The Inadvertent Creation of Strong-Chair Commissions

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ABSTRACT: In regulatory commissions across the government, chairs are not the first among equals, but the principal policymakers for their agencies. Although associate commissioners' votes are required to make law, chairs are in the minority so rarely that the occurrence makes national news. Further, the President's selection of commission chairs means that associate commissioners are limited in their abilities to ensure chairs' policies reflect majorities' values.

Congress did not intend this dynamic when it created multimember agencies and the statutes bestowing upon commission chairs the authority to manage commissions' day-to-day operations were intended only to enhance administrative efficiencies. It was these changes, however, combined with the rise of rulemakings as the primary mode of agency policymaking, that inadvertently led to the strong-chair model. This piece examines these decisions to make clear that the strong-chair model is not the way it always has been nor the way it need be in the future.

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INTRODUCTION

The Commodity Futures Trading Commission ("CFTC"), a federal financial regulatory agency with five President-appointed and Senate-confirmed commissioners, recently co-hosted a conference on agricultural commodity futures.[1] The chair's participation included a speech in which he discussed the CFTC's agenda and articulated his views on substantive policy, a discussion with the President of the Federal Reserve Bank of Kansas City about the state of the economy, and closing remarks.[2] The four associate commissioners' participation was limited to a panel in which they discussed their backgrounds and agendas for the advisory committees they each sponsor; they spoke little to substantive policy.[3]

This example, minor as it may be, illustrates the disparity between commissions' chairs and associate commissioners: Chairs are not the first among equals, but the principal policymakers for their agencies. Yes, associate commissioners' votes are required to make law, and they can collectively outvote their chairs, but it happens so rarely that it makes national news when it does.[4] And because chairs are principally selected by the President, commission majorities have a limited ability to ensure chairs' policy proposals reflect the majorities' values.[5]

Brian Feinstein's and David Zaring's *Disappearing Commissioners* is the latest in a line of articles identifying the flaws in contemporary regulatory commissions.[6] They identify "an unmistakable secular decline in length of

1. *See* COMMODITY FUTURES TRADING COMM'N & CTR. FOR RISK MGMT. EDUC. & RSCH. KAN. ST., 2024 AGRICULTURAL COMMODITY FUTURES CONFERENCE (2024) [hereinafter 2024 AGRICULTURAL COMMODITY FUTURES CONFERENCE], https://www.k-state.edu/riskmanagement/agcon_program.pdf [https://perma.cc/XFL2-ZZAW] ("The Agricultural Commodity Futures Conference, co-sponsored by the [CFTC] and the Center for Risk Management Education and Research at Kansas State University (CRMER), brings together an array of subject matter experts, respected practitioners, and high-profile speakers covering topics of interest and developing trends in agricultural futures markets.").

2. *See id.* (describing the panels); Rostin Behnam, Chairman, Commodity Futures Trading Comm'n, Opening Remarks at the CFTC and the Center for Risk Management Education and Research ("CRMER") at Kansas State University AgCon 2024 (Apr. 11, 2024), https://www.cftc.gov/PressRoom/SpeechesTestimony/opabehnam44 [https://perma.cc/342F-74U6].

3. *See* 2024 AGRICULTURAL COMMODITY FUTURES CONFERENCE, *supra* note 1 ("CFTC Commissioners' Chat: This panel will provide a unique opportunity to hear from four CFTC Commissioners as they discuss issues important to the agricultural community and the futures markets this community relies upon.").

4. *See* Emily Flitter, *How Bank Regulators Are Trying to Oust a Trump Holdover*, N.Y. TIMES (Dec. 13, 2021), https://www.nytimes.com/2021/12/10/business/jelena-mcwilliams-fdic-bank-regulation-trump.html (on file with the *Iowa Law Review*) (describing how three Directors of the Federal Deposit Insurance Corporation outvoted the Chair).

5. *See* Todd Phillips, *Commission Chairs*, 40 YALE J. ON REGUL. 277, 288, 305 (2023) [hereinafter Phillips, *Commission Chairs*] ("[T]he President likely has the capacity to effectuate the demotion and promotion of at least two-thirds (55/82) of commission chairs at will, including thirty-one that do not require further Senate confirmation for promotion.").

6. *See generally* Brian D. Feinstein & David Zaring, *Disappearing Commissioners*, 109 IOWA L. REV. 1041 (2024).

service across most commissions[,]" whereby "associate commissioners' mean tenure dropped . . . from 6.0 years in the 1980s to 3.9 in the 2010s," and a sharp increase in commission chairs' tenures between the early 1970s and early 2000s.[7] This phenomenon can be blamed on the rise of the "strong-chair" model of commission governance, whereby chairs alone can dictate the direction of commission policies.[8] It is no surprise, then, that many associate commissioners may find their positions less than rewarding and exit before their terms expire.

This dynamic could not have been Congress's intention when it created multimember agencies—and indeed, it was not. The statutes enacted in the early- to mid-twentieth century bestowing upon commission chairs the authority to manage commissions' day-to-day operations were intended only to enhance administrative efficiencies; they still provided that chairs' actions were to be "governed by general policies of" their commissions.[9] It was these changes, however, combined with the rise of rulemakings as the primary mode of agency policymaking, that inadvertently led to the strong-chair model. This piece examines the decisions that inadvertently led to the current situation to clarify that the strong-chair model is not the way it always has been, nor the way it needs to be in the future.

I. CONGRESS'S ORIGINAL INTENT WITH COMMISSIONS

The progressive movement of the late nineteenth century, which birthed the independent commission structure at the Federal level, "had 'an abiding faith in regulation, expertness, and the capacity of American government to make rational decisions provided experts in the administrative agencies could remain free from partisan political considerations.'"[10] Government reformers wanted the officials administering statutes that addressed "highly complicated and technical"[11] issues to have "scientific expertise" and engage in "informed, dispassionate decisionmaking."[12] The "prototype of all

7. *Id.* at 1043, 1062–64.

8. *See* Phillips, *Commission Chairs*, *supra* note 5, at 284 (describing strong chairs as having been granted "the ability to induce commission votes on particular items (agenda authority) and the ability to manage commissions' day-to-day operations (chief-executive authority), including hiring and firing staff, assigning staff priorities, and setting budgets.").

9. *See, e.g.*, Reorganization Plan No. 8 of 1950, 15 Fed. Reg. 3175, 3175 (May 24, 1950), *reprinted in* 65 Stat. 1264, 1264 (1950).

10. MARSHALL J. BREGER & GARY J. EDLES, INDEPENDENT AGENCIES IN THE UNITED STATES: LAW, STRUCTURE, AND POLITICS 34 (2015) (quoting MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 36 (1955)).

11. Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1133 (2000).

12. Jay S. Bybee, *Agency Expertise, ALJ Independence, and Administrative Courts: The Recent Changes in Louisiana's Administrative Procedure Act*, 59 LA. L. REV. 431, 438 (1999).

administrators" was the man who "knows how and why," rather than the one engaged in politics.[13]

To that end, progressives found multimember commissions—governed by the principle of majority rule[14] and protected against the influence of Congress and the President through long terms and removal protections—ideal to stem the corruption and abuses of executive authority prevalent in the postbellum era.[15] Commissioners would be as outside of the influence of the president as possible so that they could make decisions "largely free of political pressure or reprisal."[16] As the Supreme Court described in *Humphrey's Executor*:

> The commission is to be non-partisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. . . . [I]ts members are called upon to exercise the trained judgment of a body of experts 'appointed by law and informed by experience.' . . . [It is] a body which shall be independent of executive authority, except in its selection, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government.[17]

Furthermore, Congress recognized that the multimember nature of commissions allowed for bipartisan and geographic representation.[18]

The Pendleton Civil Service Reform Act created the first commission in 1883 to end the "spoils system" of presidential patronage by creating "open, competitive examinations for testing the fitness of applicants for the public

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13. SAMUEL HABER, EFFICIENCY AND UPLIFT: SCIENTIFIC MANAGEMENT IN THE PROGRESSIVE ERA 1890–1920 104–05 (1964) (emphasis omitted) (quoting F. W. Taylor to Carl G. Barth, Nov, 18, 1910, in Frederick W. Taylor Collection, Stevens Institute of Technology, Hoboken, N.J.)).

14. The law has long held that commissions are governed by the principle of majority rule so long as there is a quorum voting on an issue, and when commissioners vote on an issue, no one commissioner's vote is superior to the others. *See* Cooley v. O'Connor, 79 U.S. 391, 398 (1870) ("[I]t is a familiar principle that an authority given to several for public purposes may be executed by a majority of their number."); Brown v. District of Columbia., 127 U.S. 579, 586 (1888) ("'[A] major part of the whole is necessary to constitute a quorum, and a majority of the quorum may act. If the major part withdraw so as to leave no quorum, the power of the minority to act is, in general, considered to cease.'") (quoting 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 283 (4th ed. 1890)).

15. *See* Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1381–85 (2010).

16. Bybee, *supra* note 12, at 438.

17. Humphrey's Executor v. United States, 295 U.S. 602, 624–26 (1935) (emphasis omitted) (citations omitted) (quoting Ill. Cent. R.R. Co. v. Interstate Com. Comm'n, 206 U. S. 441, 454 (1907)).

18. *See* ROBERT E. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 61 (1941) (explaining to the legislators creating the Interstate Commerce Commission that "independence, if it meant anything, appears to have meant bipartisanship, as a guarantee of impartiality"); *see also id.* at 743 ("[T]here has always been a rather general belief that [multimember agencies] ought to be large enough to permit the representation of all major geographical sections of the country.").

service."[19] The U.S. Civil Service Commission ("USCSC") was a three-member, bipartisan body charged with "aid[ing] the President" as to the creation and implementation of those examinations.[20] The Act authorized the USCSC to, "subject to the rules that may be made by the President, make regulations for, and have control of, such examinations[;]" "make investigations concerning . . . the enforcement and effects of said rules and regulations[;]" and "make an annual report to the President for transmission to Congress[.]"[21] Commissioners had neither term limits nor removal protections.

The USCSC was by no means an independent agency—as one scholar has noted, "[t]he Commission proposed; the President disposed"[22]—but it was sufficiently effective that Congress adopted the multimember structure for its next major agency four years later in 1887: the five-member Interstate Commerce Commission ("ICC"). Unlike the USCSC and its commissioners, the ICC was given authority independent of the president, and ICC commissioners were protected from presidential removal except "for inefficiency, neglect of duty, or malfeasance in office."[23] To address the technical problems of regulating the railroads, commissioners were to be experts, and its structure was designed to prevent political influence.[24] To that end, the commissioners selected their own chair[25] and the only authority of the chair vis-à-vis associate commissioners was the ability to reimburse expenses.[26] Each commissioner was permitted to hire their own staff and travel throughout the nation investigating and prosecuting violations of the Interstate Commerce Act in Federal court, as well as collecting the information necessary for the Commission to adjudicate cases itself.[27] In 1920, Congress granted the ICC authority "to divide [itself] into as many divisions [of three or more members] as it may deem necessary" to accomplish its tasks[28] and, rather than having all staff report to the chair, each commissioner was given authority over one or more of the ICC's thirteen

19. Pub. L. No. 47–27, 22 Stat. 403, 403 (1883).

20. *Id.* § 2 (First).

21. *Id.,* §§ 2 (Third–Fifth).

22. Mashaw, *supra* note 15, at 1391 n.83.

23. Interstate Commerce Act, Pub. L. No. 49–104, § 11 , 24 Stat. 379, 383 (1887).

24. Bybee, *supra* note 12, at 438. However, there is evidence that the ICC's commission structure was enacted "to be politically accountable to the Senate[.]" Jed Handelsman Shugerman, *The Dependent Origins of Independent Agencies: The Interstate Commerce Commission, the Tenure of Office Act, and the Rise of Modern Campaign Finance*, 31 J.L. & POL. 139, 172 (2015).

25. BREGER & EDLES, *supra* note 25, at 191 ("When the ICC was created as the first of the modern independent multimember agencies, Congress allowed it to choose its own chair.").

26. Interstate Commerce Act §§ 6, 18–19.

27. *Id.* § 19 (commissioners could "prosecute any inquiry necessary to [the Commission's] duties[.]").

28. Pub. Law 65-38 § 2, 40 Stat. 270, 270 (1917). The full Commission could assign any "work, business, or functions" to any division for the division "by a majority thereof to hear and determine, order, certify, report, or otherwise act" with "all the jurisdiction and powers [and] same duties and obligations" of the full Commission, subject to rehearing by the full Commission. 40 Stat. 271 (1917) The senior-most member of each division became its chair.

bureaus, deciding which matters would be raised to a particular division or the full Commission for consideration.[29]

The effectiveness of the USCSC and ICC was such that Congress soon created independent commissions to regulate banks,[30] monopolies,[31] international trade,[32] and telecommunications,[33] as well as to serve adjudicatory functions in existing agencies.[34]

II. DECADES OF EVALUATING COMMISSIONS' ADMINISTRATIVE FLAWS

Not everyone supported the concept of independent commissions. Despite Congress's desire for apolitical expertise and dispassionate judgment, any commission staffed by a President's predecessor could wreak havoc on their new administration's goals. Accordingly, when the Great Depression exposed the gulf between the laissez-faire Republicans and the New Deal Democrats nearly five decades after the USCSC's establishment, President Franklin Roosevelt attempted to fire Republican FTC Commissioner William Humphrey in order to install a commissioner of the President's choosing.[35] Although having ruled less than a decade earlier that statutory removal protections were unconstitutional,[36] the Supreme Court ruled against Roosevelt and declared that "the power of the President alone to [remove agency officials] is confined to purely executive officers[,]" and not those with quasi-legislative or quasi-judicial authorities.[37]

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29. JOSHUA BERNHARDT, THE INTERSTATE COMMERCE COMMISSION: ITS HISTORY, ACTIVITIES AND ORGANIZATION 109 (1923) ("Each bureau has a single head, who reports to a commissioner, who in turn can bring matters to a division, or, if need be, to the entire commission, for determination.").

30. *See generally* Federal Reserve Act, Pub. L. No. 63-43, 38 Stat. 251 (1913) (creating the Board of Governors of the Federal Reserve System).

31. *See generally* Federal Trade Commission Act, Pub. L. No. 63-203, 38 Stat. 717 (1914) (creating the Federal Trade Commission).

32. *See generally* Revenue Act of 1916, Pub. L. No. 64- 271, 39 Stat. 756 (creating the International Trade Commission).

33. *See generally* Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162 (creating the Federal Communications Commission).

34. *See, e.g.*, Customs Administrative Act of 1890, ch. 407, § 12, 26 Stat. 131, 136 (establishing a nine-member board of "general appraisers of merchandise" within the customs service of the Treasury Department subject to removal "for inefficiency, neglect of duty, or malfeasance in office").

35. *See* Humphrey's Executor v. United States, 295 U.S. 602, 618–19 (Roosevelt believed that his and Humphrey's opinions did not "go along together on either the policies or the administering of the [FTC], and" that "the aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of [his] own selection.").

36. Myers v. United States, 272 U.S. 52, 164 (1926) ("[A]rticle II [of the Constitution] excludes the exercise of legislative power by Congress to provide for appointments and removals, except only as granted therein to Congress in the matter of inferior offices [and] that Congress is only given power to provide for appointments and removals of inferior officers after it has vested, and on condition that it does vest, their appointment in other authority than the President with the Senate's consent[.]").

37. *See Humphrey's Executor*, 295 U.S. at 631–32.

The year after the Court prohibited him from exercising control over the independent regulatory agencies, Roosevelt commissioned an evaluation of the executive branch's functioning, which included an assessment of commissions.[38] The President's Committee on Administrative Management (known as the Brownlow Committee after its chair, Louis Brownlow) *examined* the "problem of administrative management of the executive branch of the Government [and to offer] a comprehensive and balanced program for dealing with [its] overhead organization and management."[39] Although its examination of independent agencies primarily focused on their unwarranted imposition on presidential management of the executive branch,[40] the committee's report nonetheless noted that commissions are "inevitably slow, cumbersome, wasteful, and ineffective[.]"[41] The report declared that "[t]he conspicuously well-managed administrative units in the Government are almost without exception headed by single administrators."[42]

Following the Brownlow Report's publication and at the Committee's recommendation, Congress enacted the Reorganization Act of 1939 to allow the president to reorganize the executive branch subject to legislative veto, which sunset after two years.[43] Within those years, five reorganization plans had been enacted, creating the Executive Office of the President and reorganizing several departments and independent agencies.[44] The Act itself prohibited reorganization plans from touching some larger regulatory commissions, though plans abolished several smaller independent commissions.[45]

A decade after the Brownlow Report's publication, Congress formed the Commission on the Organization of the Executive Branch (known as the

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38. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2274–75 (2001) (describing the Brownlow Committee as "a study group set up by Franklin Roosevelt" that "call[ed] for fundamental reforms in administration").

39. PRESIDENT'S COMM. ON ADMIN. MGMT., REPORT OF THE COMMITTEE WITH STUDIES OF ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT III (1937).

40. *See id.* at 32 ("Without plan or intent, there has grown up a headless 'fourth branch' of the Government, responsible to no one, and impossible of coordination with the general policies and work of the Government as determined by the people through their duly elected representatives.").

41. *Id.*

42. *Id.*

43. *See* Reorganization Act of 1939, Pub. L. No. 76-19, 53 Stat. 561, 561–63.

44. *See generally* Reorganization Plan No. 1 of 1939, 4 Fed. Reg. 2727 (July 1, 1939), *reprinted in* 53 Stat. 1423 (1939) (creating, *inter alia*, the Executive Office of the President); Reorganization Plan No. 3 of 1940, 5 Fed. Reg. 2107 (June 30, 1940), *reprinted in* 54 Stat. 1231 (1940) (reorganizing, *inter alia*, the Departments of Treasury, Interior, Agriculture, and Labor).

45. *See* Reorganization Act of 1939 § 3(b) (prohibiting reorganization plans from "transfer[ring], consolidat[ing], or aboli[shing] of the whole or any part of," *inter alia*, the "Federal Communications Commission, . . . Federal Trade Commission, . . . National Labor Relations Board, Securities and Exchange Commission, . . . the Federal Deposit Insurance Corporation, [and] the Board of Governors of the Federal Reserve System"); *see also, e.g.*, Reorganization Plan No. 2 of 1939, 4 Fed. Reg. 2731, 2732 (July 1, 1939), *reprinted in* 53 Stat. 1431, 1433 (1939) (abolishing the National Bituminous Coal Commission).

Hoover Commission after its chair, former President Herbert Hoover) to again "study and investigate the present organization and methods of operation of" the federal government.[46] The Hoover Commission developed eighteen reports examining various facets of the executive branch and offering recommendations for its functioning.[47] Like the Brownlow Report, the Hoover Commission determined that "[p]urely executive duties—those that can be performed far better by a single administrative official—have been imposed upon these commissions with the result that these duties have sometimes been performed badly" with the result that the performance of these duties "has interfered with the performance of the strictly regulatory functions of the commissions."[48]

This conclusion stemmed from an analysis of nine commissions by its Committee on Independent Regulatory Commissions. In its report to the Hoover Commission, the Committee noted three primary deficiencies in commission administration: Their failure to delegate, their propensity to ineffectively supervise staff, and delay.[49] The Committee noted that "[i]t is very difficult for five or more commissioners to direct the work of the bureaus, or for the bureau chief to report to five or more masters."[50] Perhaps more problematically, the Committee found that commissioners themselves spend considerable resources "carry[ing] on a large number of activities which are essential but do not involve major issues or policy questions[,]" which "divert[s] time from matters of greater consequence[.]"[51]

The Committee concluded that "all these weaknesses point to the fact that many commissions have failed to appreciate the need for orderly administration or to adopt methods adequate to achieve it."[52] To address this, problem, the Committee recommended that "the chairman should be specifically designated as the person responsible for administration within the commission[,]" with administrative responsibilities including to supervise an agency's policymaking divisions "from the administrative point of view, such as their work load, backlog, progress, and programs" and to direct "the administrative divisions," such as those addressing the budget and

46. Act of July 7, 1947, Pub. L. No. 80-162, § 10, 61 Stat. 246, 248.

47. *See* COMM'N ON ORG. OF THE EXEC. BRANCH OF THE GOV'T, GENERAL MANAGEMENT OF THE EXECUTIVE BRANCH 45–46 (1949) (listing the reports).

48. COMM'N ON ORG. OF THE EXEC. BRANCH OF THE GOV'T, THE INDEPENDENT REGULATORY COMMISSIONS 3–4 (1949).

49. COMM. ON INDEP. REGUL. COMM'NS, A REPORT WITH RECOMMENDATIONS: PREPARED FOR THE COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT 43–46 (1949).

50. *Id.* at 44. Additionally, the Committee noted that "commissions tend to forego any systematic supervision of the several bureaus and divisions" and more promptly address matters of interest to any one commissioner. *Id.*

51. *Id.* at 43; *see also id.* (identifying these activities as including "minor personnel appointments or promotions[;] . . . handling letters and replies, or sending a staff member to an outside meeting; and . . . extending the time for filing a document, or authorizing an investigation, or issuance of a complaint in an ordinary case raising no new principle").

52. *Id.* at 46.

personnel.[53] However, the Committee took pains to note that "the chairman's primary responsibility for administration should not supplant the ultimate authority of the entire commission on matters which are of major significance to the agency."[54]

Based on the Hoover Commission's recommendations, Congress enacted the Reorganization Act of 1949[55] "to promote the better execution of the laws, the more effective management of the executive branch of the Government and of its agencies and functions, and the expeditious administration of the public business[.]"[56] Like the Reorganization Act of 1939, this Act provided for reorganization plans to become effective absent a legislative veto and the Act would sunset after four years.[57]

In 1950, President Harry Truman proposed twenty-seven reorganization plans, eight of which modified independent regulatory commissions.[58] Of those eight, Congress approved five, reorganizing the Federal Trade and Securities and Exchange Commissions, among others.[59] The reorganization

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53. *Id.* at 46–47.

54. *Id.* at 47. Items the Committee said should be addressed by full commissions include "approv[ing] appointments of bureau or division chiefs, or major reorganizations of the staff[,]" whereas "the chairman should have the responsibility for taking the initiative in spotting and analyzing the problems, developing data, and submitting proposals to the commission." *See id.* Unfortunately, the fact that chairs maintain these responsibilities is one of the significant problems facing associate commissioners. *See* Feinstein & Zaring, *supra* note 6, at 1046–48.

55. Reorganization Act of 1949, Pub. L. No. 81-109, 63 Stat. 203, 203 (codified as amended at 5 U.S.C. §§ 901–913).

56. *Id.* § 2(a)(1), 63 Stat. at 203.

57. *See id.* §§ 5(b), 6(a). Today, the Act requires Congress's expeditious consideration without amendment of reorganization plans developed and submitted by the President. *See* 5 U.S.C. §§ 910–912 (2018).

58. *See generally* 96 CONG. REC. 3239, 3252 (1950) (noting the President's submission of Reorganization Plan Nos. 1–21, including plans to reorganize the Interstate Commerce, Federal Trade, Federal Power, Securities and Exchange, and Federal Communications Commissions, as well as the National Labor Relations, and Civil Aeronautics Boards); *id.* at 6755–58 (same for Reorganization Plans Nos. 22–25, including one to reorganize the National Security Resources Board); *id.* at 7873–74 (1950) (same for Reorganization Plans Nos. 26–27).

59. *See* Reorganization Plan No. 8 of 1950, 15 Fed. Reg. 3175, 3175 (May 24, 1950), *reprinted in* 65 Stat. 1264, 1264 (1950); Reorganization Plan No. 9 of 1950, 15 Fed. Reg. 3175, 3175 (May 24, 1950), *reprinted in* 64 Stat. 1265, 1265 (1950); Reorganization Plan No. 10 of 1950, 15 Fed. Reg. 3175, 3175 (May 24, 1950), *reprinted in* 64 Stat. 1265, 1265–66 (1950); Reorganization Plan No. 25 of 1950, 15 Fed. Reg. 4565 (July 9, 1950), *reprinted in* 64 Stat. 1280, 1280 (1950) (noting Congress's failure to disapprove plans reorganizing the Federal Trade Commission, Federal Power Commission, Securities and Exchange Commission, Civil Aeronautics Board, and National Security Resources Board).

Congress appears to have vetoed the other three of the reorganization plans thanks to the lobbying of regulated interests. *See* S. REP. NO. 81-1567, pt. 2, at 21 (1950) (minority views) ("The most substantial basis for the success of the opponents [of the ICC reorganization plan] can easily be found by reading the roster of the regulated interests (and their lawyers) which appeared in opposition."). One senator noted that Congress voted down the proposed ICC and FCC reorganization plans in part because the plans would have effectively created "one-man agencies," notwithstanding that *all* plans would do the same. *Senate Kills ICC and FCC Revamping*, WASH. POST, May 18, 1950, at 1.

plans were largely identical, transferring from each commission to its chair "the executive and administrative functions of the Commission,"[60] while making explicit that execution of those functions would remain "governed by general policies of the Commission and" requiring commission approval "of the heads of major administrative units."[61] The plans also transferred the selection of the commissions' chairs from the commissioners themselves to the President.[62]

A decade after those reorganization plans became effective and in anticipation of his inauguration, President Kennedy asked James Landis to evaluate the executive branch's functioning. Among its many claims, the resulting Landis Report argued that the new authorities granted to commission chairs in President Truman's reorganization plans had "not been properly utilized."[63] James Landis nevertheless encouraged President Kennedy to propose similar reorganization plans for the remaining commissions, ensuring "that the Chairman's authority extends to all administrative matters within the agency[.]"[64] According to Landis, "[s]uch a change would permit the centralization of responsibility for the operations of the agency in a manner whereby its operations can be far more easily evaluated by the Congress, the President and the public."[65] During his first year in office, President Kennedy sent to Congress seven reorganization plans, six of which addressed regulatory commissions; Congress disapproved three, letting plans to place administrative authority in the chairs of the Federal Trade Commission ("FTC"), Civil Aeronautics Board, and Federal Home Loan Bank Board, Federal Maritime Commission go into effect.[66]

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60. Reorganization Plan No. 8 of 1950, § 1(a). *See also id.* (including in those functions those related to "the appointment and supervision of personnel[,] . . . the distribution of business among such personnel and among administrative units of the Commission, and . . . the use and expenditure of funds").

61. *Id.* § 1(b).

62. *Id.* § 3.

63. JAMES M. LANDIS, Report on Regulatory Agencies to the President-Elect 13 (1960); *see also id.* ("Some chairmen, for fear of upsetting their colleagues, have not exercised the power delegated to them but referred responsibilities entrusted to them to the collective judgment of their colleagues. Some chairmen designated by the President have simply not had the qualifications or commanded the respect required to assume their rightful position.").

64. *Id.* at 85; *see also id.* at 65 ("Reorganization plans should be prepared covering the agencies named above, strengthening the position of the Chairmen, having them designated in all instances by the President and holding the office of Chairman at the pleasure of the President.").

65. *Id.* at 38. Landis apparently found it problematic that "[t]he informed public generally knows the names of the heads of our Executive Departments and has some sense of the general policies that they advocate[,] [b]ut . . . have no idea and care less who, for the time being, might be the Chairman of the Interstate Commerce Commission." *Id.* at 37. Accordingly, he applauded that these changes would "attach to [the position of chair] a prestige equal to that of a Cabinet post, which it now plainly lacks." *Id.* at 38.

66. *See* 107 CONG. REC. 6771-72 (1961) (noting that the President submitted Reorganization Plan Nos. 1–2 regarding the Securities Exchange and Federal Communications Commissions); *id.* at 7028 (same for Plan No. 3 regarding the Civil Aeronautics Board); *id.* at

Since the Landis Report's publication and the enactment of those four reorganization plans, the norm has been to centralize commissions' chief executive authority in their chairs.[67] Today, chairs have chief executive authority in ninety-one percent of regulatory commissions; the only exceptions being for the Federal Election Commission (which is intentionally structured to ensure neither political party has more power than the other) and the National Labor Relations Board ("NLRB") (which has chief executive authority placed with the presidentially appointed and Senate confirmed General Counsel).[68] As a FTC chair once noted, "in the management of the Commission's day-to-day affairs, there are no collegial decisions."[69]

III. FROM POLICYMAKING BY ADJUDICATION TO RULEMAKING

Centralizing executive authority to chairs was not alone in what diminished associate commissioners: The transition from adjudication as the primary mode of policymaking to rulemaking in the mid-twentieth century—and the judiciary's response to that transition—helped chairs take control of their agencies nearly completely.[70]

Until that change, "adjudication was the primary and default method by which agencies articulated new policies."[71] When making policy by adjudication, commissions adjudicated cases in the same way as panels of judges, with majority opinions dictating agencies' binding interpretations of statute in much the same way as regulations.[72] These decisions were appealable to federal court, where Article III judges could overturn decisions

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7582 (same for Plan No. 4 regarding the FTC); *id.* at 8766 (same for Plan No. 5 regarding the National Labor Relations Board); *id.* at 9933–34 (same for Plan Nos. 6–7 regarding the Federal Home Loan Bank Board and Federal Maritime Commission). *See generally* Reorganization Plan No. 3 of 1961, 26 Fed. Reg. 5989 (July 3, 1961), *reprinted in* 75 Stat. 837 (1961) (noting Congress's failure to disapprove reorganization plans).

67. With this change, reformers have instead generally started calling for independent agencies to be replaced with single-headed agencies. *See, e.g.*, PRESIDENT'S ADVISORY COUNCIL ON EXEC. ORG., A NEW REGULATORY FRAMEWORK: REPORT ON SELECTED INDEPENDENT REGULATORY AGENCIES 20–21 (1971) (arguing that "the best approach to solving the problems created by the commission form is to replace commissions . . . with single administrators[,]" except "in the communications and antitrust areas").

68. *See* Phillips, *Commission Chairs*, *supra* note 5, at 296.

69. Miles W. Kirkpatrick, Chairman, Fed. Trade Comm'n, Dinner Address: *Nineteenth Annual Antitrust Spring* (Apr. 1–2, 1971), *in* 40 ANTITRUST L.J. 328, 332 (1971).

70. Agencies may make new law through either rulemaking or adjudication. *See* SEC v. Chenery Corp., 332 U.S. 194, 203 (1947) ("[T]he choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.").

71. Todd Phillips, *A Change of Policy: Promoting Agency Policymaking by Adjudication*, 73 ADMIN. L. REV. 495, 506 (2021) [hereinafter Phillips, *Policymaking*]; *see also* Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1145–46 (2001) (explaining that several agencies "only issued rules of practice, related to how adjudicatory cases were to be brought before the agency" and others, "devoted only a small percentage of agency resources to" rulemaking).

72. *See, e.g.*, Stericycle, Inc. & Teamsters Loc. 628, 372 N.L.R.B. 113 (2023) (providing majority and dissenting opinions).

that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]"[73] Courts were to grant deference to agencies' reasonable interpretations of ambiguous statutes articulated via formal adjudication.[74] Because agency decisions were narrow, adjudication would develop policy more gradually than rulemaking.

With adjudication as the principal method of agency policymaking, having chairs maintain chief executive authority was not likely to be a significant imposition on the capacity of associate commissioners to participate in policymaking. Although chairs' managerial control over enforcement divisions allowed them to prioritize certain types of cases and deprioritize others, commissioners would adjudicate appeals of hearing officers' decisions and dispose of cases like panels of judges.[75] Commissioners in the political minority would certainly find themselves in the minority of some cases and the majority in others, allowing commissioners to make their mark on the evolution of policy—even if they do not select which cases to bring or manage the staff conducting investigations. In this light, the goal of reformers in centralizing executive authority in chairs was efficiency rather than dictating policy is understandable.

The 1960s and 1970s saw agencies use rulemaking to such an extent that scholars claimed it "an age of rulemaking"[76] that "changed the whole structure of" the administrative state.[77] Congress gave new rulemaking authorities to old agencies, and required newly created agencies to make substantive policies through rulemaking.[78] Scholars and judges lauded the use of rulemaking to promulgate policy as an improvement upon adjudication in terms of both fairness and efficiency.[79]

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73. 5 U.S.C. § 706(2)(A).

74. *See* United States v. Mead Corp., 533 U.S. 218, 230 (2001) (emphasizing that policies articulated in formal adjudications may be granted *Chevron* deference). *But see* Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244, 2273 (2024) ("*Chevron* is overruled.").

75. *See* FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 43–45 (1941) (describing generally the process of formal agency adjudication).

76. J. Skelly Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 375 (1974).

77. William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 38–39 (1975).

78. *See* Schiller, *supra* note 71, at 1147–49 (describing these changes).

79. *See, e.g.*, KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY v (1969) ("[R]ules make for even handedness, because creation of rules usually is relatively unemotional, and because decision-makers seldom err in the direction of excessive rigidity when individualization is needed"); Warren E. Baker, *Policy by Rule or* Ad Hoc *Approach—Which Should It Be?*, 22 LAW & CONTEMP. PROBS. 658, 662 (1957) ("[I]t is obviously desirable to avoid, if possible, the harsh effect of *retroactive* application of agency policy inherent in the case-by-case method."); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 944–46 (1965) (describing how allowing agencies to formulate rules using the facts of adjudications means those rules are more likely to be upheld when challenged in court); Wright, *supra* note 76, at 376 (deeming adjudication "extremely costly in time, staff, and money" compared with rulemaking).

Despite this intention, the rise of regulations quickly led judges to view notice-and-comment rulemaking skeptically, requiring agencies to go beyond the APA's meager procedural requirement that agencies issue with their rules "a concise general statement of their basis and purpose."[80] Courts have explained that they serve a "supervisory function" in which they "intervene . . . [if] the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making."[81] In doing so, judges are to review agency actions based on the record before the agencies at the time decisions were made and not "*post hoc* rationalizations."[82] Furthermore courts will not engage in "a laborious examination of the record" during this review to "formulate in the first instance the significant issues faced by the agency and articulate the rationale of their resolution[;]" the agencies must do it for them.[83]

These are reasonable doctrines in the abstract, as agencies should not make decisions without thinking deeply about their consequences, and courts must be cognizant of their limited resources. Yet, the "only responsible course of action when faced with these doctrinal demands is to engage in defensive overkill when developing rules"[84] and agencies "significantly expand[ed] their preambles by detailing every possible consideration that goes into their rules' development."[85] This has been described as "ossification," wherein "the marvelously simple and speedy rulemaking procedures of 1946, when the APA was adopted, bear about as much resemblance to the rulemaking procedures of [today] as an acorn does to a mighty seventy-year-old oak."[86]

Surviving hard look review is difficult for any agency, but it is perhaps *the* contributing factor to the rise of the strong-chair model when applied to commissions. This ossified rulemaking process has made it impossible for

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80. 5 U.S.C. § 553(c). These constraints were imposed notwithstanding the Supreme Court's holding that "reviewing courts are generally not free to impose [additional requirements on agency processes] if the agencies have not chosen to grant them." Vermont Yankee Nuclear Power Corp. v. Nat'l Res. Def. Council, 435 U.S. 519, 524 (1978).

81. Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970) (footnote omitted); *see also* Motor Vehicle Mfrs. Ass'n. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, (1983) (providing courts are to overturn rules "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise").

82. *State Farm*, 463 U.S. at 50.

83. Auto. Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968); *see also id.* ("[I]f the judicial review which Congress has thought it important to provide is to be meaningful, the 'concise general statement of * * * basis and purpose' mandated by Section [553] will enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.").

84. Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1359 (2010).

85. Phillips, *Policymaking*, supra note 71, at 532.

86. Sidney A. Shapiro & Richard W. Murphy, *Arbitrariness Review Made Reasonable: Structural and Conceptual Reform of the "Hard Look,"* 92 NOTRE DAME L. REV. 331, 332–33 (2016).

associate commissioners to enact policy when they form a commission majority but do not manage agency staff. Surviving hard look review requires subject matter experts to develop policy, economists to analyze the rule's effects, and lawyers to ensure the rule and preamble are legally sufficient; dozens of employees must compile larger rules' extensive preambles. Yet each associate commissioner frequently supervises a small staff of between one and five staffers (if any), and although so few individuals can craft new *regulatory* text, they simply lack the capacity to develop the *preambulatory* text courts require—especially while also staying abreast of all other activity happening at their agency. Though associate commissioners may draft "a concise general statement of [a rule's] basis and purpose[,]" it would never be upheld on appeal.[87]

Take, for example, recent dueling proposals to address concerns regarding investment funds' ownership of banks at the Federal Deposit Insurance Corporation ("FDIC"). The agency is headed by a five-member Board of Directors comprised of three "inside" directors—a Chair, Vice Chair, and Director—and two "outside" directors who serve *ex officio*—the Comptroller of the Currency and Director of the Consumer Financial Protection Bureau ("CFPB").[88] Director McKernan (the inside director) put forth a five-page proposal that, if adopted, would require staff to develop a plan to monitor firms' compliance with legal requirements,[89] whereas the CFPB Director Chopra put forth a twenty-six-page notice of proposed rulemaking to amend rules implementing the Change in Bank Control Act ready for publication in the *Federal Register*.[90] The latter was almost certainly drafted by agency staff, as it identified staff who had worked on the proposal; included a Regulation Identification Number; and, importantly, was supported by the Chair, who is the only Board member authorized under the agency's bylaws to manage agency staff absent a directive like the one McKernan proposed.[91] The difference between the two documents is striking.

This is not to say that associate commissioners cannot make policy today if their chairs are opposed, as they may "play hardball with their votes[,]"

87. 5 U.S.C. § 553(c); *see Auto. Parts & Accessories Ass'n*, 407 F.2d at 338 ("[C]aution[ing] against an overly literal reading of the statutory terms 'concise' and 'general'").

88. 12 U.S.C. § 1812.

89. *See* FDIC, Resolution Presented by Director McKernan 2–3 (Proposed Apr. 25, 2024), https://www.fdic.gov/sites/default/files/2024-04/resolution-mckernan-proposals-related-change-bca.pdf [https://perma.cc/G4Q7-PRD8].

90. *See* FDIC, 3064-AG04, Draft Notice of Proposed Rulemaking Presented by Director Chopra 1, 11–14 (Proposed Apr. 25, 2024), https://www.fdic.gov/sites/default/files/2024-04/npr-proposals-related-change-bca-chopra.pdf [https://perma.cc/NEL7-GCMJ].

91. *See* Martin J. Gruenberg, Chairman, FDIC, FDIC Notice of Proposed Rulemaking Amending Regulations Implementing the Change in Bank Control Act (Apr. 25, 2024) ("I am supportive of the Notice of Proposed Rulemaking put forward by Director Chopra today."); FDIC, BYLAWS OF THE FEDERAL DEPOSIT INSURANCE CORPORATION, art. VI, § 4(a) (Oct. 18, 2022), https://www.fdic.gov/sites/default/files/2024-03/bylaws.pdf [https://perma.cc/7X4S-8GWU] (providing to the Chair "the general powers and duties usually vested in . . . the chief executive officer of a corporation").

opposing and preventing passage of their chairs' priorities.[92] This should incentivize chairs to instruct staff to develop associate commissioners' policies into legally adequate documents that will be upheld in court to gain passage of their own. Similarly, associate commissioners may enact proposals that instruct agency staff to develop policies for future votes, bypassing chairs entirely; if FDIC Director McKernan's proposal had been enacted, for example, staff would have been instructed to develop a policy notwithstanding any instruction by the Chair to the contrary. They can also vote to give themselves additional staff with which to engage in policymaking.[93]

But the fact is that when commissions' staff report to their chairs alone, they "draft regulations that adhere to their [chairs'] visions while associate commissioners are left to negotiate textual changes," unable to create their own.[94] As one associate FCC commissioner wrote, the "Chairman and a handful of staff—usually selected by the chair—can and usually do exercise nearly total control over that agency's basic policy agenda."[95] This control is the epitome of the strong-chair model of commission governance.

With this history in mind, Feinstein's and Zaring's conclusions that lengths of service for associate commissioners have been decreasing since the mid-1980s and increased for commission chairs between the early 1970s and early 2000s are understandable.[96] Being an associate commissioner simply became less rewarding under a regime where rulemaking is the primary mode of policymaking and not adjudication, whereas being chair became more gratifying.[97]

CONCLUSION

Two changes led to the rise of the strong-chair commission: The centralization of chief executive authority in their chairs and the transition from policymaking by adjudication to rulemaking. This was not Congress's intent when it enacted the first change, commissions' when they undertook the second, nor judges' when they interpreted the judiciary's role in a way that made rulemaking more complex.

But this situation need not be the last word. Associate commissioners—even ones of opposing parties—can join forces to outvote their chairs into devolving agenda authority to commissions themselves, notwithstanding

92. Phillips, *Commission Chairs*, *supra* note 5, at 293.

93. *See, e.g.*, David R. Burton, *Securities and Exchange Commission and Related Agencies*, *in* MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE 829, 832–33 (Paul Dans & Steven Groves eds. 2023) (recommending changes that would enable the SEC's associate commissioners to push back against the Chair's decisions).

94. Phillips, *Commission Chairs*, *supra* note 5, at 288.

95. Glen O. Robinson, *Independent Agencies: Form and Substance in Executive Prerogative*, 1988 DUKE L.J. 238, 245 n.24 (1988).

96. *See* Feinstein & Zaring, *supra* note 6, at 1062–65.

97. Feinstein and Zaring show that commission chairs' tenures began decreasing again in the mid-2000s, from nearly six years in 2000 to just over four years in 2019. *See id.* at 1064. It is possible that something changed in the mid-2000s that caused chairs to shorten their service.

statutory grants of chief executive authority to chairs. They can also grant themselves additional resources to push back against strong chairs by increasing the size of their personal offices to employ more staff that report to them, not to their chairs. Although the creation of strong-chair commissions was inadvertent, the recognition that it exists and a thorough understanding of how it developed means that policymakers—including associate commissioners themselves—can ensure that commissions serve as the balanced policymaking bodies Congress intended.