

# PRESIDENTIAL CONTROL, EXPERTISE, AND THE DEFERENCE DILEMMA

EMILY HAMMOND MEAZELL<sup>†</sup>

## ABSTRACT

*Courts reviewing agency action frequently point to superior political accountability and expertise as justifying deference to agencies. These fundamentals of deference often operate in tandem, providing distinct but complimentary reasons why courts will not substitute their judgment for that of agencies. But when courts review agency actions arising from shared regulatory space, political accountability—often expressed as presidential control—and expertise can seem at odds. How should courts respond when, for example, one agency lays claim to presidential control but another relies on expertise, and the two take inconsistent positions so that a court must choose one over the other? This Article examines this “deference dilemma” and suggests a means for confronting it. Overall, this analysis reveals that the expertise and presidential-control justifications for deference do not fit neatly into statutory schemes involving overlapping or competing jurisdiction, particularly when an independent agency is involved. This conclusion exposes weaknesses in both models of deference and supports the claim that—presidential direction and expertise notwithstanding—fidelity to statute and the reasoned-decisionmaking requirements remain the touchpoints of judicial review. These touchpoints are central to unlocking the deference dilemma and resolving it in a principled manner, as demonstrated by the framework developed in this Article. Approaching deference dilemmas in this way helps facilitate congressional control while recognizing the policymaking authority of the executive branch, and ultimately contributes to a norm that accounts for the roles of all three branches in administrative law.*

---

Copyright © 2012 by Emily Hammond Meazell.

<sup>†</sup> Associate Dean for Academic Affairs and Associate Professor, University of Oklahoma College of Law. I am grateful to David L. Markell, Mark Seidenfeld, the participants in the *Duke Law Journal*'s Forty-Second Annual Administrative Law Symposium, and the participants in Florida State University College of Law's faculty workshop on February 6, 2012. I am also indebted to Sean C. Wagner for his research assistance and the members of the *Duke Law Journal* for their work on this piece and the Symposium.

## TABLE OF CONTENTS

Introduction .....	1764
I. Theories of Deference, Theories of Power .....	1770
A. Expertise and Presidential Control .....	1770
1. Expertise .....	1771
2. Presidential Control and Political Accountability .....	1774
B. Protecting Expertise from Politics: Independent Agencies .....	1776
1. The Features of Independence .....	1777
2. Case Study: The Nuclear Regulatory Commission .....	1779
II. The Deference Dilemma in Context .....	1782
A. The Yucca Mountain Controversy .....	1782
1. Selecting Yucca Mountain .....	1783
2. Construction Licensing, Politics, and DOE's Motion To Withdraw .....	1784
3. The Suit Against the DOE: <i>In re Aiken County</i> .....	1787
B. Other Statutory Schemes .....	1790
1. Dodd-Frank Act .....	1792
2. OIRA's Oversight Role .....	1793
3. The EPA and the TVA .....	1795
III. Resolving the Deference Dilemma .....	1796
A. How the Deference Dilemma Arises .....	1797
B. The Centrality of Statutes and Congressional Design .....	1800
1. The Statutory Mandate .....	1800
2. Determining Intent .....	1802
C. Potential Objections .....	1806
Conclusion .....	1809

## INTRODUCTION

Judicial deference to administrative agencies is often grounded in presidential control<sup>1</sup> and comparative institutional expertise.<sup>2</sup> From

---

1. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984) (“While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . . .”); *In re Aiken Cnty.*, 645 F.3d 428, 440 (D.C. Cir. 2011) (Kavanaugh, J., concurring) (“Presidential control of those agencies thus helps maintain democratic accountability and thereby ensure the people’s liberty.”).

2. *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983) (stating that when agencies are acting at the frontiers of science, courts must be at their most deferential); see also *Chevron*, 467 U.S. at 863 (noting that agencies make interpretations “in the context of implementing policy decisions in a technical and complex arena”).

a separation-of-powers standpoint, the policy judgments of the elected executive carry more legitimacy than would oversight by an overbearing court. And considering that agencies often possess special knowledge about the matters they regulate, generalist courts avoid second-guessing by deferring to agencies' superior expertise. These standbys of judicial review have received much attention in the academic literature,<sup>3</sup> and they can be useful models for reviewing the actions of a single agency. But are they workable within multiagency, shared, or overlapping regulatory spaces?<sup>4</sup>

This Article argues that these models have less force in multiagency regulatory schemes. Particularly when agency decisions conflict, these schemes are understood as posing a deference dilemma. To understand why, note first that when a court reviews an action by a single agency, the presidential-control and expertise models are generally complementary. When agencies regulate in light of scientific uncertainty, for example, they must exercise their best scientific judgment while filling gaps of uncertainty with policy decisions.<sup>5</sup> Deference is arguably justified, therefore, on both the

---

3. For a sampling on presidential control, see generally Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127 (2010); Kevin M. Stack, *The President's Statutory Powers To Administer the Laws*, 106 COLUM. L. REV. 263 (2006); Peter L. Strauss, *Overseer, or "The Decider"?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2 (2009). For literature related to the expertise model, see generally STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1993); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 480 n.88 (2003); Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733 (2011).

4. For an excellent critical typology of shared regulatory spaces, see generally Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012). For a normative account in the environmental context, see generally Eric Biber, *Too Many Things To Do: How To Deal with the Dysfunction of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1 (2009).

5. This topic has generated a vast literature. See, e.g., *RESCUING SCIENCE FROM POLITICS: REGULATION AND THE DISTORTION OF SCIENTIFIC TRUTH* (Wendy Wagner & Rena Steinzor eds., 2006) (exploring the influence of special interests on scientific research); Holly Doremus, *Science Plays Defense: Natural Resources Management in the Bush Administration*, 32 ECOLOGY L.Q. 249 (2005) (discussing the George W. Bush administration's use of defensive science and suggesting that conservationists should bring transparency and a commitment to updating to the regulatory arena); Meazell, *supra* note 3 (arguing against super deference); Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613, 1650–71 (1995) (documenting incentives for agencies to conflate science and policy).

expertise and presidential-control bases.<sup>6</sup> But judicial review of multiagency actions presents a deference dilemma in the sense that all of the involved agencies can argue for deference on the basis of control or expertise—and a judicial preference for one may undermine the policies behind another.

To put the matter in concrete terms, consider this example. The Nuclear Waste Policy Act (NWPA)<sup>7</sup> relies on three federal agencies to accomplish the task of disposing of commercial nuclear waste in a geologic repository at Yucca Mountain, Nevada. The Department of Energy (DOE) is responsible for designing and ultimately operating the repository, the Environmental Protection Agency (EPA) must establish generally applicable standards for protecting the environment from releases of radioactive materials, and the Nuclear Regulatory Commission (NRC) is directed to assume responsibility for licensing the DOE-proposed repository.<sup>8</sup> Although the DOE applied for a construction permit in 2008, President Obama later directed the agency to move to withdraw the application with prejudice.<sup>9</sup> The NRC denied the motion, and a stalemate ensued.<sup>10</sup>

This scenario pits an executive agency against an independent agency. The DOE, an executive agency, was prevented by the NRC, an independent agency, from doing as the president had expressly ordered.<sup>11</sup> Although the DOE relies on the authority of presidential control, congressional design protects the NRC from the president, at

---

6. See *Chevron*, 467 U.S. at 865 (invoking both of these principles); Kagan, *supra* note 3, at 2269 (noting that courts “shy away from such substantive review of agency outcomes, perhaps in recognition of their own inability to claim either a democratic pedigree or expert knowledge”).

7. Nuclear Waste Policy Act of 1982, 42 U.S.C. §§ 10101–10270 (2006).

8. See *id.* §§ 112–115, 42 U.S.C. §§ 10132–10135 (describing the various roles of the government agencies).

9. *In re Aiken Cnty.*, 645 F.3d 428, 439 (D.C. Cir. 2011) (Kavanaugh, J., concurring) (“At the President’s direction, the [DOE] decided to withdraw the Yucca Mountain license application and terminate the Yucca Mountain nuclear storage project.”).

10. See U.S. Dep’t of Energy, No. LBP-10-11 (Atomic Safety & Licensing Bd., Nuclear Regulatory Comm’n June 29, 2010), available at <http://pbadupws.nrc.gov/docs/ML1018/ML101800299.pdf> (denying the DOE’s motion to withdraw), *aff’d by an equally divided commission*, No. CLI-11-07 (Nuclear Regulatory Comm’n Sept. 9, 2011).

11. This is perhaps the strongest case for a presidential-control theory of deference, particularly because President Obama’s direction to the DOE was transparent. *Cf.* *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) (noting that a change of presidential administration could provide a reasonable basis for an agency’s changed assessment of costs and benefits); Mendelson, *supra* note 3, at 1178 (advocating for disclosure of presidential oversight). *But see generally* Strauss, *supra* note 3 (arguing that this variety of oversight is least defensible).

least to some extent.<sup>12</sup> Furthermore, the NRC claims the authority of expertise as an independent, congressionally designated licensing agency.<sup>13</sup> This conflict between the DOE and the NRC thus presents a prime example of the deference dilemma.

Indeed, recent litigation involving precisely these facts hinted at these considerations. When the DOE moved to withdraw its application, before the NRC had issued a final decision on the matter, various entities sued the DOE for failing to comply with its statutory mandate under the NWPA.<sup>14</sup> Although the majority dismissed the suit, *In re Aiken County*,<sup>15</sup> as premature,<sup>16</sup> Judge Brett Kavanaugh's concurrence captured the issues that were implicated—issues that may well be discussed in a future case:

This case is a mess because the executive agency (the Department of Energy) and the independent agency (the Nuclear Regulatory Commission) have overlapping statutory responsibilities . . . . In particular, both agencies have critical roles in interpreting the relevant statutes and in exercising discretion under those laws.<sup>17</sup>

Judge Kavanaugh argued that the NRC ought not have the final word on the Yucca Mountain controversy; instead, because the DOE was acting expressly on the elected executive's orders, the president's choice ought to govern.<sup>18</sup> Judge Kavanaugh's rationale was grounded in the presidential-control model and its ability to inject democratic accountability into the administrative state.<sup>19</sup> When an executive and

---

12. Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 609–10 (2010) (noting that the distinguishing feature of independent agencies is that “the President lacks authority to remove their heads from office except for cause”).

13. See *infra* Part I.B.

14. See *In re Aiken Cnty.*, 645 F.3d 428, 430 (D.C. Cir. 2011) (“Three state and local governmental units, along with individual citizens, petition[ed] th[e] court . . .”).

15. *In re Aiken Cnty.*, 645 F.3d 428, (D.C. Cir. 2011).

16. *Id.* at 438. Note, however, that as of this writing, the D.C. Circuit has granted expedited review of a petition for writ of mandamus to compel the NRC to consider the pending construction-license application. *In re Aiken Cnty.*, No. 11-1271 (D.C. Cir. Nov. 4, 2011), available at <http://pbadupws.nrc.gov/docs/ML1135/ML11353A092.pdf>. Oral argument is scheduled for May 2, 2012. *In re Aiken County*, No. 11-1271 (D.C. Cir. Dec. 20, 2011), available at <http://www.state.nv.us/nucwaste/licensing/order111220oral.pdf>.

17. *In re Aiken Cnty.*, 645 F.3d at 439 (Kavanaugh, J., concurring).

18. *Id.* at 440.

19. *Id.* at 439–40 (invoking separation-of-powers and democratic-accountability rationales for the presidential-control model).

independent agency clash, he suggested, the presidentially controlled executive agency ought to prevail.<sup>20</sup>

This thoughtful opinion promises to spark debate and rethinking of the role of independent agencies. Its weakness, however, is its emphasis on the executive branch, to the near-exclusion of the legislature. Congress specifically designed the NRC to function as an expert in all matters of nuclear licensing, and Congress intentionally gave the NRC a veto over the DOE. If administrative law has emphasized anything, it is that statutory mandates reign supreme.<sup>21</sup> How, then, to account simultaneously for the legitimizing force of expertise—let alone the democracy-forcing role of presidential control?

This Article explores that question. Although the deference dilemma is particularly sharp in an executive-versus-independent-agency scenario, shared or overlapping regulatory spaces extend well beyond the Yucca Mountain controversy.<sup>22</sup> Indeed, others have documented the fascinating complexity of the administrative scheme established by the Dodd-Frank Act—a scheme in which power is both fragmented and concentrated, and in which executive agencies often hold enormous power more traditionally granted to independent agencies.<sup>23</sup> More broadly, one important theme of this Symposium’s conversation is grappling with the role of politics—and to a lesser degree, expertise—in administrative law.<sup>24</sup>

---

20. Judge Kavanaugh based his conclusion largely on his view that independent agencies are constitutionally suspect and a fluke of New Deal history. *See id.* at 441–42 (discussing the context and criticisms of *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935)).

21. *See, e.g., Massachusetts v. EPA*, 549 U.S. 497, 533 (2007) (stating that an agency’s “reasons for action or inaction must conform to the authorizing statute”); *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006) (“The starting point for this inquiry is, of course, the language of the delegation provision itself.”); *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (“Yet it can still be apparent from the agency’s generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law [in some circumstances].”).

22. *See Freeman & Rossi, supra* note 4, at 1145–50 (collecting numerous such statutory schemes); *see also infra* Part II.B.

23. *See, e.g., Rachel E. Barkow, Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 72–78 (2010).

24. *See generally id.* (describing the worldwide movement toward political control in financial regulation); Ronald J. Krotoszynski, Jr., *Cooperative Federalism, the New Formalism, and the Separation of Powers Revisited: Free Enterprise Fund and the Problem of Presidential Oversight of State Government Officers Enforcing Federal Law*, 61 DUKE L.J. 1599 (2012) (positing that a formalistic view of the separation of powers and the unitary executive undermines the constitutionality of cooperative federalism); Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1673

In contouring the deference dilemma, my descriptive claim is that characterizing interagency disputes in this way can help courts and scholars assess the appropriate role of deference in multiagency schemes. This characterization suggests some limitations of the presidential-control model because the analysis that most naturally flows from the deference dilemma relies on fidelity to statutory mandates and congressional intent. To the extent that agencies are in true competition before a court, the court's role is to determine which agency, if any, has acted consistently with its statutory mandate. Only after that determination is made can routine deference be exercised, which includes both a reasoned-decisionmaking requirement and the principle that courts will not substitute their judgments for those of agencies. In this way, courts can accommodate the preferences of both Congress and the president, while still preserving their own important legitimizing role in administrative law.

This Article proceeds as follows. Part I lays the groundwork by contouring the presidential-control and expertise models of administrative law. This Part takes care to note the role that each model plays in potentially justifying deference during judicial review. Next, Part I uses the history of the NRC to consider how independent agencies shield expertise from politics. In Part II, I describe the deference dilemma in detail, beginning with the Yucca Mountain controversy and the constitutional roles of the three branches involved. Although Yucca Mountain presents a particularly stark deference dilemma, other conflicts arising out of shared regulatory space can also be analyzed under the deference-dilemma model. Part III builds on the model by considering how the model might arise and recommending that consistency with the statutory mandates and congressional intent be of central import in these circumstances. This Part next suggests a number of factors meant to protect statutory aims and then considers potential objections to my approach. This Article concludes that the deference-dilemma model may be useful in bringing clarity and direction to judicial review of the increasingly complex administrative state.

---

(2012) (describing modern administrative law as political blood sport); Jodi A. Short, *The Political Turn in Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1813 (2012) (contending that a strong unitary-executive approach is inconsistent with hard-look review and developing an account whereby technocrats maintain an important role in bureaucratic structure); Kathryn A. Watts, *Regulatory Moratoria*, 61 DUKE L.J. 1883 (2012) (examining regulatory moratoria and providing an account that leaves room for presidential control).

## I. THEORIES OF DEFERENCE, THEORIES OF POWER

Agency claims to deference are ubiquitous in administrative law. Although expertise has been the historical favorite, presidential control has gained ground—at least in legal scholarship—as a competing and perhaps preferable rationale for deference. This Part begins by exploring both models of deference and linking those models to congressional preferences, as well as notions of administrative legitimacy. To further clarify the deference models, this Part also considers the roles of expertise and politics in independent agencies.

### A. *Expertise and Presidential Control*

Comparative expertise and presidential control are persistently invoked as justifying judicial deference in modern administrative law. These invocations occur most commonly during review for reasoned decisionmaking, which is a centerpiece of judicial review under the Administrative Procedure Act (APA).<sup>25</sup> For purposes of this Article, the deference dilemma poses a potential choice among agency positions, in circumstances in which agencies would otherwise be reviewed for compliance with the arbitrary-and-capricious,<sup>26</sup> substantial-evidence,<sup>27</sup> and statutory-jurisdiction<sup>28</sup> standards. Although these standards have important variations,<sup>29</sup> they essentially

---

25. Administrative Procedure Act (APA), 5 U.S.C. §§ 551–559, 701–706 (2006); *see id.* § 10(e), 5 U.S.C. § 706 (setting forth the grounds for judicial review); *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970) (using the term “reasoned decision-making”).

26. *See* APA § 10(e)(B)(1), 5 U.S.C. § 706(2)(A) (granting judicial authority to set aside agency actions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).

27. *See id.* § 10(e)(B)(5), 5 U.S.C. § 706(2)(E) (granting judicial authority to set aside agency actions that are “unsupported by substantial evidence”).

28. *Id.* § 10(e)(B)(3), 5 U.S.C. § 706(2)(C) (granting judicial authority to set aside agency actions that are “in excess of statutory jurisdiction”); *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984) (“When a challenge to an agency construction of a statutory provision . . . really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail.”).

29. The arbitrary-and-capricious standard operates as a catch-all, applying to the vast areas of agency policymaking and discretion that fit no other category. *See Camp v. Pitts*, 411 U.S. 138, 138–40 (1973) (*per curiam*) (illustrating the catch-all approach). By contrast, substantial-evidence review is limited to actions governed by the formal procedures set forth in sections 7 and 8 of the APA, 5 U.S.C. §§ 556–557; *Citizens To Pres. Overton Park v. Volpe*, 401 U.S. 402, 414–15 (1971). These distinctions are immaterial for purposes of this Article. *See* Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 81 (2011) (stating that in many contexts, “the version of the substantial evidence doctrine . . . is virtually identical to the version of the arbitrary and capricious standard that was

impose a reasonableness requirement, under which an agency must explain a decision based on a record and a court may not substitute its judgment for that of the agency.<sup>30</sup> In any of these instances, agencies will press for deference on the basis of their expertise and superior political accountability.<sup>31</sup>

1. *Expertise.* Since the dawn of the modern administrative state, expertise has played an important role as an anchor of regulatory legitimacy that has shaped the relationship between courts and agencies. As a theory of agency behavior, expertise is viewed as providing a shield from political influence, as well as reflecting a preoccupation with administrators as technocrats.<sup>32</sup> When Professor

---

the basis for the Court's opinion in [*Motor Vehicles Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983)]"). Under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), when an agency acts with the force of law in interpreting its own statutory mandate, a court reviews the agency's interpretation in a two-step process, *see id.* at 842–43. First, the court asks whether Congress expressly addressed the matter. If so, the analysis ends, and Congress's choice prevails. *Id.* If not, the court proceeds to the second step, which asks whether the agency adopted a permissible construction of the statute. *Id.* at 843. The second step—like the substantive standards in the APA—essentially imposes a reasonableness requirement. *See* Lisa Schultz Bressman, *Chevron's Mistake*, 58 DUKE L.J. 549, 585 (2009) (“Although the relationship between the *Chevron* inquiry and the arbitrary and capricious test has confused courts, the effect of each is much the same.”); Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1296 (1997) (predicting an increasing overlap between step two and arbitrariness review); *cf.* Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597, 603–04 (2009) (condensing *Chevron* into the principle that courts must uphold any reasonable agency construction).

30. *Chevron*, 467 U.S. at 844 (“[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”); *State Farm*, 463 U.S. at 43 (recognizing that the Court will not substitute its judgment for that of an agency).

31. I use each term broadly, to encompass other more specific reasons for deference. For instance, an agency's responsibility for administering a program could be viewed as a more specific reason to give deference on the basis of expertise. *E.g.*, *Chevron*, 467 U.S. at 842–43 (“The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules . . .” (first omission in original) (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)) (internal quotation mark omitted)). Similarly, an agency's choice of democratic procedures—such as those that evidence “fairness and deliberation” or extra opportunities for participation—could be viewed as more specific reasons to give deference on the basis of political accountability. *E.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 229–30 (2001); *see also* David L. Markell, “Slack” in the Administrative State and Its Implications for Governance: The Issue of Accountability, 84 OR. L. REV. 1, 11 (2005) (“[T]he rulemaking arena in particular . . . is a prominent example of expanding opportunities for citizens to engage their governments.”).

32. At the outset, I note that the focus of this Article is not prevailing models of agency behavior so much as models of judicial deference. The discussion here touches on the familiar models of behavior to assess their value in illuminating the origins of deference, but the

James Landis famously described administrators as implementing “the great judge[’s]” vision of “man’s destiny upon this earth,”<sup>33</sup> he spoke for a great number who believed that administrators could reach good outcomes by applying their expertise to given sets of facts.<sup>34</sup> Indeed, facts—especially those grounded in science—dictated outcomes for these technocrats, who could do their work free from political influences.<sup>35</sup>

The importance of expertise, moreover, is a part of the narrative explaining legislative delegations to administrative agencies. Just as courts are generalists, so too is Congress. Delegation to experts is a pragmatic way to get the work of regulating done by those who can bring special expertise to bear on any number of complex issues. Relying on agency expertise is also politically expedient because it permits legislators to avoid making unpopular decisions and to transfer that cost instead to agencies.<sup>36</sup>

Naturally, expertise also figures into judicial review as a reason for deference to agencies. This ground for deference was historically extremely strong. In an early ratemaking case, for example, the Supreme Court remarked that “the product of expert judgment . . . carries a presumption of validity.”<sup>37</sup> That super-deferential approach has not entirely survived the advent of hard-look review;<sup>38</sup> nevertheless, expertise remains a common justification for judicial deference. This trend makes some sense: even if regulators are captured by rent-seeking regulated entities, as a matter

---

emphasis of this Article is the role of judicial review given comparative institutional competence as well as separation-of-powers concerns.

33. JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 155 (1938).

34. *Id.* (“[P]olicies to shape such fields could most adequately be developed by men bred to the facts.”).

35. See Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1759 (2007) (“Such professionalism would sufficiently discipline agency behavior and allow [agencies] to deploy science and economics to produce sound policy.”).

36. See Wagner, *supra* note 5, at 1704 (“It is highly probable, given the controversial nature of the issues, that Congress has deliberately delegated policy decisions regarding the appropriate level of toxic risk to the executive branch precisely in order to avoid making the decision itself.”).

37. *Fed. Power Comm’n v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944); see also Meazell, *supra* note 3, at 747–55 (describing and critiquing judicial super deference on the grounds of agencies’ superior scientific knowledge and expertise).

38. Bressman, *supra* note 35, at 1761 (describing the hard-look doctrine as arising from the interest-group-representation model); see also Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. U. L. REV. (forthcoming 2012) (manuscript at 9), available at <http://ssrn.com/abstract=1961753> (“Review for reasoned decisionmaking, not surprisingly, is best explained by the interest group model of the administrative state.”).

of comparative institutional expertise, courts cannot come close to duplicating the scientific and factfinding capabilities of agencies.<sup>39</sup> Agencies can conduct their own science, after all; courts are relegated to reviewing a record post hoc. Accordingly, expressions of deference on the basis of expertise persist in the case law.<sup>40</sup> And ultimately, a prevailing reason that courts insist that they may not substitute their judgment for that of agencies is because of the agencies' expertise.<sup>41</sup>

But although courts will not substitute their judgment for that of agencies, the impact of hard-look review—and the reasoned-decision-making requirement generally—is to create a feedback loop that provides important information to stakeholders and Congress. This occurs in two ways: First, it gives agencies an incentive to provide full descriptions of their work during the rulemaking or adjudicatory process, thus enabling stakeholders and Congress to serve oversight functions using that information.<sup>42</sup> Second, courts undertaking hard-look review provide accessible descriptions of scientific and technical matters; their opinions function as translations for the many consumers of administrative law, thereby furthering access to

---

39. For a discussion of the relative capabilities of courts and agencies with respect to science, see Meazell, *supra* note 3, at 743–48.

40. Of course, some fluctuation exists in the rigor with which the reasoned-decisionmaking standard is applied. See Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 411 (noting a vacillation between levels of scrutiny); Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1064–65 (1995) (describing the “proliferation of manipulable categories to which different degrees of deference apply”). Compare *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983) (“[A] reviewing court must remember that the Commission is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination . . . a reviewing court must generally be at its most deferential.”), with *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46–57 (1983) (conducting standard hard-look review and holding that the National Highway Traffic Safety Administration was not free to “abandon[]” its existing seatbelt requirements “without any consideration whatsoever of an airbags-only requirement”), and *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148–56 (D.C. Cir. 2011) (conducting super hard-look review and vacating an SEC rule because, among other reasons, the Securities and Exchange Commission had “failed adequately to quantify the certain costs or to explain why those costs could not be quantified” and had “failed to respond to substantial problems raised by commenters”).

41. See Meazell, *supra* note 3, at 772–78 (collecting modern examples of judicial references to super deference); see also *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 713 (2011) (“We see no reason why our review of tax regulations should not be guided by agency expertise pursuant to *Chevron* to the same extent as our review of other regulations.”).

42. Bressman, *supra* note 35, at 1780–83.

information and enabling oversight.<sup>43</sup> Either way, an agency's expertise serves an important role by helping to legitimize its activities.

2. *Presidential Control and Political Accountability.* Beyond expertise, that the president is entitled to some degree of control over administrative agencies has long been recognized. This power is typically attributed to the Take Care Clause,<sup>44</sup> which provides that the president "shall take Care that the Laws be faithfully executed."<sup>45</sup> In *Myers v. United States*,<sup>46</sup> for example, the Supreme Court invalidated a limitation on the president's ability to remove a postmaster, reasoning that the president's ability to ensure that the laws are faithfully executed requires the unfettered discretion to remove executive officials.<sup>47</sup>

As demonstrated by Professor Ronald Krotoszynski, Jr., the Take Care Clause can be seen as operating in tandem with the Article II Vesting Clause<sup>48</sup> to yield a formalistic, unitary-executive theory of presidential control.<sup>49</sup> This conceptualization carefully separates the legislative duties of Congress from the executive duties of the president; taken to its extreme, this approach could invalidate many broad delegations of authority to agencies.<sup>50</sup> It might also require that the president take an active role in directing agencies' activities.

As a practical matter, of course, Congress does delegate broad authority to agencies,<sup>51</sup> and the president cannot possibly be involved in every decision agencies make. Even so, a number of legal scholars

---

43. Meazell, *supra* note 3, at 778–80; *see also* Wendy E. Wagner, *Revisiting the Impact of Judicial Review on Agency Rulemakings: An Empirical Investigation*, 53 WM. & MARY L. REV. (forthcoming 2012) (demonstrating through comparative analysis that judicial opinions are easier to read than agencies' notices of rules regarding the same subject matter).

44. U.S. CONST. art. II, § 3.

45. *Id.*; *see also* Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1264–65 (2009) (noting that "many, if not most, public law scholars would place the Chief Executive one position above the legislature in this particular hierarchy").

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

47. *Id.* at 135. *But see* *Humphrey's Ex'r v. United States*, 292 U.S. 602, 629 (1935) (upholding the for-cause-removal restriction for an independent-agency commissioner).

48. U.S. CONST. art. II, § 1, cl. 1.

49. Krotoszynski, *supra* note 24, at 1647–54.

50. *Cf. id.* at 1651–54 (arguing that cooperative-federalism schemes are also violative of formalistic separation-of-powers principles).

51. *See* *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473–74 (2001) (upholding a broad delegation of authority to the EPA under the Clean Air Act, 42 U.S.C. §§ 7401–7671q (2006 & Supp. III 2009)).

press for presidential control as a reason for judicial deference.<sup>52</sup> The doctrinal impetus for this movement was the Court's landmark decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>53</sup> In that case, the Court emphasized that “[w]hile agencies are not directly accountable to the people, the Chief Executive is”,<sup>54</sup> thus, courts should defer to agencies’ reasonable constructions of ambiguous statutes. Although courts had long emphasized that agencies are more politically accountable than the judiciary, *Chevron* tied agency accountability to the president himself,<sup>55</sup> which gives these executive agencies a claim to democratic legitimacy.

Just as the expertise model has attracted criticism, the presidential-control model is at the center of ongoing scholarly debates.<sup>56</sup> Although expertise frequently is cited as a reason for deference, just how much courts rely on presidential control as a basis for deference is unclear.<sup>57</sup> Nevertheless, at least some deference on

---

52. See sources cited *supra* note 3.

53. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Note also that beginning in 1981, the president exercised more formalized oversight over executive agencies through cost-benefit analysis and the use of executive orders. See Nina Mendelson, *Another Word on the President's Statutory Authority over Agency Action*, 79 *FORDHAM L. REV.* 2455, 2459 (2011) (describing the expansion of presidential oversight over executive agencies).

54. *Chevron*, 467 U.S. at 865 (“While agencies are not directly accountable to the people, the Chief Executive is . . .”).

55. See Bressman, *supra* note 35, at 1765 (“*Chevron*, more than any other case, is responsible for anchoring the presidential control model. It recognized that politics is a permissible basis for agency policymaking.”). Of course, *Chevron* also referenced expertise as a ground for deference. *Chevron*, 467 U.S. at 863 (noting that Congress may have delegated matters of interpretation to agencies “thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so” than Congress itself would be).

56. Cf. Watts, *supra* note 3, at 32 (arguing for hard-look review to be “modified so that certain political influences would be viewed as an appropriate factor in rulemaking”). Numerous scholars have debated the validity of the presidential-control model. See Bressman, *supra* note 35, at 1765 & n.101 (citing *Chevron* and other cases espousing the presidential-control model that “recognize[] that politics is a permissible basis for agency policymaking”). Others have suggested limits for the approach. E.g., Seidenfeld, *supra* note 38 (manuscript at 25) (arguing against using presidential control as a consideration in hard-look review); Stack, *supra* note 3, at 322–23 (arguing that *Chevron* deference ought to be accorded to presidential constructions of statutes only when Congress has expressly delegated such interpretive authority). Still others generally approve of the approach, albeit while offering suggestions for improving it. See generally Kagan, *supra* note 3 (arguing for a strong theory of the unitary executive).

57. See Seidenfeld, *supra* note 38 (manuscript at 13–14) (arguing that political influences, although legitimate, are not relevant to judicial review if hard-look review is considered to be a check on interest-group influences); Watts, *supra* note 3, at 7 (“For the most part, however, the blanket rejection of politics in administrative decisionmaking has been casually accepted as the

the basis of comparative political accountability is intuitively appealing. When courts are faced with pure policy challenges, they might appropriately be reluctant as an Article III matter to displace the views of a politically accountable branch.<sup>58</sup> Political accountability can therefore be viewed as a softer form of the presidential-control model that nonetheless justifies deference to agencies' policy judgments.<sup>59</sup>

*B. Protecting Expertise from Politics: Independent Agencies*

Expertise and presidential control usually work in tandem. For example, in *Chevron*,<sup>60</sup> the Court relied on both of those grounds in holding permissible the EPA's construction of the Clean Air Act (CAA).<sup>61</sup> More specifically, scientific uncertainty necessarily requires policy judgments, so deference to expertise means inherent deference to policy.<sup>62</sup> This arrangement works fairly well—in terms of justifying deference—for executive agencies, which are subject to a number of mechanisms that allow for presidential control.<sup>63</sup> But independent agencies are a special case because they are designed to be insulated from politics to ensure that they exercise more neutral judgment. In essence, the goal of independent agencies is to separate expertise and

---

status quo by courts, agencies, and scholars alike.”); *see also* *Sierra Club v. Costle*, 657 F.2d 298, 408 (D.C. Cir. 1981) (“But we do not believe that Congress intended that the courts convert informal rulemaking into a rarified technocratic process, unaffected by political considerations or the presence of Presidential power.”); *cf.* *Massachusetts v. EPA*, 549 U.S. 497, 533–34 (2007) (rejecting agency reliance on presidential policy when policy considerations were not within the bounds of the agency's statutory mandate). *But see* *Krotoszynski*, *supra* note 24, at 1618–19 (arguing that *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 130 S. Ct. 3138 (2010), advances a strong unitary-executive rationale).

58. *See* *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 190–91 (Breyer, J., dissenting) (arguing that the Food and Drug Administration (FDA) had jurisdiction to regulate tobacco because it could be held accountable for its regulations via the president).

59. *See* *Bressman & Thompson*, *supra* note 12, at 622 (describing two forms of presidential control: the strong form, which is constitutionally grounded, and the weak form, which pragmatically relies on presidential authority to ease concern about the administrative state generally); *Staszewski*, *supra* note 45, at 1256 (“In judicial opinions, the standard technique is for decision-makers who uphold governmental action to justify their conclusions at least in part on the basis of the need to defer to choices made by democratically accountable officials.”).

60. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 864–865 (1984).

61. *Clean Air Act*, 42 U.S.C. §§ 7401–7671q (2006 & Supp. III 2009); *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 864–65 (1984).

62. *Meazell*, *supra* note 3, at 744–48.

63. *See, e.g.*, *Exec. Order No. 12,866*, 3 C.F.R. 638, 638 (1994), *reprinted in* 5 U.S.C. § 601 app. at 745, 745 (2006) (“With this Executive order, the Federal Government begins a program to reform and make more efficient the regulatory process.”).

politics. The origins of the NRC, which are discussed at the end of this Section, help to make concrete just how Congress has attempted to implement this aim as a matter of institutional design. And overall, this closer look at independent agencies is worthwhile for teasing apart the deference dilemma and moving toward a framework that relies more fundamentally on broader principles of legitimacy.

1. *The Features of Independence.* In some contexts, there is little practical difference between independent agencies and executive agencies. The APA, for instance, makes no distinctions on this basis.<sup>64</sup> But a number of functional and theoretical distinctions are relevant here. Broadly speaking, the fundamental difference between executive agencies and independent agencies lies in the degree to which each is insulated from the president's control. Whereas executive agencies are typically headed by individuals who serve at the will of the president,<sup>65</sup> independent agencies are headed by multimember groups of people who are removable only for cause.<sup>66</sup> Further, executive heads are usually members of the president's party and serve for indefinite terms during the president's tenure. By contrast, members of independent agencies frequently must come from both parties and usually have fixed terms that may extend beyond a given president's term.<sup>67</sup>

---

64. See Administrative Procedure Act § 2(a), 5 U.S.C. § 551(1) (2006) (“[A]gency” means each authority of the Government of the United States . . .”).

65. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3146 (2010) (“Since 1789, the Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary.”).

66. See Barkow, *supra* note 23, at 16 (“[T]he defining hallmark of an independent agency is that it is headed by someone who cannot be removed at will by the President but instead can be removed only for good cause.”); Bressman & Thompson, *supra* note 12, at 600 (“This removal restriction, more than any other feature, has served to differentiate independent agencies from executive-branch agencies.”).

67. See, e.g., Energy Reorganization Act of 1974 § 201, 42 U.S.C. § 5841 (2006) (mandating that the NRC commissioners have five-year terms and that the NRC consist of five members, no more than three of whom may be of a single political party); Securities Exchange Act of 1934 § 4, 15 U.S.C. § 78d (2006) (providing a similar structure for the Securities and Exchange Commission). Note, however, that presidents frequently have the authority to appoint the heads of independent agencies, and presidents are often able to align majorities on commissions with their own political parties during their administrations. See Barkow, *supra* note 23, at 38–40 (describing how a president achieves this goal of having the majority of independent agencies be members of the president's party). In 2012, the chair of the NRC is an appointee of President Obama. See Ryan Grim, *Nuclear Power Play: Ambition, Betrayal and the ‘Ugly Underbelly’ of Energy Regulation*, HUFFINGTON POST (Dec. 29, 2011, 11:20 AM), [http://www.huffingtonpost.com/2011/12/29/nuclear-power-gregory-jaczko-nuclear-regulatory-commission\\_n\\_1160711.html](http://www.huffingtonpost.com/2011/12/29/nuclear-power-gregory-jaczko-nuclear-regulatory-commission_n_1160711.html)

These characteristics are meant to insulate independent agencies, at least somewhat, from political pressures.<sup>68</sup> This goal is achieved in several ways. First, expertise was viewed by supporters of the New Deal as the ultimate answer to politics. Thus, independent agencies—which burgeoned during the New Deal—were designed with the purpose of shielding expert decisionmakers from the shifting winds of politics.<sup>69</sup> This result comes about partly because independent agencies are expected to develop specialized knowledge about their regulated industries.<sup>70</sup> In addition, independent agencies enjoy a “singularity of purpose”<sup>71</sup> that helps focus their attention on specializing.<sup>72</sup> And finally, they often serve an adjudicatory role, which sharpens their focus on particular facts and circumstances.<sup>73</sup> Even in the twenty-first century, as a practical matter, expertise remains an important component of independent agencies’ work.<sup>74</sup>

Expertise is not the only institutional-design consideration for independent agencies. Multimember panels are expected to benefit from enhanced deliberative decisionmaking; when a single political

---

(describing a feud at the NRC involving Chairman Gregory Jaczko, an appointee of President Obama).

68. Barkow, *supra* note 23, at 19 & n.11.

69. *Id.* at 20 (“The idea is that an agency could be created that would be insulated from short-term political pressures so that it could adopt public policies based on expertise that would yield better public policy over the long term.”); *see also* Bressman & Thompson, *supra* note 12, at 612 (“Independence was traditionally justified, particularly during the New Deal era, as promoting expertise.”); Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 463 (2008) (“Some combination of concerns about expertise, due process, and the likely administrative actions of Presidents explains Congress’s decision to constrain the President this way.”); Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CALIF. L. REV. 255, 260 (1994) (“For better or for worse, independent agencies are empowered to make policy at odds with White House priorities.”).

70. Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 262 (“When Congress selects industries or segments of the economy for regulation and builds agencies around them, it expects the deciders to obtain expertise.”).

71. Bressman & Thompson, *supra* note 12, at 613.

72. *Id.*

73. Verkuil, *supra* note 70, at 263 (“What is unique about independent agencies is that they perform the executive functions of policymaking and prosecution through an organizational scheme that was designed with the adjudicatory function in mind.”); *see also* Kevin M. Stack, *Agency Independence After PCAOB*, 32 CARDOZO L. REV. 2391, 2402 (2011) (noting that the organizational features of independent agencies make them well suited for performing adjudication).

74. Bressman & Thompson, *supra* note 12, at 612 (“But it was possible, even during the New Deal, to view expertise in a more limited way that still holds today. Expertise was necessary to solve social and economic problems, and only independent agencies possessed the requisite sort.”).

party can hold only a bare majority, for example, decisions are less likely to amplify short-term political views.<sup>75</sup> Other reasons for creating independent agencies involve maintaining stability, providing insulation from interest-group capture, and protecting against bureaucratic drift.<sup>76</sup>

2. *Case Study: The Nuclear Regulatory Commission.* Congress has only infrequently offered explicit commentary on its intent in establishing an independent agency.<sup>77</sup> But the illustrative history of the Atomic Energy Commission (AEC)—now the NRC—provides a number of insights that are both consistent with the theoretical accounts of congressional intent and useful for assessing the deference dilemma.

At its creation in 1946, the AEC was tasked with broad authority over the entire nuclear field; its mandate included developing nuclear energy, ensuring its safety, and developing the nation's nuclear-weapons arsenal.<sup>78</sup> At the time, the AEC was the *only* agency with expertise in nuclear science and technology. In 1946, just after its creation, the AEC had “complete domination over atomic energy development in this country.”<sup>79</sup> Given the gravity of this subject matter, Congress chose a commission framework for the agency to ensure that such important powers were not concentrated in a single agency head. As a Senate report said, “The framers of the [1946 Act]

---

75. Verkuil, *supra* note 70, at 259–60 (noting that the characteristics of independent agencies are “designed to isolate those decisionmakers from politics”). For a discussion of panel effects, such as ideological amplification and dampening, that may be observed in the judicial context, see Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 839 (2008).

76. See Barkow, *supra* note 23, at 21–26 (noting and exploring these various reasons).

77. See Verkuil, *supra* note 70, at 258 (“What is lacking in the creation of independent agencies is any attempt in the legislative history to explain *why* Congress (or the President, for that matter) preferred one organizational format over the other.”); *id.* at 272 n.69 (describing the inferences to be drawn from the decision to remove the Interstate Commerce Commission from the Department of the Interior in 1889).

78. Barkow, *supra* note 23, at 50–51 (“[I]t was precisely this conflict of missions that ultimately led Congress to decouple the development and safety missions of the Atomic Energy Commission and place each within separate agencies, the former going to the Department of Energy and the latter residing with the Nuclear Regulatory Commission.”).

79. Edward H. Levi, *The Atomic Energy Act: An Analysis*, BULL. OF THE ATOMIC SCIENTISTS (Atomic Scientists of Chi., Chi., Ill.), Sept. 1, 1946, at 18, 18; see also H.R. REP. NO. 80-1973, at 3 (1948) (“The Atomic Energy Commission, because of the nature of its duties and the extent of its power, can exercise decisive control over the destiny of our Nation and the lives of our people.”); Exec. Order No. 9816, 3 C.F.R. 189 (Supp. 1946) (ordering the “transfer of properties and personnel to the Atomic Energy Commission”).

deliberately established a five-man directorate, rather than a single administrator, to control our atomic enterprise for the very purpose of assuring that diverse viewpoints would be brought to bear upon issues so far reaching as those here involved.”<sup>80</sup> Thus, expertise was married to collegial decisionmaking as a way to cautiously manage this perilous new technology.

Despite the civilian side of its mandate, the AEC was nevertheless largely occupied with military applications in its early years. Not until the passage of the Atomic Energy Act of 1954<sup>81</sup> did privately owned nuclear-fuel and production facilities become both possible and subject to the AEC’s regulation. Underscoring again the monopoly on expertise enjoyed by the AEC, a key focus of the 1954 Amendments was enabling the agency to share technical and scientific information more broadly.<sup>82</sup> Indeed, a primary policy function of the AEC in the ensuing years was to encourage private industry to construct nuclear-power plants and thereby facilitate the emergence of that entire industry.<sup>83</sup> But increasingly, this role seemed at odds with ensuring safety and environmental responsibility.<sup>84</sup> Although insulation from capture may be a purpose of independence, here the mixed mission of the AEC raised serious concerns that the agency was far too cozy with industry.<sup>85</sup>

---

80. See S. REP. NO. 100-364, at 2 (1988) (quoting S. REP. NO. 83-1699, at 111 (1954)). Note that the commission’s civilian composition was a hard-won attempt to move nuclear energy out of military control. The AEC’s predecessor was the Manhattan Engineer District of the U.S. Army Corps of Engineers. ALICE L. BUCK, U.S. DEP’T OF ENERGY, PUB. NO. DOE/ES-0003/1, A HISTORY OF THE ATOMIC ENERGY COMMISSION 1 (1983). Even so, the Act included a military liaison committee with significant powers. Levi, *supra* note 79, at 18.

81. Atomic Energy Act of 1954, ch. 1073, 68 Stat. 919 (codified as amended at 42 U.S.C. §§ 2011 to 2297h-13 (2006 & Supp. III 2009)). This followed closely on the heels of President Eisenhower’s Atoms for Peace policy. President Dwight D. Eisenhower, Address Before the General Assembly of the United Nations on Peaceful Uses of Atomic Energy, New York City, PUB. PAPERS 813 (Dec. 8, 1953) (outlining the policy).

82. BUCK, *supra* note 80, at 3.

83. *Id.* at 3, 5.

84. See *id.* at 8 (describing these tensions). In addition, the energy crisis heightened awareness that a single realistic solution to the nation’s increasing energy needs likely did not exist, an epiphany that caused the AEC’s power to diminish. *Id.*

85. On the difficulties of mixed missions, see generally Biber, *supra* note 4. Cf. John Gorham Palfrey, *Energy and the Environment: The Special Case of Nuclear Power*, 74 COLUM. L. REV. 1375, 1378–80 (1974) (detailing the impact of the National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321–4370h (2006 & Supp. III 2009)), on the nuclear industry and the subsequent dismantling of the AEC); *id.* at 1400–03 (arguing that safety is enhanced by combined functions in this particular industry).

Responding to concerns about this dual expert/policy function, Congress enacted the Energy Reorganization Act of 1974,<sup>86</sup> which abolished the AEC and created three successor agencies. These included the NRC, tasked with licensing and regulation; the Energy Research and Development Administration (ERDA), tasked with research, development, and production; and the Federal Energy Administration, tasked with data collection and analysis. The last two were combined in 1977 to become the DOE.<sup>87</sup> The legislative history of the split reveals particular attention to detail with respect to separating expertise and policy.

For example, Congress carefully delineated the NRC's licensing authority. The conference report emphasized Congress's intent that the NRC was to be responsible for licensing in an oversight role, as opposed to being responsible for developing research to support licensing in the first place: "The regulatory agency should never be placed in a position to generate, and then have to defend, basic design data of its own. The regulatory agency must insist on the submission of all of the data required to demonstrate the adequacy of the design contained in a license application or amendments thereto."<sup>88</sup> In essence, the Energy Reorganization Act lends support to the idea that the NRC was to have both special expertise, owing to its narrow focus, and a measure of independence, owing to the bipartisan requirements for its members who remained removable only for cause.

A look at the functions of the ERDA reveals a contrasting broad focus on policymaking generally, as well as on the congressional desire that that administrator work directly with the president.<sup>89</sup> Further, the DOE's authorizing statute reveals a purpose to develop a coordinated national energy policy and to assess energy-research priorities, among other policy-oriented goals.<sup>90</sup>

Congress continues to scrutinize the operation of the nuclear agencies. Following the Three Mile Island accident and, later, the

---

86. Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1233 (codified as amended at 42 U.S.C. §§ 5801-5891 (2006 & Supp. III 2009)).

87. Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (1977) (codified as amended at 42 U.S.C. §§ 7101 to 7385s-15 (2006 & Supp. III 2009)).

88. H.R. REP. NO. 93-1445, at 35 (1974) (Conf. Rep.), *reprinted in* 1974 U.S.C.C.A.N. 5538, 5448.

89. *Id.* at 28, *reprinted in* 1974 U.S.C.C.A.N. at 5541.

90. Department of Energy Organization Act § 102, 91 Stat. at 567-69 (codified as amended at 42 U.S.C. § 7112 (2006)).

Chernobyl disaster, the functionality of the NRC once again came under scrutiny amid concerns that the agency's structure was insufficiently nimble in responding to the needs of the regulated industry.<sup>91</sup> As discussed in Part II, this criticism is frequently raised in the twenty-first century.<sup>92</sup> Perhaps this ongoing interest in the activities of the NRC helps explain the structure of the NWPA, passed in 1988. The NWPA is significant because of the way that it limits agency policymaking discretion. And the unique history of both the NRC and nuclear policy reveal an intentional separation of expertise from presidential control in a field in which Congress has preserved for itself a large and meaningful role.

## II. THE DEFERENCE DILEMMA IN CONTEXT

With this background in mind, I now develop an account of the deference dilemma. This Part begins with a detailed examination of the Yucca Mountain controversy, which helps contextualize the tensions between expertise and presidential control. Next, I note a few other examples of regulatory schemes that raise similar issues.

### A. *The Yucca Mountain Controversy*

As described in the Introduction, the disposal of nuclear waste from commercial reactors in the United States is governed by the NWPA, which places shared responsibility on the DOE and the NRC.<sup>93</sup> The DOE is responsible for characterizing the chosen site<sup>94</sup>

---

91. For example, the proposed but unenacted Nuclear Regulation Reorganization and Reform Act of 1988, S. 2443 (1988), would have abolished the NRC and created a new agency to be headed by an administrator directly accountable to the president, S. REP. NO. 100-364, at 1 (1988). Within the new agency, however, a somewhat independent body for conducting safety investigations would still have existed. *Id.*; Verkuil, *supra* note 70, at 274–75. For a discussion of other concerns, see S. REP. NO. 100-364, at 4, 23.

92. See Grim, *supra* note 67 (describing unrest at the NRC); Roberta Rampton, *Bickering Hurts U.S. Nuclear Agency: Report*, REUTERS, Dec. 13, 2011, available at <http://www.reuters.com/article/2011/12/13/us-usa-nuclear-issa-idUSTRE7BC25R20111213> (“A report from a top Congressional watchdog said on Tuesday the dysfunction within the five-member U.S. nuclear safety regulator is damaging the agency . . .”).

93. Nuclear Waste Policy Act (NWPA) of 1982 §§ 112–115, 42 U.S.C. §§ 10132–10135 (2006). As noted, the EPA also plays a role in setting the environmental standards that the repository must meet. *E.g.*, *id.* § 121, 42 U.S.C. § 10141 (directing the EPA to set environmental standards).

94. Site characterization included a detailed assessment of the hydrologic, hydrochemical, and thermomechanical properties of Yucca Mountain. See *Review of DOE Site Characterization Process*, NUCLEAR REGULATORY COMM'N, <http://www.nrc.gov/waste/hlw-disposal/pre->

and for constructing and operating the facility, and the NRC is responsible for issuing compliance standards and licenses. To pay for this work, nuclear-power generators must make payments to a Nuclear Waste Fund.<sup>95</sup>

1. *Selecting Yucca Mountain.* The remarkable process by which Yucca Mountain was selected is a story in itself; here I note only the highlights.<sup>96</sup> As originally enacted in 1982, the NWPAs directed the DOE to consider five different sites for their suitability as potential nuclear-waste repositories, three of which were to be forwarded to the president for review.<sup>97</sup> The three sites suggested for the first repository were in Texas, Washington, and Nevada.<sup>98</sup> Texas and Washington had far more political clout than the sparsely populated Nevada, however, and in 1987, Congress amended the NWPAs to specify that Yucca Mountain would be the only site characterized.<sup>99</sup>

---

licensing/site-characterization.html (last visited Apr. 11, 2012); *see also* NWPAs § 113, 42 U.S.C. § 10133 (describing the rules for site-characterization activities).

95. *See* NWPAs § 111(b)(4), 42 U.S.C. § 10131(b)(4) (establishing a Nuclear Waste Fund “composed of payments made by the generators and owners of such waste and spent fuel”).

96. For more detail, *see generally* Richard B. Stewart, *Solving the U.S. Nuclear Waste Dilemma*, 40 ENVTL. L. REP. 10,783 (2010). I note that the Yucca Mountain controversy as a whole fits well within Professor Thomas McGarity’s conception of administrative law as blood sport. *See generally* McGarity, *supra* note 24 (arguing that federal regulation can be seen as a “kind of a blood sport” in which the regulated industries attempt to make the regulating agency look ridiculous (quoting Interview with Arthur Levitt (Oct. 1, 2010)) (internal quotation marks omitted)).

97. *See* NWPAs § 112(b)(1)(A), 42 U.S.C. § 10132(b)(1)(A) (ordering the secretary to nominate “at least 5 sites that he determines suitable for site characterization for selection of the first repository site”). Originally, the NWPAs called for constructing two repositories, one in the eastern and one in the western United States. *See* Nuclear Waste Policy Act of 1982, Pub. L. No. 97-245, tit. I, subtit. A, §§ 112 (b)(1)(C), 114 (a)(2)(A), (d)(1), 96 Stat. 2201, 2208, 2214, 2215 (1983) (codified at 42 U.S.C. §§ 10132(b)(1)(C), 10134(a)(2)(A), (d)(1) (1982)) (imposing deadlines for selection of a second repository site). Plans for a second eastern site were cancelled when Congress designated Yucca Mountain. *See* Nuclear Waste Policy Amendments Act of 1987, Pub. L. No. 100-203, tit. V, subtit. A, pt. A., secs. 5011, 5012, §§ 160(a), 161(a), 101 Stat. 1330, 1330-228, 1330-231 (codified at 42 U.S.C. §§ 10172(a), 10172a(a) (2006)) (providing for termination “of site specific activities at all candidate sites other than the Yucca Mountain site” and prohibiting the consideration of a second repository unless specifically authorized by Congress).

98. *See* Nuclear Energy Inst. v. EPA, 373 F.3d 1251, 1259 (D.C. Cir. 2004) (describing the history of the NRC); Stewart, *supra* note 96, at 10,785–86 (same).

99. Nuclear Waste Policy Amendments Act of 1987, sec. 5011, § 160(a), 101 Stat. at 1330-228 (codified at 42 U.S.C. § 10172(a) (2006)); *see also* Stewart, *supra* note 96, at 10,786 (“Congress’ choice of Yucca was driven by the influence of powerful members from Texas and Washington. Nevada lacked clout and was steamrolled.”).

The DOE thereafter completed its characterization of the Yucca Mountain site and submitted to President George H.W. Bush its recommendation that the site be selected.<sup>100</sup> President Bush notified Congress that he considered Yucca Mountain to be qualified for a construction-license application.<sup>101</sup> Nevada filed a notice of disapproval, as contemplated by the statute.<sup>102</sup> Congress responded with a joint resolution approving the site's development.<sup>103</sup>

2. *Construction Licensing, Politics, and the DOE's Motion To Withdraw.* After proceeding through various technical phases and surviving a battery of lawsuits,<sup>104</sup> the Yucca Mountain Project looked poised to advance to construction licensing. The DOE had submitted its safety report for the NRC's review,<sup>105</sup> as well as its construction-license application.<sup>106</sup> Before the application was approved, however, then-Senator Obama made a campaign promise to Nevada, the home state of Senate Majority Leader Harry Reid, stating that he would

---

100. U.S. DEP'T OF ENERGY, RECOMMENDATION BY THE SECRETARY OF ENERGY REGARDING THE SUITABILITY OF THE YUCCA MOUNTAIN SITE FOR A REPOSITORY UNDER THE NUCLEAR WASTE POLICY ACT OF 1982 (2002), available at [http://energy.gov/sites/prod/files/edg/media/Secretary\\_s\\_Recommendation\\_Report.pdf](http://energy.gov/sites/prod/files/edg/media/Secretary_s_Recommendation_Report.pdf).

101. Press Release, White House, Yucca Mountain Statement (Feb. 15, 2002), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2002/02/20020215-11.html>.

102. Press Release, Office of Kenny C. Gwynn, Governor of Nev., Statement of Reasons Supporting the Governor of Nevada's Notice of Disapproval of the Proposed Yucca Mountain Project (Apr. 8, 2002), available at <http://www.yuccamountain.org/pdf/govveto0402.pdf>.

103. Joint Resolution of July 23, 2002, Pub. L. No. 107-200, 116 Stat. 735 (2002) (codified at 42 U.S.C. § 10135 note (2006)) ("Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That there hereby is approved the site at Yucca Mountain, Nevada, for a repository, with respect to which a notice of disapproval was submitted by the Governor of the State of Nevada on April 8, 2002.").

104. See, e.g., Nevada v. U.S. Dep't of Energy, 457 F.3d 78, 93 (D.C. Cir. 2006) (rejecting a challenge to the DOE's Environmental Impact Statement for Yucca Mountain); Nevada v. U.S. Dep't of Energy, 400 F.3d 9, 17 (D.C. Cir. 2005) (rejecting a challenge to the order denying Nevada funding for its participation before the NRC); Nuclear Energy Inst. v. EPA, 373 F.3d 1251, 1259 (D.C. Cir. 2004) (upholding most challenges to the regulations implementing the NWPA and upholding the joint congressional resolution designating the site); *Nuclear Energy Inst.*, 373 F.3d at 1304 ("It is not for this or any other court to examine the strength of the evidence upon which Congress based its judgment [to approve Yucca Mountain].").

105. U.S. DEP'T OF ENERGY, YUCCA MOUNTAIN REPOSITORY LICENSE APPLICATION: SAFETY ANALYSIS REPORT (2008), available at <http://www.nrc.gov/waste/hlw-disposal/yucca-lic-app/yucca-lic-app-safety-report.html>.

106. Letter from Edward F. Sproat, III, Dir., Office of Civilian Radioactive Waste Mgmt., U.S. Dep't of Energy, to Michael F. Weber, Dir., Office of Nuclear Material Safety & Safeguards, Nuclear Regulatory Comm'n (June 3, 2008), available at <http://pbadupws.nrc.gov/docs/ML0815/ML081560407.pdf> (submitting an application for a construction license).

shut down Yucca Mountain if elected.<sup>107</sup> After his election, President Obama first eliminated funding for the project in his 2009 proposed budget.<sup>108</sup> Then, in 2010, he directed the DOE to file a motion to withdraw the construction-license application, while also directing it to establish a Blue Ribbon Commission to evaluate the country's nuclear-waste policy.<sup>109</sup>

The Atomic Safety and Licensing Board (ASLB) of the NRC denied the DOE's motion to withdraw.<sup>110</sup> Of primary importance to the ASLB, the DOE had not argued that the site was unsafe or that its application was flawed; rather, the DOE contended that the site was "not a workable option"<sup>111</sup> as a "matter of policy."<sup>112</sup> The ASLB, however, concluded that Congress's intent had been clear: the DOE had been directed to file its application,<sup>113</sup> and the NRC had been directed to reach a decision on the merits.<sup>114</sup> The overall structure of the NWPA also supported this reasoning: the DOE had the authority to conclude during the site-characterization phase that the Yucca Mountain Project was unsuitable,<sup>115</sup> and if that happened, Congress

---

107. See Bernd Debusmann, *Obama, Politics and Nuclear Waste*, REUTERS GREAT DEBATE BLOG (Mar. 5, 2010, 12:34 EST), <http://blogs.reuters.com/great-debate/2010/03/05/obama-politics-and-nuclear-waste> ("During Nevada stops in his campaign for the presidency, Obama came out strongly against Yucca Mountain, a position that helped him beat his Republican rival John McCain and win the hotly-contested state's five electoral votes."). Senator Reid is strongly opposed to the repository. See *Killing the Yucca Mountain Nuclear Waste Dump*, HARRY REID, <http://www.reid.senate.gov/about/upload/yucca-mountain-accomplishments.pdf> (last visited Apr. 11, 2012) (expressing opposition to the Yucca Mountain Project and referencing President Obama's campaign promise to cut funding for the repository).

108. Richard Harris, *Obama Cuts Funds to Nuclear Waste Repository*, NPR (Mar. 11, 2009), <http://www.npr.org/templates/story/story.php?storyId=101689489>.

109. See U.S. Department of Energy's Motion To Withdraw at 1–2, U.S. Dep't of Energy, No. LBP-10-11 (Atomic Safety & Licensing Bd., Nuclear Regulatory Comm'n June 29, 2010), *aff'd by an equally divided commission*, No. CLI-11-07 (Nuclear Regulatory Comm'n Sept. 9, 2011), available at <http://pbadupws.nrc.gov/docs/ML1006/ML100621397.pdf>; Memorandum of Jan. 29, 2010, 3 C.F.R. 299 (2011).

110. U.S. Dep't of Energy, No. LBP-10-11. slip op. at 5.

111. U.S. Department of Energy's Motion To Withdraw, *supra* note 109, at 1.

112. U.S. Department of Energy's Reply to the Responses to the Motion To Withdraw at 1, U.S. Dep't of Energy, No. LBP-10-11, available at <http://www.state.nv.us/nucwaste/licensing/doe100527response.pdf>.

113. See Nuclear Waste Policy Act (NWPA) of 1982 § 114(b), 42 U.S.C. § 10134(b) (2006) ("[T]he Secretary shall submit to the Commission an application for a construction authorization for a repository at such site . . .").

114. U.S. Dep't of Energy, No. LBP-10-11, slip op. at 5; see also NWPA § 114(d), 42 U.S.C. § 10134(d) ("[T]he Commission shall consider an application for a construction authorization for all or part of a repository . . .").

115. NWPA § 113(c)(3)(F), 42 U.S.C. § 10133(c)(3)(F).

specified the steps that the DOE was to take. But Congress did not seem to contemplate the DOE deciding not to go forward with its construction-license application for purely political reasons, and did not provide any steps to take should the DOE make such a decision.<sup>116</sup> The ASLB further reasoned:

Did Congress, which so carefully preserved ultimate control over the multi-stage process that it crafted, intend—without ever saying so—that DOE could unilaterally withdraw the Application and prevent the NRC from considering it? We think not. When Congress selected the Yucca Mountain site over Nevada’s objection in 2002, it reinforced the expectation in the 1982 Act *that the project would be removed from the political process* and that the NRC would complete an evaluation of the technical merits . . . .<sup>117</sup>

To the DOE’s claim that its policy judgment ought not be trumped by the NRC, the ASLB responded that the pertinent policy was the one in the NWPA itself.<sup>118</sup> In response, the DOE argued that requiring it to advance the license application, even though it disagreed with that approach on policy grounds, would be “[a]bsurd [a]nd [u]nreasonable.”<sup>119</sup> The ASLB was not impressed; it noted that agencies are “often required to implement legislative directives in a manner with which they do not necessarily agree.”<sup>120</sup> Furthermore, the ASLB reasoned, Congress was free to intervene should it decide that Yucca Mountain was no longer the best option.<sup>121</sup>

The ASLB relied heavily on *Massachusetts v. EPA*<sup>122</sup> in its decision. In that case, the Supreme Court held that the EPA’s rationale for failing to regulate greenhouse-gas emissions from new motor vehicles under the CAA was arbitrary and capricious.<sup>123</sup> According to the Court, the EPA’s rationale—which focused on presidential preferences for addressing climate change by means outside of the CAA—exceeded the bounds of the statutory

---

116. *U.S. Dep’t of Energy*, No. LBP-10-11, slip op. at 8–9.

117. *Id.*, slip op. at 9 (emphasis added).

118. *Id.*, slip op. at 10.

119. U.S. Department of Energy’s Reply to the Responses to the Motion To Withdraw, *supra* note 112, at 18.

120. *U.S. Dep’t of Energy*, No. LBP-10-11, slip op. at 19.

121. *Id.*, slip op. at 20. The ASLB also rejected the DOE’s argument that *Chevron* deference was warranted, reasoning that even if *Chevron* applied, the statute was clear. *Id.*, slip op. at 16.

122. *Massachusetts v. EPA*, 549 U.S. 497 (2007).

123. *Id.* at 534.

mandate.<sup>124</sup> The Court emphasized, “Although we have neither the expertise nor the authority to evaluate these policy judgments, it is evident they have nothing to do with whether greenhouse-gas emissions contribute to climate change. Still less do they amount to a reasoned justification for declining to form a scientific judgment.”<sup>125</sup> In essence, the Court rejected the agency’s policy rationale because that type of explanation was wholly outside the bounds of the statutory mandate. As Professor Mark Seidenfeld remarks, “[I]t was Congress that rejected the political factors that the agency relied on to justify its decision, not the Court invoking the hard look test.”<sup>126</sup>

Likewise, the ASLB appropriately recognized that Congress had left no room for the DOE to rely on raw politics. Had the DOE raised technical concerns about the site or its ability to construct a facility that would meet the licensing criteria, those explanations would have justified a request to withdraw the license application. Notably, the ASLB did not express concern over the argument that denying the motion would somehow amount to a policy judgment that could not trump that of the DOE. Instead, the ASLB focused on the statutory mandate. Congress’s policy governed, and—outside technical criteria—it did not leave the policy of the Yucca Mountain site to either agency.

3. *The Suit Against the DOE: In re Aiken County.* The DOE appealed the ASLB’s decision to the NRC. But in the meantime, various entities—including states that were storing nuclear waste and awaiting a permanent repository—filed suit against the DOE in the D.C. Circuit.<sup>127</sup> The petitioners’ primary argument was that the DOE’s motion to withdraw and the abandonment of the Yucca Mountain Project violated the agency’s responsibilities under the NWPA.<sup>128</sup>

With respect to the motion to withdraw, the court unsurprisingly determined that the claim was unripe.<sup>129</sup> Because the full NRC had not yet decided whether to review the ASLB’s denial of the motion to withdraw, the claim rested on contingent future events that would either moot the issue or ripen it for review.<sup>130</sup> With respect to the

---

124. *Id.* at 533.

125. *Id.* at 533–34.

126. Seidenfeld, *supra* note 38 (manuscript at 17).

127. *In re Aiken Cnty.*, 645 F.3d 428, 431 (D.C. Cir. 2011).

128. *Id.*

129. *Id.* at 435–36.

130. *Id.*

second claim, the court held that the DOE's policy announcement indicating a desire not to proceed with the Yucca Mountain Project was not a discrete, final agency action within the reviewability requirements of the APA.<sup>131</sup> Although the DOE had filed its motion to withdraw, it had also done as Congress had ordered and had submitted its construction-license application to the NRC.<sup>132</sup> Because "the [NRC] maintain[ed] a statutory duty to review that application" and because the full NRC had not, the case was not yet ripe.<sup>133</sup>

Though the majority opinion was unremarkable as a matter of administrative law, Judge Kavanaugh's concurring opinion explored deeper issues related to presidential control and expertise. Calling the case a "mess" because of the DOE's and NRC's overlapping jurisdiction, he also commented that it was odd that the NRC—rather than the president—would have the final word on Yucca Mountain.<sup>134</sup> Grounding his argument in Article II, Judge Kavanaugh emphasized that the president's duty to execute the laws ought to give the president the authority to resolve conflicts between executive agencies.<sup>135</sup> This is particularly true, according to Judge Kavanaugh, because "[t]he President is dependent on the people for election and reelection, but the officers of agencies in the Executive Branch are not. Presidential control of those agencies thus helps maintain democratic accountability and thereby ensure the people's liberty."<sup>136</sup>

Having firmly rooted administrative law in presidential control, Judge Kavanaugh launched a criticism of the rise of independent agencies. He traced the strength of independent agencies to the Supreme Court's 1935 decision in *Humphrey's Executor v. United States*,<sup>137</sup> in which the Court held that President Franklin D. Roosevelt had improperly removed a Federal Trade Commissioner for political reasons because the applicable statute required good cause.<sup>138</sup> More broadly, that opinion stands for the constitutionality of independent

---

131. *See id.* at 437 (citing Administrative Procedure Act § 10(c), 5 U.S.C. § 704 (2006); Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 64 (2004)).

132. *Id.*

133. *Id.* In a separate concurring opinion, Judge Janice Rogers Brown noted that perhaps the NRC ought to have been sued instead of the DOE. *Id.* at 438 (Brown, J., concurring) ("It is arguable that the NRC has abdicated its statutory responsibility under the NWPA.")

134. *Id.* at 439 (Kavanaugh, J., concurring).

135. *Id.* at 440.

136. *Id.*

137. *Humphrey's Ex'r v. United States*, 292 U.S. 602 (1935).

138. *Id.* at 632.

agencies.<sup>139</sup> Yet as argued by Judge Kavanaugh, *Humphrey's Executor* should be read in relation to its context: it was issued as part of a string of decisions—most of which were later reversed or discredited—by a Supreme Court resistant to New Deal policies.<sup>140</sup> Having set up *Humphrey's Executor* as constitutionally suspect,<sup>141</sup> Judge Kavanaugh emphasized that *In re Aiken County* provided a “dramatic illustration” of the implications of *Humphrey's Executor* and the NWPA: the NRC, not the president, had the final word on the continuation of the Yucca Mountain Project.<sup>142</sup>

Of course, the deference dilemma was not squarely at issue in *In re Aiken County*. And following the D.C. Circuit opinion, the NRC determined that it was evenly divided as to whether to uphold or overturn the ASLB's decision.<sup>143</sup> Under the NRC's rules, this meant that the ASLB's decision to deny the motion stood.<sup>144</sup> Had the NRC then proceeded to consider the application, a review of its denial of the motion would have had to wait.<sup>145</sup> But instead, the NRC directed the ASLB to suspend the entire licensing proceeding because of a

---

139. *See id.* at 629 (“We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named.”).

140. *In re Aiken Cnty.*, 645 F.3d at 441–42 (Kavanaugh, J., concurring) (noting that other cases from that period have been discredited); *see also* Bressman & Thompson, *supra* note 12, at 618 (describing presidential efforts to bring independent agencies back within presidential control); Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 93 (calling *Humphrey's Executor* “one of the more egregious opinions to be found on the pages of the United States Supreme Court Reports”).

141. Acknowledging that *Humphrey's Executor* remains binding precedent, however, Judge Kavanaugh mentioned various proposals to enhance the accountability and effectiveness of independent agencies. *In re Aiken Cnty.*, 645 F.3d at 446–48 (Kavanaugh, J., concurring).

142. *Id.* at 448.

143. U.S. Dep't of Energy, No. CLI-11-07, slip op. at 1 (Nuclear Regulatory Comm'n Sept. 9, 2011), available at <http://www.nrc.gov/reading-rm/doc-collections/commission/orders/2011/2011-07cli.pdf> (“Upon consideration of all filings in this matter, the Commission finds itself evenly divided on whether to take the affirmative action of overturning or upholding the Board's decision.”).

144. *See U.S. Dep't of Energy*, No. LBP-11-24, slip op. at 2 (Atomic Safety & Licensing Bd., Nuclear Regulatory Comm'n Sept. 30, 2011), available at <http://pbadupws.nrc.gov/docs/ML1127/ML11273A041.pdf> (“The Board's decision to deny DOE's motion to withdraw . . . therefore stands.”).

145. The decision would have been neither final nor ripe. *In re Aiken Cnty.*, 645 F.3d at 435–37.

predicted lack of funding.<sup>146</sup> The ASLB complied with this direction,<sup>147</sup> and the NRC promptly was sued.<sup>148</sup>

Thus, both the interbranch story of the Yucca Mountain dispute and the tension between the presidentially controlled DOE and the independent NRC persist. The dispute promises to offer many lessons for administrative law, but the most important lesson for the purposes of this Article is the centrality of the NWPA. As I elaborate in Part III, the statutory mandate is the key to unlocking the deference dilemma. But first, I note a few other examples of the types of statutory schemes in which interagency tensions may arise.

### B. Other Statutory Schemes

The Yucca Mountain Project offers a particularly long-lived controversy, but disputes are inevitable whenever Congress mandates that agencies work together.<sup>149</sup> This, of course, is true even when

---

146. See *U.S. Dep't of Energy*, No. CLI-11-07, slip op. at 1–2 (“Consistent with budgetary limitations, . . . we hereby . . . direct the Board to, by the close of the current fiscal year, complete all necessary and appropriate case management activities . . .”).

147. See *U.S. Dep't of Energy*, No. LBP-11-24, slip op. at 3 (“[B]ecause both future [dedicated appropriations] and [federal-employee positions] for this proceeding are uncertain, and consistent with the Commission’s Memorandum and Order of September 9, 2011, this proceeding is suspended.”).

148. The matter has been granted expedited review. See *In re Aiken Cnty.*, No. 11-1271 (D.C. Cir. Nov. 4, 2011) (per curiam), available at <http://pbadupws.nrc.gov/docs/ML1135/ML11353A092.pdf> (granting a motion to expedite and setting the briefing schedule). Note that the court in *In re Aiken County* suggested in dicta that were the NRC to fail to act according to the congressional deadline, it would be subject to a new cause of action under *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984). *In re Aiken Cnty.*, 645 F.3d at 436. The claim against the NRC raises this argument. Brief of Petitioners, *In re Aiken Cnty.*, No. 11-1271 (D.C. Cir. Dec. 5, 2011), available at <http://www.state.nv.us/nucwaste/licensing/dc111205brief.pdf>; see also *In re Aiken Cnty.*, 645 F.3d at 438 (Brown, J., concurring) (suggesting that the NRC had already “abdicated its statutory responsibility under the NWPA” by announcing that it would not be resolving licensing questions due to budget concerns).

149. Scholars have documented the difficulties that may arise. See generally Biber, *supra* note 4, at 6 (describing models in which agencies are regulators of other agencies); J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217, 2221 (2005) (“This Article explores the problem of agency reluctance in the face of multiple mandates and explains how and why agencies might resist secondary mandates.”); Robert Durant, Michael R. Fitzgerald & Larry W. Thomas, *When Government Regulates Itself: The EPA/TVA Air Pollution Control Experience*, 43 AM. SOC’Y PUB. ADMIN. 209, 210–14 (1983) (documenting difficulties between the Tennessee Valley Authority and the EPA); Freeman & Rossi, *supra* note 4, at 1135–36 (describing the issues arising from overlapping agency delegations). Even so, Congress may have important reasons for establishing such schemes. See Barkow, *supra* note 23, at 52 (noting that multiple-agency schemes may be created to “limit presidential control”); Freeman & Rossi, *supra* note 4, at 1146–49 (describing the benefits of agency coordination);

Congress has not expressly mandated particular relationships, but has tacitly given multiple agencies responsibility for overlapping areas.<sup>150</sup> Scholars have collected a number of examples<sup>151</sup> of opportunities for agencies to exercise veto or regulatory powers over each other.<sup>152</sup> For

---

Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 212 (“A statute that allocates authority to multiple government entities relies on *competing agents* as a mechanism for managing agency problems.”); Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181, 224 (2011) (“Because of . . . high costs, bureaucratic redundancies are most often worthwhile when the redundant agency provides a significant benefit by safeguarding against high-magnitude harm.”); Stack, *supra* note 3, at 290 (collecting political-science literature suggesting that Congress prefers to insulate agencies in periods of divided government).

150. See, e.g., Freeman & Rossi, *supra* note 4, at 1145–46 (identifying four types of shared regulatory space); Gersen, *supra* note 149, at 210 (“[T]he mere fact of jurisdictional overlap leaves unresolved the important subsequent question of whether authority is equal or hierarchical.”).

151. See, e.g., Biber, *supra* note 4, at 45–52 (describing the model of an agency as a regulator of another, as exemplified by oversight by the Office of Management and Budget (OMB)); Freeman & Rossi, *supra* note 4, at 1160–61 (describing concurrence requirements and arrangements conferring veto power). Other important examples include consultation requirements, which have the potential to create unequal power amongst agencies. Freeman & Rossi, *supra* note 4, at 1158, 1182. For example, though the EPA administrator “may consult” with any other agency when considering a pesticide application, 7 U.S.C. § 136a(f)(3) (2006), a number of agencies must not only consult, but also provide reasons if they deviate from the consulting agency’s suggestions. See Freeman & Rossi, *supra* note 4, at 1157–58 (providing the details of consultation requirements imposed by the EPA and other agencies); *id.* at 1168 (citing Dodd-Frank Wall Street Reform and Consumer Protection (Dodd-Frank) Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of the U.S. Code)); see also *Am. Farm Bureau Fed’n v. EPA*, 559 F.3d 512, 521 (D.C. Cir. 2009) (holding that the EPA had failed to explain adequately its rejection of recommendations by the Clean Air Scientific Advisory Committee, despite a statutory provision requiring such an explanation); *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1270–73 (D.C. Cir. 2004) (rejecting the EPA’s rationale for failing to follow National Academies of Science compliance-period recommendations and holding impermissible the EPA’s interpretation of the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (codified as amended in scattered sections of 15, 16, 38, and 42 U.S.C.), impermissible, given that its standard differed sharply from that recommended by the Academies). In other situations, the agency must adopt the recommendations unless it explains how doing so would conflict with the agency’s legal duties. Freeman & Rossi, *supra* note 4, at 1159–60 (citing amendments to the Federal Water Power Act, ch. 285, 41 Stat. 1063 (1920) (codified as amended at 16 U.S.C. §§791a–823d (2006 & Supp. IV 2010))). Finally, some schemes require agencies to obtain approval from another agency before acting, such as the operation of the section 7 consultation provisions of the Endangered Species Act of 1973, 16 U.S.C. § 1536(a)(2) (2006). Biber, *supra* note 4, at 53; Freeman & Rossi, *supra* note 4, at 1158. A classic statement of the force of a biological opinion is found in *Bennett v. Spear*, 520 U.S. 154 (1997). See *id.* at 169–70 (describing the “virtually determinative effect of [the Fish and Wildlife Service’s] biological opinions”).

152. Another example is the Deepwater Port Act (DWPA) of 1974, 33 U.S.C. §§ 1501–1524 (2006 & Supp. IV 2010), which governs the licensing of such ports and requires many layers of statutory procedure before the secretary of transportation may issue a construction license, *id.* § 4, 33 U.S.C. § 1503. The Act provides that the secretary may issue a license after making

purposes of this Article, I highlight three examples that help illustrate why fidelity to statutory mandates and congressional intent are so important for the deference dilemma: the Dodd-Frank Act, the Office of Information and Regulatory Affairs's (OIRA's) regulatory oversight role, and the relationship between the EPA and the Tennessee Valley Authority (TVA).

1. *Dodd-Frank Act.* The Dodd-Frank Wall Street Reform and Consumer Protection Act<sup>153</sup> creates a particularly complex set of interagency relationships. One such example involves the Consumer Financial Protection Bureau (CFPB), charged with regulating financial products to protect consumers.<sup>154</sup> Although the CFPB has full rulemaking authority, the rules it promulgates can be set aside by the Financial Stability Oversight Council (FSOC), which is comprised of traditionally industry-friendly heads of other agencies such as the Federal Reserve and the Securities and Exchange Commission.<sup>155</sup> Put in terms of the previous discussion, this means that an agency that is meant to develop a particular expertise—the CFPB—is subject to the oversight of a generalist agency with a contrasting political bent.<sup>156</sup> By contrast, Congress specified that for purposes of judicial review, the CFPB is to be treated as if it “were the only agency authorized to apply, enforce, interpret, or administer the provisions of . . . Federal consumer financial law.”<sup>157</sup> In addition, a decision by the FSOC to set

---

numerous findings, subject to compliance with section 102 of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (2006). DWPA § 5, 33 U.S.C. § 1504; *see also* Gulf Restoration Network v. U.S. Dep't of Transp., 452 F.3d 362, 365–67 (5th Cir. 2006) (describing the statutory scheme in the context of a challenge to an environmental impact statement for a liquefied-natural-gas construction-license application). In effect, the EPA can veto a license if it determines that the port will not comply with various environmental statutes, including the CAA and Clean Water Act, 33 U.S.C. §§ 1251–1387 (2006 & Supp. IV 2010). DWPA § 4(c)(6), 33 U.S.C. § 1503(c)(6); *see also id.* § 4(c)(8), 33 U.S.C. § 1503(c)(8) (providing a veto for the governor of an adjacent coastal state).

153. Dodd-Frank Act, 124 Stat. 1376.

154. Dodd-Frank Act § 1011, 124 Stat. at 1964–65 (codified at 12 U.S.C. § 5491 (Supp. IV 2010)). For a detailed discussion of the compromises and institutional-design considerations behind the CFPB, *see* Barkow, *supra* note 23, at 72–78.

155. Dodd-Frank Act § 1023(c)(3)(A), 124 Stat. at 1985–86 (codified at 12 U.S.C. § 5513(c)(3)(A)) (requiring a two-thirds vote); *id.* § 111(b), 124 Stat. at 1392–93 (codified at 12 U.S.C. § 5321(b)) (establishing the composition of the FSOC); *see also* Barkow, *supra* note 23, at 75 (describing the FSOC's composition and industry-friendly tilt).

156. Note, however, that much of the FSOC's membership is drawn from independent agencies. Dodd-Frank Act § 111(b), 124 Stat. at 1392–93 (codified at 12 U.S.C. § 5321(b)).

157. *Id.* § 1022(b)(4)(B), 124 Stat. at 1981 (codified at 12 U.S.C. § 5512(b)(4)(B)).

aside a CFPB rule must be accompanied by an explanation of reasons and is reviewable under the APA.<sup>158</sup>

Numerous other provisions of the Dodd-Frank Act also give the secretary of the treasury—an executive-agency head—important veto powers over the actions of other agencies.<sup>159</sup> In the context of orderly liquidations, for instance, the secretary of the treasury has broad authority, beginning with the power to initiate a liquidation process if he determines that a financial company is in default or is in danger of default in circumstances in which default would endanger the U.S. economy.<sup>160</sup> Although a review process follows in which the Federal Reserve and the Federal Deposit Insurance Corporation (FDIC) can issue liquidation recommendations, the secretary of the treasury, in consultation with the president, holds veto power over initiation of the liquidation process.<sup>161</sup> At this juncture, a financial company that objects to a determination to proceed with liquidation triggers a novel procedure. The secretary of the treasury may file a petition with the U.S. District Court for the District of Columbia, which determines whether the secretary’s determination was arbitrary and capricious.<sup>162</sup>

2. *OIRA’s Oversight Role.* An examination of OIRA—which is located within the Office of Management and Budget (OMB)—is also instructive. Established by the Paperwork Reduction Act of 1980,<sup>163</sup> this agency has considerable power, through Executive Order

---

158. *Id.* § 1023(c)(5), (8), 124 Stat. at 1986 (codified at 12 U.S.C. § 5513(c)(5), (8)). The standard for setting aside a regulation requires the FSOC to determine “that the regulation or provision would put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk.” *Id.* § 1023(a), 124 Stat. at 1985 (codified at 12 U.S.C. § 5513(a)).

159. *See, e.g., id.* § 113(a)(1), 124 Stat. at 1398 (codified at 12 U.S.C. § 5323(a)(1)) (requiring an affirmative vote by the secretary of the treasury to subject a nonbank financial institution to supervision by the Federal Reserve).

160. *See* Dodd-Frank Act § 203(b), 124 Stat. at 1451 (codified at 12 U.S.C. § 5383(b)) (setting forth the standards for this determination).

161. Dodd-Frank Act § 203(b), 124 Stat. at 1451 (codified at 12 U.S.C. § 5383(b)).

162. *Id.* § 202(a)(1)(A)(iii), 124 Stat. at 1445 (codified at 12 U.S.C. § 5382(a)(1)(A)(iii)). If the court fails to issue an order within twenty-four hours of receiving the petition, the petition is deemed to be granted by operation of law. *Id.* § 202(a)(1)(A)(v), 124 Stat. at 1445 (codified at § 5382(a)(1)(A)(v)). Decisions are appealable. *Id.* § 202(a)(2), 124 Stat. at 1446 (codified at 12 U.S.C. § 5382(a)(2)).

163. Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (codified as amended in scattered sections of the U.S. Code); *id.* sec. 2(a), § 3503, 94 Stat. at 2814–15 (codified as amended at 44 U.S.C. § 3503 (2006)) (establishing OIRA).

12,866<sup>164</sup> and other mechanisms, to act as a gatekeeper for new federal regulations by imposing cost-benefit analysis.<sup>165</sup> The typical account of OIRA describes it as one of the most important means by which the president exercises control over the executive agencies.<sup>166</sup> Its reviews have teeth; for example, at President Obama's direction, OIRA rejected a major EPA rulemaking that would have strengthened ozone standards under the CAA.<sup>167</sup> Yet it generally evades judicial review by virtue of the relevant statutory schemes.<sup>168</sup> As a result, this generalist agency has significant power relative to the numerous agencies that are subject to OIRA review and that otherwise bring their policymaking and expertise to bear on rulemaking.<sup>169</sup> Nevertheless, OIRA's review is not meant to interfere with agencies' statutory obligations.<sup>170</sup>

---

164. Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 745 (2006), *and* 5 U.S.C. § 601 app. at 108 (Supp. IV 2010).

165. *See id.* § 1(a), 3 C.F.R. at 638–39, *reprinted in* 5 U.S.C. § 601 app. at 745 (2006) (“In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives.”); *see also* Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011) (supplementing and reaffirming the “principles, structures, and definitions . . . established in” Executive Order 12,866).

166. *See* Biber, *supra* note 4, at 46–47 (describing direct regulation by the OMB, OIRA's home agency); Kagan, *supra* note 3, at 2277–78 (describing the emergence of this process during the Reagan administration); Mendelson, *supra* note 3, at 1146–47 (documenting the presidential supervision exercised via the OMB and OIRA); *cf.* Barkow, *supra* note 23, at 32 (noting that most, but not all, independent agencies are insulated from the political control exerted via OIRA). Although it may seem odd that a political agency (OIRA) would trump a similarly political agency (such as the EPA)—after all, both are subject to presidential control—OIRA generally has a much closer relationship with the president and is therefore in a position to exert enormous pressure. *See generally* RENA STEINZOR, MICHAEL PATOKA & JAMES GOODWIN, CTR. FOR PROGRESSIVE REFORM, WHITE PAPER NO. 1111, BEHIND CLOSED DOORS AT THE WHITE HOUSE: HOW POLITICS TRUMPS PROTECTION OF PUBLIC HEALTH, WORKER SAFETY, AND THE ENVIRONMENT (2011) (detailing study findings suggesting that OIRA's policies have led to a disproportionate impact by industry groups as compared to public-interest groups).

167. John M. Broder, *Obama Abandons a Stricter Limit on Air Pollution*, N.Y. TIMES, Sept. 3, 2011, at A1.

168. *See, e.g.*, Exec. Order No. 12,866 § 10, 3 C.F.R. at 649, *reprinted in* 5 U.S.C. § 601 app. at 749 (2006) (“This Executive order . . . does not create any right or benefit, substantive or procedural, enforceable at law or equity . . .”).

169. Note, however, that adjudication and independent agencies are normally not subject to OIRA review. Barkow, *supra* note 23, at 32. This fact highlights another feature of agency independence as well as the political nature of OIRA's activities.

170. *See* Executive Order No. 13,563 § 7(b)(i), 76 Fed. Reg. at 3822 (“Nothing in this order shall . . . impair or otherwise affect . . . authority granted by law to a department or agency, or the head thereof . . .”); *see also* Natural Res. Def. Council v. EPA, 797 F. Supp. 194, 198 (E.D.N.Y. 1992) (“OMB's review of regulations does not apply where it would conflict with statutory deadlines.”).

3. *The EPA and the TVA.* Finally, the relationship between the EPA and the TVA is a paradigmatic example of what can happen when one agency regulates another.<sup>171</sup> These agencies, the latter of which is a government corporation subject to executive control, have a long and somewhat embarrassing conflict between them.<sup>172</sup> Under the CAA, for instance, federal facilities must comply with CAA standards; the EPA, however, has struggled to enforce those standards.<sup>173</sup> Early in the history of the CAA, the EPA fought to bring some of the TVA's out-of-date coal-fired power plants into compliance with new sulfur-dioxide (SO<sub>2</sub>) emissions standards.<sup>174</sup> The TVA refused to comply with the EPA's view that the TVA must apply to the states for operating permits under the CAA.<sup>175</sup> Although the CAA required federal facilities to comply with the CAA's standards, how that compliance should be achieved was unclear.<sup>176</sup> Ultimately, the two negotiated a settlement, but not before numerous congressional actions, judicial decisions, and political machinations had taken place.<sup>177</sup>

---

171. See generally ROBERT F. DURANT, WHEN GOVERNMENT REGULATES ITSELF: EPA, TVA, AND POLLUTION CONTROL IN THE 1970S (1985) (detailing the controversy).

172. See *McCarthy v. Middle Tenn. Elec. Membership Corp.*, 466 F.3d 399, 406 (6th Cir. 2006) (holding that the TVA is a government agency for purposes of the APA).

173. See Melinda R. Kassen, *The Inadequacies of Congressional Attempts To Legislate Federal Facility Compliance with Environmental Statutes*, 54 MD. L. REV. 1475, 1476 (1995) (“[The] EPA and states have had difficulty enforcing environmental regulations against federal facilities.”); see also *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236, 1260 (11th Cir. 2003) (holding the EPA's practice of issuing Administrative Compliance Orders to the TVA to be unconstitutional); cf. *Sierra Club v. EPA*, No. 95-1562, 1996 WL 678511, at \*3 (D.C. Cir. Oct. 22, 1996) (upholding the EPA's rescission of a rule regulating radionuclide emissions from nuclear-power plants when the NRC's regulations sufficiently protected public health). In the CAA, as well as other federal environmental statutes, a significant federalism dimension is present. Although regrettably beyond the scope of this Article, that dimension merits close attention and could provide important insights for the deference dilemma. See *Miss. Comm'n on Natural Res. v. Costle*, 625 F.2d 1269, 1271 (5th Cir. 1980) (upholding the EPA's disapproval of state water-quality standards); ROBERT L. GLICKSMAN, DAVID L. MARKELL, WILLIAM W. BUZBEE, DANIEL R. MANDELKER & DANIEL BODANSKY, ENVIRONMENTAL PROTECTION: LAW AND POLICY 554–680 (6th ed. 2011) (describing the distribution of federal and state responsibilities under the Clean Water Act).

174. Durant et al., *supra* note 149, at 210; see also *Big Rivers Elec. Corp. v. EPA*, 523 F.2d 16, 22 (1975) (upholding the EPA's view of the appropriate method to reduce SO<sub>2</sub> emissions).

175. Durant et al., *supra* note 149, at 212.

176. *Id.*

177. See generally *id.* at 212–14 (recounting the political, legal, and regulatory battles between the TVA and the EPA). President Carter's political appointments of TVA members helped push through the settlement; citizen suits also played a prominent role in moving the issue forward. *Id.* at 213 (describing the president's appointment, made after consultation with environmentalists, of TVA critic S. David Freeman to the TVA board).

Stories like these reveal the enormous expense, delay, and uncertainty that can result when Congress requires one agency to regulate another. Further, a few observations seem relevant to all the examples in this Part. All of the examples involve scenarios in which the reasons for deference stand in tension. But the examples all illustrate carefully designed statutory schemes that contemplate particular roles for each agency and thereby establish standards against which courts may judge agency actions.

### III. RESOLVING THE DEFERENCE DILEMMA

As demonstrated by the discussion in Parts I and II, the expertise and presidential-control justifications for deference do not necessarily complement one another in statutory schemes that involve overlapping or competing jurisdiction, particularly when an independent agency is involved. Indeed, when agencies are positioned so as to be in tension with one another, the traditional justifications for deference may point in opposite directions. But this observation—although helping to illuminate the issues on judicial review—must yield to a broader principle: consistency with the organic statute and congressional intent are critical to untangling the deference dilemma. In fact, they may even obviate it.

This Part develops that concept by first addressing more specifically how the deference dilemma might arise during judicial review. Ultimately, this analysis supports the claim that—presidential direction and expertise notwithstanding—fidelity to the organic statute and the reasoned-decisionmaking requirements remain the touchstones of judicial review. These touchstones facilitate congressional control while recognizing the policymaking authority of the executive branch. Maximizing both ought to be a paramount goal of judicial review in any circumstance, and especially when agencies mount competing claims to deference. This approach blends well with existing case law as a descriptive matter, and it also establishes what Judge Kavanaugh's *In re Aiken County* concurrence did not: a norm that accounts for the roles of all three branches in administrative law.

### A. *How the Deference Dilemma Arises*

It is rare for agencies to be directly opposing parties before a court. Agencies do not typically sue one another,<sup>178</sup> though they are occasionally opposing parties by virtue of adjudicatory relationships or split-enforcement structures.<sup>179</sup> In many instances, conflicting agency views tend to lurk in the background, becoming apparent only when the action of one of those agencies is challenged.<sup>180</sup> The Yucca Mountain story illustrates how the deference dilemma can arise. In *In re Aiken County*, the petitioners challenged the DOE's decision to abandon the Yucca Mountain Project and move to withdraw its construction-license application.<sup>181</sup> The court, of course, was fully aware of the ASLB's decision to deny the motion, which was part of the record.<sup>182</sup> It also repeatedly made reference to the behavior and statutory obligations of the NRC.<sup>183</sup> Overall, however, the court focused on the particular issue before it—the DOE's allegedly unlawful behavior with respect to the statutory scheme—rather than

---

178. Biber, *supra* note 4, at 52 (“But agencies do not generally sue each other in court . . .”). The executive branch has developed a number of ways to resolve disputes internally. For example, Executive Order 12,866 includes a process for resolving disagreements among agency heads. Exec. Order No. 12,866 § 7, 3 C.F.R. 638, 648 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 108, 111 (Supp. IV 2010); *see also* Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CALIF. L. REV. 255 (1994) (criticizing the solicitor general's control over independent-agency litigation before the Supreme Court); Freeman & Rossi, *supra* note 4, at 1155–81 (describing executive-branch-coordination instruments, including the role of the Office of Legal Counsel and memoranda of understanding).

179. *See, e.g.*, *Hinson v. Nat'l Transp. Safety Bd.*, 57 F.3d 1144, 1151–52 (D.C. Cir. 1995) (adjudicating a Federal Aviation Administration (FAA) petition for review of a National Transportation Safety Board order); *Nuclear Regulatory Comm'n v. Fed. Labor Relations Auth.*, 859 F.2d 302, 312 (4th Cir. 1988) (ruling on an NRC petition for review of a bargaining order by the Federal Labor Relations Authority), *vacated sub nom.* *Nat'l Treasury Emps. Union v. Nuclear Regulatory Comm'n*, 496 U.S. 901 (1990).

180. *See, e.g.*, *Gulf Restoration Network v. U.S. Dep't of Transp.*, 452 F.3d 362, 366 (5th Cir. 2006) (considering claims against the secretary of transportation and describing the National Oceanic and Atmospheric Administration Fisheries Service's concern about the secretary's action).

181. *In re Aiken Cnty.*, 645 F.3d 428, 430 (D.C. Cir. 2011).

182. *See id.* at 432 (citing U.S. Dep't of Energy, No. LBP-10-11 (Atomic Safety & Licensing Bd., Nuclear Regulatory Comm'n June 29, 2010), *available at* <http://pbadupws.nrc.gov/docs/ML1018/ML101800299.pdf> (denying the DOE's motion to withdraw), *aff'd by an equally divided commission*, No. CLI-11-07 (Nuclear Regulatory Comm'n Sept. 9, 2011)).

183. *E.g., id.* (quoting *U.S. Dep't of Energy*, No. LBP-10-11); *id.* at 434–35 (“At this stage of the administrative process, however, the DOE has no say in whether the Yucca Mountain license application will be reviewed and granted. That power lies exclusively with the Secretary of the Commission and the NRC Licensing Board . . .”); *id.* at 436 (suggesting that the NRC may be subject to a suit for unreasonable delay).

reaching more broadly to attempt to resolve the conflict between the DOE and NRC.<sup>184</sup>

Of course, the claim against the DOE was undeniably not final because the full NRC had yet to consider the ASLB's decision. But more than that, the claim was contingent on future events. As the action agency, the NRC could also be open to a suit depending on its decision on the motion to withdraw the Yucca Mountain Project application. For example, if it denied the motion, the license application would proceed to the next phase. If it granted the motion, the NRC itself would be subject to suit—a possibility that was not lost on Judge Janice Rogers Brown in her concurring opinion.<sup>185</sup> A claim against the NRC would be based on an alleged failure to adhere to the NWPA. Had the NRC adopted the DOE's reasoning for halting the Yucca Mountain Project, it would have been subject to the same criticisms—lack of consistency with the statute and inadequate reasoning. And had the NRC ultimately faced review for *denying* the motion, the same standards would have applied. Either way, the NRC would be viewed through the lens of the statutory mandate and standard hard-look requirements.

Attention to statutory mandates and reason giving were also central to the Supreme Court's approach in *Martin v. Occupational Safety & Health Review Commission*,<sup>186</sup> in which both the secretary of labor and the Occupational Safety and Health Review Commission (OSHRC) sought *Chevron* deference for their interpretations of the Occupational Safety and Health Act of 1970.<sup>187</sup> In that case, the Court looked carefully at the statutory scheme to determine which agency ought to receive deference.<sup>188</sup> Reasoning that “historical familiarity and policymaking expertise account in the first instance for the presumption that Congress delegates interpretive lawmaking power to the agency rather than to the reviewing court, [the Court] presume[d] . . . that Congress intended to invest interpretive power in the administrative actor in the best position to develop [those]

---

184. Of course, Judge Kavanaugh's concurrence grappled with the implications of the NWPA more broadly. *Id.* at 439 (Kavanaugh, J., concurring).

185. *Id.* at 438 (Brown, J., concurring).

186. *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144 (1991).

187. Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–678 (2006 & Supp. IV 2010).

188. *Martin*, 499 U.S. at 152–55 (examining the structure of the split-enforcement scheme and its legislative history).

attributes.”<sup>189</sup> The Court ultimately held that the statute required interpretations of the secretary to trump those of the OSHRC, but the Court also emphasized that the secretary’s interpretations must be reasonable.<sup>190</sup> In other words, the statute governed the relationship between the agencies and their respective spheres of authority; once that issue had been decided, ordinary judicial review was to proceed, with deference as warranted.<sup>191</sup>

As a final illustration, consider *Environmental Defense Fund v. Thomas*,<sup>192</sup> which represented a high-water mark in courts’ involvement in the interaction between agencies and OMB review. In that case, the EPA faced a challenge to its failure to promulgate standards under the Resource Conservation and Recovery Act of 1976<sup>193</sup> within the statutory timeframe.<sup>194</sup> In addition to challenging the EPA’s failure to act, however, the plaintiffs argued that the OMB’s review had interfered with the EPA’s ability to meet the deadline and sought equitable relief against OMB.<sup>195</sup> The court acknowledged the “authority of the president to control and supervise executive policymaking,”<sup>196</sup> but it expressed concern that OMB review could be used to undermine congressional design.<sup>197</sup> In fact, it held that the OMB lacked the authority to use its review power to delay EPA’s promulgation of mandated regulations beyond the statutory deadline.<sup>198</sup> *Environmental Defense Fund v. Thomas* was unusual because the court was willing to issue a declaratory judgment against the OMB, which was not the action agency under the applicable

---

189. *Id.* at 152; *see also* *Hinson v. Nat’l Transp. Safety Bd.*, 57 F.3d 1144, 1148 n.2 (D.C. Cir. 1995) (noting that had the FAA not waived its claim to *Chevron* deference, it would have been entitled to that deference under the statutory scheme).

190. *Martin*, 499 U.S. at 158.

191. *See id.* at 159 (remanding to the court of appeals to determine whether the secretary had made an unreasonable interpretation).

192. *Envntl. Def. Fund v. Thomas*, 627 F. Supp. 566 (D.D.C. 1986).

193. Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901–6992k (2006 & Supp. III 2009).

194. *Thomas*, 627 F. Supp. at 567.

195. *Id.* This review was undertaken pursuant to Executive Order 12,291, 3 C.F.R. 127 (1982), which was a predecessor to Executive Order 12,866, *see* Exec. Order No. 12,866 § 11, 3 C.F.R. 638, 649 (1994), *reprinted in* 5 U.S.C. § 601 app. at 745, 749 (2006) (revoking Executive Order 12,291).

196. *Thomas*, 627 F. Supp. at 570.

197. *Id.*

198. *Id.*; *see also* *Natural Res. Def. Council v. EPA*, 797 F. Supp. 194, 198 (E.D.N.Y. 1992) (“OMB’s review of regulations does not apply where it would conflict with statutory deadlines.”).

statutory scheme. Even so, the court's approach—which focused on the applicable statutory mandate and EPA's obligations thereunder—supports the view that fidelity to statutory mandates is an important component of resolving the deference dilemma.<sup>199</sup>

*B. The Centrality of Statutes and Congressional Design*

1. *The Statutory Mandate.* In this Section, I suggest that—both as a descriptive and as a normative matter—determining the legislative intent behind a statute is central to resolving the deference dilemma. For the descriptive proposition, consider again the examples in the previous Sections. At times Congress makes clear which agencies are entitled to deference, as it did in the Dodd-Frank Act. When Congress does not act with such specificity and a multiagency scheme faces judicial review, courts will focus on the challenged agency's compliance with its statutory mandate, as the Yucca Mountain example shows. And when two agencies truly are at odds, as illustrated by *Martin v. Occupational Safety & Health Review Commission*, a court's role is to examine the statutory scheme and determine which agency Congress intended to enjoy deference. Once these matters are decided, the appropriate action is to proceed with the typical reasoned-decisionmaking review, which includes any deference principles that might apply.

For the normative proposition, consider again Judge Kavanaugh's concurrence in *In re Aiken County*. Judge Kavanaugh was correct that independent agencies are insulated, at least somewhat, from presidential control.<sup>200</sup> If presidential control is lacking, justifying deference on the basis of accountability through the electoral process does seem hard.<sup>201</sup> Recall too that Judge Kavanaugh discredited the logic of *Humphrey's Executor*, the opinion upholding

---

199. This conclusion holds in the cooperative-federalism context as well. See *Miss. Comm'n on Natural Res. v. Costle*, 625 F.2d 1269, 1276 (5th Cir. 1980) (emphasizing congressional intent and whether the EPA had exceeded its statutory jurisdiction in a dispute between a state agency and the EPA).

200. *But see* Barkow, *supra* note 23, at 30 (“[J]ust because agency officials have for-cause job protection does not mean they are immune from political pressure. Presidents seem to be able to remove them without litigating the question of good cause because officials typically voluntarily accept a presidential request for their resignation or otherwise fail to challenge their removal.”); Stack, *supra* note 3, at 294 (describing the means by which the president can exert influence, even over independent agencies).

201. Indeed, the concern over too little accountability is at least partly what motivated the Supreme Court in *Free Enterprise Fund* to reject a multilayered independent structure. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3153–55 (2010).

the constitutionality of independent agencies. Even overlooking the problems with *Humphrey's Executor*, one argument for independent agencies remains: they are creatures of congressional intent.<sup>202</sup> The weakness of Judge Kavanaugh's concurrence is that it does not address this fundamental feature of the Yucca Mountain scheme. Congressional intent may not always be obvious, but the NWSA's text, as well as the history of the NRC, provides a clear indication of what Congress intended.<sup>203</sup>

Even outside of that context, statutory authority and congressional intent are fundamental to administrative law. Those concepts are reflected, of course, in *Chevron* and, more specifically, in *United States v. Mead*.<sup>204</sup> But what those decisions and others achieve is not just a rote process; it is a meaningful way for the Court to facilitate the strategic choices of *both* branches.<sup>205</sup> As Professor Lisa Bressman argues, the Court, in elaborating administrative procedures, has attempted to mediate between the executive and legislative branches in such a way as to enable congressional monitoring of agency action.<sup>206</sup> The reasoned-decisionmaking requirement, for example, encourages agencies to share information early, enabling administrative watchdogs to provide information to Congress before rules become final.<sup>207</sup> The principle that courts may not substitute their judgment for that of agencies is not just grounded in a judicial emphasis on presidential accountability or comparative expertise, but on a judicial reluctance to substitute judge-made policy

---

202. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 621–25 (1935) (examining the statutory language and legislative history of the Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41–58 (2006 & Supp. IV 2010))).

203. Likewise, the dispute between the EPA and the TVA ultimately concluded against a backdrop of clear congressional intent.

204. *United States v. Mead*, 533 U.S. 218 (2001); *see id.* at 229 (reasoning that deference should be given when Congress intended for an agency to act with the force of law); *see also* *Chevron U.S.A. Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (reasoning that if congressional intent is clear, the analysis stops, but that if intent is unclear, Congress has impliedly delegated the matter to the agency's reasonable interpretive powers). For purposes of this analysis, I assume that constitutional objections to the independent agency such as those present in *Free Enterprise Fund* are not present. I further acknowledge, but do not address here, the strong unitary-executive view that would require the president to exercise control over all of the agencies pursuant to his duty to execute the law. *Cf. generally* STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 24* (2008); Bressman & Thompson, *supra* note 12, at 631 ("Most scholars (and judges) hold a more pragmatic view of presidential power.").

205. Bressman, *supra* note 35, at 1775.

206. *Id.* at 1776.

207. *Id.* at 1777.

views for those of the other two branches.<sup>208</sup> Such reluctance seems consistent with a Bickellian desire to take a hard stance vis-à-vis one of the other branches only when necessary.<sup>209</sup> If that intuition is true, then congressional intent ought to be the primary feature in resolving the deference dilemma.<sup>210</sup>

2. *Determining Intent.* As shown by the Dodd-Frank Act, Congress is sometimes explicit in its approach to multiagency schemes in which deference dilemmas might arise. For example, when the CFPB issues rules, it will receive deference even though the rules it promulgates are subject to an executive veto from the secretary of the treasury.<sup>211</sup> When the secretary makes a contested decision to initiate liquidation proceedings, he is open to an immediate judicial challenge under the arbitrary-and-capricious standard. This is true even though the secretary will have consulted with other agencies in making his ultimate decision.<sup>212</sup>

But for statutory schemes where Congress has not specified how interagency conflicts should be resolved, a closer look at the circumstances is necessary. If a single agency is challenged, judicial review must adhere to a routine assessment of compliance with that agency's statutory mandate and a reasonableness review—regardless of whether a competing-agency viewpoint lurks in the background. In

---

208. *See id.* (“If reviewing courts can impose their own preferences, they may simply swap one principal-agent problem (between Congress and agency) for another (between Congress and courts).”).

209. *See* Mark Seidenfeld, *Chevron's Foundation*, 86 NOTRE DAME L. REV. 273, 289 (2011) (“Implicit in Article III's assignment of the judicial power is the premise that political powers, being extrajudicial, belong to the other branches of government, and that the judiciary therefore should avoid interfering with those branches' exercise of their powers where such interference would require the courts to exercise the outer bounds of judicial power.”). These insights may hold true even for independent agencies because administrative procedures increase the ability of the legislature to exercise its oversight role. Bressman, *supra* note 35, at 1807. Professor Bressman also argues that the president's role in independent-agency decisionmaking should not be understated and points out that the president has the authority to select the chair of most of the independent agencies and that the independent agencies often share responsibilities with executive agencies—again, providing both executive and legislative checks. *Id.* at 1808 (using the Federal Communications Commission as an example). Thus, the general principle of the Court's acting as a mediator between the other branches works just as well for independent agencies as for executive agencies.

210. I acknowledge that deference is not just a means of deferring to Article I desires, but also a means of implementing Article III values, as Professor Seidenfeld suggests. *See supra* note 209. I believe, however, that preserving a role for Article I values is consistent with, and buttresses, Article III considerations.

211. *See supra* text accompanying notes 153–58.

212. *See supra* text accompanying notes 159–62.

situations like the one in *Martin v. Occupational Safety & Health Review Commission*, in which two agencies truly are at odds with one another, returning to the lessons of institutional design as a means of inferring congressional intent may be helpful. In these circumstances, courts can reasonably assume that fidelity to statutory mandates is the congressional preference. Thus, to the extent that one agency's attributes further such a preference, that agency's position should govern—provided, of course, that the agency adheres to its statutory responsibilities and engages in reasoned decisionmaking. This approach, however, does not merely favor Congress over the president. It preserves a role for both by looking first at Congress's design—which helps ground the constitutionality of the delegation—and second to the agency's reasoning—within which a legitimate role for policymaking exists.

To the extent that a “true” deference dilemma arises—that is, a situation like the one in *Martin*—the overall statutory scheme might reveal reasons to favor one agency's approach over another's. I suggest here three factors that may be especially indicative of congressional intent: the locus of expertise, the features of independence, and the form and formality of agency procedure. These factors are meant to promote adherence to the statutory mandate and are suggested tentatively as possible—but not required—indicia of a congressional desire to promote adherence to the scope of authority within a statute.

First, the locus of expertise in a given multiagency scheme might be indicative of a congressional purpose to favor one agency over another. For example, when Congress split the AEC, Congress was partly responding to difficulties raised by having a single regulator set policy and exercise expertise: the AEC was captured by the atomic-energy industry, and safety was becoming a concern. The NRC was designed specifically to have expertise separate from the policymaking role of the DOE. Admittedly, any agency exercising specialized knowledge will need to make policy decisions to fill gaps in which uncertainty occurs. If the expertise is placed within an executive agency—as seems to be the case under the Dodd-Frank Act, for example—one can surmise that Congress intended to create a greater opportunity for presidential control of policy decisions. If the expertise is placed within an independent agency, one can surmise that Congress intended to maintain more political control for itself.

Either way, some accountability through the electoral process is retained.<sup>213</sup>

Second, independent agencies, or those agencies with features of independence, might make a greater claim to deference. As the history of the NRC demonstrates, independent agencies are designed to be less influenced by political pressure and more resistant to bureaucratic drift and capture than executive agencies. In a deference-dilemma scenario, Congress likely would prefer deference for the more insulated agency as a way to maintain conformity with statutory mandates.

As a theoretical matter, some suggest that the lesser degree of political control over independent agencies justifies a lower level of deference—that is, a greater amount of judicial scrutiny.<sup>214</sup> That account, however, falls short in the competing-agency context. When Congress itself has designed a system in which multiple agencies operate, and in which two or more might be in tension, it makes sense that *Congress's* preference would be for courts to show deference to the more insulated agency.

Even if an agency is not independent, it may have other special features that insulate it from capture or that protect it against drift that would likewise justify deference. Professor Rachel Barkow identifies a number of such features.<sup>215</sup> For example, a particular agency program may be funded by an external source. As Professor Barkow notes, when agencies must go through the president and the OMB, they are subject to political pressures. Likewise, agencies that must work directly with Congress are subject to pressures in that arena.<sup>216</sup> This and other features, such as technical qualifications for

---

213. A potential difficulty may arise in locating expertise appropriately. At a macro level, for example, both the DOE and the NRC have significant expertise in matters pertaining to nuclear energy. And both fill gaps of scientific uncertainty with policy choices. If courts wish to consider expertise for purposes of making deference decisions, however, they will need to evaluate the relevant statutory scheme at a level of high specificity.

214. Kagan, *supra* note 3, at 2376–77 (suggesting that independent agencies should receive less deference on *Chevron* step two than executive agencies because independent agencies are more insulated from presidential control). Former Professor Kagan does not account for the expertise ground for deference in *Chevron* itself, although she does argue that the congressional-intent ground is typically unavailable because usually an express delegation of authority does not exist. *See id.* at 2380 (making a similar argument for hard-look review).

215. *See* Barkow, *supra* note 23, at 42 (listing other potential tools for insulating agencies from regulatory capture).

216. *Id.* at 43. But a few agencies have independent sources of funding. *Id.* at 44. As examples, Professor Barkow mentions the Federal Reserve, the Office of the Comptroller of the Currency, and the Public Company Accounting Oversight Board as receiving independent

appointments, may be useful in determining which agency has the greater claim to deference.<sup>217</sup>

Finally, the form and formality of the agency actions at issue may be relevant. As previously mentioned, independent agencies were originally established primarily to function as adjudicatory bodies. Professor Kevin Stack documents a “strong and consistent validation (and even implication of) removal protection for officers engaged in adjudication.”<sup>218</sup> In the independent-agency context, this trend means that the Court has favored protecting independence over permitting presidential control.<sup>219</sup> But this factor need not be limited to independent agencies. Executive agencies also engage in adjudication, and this feature might also factor in favor of deference to those agencies.<sup>220</sup>

The relative formality of an agency’s action is also important. For instance, the NRC’s licensing procedures for Yucca Mountain involve formal adjudicatory procedures subject to sections 556 and 557 of the APA. A closed record leaves no doubt as to what the agency considered when it made its decision. Thus, exercising oversight when formal procedures are used may be easier.<sup>221</sup> By requiring formal procedures, Congress might also attempt to insulate agencies from presidential control. Formal procedures protect against drift by shielding agencies from lobbyists because *ex parte* contacts are

---

funding in the form of fees paid to the agencies by regulated entities. *Id.* The Yucca Mountain program is similarly funded by fees from waste generators and owners, in a fund managed by the DOE. *See* Nuclear Waste Policy Act of 1982 § 111(b)(4), 42 U.S.C. § 10131(b)(4) (2006) (listing the purposes of the NWPA, including the establishment of the Nuclear Waste Fund, “composed of payments made by the generators and owners of such waste and spent fuel”). Given the strong presence of the other factors I mention that favor deference to the NRC on the license-withdrawal issue, I would not expect the DOE’s management of the Nuclear Waste Fund to be determinative in this particular dispute.

217. *See* Barkow, *supra* note 23, at 18 (listing a number of features that may help insulate agencies from capture).

218. Stack, *supra* note 73, at 2406.

219. *Id.* at 2406–07. Professor Stack elaborates that the recent *Free Enterprise Fund* decision does not necessarily reflect this reasoning for circumstances in which functions are combined. *Id.* at 2412–13; *see also* Verkuil, *supra* note 70, at 268 (arguing for the stronger separation of functions in the institutional design of independent agencies).

220. The EPA, for example, is an independent executive-branch agency that exercises adjudicatory functions when issuing permits. The Endangered Species Act’s consultation provision might be understood as operating similarly. *See* Biber, *supra* note 4, at 53–54 (describing consultation between the U.S. Fish and Wildlife Service and other agencies).

221. *Cf.* Bressman, *supra* note 35, at 1786–88 (noting that prohibitions on *ex parte* contacts in the *informal* rulemaking context help Congress exercise oversight by ensuring access to information about what an agency actually relied upon).

essentially excluded.<sup>222</sup> Further, Executive Order 12,866 specifically excludes from its coverage “[r]egulations or rules issued in accordance with the formal rulemaking provisions of [the APA].”<sup>223</sup> And adjudications, whether formal or informal, are not within the definition of regulation.<sup>224</sup> To the extent that Congress worries about changing executive policies and preventing drift, specifying formal procedures might provide at least some protection.<sup>225</sup> Thus, the presence of formality might serve as a factor favoring one agency over another when deference dilemmas arise.

In sum, there may be situations in which a true deference dilemma requires a court to roll up its sleeves and divine congressional intent. The factors I have suggested are appropriate considerations insofar as they promote adherence to a statutory scheme. But even if a court determines, based on these or other factors, that one agency’s position should trump another’s, I emphasize that that agency must still be judged against its statutory mandate and, ultimately, based on its reason giving.

### C. *Potential Objections*

The overarching conclusion from this Article is that the deference dilemma normally can be resolved by a simple focus on the relevant statute. To the extent that that task is difficult, courts can

---

222. See *Portland Audubon Soc’y v. Endangered Species Comm’n*, 984 F.2d 1534, 1543–48 (9th Cir. 1993) (holding that the president is subject to the prohibition on ex parte communications when a formal adjudication decision is pending before specified agency officials); Bressman, *supra* note 35, at 1807 (“[I]ndependent agencies are immune from all political interference to the extent that they engage in formal adjudication.”). Note that informal adjudication might present less pressure than other regulatory acts simply because the focus is on one entity rather than an entire industry. See Mark H. Grunewald, *The NLRB’s First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274, 282 (1991) (“[I]mportant policy changes can be lost (or hidden) in the reasoning process of adjudication.”).

223. Exec. Order No. 12,866 § 3(d)(1), 3 C.F.R. 638, 641 (1994), *reprinted in* 5 U.S.C. § 601 app. at 745, 746 (2006); see also Note, *OIRA Avoidance*, 124 HARV. L. REV. 994, 1002 (2011) (“[A]gencies retain the ability to take action in forms not subject to review under Executive Order 12,866—formal rulemaking and adjudication.”).

224. Exec. Order No. 12,866 § 3(d), 3 C.F.R. at 641, *reprinted in* 6 U.S.C. § 601 app. at 746.

225. Whether an agency might strategically choose to adopt formal procedures as a means of insulating itself from presidential control is interesting to contemplate. My research has not uncovered any examples of this type of behavior. *But see* Robert V. Percival, *Who’s In Charge? Does the President Have Directive Authority over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487, 2537–38 (2011) (“Because adjudications cannot be the subjects of presidential directive authority under any of the theories that support it, agencies can insulate themselves from presidential influence by choosing to set policy through adjudication.”). This is why the National Labor Relations Board waited so long to do rulemakings. *Id.*

consider factors that reasonably could be attributed to a congressional desire to maintain adherence to the statute. Once adherence to the statute is determined, judicial review can proceed normally, with the usual requirement of reasoned decisionmaking, in which deference means simply that a court will not substitute its own judgment for that of an agency. A few potential objections to these conclusions are considered in this Section.

First, some may be uncomfortable with what seems to be a judicial preference for Congress over the president. This concern might sound in the president's constitutional authority to execute the laws. My response is grounded in the particular task in which the courts are engaged. Judicial review must be distinguished from the other branches' constitutional roles. For instance, it is entirely appropriate for the president to execute the laws, via agencies, according to his political preferences. But the scope of an agency's authority has always been bound by congressional desires—as expressed by the relevant statutory mandate. When a deference dilemma appears to arise, the first matter is the scope of the agency's authority, which can be discerned only by evaluating that statute. If the challenged agency is within the statutory scope, then presidential prerogatives may be reviewed deferentially—at least to the extent that courts will not insert their own policy judgments. When multiple agencies truly present conflicting claims to deference, choosing the “winning” agency based on congressional intent is likewise consistent with the role of courts in implementing congressional preferences via judicial review.<sup>226</sup>

Any argument based on congressional intent must also grapple with the counterarguments that such intent (1) is entirely fictional,<sup>227</sup> (2) gives too much power to the courts,<sup>228</sup> and (3) creates more

---

226. Cf. Stack, *supra* note 3, at 303 (distinguishing judicial review of the president's construction of statutes from the president's constitutional powers).

227. See Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) (arguing that the notion of legislative intent to delegate the law-interpreting function to agencies is a legal fiction that courts apply when it seems to them that the “fair and efficient administration of [a] statute in light of its substantive purpose” requires judicial deference to agency interpretation).

228. Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735, 751 (2002) (calling *Mead's* delegation reasoning a “naked power grab by the federal courts”); cf. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 (“One who finds more often (as I do) that the meaning of a statute is apparent from its text and from its

problems than it resolves.<sup>229</sup> These criticisms are no worse in a deference-dilemma scenario than elsewhere. Recall that deference—regardless of context—is based generally on the idea that agencies have superior expertise and/or accountability vis-à-vis the courts.<sup>230</sup> But this conceptualization is weak in that it does not account for the legislative branch. Congress *might* prefer agencies to have latitude in policymaking and matters of expertise, but Congress might have an even stronger preference for avoiding bureaucratic drift, presidential influence, or agency capture. Broad attacks on congressional intent are unsatisfying because they make assumptions about the behavior and intent of the judicial and executive branches without confronting those same characteristics in the legislature.

In the end, then, examining congressional intent is a practical necessity. If Congress itself has created a scheme whereby agencies conflict, a court that is asked to resolve the issue must look to that scheme to determine a resolution. Choosing among agencies based on a different approach would be far more unprincipled because it would be too tempting for courts to insert judicial policy preferences. At least if courts can cabin their determination of congressional intent by looking at the relevant statute and possibly the factors discussed in this Section, they can better justify their ultimate decisions in a way

---

relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists.”).

229. See, e.g., Bressman, *supra* note 35, at 1790 (describing the uncertainty caused by *Mead*'s ad hoc test for assessing Congress's implied intent to delegate interpretive authority). Scholars have paid particular attention to congressional intent as it applies in the *Chevron* context. See Seidenfeld, *supra* note 209, at 277 & n.12 (describing arguments and collecting sources). To clarify, here I refer to whether Congress intended to delegate interpretive authority, a question often described as *Chevron* step zero. E.g., Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006). Of course, *Chevron*'s step one, which asks whether Congress has spoken on the precise issue in question, is both related and distinct.

230. See Breyer, *supra* note 227, at 370 (“[C]ourts will defer more when the agency has special expertise that it can bring to bear on the legal question.”); Cass R. Sunstein, *Beyond Marbury: The Executive's Power To Say What the Law Is*, 115 YALE L.J. 2580, 2582 (2006) (noting that statutory interpretation involves policymaking). Alternatively, Professor Seidenfeld has convincingly claimed an Article III justification for *Chevron*, rooted in Bickelian values. See Seidenfeld, *supra* note 209, at 289 (“Implicit in Article III's assignment of the judicial power is the premise that political powers, being extrajudicial, belong to the other branches of government, and that the judiciary therefore should avoid interfering with those branches' exercise of their powers where such interference would require the courts to exercise the outer bounds of judicial power.”); see also ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–23 (1986) (advocating for a restrained review in light of countermajoritarian difficulty). As I describe in this Article, I believe my solution to the deference dilemma is consistent with either approach.

that lends legitimacy to the administrative state generally by enforcing legislative preferences.

Finally, the factors discussed in this Article—particularly expertise—might be challenged based on their ability to promote meaningful review. Certainly expertise has been problematic in this regard: scholars have demonstrated that agencies sometimes cloak policy judgments in a shroud of science to avoid accountability and achieve more deferential judicial review.<sup>231</sup> Thus, the argument would go, using expertise as an indicator of congressional intent only stands to deepen these problems.

To be clear, expertise ought to operate as a factor at a higher level of generality. That both the NRC and the DOE have significant expertise in matters of nuclear-waste disposal cannot be doubted. But Congress created a statutory scheme whereby the NRC has a superior claim to expertise generally with respect to licensing the Yucca Mountain Project. By focusing on statutory structure, rather than particular pockets of specialized knowledge, courts can avoid sharpening the already-existing expertise-related problems in administrative law.

Note too that I am not advocating *extra* deference when these factors are present; rather, I suggest that the factors are useful considerations when courts confront the deference dilemma. This approach may mean that one agency may be entitled to deference in the sense that a court will not substitute its judgment for that of the agency. Or it could simply mean that one agency has adopted the approach that Congress intended and that further review should proceed on that basis alone. Regardless, the focus of my approach is on Congress's design, which protects administrative legitimacy while accommodating the strengths of administrative agencies.

## CONCLUSION

When agencies make competing claims to deference, traditional theories justifying judicial restraint become difficult, if not impossible, to apply. But as Congress increasingly relies on shared and overlapping regulatory jurisdiction to accomplish complex goals, the deference dilemma is likely to arise with more frequency. In this

---

231. Doremus, *supra* note 5, at 255 (“[S]cientizing regulatory decisions can insulate decision makers from the political consequences of their judgments.”); Wagner, *supra* note 5, at 1617 (arguing that “agencies exaggerate the contributions made by science in setting toxic standards in order to avoid accountability for the underlying policy decisions”).

Article, I argue that such disputes must be adjudged on the basis of fidelity to the agencies' organic statutes. By making congressional intent the hallmark of this type of review, courts can preserve their legitimizing role by ensuring that policy choices of both of the other branches have a voice. As the administrative state grows more complex, this role will be increasingly important.