff'd sub nom.* Bowsher v. Synar, 478 U.S. 714 (1986) (strongly suggesting that independent agencies are unconstitutional because "[i]t has . . . always been difficult to reconcile *Humphrey's Executor's* 'headless fourth branch' with a constitutional text and tradition establishing three branches of government").

41 *But see* Brady Dennis, *New $100 Bills Delayed by Errors in Production*, WASH. POST, Dec. 7, 2010, at A4 (observing that although the Federal Reserve authorizes the production of paper money, the Bureau of Engraving and Printing must still address the surprisingly wide range of issues that go into the design and printing of United States currency).

42 *See* Breger & Edles, *supra* note 26, at 1135 (calling tenure protection "the baseline definition" of agency independence).

43 *See, e.g.*, *id.* at 1114; Barkow, *supra* note 18, at 26.

44 *See, e.g.*, Devins & Lewis, *supra* note 34, at 460–62 (examining the effectiveness of bipartisan balance requirements in achieving independence).

lower federal courts and in the Supreme Court), the ability to bypass the White House in various congressional submissions, and the ability to perform formal adjudications.[45] Professor Barkow includes, among other factors, appointment qualifications, restrictions on post-agency employment, the degree to which the agency interacts with state-level actors, whether the agency can generate "politically powerful information," and whether the agency can "recruit political benefactors."[46] Additionally, many scholars consider whether the agency is required to submit its rules to the Office of Information and Regulatory Affairs ("OIRA"), within the Office of Management and Budget ("OMB").[47]

This list is not intended to suggest that a certain number of these features are required for an agency to be "independent" (although for-cause removal protection appears to have become the cornerstone of the independent agency). Rather, the point is that these features interact with each other, and, as is relevant to this Essay, with self-funding. As Professor Revesz and Kirti Datla have convincingly argued, "independence" is not a binary determination, but rather is a function of many of the factors listed above.[48]

B. The Presence of These Features of Agency Design in Self-Funded Agencies

With this view of agency independence in mind, this Part examines a number of self-funded agencies to see which of the above-listed factors they contain. This Part does not exhaustively consider every potential factor that might promote agency independence.[49] Rather, this Part examines features of agency structure that are intended to constrain executive control, as opposed to, for instance, rules on post-agency employment that are typically more concerned with limiting agency capture. Specifically, this Part examines self-funded agencies to see whether they possess for-cause removal protection, a multi-member board, a bipartisan balance requirement, independent litiga-

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45 Datla & Revesz, *supra* note 33, at 789, 799–812.

46 Barkow, *supra* note 18, at 18.

47 *See id.* at 26, 31; Datla & Revesz, *supra* note 33, at 836–42 (detailing the relationship of OIRA review to agency independence); *see also* Exec. Order No. 13,579, 3 C.F.R. 256 (2012), *reprinted in* 5 U.S.C. § 601 app. (2012) (stating that independent agencies "should consider" retrospective analyses of their rules, rather than requiring them to do so).

48 *See* Datla & Revesz, *supra* note 33, at 824 (arguing that "all agencies fall on a spectrum from most insulated from presidential control to least insulated"); *see also* 1 PIERCE, JR., *supra* note 25, at 75 ("The term 'independent' refers to an agency that is insulated from presidential control in one or more ways.").

49 It is my hope, however, that this limited study opens the door to further examination of the factors that affect the independence of self-funded agencies.

tion authority, and the ability to bypass OMB in submitting proposals and testimony to Congress.[50]

1. *For-Cause Removal Protection*[51]

For-cause removal protection—the classic indicator of agency independence—is, somewhat surprisingly, not present in all, or even most self-funded agencies. However, the reason some self-funded agencies lack statutory for-cause removal protection is quite clear. Agencies that Congress created between 1926 and 1935, such as the SEC or FCC—despite their universal classification as independent agencies—lack for-cause removal protection.[52] Following the Supreme Court's 1926 decision in *Myers v. United States*,[53] in which the Court held unconstitutional a statutory limit on the President's removal power,[54] and until the Court's 1935 decision in *Humphrey's Executor v. United States*,[55] in which the Court upheld for-cause removal protection for the heads of independent agencies,[56] Congress did not include for-cause removal provisions in agencies' organic acts, fearing that a for-cause removal provision might place an agency in constitutional jeopardy.[57] Moving forward nearly eight decades, however, to *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,[58] the Court held that the for-cause removal protection given to the members of the PCAOB was unconstitutional,[59] because the PCAOB members' for-cause protection added a second "layer of insulation" beneath the for-cause protection that the Court assumed the SEC

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50 *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 app. D at 3215–18 (2010) (Breyer, J., dissenting) (identifying these factors, as well as agency head qualification requirements, as "other indicia of independence" that exist alongside for-cause removal protection).

51 I owe a debt of gratitude to Professor Richard Revesz and Kirti Datla for compiling many of the statutes relating to these structural provisions in their article *Deconstructing Independent Agencies (And Executive Agencies)*, *supra* note 33.

52 *See generally* Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a–78nn (2006)) (creating the SEC without for-cause removal protection for its Commissioners); Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151–614 (2006)) (doing the same for the FCC).

53 Myers v. United States, 272 U.S. 52 (1926).

54 *Id.* at 176.

55 Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).

56 *See id.* at 631–32.

57 *See* 1 PIERCE, JR., *supra* note 25, at 77–78 ("Initially, *Myers* was widely interpreted as a signal that Congress could not limit in any way the President's power to remove an officer whose duties [were] executive.").

58 Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010).

59 *See id.* at 3164.

Commissioners enjoy.[60] The lesson of all of this is that, in the context of for-cause removal provisions—where the Court has played the largest role in shaping agency structure—one cannot always assume that a lack of for-cause removal protection resulted from congressional design. With that caveat, the presence of for-cause removal protection in self-funded agencies is a mixed bag.[61]

The director of the FHFA is protected by for-cause removal,[62] as are the Governors of the Fed,[63] and the director of the CFPB.[64] At least as many self-funded agencies have no statutory for-cause removal provision, however. Neither the FCA, the FDIC, the NCUA, the Pension Benefit Guarantee Corporation ("PBGC"), nor the PCAOB have for-cause removal provisions.[65] The discussion above may be instructive here: the FDIC, NCUA, and FCA were all created in the pre-*Humphrey's Executor* New Deal era,[66] suggesting that the absence of for-cause removal protection in their organic statutes may not reflect conscious congressional choice but instead is likely a product of the prevailing constitutional doctrine of the time. Further, in the post-*Free Enterprise Fund* world, it is unclear whether the absence of a statutory for-cause removal provision would bar a court from assuming that such protection exists[67] and thus, whether the President could (legally, if not necessarily politically)[68] increase his control over

60 *Id.* at 3153 (noting that the SEC Commissioners are not "subject to the President's direct control"); *see also id.* at 3182–84 (Breyer, J., dissenting) (criticizing the Court's assumption regarding the SEC Commissioners, noting that "[i]t is certainly not obvious that the SEC Commissioners enjoy 'for cause' protection"); Peter L. Strauss, *On the Difficulties of Generalization—*PCAOB *in the Footsteps of* Myers, Humphrey's Executor, Morrison, *and* Freytag, 32 CARDOZO L. REV. 2255, 2276–77 (2011) (criticizing the Court's willingness to accept the parties' agreement to the otherwise-contested fact of whether the SEC's Commissioners enjoy for-cause removal protection).

61 The results of the survey are represented graphically in the Appendix.

62 12 U.S.C. § 4512(b)(2) (2012).

63 *Id.* § 242.

64 *Id.* § 5491(c)(3).

65 *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, app. D at 3215 (2010) (Breyer, J., dissenting) (listing these agencies among those without statutory for-cause removal provisions).

66 *Cf.* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421, 424 n.9 (1987) (discussing agencies created during the New Deal era).

67 *See supra* notes 58–60 and accompanying text. It is unclear, however, whether the lack of a statutory for-cause removal provision is any longer a barrier to reading a for-cause removal provision into an otherwise silent statute. *See* Free Enter. Fund, 130 S. Ct. at 3148 (accepting the parties' agreement that the SEC Commissioners enjoy for-cause removal protection despite statutory silence on the issue).

68 *See* Pierce, Jr., *supra* note 26, at 604–05.

an independent agency by removing an agency director or commissioner with whom he disagrees.

2. *Multi-Member Board*

A multi-member board structure can lessen executive control over an agency by limiting the President's power to immediately remake the agency in his or her own image.[69] As might be expected for independent agencies, a resounding number of self-funded agencies have multi-member boards. Not all multi-member boards are created equally, however; a number are populated, in part, by at-will–removable, cabinet-level officers.

The most well-known self-funded agency, the Fed, contains a seven member structure.[70] The FDIC's board is comprised of five directors, two of whom are ex officio, cabinet-level secretaries.[71] Both the NCUA[72] and the FCA[73] have three members, while the PCAOB has five members.[74] The PBGC is administered by a single presidentially-nominated director who reports to a board comprised of three ex officio, cabinet-level directors.[75] Similarly, the FHFA is run by a director appointed by the President with the advice and consent of the Senate,[76] but who is also one member of a four-member board otherwise comprised of ex officio directors.[77]

Thus, the effect of a multi-member board in a self-funded agency cannot be easily generalized. If, for instance, a multi-member board is made up solely of executive branch officials, then one of the traditional reasons for including a multi-member board—blunting executive influence by including dissenting voices in agency decisionmaking—is tremendously weakened. On the other hand, a multi-member structure such as the Fed's, in which none of the agency's members are subject to at-will removal,[78] might further distance the agency from direct political control.

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69 *See* Devins & Lewis, *supra* note 34, at 465.

70 12 U.S.C. § 241 (2012).

71 *Id.* § 1812(a)(1).

72 *Id.* § 1752a(b).

73 *Id.* § 2242(a).

74 15 U.S.C. § 7211(e)(1) (2006).

75 29 U.S.C. § 1302(a), (d) (2006). The board members are the Secretaries of the Treasury, Labor, and Commerce. *Id.* § 1302(d).

76 12 U.S.C. § 4512(b)(1).

77 *Id.* § 4513a(c). The ex officio members are the Secretaries of the Treasury, Housing and Urban Development, and the Chairperson of the SEC. *Id.*

78 *Id.* § 242.

3. *Bipartisan Balance Requirements*

A corollary of the multi-member structure, a bipartisan balance requirement should, in theory, depoliticize agency decisionmaking. As Professor Sunstein notes, bipartisan structures may tend to moderate the more polarized views of certain members,[79] even if in practice Presidents are typically able to overcome staggered vacancy calendars of independent agencies to gain (if more slowly) a partisan majority of the agency's multi-member board.[80]

Unlike the multi-member structure described above, the number of self-funded agencies with bipartisan balance requirements is not as large. The FDIC,[81] FCA,[82] and NCUA[83] all have bipartisan balance requirements, while the Fed,[84] the Federal Housing Finance Oversight Board (the board that advises the director of the FHFA),[85] and PCAOB[86] do not. Of course, like for-cause removal, the absence of a bipartisan balance requirement is not necessarily indicative of a conscious choice on Congress's part; the results are affected by whether an agency has a multi-member board and partly by whether that board is made up of cabinet-level officials.

4. *Litigation Authority*

The default rule for litigation involving federal agencies is that the Department of Justice ("DOJ") is the only agency authorized to litigate in the federal courts.[87] From its centralized position, DOJ is able to exercise at least some authority over which cases an agency may bring to court. Indeed, according to Professors Devins and Herz, "[a]gencies *would* bring some cases that DOJ refuses to because in general agencies are more willing to run litigation risks than is DOJ."[88] Thus, the effect of removing an agency from the default rule

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79 *See* Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 103 (2000).

80 *See* Devins & Lewis, *supra* note 34, at 461. The result, according to Professors Devins and Lewis is that "today's independent agencies are more likely to agree with presidential preferences *once* the President appoints a majority of his party to the agency." *Id.*

81 12 U.S.C. § 1812(a)(2).

82 *Id.* § 2242(a).

83 *Id.* § 1752a(b).

84 *See id.* § 242.

85 *See id.* § 4513a(c).

86 *See* 15 U.S.C. § 7211(e) (2006).

87 *See* 28 U.S.C. § 516 (2006).

88 Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PA. J. CONST. L. 558, 587 (2003).

of DOJ litigation is to remove the agency's litigation activity from centralized executive oversight.[89]

A survey of self-funded agencies finds few examples of agencies reliant on DOJ. The Fed,[90] FDIC,[91] CFPB,[92] FHFA,[93] FCA,[94] PCAOB,[95] and PBGC[96] are all statutorily permitted to litigate in their own name. The NCUA, however, is not.[97] Thus, self-funded agencies almost universally have the authority to determine not only what cases they bring, but the legal theories raised in those cases—theories which may not necessarily be consistent with DOJ's preferences.

5. *Executive Review of Congressional Submissions*

Congress has granted a number of self-funded agencies the authority to submit testimony, proposals, and legislative comments directly to Congress without having to first gain OMB approval. The effect of this power is obvious: without the ability to modify independent agencies' submissions to Congress, executive oversight is severely limited. Direct submission is the clear majority rule for self-funded agencies. The primary source for this protection, 12 U.S.C. § 250, provides that "[n]o officer or agency of the United States shall have any authority to require" the Fed, the FDIC, the FHFA, or the NCUA, among other 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 the submission . . . to the Congress."[98] Similarly, other statutes expressly provide

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89 *See* Datla & Revesz, *supra* note 33, at 801–02 ("Centralized litigation control increases agency independence from Congress but decreases agency independence from the Executive. . . . The result is that by centralizing control of litigation in the DOJ, congressional oversight over agency enforcement is weakened.").

90 12 U.S.C. § 248(p).

91 *Id.* § 1819(a).

92 *Id.* § 5564(a)–(d). However, although the CFPB can litigate in its own name, it must sometimes coordinate with the Attorney General. *Id.* § 5564(d).

93 *Id.* § 4513(c).

94 *Id.* § 2244(c).

95 15 U.S.C. § 7211(f)(1) (2006). The PCAOB's litigation authority, however, is subject to SEC oversight. *See id.*

96 29 U.S.C. §§ 1302(b)(1), 1303(e) (2006).

97 The NCUA, however, does have the ability to litigate on behalf of the National Credit Union Central Liquidity Facility, an entity within the NCUA that provides loans to credit unions that are experiencing liquidity shortfalls. *See* 12 U.S.C. § 1795e (allowing the Central Liquidity Facility to extend credit); *id.* at § 1795f(a)(9) (allowing the NCUA to litigate on behalf of the Central Liquidity Facility).

98 *Id.* § 250. The statute merely requires such submissions to disclaim that they do not represent the President's views. *Id.*

that the Fed,[99] the FDIC,[100] the FCA,[101] and the CFPB[102] are exempt from OMB review (or at least that the OMB may not alter the agency's comments). The PBGC, however, is not so exempt.[103]

Thus, nearly all self-funded agencies are free from executive control over submissions to Congress. Along with for-cause removal protection, freedom from OMB presubmission may be the most important feature of executive independence possessed by self-funded agencies because it weakens the Executive's ability to present a uniform policy to Congress. Significantly, even those self-funded agencies that do not enjoy statutory for-cause removal protection (with the exception of the PBGC) are free to present recommendations, testimony, or comments to Congress free of any centralized review.[104]

CONCLUSION

What does this survey teach us? The simple answer appears to be that Congress's choice of which independence-defining structural features to include in self-funded agencies is largely incoherent; there does not appear to be any consistent framework that determines when a self-funded agency might have certain indicia of independence and when it does not. There are, however, some general themes: more self-funded agencies have multi-member board structures than single-member heads, even if some of those multi-member boards are partly made up of executive branch officials;[105] non-DOJ litigation authority is the norm;[106] and nearly all self-funded agencies are permitted to bypass the OMB in their congressional submissions.[107] There are, however, also some surprises: despite a desire for political independence, the heads of a number of self-funded agencies do not enjoy statutory for-cause removal protection.[108]

Moreover, when there is greater potential for executive influence over a self-funded agency, such as in the FHFA's and the PBGC's cabinet-level boards of directors,[109] we sometimes see a correlative in-

99 *Id.* § 247.

100 *Id.* § 1827(a).

101 *Id.* § 2252(a)(3).

102 *Id.* §§ 5492(c)(4), 5497(a)(4)(E).

103 *See* 29 U.S.C. § 1302(b) (2006).

104 *See supra* notes 64–65, 97–102 and accompanying text.

105 *See supra* notes 70–77 and accompanying text.

106 *See supra* notes 90–97 and accompanying text.

107 *See supra* notes 98–103 and accompanying text.

108 *See supra* notes 62–65 and accompanying text.

109 *But see* Editorial, *A Model Bureaucrat*, WALL ST. J., Aug. 1, 2012, at A12 (praising the

crease in other indicia of executive independence. For instance, the FHFA is permitted to submit proposals, comments, and recommendations to Congress without the OMB's approval.[110] Moreover, while the PBGC is not exempt from OMB presubmission,[111] both the PBGC and the FHFA *are* permitted to litigate in their own names.[112] This is not to suggest that self-litigation authority—or any structural feature—is the perfect antidote to the increased executive control that might otherwise result from agency self-funding. It is simply to point out that, because they contain features of executive independence in addition to an independent funding source, self-funded agencies enjoy more structural independence than the typical independent agency.[113]

Thus, contrary to the *Harvard* Note's argument,[114] self-funding may not necessarily lead to increased executive control. This argument may be correct as an initial matter: agency self-funding's first effect is to increase presidential influence by channeling presidential control through agency appointments.[115] However, the *Harvard* Note does not delve deeper into self-funded agency structure. As this Essay has demonstrated, doing so demonstrates that in practice, self-funding is typically paired with other features of agency design that should potentially lead to even greater independence from both the President and Congress. The balance may not be perfect; indeed, whether these other structural features are truly effective at offsetting executive influence in self-funded agencies is a question that is ripe for future scholarship. Nonetheless, this Essay shows that, as a group, self-funded agencies are not only unmoored from any significant congressional control, but that they also typically lack the basic structural fea-

acting director of the FHFA for resisting executive pressure to allow Fannie Mae and Freddie Mac to forgive housing debt).

110 *See supra* note 98 and accompanying text.

111 *See supra* note 103 and accompanying text.

112 *See supra* notes 93, 96 and accompanying text.

113 It is critical to remember, however, that this independence is only structural and will not necessarily translate into political independence. As Professors Calabresi and Prakash note, "indirect [congressional] political control will necessarily exist with any so-called 'independent' agency or officer because absent presidential control, congressional oversight and appropriations powers become the only concern for the officers of the allegedly 'independent' agencies. There is no such thing in Washington as a politically 'independent' agency." Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 583 (1994). Thus, even with congressional appropriations control out of the picture, self-funded agencies are still subject to congressional oversight, as well as general political pressure from Congress and the President.

114 *See generally Independence, Congressional Weakness, and the Importance of Appointment*, *supra* note 9.

115 *Id.* at 1839.

tures of presidential control that characterize executive agencies. They are, in short, the most structurally independent agencies in the federal government.

Although it critiques the *Harvard* Note, this Essay's survey also buttresses one of the *Harvard* Note's conclusions: that self-funding increases the stakes of Senate confirmation.[116] If, as this Essay has demonstrated, self-funded agencies are typically independent of direct political control from two branches, rather than just one, the President is incentivized to put all of his political eggs into one basket: because the President cannot remove the agency's head at will, because DOJ cannot control the agency's litigation, and because the OMB can review neither the agency's submissions to Congress nor the agency's rules, the President has an incentive to nominate an individual whom he can trust to lead the agency in his own image. As the *Harvard* Note explains, in response to the President's incentives, Senators not of the President's party will be motivated to channel the entirety of their opposition to an agency in the direction of the President's nominee. The CFPB exemplifies this problem: from the time the Dodd-Frank Act was signed into law, it took just short of three years for the Senate to confirm the CFPB's first director, and even then, confirmation only came when "a generation of [the Senate's] procedural traditions" was threatened.[117]

This Essay's conclusion may be unsettling for some. Self-funded agencies might, according to some critics, be as close as federal agencies come to being "headless fourth branches" of government.[118] Yet, others may find this removal from politics to be appropriate, especially considering that we see self-funding most often in financial and banking regulatory agencies. In the post–Great Recession world, perhaps it is better that certain agencies are beyond the immediate reach of politics. The answer to this normative question is well beyond this Essay's scope. Instead, this Essay has attempted to demonstrate that self-funding is not the be-all, end-all of agency independence, as some of the CFPB's critics and supporters have argued;[119] self-funding is, instead, only one part of a more complex picture.

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116 *Id.* at 1843 (noting that "[s]elf-funding will reduce the total level of control, increase the President's relative influence, and create greater focus on appointment").

117 Weisman & Steinhauer, *supra* note 36, at A1 (noting that Richard Cordray's confirmation as the first director of the CFPB came as part of a compromise to preserve the Senate filibuster for executive nominations).

118 *See supra* note 40.

119 *See, e.g.*, Cushman, *supra* note 1; Kaiser, *supra* note 1.

APPENDIX

	For-Cause Protection	Multi-Member Board	Bipartisan Balance Requirement	Independent Litigation Authority	Exempt from OMB Pre-submissions
Fed	X	X	—	X	X
FHFA	X	X[120]	—	X	X
CFBP	X	—	—	X	X
FDIC	—	X	X	X	X
PBGC	—	X[121]	—	X	—
PCAOB	—[122]	X	—	X	—
FCA	—	X	X	X	X
NCUA	—	X	X	—	X

120 Single director with board comprised of cabinet-level officers.

121 Comprised solely of cabinet-level officers.

122 Enacting statute had for-cause removal protection. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3151 (2010).