SUBMERGED INDEPENDENT AGENCIES

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

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

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

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INTRODUCTION

Debates about agency independence tend to focus on agency heads: the secretaries, administrators, commissioners, and board members that lead the federal bureaucracy. The central question is often whether individuals in those positions can be removed by the President at will or only for cause. In other words, can the President dismiss an agency’s leader without explanation, or does a statute require the President to furnish one? If the former, then some consider the agency to be “executive” in nature, while the latter renders the agency “independent.”¹ The basic idea is that when top personnel serve at the President’s pleasure, executive control over that agency is at its height. By contrast, when Congress limits the President’s ability to fire, it seeks to shield the agency from presidential influence.

¹ See Jacob E. Gersen, Designing Agencies, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 333, 347 (Daniel A. Farber & Anne Joseph O’Connell eds., 2010) (“Independence is a legal term of art in public law, referring to agencies headed by officials that the President may not remove without cause. Such agencies are, by definition, independent agencies; all other agencies are not.”).
Some have pushed back on this “binary” view of agencies, however, to insist that agency independence is instead a matter of degree. From this perspective, what matters are not removal restrictions in isolation, but rather a number of factors bearing on the President’s ability to dictate policy. Consider, for example, congressional use of multimember structures, partisan balancing requirements, or specified terms of tenure. The more robust each of these features are, the more difficult it is for the White House to call the shots. Increased effort is required for the President to convince many agency heads instead of one, to convince those from a different party, and to remove someone entitled to a definite term. Because agencies possess these individual features to varying degrees, agency independence must be understood along a spectrum.

2 See Kirti Datla & Richard L. Revesz, Deconstructing Independent Agencies (and Executive Agencies), 98 CORNELL L. REV. 769, 773 (2013) (“[A]gencies 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.”); see also Rachel E. Barkow, Insulating Agencies: Avoiding Capture Through Institutional Design, 89 TEX. L. REV. 15, 17 (2010) (“[T]he traditional metrics for an independent agency are not the only . . . ways in which insulation from interest groups and partisan pressure can be achieved. In fact, under modern conditions of political oversight, other design elements and mechanisms are often just as important to an agency’s ability to achieve its long-term mission relatively free from capture.”); Aziz Z. Huq, Removal as a Political Question, 65 STAN. L. REV. 1, 6 (2013) (arguing that the causal connection between presidential removal authority and control, and presidential control and democratic accountability, both fail because both ignore other agency design options and the strategic responses of other government actors); Geoffrey P. Miller, Independent Agencies, 1986 SUP. CT. REV. 41, 43-44 (“A more useful analytic approach is to undertake a detailed study of the particular form of presidential oversight and control that is being asserted. A first step toward evaluating the constitutionality of independent agencies, in other words, is to ‘deconstruct’ the agencies into their constituent elements of independence.”); David E. Lewis & Jennifer L. Selin, Political Control and the Forms of Agency Independence, 83 GEO. WASH. L. REV. 1487, 1504-05 (2015) (“[A]gency independence should be thought of as a scale, ranging from less to more insulated from political influence.”); Jennifer L. Selin, What Makes an Agency Independent?, 59 AM. J. POL. SCI. 971, 973 (2015) (“Because agencies across the executive branch have structural features that insulate them from presidential and congressional influence, scholars would benefit from moving beyond sparse, rigid categories of agencies (independent or not) to a more nuanced approach that takes into consideration the wide variety of structural features that affect political influence and recognizes that structural features can change over time.”). Judges have also made similar observations. For instance, Justice Breyer noted:

Agency independence is a function of several different factors, of which “for cause” protection is only one. Those factors include, inter alia, an agency’s separate (rather than presidentially dependent) budgeting authority, its separate litigating authority, its composition as a multimember bipartisan board, the use of the word “independent” in its authorizing statute, and, above all, a political environment, reflecting tradition and function, that would impose a heavy political cost upon any President who tried to remove a commissioner of the agency without cause.


3 See sources cited supra note 2.
This perspective also looks to the top of the administrative hierarchy. This focus is understandable given that Congress typically grants final decisionmaking authority to agency heads. But the buck does not always stop with secretaries and commissioners. Rather, these leaders often relinquish their decisionmaking authority to their subordinates. In other words, they subdelegate their power—not only to fellow political appointees, but often to tenure-protected career staff. These subdelegations are sometimes legally enforceable, but even when they are not, norms and resource constraints often result in effectively final, discretionary authority below agency heads. And these delegations to civil servants, as this Article will show, are more common than previously understood.

Not only are such delegations pervasive, they can also be substantial in scope. They are decidedly not garden-variety authorizations to fetch coffee and make copies, so to speak. Rather, they are decisions that affect outside parties’ legal rights and obligations. Take, for example, the Administrator of the National Highway Traffic Safety Administration’s (NHTSA) decision to assign rulemaking authority to a career Associate Administrator. The action gave the civil servant the authority “to exercise the powers and perform the duties of the Administrator” to “set[] motor vehicle safety and theft prevention standards” as well as “fuel economy standards.” Notably, the NHTSA Administrator reserved the authority to issue, amend, or revoke final rules concerning safety and fuel economy standards, but did not do so for theft prevention standards.
NHTSA’s Associate Administrator for Rulemaking—again, a tenure-protected civil servant—has made consequential use of this delegated authority. In recent years, the Associate Administrator has invoked this authority to grant exemptions to automakers from a theft prevention regulation;\(^\text{11}\) issued notices of proposed rulemakings concerning fuel economy calculations and safety standards;\(^\text{12}\) and delayed, for a year or more, the effective date of more rigorous safety regulations concerning many auto parts.\(^\text{13}\) Indeed, the Associate Administrator’s website takes public credit for the agency’s actions, stating that the civil servant’s “office is responsible for setting the nation’s vehicle safety standards, fuel economy regulations, anti-theft and consumer information regulations, and international harmonization and policy.”\(^\text{14}\)

Consider another high profile devolution of authority that has been in place for over twenty years. In 1990, Congress instructed the Secretary of Health and Human Services (HHS) to issue a recall upon finding that a medical device “would cause serious, adverse health consequences or death.”\(^\text{15}\) The Secretary delegated this authority to the Assistant Secretary for Health, who further delegated authority to the Food and Drug Administration (FDA) Commissioner.\(^\text{16}\) The Commissioner ultimately passed that final decisionmaking in effect at the time of the 1985 subdelegation contained a substantially similar list of reservations of authority. See Administrator’s Reservations of Authority, 49 C.F.R. § 501.7 (1985).


authority down to sixteen separate FDA career executives, all Directors and Deputy Directors of various FDA offices and centers. Many of the resulting recalls have been high profile and controversial. This devolution of authority is not an aberration for the FDA; a recent study found that career employees issued “almost all” of the 1,891 FDA rules published from 2001 to 2018. In other words, virtually every final rule issued by the FDA over an almost twenty-year period was signed by a civil servant. Indeed, we find that FDA is the agency with the most published subdelegations in our dataset.

Multimember commissions devolve their authority too, though the dynamics can be more complex, especially with partisan balancing requirements. In 2011, for example, a Democrat-dominated Federal Communications Commission delegated authority to its Wireless Telecommunication Bureau (WTB)—headed by a career executive—to resolve disputes arising out of a rule governing domestic data roaming. The delegation was made after a 3–2 vote along party lines. Three years later, the head of the WTB granted a petition in favor of T-Mobile’s interpretation of the rule with which the sitting Republican Commissioners disagreed. The Republican Commissioners publicly called on the Chair to bring the matter to a full commission vote, which never occurred.

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17 See 21 C.F.R. § 5.411 (2002) (listing the sixteen officials with authority to recall medical devices); Delegations of Authority and Organization; Reorganization and Republican, 66 Fed. Reg. 30992, 31013 (June 8, 2001) (reorganizing delegations within FDA by functional areas and relisting 21 C.F.R. § 5.10 as 21 C.F.R. §5.411). These officials include the Director and Deputy Director for the Office of Compliance and the Director and Deputy Directors of the Center for Biologics Evaluation and Research, among other similarly situated officials. Id.


20 See infra Section II.A.


22 See generally id.


just go through the confirmation process in order to have bureaus and advisory committees make decisions that should be made by Commissioners.”

Notwithstanding the Commissioner’s complaint, the WTB’s decision was not revisited.

Examples like these reflect a bureaucracy overseen by civil servants and hidden in plain sight. It hums along even when the agency is beset by vacancies at the top or otherwise helmed by acting officials. Even when presidentially appointed, Senate-confirmed officials are in place, some are unaware that subdelegated authority is even being exercised below. In advising new Commissioners, for example, a former Commissioner of the Securities and Exchange Commission (SEC) recounted his experience: “From time to time, you might read in a newspaper about a ‘Commission action,’ and you will have no idea what it is about.” The former Commissioner explained that this is often because “the staff has taken action pursuant to the more than 376 separate rules where the Commission previously granted delegated authority to the SEC staff.”

His tone of resignation reflects not only the magnitude of subdelegated authorities, but also the costs of learning about them.

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

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for a simple up or down vote, consistent with both the law and the long-standing practice of both Republican and Democratic FCC Chairmen. The Chairman’s Office refused.”.

25 Id. For an overview of the role of advisory committees in agency decisionmaking, see generally Brian D. Feinstein & Daniel J. Hemel, Outside Advisers Inside Agencies, 108 GEO. L.J. 1139 (2020).
27 See generally Anne Joseph O’Connell, Actings, 120 COLUM. L. REV. 613 (2020) (examining the pervasiveness of temporary leaders in federal agencies).
29 Id.
30 See Federal Register, 1936 to Present, GOVINFO, https://www.govinfo.gov/help/fr#about [https://perma.cc/74E5-NK8H] (“[The Federal Register] is the official daily publication for rules, proposed rules, and notices of Federal agencies and organizations, as well as executive orders and other presidential documents.”).
Federal Government.” Both are highly formal venues that require attention to drafting conventions and review by the Office of Federal Register. Second, as we will show, executive actors often issue subdelegations during the midnight period before a presidential transition. As a result, reversal can be costly for new administrations given their competing priorities and steep learning curves. Finally, these delegations can also become functionally entrenched as various interests coalesce around them. Indeed, our study reveals that, once granted, these more formal delegations are rarely revoked.

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

This Article introduces the concept of submerged independent agencies, sheds light on their scope, and reflects upon the resulting normative implications. Previous scholarship on subdelegations draws on disjointed examples to paint an incomplete picture of the phenomenon, and some of

33 See infra Section II.C.
34 See infra Section III.B.
35 See infra subsection II.B.2.
36 See infra Section II.B.
37 The Center for Biologics Evaluation and Research (CBER), for example, has numerous offices and staff that rival more familiar organizational charts at agencies like the FDA, of which it is a part. See Center for Biologics Evaluation and Research (CBER), U.S. FOOD & DRUG ADMIN. (June 29, 2022), https://www.fda.gov/about-fda/fda-organization/center-biologics-evaluation-and-research-cber [https://perma.cc/E5WM-F353] (“CBER is the Center within FDA that regulates biological products for human use under applicable federal laws, including the Public Health Service Act and the Federal Food, Drug and Cosmetic Act.”).
38 See infra Section II.A.
39 See supra notes 27–29 and accompanying text.
these analyses are already outdated.40 Building on and updating this work, our contributions are both conceptual—synthesizing themes of agency independence—and empirical. One of this Article’s main advances is to document systematically the extent and nature of subdelegations to civil servants through a new dataset. This dataset also has the potential to open new lines of scholarship akin to the decades of work on congressional delegation. In turn, our descriptive findings will likely generate further hypotheses to be tested in future work, some of which are already in progress.41

The lens we offer also intervenes in several other existing literatures. For instance, it complicates work on the “internal separation of powers,” which often portrays civil servants and political appointees as competitors and rivals.42 When appointees grant power to aligned civil servants, especially in

40 See Elizabeth Magill, Agency Self-Regulation, 77 GEO. WASH. L. REV. 859, 898 (2009) (“While there are many studies . . . about delegation, these studies do not focus on self-regulatory measures.”); Nou, Subdelegating Powers, supra note 5, at 526 (describing the many unanswered questions regarding agency subdelegations). Previous legal scholarship, for instance, has examined questions of statutory interpretation: whether Congress explicitly permitted the delegation and, if not, how to understand legislative silence or ambiguity. See, e.g., Nathan D. Grundstein, Subdelegation of Administrative Authority, 13 GEO. WASH. L. REV. 144, 145 (1945) (describing the question “to be probed” as the extent to which the power to subdelegate authority may be implied when Congress has not explicitly done so); Jason Marisam, The Interagency Marketplace, 96 MINN. L. REV. 886, 892 (2012) (“The question of whether Congress has authorized subdelegation is a matter of statutory interpretation.”); Note, Subdelegation by Federal Administrative Agencies, 12 STAN. L. REV. 808, 810 (1960) (“[W]here the statute is silent, the difficulty of anticipating the needs for subdelegation in each situation suggests that the determination of where subdelegation should be made has been left to agency discretion.”). Related issues are the extent to which the President has an inherent constitutional authority to delegate, or whether the nondelegation doctrine demands congressional authorization. See Thomas W. Merrill, Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation, 104 COLUM. L. REV. 2007, 2176 (2004) (“The exclusive delegation doctrine suggests that the President and executive branch agencies can subdelegate only if and to the extent Congress has authorized subdelegation.”). Still other scholars have proposed that judicial deference to agency interpretations should only extend to those signed-off by agency heads, rather than their subordinates. See David J. Barron & Elena Kagan, Chevron’s Nondelegation Doctrine, 2001 SUP. CT. REV. 201, 238 (proposing to limit Chevron deference to action of the statutory delegatee). In the context of acting officials and the Vacancies Act, Anne O’Connell explores many of the legal issues arising from delegated authority, which she argues functions as a “substitute” for acting leaders. See O’Connell, Actings, supra note 27, at 658, 682-89; see also Daniel A. Farber & Anne Joseph O’Connell, Agencies as Adversaries, 105 CALIF. L. REV. 1375, 1447-50 (2017) (analyzing legal issues concerning subdelegations in the context of agencies acting as adversaries).

41 See, e.g., Brian D. Feinstein & Jennifer Nou, Strategic Subdelegation (Dec. 14, 2022) (unpublished manuscript) (on file with authors) (finding that political appointees subdelegate to civil servants when policy preferences align).

42 See Jon D. Michaels, Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers, 91 N.Y.U. L. REV. 227, 235 (2016) (“[A]dmnistrative power is . . . divided and shared among three sets of rivals: the politically appointed agency leaders who set the administrative agendas, the politically insulated career civil servants who handle most of the agency’s day-to-day responsibilities, and the broader public legally authorized to contribute to the development and implementation of administrative policies.”); see also Jon D. Michaels, An Enduring, Evolving Separation of Powers, 115 COLUM. L. REV. 515, 534 (2015) (describing how civil servants are “rivalrous counterweights” to “political leadership atop administrative agencies”).
midnight periods, these two groups can act in concert to perpetuate an administration's preferences.\textsuperscript{43} In this sense, these dynamics involve a separation of parties rather than powers.\textsuperscript{44} Finally, our findings further reinforce the descriptive observation that the executive branch is hardly unitary. While many have noted that the executive branch is a “they” and not an “it,”\textsuperscript{45} submerged independent agencies show just how much delegated power civil servants can wield.

The topic is also timely in light of the Trump Administration's outgoing efforts to subject these agencies to greater political control.\textsuperscript{46} President Trump's Executive Order prohibited career staff from authorizing regulations, required that any rules “be signed by a senior appointee,” only allowed senior appointees to initiate rulemakings, and prohibited any future subdelegations of sign-off authority to staff.\textsuperscript{47} Given its lame-duck timing, however, the Order seemed more symbolic than substantive and was revoked about a month later by President Biden.\textsuperscript{48} The issue, however, is likely to reemerge during the next Republican administration. In addition to these hints of greater presidential scrutiny, private parties have already begun to challenge agency subdelegations as unconstitutional.\textsuperscript{49} Once the extent of the phenomenon is better known, there is likely to be even more political attention and litigation.

\textsuperscript{43} Gillian E. Metzger, The Interdependent Relationship Between Internal and External Separation of Powers, 59 EMORY L.J. 423, 436 (2009) (considering the civil service to be a 'structural protection[] for intra-Executive Branch independence’); Neal Kumar Katyal, Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within, 115 YALE L.J. 2314, 2316 (2006) ("The first-best concept of 'legislature v. executive' checks and balances must be updated to contemplate second-best 'executive v. executive' divisions."); Katyal, Internal Separation of Powers, supra, at 2317 ("A critical mechanism to promote internal separation of powers is bureaucracy.").

\textsuperscript{44} Cf. Daryl J. Levinson & Richard H. Pildes, Separation of Parties, Not Powers, 119 HARV. L. REV. 2311, 2315 (2006) ("[T]he 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.").

\textsuperscript{45} See, e.g., Cass R. Sunstein & Adrian Vermeule, The Law of "Not Now": When Agencies Defer Decisions, 103 GEO. L.J. 157, 161 (2014) ("[T]he Executive Branch is a ‘they, not an it,’ with multiple offices and departments having a wide range of perspectives and expertise.").


\textsuperscript{49} See, e.g., Jooce v. Food & Drug Admin., 981 F.3d 26, 28 (D.C. Cir. 2020) (describing appellants’ contention that a rule promulgated through subdelegation was unconstitutional), cert. denied, 141 S. Ct. 2854 (2021); The Constitution Going Up in Vapor, PAC. LEGAL FOUND. https://pacificlegal.org/case/vape-litigation [https://perma.cc/TPU5-FNK8] ("The final rule published in the Federal Register, however, contains only the name of an FDA employee, not a principal officer of the FDA . . . . Therefore, under the Appointments Clause, the Deeming Rule is constitutionally invalid.").
This Article proceeds in three parts. Part I introduces the concept of submerged independent agencies. It situates the idea amidst empirical efforts to define the “agency” as a meaningful unit of analysis. While such efforts often rely on rule-like definitions, we offer a functional account grounded in legal theory and doctrine: an administrative agency is an entity that exercises discretionary governmental authority. Among other things, this principle helps to answer the question of when subunits within government should be treated separately. Part I then details our method for isolating independent agencies using forty years of data drawn from the Federal Register.

Part II proceeds by using this dataset to present an empirical portrait of submerged independent agencies. It begins with the observation that the majority of internal delegations of governmental authority are grants from political appointees to civil servants, rather than other appointees. At first glance, the finding is perplexing: why would decisionmakers voluntarily abdicate their power to tenure-protected staff over whom they have less control? To shed light on this question, we seek to understand time trends as well as any underlying political dynamics. First, we find a gradual decline in the frequency of subdelegations over the last four decades. Potential explanations for this trend include a decline in the stock of statutory authority available to delegate or an increasing preference not to publish delegated authorities. Subdelegations also tend to occur more frequently during the final three months of an outgoing presidential administration. Finally, some models suggest that subdelegations are less common during periods of divided party control between the presidency and House of Representatives. Consistent with a broader literature, this finding suggests that submerged independent agencies emerge as the result of strategic political calculations.50

Part III then takes a step back to consider the legal and normative implications. Submerged independent agencies raise constitutional and statutory issues. Because civil servants are entrusted with significant governmental authority, they may be improperly appointed. And because these same civil servants are removable only for cause, the subdelegations may also interfere with the President’s duty to “take care” that the laws are faithfully executed.51 That said, agencies may be able to cure the constitutional defects through prospective and ex post ratification and review procedures.52

50See, e.g., DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN 162 (2003) (“With the growth in federal government responsibility and the increasing complexity of public policy, political actors are delegating increasing amounts of authority to executive branch actors.”).
52See infra Section III.A.
More broadly, submerged independent agencies reanimate classic debates in administrative law that have long surrounded the form. On the one hand, they likely facilitate the development and incorporation of expertise within the executive branch. On the other, they suffer from familiar concerns about political accountability. Accordingly, we explore institutional mechanisms to assist political actors in navigating this tradeoff. For instance, we recommend that political actors consider establishing a process for reviewing actions taken pursuant to delegated authority, sunsetting these delegations, and requiring more review of the delegated authorities themselves, especially during presidential transitions.

I. EXECUTIVE BRANCH AGENCY DESIGN

It is well-known that Congress and the President design agencies. Scores of studies attempt to understand when and why they do so. Less known, however, is the fact that lower-level executive officials—agency heads and other political appointees—design agencies as well. Like Congress, they sometimes choose the independent agency form. This behavior raises a number of questions, such as which officials engage in this practice, how often, and why?

This Part lays the foundation needed to address these questions. First, Section A isolates the relevant unit of empirical analysis—the “agency”—which we functionally define in terms of the exercise of discretionary governmental authority. Section B then operationalizes the concept and describes the method used to generate our dataset.

A. Independent Agencies

Debates about independent agencies focus more on what it means to be “independent” rather than on what it means to be an “agency.” The term “agency,” in the administrative sense, means different things for different purposes. The definitional issue often arises when the boundaries of a


54 See Christopher R. Berry & Jacob E. Gersen, Agency Design and Political Control, 126 YALE L.J. 1002, 1019 (2017) (“[T]he term agency has several meanings in political science and is a term of art in
governmental entity are ambiguous, for example, when an organization straddles the border between the public and private sectors or between federal and state governments. But these contested borders can also exist within an organization. For instance, is the Public Company Accounting Oversight Board (PCAOB) within the SEC a standalone “agency”? What about the Wireless Telecommunications Bureau (WTB) within the Federal Communications Commission (FCC)? One possible intuition is that lower-level units that exercise some threshold level of policymaking discretion should be thought of as separate agencies. For example, commentators often treat the Federal Energy Regulatory Commission (FERC) as a separate entity, even though it is technically within the Department of Energy. The same goes for the FDA, housed within the Department of Health and Human Services, or the Internal Revenue Service (IRS), housed within the Department of Treasury.

Scholars, for their part, have been surprisingly imprecise when faced with these questions. What counts as an “agency” often depends on decisions made in pre-existing datasets, often with limited explanation. But some data sources contain about one hundred agencies, while others count over six
hundred.\textsuperscript{61} This disparity is a problem for those who wish to compare findings and study the administrative state in a systematic way. Perhaps the most thoughtful attempt to define the concept for empirical purposes comes from Jennifer Selin and David Lewis.\textsuperscript{62} They define an “agency” as any “federal executive instrumentality directed by one or more political appointees nominated by the President and confirmed by the Senate (the instrumentality itself rather than its bureaus, offices, or divisions).”\textsuperscript{63}

As for the question of which units within an agency to include, Selin and Lewis also incorporate “politically important” bureaus and other subunits if they: (1) issue a rule to Congress reported under the Congressional Review Act; (2) are listed in data sources as reporting to an Under Secretary or the equivalent; or (3) are excluded from the first two requirements for national security reasons.\textsuperscript{64} These criteria lead them to generally exclude Offices of Public Affairs and General Counsel Offices, but include bureaus like the Department of Defense’s National Security Agency and the Department of Energy’s National Nuclear Security Administration.\textsuperscript{65} In doing so, Selin and Lewis should be lauded for offering a definition that rigorously synthesizes normative and empirical concerns.\textsuperscript{66} Many observers care about the political dynamics of agencies. So Selin and Lewis sensibly focus on indicia of oversight by political actors, such as congressional review. Perhaps implicit in their definition is an emphasis on political salience, for which presidential nomination and Senate confirmation serve as a proxy.

Whereas Selin and Lewis offer a politically informed definition of agencies, we present a more functional, legally grounded one. Instead of focusing on political resonance, we ask whether an administrative unit exercises discretionary governmental authority. In other words, we look at whether the administrative unit is empowered to act independently of other officials.\textsuperscript{67} This more functional


\textsuperscript{62} See \textit{SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES}, supra note 54, at 13-14, 14 n.51.

\textsuperscript{63} \textit{Id.} at 14 (emphasis omitted).

\textsuperscript{64} \textit{Id.} at 14-15.

\textsuperscript{65} \textit{See id.} at 15 nn. 55-56.

\textsuperscript{66} Cf. Robert M. Fishman, \textit{Rethinking Dimensions of Democracy for Empirical Analysis: Authenticity, Quality, Depth, and Consolidation}, 19 \textit{ANN. REV. POL. SCI.} 289, 291 (2016) (observing, in the context of disagreements over how to define democracy, that “[i]t is only through conceptual work simultaneously oriented toward both normative concerns and empirical research that progress toward [scholarly] consensus can be made”).

\textsuperscript{67} To be sure, the concept of “authority” is a nuanced one. We seek to give it content by reference to examples and other verbal formulations. Joseph Raz’s formulation also provides a valuable framework, namely, “authority” as preemptive: the exercise of reason-displacement as grounds for action. See Joseph Raz, \textit{Authority and Justification}, 14 \textit{PHIL. & PUB. AFFS.} 3, 13 (1985) (“The fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should exclude and take the place of some of them.” (emphasis omitted)).
conception is intended to track a range of constitutional and statutory concerns about the exercise of delegated power by administrative actors. To be sure, there are subtle differences between various legal definitions of the “agency” that matter in fact-specific constitutional or statutory disputes. Nonetheless, we argue that there is a common conceptual core that is possible to recognize in service of isolating administrative units within larger ones. The hope is that this alternative definition will inform future empirical work on administrative agencies more broadly.

Consider, for instance, constitutional disputes about the President’s removal power, an oft-cited hallmark of agency independence.\(^{68}\) While the case law sometimes refers to the “agency” at issue,\(^ {69}\) the Supreme Court does not meaningfully grapple with the concept as such in removal cases. Rather, what matters is that the “officer” at issue exercise discretionary executive authority.\(^ {70}\) For example, in *Morrison v. Olson*,\(^ {71}\) the Court concluded that the Office of Independent Counsel was an appropriate unit of constitutional analysis since the role entailed “law enforcement functions that typically have been undertaken by officials within the Executive Branch.”\(^ {72}\) Most importantly, the Independent Counsel exercised discretionary authority in carrying out these executive functions.\(^ {73}\)

In a later case implicating removal restrictions, *Free Enterprise Fund v. Public Company Accounting Oversight Board*,\(^ {74}\) the Court considered a double-for-cause removal scheme: the President could not remove members of the SEC at will; the SEC, in turn, could not fire members of Public Company Accounting Oversight Board (PCAOB) without cause.\(^ {75}\) PCAOB was a “private ‘non-profit corporation’” modeled on “private self-regulatory organizations in the

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69 See, e.g., Collins v. Yellen, 141 S. Ct. 1761, 1784 (2021) (“The [Federal Housing Finance Agency] (like the CFPB) is an agency led by a single Director, and the Recovery Act (like the Dodd-Frank Act) restricts the President’s removal power.” (emphasis added)).

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


72 Id. at 691.

73 See id. at 696 (“T]he counsel is to some degree ‘independent’ and free from executive supervision to a greater extent than other federal prosecutors . . . .”).


75 Id. at 484.
securities industry.”

The Court referred to the powers of PCAOB members as that of “determin[ing] the policy and enforc[ing] the laws of the United States.” In this manner, the relevant unit of analysis for removal purposes was that of executive officers that exercised discretionary governmental authority.

Similar emphasis on the exercise of discretionary governmental authority informs congressional and judicial attempts to define an “agency” for statutory purposes. Take the Administrative Procedure Act (APA), which defines an “agency” as “each authority of the Government of the United States, whether or not it is within or subject to review by another agency . . . .” The definition, by its terms, contemplates that what are traditionally thought of as subagencies, such as the FDA, are “agencies,” since they are “within” or “subject to review” by another agency. The same goes for organizational units like offices and bureaus. When confronted with such internal entities, courts have further clarified that an agency is “any administrative unit with substantial independent authority in the exercise of specific functions.” In Soucie v. David, for example, the U.S. Court of Appeals for the D.C. Circuit held that the Office of Science and Technology qualifies as a separate agency—despite being a unit of the Executive Office of the President—because it exercises the “independent function of evaluating federal programs,” that is, functions granting it discretion apart from the President.

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76 Id.; see also O’Connell, Bureaucracy at the Boundary, supra note 54, at 858-59 (classifying PCAOB as an “agency-related nonprofit corporation”).
77 Morrison, 561 U.S. at 484.
78 To be sure, Congress has used different textual formulations across different statutes. See JARED P. COLE & DANIEL T. SHEDD, CONG. R Sch. Serv., R43562, ADMINISTRATIVE LAW PRIMER: STATUTORY DEFINITIONS OF “AGENCY” AND CHARACTERISTICS OF AGENCY INDEPENDENCE (2014) [hereinafter ADMINISTRATIVE LAW PRIMER] (“Congress has not provided one all-encompassing definition of an agency. Instead, the term ‘agency’ can mean different things in different contexts, depending on what statute is at issue.”). These different formulations can result in different applications, particularly when the entity in question overlaps with external bodies, such as private actors or state governments.
79 5 U.S.C. § 551(1). The provision excludes Congress and the federal judiciary, as well courts martial and military commissions, and military authority exercised in the field in time of war or in occupied territory. Id. This definition is cross-referenced in a number of other statutes, such as the Negotiated Rulemaking Act, 5 U.S.C. § 562, the Regulatory Flexibility Act, 5 U.S.C. § 601, and the Congressional Review Act, 5 U.S.C. § 804. See ADMINISTRATIVE LAW PRIMER, supra note 78, at 8 (“[T]he definition of ‘agency’ provided in the APA is often referenced in other statutes that govern the rulemaking process. For example, the Negotiated Rulemaking Act, the Regulatory Flexibility Act, and the Congressional Review Act all define agency by reference to the APA’s definition.”) (citations omitted)).
80 Soucie v. David, 448 F.2d 1067, 1073 (D.C. Cir. 1971).
81 Id. at 1074-75. A Senate report during of the drafting of the APA also offered that an agency was “any officer or board” that “has authority to take final and binding action with or without appeal to some superior administrative authority.” PAT MCCARRAN, ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. Doc. No. 79-248, at 13 (2d Sess. 1946).
In this manner, our legally informed definition of the agency focuses on discretionary governmental authority. This conception encompasses both traditional executive functions, as well as quasi-adjudicative and quasi-legislative ones that are nevertheless executive in nature.\(^82\) Focusing on this functional definition allows us to locate units of analysis that track a range of normative concerns, such as the relative accountability or expertise of those that exercise coercive power. Our functional definition also elucidates how authority delegated from Congress to a political appointee and then subdelegated again to a civil servant results in a species of agency in its own right.

This claim requires us to show how the recipient of a subdelegation exercises \textit{independent} discretion, despite her lower position in the administrative hierarchy. After all, one could wonder whether the initial delegator could simply reverse any decision made pursuant to the subdelegation. In other words, just because someone delegates authority to perform a function, that does not imply they cannot subsequently undo a later performance of that function. While this premise may be true in some contexts, it is less likely to be so for the class of subdelegations that we study: those that have been published in the Federal Register as rules and subsequently codified in the CFR.

As an initial matter, when an agency official subdelegates their authority as a published rule in the CFR, that subdelegation may become judicially enforceable due to the \textit{Accardi} doctrine, which requires an agency to follow its own rules.\(^83\) In the paradigm cases invoking \textit{Accardi}, a lower-level agency official acts pursuant to a subdelegated power. After a higher-level official overrules or otherwise reverses the decision, an adversely affected litigant brings suit arguing that the delegation should be enforced and that the delegator’s decision be nullified. The litigant, in other words, argues that the higher-level official has violated \textit{Accardi} by failing to follow the entity’s own procedural rule.\(^84\) Under these circumstances, courts will look at the language and form of the internal delegation to determine whether or not that rule should be enforced.

\(^{82}\) See United States v. Arthrex, Inc., 141 S. Ct. 1970, 1982 (2021) (“The activities of executive officers may take legislative and judicial forms, but they are exercises of—indeed, under our constitutional structure they must be exercises of—the executive Power, for which the President is ultimately responsible.” (quotation marks omitted)). Specifically, the Supreme Court noted in \textit{Arthrex} that “[w]hile the duties of [Administrative Patent Judges (APJs)] partake of a Judiciary quality as well as Executive, APJs are still exercising executive power and must remain dependent upon the President.” \textit{Id.} (quotation marks omitted).

\(^{83}\) See United States \textit{ex rel. Accardi} v. Shaughnessy, 347 U.S. 260, 268 (1954) (finding that the Board of Immigration Appeals “failed to exercise its own discretion, contrary to existing valid regulations”); see generally Thomas W. Merrill, \textit{The Accardi Principle}, 74 GEO. WASH. L. REV. 569 (2006) (summarizing the \textit{Accardi} principle and explaining how it works in practice).

\(^{84}\) See, \textit{e.g.}, \textit{Accardi}, 347 U.S. at 267-68; Service v. Dulles, 354 U.S. 363, 388 (1957); \textit{Chevron Oil Co. v. Andrus}, 588 F.2d 1383, 1385-86 (5th Cir. 1979); \textit{Skokomish Indian Tribe v. Gen. Servs. Admin.}, 587 F.2d 428, 431-32 (9th Cir. 1978).
Indeed, this was the outcome of Accardi itself, which featured a subdelegation published in the CFR from the Attorney General to the Board of Immigration Appeals (BIA). 85 Joseph Accardi sought a discretionary suspension of deportation. 86 After initial proceedings before an agency adjudicator, but before his case reached the BIA, the Attorney General announced that he planned to deport Accardi and circulated a list with Accardi’s name on it to members of the BIA, who affirmed the denial of the suspension of deportation. 87 The Supreme Court eventually found in Accardi’s favor, however, citing the Attorney General’s violation of the published subdelegation. 88 As the Supreme Court later characterized this holding, “so long as the Attorney General’s regulations remained operative, he denied himself the authority to exercise the discretion delegated to the Board even though the original authority was his and he could reassert it by amending the regulations.” 89 Other judicial decisions feature analogous facts: a delegator of authority attempts to overrule the delegatee, only to have a judge reverse the decision on the principle that an agency must abide by its own rules, including procedural rules subdelegating authority. 90

Regarding the language of the delegation, one critical issue in these cases concerns how a judge interprets the rule subdelegating authority: did the delegator intend to divest themselves of that authority? Indeed, to ensure that an agency abides by its own rules under Accardi, the court has to interpret those rules. 91 Sometimes delegators are explicit about this intent. For example, one subdelegation from the Secretary of Commerce to the Director of the Census Bureau regarding population tabulations made clear that the “determination of the Director of the Census shall not be subject to

85 Under the existing framework at the time, the agency operated as follows:

The Board is appointed by the Attorney General, serves at his pleasure, and operates under regulations providing that: “In considering and determining . . . appeals, the Board of Immigration Appeals shall exercise such discretion and power conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case. The decision of the Board . . . shall be final except in those cases reviewed by the Attorney General . . . .”

Accardi, 347 U.S. at 266 (quoting 8 C.F.R. § 90.3(c) (1949)).

86 Id. at 261-62.

87 Id. at 262-63.

88 Id. at 268.


90 See, e.g., Service, 354 U.S. at 386-87 (overturning a Secretary’s decision to discharge an individual from the State Department based on previous regulations subdelegating the decision to the Deputy Under Secretary who had concluded that the individual should not be discharged).

91 See Nou, Subdelegating Powers, supra note 5, at 521 (“[E]ven when subdelegation takes the form of a legislative rule, courts must then engage in regulatory interpretation to determine whether the rule indeed divested the agency head of her authority . . . .”).
review, reconsideration, or reversal by the Secretary of Commerce." 92 In other words, the delegator expressly stated that she would not disturb the decision of the delegatee. Another common formulation of this intent to divest authority is when the subdelegation makes clear that the delegatee’s decision will be “final.” 93 Under these circumstances, a court will likely invoke Accardi against a Secretary who seeks to later reverse the Census Director’s decision.

Delegators can also be explicit in the other direction: that is, to make clear that they do not divest themselves of authority. Most commonly, agency heads explicitly “reserve” authority to exercise the delegated power themselves. Sometimes they issue blanket reservations of authority. The Secretary of Transportation, for example, declares that “[e]xcept as otherwise provided,” she “may exercise powers and duties delegated or assigned to officials other than the Secretary.” 94 Alternatively, subdelegations can also specify reservations for individual grants of power. The Secretary of Agriculture specifically reserves authority from a delegation to the Under Secretary for Trade and Foreign Agricultural Affairs for “[a]pproving export controls.” 95 Under these circumstances, courts generally decline to apply Accardi since the rule itself retains authority in the initial delegator. 96

Between these two poles are a host of delegations that are ambiguous: they lack both clear reservations of authority and explicit intent to divest authority completely. Unfortunately, given the challenges of collecting and coding data on reservations of authority, our dataset does not capture which

92 See 15 C.F.R. § 101.1(a)(4) (2001). Interestingly, the subdelegation was not achieved without ambivalence. On the one hand, the subdelegation stripped the Secretary of Commerce’s authority to “review, reconsider[,] or reverse” the decision below. See Report of Tabulations of Population to States and Localities Pursuant to 13 U.S.C. 141(c) and Availability of Other Population Information, 65 Fed. Reg. 59713, 59716 (Oct. 6, 2000) (codified at 15 C.F.R. pt. 101). At the same, the rule also stated that it did not “relieve[] the Secretary of Commerce of responsibility for any decision made by the Director of the Census pursuant to this delegation.” Id. It is unclear what the Department of Commerce meant through the subdelegation when it stated that the Secretary still had “responsibility” for the decision even if he could not disturb it. Perhaps the subdelegation was implying that the Secretary was still on the hook for the initial delegation.


94 49 C.F.R. § 1.21(a) (2021); see also 7 C.F.R. § 780.3 (2021) (“Nothing contained in this part shall preclude the Secretary, or the Administrator of [the Farm Service Agency (FSA)], Executive Vice President of [the Civilian Conservation Corps (CCC)], the Chief of [the Natural Resources Conservation Service (NRCS)], if applicable, or a designee, from determining at any time any question arising under the programs within their respective authority or from reversing or modifying any decision made by a subordinate employee of FSA or its county and State committees, or CCC.”).


96 See, e.g., Chevron Oil Co. v. Andrus, 588 F.2d 1383, 1386-88 (5th Cir. 1979) (allowing delegator to overrule delegatee based on delegation’s language); Skokomish Indian Tribe v. Gen. Servs. Admin., 587 F.2d 428, 432 (9th Cir. 1978) (same).
delegations fall into each of these categories. Reservations, whether blanket or individual, are often placed in different parts of the CFR and have idiosyncratic appearances in the Federal Register. They must be matched, often manually, with each delegated power through cross-references. Nevertheless, to try to get some sense of magnitude, we drew a random sample of 200 of the delegations in our dataset and found only two for which explicit reservations were present in the same Federal Register entries.97 Further, none of the 200 delegations in this sample included an express statement of divestment within the same entry. For these more ambiguous rules, judges will often defer to the agency after deploying the ordinary tools of regulatory interpretation.98

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

97 See infra note 141 and accompanying text
98 See Auer v. Robbins, 519 U.S. 452, 461 (1997) (giving “controlling” weight to an agency interpretation so long as it is not “plainly erroneous or inconsistent with the regulation” (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 322, 359 (1989))); see also Kisor v. Wilkie, 139 S. Ct. 2400, 2415 (2019) (stating that a court should not afford Auer deference until it has “exhaust[ed] all the traditional tools of construction” (quotation marks omitted)).
99 See Merrill, The Accardi Principle, supra note 83, at 596 (“[A] strong duty of compliance attaches when the agency promulgates a ‘legislative rule.’ It does not attach when an agency adopts other forms of rules, such as interpretative rules, policy statements, guidance documents, or agency precedents. Legislative rules are universally acknowledged as ‘binding’ on the agency and its personnel . . . .” (citation omitted)).
100 If the agency issues a subdelegation as a non-legislative procedural rule, which agencies often do, courts ask whether the rule “encodes a substantive value judgment or puts a stamp of approval or disapproval on a given type of behavior.” See Am. Hosp. Ass’n v. Bowen, 834 F.2d 1037, 1047 (D.C. Cir. 1987). Alternatively, if the subdelegation is presented as an interpretive rule, then judges examine indicia, such as whether the agency invoked its general legislative authority, otherwise possessed an adequate legislative basis, amended a previous rule, or published the rule in the CFR. See Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1109 (D.C. Cir. 1993). CFR publication weighs in favor of treating the rule as binding and thus more judicially enforceable than had the rule not been published. See 44 U.S.C. § 1510(a)-(b) (stating that “complete codifications of the documents of each agency of the Government having general applicability and legal effect” shall be published in a document “designated as the ‘Code of Federal Regulations’” (emphasis added)); Am. Portland Cement All. v. EPA, 101 F.3d 772, 776 (D.C. Cir. 1996) (“In examining whether agency actions are subject to judicial review, the court has looked to a variety of criteria, including . . . publication or lack thereof in the Federal Register or the Code of Federal Regulations . . . . The court has also recognized that the real dividing point between regulations and general statements of policy is publication in the Code of Federal Regulations.” (alterations and quotation marks omitted)). But see Health Ins. Ass’n of Am., Inc. v. Shalala, 23 F.3d 412, 423 (D.C. Cir. 1994) (calling CFR publication a mere “snippet of evidence of agency intent”).
Even if a court classifies a rule as “non-legislative,” however, it may still enforce the rule against the agency. In *Morton v. Ruiz*, for example, the Court invalidated a Bureau of Indian Affairs regulation for failure to abide by a provision in an internal manual stating that such regulations should be published in the CFR. 101 The most coherent rationale under these circumstances is that of due process. 102 If the rule was intended to protect individual rights and an individual is harmed or otherwise relied on the rule, due process concerns may require that the agency decision that violated the procedure be struck down. 103 This justification would likely be most persuasive in the adjudicatory context. 104

Separately, courts have sometimes also invoked the APA’s demand for reasoned explanation if the agency does not comply with its own rules. Failure to explain why the agency did not abide by the rule, in this view, is “arbitrary and capricious” and allows a court to vacate and remand the decision that violated the procedural rule. 105 For instance, consider a case concerning an HHS Secretary’s decision to overrule the FDA’s determination to make Plan B available over-the-counter. 106 In *Tummino v. Hamburg*, the judge explicitly took notice of the Secretary’s subdelegation to the FDA commissioner regarding over-the-counter product approvals. 107 He observed that the HHS Secretary had not reserved the right to review or otherwise “intervene” in the FDA’s decision-making. 108 As a result, the court characterized HHS’s departure from agency practice as arbitrary and capricious. 109 In this manner, and as *Tummino* demonstrates, *Accardi* and ordinary arbitrariness review helps to furnish discretion on officials exercising subdelegated authority.

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

During my tenure, the staff has improved at giving Commissioners a “heads-up” about notable actions that the staff plans to take using its delegated authority. Nevertheless, there are still times when the staff acted based on delegated authority on important matters (or, at least, important to one or more Commissioners) without notice to the Commissioners.\textsuperscript{110} As a result, it can be extremely difficult for agency heads to learn about decisions made pursuant to delegated authority until after the fact. These information costs are particularly high for new political appointees with steep learning curves.

Finally, there are also norms or conventions that develop over time, which further allow the delegatee to exercise discretion.\textsuperscript{111} Consider, once again, the FDA Commissioner. The FDA, by statute, is “established in” HHS.\textsuperscript{112} The HHS Secretary explicitly has the authority to “provid[e] overall direction” and “prescribe” actions for the FDA Commissioner,\textsuperscript{113} who is removable at will. Nevertheless, HHS rarely overturns FDA decisions under FDA’s myriad subdelegated authorities, which helps explain the outcry over the aforementioned Plan B decision. As a result, an “unbroken practice of deference to the FDA seemed to have developed at the HHS level, and there were some grounds for thinking that the practice had hardened into a convention.”\textsuperscript{114} Similar dynamics are also true for administrative law judges and inspectors general, many of whom have been subdelegated authority.\textsuperscript{115}

Under these circumstances, when the initial delegator attempts to overturn the decision of the delegatee, she will face pushback from both the delegatee and other political actors as well.

For these reasons, these CFR-published subdelegations to civil servants can be understood as delineating agencies that are important features of the administrative state. Their conceptual underpinnings mirror those of more traditional agencies. In the Department of Transportation, for example, NHTSA’s Office of Rulemaking makes discretionary decisions pursuant to

\textsuperscript{110} See Aguilar Statement, supra note 28.

\textsuperscript{111} See Adrian Vermeule, Conventions of Agency Independence, \textit{113 COLUM. L. REV. 1163}, 1207-08 (2013) (describing the strong convention of independence surrounding the FDA).

\textsuperscript{112} See \textit{21 U.S.C. § 393(a)} (“There is established in the Department of Health and Human Services the Food and Drug Administration . . . ”).


\textsuperscript{114} Vermeule, \textit{Conventions of Agency Independence}, supra note 111, at 1208.

\textsuperscript{115} Id. at 1210-13.
authority originally granted by Congress but delegated down. These subunits are usually bureaucracies in their own right. NHTSA's Office of Rulemaking, for instance, requested a 2021 budget of $22.59 million.\textsuperscript{116} As previously mentioned, the office takes public responsibility for NHTSA's rules.\textsuperscript{117} As such, the legal and conceptual basis provided here aims to sharpen what appear to be inchoate intuitions in the literature about which sub-administrative bodies are worthy of examination as separate units of analysis.

B. Identifying Delegations

Given this class of agencies exercising discretionary governmental authority, those headed by civil servants are particularly important to study in isolation because they are abiding and persistent features of the administrative state in two senses: (1) the subdelegations themselves are relatively entrenched;\textsuperscript{118} and (2) the delegatees—the career civil servants—carrying them out tend to remain in government through presidential transitions.\textsuperscript{119} This is not, however, a story of the “permanent bureaucracy” wresting control. Rather, these powers have been granted by political appointees themselves. In other words, the President’s agents have chosen to abdicate their authority when creating submerged independent agencies. The questions raised, therefore, are why, to what extent, and where in the federal bureaucracy this behavior occurs.

To shed light on these inquiries, we used Westlaw’s searchable Federal Register database to locate final rules containing subdelegations of authority.

\begin{footnotesize}

\textsuperscript{117} See supra note 14 and accompanying text.

\textsuperscript{118} See infra subsection II.B.2; see also Daryl Levinson & Benjamin I. Sachs, Political Entrenchment and Public Law, 125 YALE L.J. 400, 408 (2015) (“At the most general level, ‘entrenchment’ means that political change has been made more difficult than it otherwise would (or should) be.”). Nina Mendelson characterizes administrative policy entrenchment as follows:

\begin{quote}
Administrative policy entrenchment typically takes the following form: In anticipation of the arrival of a new President, usually in the last several weeks of the outgoing President’s administration, an agency formally and publicly decides a policy question. The agency might issue a rule, policy statement, or guidance, file or settle litigation, or set the terms of a grant competition . . . . Although such a decision is likely to be reversible at least as a procedural matter, it is probable that the change will be costly.
\end{quote}


\end{footnotesize}
Specifically, we isolated all entries on which the stem words “delegat-” and “authori-” appeared in the same paragraph. We chose this approach based on our qualitative reading of dozens of subdelegations and the ways in which they are usually drafted.\textsuperscript{120} To corroborate this approach, we conducted a validity check using delegations within the SEC.\textsuperscript{121} Accordingly, we have strong reason to believe that we have collected essentially all of the subdelegations printed in the Federal Register during the study period.

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

The process yielded 1,389 relevant Federal Register entries from June 14, 1979 through August 31, 2019. Because many of these entries contain multiple subdelegations, we then disaggregated them by each specific authority granted.\textsuperscript{123} In all, the dataset initially contained 5,549 discrete

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

\textsuperscript{121} The SEC places its subdelegations consecutively in the CFR. See 17 C.F.R. §§ 200.30-1 to -19 (2021) (listing SEC delegations). That placement makes locating the full set of SEC delegations in that agency more straightforward. We identified 206 SEC delegations in the Federal Register. The CFR Sections in which SEC delegations are located also contain these same 206 delegations (as well as other delegations that occurred outside our study period). These 206 delegations in the CFR are cross-referenced with the Federal Register entries that we identified.


\textsuperscript{123} Ordinarily, multiple subdelegations within a given Federal Register entry are placed within separate CFR subsection revisions near the end of the Federal Register entry. On rare occasion, research assistants had to make judgment calls regarding whether, e.g., the statement that “the authority
subdelegations. We then used a machine-learning classification approach to isolate delegations of discretionary governmental authority: generally the authority to take actions yielding effects on outside parties. Examples of governmental authority include the power to promulgate regulations, impose penalties, grant or deny waivers of regulatory requirements, and settle litigation to which the agency is a party. By contrast, subdelegations that grant discretion to the delegatee but do not involve the exercise of governmental authority include ministerial or consultative tasks, such as providing nonbinding assistance, issuing informational notices.


125 This working definition draws on general judicial attempts to define the concept in the agency context. Cf. Dong v. Smithsonian Inst., 125 F.3d 877, 881 (D.C. Cir. 1997) (characterizing "governmental authority" for APA purposes as "a part of government which is generally independent in the exercise of its functions and which by law has authority to take final and binding action affecting the rights and obligations of individuals" (quoting James O. Freedman, *Administrative Procedure and the Control of Foreign Direct Investment*, 119 U. PA. L. REV. 1, 9 (1970))).

126 See, e.g., *Delegations of Authority and Organization; Center for Devices and Radiological Health*, 60 Fed. Reg. 47267, 47268 (Sept. 12, 1995) (delegating authority to the director of the FDA Center for Devices and Radiological Health to "promulgate regulations under which the Director may withdraw approval of [mammography facility] accreditation bodies").

127 See, e.g., *Delegations of Authority and Organization; Civil Money Penalties*, 58 Fed. Reg. 34212, 34213 (June 24, 1993) (delegating authority to the FDA's Deputy Commissioner of Operations "[t]o issue the final decision for the Commissioner, which constitutes final agency action" under several drug, medical device, and vaccine safety laws).


129 See, e.g., *Organization and Functions of the Board and Delegations of Authority*, 60 Fed. Reg. 61437, 61489 (Nov. 30, 1995) (delegating authority to the National Transportation Safety Board General Counsel to "compromise, settle, or otherwise represent the Board's interest in judicial or administrative actions to which the Board is a party or in which the Board is interested").

130 See, e.g., *Revisions of Delegations of Authority*, 53 Fed. Reg. 18253, 18258 (May 23, 1988) (delegating from the Secretary of Agriculture and others to the Chief of the Soil Conservation Service to, inter alia, "[p]rove technical assistance on soil and water conservation technology").

131 See, e.g., *Delegations of Authority and Organization*, 66 Fed. Reg. 30992, 31010 (June 8, 2001) (authorizing several civil service positions in the FDA Center for Food Safety and Applied Nutrition "to issue notices of confirmation of effective date of [several categories of] final regulations").
communicating with others, and authenticating documents for use in adjudications.

Applying this criterion, we then hand-coded a set of 1,400 subdelegations for whether each involved the exercise of discretionary governmental authority, our main criterion for demarcating agencies. We then divided this set into a “training” batch with 1,200 subdelegations and a “test” batch with the remaining 200 items. Next, we ran a series of machine-learning classifiers on the training data. Although the details differ by classifier, each classifier searches for patterns of words or syllables that are associated with the classification of a subdelegation in the training batch as authoritative or not, and then uses the appearance of these patterns in the test batch to predict the significance of each item in that batch.

We then selected the classifier that achieved the highest F₁ score—a combined measure of precision and recall on the test batch.

This classifier accurately predicted 95% of all subdelegations and achieved an F₁ score of 0.78, which is comparable to other classifiers applied to legal texts.

This process led us to eliminate 2,191 subdelegations from the remaining analyses, leaving us with 3,358 subdelegations of discretionary governmental authority.

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133 See, e.g., Amendment of Rules Concerning Delegations of Authority to the Director, Office of Applications and Reports Services and the Director, Division of Corporation Finance, 55 Fed. Reg. 11167, 11168 (Mar. 27, 1990) (delegating authority to the Director of the SEC Office of Applications and Reports Services to “authenticate all Commission documents produced for administrative or judicial proceedings”).

134 To identify the optimal classifier, we ran classifiers with every possible combination of the following two features: (1) preprocessing method (i.e., 3-grams & words, 3-grams, 4-grams, 5-grams), or English-language Lemmatization; and (2) classifier algorithm (i.e., naïve Bayes or k-nearest neighbor). These options produced ten possible combinations, each of which we ran. For all ten, we removed punctuation and unusual characters, replaced uppercase with lowercase letters, and analyzed the first 500 words in each subdelegation (in practice, the entire text). We then ran each classifier using WordStat software and selected the one that generated the highest F₁ score. See infra note 135 and accompanying text.

135 Precision measures how many positive predictions that the classifier makes are correct (correctly predicted positive cases divided by total number of predicted positive cases). Recall measures how many true positives in the dataset the classifier found (correctly predicted positive cases divided by the actual number of positive cases in the dataset). F₁ is the harmonic mean of precision and recall.

136 This specification has the following attributes. We preprocessed the test batch by breaking the text of each delegation into three-word sequences known as trigrams or three-grams. We then employed a naïve Bayes classifier with a multinomial distribution. We also tried many other combinations of preprocessing methods and classifiers and selected the combination that generated the highest F₁ score. The average precision for our model is 0.80 and the average recall is 0.76.

137 See Choi, An Empirical Study of Statutory Interpretation in Tax Law, supra note 124, at 402 (reporting F₁ scores of 0.762 and 0.707 in analyses of judicial opinions); see also Jennifer Nou & Julian Nyarko, Regulatory Diffusion, 74 STAN. L. REV. 897, 915 n.86 (2022) (reporting a 0.83 F₁ score for an analysis of regulatory text).
II. FINDINGS

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

A. Delegators and Delegatees

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

138 In most cases, delegators do not appear to retain authority to also exercise the subdelegated power. Analysis of a random sample of 200 subdelegations in our dataset reveals only two subdelegations in which the delegator reserved the right to exercise concurrent authority with the delegatee concerning the entire power in question. See, e.g., Organization and Functions, 49 Fed. Reg. 46527, 46529 (Nov. 27, 1984) (“No [sub]delegation prescribed herein shall preclude the [delegatee] . . . from exercising any of the powers or functions [described in the subdelegation].”); Regulations, Rules of Practice, Policy Statements and Organization and Functions, 46 Fed. Reg. 60414, 60416 (Dec. 10, 1981) (same). Notably, both subdelegations concern the USDA’s Packers and Stockyards Administration. For each of the 200 subdelegations in this analysis, we examined whether the Federal Register entry containing the subdelegation also included an express reservation of authority. Due to data limitations, we did not examine whether relevant reservations, either pertaining specifically to the subdelegation in question or to agency subdelegations in general, were included in separate Federal Register entries.

139 The numbers of subdelegations in the figure do not sum to the total number of delegations involving agency-like authority because some delegations do not list the delegator, list both appointee and civil servant delegatees, or list another type of delegatee (e.g., a state or local government).
At first glance, it is striking that most subdelegations are from appointees to civil servants. As previously asked: Why would political appointees cede authority to civil servants over whom they have limited control? After all, civil servants have tenure protections. They cannot be easily fired if recalcitrant. Why not just use them as advisors rather than final decision-makers? If the motivation is merely to save resources, then why not delegate to a more loyal appointee instead? These questions become all the more pressing in light of our finding, discussed further below, that once these delegations are granted to a civil servant, they are infrequently revoked.\(^{140}\)

Perhaps part of the answer is that a substantial number of these civil servants are members of the Senior Executive Service (SES) and therefore more subject to political control, at least relative to line career staff.\(^ {141}\) The

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\(^{140}\) See infra subsection II.B.2.

\(^{141}\) Forty-four percent of the civil servant delegatees in our dataset are listed in the Plum Books as career appointees, all of whom are SES members. Another thirty-six percent of civil servant delegatees in our dataset are not listed in the Plum Book at all, which means they are either general service members or SES members in career-reserved SES positions. Presumably, some positions within this latter group are held by SES members. Some positions listed in the Plum Book as being held by career appointees could alternatively be held by non-career appointees, at agency leaders’ discretion, and subject to several limitations. See MAEVE P. CAREY, CONG. RSC. SERV., R41801, THE SENIOR EXECUTIVE SERVICE: BACKGROUND AND OPTIONS FOR REFORM 6 (2012)
SES was created under the Civil Service Reform Act of 1978 (CSRA) “to ensure that the executive management of the Government of the United States is responsive to the needs, policies, and goals of the Nation and otherwise is of the highest quality.”142 The hope was to create a more experienced “interface” between political appointees and civil servants with often-clashing objectives and worldviews.143 Accordingly, the statute allowed agency heads more mechanisms to control SES members, while still furnishing the SES with protections against arbitrary firings and reassignments.144

Political supervisors, for example, can reassign career SES members to other SES positions within the same agency or transfer them to SES positions in other agencies.145 Career SES members with performance reviews below a certain threshold can be reassigned to another SES position, and members with multiple performance reviews under this threshold within a certain period must be removed from the SES and placed into the regular civil service.146 These tools of control may help explain why a delegator would grant authority to them over a non-SES civil servant, but it does not fully explain the substantial number that run to ordinary line staff as well.
Returning to our initial descriptive account, a broad and diverse set of actors create submerged independent agencies. Appointees occupying sixty-six distinct offices are represented as delegators in our dataset. Delegators’ positions include cabinet secretaries, administrators of important subagencies, various undersecretaries and assistant secretaries, and independent regulatory commissioners.\textsuperscript{147} Table 1 lists the ten delegator positions with the most subdelegations to civil servants.

### Table 1: Most Common Officials Subdelegating Authority to Civil Servants

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

As the table shows, the FDA Commissioner leads the field concerning subdelegations, with two officials in the Department of Agriculture—the Secretary and the Administrator of the USDA’s Rural Electrification Administration (REA)—occupying the second and third positions, respectively. Beyond these three, officials with jurisdiction over an eclectic set of programs and policies are represented, with a tilt toward independent regulatory commissioners over officials in executive departments. Eight of the top ten delegators are the top-level officials (or multimember board of officials) in the agency.\textsuperscript{148}

\textsuperscript{147} These sixty-six delegator offices are situated within 28 distinct cabinet-level departments, independent agencies, and other government entities.

\textsuperscript{148} These eight top-level delegators are the Secretary of Agriculture, Commissioners of the Federal Maritime Commission, Administrator of the Small Business Administration, Board of Directors of the Federal Deposit Insurance Corporation, Commissioners of the Securities and Exchange Commission, Commissioners of the Federal Communications Commission, Board of Governors of the Federal Reserve System, and Members of the Surface Transportation Board/Interstate Commerce Commission. The other two officials included among the top ten delegators are the Commissioner of the Food and Drug Administration, Department of Health and Human Services, and the Administrator of the Rural Electrification Administration, Department of Agriculture.
Greater examination of two of the most frequent delegators—the FDA Commissioner and Rural Electrification Administrator—may shed some light on why appointees willfully cede power. The FDA’s status as the agency with the most published subdelegations can likely be explained by the heightened scrutiny it faces over whether its decisions are made for political or science-based reasons. More than most agencies, its power to engage in premarket interventions stems from its reputation.\(^{149}\) As Daniel Carpenter has persuasively argued, this public face is that of a “protector of patients and consumer safety” as well as that of “scientific accuracy.”\(^{150}\) Subdelegation to more expert civil servants can bolster this reputation; it can operate as a tool for increasing legitimacy and public confidence in the agency’s decisions.

To witness this dynamic at work, consider a recent controversy one level up in the authority hierarchy. As discussed earlier, the HHS Secretary has the statutory authority to “prescribe” actions for the FDA Commissioner to undertake.\(^{151}\) Nevertheless, in 2020, HHS Secretary Alex Azar, faced public outcry when he issued an internal memorandum, pursuant to that authority, that prohibited the FDA from signing any new rules and reserving that power to himself.\(^{152}\) While Azar’s chief-of-staff said the memo was merely a “housekeeping matter” aimed at “good governance,” many feared that the memo “could contribute to a public perception of political meddling in science-based regulatory decisions”—at a time when a global pandemic was still raging.\(^{153}\)

To revive the FDA’s reputation, the Biden Administration’s HHS Secretary Xavier Becerra, published a notice in the Federal Register explicitly “revok[ing]” Azar’s previous memorandum, “reinstat[ing] any delegations to FDA rescinded” by the previous memorandum, and making clear his intent to “delegate[ ]” to the FDA Commissioner “the authority vested in the Secretary to issue all regulations of the FDA,” with some limited reservations of that authority.\(^{154}\) The move seemed successful; as Scott Gottlieb, former FDA

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\(^{149}\) See DANIEL CARPENTER, REPUTATION AND POWER: ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REGULATION AT THE FDA 11 (2010) (“The regulatory power of the Food and Drug Administration stems in large measure from a reputation that inspires both praise and fear.”). Carpenter defines an “organizational reputation” as “a set of symbolic beliefs about the unique or separable capacities, roles, and obligations of an organization, where these beliefs are embedded in audience networks.” Id. at 45.

\(^{150}\) Id. at 11.

\(^{151}\) See supra notes 112–115 and accompanying text.

\(^{152}\) See Sheila Kaplan, In ‘Power Grab,’ Health Secretary Azar Asserts Authority Over F.D.A., N.Y. TIMES (June 12, 2021), https://www.nytimes.com/2020/09/19/health/azar-hhs-fda.html [https://perma.cc/8UFC-QSNC] (“In a stunning declaration of authority, Alex M. Azar II, the secretary of health and human services, this week barred the nation’s health agencies, including the Food and Drug Administration, from signing any new rules regarding the nation’s foods, medicines, medical devices and other products, including vaccines. Going forward, Mr. Azar wrote in a Sept. 15 memorandum[,] . . . such power ‘is reserved to the Secretary.’”).

\(^{153}\) Id.

Commissioner under the Trump Administration, commented: “This decision by current HHS will restore an essential element of FDA’s independent judgment and allow the agency to act faster.” In this manner, a published subdelegation had the effect of restoring the agency’s expert-driven bona fides, while also expediting agency decisionmaking.

Among other lower-level officials included in the table above, the REA Administrator within the USDA also merits discussion. The Administrator is the head of a relatively obscure, now-defunct USDA subagency which dealt with rural electrification. All of the subdelegations from this official are, unusually, contained in one Federal Register entry—an outlier in our dataset. Although a definitive account of why the Administrator subdelegated 121 discrete powers on a single day in April 1994 remains elusive, the historical context may provide some clues. The REA had been subject to bipartisan calls to reduce its budget throughout the early 1990s. In December 1993, an internal whistleblower’s accusations of waste, potential fraud, and mismanagement at the REA generated headlines—perhaps bringing it more directly into policymakers’ sights. In October 1994, six months after the subdelegations were published, President Clinton signed into law a bill that, inter alia, transferred REA’s programs to a new entity within USDA. The law also limited the potential set of positions to whom the

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157 See General Information; Delegation of Authority, 59 Fed. Reg. 21623 (Apr. 26, 1994); see also supra Table 1. As a robustness check, we reran all the analyses in this Part excluding the REA subdelegations contained in this Federal Register entry. The only material change is that the coefficient estimate concerning midnight subdelegations (Table 2, Model 1) is larger and significant at the more demanding $p < 0.01$ level.


holder of a newly established undersecretary position with authority over these programs could subdelegate this authority.\textsuperscript{161}

This historical context suggests two possible explanations for why the REA Administrator subdelegated this large number of powers in one fell swoop. First, and most familiarly, he may have intended this action to be a good government measure, placing authority in the hands of civil servants that were viewed as neutral experts in an effort to reform a scandal-plagued organization. Second, he may have anticipated legislative changes to the REA (if not its demise), and thus strategically assigned functions to aligned civil servants that he expected would be costly for successors to reverse.\textsuperscript{162} These explanations—whic which we present merely as conjectures to inform more general hypotheses—suggest possible reasons why political actors willingly abnegate their own authority.

B. Trends

We next examine subdelegation dynamics over time and across presidential administrations. In doing so, we aim to motivate further thinking as to how, when, and why the executive branch devolves power. The first Section looks at initial delegations of authority, while the second looks more closely at revocations.

1. Initial Delegations

How do initial grants of power to career staff vary over time? Figure 2 displays the number of new subdelegations to civil servants per month, along with a Locally Weighted Scatterplot Smoothing (LOWESS) curve in blue and associated ninety-five percent confidence interval in gray. Dashed lines signify changes in presidential administration. In general, the figure shows a declining number of new subdelegations to civil servants throughout our study period—from 1979 to 2019—perhaps with a slight uptick around 2012 (although the large confidence intervals around the LOWESS line stymie firm conclusions).\textsuperscript{163} By


\textsuperscript{162} Interestingly, the House Agriculture Committee Chair had introduced the Bill in Congress only twelve days before the date on which the agency’s administrator subdelegated these 121 powers. See Actions Overview: H.R. 4217, CONGRESS.GOV, https://www.congress.gov/bill/103rd-congress/house-bill/4217/actions [https://perma.cc/X33C-DRMP] (noting that the Bill was introduced in the House of Representatives on April 14, 1994).

\textsuperscript{163} Bivariate linear regressions of the number of subdelegations on various time measures shows a statistically significant, slightly negative relationship between subdelegations and time. We operationalize time as an independent variable as a running count of months since the start of the study period or, alternatively, several common polynomial transformations of that count.
contrast, the number of new subdelegations to other appointees has remained essentially flat during this study period.164

Figure 2: Subdelegations to Civil Servants per Month

One possible explanation for the downward trend is that there is a relatively fixed stock of statutes delegating regulatory power.165 As appointees subdelegate their powers over time, there is less statutory authority to grant. As a result, subdelegations activity would decrease over time. By a similar

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

165 See Jody Freeman & David B. Spence, Old Statutes, New Problems, 163 U. PA. L. REV. 1, 15-16 (2014) ("[T]he current partisan and ideological makeup of Congress renders [regulatory legislation] much less likely, all else equal, than at any time in the modern regulatory era."). Freeman and Spence also note that "[t]he parties have grown steadily farther apart ideologically since the 1970s, making bipartisan action to address important problems significantly more difficult." Id. at 14.
logic, the slight increase in subdelegations around 2012 may be attributable to the passage of two major new statutes: the Patient Protection and Affordable Care Act (ACA) and the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), both of which were enacted two years earlier. Another possible explanation for the overall downward trend is that officials have shifted to subdelegating their authority in different forms. Rather than publishing subdelegations in the Federal Register, they may opt for less transparent means such as staff manuals hosted on internal agency servers. If this is correct, then the trend only speaks to the subset of subdelegations that are published in the Federal Register. We offer both possible explanations with a note of caution, however, given the size of the confidence intervals in the figure.

Next, we examine whether presidential administrations differ in their propensity to delegate to civil servants. Figure 3 shows the number of subdelegations to civil servants during each full-term presidential administration during our study period. The Figure suggests that subdelegations activity declines for each successive consecutive term in which a party holds the presidency, perhaps because candidates for advantageous subdelegations decline over time. Another possibility is that there is a burst of subdelegations at the start of administrations due to vacant offices and lags in presidential nominations and Senate confirmations. ""}

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167 See Nou, Subdelegating Powers, supra note 5, at 502–03 (discussing the EPA’s Delegations Manual which are hosted only on non-public EPA servers and accessible only through Freedom of Information Act requests).
168 At the same time, these explanations are admittedly incomplete. They do not explain another one of our findings: the number of new subdelegations per month to appointees has remained steady during the same period as the number to civil servants declined. If the supposed increased scarcity of new powers to subdelegate or the possibility that officials shifted their subdelegations to different forms completely explains the decrease in new subdelegations to civil servants, the question remains why subdelegations to appointees are immune from these forces. To shed further light on these divergent trends in subdelegations to civil servants versus appointees, we will be examining the choice-of-(sub)delegate question in future work.
169 This analysis assumes that political control switches on inauguration day. Because presidential control over agencies operates on a continuum, the extent to which this assumption holds varies by agency. See Datla & Revesz, Deconstructing Independent Agencies (and Executive Agencies), supra note 2, at 826 (noting that “agencies fall along a continuum” that “ranges from most insulated to least insulated from presidential control”). As a validity check, Appendix B contains a version of the figure that includes only subdelegations within agencies that feature either of the following structures: removal protection for the agency head(s); or, for multimeember agencies, partisan-balance requirements concerning board members’ appointments. This figure appears substantially similar to the figure included below.
170 One exception is that subdelegations are more frequent during the “midnight” period in the closing three months of a presidential administration. See infra Section II.C.
171 See Anne Joseph O’Connell, Vacant Offices: Delays in Staffing Top Agency Positions, 82 S. CAL. L. REV. 913, 955-61 (2009) (showing that usually more vacancies are filled at the start of an administration).
Presidents Reagan and Obama stand out among other recent presidential administrations. Across President Reagan’s eight years in office, his Administration witnessed substantially greater subdelegation activity on average: a mean of 62.8 subdelegations per year, versus a mean of 35.1 subdelegations per year in the other administrations in our study period. By contrast, the Obama Administration cut back drastically on new subdelegations, with a mean of 14.0 subdelegations per year during President Obama’s eight years in office, versus 48.1 subdelegations per year in the other administrations. The latter number is higher now because it is an average across other administrations, including the higher Reagan years.

The significance levels for the presidential administrations studied are as follows: for the 27.1 subdelegations per year difference in means during the Reagan Administration versus other administrations, t = 2.40, p-value = 0.022; for the -34.1 difference in means for the Obama Administration versus other administrations, t = -2.96, p-value = 0.006; and for the other administrations in our sample, none of the corresponding differences in means approaches conventionally accepted levels of statistical significance. Test statistics calculated via Welch’s t-test.
These observations are puzzling along at least one dimension: President Reagan was known as a fierce critic of the bureaucracy\textsuperscript{174}—and yet his appointees empowered civil servants via relatively frequent subdelegations. President Obama lacked this reputation\textsuperscript{175}—and yet his appointees assigned powers to civil servants at a lower rate than appointees in other administrations. Further, it is decidedly not the case that a small number of conservative-leaning or otherwise outlier delegators drive these results. Instead, a wide variety of agencies exhibit greater subdelegation activity during the Reagan Administration.

Next, we aggregate data across presidential administrations to examine whether the two parties generally differ in their relative propensities to subdelegate. We find that agencies subdelegate a mean of 44 powers per year during Republican administrations versus 37.2 powers during Democratic ones. It is important to caution, however, that this estimated greater Republican propensity to subdelegate falls far short of conventionally accepted levels of statistical significance.\textsuperscript{176} The lack of clearer evidence showing that Republicans eschew subdelegation is somewhat surprising. The practice of transferring legal authority to civil servants seems at odds with Republicans' embrace, at least since the Reagan Administration, of the unitary executive theory.\textsuperscript{177} This theory generally holds that the President is constitutionally vested with all executive authority and should exercise it accordingly.\textsuperscript{178} Conveying that authority to tenure-protected career staff, however, is arguably in tension with this view. After all, some of the strongest proponents of unitary executive theory argue that tenure-protected agency heads exercising statutory authority are unconstitutional.\textsuperscript{179} Presumably, tenure-protected career staff


\textsuperscript{175} See Gillian E. Metzger, Federalism Under Obama, 53 WM. & MARY L. REV. 567, 568 (2011) (“The administration's signature achievements to date involve substantial expansions of the federal government's role . . . .”).

\textsuperscript{176} Test statistic for Welch's t-test = -0.40; p-value = 0.70.


\textsuperscript{178} See Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, The Unitary Executive in the Modern Era, 1945-2004, 90 IOWA L. REV. 601, 604 (2005) (characterizing the “unitary executive” as one "in which all executive authority is centralized in the president").

\textsuperscript{179} See CALABRESI & YOO, supra note 177, at 428 (arguing that "a removal power and a power to control subordinates" are the central features of the “Reagan era concept of the unitary executive”); see also id. at 420 (“[H]istorical practices under our Constitution show[] that all forty-three presidents—each of them an interpreter of the Constitution—have vigorously exercised and defended an unlimited presidential removal power.”).
exercising the same authority would be similarly worrisome, perhaps even more so. Moreover, Republican appointees and civil servants are often perceived as antagonists—as illustrated by President Trump and his allies’ rhetoric about the “deep state.” Conservatives also generally seek to reduce the size of government, which is often at odds with the self-interest of civil servants. For these reasons, it is unexpected that the partisan differences in subdelegations are not statistically significant. If anything, one could have reasonably expected to find evidence that Republicans subdelegate less than Democrats.

Perhaps this finding is due to the limitations of our approach in counting subdelegations, rather than alternative measures that could better capture the scope or significance of each delegation. Once deployed, these alternative measures could in theory reveal that Democratic administrations indeed delegate much more consequential and salient issues down to civil servants, relative to Republican administrations that focus on more minor issues. However, we were unable to conceive of a satisfying measure of scope or significance. As a second-best approach, we attempted to better understand the substance of the subdelegations in the hopes of shedding some light. To shed light on the kinds of powers granted by Republican versus Democratic administrations, we use a structural topic model to examine the substance of these subdelegations. Unsupervised topic modeling is used to identify natural groups of words within a corpus. Importantly, the method classifies words into categories automatically, without human judgments.

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180 See Rebecca Ingber, Bureaucratic Resistance and the National Security State, 104 IOWA L. REV. 139, 153 (2018) (“Any perceived bureaucratic resistance to the President’s agenda . . . became evidence to the President’s supporters of a ‘deep state’ seeking to undermine him.”).

181 One possibility we considered, but rejected as impractical, was somehow trying to map the significance of a subdelegation to the significance of the underlying statutory authority. Some political scientists, for example, use a dataset collected by David Mayhew characterizing “important laws enacted” based on newspaper accounts informed by historians and political observers. See DAVID R. MAYHEW, DIVIDED WE GOVERN 36-49 (1991); see also Datasets and Materials: Divided We Govern, YALE CAMPUS PRESS, https://campuspress.yale.edu/davidmayhew/datasets-divided-we-govern [https://perma.cc/4BGD-T57X] (providing the dataset for the study discussed in Mayhew’s book); DAVID EPSTEIN & SHARYN O’HALLORAN, DELEGATING POWERS 14-18 (1999) (describing Mayhew’s study as “influential mainly due to its methodological focus” which “took a ground-up view of legislative organization and built upon this edifice a theory of public policy”). However, there are a few problems with applying that approach to our dataset. First, Mayhew’s list ends in 1990, whereas our dataset extends to 2019. Second, statutory authority is recorded in the Federal Register in non-standardized ways, which renders a matching exercise technically infeasible without manually recoding and researching over a thousand subdelegations. Even then, the exercise would be incomplete because often only certain aspects of a particular statute are subdelegated, which would require a separate measure of significance.

concerning which words to group in particular categories or the optimal number of categories. Here, the method identifies twenty categories as the optimal number of topics. These categories appear in Figure C.1 in Appendix C. For some of these categories, glancing at the words that the model bundles together suggests obvious themes. For instance, the “lift words” that appear most frequently in one topic include counsel, claim, compromis* and settl*. These words evince a common theme: delegations in this topic tend to concern litigation authority.

Having classified the text of delegations into twenty topics, we then examine how delegations concerning these topics vary based on the party in power. Four topics exhibit greater prevalence, with the differences being statistically significant, in subdelegations during Republican administrations: food and drug regulation (54% more prevalent); closely-related categories concerning drug approval (47%); medical devices (37%); FDA citizen petitions (36%); and financial regulation (35%). The relatively obscure topic category related to rural electricity projects and lending is 435% more prevalent in Democratic administrations, whereas a second category concerning lending is 125% more prevalent.

The Republican tilt concerning pharmaceuticals may be a response to decades-long conservative critiques of the length of FDA review periods. Under this view, the FDA drug approval process is too slow. Subdelegation

183 See Justin Grimmer, A Bayesian Hierarchical Topic Model for Political Texts: Measuring Expressed Agendas in Senate Press Releases, 18 POL. ANALYSIS 1, 2 (2010) (describing political scientists’ use of unsupervised learning methods to analyze text). Given the novelty of our dataset, one must be especially cautious not to impose one’s own presumptions regarding which types of transfers of authority should be classified together. See Justin Grimmer & Brandon M. Stewart, Text as Data: The Promise and Pitfalls of Automatic Content Analysis Methods for Political Texts, 21 POL. ANALYSIS 267, 281 (2013) (“Unsupervised methods are valuable because they can identify organizations of text that are theoretically useful, but perhaps understudied or previously unknown.”).

184 We identified twenty as the optimal number of categories because it combines a high held-out likelihood, high semantic coherence, and low residuals. In making this assessment, we conducted diagnostic tests for seven to thirty categories, remaining mindful that there is no “perfect” number of categories. See Grimmer & Stewart, Text as Data, supra note 183, at 270-71 (finding that differences in underlying objectives lead to variation in optimal numbers of categories); see also Margaret E. Roberts, Brandon M. Stewart & Dustin Tingley, stm: An R Package for Structural Topic Models, J. STAT. SOFTWARE, Oct. 2019, at 11-12 (introducing the searchK function used for the assessment in this Article).

185 Differences were calculated using the plot.estimateEffect command in the STM package in R, with method = “difference.”

186 This prevalence of rural-electrification-related subdelegations in Democratic administrations is attributable to the outlier observation discussed earlier; the Administrator of the USDA’s Rural Electrification Administration, which provided loans to rural utilities, subdelegated 121 distinct powers in a single Federal Register entry in 1994. See supra notes 156–161 and accompanying text.

187 See CARPENTER, supra note 149, at 3-4, 8 (describing a pattern of Wall Street Journal editorials on the pace of FDA action since the 1980s, as well as numerous hearings and reform rhetoric over the years).
may speed decisions in this area by eliminating one or more layer of additional sign-offs before a decision can be reached. Subdelegation, in other words, streamlines the decisionmaking process, eliminating higher-level review and thus reducing the wait time for approval of potentially life-saving medical and pharmaceutical products.

2. Revocations

If the flow of new published delegations declines over time, a natural follow-up question is how frequently delegations are rescinded. In the aggregate, our dataset includes 1,598 appointee-to-civil servant subdelegations, while only 48 revocations are of this type. In other words, approximately one appointee-to-civil servant subdelegation is revoked for every thirty-three granted. While there is some variation in revocations over time and across presidential administrations, it is difficult to ascribe much significance to such variation given the relatively small number of total revocations (48).

In this manner, revocations occurred infrequently (relative to new subdelegations) over the study period. In other words, subdelegations tend to be durable. This relative durability, in turn, presents a puzzle. One might have thought that subdelegations would be easily and frequently reversed. Because they are usually promulgated as procedural rules exempt from notice-and-comment rulemaking, agencies do not need to engage in public comment when reversing them. Even in the few instances when delegators subdelegate through notice-and-comment proceedings, an

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

189 See, e.g., Revision of Delegations of Authority, 79 Fed. Reg. 44101, 44105 (July 30, 2014) (classifying a revision to delegations as a rule about internal agency management and therefore exempt from notice-and-comment proceedings).

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

Office of Legal Counsel memorandum suggests that the same procedure is not necessary to revoke the subdelegation.192

Nonetheless, there are several factors that may help explain the durability of subdelegations. For one, resource costs may discourage revocations. By statute, agencies must “publish in the Federal Register” procedural and substantive “rules,” which can only be amended by another “rulemaking”—that is another “rule” published in the Federal Register.193 As a result, a subdelegation published in the Federal Register requires another published rule to revoke it. Publication, however, requires agency fees, but beyond that, also demands time and effort to draft the Federal Register entry.194 These costs may seem minimal, but it is revealing that some agencies perceive them as onerous enough to revoke all their published subdelegations in favor of putting them on their website instead. For instance, in 2002, the Federal Deposit Insurance Corporation explicitly made this choice in “order to provide the maximum amount of flexibility and efficiency.”195 In other words, this agency perceived the costs of recording subdelegations in the Federal Register as a barrier to desirable revocations and changes. More broadly, mass revocations of subdelegations could also be subject to arbitrariness review, which would require a costly explanation.196

Further, political appointees can “functionally” entrench a delegation by mobilizing supporters and other interest groups to fend off subsequent revocations.

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193 See 5 U.S.C. § 552; see also 5 U.S.C. § 552(a)(1)(C) (“Each agency shall separately state and currently publish in the Federal Register for the guidance of the public . . . . rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations . . . .”); 5 U.S.C. § 555(5) (defining a “rule making” as an “agency process for formulating, amending, or repealing a rule”). These requirements are judicially enforceable upon a showing of harm. See Lake Mohave Boat Owners Ass’n v. Nat’l Park Serv., 78 F.3d 1360, 1368 (9th Cir. 1995) (“An individual may not raise an FOIA claim based on an agency’s failure to publish a rule or regulation, unless he makes an ‘initial showing’ that ‘he was adversely affected by the lack of publication.’” (quoting Mada-Luna v. Fitzpatrick, 813 F.2d 1006, 1018 (9th Cir. 1987))).

194 See OFR Publishing Services, U.S. GOV’T PUBL’G OFF., https://www.gpo.gov/ofr-publishing-services [https://perma.cc/M9FX-38TH] (“All agencies that publish material in the Federal Register are charged at a per column rate (published columns) depending on the type of article submission. Current rates for submission types are as follows: Word document - $151/column . . . .”).

195 Filing Procedures; Unsafe and Unsound Banking Practices; Registration of Transfer Agents; International Banking; Management Official Interlocks; and Golden parachutes and Indemnification Payments, 67 Fed. Reg. 79246, 79246 (Dec. 27, 2002).

196 See 5 U.S.C. § 706(2) (instructing courts to “hold unlawful and set aside agency action” if it is determined to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).
Submerged Independent Agencies

The Federal Register and CFR are both highly structured, which make it easier for external monitors, such as interest groups and lobbyists, to track them and thus know who holds decision-making authority. To illustrate this point, return to HHS Secretary Alex Azar’s memorandum prohibiting the FDA from signing any new rules and reserving that power to himself. Various interest groups publicly objected, albeit often on good governance grounds. Perhaps reacting to such fire alarms, a congressional subcommittee released a report decrying the measure. In this manner, subdelegations can persist due to a kind of interest group endowment effect.

There are also internal procedural costs to revoking subdelegated authority through the Federal Register. Such decisions require sign-off and negotiation between multiple internal actors, usually involving a structured

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197 See Magill, Agency Self-Regulation, supra note 40, at 894 (“The agency could . . . empower an internal agency unit with predictable views to be in charge of the agency choice . . . . As a consequence, if the agency advances policy aims in this way, it may be more difficult for political opponents to oppose the effort or to dislodge it once it is in place.”); see also Levinson & Sachs, Political Entrenchment and Public Law, supra note 118, at 429-30 (describing methods of “functional” entrenchment as involving the “strengthening political allies or weakening political opponents,” “changing the composition of the political community,” and “empowering a different governmental institution and consequently a different set of political actors and groups”).

198 See Sheila Kaplan, In ‘Power Grab,’ Health Secretary Azar Asserts Authority Over F.D.A., N.Y. TIMES (June 12, 2021), https://www.nytimes.com/2020/09/19/health/azar-hhs-fda.html [https://perma.cc/8UFQ-QSNC] (describing Secretary Azar’s declaration which barred health agencies from signing new rules about food, medicine, medical devices, vaccines, and the like, and specified that this power was reserved to his position). Note that to the extent that Secretary Azar’s memorandum was an attempt to revoke subdelegations previously published in the Federal Register, his use of an unpublished internal memorandum was likely improper. The APA defines a rule as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . .” 5 U.S.C. § 551(4). A “rule making,” in turn, means the “agency process for formulating, amending, or repealing a rule.” 5 U.S.C. § 551(5). The pre-existing subdelegations were likely procedural rules, which would thus require another rule to repeal them in accordance with the APA’s requirements. See supra note 193 and accompanying text.


clearance process. The dynamics become even more complicated—and thus costly—at multimember agencies, which usually require majority votes among partisan-balancing requirements. Recall the earlier example involving the FCC’s subdelegation regarding domestic data roaming. That subdelegation passed a bare majority vote on party lines. When a different partisan configuration of commissioners later objected to the subdelegation, they did not possess enough votes to revoke the grant of power to civil servants. In this manner, decision costs within an agency can prevent the revocation of subdelegated authority.

Finally, judicial doctrine may contribute to the durability of subdelegations. As discussed above, the Accardi doctrine essentially requires agencies to follow their own rules. That requirement may discourage agencies from changing horses midstream. Similarly, the need for agency actions to clear courts’ arbitrariness review may further act as a drag. Again, the decision to change practices may invite a judicial challenge and need for explanation which could be avoided by sticking with the status quo.

C. Midnight Subdelegations

The prospect of durable subdelegations amidst political dynamics, in turn, raises a key opportunity for strategic behavior: creating submerged independent agencies in the waning days of a presidential administration. We hypothesize that subdelegations to civil servants are more common immediately prior to presidential transitions, especially when there is a new incoming party. Presidents recognize the value of pursuing durable policy and personnel changes immediately prior to leaving office. For instance, during the final three months of a presidential administration, agencies tend to

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202 See id. at 1198 (“Like legislatures drafting statutes, agencies drafting rules require the agreement of multiple internal actors. This dynamic is especially true in multimember commissions, which normally require a majority vote to approve a rule.”).

203 See supra notes 21–26 and accompanying text.


206 See supra Section I.A.

207 See 5 U.S.C. § 706(2) (“[Courts shall] hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . .”).

208 We note that the question of whether arbitrariness review applies to subdelegation decisions has yet to be tested in the courts.
promulgate more rules—particularly rules with highly traceable upfront costs—and submit a greater number of economically significant regulations to the Office of Information and Regulatory Affairs (OIRA). Political appointees also work to hire and promote ideologically aligned personnel in civil-service positions during the period between presidential elections and the inauguration of a new President.

Subdelegating authority to civil servants is a similar means of potential presidential entrenchment. By devolving authority to aligned civil servants prior to a transition, appointees can preemptively strip their successors of power by placing it, at least temporarily, in the hands of sympathetic civil servants. We test this theory by regressing the number of appointee-to-civil servant transfers in a given agency and month on whether that month falls within the last three months preceding a presidential transition. We run separate regressions for executive and independent entities, which we operationalize according to whether the heads are removable for-cause.

As discussed in Part I, the definition of an “independent” agency is a contested one. See SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES, supra note 54, at 48 ("There is no general, widely accepted definition of an independent agency, but this label or definition is consequential for both law and politics."). While we are more sympathetic to the functional approach, for purposes of our empirical analysis, we focus only on those entities headed by agency officials with for-cause removal. One reason is that we seek a minimal, conceptually conservative, measure of presidential independence. Another is that choosing just one indicia of independence may facilitate the interpretation of any statistically significant results.

An alternative set of models operationalize “independent agencies” as possessing either for-cause removal protection or multimember partisan-balance requirements. Whereas the former provision limits the President’s ex post control over agency officials, the latter restricts their ex ante ability to appoint favored personnel to these positions. Further, expanding this operationalization to include agencies with partisan-balance requirements allows us to include several entities that are conventionally considered “independent agencies” but lack formal removal protection. See Datla & Revesz, Deconstructing Independent Agencies (and Executive Agencies), supra note 2, at 797 (listing the Commodity Futures Trading Commission (CFTC), Equal Employment Opportunity Commission (EEOC), Federal Communications Commission (FCC), Federal Deposit Insurance Corporation (FDIC), Federal Election Commission (FEC), National Credit Union Administration (NCUA),
Hypothesis is that Presidents hold more limited control over officials in the latter category, and are thus less likely to be able to entrench power there.

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

Table 2 reports the results.

In alternative model specifications, we replace this year variable with several common polynomial transformations of the number of years since the start of the study period. The results of these unreported models are essentially identical to those reported in Table 2. Because presidency-level fixed effects and our time measure vary collinearly, we omit models containing both covariates from the regression table below. Nonetheless, we describe the results of these unreported models. See infra note 218 and accompanying text. In models containing a year variable and presidency fixed effects, the variance-inflation factor (VIF) for the former is 26.3, and the VIFs for the latter range from 37.6 for President Carter to 138.6 for President Reagan. As a general rule of thumb, VIF values above 5 or 10 are taken to indicate substantial multicollinearity. See José Dias Curto & José Castro Pinto, The Corrected VIF (CVIF), 38 J. APPLIED STAT. 1499, 1500 (2011) (“[A] rule of thumb for evaluating [VIF] is to be concerned with any value larger than 10 . . . .”); Trevor A. Craney & James G. Surles, Model-Dependent Variance Inflation Factor Cutoff Values, 14 QUALITY ENG’G, 391, 392 (2002) (“Although no formal criteria exist for deciding when a VIF is too large, generic cutoff values, such as VIF ≥ 5 or VIF ≥ 10, are commonly used to determine if the collinearity is strong enough to require remedial measures.”). Accordingly, including both measures in the same model is associated with a sizable reduction in the precision with which the relative effects of these variables can be measured. See Kevin Arceneaux & Gregory A. Huber, What to Do (And Not Do) with Multicollinearity in State Politics Research, 7 ST. POL. & POL’Y Q. 81, 83 (2007) (“[E]ven moderate levels of correlation between [two variables] can obfuscate their independent effects.”).

Because the dependent variable, both here and in all subsequent models, is a count of the number of subdelegations per agency and unit of time, we estimate an event-count model. Specifically, we use negative binomial models, which are appropriate where, as here, the dependent variable is over-dispersed. The notes presented in the bottom row of tables report the associated dispersion parameter α. In all models, these values indicate that variance of the distribution of the dependent variable is sufficiently larger than its mean to warrant a negative binomial model.
Table 2: Midnight Subdelegations

<table>
<thead>
<tr>
<th></th>
<th>(1)</th>
<th>(2)</th>
<th>(3)</th>
<th>(4)</th>
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<tbody>
<tr>
<td>Last 3 Months of Presidency</td>
<td>1.644 *</td>
<td>1.228 *</td>
<td>0.181</td>
<td>-0.239</td>
</tr>
<tr>
<td></td>
<td>(-0.779)</td>
<td>(-0.587)</td>
<td>(-0.736)</td>
<td>(-0.672)</td>
</tr>
<tr>
<td>Agency Fixed Effects?</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>Presidency Fixed Effects?</td>
<td>Y</td>
<td>N</td>
<td>Y</td>
<td>N</td>
</tr>
<tr>
<td>Time</td>
<td>-0.055 **</td>
<td>-0.019</td>
<td>-0.134 **</td>
<td>(-0.042)</td>
</tr>
<tr>
<td>Observations</td>
<td>8,348 Agency-Months</td>
<td>7,232 Agency-Months</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Included Entities</td>
<td>Executive Entities</td>
<td>Independent Entities (with for-cause removal)</td>
<td></td>
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</tbody>
</table>

As predicted, Models (1) and (2) report positive and statistically significant coefficient estimates for the Last 3 Months of Presidency covariate for executive entities. Put plainly, for entities over which the President has more direct control, these results suggest that presidential administrations pursue midnight subdelegations. By contrast, Models (3) and (4) show null results for those entities over which presidential control is more limited.

217 Model: negative binomial regression with robust standard errors clustered at the agency level. Unit of analysis: agency-month. Dispersion parameter $\alpha$ in Model 1 = 25.74 (SE=4.26); in Model 2: 26.55 (4.16); Model 3: 29.99 (9.59); Model 4: 31.48 (10.31). McFadden’s pseudo-R$^2$ in Model 1: 0.17; in Model 2: 0.17; in Model 3: 0.11; Model 4: 0.10. *** signifies $p < 0.001$, ** $p < 0.01$, * $p < 0.05$, † $p < 0.10$.

218 For interested readers, a third model that includes agency fixed effects, presidency fixed effects, and the time variable reports a coefficient estimate for Last 3 Months of Presidency that is positive and statistically significant at the $p < 0.10$ level ($\beta = 1.046$, SE = 0.631). We do not report this model in the table due to severe multicollinearity issues when all of these independent variables are included. See supra note 215.

219 Alternative model specifications—e.g., expanding our conception of entities insulated from the White House to include not only entities headed by an appointee with for-cause removal
Because the substantive magnitude of estimates in a negative-binomial model are not intuitive, we also generate simulated first differences for several agencies. For the Department of Agriculture, which is the agency with the most subdelegations in our dataset, these simulated first differences for Model (1) reveal an expected 1.17-unit increase in the number of USDA subdelegations per month during the midnight period. A similar analysis for HHS, which is the second-most active agency in the dataset, shows an additional 1.03 HHS subdelegations per month during the midnight period. For comparison, the mean monthly subdelegations across the study period for USDA and HHS are, respectively, 0.94 and 0.77 per month.\(^{220}\)

D. Congressional-Executive Dynamics

Given evidence of variation within presidential administrations, we next explore the relationship between subdelegations and divided government, that is, periods in which the President is of a different party than at least one chamber of Congress. We theorize that the act of reassigning authority bestowed by Congress on appointees may provoke congressional ire—particularly when the opposition party controls Congress.

Legislators have access to considerable information from agencies; they receive thousands of statutorily mandated reports from the executive branch each year and hold hundreds of oversight hearings.\(^{221}\) When Congress learns of agency action that it opposes, it can utilize several mechanisms to sanction the offending agency, from embarrassing the agency head at an oversight hearing to enacting agency-disfavored statutory or budgetary changes.\(^{222}\) The extent to which Congress makes use of its considerable oversight capacity, however, varies based on whether the President and congressional leadership share the same partisan identity, with agency officials facing a much less protection, but also to include multimember commissions with partisan balance requirements—generate similar results. Likewise, a model containing agency fixed effects, presidency fixed effects, and the time variable also returns null results for this estimate.

\(^{220}\) Simulated first differences were generated from Model (1).

\(^{221}\) See William T. Egar, CONG. R.SCH. SERV., R46357, CONGRESSIONALLY MANDATED REPORTS: OVERVIEW AND CONSIDERATIONS FOR CONGRESS 1 (2020) ("Congress requires various federal entities to submit thousands of reports, notices, studies, and other materials each year, and new requirements for both singular and recurring reports continue to be enacted."); Brian D. Feinstein, Congress in the Administrative State, 95 WASH. U. L. REV. 1187, 1190 n. 13 (2018) ("[E]ach year in recent Congresses, House committees and subcommittees convene a median of 221 critical hearings concerning agencies; for Senate committees and subcommittees, the figure is 82 hearings annually.").

\(^{222}\) See Feinstein, Congress in the Administrative State, supra note 221, at 1204 (describing the options for sanctions available to Congress).
forgiving Congress when the opposition party (to the President) controls that branch.223

Accordingly, agency heads are likely to be especially inclined to avoid congressional oversight during periods of divided government.224 Thus, we hypothesize that divided government discourages subdelegations. To test this hypothesis, we examine the relationship between subdelegations activity and divided control of each chamber of Congress and the White House. We examine divided party control of the House and presidency and of the Senate and presidency separately for two reasons. First, the chambers may utilize different mechanisms for monitoring, influencing, or sanctioning executive-branch actors. Namely, the Senate’s constitutional role in appointments provides it a lever that is unavailable to the House, whereas the House tends to engage in more frequent oversight,225 perhaps as an alternative means of influencing the executive branch. Second, the Senate’s norms and rules promote, in different situations and during different eras, some combination of unanimity or supermajoritarian or bipartisan consensus.226 These norms and rules cloud any decision about what party ratio qualifies as partisan “control” of that body. To mitigate these concerns, we examine each chamber separately.

Table 3, below, presents regression results concerning the association between subdelegations and divided government. Model (1) regresses the number of subdelegations per year in executive entities on whether different parties controlled the House and presidency.227 As in the midnight-

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224 At times, Congress uses oversight hearings to discredit or embarrass agency heads, and how these oversight hearings are more common during divided government. See Feinstein, Congress in the Administrative State, supra note 221, at 1204-05, 1238 (describing the potential embarrassing effects of Congressional hearings on agency heads and noting that oversight tends to occur more frequently when the preferences of an agency and Congressional committee diverge).

225 See Feinstein, Congress in the Administrative State, supra note 221, at 1192 n.13 (reporting that the House convenes substantially more hearings per year than the Senate); DOUGLAS L. KRINER & ERIC SCHICKLER, INVESTIGATING THE PRESIDENT 18 (2016) (describing how the House possesses stronger procedural tools for engaging in investigative activity compared to the Senate).

226 See Barbara Sinclair, The New World of U.S. Senators, in CONGRESS RECONSIDERED 1, 6 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 10th ed. 2013) (describing how, even in the modern era of increased partisanship, Senate committees often work in bipartisan ways for various strategic reasons, such as by working together in the ill drafting process to ensure a bill has the necessary support when it reaches the Senate floor).

227 As explained above, we also run companion regression models concerning divided party control of the Senate and presidency, and report the results of these models at the end of this Section.
subdelegations analysis, Model (1) includes agency and presidency fixed effects and Model (2) includes agency fixed effects and a time measure.228

Table 3: Subdelegations during Divided vs. Unified Party Control of the House and Presidency229

<table>
<thead>
<tr>
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<th>(1)</th>
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<th>(3)</th>
<th>(4)</th>
</tr>
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<tbody>
<tr>
<td><strong>House / President Divided Control</strong></td>
<td>-1.048 †</td>
<td>-0.557</td>
<td>-0.878 †</td>
<td>-0.464</td>
</tr>
<tr>
<td></td>
<td>(0.615)</td>
<td>(0.358)</td>
<td>(0.503)</td>
<td>(0.470)</td>
</tr>
<tr>
<td><strong>Agency Fixed Effects?</strong></td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td><strong>Presidency Fixed Effects?</strong></td>
<td>Y</td>
<td>N</td>
<td>Y</td>
<td>N</td>
</tr>
<tr>
<td><strong>Time</strong></td>
<td>—</td>
<td>-0.057 **</td>
<td>—</td>
<td>-0.099 ***</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(0.020)</td>
<td></td>
<td>(0.026)</td>
</tr>
<tr>
<td><strong>Observations</strong></td>
<td>821 Agency-Years</td>
<td>600 Agency-Years</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Included Entities</strong></td>
<td>Executive Entities</td>
<td>Independent Entities (with for-cause removal)</td>
<td></td>
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</tbody>
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Models (3) and (4) report similar regression results for independent agencies. The imperative to avoid antagonizing Congress may be particularly acute for these independent agencies. Some argue that Congress holds greater

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228 Once again, the table does not include a model with all three controls due to substantial multicollinearity issues when one includes all these covariates. Specifically, the variance inflation factor is 3.3 for House/President Divided Control, 48.7 for Year. For the presidency fixed effects, the variance inflation factor ranges from 15.0 for President Carter to 91.2 for President Reagan. Suffice it to say, a "full" model with all covariates returns null results concerning the divided control covariate.

229 Model: negative binomial regression with robust standard errors clustered at the agency level. Unit of analysis: agency-year. Dispersion parameter $\alpha$ in Model 1: 6.71 (SE=0.65); Model 2: 6.71 (0.67); Model 3: 3.34 (1.09); Model 4: 3.38 (1.17). McFadden’s pseudo-$R^2$: 0.17 in Models 1-2; 0.18 in Models 3-4. ** signifies $p < 0.001$, * * $p < 0.01$, * $p < 0.05$, † $p < 0.10$. 
sway over these agencies than executive agencies.\textsuperscript{230} Accordingly, if Congress is able to exert greater relative influence on independent agencies than executive agencies, we would expect any reduction in subdelegations during divided government to be even greater for independent agencies. As before, we operationalize “independence” as the presence of for-cause removal protection for the agency’s head.\textsuperscript{231} At the same time, we assume that the party of the independent agency is the party of the President in power due to the President’s influence over appointments, particular that of the chair.\textsuperscript{232}

Overall, Table 3 suggests a potential negative relationship between subdelegation activity and divided party control of the House and presidency. That finding holds for both executive (Model (1)) and independent entities (Model (3)).\textsuperscript{233} We present this possible negative relationship between

\textsuperscript{230} See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, \textit{The President’s Power to Execute the Laws}, 104 \textit{YALE L.J.} 541, 582-83 (1994) (claiming that Congress possesses greater indirect political control over independent agencies through powers of oversight and appropriations); Peter L. Straus, \textit{The Place of Agencies in Government: Separation of Powers and the Fourth Branch}, 84 \textit{COLUM. L. REV.} 573, 592 (1984) (“Congressmen tend to talk about the independent commissions in a proprietary way—these are ‘our’ agencies, not so much independent as independent-of-the-President.”); Barry R. Weingast & Mark J. Moran, \textit{Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission}, 91 \textit{J. POL. ECON.} 765, 768-69 (1983) (describing the “congressional incentive system” which can be used to exert influence over independent agencies). The Supreme Court has also expressed a similar view, asserting: “The independent agencies are sheltered from politics but from the President, and it has often been observed that their freedom from Presidential oversight (and protection) has simply been replaced by increased subservience to congressional direction.” \textit{FCC v. Fox Television Stations, Inc.}, 556 U.S. 502, 523 (2009).

\textsuperscript{231} Unreported models use an alternative operationalization: whether its leadership possesses for-cause removal protection, or it is a multimember body for which the President must reserve some seats for her ideological opponents. Essentially, this alternative specification captures entities with a substantial limitation on either the President’s appointment or removal authority. \textit{See generally} Brian D. Feinstein & Daniel J. Hemel, \textit{Partisan Balance with Bite}, 118 \textit{COLUM. L. REV.} 9 (2018) (describing how requirements barring Presidents from filling seats with members of their own party tends to result in Presidents appointing their genuine ideological opponents to seats). These unreported models yield materially identical results to those reported.

\textsuperscript{232} See \textit{ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND} 57 (2010) (“Recent empirical work suggests that the heads of independent agencies and executive agencies tend to have common preferences and beliefs, both aligned with those of the reigning president . . . . Two mechanisms, one political and one legal, bring about this result.”); \textit{see also} Todd Phillips, \textit{Commission Chairs, YALE J. ON REGUL.} (forthcoming) (manuscript at 24-25), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=31927518 (https://perma.cc/963R-Y9BH) (reporting that the President possesses authority to select the chair of most independent regulatory commissions).

\textsuperscript{233} To provide a sense of the magnitude of these relationships, simulated first differences reveal that divided government is associated with an expected 3.6 fewer subdelegations per year at the USDA, 2.9 fewer at HHS, and 1.0 fewer at both the FDIC and Federal Maritime Commission (FMC). These entities correspond to the two cabinet-level entities and two other entities with the greatest proportion of subdelegations in our dataset. \textit{See supra} Table 1. By comparison, mean subdelegations per year overall are 11.1 at the USDA, 8.3 at HHS, 2.2 at FMC, and 1.4 at FDIC. Note that FMC commissioners possess for-cause removal protection, but FDIC commissioners do not. Both commissions have partisan-balance requirements. \textit{See} Datla & Revesz, \textit{Deconstructing
subdelegations and divided control of the House and presidency with caution, however, as the coefficient estimates are statistically significant only at the $p < 0.10$ level and only in models with presidential fixed effects. Models with only a time variable yield null results. In this manner, our hypothesized link between subdelegations and divided party control of the House and presidency is model-dependent at best. Similar models regressing subdelegations activity on divided control of the Senate and White House yield null results.

One possible interpretation of these findings is that Congress as a body is not generally aware of agency delegation decisions—even when they are published in the Code of Federal Regulations. Given that Congress often relies on “fire-alarm” oversight, interest groups may not bring them to legislative attention, particularly when they stand to benefit from them. Alternatively, agency heads may make subdelegation decisions primarily due to exogenous considerations, such as internal agency alignment or resource considerations, rather than with an eye towards political dynamics on Capitol Hill. In other words, the decision to grant power to a civil servant may be more a function of appointees’ desire to expedite agency decisionmaking or entrench their preferences at the end of a presidential administration, rather than congressional avoidance.

### III. Implications

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

The second Section assesses the broader normative desirability of the phenomenon. Specifically, it explores how the practice can foster investment in expertise, but at the same time can undermine political accountability.

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

Subdelegation also has related implications for presidential and congressional control over the administrative state. Finally, the third Section considers institutional mechanisms to help the executive branch navigate between these two poles of expertise and accountability in a transparent manner.

A. Legality

The specter of tenure-protected officials exercising discretionary governmental authority raises constitutional worries about these officials’ appointments and potential removals, as well as statutory concerns with the practice of agency officials redelegating authority that Congress assigned to others. This Section addresses these matters in turn.

1. Appointments

The Constitution provides that the President “shall nominate” and the Senate confirm all “Officers of the United States,” though Congress can “by Law vest” the appointment of “inferior Officers” in the President, “Courts of Law,” or in the “Heads of Departments.” By referring to governmental “Officers,” the clause implicitly recognizes that there are non-Officers, or employees. Employees can be hired through a wide variety of means involving non-constitutional actors. Recent Supreme Court decisions have provided some guidance on the dividing line between employees and officers, though the precise contours are highly fact-specific.

In *Lucia v. Securities & Exchange Commission*, the Supreme Court considered the status of SEC Administrative Law Judges (ALJs), concluding that they were Officers for constitutional purposes. The majority’s analysis centered on two dimensions: (1) whether an Officer’s position was of an enduring nature; and (2) whether the Officer exercised significant legal authority.

First, as *Lucia* indicates, Officers occupy “continuing and permanent” positions rather than “occasional or temporary” ones. More specifically, “an individual must occupy a ‘continuing’ position established by law to qualify as an officer.” This test suggests that Congress must have created the specific role occupied by the delegatee, or else allowed the agency head

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236 U.S. CONST. art. II, § 2, cl. 2.
238 Id.
239 Id. (quoting United States v. Germaine, 99 U.S. 508, 511-12 (1879)).
240 Id. (quoting Germaine, 99 U.S. at 11).
to create the position. The latter criterion requires statute-specific interpretation for particular submerged independent agencies. It is worth noting that many positions in our database were created by agency heads under statutory authority permitting them to do so.

One open issue is how courts should approach positions created through executive branch action rather than explicitly by statute. The question is whether such executive actions reflect decisions by Congress to allow executive officials to create those positions, since the Appointments Clause requires that offices must be “established by Law.” It is first worth noting that many organic statutes contain “general authorizations that might suffice to justify the heads of agencies or departments to delegate their functions and to appoint persons to carry out those functions.” For instance, Congress explicitly grants the Secretaries of Agriculture, Education, and Transportation the authority to appoint officers to carry out their departments’ duties. William Funk also raises the intriguing possibility that the Civil Service Reform Act of 1978 itself could furnish the requisite authority—especially for SES members that occupy many of the delegated roles—though he concludes that it likely does not.

How courts resolve these issues will likely turn in part on “pragmatic” considerations or a desire to engage in constitutional avoidance. Insofar as courts generally allow agencies to organize their own internal affairs, they may also be willing to grant them Chevron deference on the matter—an issue we discuss in more detail below.

241 See O’Connell, Acting, supra note 27, at 683 n.364 (“Article II’s Excepting Clause ‘does not require that a law specifically provide for the appointment of a particular inferior officer.’” (quoting Pennsylvania v. Dep’t of Health & Human Servs., 80 F.3d 796, 804-05 (3d Cir. 1996))).

242 Id. at 685 (“Outside the acting leadership context, courts have generally relied on agency organic statutes to find the requisite authority for the executive branch’s creation of positions.”).

243 See, e.g., 49 U.S.C. § 106(f)(1) (authorizing NHTSA’s administrator to “appoint . . . such officers and employees . . . as may be necessary”).

244 See, e.g., Changes to Regulations to Reflect the Role of the New Environmental Appeals Board in Agency Adjudications, 57 Fed. Reg. 5320, 5320 (Feb. 13, 1992) (creating the Environmental Appeals Board and granting it authority to hear and decide appeals of permit and penalty decisions in response to increasing levels of administrative adjudications). This example comes from William Funk’s legal analysis of the Environmental Appeals Board within the EPA. See William Funk, Is the Environmental Appeals Board Unconstitutional or Unlawful?, 49 ENV’T LAW 737, 738, 738 n.3 (2019) (discussing how the Administrator of the Environmental Protection Agency created the Environmental Appeals Board to replace the former judicial officers who originally had delegated authority to hear and decide appeals).

245 U.S. CONST. art. II, § 2, cl. 2.

246 Funk, Is the Environmental Appeals Board Unconstitutional or Unlawful?, supra note 244, at 743.

247 See id. at 743. 743 n.61 (citing statutes granting such authority).

248 Id. at 743-46.

249 See id. at 750 (“[C]ases may suggest some willingness by courts to address pragmatically whether Congress has vested the head of an agency with the power to make appointments of inferior officers.”).
Second, constitutional Officers exercise “significant authority pursuant to the laws of the United States.” According to the *Lucia* Court, the inquiry to determine whether this criterion is met “focus[s] on the extent of power an individual wields in carrying out his assigned functions.” The majority declined to clarify further, but it is worth noting that the government’s briefs in the case proposed criteria such as the extent to which the individual exercising authority has “the power to bind the government or third parties on significant matters or to undertake other important and distinctively sovereign functions.” This standard closely mirrors the one we use to classify subdelegations involving agency authority when creating our subdelegations database. This conceptual overlap suggests that most, if not all, the subdelegations in our dataset are constitutionally significant. Previous cases have also clarified that constitutional Officers engage in rulemaking, final adjudication, and traditional enforcement functions—all of which are often conducted under subdelegated authority, as our dataset reveals.

Some examples of likely significant authority include the subdelegation of rulemaking powers to civil servants. The Nuclear Regulatory Commission, for instance, delegated the authority to promulgate rules concerning, inter alia, nuclear reactor safety to the Commission’s Executive Director for Operations, with certain exceptions. The FDA Commissioner has assigned

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250 *Lucia* v. SEC, 138 S. Ct. 2044, 2051 (quoting Buckley v. Valeo, 424 U.S. 1, 126 (1976)).
251 *Id.* Because the ALJs basically utilized “nearly all the tools of federal trial judges,” their authority was significant, thus rendering them Officers. *Id.* at 2053. The ALJs took testimony, received evidence, examined witnesses at hearings, took pre-hearing depositions, conducted trials, administered oaths, ruled on motions, generally regulated the course of a hearing, ruled on the admissibility of evidence, and could punish all contemptuous conduct. *See id.*
252 *Id.* at 2051-52.
253 *See supra* Section I.B.
254 Officers, for example, issue regulations and orders. *See Collins v. Yellen, 141 S. Ct. 1761, 1785-86 (2021)* (“[The Federal Housing Finance Agency] is empowered to issue a ‘regulation or order’ requiring stockholders, directors, and officers to exercise certain functions.”); *Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2200 (2020)* (“[T]he [CFPB] Director possesses the authority to promulgate binding rules fleshing out 19 federal statutes, including a broad prohibition on unfair and deceptive practices in a major segment of the U.S. economy.”). They make final decisions awarding relief in administrative adjudications. *See Seila Law, 140 S. Ct. at 2200* (“[T]he Director’s enforcement authority includes the power to seek daunting monetary penalties against private parties on behalf of the United States in federal court . . . .”). And they exercise criminal and civil law enforcement functions with respect to private individuals and entities. *See Springer v. Philippine Islands, 277 U.S. 189, 202 (1928)* (“Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions.”).
255 Delegation of Rulemaking Authority to Executive Director for Operations, 47 Fed. Reg. 11816, 11817 (Mar. 19, 1982). The Commission reserves to itself the power to promulgate rules “involving significant questions of policy” and rules concerning several discrete subjects, most notably rules of practice for domestic licensing proceedings and rules concerning international trade in nuclear
to the Director of the Center for Devices and Radiological Health the authority to issue rules governing decisions to withdraw approval of mammography facility accreditation organizations.\textsuperscript{256} A 1999 delegation tasks a career appointee in the Department of Transportation with “promulgat[ing] . . . necessary regulations” concerning inspections of commercial interstate trucks’ noise levels.\textsuperscript{257} Finally, a 2002 subdelegation assigns to the Chief of the Federal Communications Commission’s Media Bureau a wide variety of rulemaking and enforcement functions regarding broadcast media ownership, programming, and technical standards.\textsuperscript{258}

All of these examples of delegated rulemaking authority would likely be understood as constituting significant governmental authority. So would many others in our dataset given the overlap of the constitutional test with our definition of an “agency.” Moreover, most of the submerged independent agencies we have identified presumably were created under statutes that could be interpreted to permit subdelegation. For these reasons, the civil servants heading these submerged independent agencies are likely constitutional Officers.

The problem, however, is that none of them are appointed by the President, a court of law, or department head. To the contrary, civil servants are generally hired through a merit-based process regulated by the Office of Personnel Management (OPM).\textsuperscript{259} For career SES in particular, an agency in conjunction with the Office of Personnel Management publishes a job announcement for an SES position, rates and ranks eligible applicants, and approves of the candidate’s qualifications.\textsuperscript{260}


\textsuperscript{258} Establishment of the Media Bureau, the Wireline Competition Bureau and the Consumer and Governmental Affairs Bureau, Reorganization of the International Bureau, and Other Organizational Changes, 67 Fed. Reg. 13216, 13216 (Mar. 21, 2002).

\textsuperscript{259} See Hiring Information: Competitive Hiring, U.S. Off. of Pers. Mgmt., https://www.opm.gov/policy-data-oversight/hiring-information/competitive-hiring [https://perma.cc/R6F5-WR4H] (describing the process employed by U.S. Office of Personnel Management (OPM) in hiring different categories of the civil service); see also The Senior Executive Service, supra note 141, at 7 (describing the process of making and reviewing career appointments to the senior executive service).

\textsuperscript{260} Both the agency and the SES Qualifications Review Board (QRB), administered by OPM, must review and approve the qualifications of the candidate. See The Senior Executive Service, supra note 141, at 7.
As a result, some submerged independent agencies likely violate the Appointments Clause. That many of the civil servants exercising subdelegated authority may even qualify as principal Officers exacerbates the problem. Principal Officers must be presidentially nominated and Senate-confirmed. The Supreme Court in United States v. Arthrex clarified that identifying principal Officers “calls for . . . an appraisal of how much power an officer exercises free from control by a superior.” Again, this assessment requires a case-specific inquiry. Rather than mechanistically look at an agency’s organizational chart, courts must assess whether the individual’s “work is directed and supervised at some level” by a principal Officer. As previously discussed, however, many subdelegations are exercised with very little formal oversight or review. Because civil servants are tenure-protected, they also cannot be fired unilaterally by the agency head, usually a principal officer. As a consequence, many of the submerged independent agencies in our dataset are likely headed by principal Officers that are not presidentially appointed and Senate-confirmed and thus are unconstitutional.

Recent case law, however, suggests that ratification by an agency head of an allegedly improper decision by a delegatee may cure the constitutional defect provided that the agency head also possessed the authority to do so at the time of the delegated decision. The doctrine of ratification provides that a principal’s affirmation of an agent’s prior act that was avowedly taken on the principal’s account serves to bind the principal. Thus, post hoc ratification cures an otherwise constitutionally invalid decision by an improperly

261 See U.S. CONST. art. II, § 2, cl. 2.
263 Id. (“The dissent would have the Court focus on the location of an officer in the agency ‘organizational chart,’ but as we explained in Edmond, ‘it is not enough that other officers may be identified who formally maintain a higher rank, or possess responsibilities of a greater magnitude.’” (alterations omitted) (quoting Edmond, 520 U.S. at 662-63)).
264 Edmond, 520 U.S. at 663 (emphasis added). In Arthrex, the fact that no higher-ranking officer could directly review the Administrative Patent Judges’ decisions weighed heavily in the holding that their appointment to an inferior office was incompatible with the Appointments Clause. See Arthrex, 141 S. Ct. at 1985.
265 See supra Section I.A.
266 See Morrison v. Olson, 487 U.S. 654, 689-90 (1988) (identifying removal by a Principal Officer as a factor in determining whether a person is an inferior officer). For a discussion of the circumstances under which SES career appointees may be removed from the SES, see supra note 144 and accompanying text.
267 See RESTATEMENT (SECOND) OF AGENCY § 82 (1958). Although the doctrine is grounded in common law, courts deciding public law cases also apply ratification in governmental principal–agent relationships. See, e.g., Fed. Election Comm’n v. Nat’l Rifle Ass’n Pol. Victory Fund, 513 U.S. 88, 98 (1994) (holding that the ratification doctrine is applicable, but that the particular ratification at issue in this case was untimely); Wilkes-Barre Hosp. Co. v. NLRB, 857 F.3d 364, 371 (D.C. Cir. 2017) (“Ratification can remedy defects arising from the decisions of improperly appointed officials.”).
appointed official.\textsuperscript{268} Even the issuance of a final rule—one of the most consequential actions that agencies undertake—promulgated by an improperly appointed civil servant can be cured of that defect via ratification.\textsuperscript{269} Accordingly, an agency head’s periodic review and approval of subordinates’ decisions made pursuant to subdelegated authority would likely cure any potential Appointments Clause problems (without conceding that any such defect exists).\textsuperscript{270} As mentioned, however, an important limitation concerns the timing of ratifications: the ratifying officer must possess authority to undertake the act both at the time the act was done and at the time the ratification was made.\textsuperscript{271} Many subdelegations in our dataset, however, do not seem to reserve authority explicitly to the delegator or otherwise make the exercise of authority concurrent.\textsuperscript{272} Under such circumstances, the rule of meaningful variation could suggest that, absent such express reservations, the delegator intended to divest themselves of authority. If a court interprets the delegation accordingly, then these submerged independent agencies would continue to be unconstitutional because the principal officers would not have the authority to take the action.

\textsuperscript{268} See Jooce v. Food & Drug Admin., 981 F.3d 26, 28 (D.C. Cir. 2020) (“Even assuming . . . [that] issuance of the Deeming Rule violated the Appointments Clause and that Commissioner Califf’s general ratification of prior actions by the FDA as part of an agency reorganization was invalid, Commissioner Gottlieb’s ratification cured any Appointments Clause defect.”), cert. denied, 141 S. Ct. 2854 (2021).

\textsuperscript{269} See id. In Jooce, Congress delegated the authority to regulate cigarettes and “any other tobacco products that the Secretary [of Health & Human Services] by regulation deems to be subject to” the Family Smoking Prevention and Tobacco Control Act. See 21 U.S.C. § 387a(b); see also Jooce, 981 F.3d at 27 (describing the Act and its delegation of authority). The Secretary subdelegated this authority to the FDA Commissioner. See 2 FDA STAFF MANUAL GUIDES § 1410.10(1)(A)(14) (2016). The Commissioner in turn subdelegated the authority to the career-appointed Assistant Commissioner for Policy. See 2 FDA STAFF MANUAL GUIDES § 1410.21(1)(G) (2016). The Assistant Commissioner then promulgated a final rule deeming e-cigarettes to be tobacco products subject to the Act. See Deeming Tobacco Products to Be Subject to the Federal Food, Drug, and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act, 81 Fed. Reg. 28974, 28976 (May 10, 2016). A group of e-cigarette retailers sued, alleging, inter alia, that the functions performed by the Assistant Commissioner indicate that the position must be filled by a properly appointed principal or inferior official and, since a proper appointment did not occur here, the e-cigarette rule was issued in violation of the Appointments Clause. See Jooce, 981 F.3d at 28. After they filed suit, the FDA Commissioner (a properly appointed officer) “affirm[ed] and ratif[ied]” the Assistant Commissioner’s rule, noting that he did so “based on [his] careful review of the rule, [his] knowledge of its provisions, and [his] close involvement in [related] policy matters.” See id. at 29. The D.C. Circuit held that this statement “cured any potential Appointment Clause defect” concerning the Assistant Commissioner’s issuance of the rule. Id. at 30. The court did not reach the question of whether such a defect would have existed but—for the ratification.

\textsuperscript{270} See Jooce, 981 F.3d at 30 (holding that ratification by the principal officer, such as an agency head, cured any potential Appointments Clause defect). The court in Jooce did not reach the question of whether an Appointments Clause defect actually existed. See id.


\textsuperscript{272} See supra Section I.A.
at the time it was taken by the delegatee; thus, ratification could not cure the Appointments Clause defect under these circumstances.

Going forward, agency heads and their general counsels seeking to avoid Appointments Clause problems would do well to draft their subdelegations to explicitly reserve authority concerning agency actions. Even if the delegator never exercises their concurrent authority in practice, this language can help the agency in litigation concerning an action taken pursuant to the subdelegated power. Further, agency heads should also consider implementing a process whereby they or other properly appointed officials periodically review and sign off on subordinates’ decisions. This process should also encourage agency leaders to review the corpus of subdelegated powers in their respective agencies. This periodic review can also potentially help uproot previous appointees’ subdelegations—a prospect we discuss in more detail later.

2. Removal

Turning from appointments to the removal of agency officials, the Constitution vests “executive Power” in the President and requires the President to “take Care” that the laws are “faithfully executed.” The Supreme Court infers from these provisions that the President has the right to fire certain agency officials at will. However, the Court allows Congress to place removal restrictions on certain actors as long as these restrictions are not “of such a nature that they impede the President’s ability to perform his constitutional duty.” That imperative suggests that submerged independent agencies—which, recall, are headed by civil servants who are removable only for cause—may face two constitutional challenges stemming from the President’s inability to remove their heads at will. First, their constitutionality could be called into question if they are characterized as single-headed agencies helmed by principal officers. Second, even if led by
inferior officers, they may still be unconstitutional if contained within another agency headed by officials who themselves have removal protections.

On the first issue: In *Collins v. Yellen*, the Supreme Court considered a constitutional challenge to the Federal Housing Finance Agency, which was headed by a single director removable only for cause.278 The Court held the removal restriction unconstitutional largely based on a previous precedent decided just the year before, *Seila Law LLC v. Consumer Financial Protection Bureau*.279 In *Seila Law*, the Court severed a good-cause protection placed on the single director of the Consumer Financial Protection Bureau.280 It reasoned that a single-headed agency concentrated too much power in one individual unchecked by fellow members of a multimember body.281 When that single head with “significant authority” was also removable for cause, the scheme became unconstitutionally untethered from presidential control.282 *Collins* expanded on *Seila Law*’s logic, insisting that the analysis does not “hinge[]” on “the nature and breadth of an agency’s authority,” in particular, but rather on whether the agency directly regulates outside parties’ rights.283

Some submerged independent agencies have superficial similarities with the structure of the CFPB and FHFA. Single delegates exercise delegated executive powers and have limitations on their removal.284 That civil service protections differ from the for-cause removal protection at issue in *Seila* may be of little consequence, as the “Constitution prohibits even ‘modest restrictions’ on the President’s power to remove the head of an agency with a single top officer.”285 For the subset of submerged independent agencies
that are headed by a single principal officer, their passing resemblance to the structure that the Court confronted in Seila Law and Collins renders them constitutionally vulnerable.  

Seila Law, however, also emphasized the novelty of the CFPB’s structure as prime evidence of its unconstitutionality. That structure’s novelty was “[p]erhaps the most telling indication” of its unconstitutionality. There is, by contrast, nothing novel about submerged independent agencies. As we show, they are remarkably common, with 1,598 new appointee-to-civil servant subdelegations during the 1979 to 2019 period. The practice persists during Democratic as well as Republican administrations, and in independent as well as executive agencies. The Federal Register records the first subdelegation on March 27, 1936, which is the tenth day of the Federal Register’s existence. The practice of recording subdelegations in the Federal Register persisted throughout the mid-twentieth century.
There is therefore good reason to think that submerged independent agencies are not unconstitutional, at least under the anti-novelty premise in \textit{Seila Law}. Concerning the second removal-related constitutional challenge: even if submerged independent agencies are not vulnerable as single-headed agencies with for-cause removal restrictions, they may still be so when they are contained within other agencies headed by officials with for-cause removal protection. In \textit{Free Enterprise Fund}, the Supreme Court held that such double for-cause removal restrictions violate the Constitution.\footnote{See \textit{Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.}, 561 U.S. 477, 484 (2010) (“We hold that such multilevel protection from removal is contrary to Article II’s vesting of the executive power in the President.”).} To be sure, Chief Justice Roberts, writing for the majority, was adamant that the case did not decide the question of SES or civil service constitutionality.\footnote{See \textit{id.} at 506 (“We do not decide the status of other Government employees, nor do we decide whether lesser functionaries subordinate to officers of the United States must be subject to the same sort of control as those who exercise significant authority pursuant to the laws.” (quotation marks omitted)).} Nevertheless, Justice Breyer in dissent pointed out that the majority’s logic was difficult not to apply to these positions.\footnote{See \textit{id.} at 538 (Breyer, J., dissenting) (“The civil service . . . includes many officers indistinguishable from the members of both the Commission and the Accounting Board.”).} Justice Breyer’s observation is even stronger if civil servants are also deemed to be constitutional officers rather than mere employees.\footnote{Cf. \textit{id.} at 506 (majority opinion) (“The parties here concede that Board members are executive ‘Officers,’ as that term is used in the Constitution.”).} As previously discussed, many subdelegated authorities are significant in character, which makes this conclusion likely.

If a judge were to find unconstitutional the removal restrictions on a civil servant exercising subdelegated authority, the question of remedy would be case- and statute-specific. Courts have sometimes severed the offending removal restrictions,\footnote{See David Zaring, \textit{Toward Separation of Powers Realism}, 37 \textit{YALE J. ON REGUL.} 708, 714 (2020) (describing precedents which include a “vigorous severability practice”); see also Kent Barnett, \textit{To the Victor Goes the Toil—Remedies for Regulated Parties in Separation-of-Powers Litigation}, 92 N.C. L. REV. 481, 527 (2014) (“Courts have often . . . validated past administrative actions and provid[ed] Congress lengthy stays of the judgment to fashion remedial legislation.”).} but the inquiry as to whether to do so may turn on perceived congressional intent.\footnote{See Barnett, \textit{To the Victor Goes the Toil}, supra note 297, at 521 (“[S]evering an unconstitutional portion of a statute may comport with understandable efforts to implement ‘fallback’ congressional intent and limit disruption to federal programs.”).} Given that the purpose of the civil service laws was to insulate civil servants, it is unlikely that severance would be the correct remedy in this context. Rather, depending on the case facts and whether relief is prospective or retrospective, courts may consider
alternative remedies such as ratification or simply deeming the action ultra vires as to the parties.\textsuperscript{299}

One complication to the analyses above is the fact that the potential removal issue arises in this context only because of an executive branch actor’s decision to subdelegate authority. The President, through control over that actor, could always revoke the subdelegation if exercised in an undesirable way. This fact pattern arguably distinguishes it from the Court’s removal cases, which involve \textit{congressional} grants of power to tenure-protected actors that cannot be stripped by the President. Thus, one could argue, the “President’s ability to perform his constitutional duty” is not undermined by submerged independent agencies.\textsuperscript{300} Note, however, that this claim is convincing only if one agrees that a potential Article II violation could be cured ex post by the revocation of subdelegated authority—a possibility that current case law could be read not to support, though the issue has not been directly addressed.\textsuperscript{301}

Moreover, the President’s removal authority is also arguably compromised when the subdelegation in question is judicially enforceable under \textit{Accardi}.\textsuperscript{302} In these situations, the President would be constrained from both removing the subordinate as well as from overturning the decision itself. Any efforts to later revoke the subdelegation, in turn, would not change the subordinate’s judicially enforceable decision. This is also likely to be true in the adjudicatory context, where due process norms have long constrained the ability of the President to interfere in a pending decision, even if the President could remove the adjudicator after the decision had been made.\textsuperscript{303}

\textsuperscript{299} See Collins v. Yellen, 141 S. Ct. 1761, 1795 (2020) (Gorsuch, J., concurring) (noting that the typical remedy to an unconstitutional agency action is to “set aside the Director’s ultra vires actions as ‘contrary to constitutional right’”).

\textsuperscript{300} See Morrison v. Olson, 487 U.S. 654, 691 (1988) (“[W]e cannot say that the imposition of a ‘good cause’ standard for removal by itself unduly trammels on executive authority.”).

\textsuperscript{301} Cf. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 504 (2010) (“[A]ltering the budget or powers of an agency as a whole is a problematic way to control an inferior officer. The Commission cannot wield a free hand to supervise individual members if it must destroy the Board in order to fix it.”).

\textsuperscript{302} See supra Section I.A (discussing the \textit{Accardi} doctrine, which requires that agencies follow their own rules).

\textsuperscript{303} See Myers v. United States, 272 U.S. 52, 135 (1926) (“[T]here may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control. But . . . he may consider the decision after its rendition as a reason for removing the officer . . . .’’).
3. Statutory Constraints

Turning from constitutional to statutory issues, Congress can control the extent to which authority is redelegated after its initial delegation to an agency head simply by clearly specifying to which officials, if any, an authority may be reassigned. When the statute is ambiguous on this point, however, courts apply Chevron’s familiar two-step framework. First, they ask whether Congress clearly answered the question as to whether a statutory delegate can redelegate her authority. If the answer is no, then courts defer to an agency’s reasonable statutory construction. This inquiry would require a statute-by-statute analysis of the subdelegations in our dataset.

More broadly, courts currently treat internal and external agency delegations asymmetrically. Courts generally presume that Congress allows agencies to delegate authority internally, absent a statutory prohibition. While delegations to an internal actor are presumptively valid absent express statutory proscription, those to actors outside of the agency are not. In other words, when statutes are otherwise silent, judges generally read such silence to permit internal subdelegation, but to prohibit redelegation to external actors.

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304 See, e.g., 41 U.S.C. § 8105(b) (“The authority of the head of an agency under this section to waive a suspension, termination, or debarment shall not be delegated.”); 50 U.S.C. § 4565(b)(1)(G) (“The authority of the Committee to initiate a review . . . may not be delegated to any person, other than the Deputy Secretary or an appropriate Under Secretary of the department or agency represented on the Committee.”).


306 See, e.g., Halverson v. Slater, 129 F.3d 180, 181 (D.C. Cir. 1997) (applying the “the first step of the familiar Chevron analysis” to hold that the statute in question “limits delegation” to a third party based on the text of the statute).

307 See U.S. Telecom Ass’n v. FCC, 359 F.3d 554, 566 (D.C. Cir. 2004) (“[W]hile federal agency officials may subdelegate their decision-making authority to subordinates absent evidence of contrary congressional intent, they may not subdelegate to outside entities—private or sovereign—absent affirmative evidence of authority to do so.”); see also O’Connell, Acting, supra note 27, at 687 (“[C]ourts presumptively permit subdelegation to a subordinate federal officer or agency absent affirmative evidence of a contrary congressional intent.” (alterations and quotation marks omitted)).

308 See, e.g., United States v. Giordano, 416 U.S. 505, 513-14 (1974) (“[M]erely vesting a duty in the Attorney General, as it is said Congress did in [the statute], evinces no intention whatsoever to preclude delegation to other officers in the Department of Justice . . . .”); Assiniboine & Sioux Tribes v. Bd. of Oil & Gas Conservation, 792 F.2d 782, 796 (9th Cir. 1986) (limiting subdelegation of responsibilities based in part on “legislative silence” on the matter); Shook v. District of Columbia Fin. Resp. & Mgmt. Assistance Auth., 132 F.3d 775, 783 (D.C. Cir. 1998) (“We therefore conclude that under [the statute] the Board of Education could not have delegated executive functions or policymaking authority to anyone but the Superintendent.”); U.S. Telecom Ass’n, 359 F.3d at 565 (“[T]he case law strongly suggests that subdelegations to outside parties are assumed to be improper absent an affirmative showing of congressional authorization.”); La. Forestry Ass’n v. Sec’y U.S. Dep’t of Lab., 745 F.3d 653, 671 (3d Cir. 2014) (“[A] subdelegation of authority from the [Department of Homeland Security] to the [Department of Labor]—an outside, non-subordinate agency—would be impermissible absent a clear statement from Congress authorizing such.”).
another entity—whether another agency, private party, or a state. The relevant cases usually justify this approach with one of two rationales. First, accountability regarding internal delegations arguably remains with the federal agency, while external delegations “blur” the lines of responsibility. Second, delegations to external entities also increase the likelihood that they will be pursued by actors with different interests; as one court put it, they “aggravate[] the risk of policy drift inherent in any principal-agent relationship.”

Because the subdelegations at issue in this study are all internal and to civil servants, courts would likely extend *Chevron* deference to the agency’s interpretation of the statute that the agency claims permits the subdelegation. In light of the constitutional issues analyzed above, however, courts may be loath to allow particular delegations of final authority if they encroach on the President’s Article II executive powers. In other words, judges are more likely to exercise constitutional avoidance to prohibit delegations that would raise such concerns.

**B. Tradeoffs**

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

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309 See F. Andrew Hessick & Carissa Byrne Hessick, *The Non-Redelegation Doctrine*, 55 WM. & MARY L. REV. 163, 168 (2013) (“[W]hen Congress unambiguously delegates policy-making power to a particular agent, only that agent may exercise the delegated power.”); Marisam, *The Interagency Marketplace*, supra note 40, at 891 (terming the prohibition against external delegations “the anti-redelegation doctrine”).

310 See *U.S. Telecom Ass’n*, 359 F.3d at 565 (“[W]hen an agency delegates power to outside parties, lines of accountability may blur, undermining an important democratic check on government decision-making.”).

311 Id. at 566.

312 See, e.g., Gentiva Healthcare Corp. v. Sebelius, 857 F. Supp. 2d 1, 8-12 (D.D.C. 2012) (performing *Chevron* analysis on an agency’s subdelegation to an internal actor).

313 See supra subsections III.A.1–2.

314 See Levinson & Sachs, *Political Entrenchment and Public Law*, supra note 118, at 453 (“[T]he administration can engage in ‘personnel burrowing,’ converting agency political appointees into civil service employees in order to keep them in their jobs beyond the end of the President’s term.”).

bypassing Senate confirmation in favor of a civil servant with aligned preferences.316

By contrast, subdelegations initiated sua sponte by the agency head can in theory be deployed as a means of “resistance” against the White House.317 Sometimes, Presidents and agency heads’ hold divergent preferences due, for instance, to bureaucratic capture, civil-servant influence, or pressure from Congress.318 Under these circumstances, an agency head can subdelegate authority to an aligned civil servant as a mean of achieving a policy goal at odds with the prevailing President, while disclaiming responsibility for the decisions. If she reserves authority to herself, the delegation provides option value. The same is true when the agency is faced with congressional pushback or broader accusations of politicizing a matter. In these circumstances, subdelegating to a civil servant may signal agency neutrality and expertise.319

At the same time, it is important not to overstate the prospect of a civil servant exercising delegated authority in ways that depart from a prevailing principal’s desired outcomes, whether that of an agency head or the White House. To the contrary, civil servants generally have a strong sense of “role perception,” backed by powerful norms regarding appropriate institutional behavior and respect for the preferences of politically appointed superiors.320 In other words, it may be the case that subdelegated authority is in fact exercised faithfully with respect to the relevant principal’s wishes. Further empirical work is necessary to determine how civil servants exercise the authority granted to them and the extent to which it departs from the preferences of a prevailing principal.


317 See generally Ingber, Bureaucratic Resistance and the National Security State, supra note 180.


319 See GREGORY A. HUBER, THE CRAFT OF BUREAUCRATIC NEUTRALITY 35 (2007) (“[T]hose managers who seek an agency’s survival have a generic incentive to demonstrate to elected officials that agency resources are being used efficaciously.”).

320 See, e.g., MARISSA MARTINO GOLDEN, WHAT MOTIVATES BUREAUCRATS? 155 (2000) (“[C]areer civil servants are motivated, at least in part, by their role perception, . . . [which] leads them to cooperate with their appointed principals in the executive branch.”).
The normative valence of each of these strategies, in turn, also depends on exogenous views about the broader merits of presidential control.\textsuperscript{321} If one believes that the presidential control model has been a valuable, even necessary, development for legitimizing the administrative state, then subdelegation as a means of bureaucratic autonomy is worrisome. All the more so when bureaucratic power is submerged at the civil servant level. On the other hand, if one believes that presidential interference is unwise, or even illegal under statutes that explicitly delegate authority to the agency head, then subdelegation can be a welcome tool to combat political interference and vindicate congressional preferences.\textsuperscript{322}

Taking a step back to consider the practice’s implications for the administrative state as a whole, the prospect that political appointees can use subdelegations to entrench their preferences—and thus raise the costs to future Presidents to implement their democratically ratified agenda—is normatively troubling for those that believe that administrative legitimacy stems from political accountability.\textsuperscript{323} Given the heated contexts in which the practice often occurs, the prospect is especially concerning in an age of increased political polarization and regulatory oscillation.\textsuperscript{324}

By potentially empowering insulated civil servants, political appointees may sacrifice democratic responsiveness.\textsuperscript{325} If they had instead retained the authority, they would be subject to more potential oversight by a President who faces elections.\textsuperscript{326} After all, if civil servants were policy-motivated in particular cases, they presumably value the exercise of delegated authority to the extent that authority enables them to move policy from what it would otherwise be. If civil servants’ preferences differ from their prevailing

\textsuperscript{321} See, e.g., Kagan, Presidential Administration, supra note 68, at 2376–77 (comparing doctrinal opinions on whether the President deserves more or less deference than agencies with regards to executive action).

\textsuperscript{322} See Kevin M. Stack, The President’s Statutory Powers to Administer the Laws, 106 COLUM. L. REV. 263, 295 (2006) (“[I]t is in principle possible to vest independent legal discretion in an official, even though the official is subject to removal by the President.”).

\textsuperscript{323} See CHARLES FRIED, ORDER AND LAW 153 (1991) (“The lines of responsibility should be stark and clear, so that the exercise of power can be comprehensible, transparent to the gaze of the citizen subject to it.”).


\textsuperscript{325} See generally Francis E. Rourke, Responsiveness and Neutral Competence in American Bureaucracy, 52 PUB. ADMIN. REV. 339 (1992) (illustrating the tension between political accountability and insulated bureaucracies). But see Matthew C. Stephenson, Optimal Political Control of the Bureaucracy, 107 MICH. L. REV. 53, 55 (2008) (contending that left-leaning civil servants, in combination with more extreme liberal or conservative appointees, can pull the executive branch towards the median voter).

\textsuperscript{326} On the other hand, an election-oriented President may favor subdelegations to civil servants, particularly on politically contentious issues that could divide the governing coalition.
principals’ views, then delegations could generate policy drift. Where appointees and civil servants are generally in agreement, delegations to civil servants—with job protections and long career horizons—could enable appointees to project their preferences into the future, should a civil servant decide not to abide by institutional norms and defy the prevailing principal instead. In this way, subdelegations can facilitate partisan entrenchment.

When the next President comes into power, however, she possesses the constitutional imperative to “faithfully execute[]” the laws. When some of that authority has been delegated to civil servants through the Federal Register, it can be challenging for new appointees to revoke and exercise that authority as previously discussed. For example, there is an information problem; the learning curve for inexperienced government officials is steep. Locating and appreciating the scope of subdelegated authority takes up further time, so may be deprioritized. In addition, revoking a published delegation requires another publication in the Federal Register. Drafting and formatting that revocation takes more resources. Further, as previously discussed, the subdelegation could also be “functionally” entrenched: it empowers lower-level officials who can mobilize supporters and other interest groups to fend off subsequent attempts at repeal.

On the other side of the ledger, there are many reasons why submerged independent agencies should be celebrated and preserved. Most importantly, credible, entrenched delegations can encourage civil servants to develop expertise.

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327 See Kenneth A. Shepsle, Bureaucratic Drift, Coalitional Drift, and Time Consistency: A Comment on Macy, 8 J.L. ECON. & ORG. 111, 114 (1992) (“Bureaucratic drift, then, is the difference between the policy as passed in legislation [] and the policy as implemented by the bureaucratic agent [].”).

328 See Jennifer Nou, Civil Servant Disobedience, 94 CHI-KENT L. REV. 349, 352 (2019) (“Civil servant disobedience . . . refers to conscientious and public acts of defiance against political appointees.”).

329 U.S. CONST. art. II, § 3, cl. 1.

330 See supra subsection II.B.2.

331 See Levinson & Sachs, Political Entrenchment and Public Law, supra note 118, at 429-30 (describing methods of “functional” entrenchment involving the “strengthening political allies or weakening political opponents,” “changing the composition of the political community,” and “empowering a different governmental institution and consequently a different set of political actors and groups”); Magill, Agency Self-Regulation, supra note 40, at 894 (noting that agency heads “could empower an internal agency unit with predictable views to be in charge of the agency choice” thus rendering it “more difficult for political opponents to oppose the effort or to dislodge it once it is in place”).

of delegation is to motivate effort and information acquisition. Essentially, when a civil servant knows that her decision will be the final one, she is much more willing to invest time and expertise into making it. Moreover, the prospect of exercising delegated authority may serve as a form of compensation to civil servants. Further, because motivated job applicants will value delegated authority-as-compensation more than unmotivated ones, delegation offers a screening mechanism to attract a high-quality workforce.

In addition, by tying their own hands, political appointees can credibly commit to more stable policy choices. This greater regulatory stability, in turn, can engender increased investment and economic growth. Finally, subdelegation can also free up resources for political appointees to pursue higher-priority tasks. By declining decision-making authority, agency heads can focus more time and attention on relatively more important matters.

333 See, e.g., Philippe Aghion & Jean Tirole, Formal and Real Authority in Organizations, 105 J. POL. ECON. 1, 3 (1997) (“The transfer of formal authority to an agent credibly increases the agent’s initiative or incentive to acquire information.”); Ryan Bubb & Patrick L. Warren, Optimal Agency Bias and Regulatory Review, 43 J. LEGAL STUD. 95, 96-97 (2014) (describing how an agent’s ability to influence a principal’s decision incentivizes the agent to generate information to support the proposed decision); Stephenson, Information Acquisition and Institutional Design, supra note 332, at 1444 (“A principal might prefer to delegate substantial discretion . . . in order to induce greater research investment.”).


335 See Stephenson, The Qualities of Public Servants Determine the Quality of Public Service, supra note 334, at 1202 (“Diminishing the intrinsic satisfaction associated with public sector jobs by reducing even relatively high-level civil servants to mere functionaries will make it harder to attract and retain talented people.”).

336 See id. at 1201-02 (describing how the ability to influence policy attracts talented people); see also Sean Gailmard & John W. Patty, Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise, 51 AM. J. POL. SCI. 873, 880 (2007) (arguing that “discretion is a substitute for money” to attract motivated and skilled bureaucrats).


338 See James P. Pfiffner, Political Appointees and Career Executives: The Democracy-Bureaucracy Nexus in the Third Century, 47 PUB. ADMIN. REV. 57, 63 (1987) (noting the limits on political appointees’ time and arguing that a certain level of subdelegations to civil servants may improve agency functioning and, thus, better enable the agency to achieve appointee objectives).
To summarize, submerged independent agencies can foster expertise and generate higher-quality decisionmaking. But they also may yield less democratically responsive policies. Responsiveness can be diminished to the extent civil servants act on preferences that differ from the views of prevailing politically accountable appointees; the extent to which this occurs is, again, an open question. How one weighs these competing considerations may also vary by agency or policy issue, or even by diverging first principles about constitutional and administrative law. Overall, there are still challenging empirical questions that must be resolved before deciding whether submerged independent agencies are, on net, desirable for the administrative state.

C. Oversight

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

A well-developed literature in the election-law context, however, suggests that political actors may be better equipped than judges to police against entrenchment.339 To start, entrenchment does not admit to an obvious judicially manageable standard.340

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339 See Heather K. Gerken, Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum, 153 U. PA. L. REV. 503, 517 (2004) ("Lacking a sound framework for adjudicating political process claims, the Supreme Court’s election law opinions often lack analytic coherence and thus provide little guidance to lower courts or other political actors."); Samuel Issacharoff, Gerrymandering and Political Cartels, 116 HARV. L. REV. 593, 639–45 (2002) (discussing the Supreme Court’s “constitutional entanglement” with the redistricting process and “intrusion[s] into state political arrangements”); Samuel Issacharoff & Richard H. Pildes, Politics As Markets: Partisan Lockups of the Democratic Process, 50 STAN. L. REV. 643, 644 (1998) (“[The Supreme] Court has never been able to articulate a correspondingly expansive, sophisticated, or highly functional account of what features of democratic politics should be the focus of constitutional analysis.”). But see Nathaniel Persily, The Place of Competition in American Election Law, in THE MARKETPLACE OF DEMOCRACY: ELECTORAL COMPETITION AND AMERICAN POLITICS 171, 193 (Michael P. McDonald & John Samples eds., 2006) (“As difficult as it may be to come up with administrable election law standards to promote competition, reformers will continue to view the courts as the most promising agents for clearing the channels of political change. The alternative—hoping that those in charge of the crafting of election laws will become amenable to rules that make their jobs less secure—has never shown much promise.” (alterations and quotation marks omitted)).

340 See Persily, supra note 339, at 173 (“Different election laws will have different competition-related effects, and maximizing competitiveness along one dimension might diminish it on another.”).
The concept of raising the costs of repeal or amendment, for example, raises several normative questions. For instance, how many allies created as a result of the delegation is too many? How much greater must the marginal costs of repeal be to qualify as too much? Such questions also require difficult inquiries regarding mixed motives: Did the agency head intend to entrench power or merely motivate internal expertise? For these reasons, along with more familiar separation-of-powers concerns, courts have historically deferred to agency heads’ judgments of how to manage their internal resources and affairs, especially when such decisions are not fixed by statute.

Political actors, by contrast, have the tools as well as stronger incentives to root out delegations to internal agency actors that are no longer aligned with current preferences. The problem may be how to ensure that political actors are aware of potentially problematic subdelegations. To be sure, the subdelegations studied in this Article are all published in the Federal Register and the Code of Federal Regulations. But publication by itself is often insufficient to garner limited presidential or legislative attention.

To increase the salience of subdelegations, Congress should consider requiring agencies to submit existing internal delegations after presidential and congressional transitions to the relevant congressional committees or the Government Accountability Office. Similarly, new Presidents-elect should review these delegations as part of transition planning.

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

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


343 See 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 7.9, at 668 (5th ed. 2010) (“It is simply impossible for the President even to be aware of all of the policy decisions agencies make. His staff assigned to this task is too small to engage in detailed scrutiny of all major policy decisions.”).
Finally, Congress or the President could go even further by passing legislation or drafting an executive order automatically sunsetting all internal agency subdelegations—thereby requiring incoming agency heads to affirmatively review and ratify them. Such measures would help to ensure that subdelegations to lower-level officials do not persist due to inertia and simple path dependence. The major drawbacks to this approach, however, are that it could result in the revocation of socially beneficial subdelegations and could have a chilling effect on the exercise of delegated authority.

CONCLUSION

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

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

Many questions remain for the research agenda established and motivated by our descriptive findings and dataset. Among them is the important question of what factors inform an appointee’s choice to delegate to a civil servant rather than to a political appointee. Does it vary according to the level of expertise required or perceived policy preference alignment? Another question is what influences a delegator’s choice of form: When does it make sense to publish the subdelegation in the CFR versus an internal manual or not at all? Does it depend on the monitoring environment, the number of interest groups engaged on an issue, or other factors? Further, in light of our findings concerning presidential transitions and party control of Congress, more fine-grained work is needed concerning the political circumstances under which subdelegations occur; for instance, do we observe
heightened activity preceding *congressional* transitions?\textsuperscript{344} Finally, as previously discussed, more work should be done to understand what kinds of actions are taken by civil servants pursuant to these subdelegations.

Independent agencies are already in the judicial crosshairs. Those identified here are unlikely to be an exception. The heated rhetoric over this administrative form, however, should be tempered by more careful consideration of their costs and benefits. Executive branch actors have been creating submerged independent agencies for decades, suggesting that they serve an important function and perceived need. Accordingly, our hope is that the future of submerged independent agencies will depend not on soundbites, but rather on careful empirical work to better understand the motivations and consequences of the phenomenon.

APPENDICES

Appendix A. Delegator and Delegatee Characteristics

To provide a more comprehensive overview on our new subdelegations dataset, the following two tables report information on the identities of the delegators and delegatees. For the delegatee table, the pool expands from appointees and civil servants to include other governmental actors: states and other subnational government entities, other federal agencies, and inspectors general.345

Table A.1. Delegator Characteristics 346

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

345 Although inspectors general are PAS appointees, they enjoy a measure of operational and budgetary autonomy from other agency officials. See Robin J. Kempf & Jessica C. Cabrera, The De Facto Independence of Federal Offices of Inspector General, 49 AM. REV. PUB. ADMIN. 65, 67 (2019) (describing how inspectors general have “complete autonomy in deciding who to investigate and what to audit” and how they receive funding in the form of a separate line item within their agencies’ budgets). An inspector general is a delegator concerning one subdelegation in our dataset. That delegation, from the USDA’s inspector general, is included among the PAS appointee delegators in Table A.1.

346 Some values are higher than the total number of civil servant-to-appointee and civil servant-to-civil servant delegations reported in Figure 1 because Table A.1 aggregates all subdelegations for which the identity of the delegator is known, whereas Figure 1 aggregates all subdelegations for which the identities of both the delegator and delegatee are known, which is a smaller set. The Other Appointees category includes presidential appointments not requiring Senate confirmation, noncareer appointments, Schedule C appointees, and appointments excepted by statute. The Civil Servants category includes career appointments, positions not listed in the most recent Plum Book published prior to the relevant delegation, and military officers (excluding those listed in the Plum Book).
Table A.2. Delegate Characteristics

<table>
<thead>
<tr>
<th>Category</th>
<th>Total</th>
<th>Mean / Year (SD)</th>
<th>Median / Year (MAD)</th>
<th>Mean / Agency-Year (SD)</th>
<th>Median / Agency-Year (MAD)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appointees</td>
<td>1,128</td>
<td>26.9 (27.3)</td>
<td>17.5 (17.1)</td>
<td>6.6 (14.5)</td>
<td>2.0 (1.5)</td>
</tr>
<tr>
<td>PAS Appointees</td>
<td>705</td>
<td>16.8 (20.6)</td>
<td>11.5 (12.6)</td>
<td>5.5 (11.9)</td>
<td>2.0 (1.5)</td>
</tr>
<tr>
<td>Other Appointees</td>
<td>423</td>
<td>10.1 (17.3)</td>
<td>4.0 (4.4)</td>
<td>5.0 (11.6)</td>
<td>1.5 (0.7)</td>
</tr>
<tr>
<td>Inspectors General</td>
<td>21</td>
<td>0.5 (1.4)</td>
<td>0</td>
<td>0.5 (1.2)</td>
<td>0</td>
</tr>
<tr>
<td>Civil Servants</td>
<td>1,621</td>
<td>40.5 (49.7)</td>
<td>28.0 (32.6)</td>
<td>6.5 (16.7)</td>
<td>2 (1.5)</td>
</tr>
<tr>
<td>Article I Judges</td>
<td>8</td>
<td>0.19 (0.46)</td>
<td>0</td>
<td>0.002 (0.05)</td>
<td>0</td>
</tr>
<tr>
<td>State, Local, &amp; Tribal Gov’t</td>
<td>467</td>
<td>11.4 (12.3)</td>
<td>8.0 (7.4)</td>
<td>10.4 (12.0)</td>
<td>6.0 (7.4)</td>
</tr>
<tr>
<td>Other Fed. Agencies</td>
<td>29</td>
<td>0.7 (1.4)</td>
<td>0</td>
<td>0.7 (1.2)</td>
<td>0</td>
</tr>
</tbody>
</table>

347 Some values are higher than the total number of appointee-to-appointee and civil servant-to-appointee delegations reported in Figure 1 because Table A.2 aggregates all subdelegations for which the identity of the delegatee is known, whereas Figure 1 aggregates all subdelegations for which the identities of both the delegator and delegatee are known, which is a smaller set. Similarly, values for civil servant delegates are slightly higher than the total number of appointee-to-civil servant and civil servant-to-civil servant delegations reported in Figure 1 because the identities of several delegators are unknown. The Other Appointees category includes presidential appointments not requiring Senate confirmation, noncareer appointments, Schedule C appointees, and appointments excepted by statute. The Inspectors General category is a subset of PAS appointees. See supra note 345. The Civil Servants category includes career appointments, positions not listed in the most recent Plum Book published prior to the relevant delegation, and military officers (excluding those listed in the Plum Book). The Article I Judges category includes six subdelegations to Administrative Law Judges (ALJs) and two subdelegations to the Justice Department’s Chief Immigration Judge. Immigration Judges, along with some other types of judges within the executive branch, are legally distinct from ALJs. See Kent Barnett & Russell Wheeler, Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal, 53 GA. L. REV. 1, 5, 8 (2018) (describing the differences between ALJs and non-ALJ adjudicators in administrative agencies).
Within the largest of these new categories, intergovernmental subdelegations, all but four of the 467 are EPA conveyances to states and other subnational units to implement two pollution-control standards under the Clean Air Act. A majority of interagency subdelegations involve either the DOJ assigning the ability to respond to legal claims to the targeted agency or the General Services Administration authorizing other agencies to undertake certain leasing and procurement decisions.

Appendix B. Subdelegations by Presidential Administration

Figure 3 in subsection II.B.1 reports total subdelegations to civil servants by presidential administration. As that figure shows, subdelegation activity declines for each successive consecutive term in which a political party holds the presidency. In other words, subdelegations decline from President Reagan’s first term to his second, and from his second to President George H.W. Bush’s term; they also decline from the first to the second terms of Presidents Clinton, George W. Bush, and Obama. We speculated in Section II.C that these declines are attributable to either presidential personnel identifying advantageous subdelegations early in their administration or to the existence of a higher-than-average proportion of vacant appointed offices at the start of new presidential administrations.

As a validity check, we also produced a version of this figure solely for agencies with either of two common indicia of insulation from the President: removal protection for the agency head(s) or, for multimember commissions and boards, partisan-balance requirements for commissioners and board members.

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349 See, e.g., Administrative Claims Under the Federal Tort Claims Act, 73 Fed. Reg. 70278 (Nov. 20, 2008) (authorizing delegation from DOJ to Secretary of Veterans Affairs to settle administrative torts claims for up to $300,000); Acquisition of Real Property, 58 Fed. Reg. 40592 (July 29, 1993) (expanding delegated authority from the General Services Administration (GSA) to other agencies to lease space in private buildings).

350 See supra subsection II.B.1.

351 See O’Connell, Vacant Offices, supra note 171, at 955-61 (showing that there are usually more vacancies filled at the beginning of an administration than at the end).

352 See Datla & Revesz, Deconstructing Independent Agencies (and Executive Agencies), supra note 2, at 772 (referring to these features as “indicia of independence”).
Figure B.1 shows a similar decline in subdelegations for each successive consecutive term as reported in Figure 3 concerning the full dataset.353

Appendix C. Frequent Topics of Subdelegations

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

353 See supra subsection II.B.1.
The most notable feature of the figure is the substantially greater prevalence of subdelegations concerning rural utility lending (Topic 11) during the Clinton Administration and corresponding substantially lower prevalence in many other administrations. This result is almost entirely attributable to a single Federal Register entry in 1994; as discussed in Part II, this outlier entry subdelegated dozens of discrete powers within the REA.