

# THE UNCERTAIN EFFECTS OF SENATE CONFIRMATION DELAYS IN THE AGENCIES

NINA A. MENDELSON<sup>†</sup>

## ABSTRACT

*As Professor Anne O’Connell has effectively documented, the delay in Senate confirmations has resulted in many vacant offices in the most senior levels of agencies, with potentially harmful consequences to agency implementation of statutory programs. This symposium contribution considers some of those consequences, as well as whether confirmation delays could conceivably have benefits for agencies. I note that confirmation delays are focused in the middle layer of political appointments—at the assistant secretary level, rather than at the cabinet head—so that formal functions and political oversight are unlikely to be halted altogether. Further, regulatory policy making and even agenda setting can depend more critically on the work of career civil servants than on the political leadership of an assistant secretary, further reducing the cost of midlevel vacancies. The Article then suggests that confirmation delays can have positive effects, although the list is short. Senior civil servants, serving as acting officials, can offer valuable expertise on regulatory decisions, and their expertise with respect to core implementation and enforcement issues may exceed that of more generalist political appointees. Additionally, confirmation delays may prompt both increased leadership by longtime civil servants and reduced turnover in their ranks, with benefits to overall agency function. On the other hand, confirmation delays surely cause significant problems by reducing resources to agencies and increasing turnover in management. Missing confirmed appointees also may contribute to slower White*

---

Copyright © 2015 Nina A. Mendelson. Noncommercial copying of this work is licensed under the Creative Commons Attribution-NonCommercial License, as long as the licensee notes the author’s name, title, and the work’s first publication in the *Duke Law Journal*.

<sup>†</sup> Joseph L. Sax Collegiate Professor of Law, University of Michigan Law School. Thanks for excellent conversation and feedback to participants in the *Duke Law Journal*’s 45th Annual Administrative Law Symposium, the University of Michigan’s Governance Workshop and Research Lunch Series, and a faculty workshop at the University of Chicago Law School. Especial thanks to David Lewis for serving as a commenter on the piece, to Kate Andrias, Michael Barr, Sam Bagenstos, Riyaz Kanji, Jennifer Nou, and Biz Scott for valuable conversations, and to Joseph Celentino for outstanding research assistance. Finally, I appreciate the generous research support of the University of Michigan Law School’s Cook Fund.

*House regulatory review. More research is needed, but at a minimum, thinking about confirmation delays presents another opportunity to reflect on whether we should thin the layer of political management in agencies and on the relative importance, to administrative agency legitimacy and function, of specific expertise, compared with political accountability.*

## TABLE OF CONTENTS

Introduction .....	1572
I. Confirmation Delays .....	1574
II. Effects on Agency Function.....	1576
A. Supervision of Agency Regulation.....	1587
B. Supervision of Other Agency Decisions.....	1597
C. Other Effects of Increasing Civil Service Responsibility .....	1601
Conclusion.....	1603

## INTRODUCTION

The federal executive agencies<sup>1</sup> have been plagued by persistent delays in Senate confirmation. One year into his administration, only 64.4 percent of President Obama's Senate-confirmed positions were filled, continuing the downward trend from a still-not-very-impressive fill rate of 86.4 percent at the one-year mark of the Reagan administration.<sup>2</sup> Some of this is attributable to nomination delays

---

1. This Article focuses on executive branch agencies, conventionally understood to be those whose heads are removable at will by the President. See Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1163 (2013) ("It is often said that the legal touchstone of agency independence is whether the agency head or heads are dischargeable at will, or only for cause."). Because independent agencies are understood to be structured initially to create greater independence from the President, delays in confirming presidential appointees raise fewer distinct issues with respect to presidential control. However, for those (such as unitary executive theorists) who argue that the legitimacy and constitutionality of the administrative state depends on presidential control, confirmation delays of independent agency officials might be understood as simply worsening the difficulties accompanying the creation of independent agencies. Cf. Steven Calabresi & Saikrishna Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541, 570-99 (1994) (discussing textual arguments for a unitary Executive); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 502 (2010) ("Congress cannot reduce the Chief Magistrate to a cajoler-in-chief.").

2. ANNE JOSEPH O'CONNELL, CTR. FOR AM. PROGRESS, WAITING FOR LEADERSHIP: PRESIDENT OBAMA'S RECORD IN STAFFING KEY AGENCY POSITIONS AND HOW TO IMPROVE THE APPOINTMENTS PROCESS 8 (Apr. 2010), available at [https://cdn.americanprogress.org/wp-content/uploads/issues/2010/04/pdf/dww\\_appointments.pdf](https://cdn.americanprogress.org/wp-content/uploads/issues/2010/04/pdf/dww_appointments.pdf).

inside the White House, but much is also attributable to Senate delays.<sup>3</sup> Meanwhile, scholars have stressed the importance of the President choosing her own senior agency officials. The key issue is democratic legitimacy, because presidential control of agencies can supply political accountability. As Professor Jerry Mashaw has suggested, presidential supervision can assure an agency's democratic responsiveness, perhaps even better than close control by Congress.<sup>4</sup> The legitimizing effect of presidential control is a critical justification for the *Chevron* doctrine of judicial deference to agency interpretations.<sup>5</sup> If the President's ability to choose her own people to run the agencies is impaired, it would seem to follow that this democratic accountability would be eroded. Indeed, Professor Matthew Stephenson has argued that presidential power is at its "apex" for senior executive officials and that the prospect of electoral accountability is most salient for senior executive officials.<sup>6</sup> Beyond this, Professor Anne O'Connell has emphasized the functional consequences of vacancies in Senate-confirmed positions, stating they "likely have detrimental consequences for the administrative state and therefore for public policy"—most critically, a lack of direction by political officials to career staff, who may be "less likely to address important problems and less equipped to handle crises."<sup>7</sup> Finally, now-Justice Kagan has argued that "agency experts have neither democratic warrant nor special competence to make the value judgments—the essentially political choices—that underlie most

---

3. Delay from additional vetting in the White House to avoid confirmation problems in the Senate could also be laid at the feet of the Senate; in addition, the White House might tend to select nominees whose views are closer to those in the Senate to reduce confirmation delay.

4. JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* 153 (1997); see Cynthia R. Farina, *Undoing the New Deal Through the New Presidentialism*, 22 HARV. J.L. & PUB. POL'Y 227, 229 (1998) ("[P]laced unambiguously under the President's direction, [the regulatory state's] democratic pedigree becomes impeccable."); SIDNEY A. SHAPIRO & ROBERT L. GLICKSMAN, *RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH* 179 (2003) ("[P]olitical oversight should . . . enhance the legitimacy of the agency's endeavors by putting upon them the stamp of democratic accountability.").

5. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 463 U.S. 29, 59 (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 . . .").

6. Matthew Stephenson, *Can the President Appoint Principal Executive Officers Without a Senate Confirmation Vote?*, 122 YALE L.J. 940, 948–49 (2013).

7. Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 920 (2009).

administrative policymaking.”<sup>8</sup> The implication would be that Senate interference with the President’s ability to select senior agency officials would have substantial costs for the function and legitimacy of the administrative state.

The news so far seems bad, but there may be more to the story. This Article reflects further on the costs of confirmation delays for agency function and considers whether such delays could conceivably generate positive consequences.<sup>9</sup> In particular, this Article focuses in greater detail on the levels at which confirmation delays are concentrated and the responsibilities of affected officials and the agencies in general. First, confirmation delays are not evenly spread across appointees, but affect heads of agencies far less than those lower down in the hierarchy. Second, the impact of confirmation delays can vary by agency function. Commentators focus most on the costs to presidential influence over broad policies, as compared to simple management of program implementation. But even for such significant regulatory activity, given the gestation period required for a new policy and other factors, reliance on acting career officials to fill a position or an outright vacancy may be less costly than expected.

That said, confirmation delay certainly entails significant costs to agency function, including reductions in agency personnel resources and increased personnel turnover. Potential positive effects are not wholly lacking, but the list is short. Confirmation delay’s most positive consequence may be to prompt closer examination of agency decision making patterns and career and political officials’ qualifications, and to consider more seriously reforms to our current bureaucratic structure.

## I. CONFIRMATION DELAYS

At the outset, confirmation of cabinet officials is not the main problem.<sup>10</sup> O’Connell reports relatively short initial average vacancy periods for cabinet secretaries, ranging from five days (Clinton and

---

8. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2353 (2001).

9. This work builds on Anne O’Connell’s initial look at the costs and benefits of vacancies in positions requiring confirmation in her leading article, *Vacant Offices*. See O’Connell, *supra* note 7, at 935–51.

10. According to the White House website, the Cabinet includes the heads of fifteen executive departments. *The Cabinet*, THE WHITE HOUSE, <http://www.whitehouse.gov/administration/cabinet> (last visited Apr. 6, 2015). The heads of two additional non-White House agencies also have what the website terms “the status of Cabinet-rank:” the Environmental Protection Agency (EPA) and the Small Business Administration. *Id.*

George W. Bush) to thirteen days (Reagan) to the relative outlier of thirty-six days (George H.W. Bush).<sup>11</sup> These short vacancy periods likely also characterize confirmation of officials at freestanding noncabinet executive agencies such as the Environmental Protection Agency (EPA).<sup>12</sup> This is not all that surprising, since these positions represent only a very small number of the total presidential nominations to the executive branch. The confirmation processes accompanying them are highly visible. Senatorial opposition to these high-level nominations is likely to receive extensive media coverage. Such visibility might tend to deter, for example, both presidential selection of appointees with problematic qualifications and senatorial opposition that could be characterized as obstructionist.

Instead, the lengthiest average vacancies in Senate-confirmed positions are for lower levels of management, including assistant secretaries and what O’Connell terms the “agency heads,” by which she mostly means leaders of agencies that are located within larger departments (for example, the Federal Aviation Administrator within the Department of Transportation).<sup>13</sup> O’Connell reports that assistant secretaries faced long confirmation delays during the administrations she considered—140 to 250 days. Meanwhile, the agency heads also faced long delays, ranging from 155 to 238 days.<sup>14</sup>

---

11. O’Connell, *supra* note 7, at 957.

12. *E.g.*, *The New Team*, N.Y. TIMES, [http://projects.nytimes.com/44th\\_president/new\\_team](http://projects.nytimes.com/44th_president/new_team) (Obama EPA administrator confirmed Jan. 22, 2009; CIA director confirmed Feb. 12, 2009; OMB director confirmed Jan. 20, 2009). *But see* Juliet Eilperin, *Senate Confirms Gina McCarthy as EPA Administrator*, WASH. POST, July 18, 2013, <http://www.washingtonpost.com/blogs/post-politics/wp/2013/07/18/senate-confirms-gina-mccarthy-as-next-epa-administrator-in-59-to-40-vote> (four months needed to confirm Gina McCarthy, Obama’s second EPA administrator); Elizabeth Newell Jochum, *Senate Approves Venture Capitalist as Small Business Administrator*, GOV’T EXECUTIVE, Apr. 3, 2009, <http://www.govexec.com/oversight/2009/04/senate-approves-venture-capitalist-as-sba-administrator/28903> (Small Business Administrator not confirmed until April 2, 2009). O’Connell groups all “agency heads” into the same category, however, whether or not the agency is located within another, larger agency, or whether it is a freestanding agency. For example, the head of EPA is grouped in the same category as the head of the National Highway Traffic Safety Administration. O’Connell, *supra* note 7, at 999. As with cabinet departments, nominations to heads of freestanding agencies can be highly visible, and thus confirmation is likely to move more quickly. In addition, vacancies in these positions can have far more serious consequences to agency function, since statutory authorizations typically run to the head of the entire organization. *See infra* text accompanying note 68. O’Connell’s grouping of this data implies that confirmation delays for heads of agencies within departments are likely to be even longer than the data suggest.

13. O’Connell, *supra* note 7, at 999.

14. *Id.* at 957.

In late 2013, Senate Democrats enacted a rule change—the so-called “nuclear option.” Under the nuclear option, executive branch nominations and judicial nominations other than those to the Supreme Court can no longer be filibustered—under the revised Senate rules, only a majority vote is required to close debate.<sup>15</sup> It remains to be seen how much the Senate rule change will mitigate delays, as other delaying countermoves remain possible. Opposing senators could still, for example, refuse unanimous consent to scheduling hearings or voting on nominations. Anecdotal reports are mixed.<sup>16</sup> Professor Anne O’Connell has reported that in the year after the reform, confirmations actually took longer, compared to the year before the reform, but fewer nominees were returned or withdrawn.<sup>17</sup> Continuing delays in confirmation may prompt the White House to further investigate nominees and pre-vet candidates with the relevant Senate committees, slowing the process still further.

## II. EFFECTS ON AGENCY FUNCTION

Confirmation delays, of course, slow the President’s ability to place her choices in the relevant offices. Leave aside for the moment the temptation to allocate these jobs as spoils for campaign workers or donors.<sup>18</sup> Assume that the President’s reasons for selecting

---

15. See Paul Kane, *Reid, Democrats Trigger ‘Nuclear’ Option; Eliminate Most Filibusters on Nominees*, WASH. POST, Nov. 21, 2013, [http://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c\\_story.html](http://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html).

16. E.g., Andrew Siddons, *Conflict in Senate Creates a Logjam of Ambassador Confirmations*, N.Y. TIMES, July 16, 2014, at A10; Ian Millhiser, *Why the Senate STILL Isn’t Able To Get Anything Done Even After the ‘Nuclear Option,’* THINKPROGRESS, Feb. 13, 2014, <http://thinkprogress.org/justice/2014/02/13/327339/senate-nuclear-option/>.

17. See Anne Joseph O’Connell, *Shortening Agency and Judicial Vacancies Through Filibuster Reform? An Examination of Confirmation Rates and Delays from 1981 to 2014*, 64 DUKE L.J. 1645, 1677 (2015).

18. See generally David E. Lewis, *The Personnel Process in the Modern Presidency*, 42 PRESIDENTIAL STUD. Q. 577, 584 (2012) (discussing the administration’s incentive to “reward campaign personnel, surrogates, and donors with jobs”); Christopher V. Fenlon, *The Spoils System in Check? Public Employees’ Right to Political Affiliation and the Balkanized Policymaking Exception to 1983 Liability for Wrongful Termination*, 30 CARDOZO L. REV. 2295, 2296 n.3 (2009) (defining patronage and summarizing the literature discussing it). Presidents undoubtedly do allocate some jobs as rewards to devoted campaign supporters. See, e.g., Al Kamen, *Sharply Divided Senate Narrowly Confirms Two Bundlers for Sensitive Posts*, WASH. POST, Dec. 2, 2014, <http://www.washingtonpost.com/blogs/in-the-loop/wp/2014/12/02/sharply-divided-senate-narrowly-confirms-two-bundlers-for-sensitive-posts> (discussing Senate confirmation of “two major Obama campaign contributors” for ambassadorships to Hungary).

particular officials—for which she will be held accountable by the electorate—are the same as for exercising other forms of control over agencies. In other words: the accomplishment of her policy goals and enhancement of an agency’s performance of its statutory functions.<sup>19</sup>

In arguing that presidential control is essential to agency legitimacy, the presidential control literature has mainly focused on control over regulatory decisions. This emphasis on regulation is unsurprising because this quasi-legislative power is understood to be one of the administrative state’s broadest and most far-reaching policymaking devices.<sup>20</sup> The presidential interest in controlling regulatory decision making is not only strong, but growing.<sup>21</sup> Meanwhile, Jerry Mashaw’s influential argument in favor of broad congressional delegations to agencies, rather than the use of highly specific statutory language, largely concerns rulemaking authority.<sup>22</sup> Moreover, although agency rulemaking can be technical in nature, the questions agencies must resolve also very often include significant issues of value, such as what constitutes an “unreasonable risk,” or an “adequate margin of safety.”<sup>23</sup> We might prefer such matters to be resolved by institutions that are accountable to the electorate.

Regarding particular tools of control, the literature has then focused substantially on centralization—centralized presidential

---

and Argentina in the face of “a letter in opposition from 15 former presidents of the American Foreign Service Association”).

19. This Article assumes that the President will not wish, for example, to appoint individuals or make decisions specifically to undermine agency function. Cf. Yvette Barksdale, *The Presidency and Administrative Value Selection*, 42 AM. U. L. REV. 273, 280 (1993) (observing that although many academics characterized Reagan-era efforts at regulatory review as valid assertions of presidential power, “[o]ne commentator denounced the Reagan initiatives as a license for the OMB to undermine regulatory programs established by Congress”).

20. E.g., Nina Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1131 (2010).

21. E.g., Peter L. Strauss, *Foreword: Overseer, or “The Decider”? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 697–98 (2007) (“That recent years have witnessed presidential blurring of the distinction [between authority to decide and oversight of agency decisions] may not be surprising politically . . . .”); *id.* at 702 (“Our most recent Presidents . . . seem to have been at pains to convey the impression that they are personally responsible for the conduct of domestic governance . . . and their cabinet officials sometimes speak as if they were following binding presidential orders . . . .”). See generally Kagan, *supra* note 8 (discussing presidential control over rulemaking decisions).

22. See MASHAW, *supra* note 4, at 148–52 (articulating an accountability rationale for broad delegations of legislative authority to agencies, rather than detailed statutes). Of course, setting prospective policies is not the only aspect of agency management for which the public may perceive that the President is accountable.

23. See Mendelson, *supra* note 20, at 1135–37.

control of particular agency rulemaking decisions, in which the President or her White House agents supervise agency action directly; and politicization—controlling agency behavior through appointments.<sup>24</sup> Centralized supervision could be conducted through regulatory review by the Office of Management and Budget's (OMB's) Office of Information and Regulatory Affairs (OIRA),<sup>25</sup> via presidential directives,<sup>26</sup> or by coordination with other White House offices, including the so-called White House czars.<sup>27</sup> Since the issuance of Executive Order 12,291 by President Reagan, Presidents have successfully routinized regulatory review.<sup>28</sup> As I have written elsewhere, OIRA review has been consistently characterized by high rates of changes to agency rules, though the content of those changes is unclear.<sup>29</sup> A related focal point of scholarly debate in this area has been whether the President has the authority to decide or merely to oversee questions that statutes allocate to the agencies.<sup>30</sup>

---

24. Kagan, *supra* note 8, at 2273 & n.123 (noting contrasting strategies of “centralization” and “politicization”).

25. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993). See generally Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260 (2006) (arguing that the belief that agencies will tend to overregulate is incorrect); see generally Lisa Bressman & Michael Vandenberg, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47 (2006) (arguing for a reworking of the structure of presidential control over agencies); Sally Katzen, *A Reality Check on an Empirical Study: Comments on “Inside the Administrative State”*, 105 MICH. L. REV. 1497 (2007) (disagreeing with Bressman and Vandenberg, *supra*, over their areas for improvement of the presidential control structure).

26. See Kagan, *supra* note 8, at 2290–98 (discussing the use of presidential directives to govern agency decisions).

27. See generally Aaron Saiger, *Obama’s “Czars” for Domestic Policy and the Law of the White House Staff*, 79 FORDHAM L. REV. 2577 (2011) (discussing the use of “czars” to regulate agency decisions).

28. See generally David Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1106–10 (2008) (discussing regulatory review under the Reagan administration); Mendelson, *supra* note 20, at 1146–47 (summarizing the history of regulatory review executive orders).

29. Mendelson, *supra* note 20, at 1149–51 (reporting that a strong majority of agency rules submitted for OIRA review were either rejected or approved “consistent with change”).

30. Compare Thomas O. Sargentich, *The Emphasis on the Presidency in U.S. Public Law: An Essay Critiquing Presidential Administration*, 59 ADMIN. L. REV. 1, 7 (2007) (arguing that Presidents generally lack directive authority, highlighting the importance of checks and balances), Kevin M. Stack, *The President’s Statutory Powers To Administer the Laws*, 106 COLUM. L. REV. 263, 293–96 (2006) (arguing that the President only has the power to direct agencies when the statute clearly grants it), and Strauss, *supra* note 21, at 759 (“If [statutory] text chooses between President as overseer of the resulting assemblage, and President as necessarily entitled ‘decider,’ the implicit message is that of oversight, not decision.”), with Kagan, *supra* note 8, at 2327–28 (arguing that when a statute delegates authority to an agency



But as Professor Terry Moe has argued, and as then-Professor David Barron has emphasized, centralization is an inherently limited strategy, owing to finite presidential resources. OIRA and other White House offices cannot feasibly supervise all of the regulatory state's activity,<sup>31</sup> and the number of directives a President can issue is bound to be limited.<sup>32</sup> Moreover, despite occasional experimentation with so-called "prompt letters," regulatory review has been overwhelmingly reactive.<sup>33</sup> Rather than initiating new regulatory policies, centralization strategies almost always respond to regulatory activity that originates, in the first instance, in the agencies.<sup>34</sup>

Accordingly, Presidents will have an incentive to shift to the alternative strategy of politicization. "By appointing individuals on the basis of loyalty, ideology, or programmatic support," the President can attempt to enhance responsiveness more widely.<sup>35</sup> Rather than trying to control regulatory decisions directly, the President might appoint senior agency officials with either a high degree of loyalty to the President or similar policy commitments.<sup>36</sup>

---

official, it is best read as delegating that authority to the President as well), and Nina Mendelson, *Another Word on the President's Statutory Authority over Agency Action*, 79 *FORDHAM L. REV.* 2455, 2457–58 (2011) (arguing that statutory delegation to a member of the executive branch should not be interpreted to preclude presidential control).

31. Barron, *supra* note 28, at 1103; *id.* at 1110–14 (noting the limitations of centralized regulatory review).

32. *See id.* at 1118 (describing the limitations of directives). Even when they are affirmative in tone, directives may well simply pick up on what is already happening in the agencies. *See infra* text accompanying notes 106–07.

33. *See* Nina A. Mendelson & Jonathan B. Wiener, *Responding to Agency Avoidance of OIRA*, 37 *HARV. J.L. & PUB. POL'Y* 447, 498 (2014); Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 *GEO. L.J.* 1337, 1382–85 (2013).

34. OIRA Administrator John Graham, in the George W. Bush administration, initiated the practice of issuing prompt letters, but such letters have been rare at best. *See* Mendelson & Wiener, *supra* note 33. Meanwhile, in response to the generally reactive nature of OIRA review, Revesz and Livermore have recently advocated for more systematic OIRA review of agency inaction, in the form of agency denials of petitions for rulemaking. *See* Livermore & Revesz, *supra* note 33.

35. Terry Moe, *The Politicized Presidency*, in *THE MANAGERIAL PRESIDENCY* 151–52 (1999). Moe also observes that by emphasizing "professionalism, expertise, and administrative experience, [the President] can take action to enhance organizational competence." *Id.*

36. The President or her appointees might also attempt to use ideology to guide civil service appointments, though that practice is controversial. *See generally* Barron, *supra* note 28, at 1131–32 (mentioning that the use of politics to hire careerists has "provoked controversy, and even been reversed by the most recent Attorney General"); Nina Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 *N.Y.U. L. REV.* 557, 610–11 (2003) ("[T]he reality is that political concerns often factor into [ostensibly merit-based civil service hiring].").

Such senior officials could be expected to influence the content of agencies' regulatory initiatives.

Barron has argued that this politicization strategy is on the upswing and could enable a President to "transform[] the nation's administrative agencies from within."<sup>37</sup> Compared with centralization, politicization may be understood to have even greater potential for realizing presidential policy goals because the number of positions subject to direct political control has increased. Professor Paul Light has documented this "thickening" of the political layer in the agencies.<sup>38</sup> Barron has also noted a shift in nonpolitical agency jobs toward "economists, engineers, scientists, and lawyers" who can significantly affect regulatory policy.<sup>39</sup> If the White House also can influence the selection of persons to fill these jobs, including on an ideological basis, it can further facilitate politicization.<sup>40</sup>

In advocating that under some circumstances, Senate inaction on a nominee ought to be understood to satisfy the constitutional confirmation requirement, Stephenson has moved beyond presidential goals to focus on legitimacy.<sup>41</sup> With respect to the most senior agency officials, those subject to confirmation, Stephenson has contended that the "political accountability" arguments typically invoked to justify presidential control are most salient.<sup>42</sup> The greatest "concentration of responsibility and accountability" for the President exists with respect to these officials.<sup>43</sup>

Thus, confirmation delays could be understood as undercutting not only presidential influence, but electoral accountability and, in turn, agency legitimacy. First, to the extent voters elected the President to carry out a platform of policy goals, that platform might be less likely to be realized. Government could be understood as less responsive to the electorate. Second, confirmation delays might prompt the public to absolve the President in future elections of

---

37. Barron, *supra* note 28, at 1196.

38. *See generally* PAUL LIGHT, THICKENING GOVERNMENT (1995). Light analyzes the thickening of the political layer as one feature of the overall thickening of agency management layers. *Id.* at 88–89, 166–67 (noting "politicization, and the thickening that appears to go with it;" describing growth in corps of "presidential 'helpers,'" though noting the irony that it has "thickened the career executive ranks too").

39. Barron, *supra* note 28, at 1123–24.

40. *Id.*

41. *See generally* Stephenson, *supra* note 6.

42. *Id.* at 948 (political accountability arguments are "particularly salient" with respect to senior executive officers).

43. *Id.*

responsibility for agency ineffectiveness and malfunctions, further undermining agencies' electoral accountability.

But commentary on presidential control of agencies is limited by its largely undifferentiated focus on regulatory policy. Perhaps to state the obvious, making significant policy changes, including through regulation, is far from the only critical function carried out by administrative agencies, or the only function for which electoral accountability is relevant.

Consider the executive function that might be termed "implementation," which includes day-to-day review of permit applications, the issuance of licenses to doctors to prescribe controlled substances, and the management of air traffic by air traffic controllers. Responsibility for these core activities also runs to senior agency managers. Consider the spring 2014 scandal in which veterans experienced serious delays in obtaining health care at hospitals and clinics run by the Department of Veterans Affairs. An outside audit revealed that many thousands of veterans had waited months for medical appointments.<sup>44</sup> Moreover, some patient schedulers had been instructed to enter false information related to how long veterans had to wait for appointments.<sup>45</sup> Notably, in Phoenix, Arizona, delays in care contributed to the deaths of patients.<sup>46</sup> These events did not implicate rulemaking, but instead the most basic issues of functioning at the Veterans' Administration.<sup>47</sup> Similarly, the Centers for Disease Control's (CDC's) management of the Ebola virus in the United States drew criticism in the fall of 2014. Few, if any, of the CDC's policies on Ebola have been implemented through rulemaking. Instead, the key agency actions have involved placing CDC

---

44. See Richard A. Oppel, Jr., *Audit Shows Extensive Medical Delays for Tens of Thousands of Veterans*, N.Y. TIMES, June 9, 2014, <http://www.nytimes.com/2014/06/10/us/va-audit-finds-long-waits-for-care-are-widespread.html>.

45. *Id.*

46. Richard A. Oppel, Jr., *V.A. Official Acknowledges Link Between Delays and Patient Deaths*, N.Y. TIMES, Sept. 17, 2014, <http://www.nytimes.com/2014/09/18/us/va-officials-acknowledge-link-between-delays-and-patient-deaths.html>.

47. E.g., Matthew Daly, *VA Fires Phoenix Hospital Director*, WASH. TIMES, Nov. 24, 2014, <http://washingtontimes.com/news/2014/nov/24/apnewsbreak-va-fires-phoenix-hospital-director>; Ryan Howes, *Shinseki Acts Against Phoenix VA Officials, Then Turns in Resignation*, CRONKITE NEWS ONLINE, May 30, 2014, <http://cronkitenewsonline.com/2014/05/shinseki-acts-against-phoenix-va-officials-then-turns-in-resignation>.

employees at hospitals and devising policies through informal means.<sup>48</sup>

In addition, consider the essential executive function of enforcement.<sup>49</sup> Agency enforcement initiatives can serve as vehicles for policy implementation,<sup>50</sup> but the enforcement function also subsumes numerous individual decisions.

Finally, there is adjudication. In the executive agencies, adjudication tends to be dominated by the resolution of individual claims by administrative law judges, such as the resolution of immigration claims by immigration judges or the processing of a particular permit application to fill a wetland. Adjudication before a full multimember commission such as the National Labor Relations Board (NLRB) or the Securities and Exchange Commission (SEC) may more typically implicate policy issues. But such adjudication is beside the point for this Article, since those adjudicating agencies are usually independent.<sup>51</sup>

As discussed in greater detail below, effectively performing all these sorts of functions may, like rulemaking, require resolving some broad policy issues, but managing may more often require deploying insights into what has worked and what has not, knowledge we might associate with officials with extensive agency experience.<sup>52</sup>

Commentary on this issue also has not adequately considered the levels at which confirmation delays are concentrated; agencies with vacancies generally have at least some confirmed political appointees in place. First, vacancies from confirmation delays are not at the tops of agencies, but instead affect political appointees one or two layers down from the agency head.<sup>53</sup> The layer of appointed agency officials subject to Senate confirmation in a given agency is often two or three deep, occasionally four. The President may have the ability to select

---

48. E.g., Lena H. Sun, Lenny Bernstein & Joel Achenbach, *CDC Director's Challenge: Deadly Ebola Virus and Outbreak of Criticism*, WASH. POST, Oct. 16, 2014, [http://www.washingtonpost.com/national/health-science/cdc-directors-challenge-deadly-ebola-virus-and-outbreak-of-criticism/2014/10/16/f0109802-5547-11e4-ba4b-f6333e2c0453\\_story.html](http://www.washingtonpost.com/national/health-science/cdc-directors-challenge-deadly-ebola-virus-and-outbreak-of-criticism/2014/10/16/f0109802-5547-11e4-ba4b-f6333e2c0453_story.html).

49. Cf. *Morrison v. Olson*, 487 U.S. 654, 691 (1988) (noting that the independent counsel's functions were indisputably "'executive' in the sense that they are law enforcement functions").

50. See Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1041–46 (2013).

51. See Vermeule, *supra* note 1, at 1168 (identifying the "multimember" nature of certain organizations as a "structural feature[] that characterize[s] many . . . independent agencies").

52. See *infra* text accompanying notes 115–19.

53. See *supra* notes 11–15 and accompanying text.

officials lower down in the agency as well, but these appointments do not depend on Senate confirmation.

For example, as the Plum Book describes, at the Department of Labor the secretary and deputy secretary of labor are presidential appointees, subject to Senate confirmation.<sup>54</sup> The assistant secretaries are subject to Senate confirmation as well.<sup>55</sup> But other posts, such as the associate deputy secretary, deputy assistant secretaries, and chiefs of staff, include “noncareer” (or political) appointees exempt from Senate confirmation.<sup>56</sup>

The layers are thicker at the Department of the Treasury. Both the secretary of the treasury and deputy treasury secretary are presidential appointees, subject to Senate confirmation. Some of Treasury’s offices below the deputy secretary level are headed by assistant secretaries reporting directly to the secretary and deputy secretary; some are headed by undersecretaries. Each of these in turn may supervise a group of assistant secretaries, all of which are subject to Senate confirmation. Below these there are multiple noncareer appointees not subject to confirmation.<sup>57</sup>

The EPA’s leadership structure includes an administrator and deputy administrator, both presidential appointees subject to Senate confirmation.<sup>58</sup> The heads of each office, such as the assistant administrators for the Office of Water, Office of Chemical Safety, and so on, are also presidential appointees subject to Senate confirmation. Their deputies, however, typically include at least one political appointee not subject to confirmation and one career appointee.<sup>59</sup> Each assistant administrator usually supervises several offices, headed by senior career civil service officials.<sup>60</sup> Regional administrators and deputy assistant administrators are typically political appointees not

---

54. See STAFF OF H. COMM. ON OVERSIGHT AND GOV’T REFORM, 112TH CONG., POLICY AND SUPPORTING POSITIONS (v), 99 (Comm. Print 2012), available at <http://www.gpo.gov/fdsys/pkg/GPO-PLUMBOOK-2012/pdf/GPO-PLUMBOOK-2012.pdf> (last visited Apr. 6, 2015) [hereinafter PLUM BOOK].

55. See *id.* at (v), 99–102.

56. See *id.*

57. See *id.* at 122–26; *Organizational Structure*, U.S. DEP’T OF THE TREASURY, <http://www.treasury.gov/about/organizational-structure/Pages/default.aspx> (last updated Apr. 1, 2014). See generally Barron, *supra* note 28, at 1131 (noting White House influence over, if not control of, the selection of lower level noncareer appointees).

58. See PLUM BOOK, *supra* note 54, at (v), 146.

59. See *id.*

60. See *id.*

subject to confirmation, or a mix of political and career appointees.<sup>61</sup> Vacancies in these latter positions are not attributable to confirmation delay.

Even for a confirmation delay-caused vacancy, a nominee who is awaiting confirmation may be permitted to informally select or suggest political appointees within his or her office, conceivably blunting the effect of a continuing vacancy.<sup>62</sup> Occasionally, an agency may still receive the benefit of a nominated individual's perspective and expertise even without confirmation. For example, Antonio Weiss was appointed in January 2015 to be a counselor to the Treasury Secretary—a political appointment requiring no confirmation—after the Senate failed to confirm him as the Treasury Department's Under Secretary for Domestic Finance.<sup>63</sup>

In sum, the primary confirmation delay problem is in the middle layer of political agency managers—the agency subheads or assistant secretaries, sandwiched between the cabinet officials and the lower layers of political appointees not subject to confirmation. This middle layer is composed of appointees chosen through a political process either controlled or substantially influenced by the White House.<sup>64</sup>

Even then, the lack of a confirmed appointee does not necessarily result in an outright vacancy. The Federal Vacancies Reform Act of 1998<sup>65</sup> provides three methods of filling a vacancy in an

---

61. *See id.*

62. *See supra* notes 48–56 and accompanying text (noting that the White House is typically involved with, though may not outright control, lower-level political appointments).

63. *See* Ben White, *Elizabeth Warren Wins on Antonio Weiss Nomination*, POLITICO (Jan. 12, 2015), <http://www.politico.com/story/2015/01/antonio-weiss-pulls-out-treasury-under-secretary-114191.html>.

64. Although the Plum Book lists some nonconfirmed positions as “presidential appointment[s]” and other noncareer positions in other ways (such as Schedule C), the White House clearly exercises a great deal of influence in the filling of all political positions. *See, e.g., Presidential Appointment Application*, THE WHITE HOUSE, <https://apply.whitehouse.gov> (last visited Mar. 6, 2015) (“President Barack Obama makes appointments for noncareer positions throughout the federal government on an ongoing basis.”); COUNCIL FOR EXCELLENCE IN GOV'T, *A SURVIVOR'S GUIDE FOR PRESIDENTIAL NOMINEES* 38 (2000), *available at* <http://whitehoustransitionproject.org/nfo/SoftwareGuide/AppointeeSurvival.pdf> (“A president enters office with 1,000-plus executive branch appointments to fill that require Senate confirmation . . . and more than 2,000 other political appointments that do not require Senate approval.”); *id.* at 81 (“White House officials and Cabinet secretaries engage in a tug-of-war over who will fill the second tier of positions.”).

65. Federal Vacancies Reform Act of 1998, 5 U.S.C. §§ 3345–3349d (2012). *See generally* HENRY B. HOGUE, CONG. RESEARCH SERV., RS21412, TEMPORARILY FILLING PRESIDENTIALLY APPOINTED, SENATE-CONFIRMED POSITIONS (2008) (describing temporary appointment tools for addressing vacancies under the Federal Vacancies Reform Act of 1998).

executive agency: the “first assistant” may assume the functions and duties of the office (assuming the person has been in that position for at least ninety days and is not the nominee for the position); the President may direct an officer occupying a different position for which the officer has been confirmed by the Senate to perform the tasks; or the President may select an officer or employee who occupies a position in the same agency at the GS-15 level or above and has been with the agency for at least ninety of the preceding 365 days.<sup>66</sup> In general, the acting official may serve for 210 days after the date on which the vacancy commenced; the time restriction is suspended if a nomination has been submitted to the Senate for confirmation, and the temporary appointment can continue for an additional 210 days after the rejection, withdrawal, or return of such a nomination.<sup>67</sup> Very often, this all culminates in a career deputy in the office occupying the vacant position as an acting official.

So the key question is how agency function might be affected by delays in confirming the middle layer. To begin with, a missing assistant secretary is highly unlikely to halt the agency’s performance of formal functions, such as publishing rules. For example, statutory delegations of rulemaking authority typically run either to the head of the agency (the secretary or administrator) or to the President. Thus, even with a vacancy and no designated acting official, rules in the Federal Register, for example, can be properly signed.<sup>68</sup>

On the other hand, the lack of a confirmed official in certain senior agency positions may impair the agency’s function by undermining its ability to provide a person with appropriate status—someone endorsed by both federal political branches—to represent the administration on significant policy issues. For example, in testifying before Congress in defense of the executive branch’s performance, or in representing the United States’ position before

---

66. 5 U.S.C. § 3345(a).

67. The Federal Vacancies Reform Act of 1988, 5 U.S.C. §§ 3345–3349d.

68. Admittedly, vacancies in other Senate-confirmed positions can preclude some agencies from carrying out their responsibilities, as with the NLRB. *See, e.g., New Process Steel, L.P. v. Nat’l Labor Relations Bd.*, 560 U.S. 674 (2010) (invalidating NLRB decision for Board’s failure to have three-member quorum). This is because the Vacancies Reform Act of 1998, authorizing the appointment of acting officials, excludes multimember, independent commissions from its scope. 5 U.S.C. § 3349c(1) (2012). As an independent agency, the NLRB is beyond the scope of this Article in any event.

international institutions, an official's lack of Senate confirmation can impair her status and effectiveness in furthering the agency's goals.<sup>69</sup>

Beyond this, the senior political official is there to supervise—to ensure that agency offices, composed mainly of career civil servants, perform work that hews to the President's expectations of policy direction and quality. It is almost a commonplace that incoming Presidents worry about a resistant career civil service—shirking, resisting, or outright undermining the goals of the new administration.<sup>70</sup> Light has reported, however, that most political appointees ultimately conclude that careerists are competent and responsive.<sup>71</sup> Professor David Lewis has independently suggested that “[c]areer executives are more likely [than political appointees] to have subject area expertise [and] public management skills.”<sup>72</sup> The following discussion assumes, consistent with Light and Lewis's views,

---

69. See, e.g., Paul Verkuil, *Outsourcing and the Duty To Govern*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 312, 330 (2006) (“Public status enhances credibility.”). But see Nolan McCarty & Rose Razaghian, *Advice and Consent: Senate Responses to Executive Branch Nominations 1885–1996*, 43 AM. J. POL. SCI. 1122, 1127 (1999) (noting that “career servants have long-term interactions with Congress, primarily through budget procedures and congressional oversight, making them more responsive to the wishes of Congress than to the more transitory presidential administrations”).

70. E.g., J. CLARENCE DAVIES, ENVIRONMENTAL INSTITUTIONS AND THE REAGAN ADMINISTRATION, in ENVIRONMENTAL POLICY IN THE 1980S: REAGAN'S NEW AGENDA 144 (Norman J. Vig & Michael E. Kraft eds., 1984) (noting concern in Carter administration that career civil service would be an “obstacle,” and in Reagan administration that agencies were staffed by “‘extremists’ who were hostile to Reagan”); JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 50 (1989) (noting Nixon's fears that “the federal bureaucracy [including liberals recruited by past Democratic administrations] would sabotage his administration's plans”); Mendelson, *supra* note 36, at 559 (quoting Truman, regarding Eisenhower taking office, as saying “[h]e'll sit right here . . . and he'll say do this, do that!! And nothing will happen.” (quoting MARGARET TRUMAN, HARRY S. TRUMAN 551–52 (1973))). Hugh Heclo suggested four types of unsupportive behavior in career civil servants: They can oppose political leadership (leading to sabotage), misunderstand their directions, or wish to be persuaded or heard before agreeing to support political leadership. See HUGH HECCLO, A GOVERNMENT OF STRANGERS: EXECUTIVE POLITICALS IN WASHINGTON 204–05 (1977).

71. See Paul C. Light, *When Worlds Collide: The Political-Career Nexus*, in THE IN-AND-OUTERS, PRESIDENTIAL APPOINTEES AND TRANSIENT GOVERNMENT IN WASHINGTON 156, 158–59 (G. Calvin Mackenzie ed., 1987). Light cautions, however, that a delay in developing that level of respect can impair agency function. *Id.*; see also O'Connell, *supra* note 7, at 943 (“Public administration scholars see productive interactions between careerists and political appointees as critical for strong agency performance.”).

72. DAVID E. LEWIS, THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE 142 (2008); see also CHARLES GOODSSELL, THE CASE FOR BUREAUCRACY 104 (2004) (summarizing studies suggesting that “an image of bureaucrats as lazy and inefficient . . . is wholly inaccurate” (quoting JOHN BREHM & SCOTT GATES, WORKING, SHIRKING, AND SABOTAGE 108 (1999))).



that career civil servants are likely to be competent and responsive, but may require direction and information from political appointees to develop and select policies, including allocating resources, consistent with presidential preferences. If civil servants are indeed unresponsive or shirk their work, more supervisory resources will be required; a missing midlevel appointee accordingly may represent a greater problem.<sup>73</sup>

#### A. *Supervision of Agency Regulation*

Consider first the supervision of significant agency regulatory activity and other major policy decisions, the function on which commentators typically focus. Again, the norm of democratic accountability dominates the discussion: by virtue of the electoral process, the incoming administration has earned the right to pursue the President's policy preferences and is responsible to voters for major executive decisions.<sup>74</sup>

Vacancies in midlevel political positions can certainly slow review of agency policy decisions. All recent White Houses have prioritized political supervision of agency decisions to some degree. President George W. Bush went the furthest, by ordering that each agency's "regulatory policy officer" be a political appointee and that such officer serve as a "gatekeeper" for rulemaking within that agency.<sup>75</sup> This order was revoked by the Obama administration,<sup>76</sup> but it is still widely understood that a significant regulatory initiative will typically be approved by a senior political official before the agency proceeds with it.

A political deputy to a not-yet-confirmed assistant secretary or assistant administrator, as there often is, can perform some review function, but senior political officials would likely insist on further review of regulatory action beyond what the deputy or an acting civil servant can provide. Other officials in the department, at the same level as or higher than the vacant position, may also be called on to review. These individuals will have to expend time and energy to

---

73. See LEWIS, *supra* note 72, at 32–59 (2008) (describing techniques for "politicizing" in response to resistant civil service).

74. See Barron, *supra* note 28, at 1096.

75. See Exec. Order No. 13,422, 72 Fed. Reg. 2763, 2764 (Jan. 18, 2007); Michael Hissam, *The Impact of Executive Order 13,422 on Presidential Oversight of Agency Administration*, 76 GEO. WASH. L. REV. 1292, 1298 (2008).

76. See Exec. Order No. 13,497, 74 Fed. Reg. 6113, 6113 (Feb. 4, 2009).

understand and review policy decisions. For example, as of fall 2014, confirmed U.S. Treasury Assistant Secretary for Financial Markets Matthew Rutherford was simultaneously serving as acting Under Secretary for Domestic Finance, due to a vacancy in that position.<sup>77</sup> This added burden on confirmed officials could divert resources from, and therefore slow, implementation of other agency actions, including actions on the President's affirmative regulatory agenda.

Further, even if an acting official has been designated under the 1998 Vacancies Reform Act, two of the Act's three vacancy-filling methods call directly for diversion of someone working elsewhere in the agency (either a "first assistant" or senior civil servant). The third may result, as with Rutherford, in the vacancy being filled by a confirmed official in the same agency.

But confirmation delays, and the resource drains they can occasion, seem unlikely to halt regulatory work altogether. For example, consider a very-long-delayed confirmation at the EPA, for nominee Kenneth Kopocis to serve as assistant administrator of the Office of Water. Kopocis was nominated in 2011 and renominated in 2014, and his nomination was returned to the President in December 2014 at the close of the 113th Congress.<sup>78</sup> As of April 2015, Kopocis had not yet been renominated. Those opposing his confirmation in the Senate may have been attempting to communicate their

---

77. *E.g.*, Ian Katz, *Rutherford To Quit Treasury After Assuming Undersecretary Role*, BLOOMBERG (Aug. 7, 2014), <http://www.bloomberg.com/news/2014-08-07/rutherford-to-quit-treasury-after-assuming-undersecretary-role.html>.

78. *See* Patrick Crow, *Kapocis [sic] Senate Confirmation Left on the Table*, WATERWORLD, <http://www.waterworld.com/articles/print/volume-29/issue-9/departments/washington-update/kapocis-senate-confirmation-left-on-the-table.html> (last visited Apr. 6, 2015). Kopocis eventually joined EPA as a "senior advisor" on Nov. 2, 2013, *see id.*, and was renominated for the assistant administrator position on Jan. 6, 2014. *See Nominations & Appointments*, THE WHITE HOUSE, <http://www.whitehouse.gov/briefing-room/nominations-and-appointments> (last visited Apr. 6, 2014). For information about the previous acting assistant administrator, Nancy Stoner, *see generally Nancy Stoner, Acting Assistant Administrator for Water*, U.S. ENVTL. PROT. AGENCY, <http://www2.epa.gov/aboutepa/nancy-stoner-acting-assistant-administrator-water> (last updated May 8, 2014) (noting that Stoner had served as deputy assistant administrator for Water), and Jeff Spross, *Why EPA Suddenly Doesn't Have Anyone Running the Office that Protects Our Waterways*, CLIMATE PROGRESS (Aug. 1, 2014, 12:38 PM), <http://thinkprogress.org/climate/2014/08/01/3466785/epa-water-kopocis-delayed> (noting that acting Assistant Administrator Nancy Stoner had "hit the legal limit on how long an unconfirmed leader can hold an office"). Kopocis's nomination was returned on Dec. 17, 2014. *See Nomination Information for Kenneth J. Kopocis*, CONGRESS.GOV, <https://www.congress.gov> (choose "Nominations" from the drop-down menu to the left of the search bar; then search for "PN1085"; then check the box for "113 (2013–2014)" under the "Congress" tab on the left of the screen; then click on the "PN1085" result).

disapproval of a major regulatory initiative at the EPA, the EPA's reinterpretation of the key Clean Water Act jurisdictional term "waters of the United States," in response to recent Supreme Court decisions.<sup>79</sup> Even with a senior career civil servant heading the office as an acting official, and despite the visibility of the issue, the EPA still managed to issue the proposed rule for comment in April 2014.<sup>80</sup>

Consider a second example, in the Department of the Interior. Owing to delays in both the White House and the Senate, the Fish and Wildlife Service was headed by an acting career official from February 21, 2010 through June 30, 2011.<sup>81</sup> Nonetheless, the Fish and Wildlife Service proceeded in issuing a policy essential for implementing the Endangered Species Act: its interpretation of when a species should be considered "endangered or threatened" through a "significant portion of its range" in the language of the Endangered Species Act. The draft policy was sent to OIRA in early June 2011 for review.<sup>82</sup> In February 2011, the Fish and Wildlife Service also issued a proposed policy for wind-turbine operators to minimize wildlife impacts.<sup>83</sup> Of course, these are only a few examples. And at a minimum, the acting civil servants appeared to be serving presidential

---

79. See Spross, *supra* note 78 (noting that the "Waters of the United States" rule provoked opposition from Senate Republicans).

80. See Definition of the "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22,188 (proposed Apr. 21, 2014) (to be codified at 33 C.F.R. pt. 328). The comment period closed on Nov. 14, 2014. See Extension of Comment Period for the Definition of "Waters of the United States" Under the Clean Water Act Proposed Rule and Notice of Availability, 79 Fed. Reg. 61,590 (Oct. 14, 2014).

81. The acting career official was Rowan Gould, the Fish and Wildlife Service's career deputy director. See *Rowan W. Gould*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/offices/rowangould.html> (last updated July 15, 2013). The director of the Fish and Wildlife Service, Sam Hamilton, had died suddenly in February 2010, roughly six months after his confirmation in early September 2009, and a replacement, Daniel Ashe, was not nominated by the White House until December 6, 2010, and not confirmed until June 30, 2011. See *Nomination Information for Daniel M. Ashe*, CONGRESS.GOV, <https://www.congress.gov> (choose "Nominations" from the drop-down menu to the left of the search bar; then search for "PN2378"; then check the box for "111 (2013-2014)" under the "Congress" tab on the left of the screen; then click on the "PN2378" result); *Nomination Information for Daniel M. Ashe*, CONGRESS.GOV, <https://www.congress.gov> (choose "Nominations" from the drop-down menu to the left of the search bar; then search for "PN57"; then check the box for "112 (2013-2014)" under the "Congress" tab on the left of the screen; then click on the "PN57" result).

82. OIRA did not conclude its review of the policy until Dec. 2011. See *Review of Interim Policy*, REGINFO.GOV, <http://www.reginfo.gov/public> (search for "1018-AX49" in the search bar; then select the rule with a "Date Received" of 06/10/2011).

83. OIRA concluded its review of this policy promptly. See *Review of Guidelines*, REGINFO.GOV, <http://www.reginfo.gov/public> (search for "1018-AX45" in the search bar; then select the rule with a "Date Received" of 02/02/2011).

goals, and perhaps, even without the imprimatur of confirmation, were distinctively equipped to develop these policies.

Furthermore, a persistent issue with all studies measuring the pace and volume of regulation is the difficulty in defining an appropriate baseline. Thus, one fully completed, economically significant proposed rule and a couple of important policies might tell us little about whether confirmation delays significantly slowed agencies' work or about the precise mechanism by which any such slowing occurred (for example, whether through net reduction in personnel resources or limited capacity for political oversight). These examples might tell us even less about the impacts of confirmation delays at this level in other agencies. But, at a minimum, the anecdotes suggest that further inquiry into how well career civil servants supervise this type of policy work would be worthwhile.

Beyond slowing implementation of an agency's regulatory agenda, midlevel vacancies may undermine the agency's ability to work with its counterparts at other agencies and with political overseers on rulemaking issues. Again, centralized regulatory review under Executive Order 12,866 is now a critical aspect of presidential supervision of executive agencies. Under that executive order, proposed and final significant executive agency rules must be "cleared" by OIRA before publication.<sup>84</sup> That process facilitates not only White House offices' review of agency regulatory activity for consistency with presidential priorities,<sup>85</sup> but also involvement by other agencies.<sup>86</sup>

The well-established nature of this centralized review could substitute somewhat for intra-agency political supervision of regulatory decisions. But vacancies might have other negative implications for an agency's policy choices in regulatory review. For example, White House officials, including those in OIRA, might repose less trust in an agency office's decision when the office is headed by an acting civil servant rather than a duly confirmed political appointee. Even though political officials may have selected

---

84. See Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,743-44 (Sept. 30, 1993) (conditioning publication on completion of the OIRA review process). The history of centralized regulatory review has been recounted extensively elsewhere, including in my own work. See, e.g., Barron, *supra* note 28, at 1107-14; Mendelson, *supra* note 20, at 1146-47.

85. See Exec. Order No. 12,866, 58 Fed. Reg. at 51,735-36.

86. See Cass R. Sunstein, *White House Review of Regulation: Myths and Realities*, 2013 Regulation Lecture at the University of Pennsylvania Law School 6-7 (Jan. 16, 2013), available at <https://www.regblog.org/wp-content/uploads/2013/11/PPR-Regulation-Lecture-2013.pdf>.

the acting official, her loyalty to or alignment with the President's policy preferences may not be as strong as that of a confirmed appointee; even if it is, reviewing officials might question it nonetheless.<sup>87</sup> Such suspicions could slow regulatory review as OIRA officials look more carefully at the agency's regulatory proposal.

For example, OIRA reviewed the EPA rule proposing a revised definition of "waters of the United States" for more than six months, longer than five of the other six economically significant EPA rule reviews completed by OIRA in 2014.<sup>88</sup> On the other hand, OIRA delays on this rule could have been a symptom of the same policy disagreements that may have prompted confirmation delays in the Senate, rather than the lack of a confirmed assistant administrator.

Further, when there are disputes between the regulating agency and others in the regulatory review process, a midlevel vacancy may impede the agency's ability to press its own perspective. As former OIRA Administrator (now Professor) Cass Sunstein has described, disagreement among the agencies is typically resolved through discussion. This discussion takes place in a process "dominated by career staff."<sup>89</sup> A vacancy at an assistant secretary level would not affect this process. But if a dispute were "elevated" within the various agencies, the assistant secretary or equivalent at the agency might be responsible for advocating the agency's view.<sup>90</sup> An agency representative in such a discussion without the imprimatur of Senate confirmation might be accorded less status, and her policy judgments

---

87. *E.g.*, LEWIS, *supra* note 72, at 30–31 (discussing "a variety of reasons why career bureaucrats do not have the same perspective as their political superiors"); *see supra* text accompanying note 70 (discussing presidential worries concerning civil servant sabotage and shirking).

88. *See Definition of "Waters of the United States" Under the Clean Water Act*, REGINFO.GOV, <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201404&RIN=2040-AF30> (last visited Apr. 6, 2015). The review did, however, take less time than reviews of other rules that have been pending for many months, perhaps indicating that OIRA suspicion was not substantial. As others have observed, data on the time required to complete OIRA review are incomplete, as they exclude rules for which review is incomplete, some of which have been pending for years. *See* Rena Steinzor, *What the White House Taketh Away, It Can Also Giveth: An Agenda for 'Regulatory Czar' Howard Shelanski's First 30 Days*, CPRBLOG (May 23, 2013), <http://www.progressivereform.org/CPRBlog.cfm?idBlog=D1D07F71-99BB-9B0F-D89627B2C274AAC4>. For supporting tables on OIRA review times, *see Table 1: Average OIRA Review Times Rose in 2012 and 2013*, CENTER FOR PROGRESSIVE REFORM (May 14, 2013), [http://www.progressivereform.org/articles/OIRA\\_Tables\\_Copeland.pdf](http://www.progressivereform.org/articles/OIRA_Tables_Copeland.pdf); *Rules Under Review Since 2010*, CENTER FOR PROGRESSIVE REFORM, [http://www.progressivereform.org/articles/Rules\\_Under\\_OIRA\\_Review\\_052413.pdf](http://www.progressivereform.org/articles/Rules_Under_OIRA_Review_052413.pdf) (last visited Apr. 6, 2015).

89. Sunstein, *supra* note 86, at 8.

90. *Id.*

correspondingly less deference. If the agency had the option to seek further elevation, a confirmed cabinet or deputy cabinet official would then become involved.<sup>91</sup> In short, a vacancy at the assistant secretary level could increase the chances of an agency rule being slowed in the review process. Moreover, to the extent that the President attempts to achieve some sort of rough interest balancing with respect to agency regulatory activity by appointing midlevel political officials at each agency, a delay in confirming some of them could theoretically impair that balance.

These are difficulties, to be sure. But supervising the issuance of significant agency rules or other substantial policy decisions simply may not be a substantial part of any given midlevel political appointee's work. For example, take the three agencies recently responsible for the most regulatory activity: the EPA, the Department of Agriculture (USDA), and the Department of Transportation (DOT). In 2013, the list of EPA-submitted rules reviewed by OIRA included thirteen final rules and twenty proposed rules, of which only four were classified as "economically significant."<sup>92</sup> For the USDA, OIRA reviewed thirteen final rules and ten proposed rules, of which seven were classified as "economically significant."<sup>93</sup> And for that same period, OIRA reviewed fourteen final rules and three proposed rules from the DOT, of which only seven were classified as "economically significant."<sup>94</sup> Meanwhile, the EPA had (and has) ten midlevel appointees subject to Senate confirmation, including its general counsel and chief financial officer, both less likely to have policymaking responsibility; the USDA has twelve; and the DOT has sixteen, including its general counsel and chief financial officer.<sup>95</sup> Even taking into account that review might

---

91. *Id.* (discussing elevation of a contested rule to the head of OIRA and to the deputy secretary or cabinet head).

92. Historical Reports, REGINFO.COM, <http://www.reginfo.gov/public/do/eoHistReviewSearch> (under "Executive Order Reviews Completed" select the drop-down box below "Select Agency," then select "Environmental Protection Agency"; then select the drop-down box next to "Select Calendar Year," and select 2013).

93. *Id.* (under "Executive Order Reviews Completed" select the drop-down box below "Select Agency," then select "Department of Agriculture"; then select the drop-down box next to "Select Calendar Year," and select 2013).

94. *Id.* (under "Executive Order Reviews Completed" select the drop-down box below "Select Agency," then select "Department of Transportation"; then select the drop-down box next to "Select Calendar Year," and select 2013).

95. See PLUM BOOK, *supra* note 54, at 11–18, 115–21, 146–51. Because the focus of this Article's analysis is midlevel appointees subject to confirmation (denoted "PAS"), these counts

result in an agency not proceeding with some rules, so that these numbers understate how much regulatory supervision is conducted by a midlevel appointee, the numbers do suggest that no single midlevel confirmed appointee is likely to spend her time in continuous review of regulatory policy proposals.

Further, even when there is intra-agency political supervision of significant regulatory proposals, that supervision is far less likely to generate new initiatives than simply to react to existing policies in development. This is true for a number of reasons. At the most basic level, recent data suggest that, taking into account the necessary pre-notice-of-proposed-rulemaking development, many rulemakings may take “six to eight years” to complete.<sup>96</sup> Thus, a particular rule is unlikely to be initiated and then brought to completion under the supervision of a single presidential administration, let alone under the supervision of a single midlevel confirmed official. O’Connell’s finding that relatively few notice-and-comment rulemakings are initiated in the first year of a presidency is consistent with two intuitions about political supervision of rulemaking. First, as noted, regulatory development takes a long time, limiting the influence of any particular individual over a regulatory initiative. Second, political officials take significant time to understand what is already under development within the ranks of expert civil servants.<sup>97</sup>

---

excluded the PAS positions of Secretary and Deputy Secretary of Transportation and Agriculture and the Administrator and Deputy Administrator of the EPA.

96. Richard J. Pierce, Jr., *Rulemaking Ossification is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493, 1496 (2012). A recent study has attempted to assess the time an agency has to take before issuing notices of proposed rules. See Wendy Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA’s Air Toxic Emissions Standards*, 63 ADMIN. L. REV. 99, 119 (2011) (considering the “rulemaking life cycle for ninety air toxic emissions standards”); see also Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1385–86 (1992) (observing that “the rulemaking process has become increasingly rigid and burdensome”); Richard J. Pierce, Jr., *Seven Ways To Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 60–62 (1995) (discussing the results of multiple studies analyzing growing ossification in the rulemaking process); William F. West & Connor Raso, *Who Shapes the Rulemaking Agenda?: Implications for Bureaucratic Responsiveness and Bureaucratic Control*, 23 J. PUB. ADMIN. RES. & THEORY 495, 510 (2012) (stating that “[t]he rules in our sample had been under development for varying periods, and many had been initiated years earlier”). Studies suggesting a shorter time for rulemaking have not included the pre-notice-of-proposed-rulemaking period, which is critical for developing the details of the proposal and supporting analyses. E.g., Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414, 1480 (2012) (acknowledging this limitation of their analysis).

97. See Anne Joseph O’Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 943 (2008) (noting “a significant start-up

Consider as well that officials' terms are short. A particular political official's supervision of a rulemaking process is thus highly likely to be interrupted. O'Connell has summarized data from multiple administrations indicating that mean and median tenure rates for senior political appointees have been well under three years.<sup>98</sup> The then-General Accounting Office found that, for 1981 to 1991, the median appointee tenure was 2.1 years.<sup>99</sup> Nine cabinet-level agencies, moreover, had median service lengths of below two years during this period.<sup>100</sup> This sort of turnover would clearly undermine a senior political official's ability to implement policy preferences by shepherding a rulemaking or other major policy decision through the agency. In short, midlevel officials are unlikely to guide any regulatory initiative into law from inception to promulgation. Instead, they are likely to review and revise regulatory policies developed primarily in the civil service.

A midlevel political official could serve mainly as the conduit for presidential preferences into the agency, in which case turnover among political officials might be less significant. In this vein, however, consider William West and Connor Raso's recent study of agenda setting in a data set of 276 agency rules in the second Bush administration, one that emphasized executive control. The study found that the President "encouraged agencies to issue only 7 of the 276 rules in the sample."<sup>101</sup> West and Raso further observed that these seven were not primarily substantive policies.<sup>102</sup> The OMB's (or

---

period for each President, likely because of the lag associated with learning about the administrative state, finding and appointing agency leaders," and so on).

98. See O'Connell, *supra* note 7, at 919 n.23 and accompanying text (summarizing multiple data sources and commenting, "Therefore, a year or two after the start of an administration, presidents are often looking to fill critical agency jobs a second time"); see also LEWIS, *supra* note 72, at 177 (arguing that data on careerist qualifications "implies that appointee-run federal programs experience more managerial turnover than do programs administered by careerists").

99. U.S. GEN. ACCOUNTING OFFICE, POLITICAL APPOINTEES: TURNOVER RATES IN EXECUTIVE SCHEDULE POSITIONS REQUIRING SENATE CONFIRMATION 2 (1994).

100. These agencies were the Departments of Veterans Affairs, Commerce, Labor, Defense, HUD, Education, Interior, Justice (excluding the U.S. attorneys), and the EPA. *Id.* at 4. GAO suggested that incumbents in term-limited positions (for example, on commissions and boards, many likely independent) generally serve longer. *Id.* at 9.

101. See West & Raso, *supra* note 96, at 510. The authors do caution that one must distinguish "between the president and political executives as original sources of rulemaking initiatives"; the study did not, however, focus on within-agency political executives. *Id.* at 511. Moreover, it is conceivable that the career officials whom Raso and West interviewed were simply unaware that particular rules were developed at the behest of the White House.

102. *Id.* at 510.



OIRA's) influence on defining the substantive rulemaking agenda was similarly limited, though OMB and OIRA might have been heavily involved at later stages.<sup>103</sup> Congress dictated the agenda for roughly a third of the rules, and courts for another 3 percent, but the clear majority occurred “at agencies’ discretion.”<sup>104</sup>

Indeed, even one of President Obama’s most visible “directive” announcements—to the EPA and the DOT to develop greenhouse-gas and fuel-efficiency standards for cars<sup>105</sup>—built importantly on material that had been developed in the previous administration, largely in an office headed by senior civil servants inside the EPA.<sup>106</sup> As Professor Lisa Heinzerling (formerly senior climate policy counsel at the EPA) has recounted, the Office of Transportation and Air Quality, based in Ann Arbor, Michigan, “developed a new model for assessing possible greenhouse gas regulations in light of costs and cost-effectiveness,” and researched vehicle technology and other costs associated with new regulations.<sup>107</sup> According to West and Raso, the sources for particular discretionary rule proposals in their multiagency sample were overwhelmingly from the agencies themselves, from an advisory committee, or, in the case of roughly a third of significant rules, from an interest group, most often a business group.<sup>108</sup>

Again, though this evidence is limited, it raises the possibility that political supervision of significant regulatory activity is mainly reactive, not proactive. Midlevel Senate-confirmed political officials may not be responsible for many significant new affirmative agenda

---

103. *Id.* at 511.

104. *Id.* at 504.

105. John M. Broder, *Obama To Toughen Rules on Emissions and Mileage*, N.Y. TIMES, May 18, 2009, <http://www.nytimes.com/2009/05/19/business/19emissions.html>; David A. Fahrenthold & Juliet Eilperin, *White House Proposes First National Limits on Greenhouse Gases*, WASH. POST, Sept. 16, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/15/AR2009091503146.html>.

106. See Lisa Heinzerling, *Introduction: Climate Change at EPA*, 64 FLA. L. REV. 1, 4 (2012) (describing “months of hard work” in the EPA’s Office of Transportation and Air Quality predating the Obama administration to develop the basis for a tailpipe rule regulating greenhouse-gas emissions).

107. *Id.* at 4 (seeing the “fruits of all of these labors” in the Obama administration greenhouse gas standards for automotive emissions).

108. West & Raso, *supra* note 96, at 509; see also Marissa Martino Golden, *Who Controls the Bureaucracy?: The Case of Agenda Setting 14–23* (Oct. 2003) (unpublished manuscript) (on file with author) (noting that although civil servants are “reactive rather than proactive,” at least at NHTSA, careerists “have a fair amount of discretion in deciding what they want to promulgate rules about”).

items. In its reactive quality, internal political supervision (“politicization,” in Professor Moe’s words) may resemble the centralized political supervision of rulemaking that takes place in OIRA, responding to and deliberating over the quality of proposals developed largely within the agency’s civil service ranks.

This discussion underscores how much can depend on the skills and responsiveness of career civil servants. These examples suggest a largely competent and responsive civil service, but suppose this were not the case. Even if an assistant secretary position were filled by a confirmed appointee, the likely shortness of the term, frequency of turnover, and length of time required to develop a new regulatory initiative would limit the assistant secretary’s effectiveness in getting civil servants to change course or implement a new initiative.

But if, as suggested above, civil servants are competent and responsive, their greater involvement can have important benefits for policy development, because of their expertise and experience. Although rulemaking can be characterized by questions of value, it also undoubtedly requires both technical expertise and mature judgment. Some commentators have suggested that expert agency work may be best understood as incorporating a notion of “craft,” including not simply rational analysis, but the ability to exercise judgment, over time, regarding “what works and what doesn’t when ferreting out information, what evidence is reliable and what is not . . . .”<sup>109</sup> Long experience with an agency’s portfolio and an environment characterized by deliberation, professionalism, and a sense of public service may help develop both an individual’s and an institution’s ability to make such judgments.<sup>110</sup>

---

109. See JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* 67 (1983), *quoted in* Sidney Shapiro, *The Failure To Understand Expertise in Administrative Law* (2014) (unpublished manuscript) (on file with author); Thomas O. McGarity, *The Internal Structure of EPA Rulemaking*, 54 *LAW & CONTEMP. PROBS.* 57, 61 (1991) (“The expertise upon which the rulemaking edifice rests is thus an ‘institutional expertise’ that transcends the knowledge and experience of any individual person or office within the agency.”).

110. See Sidney Shapiro & Elizabeth Fisher, *Chevron and the Legitimacy of “Expert” Public Administration*, 22 *WM. & MARY BILL RTS. J.* 465, 479 (2013) (arguing that the notion of “expertise” should include the “deliberative-constitutive” paradigm of expert public administration, characterized by institutional factors, including “[t]he capacity of agencies to assemble a diverse group of experts, to conduct a discursive process, and to reach a decision that reflects this expertise,” guided by a pro-mission “organizational culture,” “a sense of public services, and professionalism”).

Compared with newly arrived generalist political appointees, senior career civil servants may well be in a better position to offer such experience and judgment. To the extent confirmation delays increase an agency's tendency to rely upon the knowledge and judgment of experienced civil servants, that may have significant value in refining the agency's ultimate policy judgments.<sup>111</sup> Moreover, the scenario here is not complete elimination of political supervision. Because confirmation of heads of agencies is rarely delayed, and because confirmation is no obstacle to presidential appointment of a significant number of lower level officials, regulatory decision making will still be subject to some intra-agency political supervision. The pertinent question is the marginal value of a confirmed appointee at the midlevel.

### *B. Supervision of Other Agency Decisions*

Beyond regulatory policy, the work of an assistant secretary or assistant administrator may simply be on other matters. Decisions may involve straightforward questions of management: How much more effort should a team devote to developing this or that variety of data? How should veterans' requests for health care be handled? What are the data-related challenges for a benefits program?<sup>112</sup> And with respect to management of day-to-day program implementation, it is unclear that control by a newly confirmed political official is quite as critical.

The President may be held accountable for an agency's performance—for example, President Obama's approval ratings may have shifted to reflect public dissatisfaction with the Veterans' Administration hospitals' handling of veterans' health care needs, or the CDC's handling of American hospitals' preparedness for the Ebola virus.<sup>113</sup> Moreover, an official making these decisions may have

---

111. Cf. Mendelson, *supra* note 36, at 641–47 (discussing the benefits to agency diversity resulting from late-presidential-term hiring into the civil service).

112. See also McGarity, *supra* note 109, at 61 (“The agency staff can usually provide high-level political appointees with a rudimentary understanding of the relevant macro-issues, but agency decisionmakers must still rely heavily upon the staff [and] . . . must trust the staff to make the ‘right’ calls on [] scores of micro-issues . . .”).

113. E.g., Elise Viebeck, *Ebola Is 2014 October Surprise*, THE HILL (Oct. 15, 2014), <http://thehill.com/policy/healthcare/220774-ebola-is-2014-october-surprise> (describing the public debate over responsibility for handling Ebola-virus challenges); *Ebola Concerns, Obama and CDC Approval*, WASH. POST, Oct. 29, 2014, [http://www.washingtonpost.com/politics/polling/ebola-concerns-obama-cdc-approval/2014/11/04/c1bd23e0-5f5a-11e4-827b-2d813561bdfd\\_page.html](http://www.washingtonpost.com/politics/polling/ebola-concerns-obama-cdc-approval/2014/11/04/c1bd23e0-5f5a-11e4-827b-2d813561bdfd_page.html) (noting 41 percent disapproval of Obama and 45 percent disapproval of the CDC); see also

to contend with values issues of the sort that some commentators associate with political decision making and electoral accountability.<sup>114</sup> These values issues can include questions of resource allocation and how highly to prioritize certain values (such as the unbridled ability, say, to choose one's health care provider or avoid quarantine).<sup>115</sup> Further, assuming that midlevel political appointees tend to be agency outsiders and generalists, they may bring a fresh perspective and new skills not already possessed by agency insiders.<sup>116</sup>

Even so, implementation decisions may be characterized less by significant values issues than by issues of simple management, mechanics, and technical expertise. Adding another layer of Senate-confirmed political management could thus be less critical; having these issues supervised by an expert may be more important. As compared to a political appointee, a careerist may have greater program- and public-management expertise, including in the particular agency.<sup>117</sup> Such a senior civil servant, with long experience in the agency and its particular issues and programs, could also very plausibly know better the particular needs at the agency's front lines—what has worked and what has failed.<sup>118</sup> Again, this assumes that the White House has the ability to select such a competent and responsive civil servant to serve in an acting role.

Certainly, owing to Vacancies Reform Act rules that fill vacancies primarily by repositioning existing agency personnel, a

---

Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 988 (1997) (“Increasingly, scholars (and, at times, the judiciary) look to the President not only to improve the managerial competence and efficiency with which regulation occurs but also, and more deeply, to supply the elusive essence of democratic legitimation.”).

114. See, e.g., *supra* note 8 and accompanying text (noting Kagan's suggestion that agency officials lack both expertise and “democratic warrant” to make value judgments).

115. See, e.g., Mendelson, *supra* note 20, at 1136–37 (discussing the level of judgment built into agency decision making).

116. LEWIS, *supra* note 72, at 177; see also *id.* at 141 (discussing the fact that “a long tradition holds that political appointees drawn from outside the civil service bring needed energy and responsiveness to federal management”); O'Connell, *supra* note 7, at 947 (arguing that “[n]ew leaders bring new ideas and fresh connections with certain relevant outside groups, forcing needed change and improving agency performance”). For reasons stated *infra* note 121 and accompanying text, the evidence seems decidedly mixed regarding whether new appointees tend to improve agency performance across the board.

117. See Lewis, *supra* note 18, at 589 (discussing the advantages in expertise possessed by “careerists” as opposed to political appointees).

118. See LEWIS, *supra* note 72, at 77 (finding that careerists were “the most likely to have worked in the bureau they manage, to have the most public management experience, and to have the longest tenures in their current positions”).

confirmation delay represents one less person supervising the agency's work (or, alternatively, that of a different agency if the President chose to transfer a confirmed appointee into the acting position). But because an acting official is highly likely to be a longtime civil servant (either a former "first assistant" or a senior civil servant), the vacancy filled in this way may offer important benefits as compared with supervision by a political appointee. In short, the public may benefit from the presence of a longtime career civil servant. And if the President is indeed ultimately held accountable for the agency's performance, it may be to the President's advantage to have more experienced civil servants in these positions.

David Lewis, for example, discusses the poor response of the Federal Emergency Management Agency (FEMA) to Hurricane Katrina. FEMA was led at the time by Director Michael Brown (of "Brownie" fame),<sup>119</sup> who had no previous expertise with emergency management. Senior political officials at FEMA below Brown's level did not take seriously the warnings of longtime career officials in the agency. This resulted in a failure of advance planning for Katrina and a very slow response. Lewis concludes that the failures were largely attributable to overpoliticization of the department, including a reduction in career civil servants with significant specific expertise.<sup>120</sup>

Lewis also collected aggregate data supporting the position that career civil servants tend to be better managers than political appointees. Based on so-called "PART" scores, a measure of agency performance devised in the George W. Bush administration, offices headed by careerists performed better than those headed by appointees.<sup>121</sup> More specifically, Lewis found an office head's experience in the agency tended to significantly improve the

---

119. *President Arrives in Alabama, Briefed on Hurricane Katrina*, Archived Press Release, Office of the Press Secretary, THE WHITE HOUSE (Sept. 2, 2005), <http://georgewbush-whitehouse.archives.gov/news/releases/2005/09/20050902-2.html> ("Brownie, you're doing a heck of a job.").

120. LEWIS, *supra* note 72, at 169; *see* Verkuil, *supra* note 69, at 312 (discussing evidence that "political appointees are less effective managers than career officials").

121. LEWIS, *supra* note 72, at 172–202 (2008) (analyzing the performance difference between careerists and appointees). According to Lewis, PART scoring was administered jointly by the OMB and the implementing agency, and it incorporated scoring on results, management, and planning, among other factors. *See* David E. Lewis, *Testing Pendleton's Premise: Do Political Appointees Make Worse Bureaucrats?*, 69 J. POL. 1073, 1075–76 (2007).

performance of that office.<sup>122</sup> With respect to management, a senior civil servant appointed as an acting official may have more to offer than a political appointee.<sup>123</sup>

For another telling example, the White House often delays selecting political nominees to become agencies' chief financial officers.<sup>124</sup> Because these jobs are characterized overwhelmingly by management issues, the White House may think it preferable for longtime career civil servants to occupy the positions.<sup>125</sup> These examples support the conclusion that acting civil servants possess some advantages compared with incoming political appointees; they are also consistent with a view of the civil service as competent and responsive.

A similar point might be made regarding supervision of programmatic enforcement decisions. Although such decisions offer significant potential for policymaking, the White House does not typically supervise individual enforcement decisions.<sup>126</sup> And with respect to such decisions, a longtime career official with specific experience with the issues the agency has handled over the years may well be better situated to exercise the necessary supervisory judgment than a newly arrived political official.

Finally, this analysis assumes the best of incoming confirmed political appointees—that they bring to bear generalist managerial expertise and a valuable fresh perspective as well as a particular

---

122. LEWIS, *supra* note 72, at 181. But offices headed by an acting career civil servant in lieu of a confirmed nominee may be at a disadvantage relative to other offices in the agency. That may affect how the office fares in the allocation of personnel and budgetary resources.

123. Lewis's study tends to support the conclusion that senior career civil servants are competent and hardworking, rather than resistant or shirking.

124. *See* Lewis, *supra* note 18, at 592 (noting that midlevel positions aimed at management, "chief financial officers, and inspectors general . . . are some of the most persistently vacant Senate confirmed positions").

125. *See, e.g., id.* ("Such positions are ideally suited for long timers."). Similar considerations likely prompted the Senate's passage of Senate Resolution 116 in the 112th Congress, which provided for a streamlined confirmation process for approximately 270 positions, mainly appointments to boards of trustees and advisory councils, but also including the chief financial officers of all the cabinet agencies. *See* S. RES. 116, 112th Cong. (as passed by Senate, June 19, 2011). *See generally* MAEVE CAREY, CONG. RESEARCH SERV., R41872, PRESIDENTIAL APPOINTMENTS, THE SENATE'S CONFIRMATION PROCESS, AND CHANGES MADE IN THE 112TH CONGRESS app. B (2012).

126. *See, e.g.,* Andrias, *supra* note 50, at 1072 n.191 and accompanying text (describing the White House's firm policy of no contact regarding pending agency enforcement actions); *see also id.* at 1059–63, 1067 (discussing "largely episodic and not institutionalized" presidential control of enforcement policy in the Obama, Reagan, Clinton, and George W. Bush administrations).

responsiveness to White House supervision. If political managers are placed through patronage appointments, rather than based on their expertise, their managerial advantage over longtime civil servants likely would be further reduced.<sup>127</sup>

### C. *Other Effects of Increasing Civil Service Responsibility*

At a more general level, placing career civil servants into acting roles pending a confirmation delay could improve agency morale. Assuming a civil servant is responsive, not resistant, to an administration's goals (likely a precondition for appointment as an acting official), greater engagement in policy issues may increase the civil servant's job satisfaction and, in turn, the likelihood that she will remain with the agency. This observation is consistent with other commentators' suggestions that greater engagement by career civil servants in important roles will reduce turnover in agencies, which seems likely to benefit the agency significantly.<sup>128</sup> Both those civil servants who have greater policy engagement opportunities and other civil servants who simply observe engagement by others may have higher job satisfaction and be less likely to leave because they perceive that the agency, in general, places a higher value on experienced career officials.

With respect to FEMA in particular, Lewis has observed that “[r]educing the number of appointees would have generated more stable leadership since career professionals would have then assumed important management positions.”<sup>129</sup> Of course, an acting official's having to return to the ranks once the Senate has confirmed the

---

127. Lewis points out that members of Congress can be “willing partners to politicization,” since it gives them an opportunity to “plac[e] their favorites into administration jobs.” LEWIS, *supra* note 72, at 204.

128. See Anthony M. Bertelli & David E. Lewis, *Policy Influence, Agency-Specific Expertise, and Exit in the Federal Service*, 23 J. PUB. ADMIN. RES. & THEORY 223, 225 (2014) (claiming that without senior executives choosing to remain in agency and invest in costly expertise, “congressional delegations as well as the effectiveness of the administrative state will suffer”); Lewis, *supra* note 121, at 1075 (“Increased turnover creates leadership vacuums, mixed signals about agency goals, an inability to credibly commit to reform, and generally poorer performance.”); LEWIS, *supra* note 72, at 211 (“When appointees are brought in from outside the civil service . . . natural problems arise from . . . reduced morale and incentive to develop expertise.”). *But see* O’Connell, *supra* note 7, at 947 (arguing that frequent turnover can benefit agencies by “foster[ing] creative solutions” (citation omitted)).

129. LEWIS, *supra* note 72, at 169.

appointee might undermine her newfound job satisfaction.<sup>130</sup> Others may, however, still retain some level of satisfaction from working in an institution where senior civil servants can possess significant policy influence.<sup>131</sup>

These potential advantages could be counterbalanced by other significant problems, however. First is the distinct increase in turnover resulting from confirmation delay and the accompanying need to appoint an acting official. For example, suppose that three separate individuals are appointed and confirmed, sequentially, for one assistant secretary position and that each serves the median term of roughly two years. A confirmation delay of a few months for each of them might prompt the appointment of an acting official, so that five or six separate individuals come to occupy the post in the course of a two-term administration. Each individual must learn the duties of the post, and those working in the office must adjust to the new boss. This level of turnover very likely will undercut the office's overall efficiency.<sup>132</sup>

Second, the instability and resource loss occasioned by persistent turnover or vacancies in a particular office may erode morale over the long term, even if such turnover can provide career civil servants with greater opportunities to serve in senior management positions. Finally, the perception that the White House does not see an office as sufficiently important to invest its resources in nominating an appointee and pressing the Senate to confirm may also undermine morale in the office.

Overall, previous analyses of the costs of vacancies may have implicitly overstated midlevel political appointees' responsibility for shaping agency policy initiatives.<sup>133</sup> Moreover, with respect to management of core implementation functions and individual enforcement decisions, long-term civil servants may have superior expertise relative to newly arrived political appointees. Placing long-

---

130. *Id.* at 144 (noting the "demoralizing" situation for career civil servants when they are replaced by political appointees). Moreover, a career civil servant, as with an incoming political appointee, will need time to adjust to the demands of her new position.

131. *See Bertelli & Lewis, supra* note 128, at 235.

132. *See, e.g., Lewis, supra* note 18, at 589-90 (noting the pervasive costs of management turnover).

133. Of course, there are exceptions; a particular assistant secretary may make significant contributions either in presenting an agenda for legislative reform to Congress or in finalizing substantial regulations. The relevant question here is whether, across the executive branch, these gains are worth the costs of a thicker political layer.



term career officials into acting positions while awaiting confirmation may enhance not only the quality of management, but the job satisfaction and longevity of career civil servants—factors critical to agency effectiveness. (Again, this assumes a responsive, rather than a resistant, civil service overall.)

Certainly, vacancies caused by confirmation delays are problematic—but consider that a number of problems, particularly resource drains from confirmation-caused vacancies, turnover and the long-term erosion of morale, would be minimized if the positions were not designated as political in the first place, but filled as a matter of course by senior career civil servants. Assessing the true scale of the costs and benefits of filling these positions with political appointees subject to confirmation (and in turn to confirmation delay) would require a good deal more inquiry, including into the relative qualifications of senior career officials and midlevel political appointees subject to confirmation. It would also require more systematic inquiry into the relative importance of political control of the various agency functions that a midlevel political appointee supervises. Still, these examples suggest that the inquiry is worth undertaking.

#### CONCLUSION

A more complete understanding of the costs—and potential benefits—of Senate confirmation delays for agency functioning requires deeper inquiry into the specifics. Confirmation delays affect midlevel management more than other levels. Managers at this level may play both a limited role in overseeing policy and a pronounced role in core management. In this setting, a career civil servant may have as much to offer as a generalist appointee. Moreover, confirmation delays unquestionably reduce agency resources and increase turnover in these positions, which may interfere with officials' ability to represent the United States in some settings and negotiate with their confirmed counterparts within the agency and executive branch. Resolving costs and benefits definitively would require more inquiry across a range of agency officials and functions. The best one can say at this juncture: "It depends."

But the confirmation delay problem nonetheless provides another chance to reflect both on the structure of agency management and the contrast between political appointees and career civil servants. As Paul Light has argued, supervisory layers in the

agencies have thickened far beyond the point at which they are useful, occupying too many resources and interfering with performance.<sup>134</sup> And as Lewis has pointed out, the extra political layers may add little in terms of agency functioning.<sup>135</sup>

A vacancy resulting from confirmation delay is one way to thin an agency's political management, but it is a haphazard and costly way of doing so. And with respect to particular positions in the middle of an agency's management structure, more focused reflection is needed on whether the position would be best filled by a confirmed political appointee or a career civil servant, or perhaps eliminated altogether. Again, much depends on the functions such a person must perform and on her qualifications.

Finally, it is worth returning briefly to the issue of legitimacy, with which this Article began. Administrative law commentators such as Stephenson tend to emphasize the necessity of the democratic connection. But this does not resolve the question of the optimal amount of democratic control. Past reform of the federal civil service requiring a focus on merit and eliminating the "spoils system" itself reflects a continuing consensus that complete political control of the bureaucracy, while perhaps "democratic," would not be legitimate.<sup>136</sup> "An overly politicized bureaucracy . . . cannot be responsive because it is not effective."<sup>137</sup>

Legitimacy is hard to measure, and many commentators—including myself—have questioned how effectively a presidential election can convey voter preferences regarding the operation of the administrative state.<sup>138</sup> In this context, it may be worth considering

---

134. LIGHT, *supra* note 38, at 61–95.

135. See *supra* note 132 and accompanying text (discussing Lewis's findings). Of course, all this assumes that the thinning of the political layer would mean thinning overall, not simply thinning of Senate-confirmed political appointments and replacement with political appointments not requiring confirmation. The potential advantages come from increasing the role of the career civil service in agency management.

136. See generally STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920, at 178–210 (1982) (describing efforts of Theodore Roosevelt, Taft, Wilson, and Harding to eliminate the "spoils system"); Christopher V. Fenlon, *The Spoils System in Check?*, 30 CARDOZO L. REV. 2295, 2301–02 & nn.22–30 (2009).

137. LEWIS, *supra* note 72, at 207.

138. See Farina, *supra* note 113, at 1000; Mendelson, *supra* note 36, at 617–19 (discussing why the presidential election process might imperfectly convey electoral preferences). Agencies might also be conceptualized as democratic because of the processes they use or because multiple interests are represented in agency discussions. See Mendelson, *supra* note 36, at 585–

other yardsticks for the administrative state's legitimacy. For example, Professor Francis Fukuyama has argued that a critical measure of a government's capacity and effectiveness is the "level of education and professionalization of government officials," and has further noted that "we trust highly educated professionals with a much higher degree of discretion."<sup>139</sup> For example, the public has condemned perceived political tampering with science, which has undermined the reputation of both administrations and agencies.<sup>140</sup> And as Fukuyama has pointed out, the public has greatest respect for highly expert agencies (such as the CDC and NASA) that invest considerable discretion in expert career officials.<sup>141</sup> The CDC's head is a political appointee not subject to Senate confirmation,<sup>142</sup> and its listing of "most common jobs" is dominated by health and science professionals.<sup>143</sup> The Pew Research Center recently reported very strong favorable ratings for both the CDC and NASA, even though "overall trust in government is near historic lows."<sup>144</sup> Public administration literature on the public's trust in government officials similarly emphasizes criteria other than political control.<sup>145</sup>

---

86 (discussing "other conceptions of democratic legitimacy" resting more directly on agency decision making processes).

139. Francis Fukuyama, *What Is Governance?*, 26 GOVERNANCE 347, 354 (2013).

140. See, e.g., Charlie Savage, *Report Finds Meddling in Interior Dept. Actions*, N.Y. TIMES, Dec. 15, 2008, <http://www.nytimes.com/2008/12/16/washington/16interior.html> (reporting that the Interior Department's inspector general concluded that Fish and Wildlife Service Deputy Assistant Secretary Julie MacDonald caused harm to species, as well as to "the morale and reputation" of the agency); see also Andrew C. Revkin, *Bush Aide Softened Greenhouse Gas Links to Global Warming*, N.Y. TIMES, June 8, 2005, <http://www.nytimes.com/2005/06/08/politics/08climate.html>; Andrew C. Revkin & Matthew L. Wald, *Material Shows Weakening of Climate Reports*, N.Y. TIMES, Mar. 20, 2007, <http://www.nytimes.com/2007/03/20/washington/20climate.html>.

141. Francis Fukuyama, *Remarks*, ADMIN. CONF. OF THE U.S. (June 6, 2014), [http://acus.granicus.com/MediaPlayer.php?view\\_id=2&clip\\_id=130](http://acus.granicus.com/MediaPlayer.php?view_id=2&clip_id=130).

142. See PLUM BOOK, *supra* note 54, at 66.

143. See *Most Common Jobs at the CDC*, CTRS. FOR DISEASE CONTROL AND PREVENTION, [http://www.cdc.gov/employment/menu\\_topjobs.html](http://www.cdc.gov/employment/menu_topjobs.html) (last updated Jan. 6, 2014).

144. *Most View the CDC Favorably; VA's Image Slips: Ratings of Government Agencies*, PEW RES. CENTER (Jan. 22, 2015), <http://www.people-press.org/2015/01/22/most-view-the-cdc-favorably-vas-image-slips>. Another factor possibly relevant to public trust, as yet unexamined, might be the sort of expertise understood to be resident in each agency. It could be, for example, that the public has greater trust in NASA's physicists than in the Department of Labor's economists.

145. See, e.g., David J. Houston & Lauren Howard Harding, *Public Trust in Government Administrators*, 16 PUB. INTEGRITY 53, 55, 69 (2014) (distinguishing between "trust based on competence" and "trust based on care," advocating further research to "develop a more complete understanding of particularized trust in public servants," whether grounded in

Persuading a President to give up political appointments would be tremendously challenging.<sup>146</sup> Nonetheless, it may be worth reflecting on whether confirming multiple layers of political officials in agencies is really the best way to bolster the executive branch's democratic legitimacy. Particularly in institutions in which expertise is high, we might understand a central contributor to the legitimacy of agency power to be resident expertise and the agency's adherence to professional norms.<sup>147</sup> On this view, multiple layers of political supervision may be unnecessary. If so, rather than taking for granted as necessary the number of agency officials with formal links to the President, we should strive to recalibrate the balance between these officials and career civil servants.<sup>148</sup>

---

"trustworthiness or competence"). Professor Löfstedt has argued that public trust has three dimensions: fairness (including whether the regulators took everyone's interests into account, not just "certain powerful industrial bodies"), competence (expertise, roughly speaking), and efficiency (attention to the use of taxpayer funds). See RAGNAR E. LÖFSTEDT, RISK MANAGEMENT IN POST-TRUST SOCIETIES 7 (2005). Of these, "fairness" seems most directly connected with political control, and even then, the relationship is problematic if one perceives greater risk of capture in the electoral process than in the administrative process.

146. LEWIS, *supra* note 72, at 584 (noting that political appointments hold out the promise of helping Presidents "secure control of agency policy making but also provide a means of satisfying the immense demand for jobs in the new administration").

147. The idea that an agency may find legitimacy in the bureaucratic sense of professionalism is not novel. See Gerald Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1320–21 (1984) (observing that under the expertise model, the agency is constrained by "the limits of professionalism, expertise, and competence"); Fukuyama, *supra* note 139, at 354.

148. Such a position might be consistent with Jody Freeman and Adrian Vermeule's characterization of the Supreme Court as increasingly concerned with "protect[ing] administrative expertise from political intrusion," at least in times of alleged "widespread tampering" with traditional expertise-driven decision making. See Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 54–55; Farina, *supra* note 113, at 987 ("Like an intriguing but awkward family heirloom, the legitimacy problem is handed down from generation to generation of administrative law scholars.").