NET NEUTRALITY, THE CFPB, AND CARBON EMISSIONS: AN ANALYSIS OF SEPARATION OF POWERS ISSUES IN PUBLIC ADMINISTRATION

By

Aaron Matson

B.A., Northern State University, 2002
M.Div., Trinity Lutheran Seminary, 2008

A Dissertation Submitted in Partial Fulfillment of the Degree of Doctor of Philosophy

Department of Political Science

In the Graduate School
The University of South Dakota
May 5, 2018

www.manaraa.com

ProQuest Number: 10634591

All rights reserved

INFORMATION TO ALL USERS
The quality of this reproduction is dependent upon the quality of the copy submitted.

In the unlikely event that the author did not send a complete manuscript
and there are missing pages, these will be noted. Also, if material had to be removed,
a note will indicate the deletion.

ProQuest 10634591

Published by ProQuest LLC (2018). Copyright of the Dissertation is held by the Author.

All rights reserved.
This work is protected against unauthorized copying under Title 17, United States Code
Microform Edition © ProQuest LLC.

ProQuest LLC.
789 East Eisenhower Parkway
P.O. Box 1346
Ann Arbor, MI 48106 – 1346

www.manaraa.com

Copyright by

AARON MATSON

2017

All Rights Reserved

www.manaraa.com

The members of the Committee appointed to examine the dissertation of Aaron Matson find it satisfactory and recommend that it be accepted.

Chairperson, Chad Newswander

Matthew Fairholm

Daniel Boden

Lynita Newswander

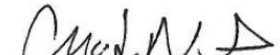
www.manaraa.com

Abstract

This dissertation examines the debate over the constitutional legitimacy of the administrative state. It focuses on the attacks on its legitimacy by formalists – who interpret the Constitution as demanding a strict separation of powers between the branches of government – in three areas of controversy: nondelegation, presidential removal power, and independent agencies.

After summarizing the responses to formalists in these areas by functionalists – who argue the Constitution allows blending of powers between the branches as long as one branch does not become dominant over the others – the dissertation uses David Rosenbloom's "retrofitting" concept show how the constitutional legitimacy of the administrative state can be defended from a formalist perspective. Namely, following World War II, Congress and the courts took a series of actions to retrofit the administrative state to the Constitution. Because these actions, there is now a "tri-partite custody" of public administration – meaning that when administrators perform legislative or judicial functions, they are not merely agents of the legislative or judicial branches, but extensions, or part of, those branches.

The dissertation applies the retrofitting concept to a contemporary case study in each area of controversy: the nondelegation controversy is examined through the debate around former President Obama's Clean Power Plan, the removal power controversy is examined through a constitutional challenge to the Consumer Financial Protection Bureau, and the independent agencies controversy is examined through the debate around the Federal Communication Commission's rules on "net neutrality." By applying the retrofitting concept to these cases, the dissertation will show how, in each area of controversy, the constitutional legitimacy of the administrative state can be defended with formalist logic.

Dissertation Advisor 

Dr. Chad Newswander

www.manaraa.com

TABLE OF CONTENTS

Abstract		iii
Table of Contents		iv
I.	Introduction: Shared or Separated Powers?	1
II.	Theory and Methodology	20
III.	Nondelegation Case Study: The Clean Power Plan	39
IV.	Removal Power Case Study: The Consumer Finance Protection Bureau	56
V.	Independent Agencies Case Study: The FCC and Net Neutrality	75
VI.	Conclusion	96
References		115

www.manaraa.com

I. CHAPTER ONE

SHARED OR SEPARATED POWERS?

More and more, the normal lawmaking process seems broken, stumbling from one crisis to the next, with fewer bill being passed by the past several sessions of Congress than ever before (Bump, 2015) and the federal government struggling to do what used to be basic tasks, such as passing a debt ceiling increase, until the very last minute. Even then, the partisan rancor plaguing Washington can threaten vital programs with government shutdowns or the full faith and credit of the United States with the many members of Congress pledging never to increase the debt ceiling.

While partisan controversy and battles between branches is nothing new, the federal government seems more gridlocked and less productive than in recent history (Mann and Ornstein 2006 and 2012). As a result, there is more and more pressure on administrators to handle the tasks of governing. Frustrated with his lack of success in passing much of his legislative agenda since Republicans gained control of the House in 2011, President Barack Obama unveiled his "phone and pen" strategy in early 2014. While claiming he intended to work with Republicans in Congress to find common ground on a positive governing agenda, Obama also said that if Congress was unable or unwilling to compromise, he would use his "pen" to sign executive orders and "phone" to convene outside business and nonprofit groups to achieve what policy goals he could to build on economic gains and improve the lives of Americans (Epstein 2014, Eilperin, 2014). In an illustrative speech to an education event at the White House during this period, Obama told the crowd, "I am going to be working with Congress where I can to accomplish this, but I am also going to act on my own if Congress is deadlocked…I've got a pen

www.manaraa.com

to take executive actions where Congress won't, and I've got a telephone to rally folks around the country on this mission" (Keith, 2014, para 4.).

In response to this "pen and phone" strategy, Republican critics in Congress charged the President with overstepping his authority and disregarding the rule of law and the principle of separation of powers (Keith, 2014 and Viebeck, 2014). Republicans in Congress went so far as to pass a pair of laws that spring to reign in what they saw as executive overreach. Explaining the need for the laws, then-House Majority Leader Eric Cantor (R-Va.) said, "This administration's blatant disregard for the rule of law has not been limited to just a few instances…The president's dangerous search for expanded power appears to be endless" (Memoli, 2014, para. 4). Despite these rebukes from Republicans in Congress, Obama continued to rely on this strategy for the remainder of his time in office. These developments have only given more fodder to those who believe that the modern administrative state undermines the principle of separation of powers.

With the rise of the modern administrative state in the wake of the New Deal, government agencies and unelected public administrators who work within them have come to touch almost every part of American life (Rosenbloom, 2003). As the involvement of public administrators in American life has grown, so have the consequences surrounding the debate of the constitutional legitimacy of the administrative state. By "administrative state," this paper refers to what John Rohr (1986) calls "the political order that came into its own during the New Deal and still dominates our politics" (p. xi). This administrative state has as its hallmark "the expert agency," which performs vital tasks of governance by authority drawn from statutes which are written with varying degrees of vagueness. Through such statutes, unelected administrators are empowered to carry out loosely defined functions such as "preventing 'unfair

www.manaraa.com

competition,' granting licenses as 'the public interest, convenience or necessity' will indicate, maintaining a "fair and orderly market," and so forth" (Rohr, 1986, p. xi).

The administrative state is not just concerned with regulation; it has its hand in defense contracting, diplomacy, and managing public assistance and housing, among many other policy areas. It has grown to encompass not only the "patronage state" fostering commerce, investment, and distribution of land, which Theodore Lowi (1985) argues was the original purview of national administration, but also the "regulatory state" by which it "seeks to impose obligations directly upon citizens, backing those obligations with sanctions" (p. 46) and the "redistributive state" which has the goal of creating "new structures," and seeks to "influence individuals by manipulating the value of property or money, or to categorize people according to some universalized attribute, such as level of income or age or status of occupation" (p. 47). Put simply, the administrative state is, in Rohr's words, the "welfare/warfare state we know so well" (p. xi). The modern administrative state does not merely execute the laws passed by Congress (and signed by the President); it is also granted discretion within the laws to perform quasi-legislative functions through rulemaking and quasi-judicial functions through adjudication (Rosenbloom, 2000a, 2000b).

After two decisions striking down this type of delegation in 1935 (*A. L. A. Schechter Poultry Corp. v. United States* and *Panama Refining v. Ryan*), the Supreme Court has generally upheld broad delegations of authority to administrative agencies (e.g., *Lichter v. United States, American Power & Light Co. v. SEC, Chevron v. Natural Resources Defense Council,* and *Mistretta v. United States*). Despite these rulings, the blending of powers in federal agencies, and therefore entire administrative state, has continued to come under attack by critics with as unconstitutional in a system of separation of powers. Constitutional criticisms center around

www.manaraa.com

what Ronald Pestritto (2007a) identifies as three key tenets of the separation of powers and rule of law: (1) the principle of non-delegation, which dictates one branch may not delegate its powers to another branch; (2) the related principle that multiple governmental powers may not be combined within the same branch; and (3) finally, the principle that administrative discretion must be exercised within the confines of political accountability (pp. 3-4). For Pestritto, the modern administrative state violates the constitution because it does not adhere to these tenets of the constitutional principle of separation of powers – Congress often delegates its lawmaking power to agencies and administrators within the executive branch, these agencies often exercise executive, legislative, and judicial powers, and many are independent, or at least shielded from direct removal by the president (except for cause), which protects them from political accountability.

Scholars echoing these critiques which claim the post-New Deal administrative state is unconstitutional adhere to a formal understanding of separation of powers, which seeks to enforce the "formal" lines of separation its adherents believe exist in the Constitution. Formalists claim that the Constitution "draws sharply defined and judicially enforceable lines among the three distinct branches of government" and resist "efforts to reallocate power outright from the particular branch to which a given Vesting Clause has assigned it" (Manning, 2011, pp. 1943-1944).

To some formalists, the administrative state is not only unconstitutional, its continued existence without significant challenge "amounts to nothing less than a bloodless constitutional revolution" (Lawson, 1994, p. 1231). Gary Lawson (1994) argues the modern administrative state's mixing of powers joins together the powers that the Constitution's text dictates should be kept asunder: administrators create rules, enforce those rules, and adjudicate the actions they take

www.manaraa.com

to enforce the rules. For critics, the current administrative state harkens back to the absolute power of European monarchs, the kind of power rebelled against in the American Revolution and which is prohibited in the Constitution. According to Philip Hamburger (2014), administrative power contains the three basic elements of absolute power. First, it is extralegal in that it works outside of the normal legal system, and instead through mechanisms such as administrative rules and regulations. Second, it is supralegal; that is, it often sets itself above the normal legal system and requires judges to defer to agency judgments and actions, rather than their own independent legal judgment. Finally, administrative power consolidates power because agencies exercise the power of all three branches, executive, legislative, and judicial. Therefore, concludes Hamburger, by allowing administrative power to operate outside and above the law, administrative law not only violates the law, but also "departs from the ideal of government through and under the law" (p. 7).

To these critical scholars, the administrative state does not violate the precepts at the heart of the separation of powers principle by accident, but rather has done so by design from its very founding. Pestritto (2005, 2007a, 2007b, and 2012) details what critics view as Woodrow Wilson (1887) and Frank Goodnow's (1900) animosity towards the separation of powers and political accountability of administration and their affection towards delegation, blending of powers for efficiency, and insulation of administrators from political influence through the politics-administration dichotomy. Christian Rosser (2010, 2012) argues convincingly of the great influence of German philosophy, particularly the philosophy of Georg Hegel, on Wilson and Goodnow. Following this influence, they (and other Progressive reformers) saw public administration as a tool to aid the progress of history and society; for them, the Constitution was not a set of timeless, unchanging guidelines and laws, but rather a framework to begin from and

www.manaraa.com

build upon. So then, the principle of separation of powers was not an immutable part of government; because they saw separation of powers as standing in the way of necessary societal progress, it was something to overcome. Critics view these ideas of progress and change, shaped so much by German philosophy, as anathema to the 18th and 19th Century liberalism of the Founders and the system of government they created. Eventually law, politics, and culture accepted the concepts of delegation, combination of functions, and insulating administration from political control and the president's removal power. This has resulted in arguments for the modern administrative state being based not on constitutional principles, but rather on how Progressive reformers (and their progeny), influenced by German philosophy, perceived needs of the day.

This Progressive idea that the perceived needs of the day should play a role in understanding the application of separation of powers is part of the "functionalist" understanding of the separation of powers. While the formal view of separation of powers interprets the Constitution as dividing the three powers of government into categories and assigning each to branch of government, which was to be limited to that responsibility, the functionalist view argues that other than the "core functions" laid out in the Constitution, which branch does what task is to be decided through the political process. In this view, the Constitution only requires a "proper balance" to be preserved between the three branches (Strauss, 1984). While functionalists do acknowledge their commitment to be "attentive to evidence of the concrete social issues catalyzing legislative action" (i.e. the needs of the day), they argue their understanding is still dictated and bound by the constraints of the constitutional text (Strauss, 2011). Within functionalism, there is further division into moderate and extreme camps, with differing views of the role of the judiciary in preventing the encroachment of legislative and

www.manaraa.com

executive branches upon each other's powers (Sargentich, 1987). Moderate functionalists, such as Peter Strauss (1984, 1987, 2011) see the judiciary's role as making sure one branch does not encroach on the "core functions" of the other, while not insisting on judicial enforcement of the strict separation between the branches as formalists. Conversely, extreme functionalists, as typified by Jesse Choper (1980), argue that the constitutional system of checks and balances is self-correcting, and the judiciary should leave the political branches to decide how to balance the separation of powers given the political circumstances of their place and time.

Since 1935, when the Supreme Court opened the gates to the regime of delegation brought about by the New Deal, it has vacillated between the formal understanding of separation of powers described above, and this more functional understanding. Some justices have been consistent in their adherence to one school of thought or the other, other justices have seemingly subscribed to whichever interpretation best fits the needs of the moment[1] (Merrill, 1991, p. 226).

The divide between the two understandings can be seen taking form in two ways. First, it echoes the debate between rules and standards in legal reasoning (Merrill, 1991). This debate is exemplified in the difference between the majority opinion and dissent in the case of *INS v. Chadha*, which invalidated the legislative veto. The majority opinion, authored by Chief Justice Warren Burger, struck down the one-house legislative veto on the grounds it violated the presentment (outlining the process through which bills become law in Congress) and bicameralism (which establishes a Congress consisting of a House and Senate) clauses of the Constitution – two "rules" established by the Constitution. Justice Byron White's dissent objected the majority opinion for apparently invalidating all legislative vetoes, and further argues

[1] For instance, on the same day in 1986 the court handed down both a formalist decision in *Bowsher v. Synar* and a functional decision in *Commodity Futures Trading Commission v. Schor*. Four justices – Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor – signed on to the majority opinion in each case (Merrill, 1991 and Strauss, 1987).

www.manaraa.com

the separation of powers questions issues in the case should be judged by the standards of whether the legislative veto upset the balance between branches of government and whether it interfered with the executive branch performing its necessary functions (Schlag, 1985).

In a similar vein, for formalists a strict separation of powers is a rule mandated in the Constitution, and as the Constitution is the ultimate authority on the nations system of government, this rule must be obeyed. Conversely, the functionalist maintains a better approach is to settle structural questions using standards meant to further the purposes of a system of separation of powers, namely preserving individual liberty. On a deeper level, the differences in approach belie different interpretations of the Constitution. Formalists read the Constitution as assigning each branch a specific function for it and it alone to carry out, unless the Constitution specifically allows an exception – such as the President participating in the legislative process via the veto power. Outside of the "core functions"[2] outlined in the Constitution, functionalists believe Courts should allow Congress to decide where to allocate these activities as long as the "core functions" of each branch are left intact, ensuring each branch has the power to check the others and an equilibrium between the branches is maintained (Merrill, 1991, 230-232).

The attractiveness of formalism lies in its simplicity – the embrace of a one branch, one function equation based on the words of the Constitution (Merrill, p. 230). However, functionalists would argue this beautiful ship of simplicity is no match for the iceberg of the complexities of governing, whether in 1787 or 2016. In order to "achieve the worthy ends of those who drafted our Constitution," we must "give up the notion that it embodies a neat division

[2] In his seminal article on functionalism, Strauss (1984) identifies what he considered the core functions of each branch:

> Subject to definitional issues, we accept (and the Constitution is reasonably explicit) that, as among them, only Congress may legislate, only the Supreme Court may adjudicate, and only the President may see to the faithful execution of the laws; and each is to have a significant function in these respects. In this way, "separation of powers" remains vital in suggesting the forms of control each of the three may exercise over the bulk of government (p. 596)

www.manaraa.com

of all government into three separate branches, each endowed with a unique portion of governmental power and employing no other" (Strauss,1984, p. 667). Beyond the core functions given to those at the top of government – Congress, the President, and the Supreme Court, the rest of government was left for the political system, especially Congress, to define as long as those decisions met two key conditions laid forth in the Constitution: that the "work of law-administration be under the supervision of a unitary, politically accountable chief executive," and that the chosen structures created "permit, even encourage, the continuation of rivalries and tensions among the three named heads of government, in order that no one body become irreversibly dominant and thus threaten to deprive the people themselves of their voice and control" (Strauss,1984, p. 667).

Functionalists see the problem with the formalist reasoning as that it seems to argue that the Founders left their descendants the impossible choice of fealty to their system of government and the flexibility in government to deal with the challenges facing the world they live in – whether that world was lived in during the 18th Century or 21st Century. They interpret the Founders' words as indicating that they intended to create a flexible system of separation of powers bound by core functions laid out in the Constitution and the principle of consent at the core of a liberal system of government. Strauss (1984, p. 604) argues that the "imprecision" in the definition of boundaries in the constitutional system leads to the political rivalries that keep the branches in check, while allowing for more ease in functioning on areas of agreement. The relative strength of the branches may change over time, but the system creates and fosters tensions among them, encouraging them to limit each other, so that action requires consent and in Madison's words, ambition counteracts ambition.

www.manaraa.com

This functionalist reasoning is present in the arguments made by the defenders of the legitimacy of the administrative state, including Richard Neustadt's (1960) influential dictum that the constitution did not create a government of separated powers, but rather a government of "separated institutions *sharing* powers" (p. 33); liberty is preserved by the preventing one branch from having enough power to rule over another. This view of shared powers typifies a progressive interpretation of the principle of separation of powers, echoed by other scholars. One hears the influence of Neustadt, and this interpretation of separation of powers, in Mark Rutgers' argument that, while the three powers of government are distinguished in the constitution, what characterizes it is not the "separation principle," but rather the idea "that mutual control of powers, the checks-and-balances ability to correct one another" (2000, p. 291).

Another less stringent interpretation can been in from John Rohr (1986), who argues that separation of powers attacks on the administrative state are based on an "excessively rigid interpretation" of the doctrine, pointing to evidence of James Madison holding a generally relaxed view of separation of powers as an author in the *Federalist Papers*, as a delegate to the Constitutional Convention in Philadelphia, and as a member of congress in the early government[3]. Not all the founders agreed with Madison's view, but there is ample evidence many did in the notes from the Constitutional Convention and the early years of the country. Rohr demonstrates Madison's relaxed view using Publius' argument in *Federalist* 47 that Montesquieu's conception of the separation of powers did not forbid all acts of control one branch might exercise over another, it was against the whole power of one branch being exercised by the same person or people who exercised the whole power of another branch.

[3] In practice, however, Madison's view of separation of powers was not so relaxed as evidenced by his siding with the president in the foundational removal power controversy settled by The Decision of 1789 (Alvis, Bailey, and Taylor (2013).

www.manaraa.com

Given this relaxed interpretation of separation of powers doctrine from Madison himself, attacks on the administrative state based on the combination of powers in administrative agencies are "off the mark," as the *whole* power of one branch of government has never been transferred to an administrative agency, despite some flirtation with this in the New Deal, and an administrative agency by its very nature would never exercise the whole power of one branch of government in the first place:

> The powers of administrative agencies, unlike those of Congress, the president, and the courts, are always "partial" and never "*whole*." They are partial because they are exercised of a narrowly defined scope of governmental activity – for example TV licensing, railroad rates, food stamps, and so forth. Not only are these powers partial but – unlike those of Congress, the president, and the courts – they are formally subordinated in their entirety to one or another of the traditional constitutional branches. Thus, even egregious abuses by administrative agencies are far removed from "tyranny." (Rohr, 1986, p. 27)

An example of how these powers may be blended is the Senate, which legislates along with the House of Representatives, provides advice and consent on presidential appointments, and adjudicates impeachment trials.

In fact, Laurence Lynn (2013) notes, Madison's argument in *Federalist* 47 was not to defend strict separation of powers between the branches, but to defend the constitutional structure in which powers overlapped between branches. A key part of Madison's argument which Lynn points to is that "none of the colonies, nor the government of Great Britain, featured such strict separation, nor did *Montesquieu*, author of the tripartite scheme, require such separation" (p. 614). If all of these predecessors did not require such strict separation, why should the new Constitution? Rather, the only way to achieve an effective separation of powers was to blend these powers (Green, 2002, p. 546).

One can see this blending of the powers, not only in Rohr's example of the Senate as originally conceived, but in Alexander Hamilton's Treasury department – an administrative

www.manaraa.com

agency. Richard Green's study of the Treasury under Hamilton reveals that the department "possessed extensive rulemaking and some adjudicative authority over many financial and customs operations. The comptroller enjoyed significant discretionary powers and quasi-judicial authority over the drawing of funds from the treasury pursuant to law" (2002, p. 547). Then, as now, the exercise of this authority was not without controversy, or critics in Congress, where some feared these rules would become more powerful than duly enacted laws. This example also shows Congress exercising oversight and control over the affairs of an executive agency, as it wrote detailed prescriptions for reporting and the division of managerial and planning control between itself and the secretary into the Treasury Act.

The common understanding of administration during the first century of the American Republic as almost non-existent and administrative law as only concerned with judicial cases and decisions is inherently flawed, according to Jerry Mashaw (2012). Mashaw's research reveals an active public administration in American life from the Founding, along with an administrative law emerging from internal practices and guidelines of agencies which helped administrative capacity and political and legal accountability grow along with the country. For Mashaw, the kinds of delegation and adjudication pointed to by the critics of administration as unconstitutional and against the original understanding of limited government in this country have, in fact, been present from the very beginning of American government.

However, critics argue the size of the modern administrative state and the scope of the delegation to unelected administrators beginning with the New Deal represent something new. These critics maintain that the victory of the Progressive vision prioritizing the needs of the day over the text of the constitution is so complete, there is no longer much debate over whether or not "administrative agencies can have such discretion delegated to them, or whether or not they

www.manaraa.com

may exercise legislative and judicial powers in addition to their executive powers" (Pestritto, 2007b, p. 53). The entire modern administrative state owes its existence to "the abandonment of separation of powers as an operative constitutional principle, and its replacement by a system separating politics and administration" (Pestritto, 2007b, pp. 53-54).

In summary, then, critics are concerned with the delegation of authority and tasks by one branch of government to another branch, the combination of constitutional powers under one branch, and what they perceive as a lack of political oversight over agencies and their officials. To these critics, the modern administrative state is the result of the victory of the Progressive vision and big government over the constitutional principles of separation of powers and limited government. To restore the separation of powers the founders intended, critics argue, the Supreme Court should enforce, and Congress and the President should honor, the nondelegation doctrine, and public administrators should return to strictly performing executive functions and answer only to the president (Pestritto, 2007a; Calabresi and Yoo, 2008; Hamburger, 2014). The political and legal battles between critics have centered on these basic areas of conflict the delegation of power and nondelegation doctrine, presidential removal power (or lack thereof) of administrative agents, and independent regulatory agencies, which combine these issues. At stake is the future of the administrative state, which has become a deeply ingrained aspect of American law, politics, and society.

The battle lines in the fight over the legitimacy of the administrative state seem to be set with functionalists arguing in favor of its legitimacy and formalists arguing against it. However, acknowledging the legitimacy of the administrative state is not incommensurable with a formal understanding of the separation of powers. Despite sometimes vociferous criticism from formalist scholars, a strong defense can be made for the legitimacy of the administrative state. In

www.manaraa.com

his concept of "retrofitting," central to his theory of legislative-centered public administration, Rosenbloom (2000a) identifies different safeguards against abuses of power by public administrators created by Congress and the courts in the wake of the New Deal, how the administrative state was "retrofit" to conform to a formal understanding of the constitutional system, and how the administrative state reflects – or at least can be made to reflect – constitutional values such as accountability, responsiveness, openness, and the due process of law.

To be sure, the three branches may not always use their powers and the tools available to them to make sure the administrative state reflects constitutional values, but the power and tools to do so are available to them. And in the battle between presidents and Congress for control of the administrative state, each branch has sought put different tools to use, and from time to time, even stretched beyond the bounds of its legal and constitutional authority, in battles which have gone all the way to the Supreme Court for resolution. By studying how separation of powers can be applied in administrative settings with a focus on the three main areas of criticism through case studies tracing the jurisprudence around them and current examples of controversy, this research will examine and compare in depth the different understandings of the constitutional issues around the those controversies, how specific cases in those areas of controversies fit (or not) within the separation of powers doctrine, and show how Rosenbloom's theory legitimizes the administrative state from a formalist perspective.

The purpose of this research is to show how separation of powers can be applied in specific administrative settings of the contemporary administrative state centering on the three areas of controversy – non-delegation, removal power, and independent agencies. It will do so by examining three case studies from current controversies – the 2015 rules created by the

www.manaraa.com

Environmental Protection Agency on carbon emissions at the direction of President Obama, the 2011 formation of the Consumer Financial Protection Bureau, and the 2015 rule on net neutrality formulated by the Federal Communication Commission. In particular, this dissertation seeks to follow in the tradition of defending the constitutional legitimacy of the modern administrative state against contemporary separation of powers critiques as detailed above (Calabresi and Rhodes, 1992; Calabresi, 1995; Calabresi and Yoo, 2008). Using David Rosenbloom's concept how the administrative state was "retrofit" to conform to a formal understanding of separation of powers (2000a, 2000b) the dissertation will answer the charges of critics and show how the modern administrative state respects and honors constitutional system of separation of powers through a complex system of administrative law mainly developed following the passage of the Administrative Procedure Act (APA) of 1946.

While there have been several attempts to defend the constitutional legitimacy of public administration (Wamsley, et. al., 1990; Rohr, 1986; Bertelli and Lynn, 2006), no one has used Rosenbloom's retrofitting paradigm to systematically answer potentially unconstitutional aspects of administrative state from a formalist perspective.

Retrofitting the Administrative State

Rosenbloom (1983 and 1998) has identified three competing paradigms within public administration describing how it can be reconciled with the separation of powers. Each paradigm views public administration through prioritizing one branch of government and its inherent values above the others; in turn, by aligning public administration with these values, it can fit comfortably within the separation of powers regime.

Rosenbloom summarizes the values prioritized by each branch in a table which is partially reproduced below.

www.manaraa.com

Rosenbloom's Summary of Perspectives on Public Administration (Rosenbloom, 1998 p.39; Ingraham and Rosenbloom 1990, p. 212; see also Rosenbloom, 1983)

		Perspectives	
	Executive (Management)	Legislative (Politics)	Juridical (Law)
Values	Economy, Efficiency, Effectiveness	Representation, Responsiveness, Accountability	Constitutional Integrity, Procedural Due Process, Robust Substantive Rights, Equal Protection

Central to his theory of legislative-centered public administration, Rosenbloom describes a process by which Congress and the courts shaped the administrative state to honor a formalist view of separation of powers. Since 1946, the legislative and judicial branches have acted to "retrofit" the administrative state to the constitutional separation of powers by considering them a part of the branch whose tasks they are performing and providing oversight to administrators to make sure administrators honor the fundamental values listed above of each branch when they perform executive, legislative, and judicial tasks, and. Further, each branch has a way to check the actions of administrators when they are acting as part of another branch. A key innovation in Rosenbloom's approach is that it allows for a formal understanding of separation of powers but also acknowledges the constitutional legitimacy of the administrative state. The actions taken by congress and the courts in the years since 1946 made administrators a part of the legislative, executive, or judicial branch when it performs legislative, executive, or judicial tasks respectively. By understanding administrators as a part of the branch whose functions they are performing, Rosenbloom's theory solves the problem of one branch delegating tasks to another branch – the legislative branch is delegating functions to a part of the legislative branch, judiciary to judiciary, and executive to executive. Further, each branch has the tools it needs to

www.manaraa.com

make sure its core values are respected in administrative decisions, and to make sure no one branch gains too much power.

Like John Rohr's (1986) conception of the administrative state as a balance wheel, balancing between service to the three branches in pursuit of ensuring the greatest amount of individual liberty in the actions it takes, Rosenbloom sees administrators as not merely a part of one branch, the executive. In contrast, where Rohr sees administrators as servants and (to a degree) independent of all three branches, and relies upon an administrator's fealty to his or her constitutional oath of office to maintain constitutional balance, Rosenbloom's system sees administrators as firmly embedded in each of the three branches and relies on the heads of each constitutional branch to maintain constitutional balance, not the administrators themselves. While there is a formal separation of powers, the tri-partite custody of the administrative state found in Rosenbloom's framework means that administrators can perform executive, legislative, and judicial tasks without violating that separation and preventing one branch from exercising all three constitutional powers.

Preview of Study

In showing how the separation of powers is honored in public administrative settings, the dissertation will proceed in the following way. Chapter Two will examine key theories and issues involved in separation of powers issues in public administration, particularly Rosenbloom's concept of retrofitting, and discuss the case study and black letter law methodologies used in the dissertation. After that, it will use three case studies to show how Rosenbloom's theory explains how the principal of separation of powers is honored within specific settings of the contemporary administrative state – even regarding delegation, removal

www.manaraa.com

power, and independent agencies, what lessons might be drawn for the application of separation of powers in the administrative state at large.

In Chapter Three, the nondelegation/delegation controversy will be explored through the case of the Environmental Protection Agency's (EPA) Clean Power Plan concerning carbon emissions from existing power plants. A draft rule of the plan was first proposed June of 2014, with the finalized rule released in August of 2015. The finalized rule dictated that existing power plants to reduce their carbon emissions by 32 percent of 2005 levels by 2030, and that 28 percent of their generating capacity come from renewable sources. The rule also sets for each state a target for reducing carbon pollution from power plants, and gives each state the responsibility for creating its own plan for meeting that target (Davenport and Harris, 2015). After the release of the draft rule, the plan was criticized on several grounds by fossil fuel trade groups, such as that it would be extremely costly to implement and would stunt economic growth (Neuhauser, 2015). The plan was also attacked on constitutional grounds, with industry lawyer and constitutional law professor Lawrence Tribe charging in congressional testimony (EPA'S proposed 111(d) rule for existing power plants: Legal and cost issues, 2015) that the EPA's rule violated the non-delegation doctrine.

The controversy over presidential removal power will be examined through constitutional challenges to the Consumer Finance Protection Bureau (CFPB) in Chapter Four. Created as part of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act passed in the wake of the financial crisis of 2008, the CFPB was created to protect consumers from unfair practices by banks and other financial institutions (Martinez, 2015). After the CFPB filed lawsuit against debt-relief services company Morgan Drexen, alleging (among other charges) its practices deceived consumers (Consumer Finance Protection Bureau [CFPB], 2013), Morgan Drexen, as

www.manaraa.com

part of its defense, argued that the CFPB charges should be dismissed because the CFPB itself was unconstitutional. Of the five constitutional critiques of the CFPB raised by Morgan Drexan, this paper will focus on the critique that the head of the CFPB cannot be removed by the president except for cause, which contravenes the constitutional grant of removal power to the president (Niemann, 2014).

In Chapter Five, the controversy surrounding independent agencies will be studied through the debate surrounding the Federal Communications Commission's (FCC) 2015 rules on "net neutrality." The rules prohibit internet providers from blocking websites and from auctioning faster speeds to those willing and able to bid for them (Kang and Fung, 2015). Critics of the 2015 FCC rules, including several large telecommunications companies and lobbying organizations, charge that they will stifle innovation and are unconstitutional, and subsequently filed lawsuits to block the rules. Reporting on these lawsuits, Grant Gross (2015) and Brian Fung (2015) reported that the constitutional issues raised in the lawsuits center on complaints that the FCC violated the procedures dictated in the APA of 1946 in that the FCC did not compile a satisfactory record to support the reclassification of internet service at the heart of the new rules, nor did it give enough notice that it was considering reclassification. A United States court of appeals heard arguments in these lawsuits in December of 2015 (Ingram, 2015).

Finally, Chapter Six will conclude the dissertation with a cross-case study analysis examining the similarities and differences between the cases and what larger themes and lessons can be drawn about the application of separation of powers in specific administrative settings.

www.manaraa.com

II. CHAPTER TWO

THEORY AND METHODOLOGY

This chapter will describe the methodological approach used in this dissertation to explore how a formal understanding of separation of powers can co-exist with the administrative state. In particular, the methodology in this study used a doctrinal, or "black letter law" approach of legal analysis, the dominant form of legal scholarship of the past two centuries. This analysis seeks to uncover a coherent framework explaining the case law and legislation surrounding a particular area of law. This research will consider how Rosenbloom's framework of retrofitting through Legislative-centered Public Administration provides a framework which both accepts the formal understanding of separation of powers described in the previous chapter and the legitimacy of the modern administrative state. While the modern administrative state birthed in the wake of the New Deal stretched the formal understanding of separation of powers beyond its limits, beginning in 1946, Congress and the courts began to take a series of steps to "retrofit" the administrative state to the separation of powers. To examine these methodological approaches, this chapter outlines black letter legal analysis used to answer the research questions, defines the concept of retrofitting which provides the theoretical framework to be applied in examining modern separation of powers controversies, and describes the case study methodology used to select and analyze contemporary controversies.

Black Letter Law

Legal scholarship has followed two generally followed two traditions in its history: doctrinal, or "black letter law" and "law in context" (McConville and Chui, 2014). The first, doctrinal or "black letter law," studies the law as "as a self-sustaining set of principles which can be accessed through reading court judgments and statutes with little or no reference to the world

www.manaraa.com

outside the law" (p. 1). This method, which has been central to traditional legal scholarship, uses decided cases to develop generally applicable legal principles and values and form "coherent frameworks" with an eye to find "order, rationality, and theoretical cohesion" (p. 1) in judicial decisions and statutes. The other tradition, "law in context," studies the law from the perspective of societal problems which its scholars believe are generalizable. While the black letter law tradition has been at the center of legal scholarship for the past two centuries, the law in context tradition evolved in the late 1960s (p. 1).

This dissertation will use the principles of the black letter law tradition, studying the case law and legislation around separation of powers controversies in public administration to find a coherent framework for application in current cases. It is important to note that while black letter law seeks to form coherent frameworks in the areas of law under consideration, and explain any inconsistencies within case law, there is also an understanding that developing a completely consistent and coherent framework in any area of law is unlikely – if not impossible. Therefore, the point of any doctrine or framework developed in black letter law is not prediction, but rather "synthesis, explanation and clarity" (Dixon, 2014, p. 165).

Black letter law rejects the idea that the law is made up of random, one-off decisions. Rather, it sees each case as part of larger system of connected rules and case law which has developed systematically over time. Each case is part of a larger web in an area of law; it may confirm previous cases or reject previous cases, but it is still part of bigger picture, a historically developed area of case law. Black letter legal analysis seeks to identify these webs or frameworks of development and fitting new cases within these frameworks. Just as each case is part of the ongoing development of an area of caselaw, black letter scholars aim to contribute to legal scholarship by adding new commentaries to be "superimposed upon the prior contributions

www.manaraa.com

of other researchers, and which, in turn, may be adapted and modified by others perhaps in the near future" (Salter and Mason, 2007, p. 50).

Unlike scholars incorporating empirical research methods, such the natural sciences, those conducting black letter research do not produce new findings through experimentation. Instead, they see their task as "systematizing existing and emerging case law and legislative developments" which then is "reinterpreted so that it becomes fully integrated into apparently coherent bodies of doctrine organized in encyclopedia of rules, principles and axioms, and related doctrinal commentaries" (p. 59). A dissertation in the black letter tradition must "bring to the surface the underlying coherence of a system of doctrine, which underpins individual cases, and which less sophisticated interpretations would miss," while also explaining "possible discrepancies within the case law, for example between specific rules, principles and axioms" (p. 72). In this vein, this dissertation seeks to build upon David Rosenbloom's theory of legislative-centered public administration, which describes how the administrative state has been "retrofit" into a formal understanding of the constitutional framework of separation of powers, by showing how this "retrofitting" framework can be applied to contemporary separations of powers cases. Even if judges do not overtly use this retrofitting logic in their jurisprudence, it can be used to bring order to the seeming chaos of separation of powers. While there is always some ambiguity in law, the retrofitting concept of legislative-centered public administration can be the thread to tie things together.

Retrofitting and Legislative-Centered Public Administration

Among the scholars defending the constitutional legitimacy of public administration against its critics, Rosenbloom and his theory of retrofitting the administrative state to the Constitution through legislative-centered public administration offers a framework which honors

www.manaraa.com

the formal understanding of the separation of powers yet also acknowledges the legitimacy of the administrative state. Challenging the dominant view of an executive-centered public administration, Rosenbloom (2000a, 2000b) argues Congress and the Court, through a series of laws and court decisions beginning in 1946, "retrofit" the burgeoning administrative state to the Constitution and created a "tripartite custody" of public administration.

Worried about the growing power of the executive branch resulting from the birth of the modern administrative state after the New Deal, Congress responded after World War II by beginning a process of adopting a series of legislation which had the effect of making administrators a part of the legislative branch when they performed legislative functions. The Administrative Procedure Act (APA) and the Legislative Reorganization Act (LRA), passed by Congress in 1946, are based on the belief that because agencies are delegated the responsibility to perform legislative functions through procedures like rulemaking, they should be considered as extensions of the legislative branch when they perform those functions. Because they are legislative extensions, Congress (as the legislative branch) should "specify their procedures to promote its views of how legislation by other means – that is, administration, should work" (p. 23). This understanding of agencies as legislative *extensions*, according to Rosenbloom, is different from the traditional constitutional and public administrative understanding of them as Congress' *agents*. As extensions, agencies are joined to the legislature, and exercise its core constitutional responsibility – legislation; therefore, Congress may direct administration by specifying its procedures and values (p. 24).

The APA was the result of Congress' effort to enact a law that controlled agencies rulemaking, adjudication, enforcement, transparency, and subordination to judicial review. Its main premise, according to Rosenbloom, was that since public administration includes

www.manaraa.com

legislative functions, legislative values should inform it. the APA's "fundamental premise" is that when there is a serious conflict between legislative values – such as participation – and executive values – such as efficiency, "legislative values must trump administrative or bureaucratic concerns. If necessary, efficiency, economy, and even managerial effectiveness should be subordinated to participation, transparency, and the protection of individual rights" (p. 58).

Subsequent laws, such as The Freedom of Information Act (1966), the Federal Advisory Committee Act (1972), the Privacy Act (1974), the Government in the Sunshine Act (1976), the Regulatory Flexibility Act (1980), the Paperwork Reduction Acts (1980, 1995), Negotiated Rulemaking Act (1990), the Government Performance and Results Act (1993), and the Small Business Regulatory Enforcement Fairness Act (1996), continue and expand the APA's premise of putting legislative values before executive values. These laws regulate agencies' procedures for making rules, collecting and releasing information, holding meeting, addressing the needs of small businesses and other entities, and developing strategic plans and performance measures.

Legislative-centered administration's retrofitting concept disagrees with the classical public administration concept of a politics-administration dichotomy because constitutional structure and procedure cannot be separated from administration. Further, it disagrees with the premise that administration is solely, or even predominantly, the concern of the president and political executives (the dominant thought of the last century of public administration scholarship). Because administration performs all three constitutional functions of government – legislative, executive, and judicial, legislative-centered public administration considers administrators subordinate to all three branches:

> Because Congress is constitutionally responsible for legislation, it is also responsible for how agencies legislate – and, under the rulemaking review procedures of the SBREFA,

www.manaraa.com

> what they legislate as well. Judicial review protects the rule of law, the fundamental fairness guaranteed by procedural due process, and other constitutional rights. The executive is responsible for coordinating policy implementation and improving administration within these parameters and others, such as paperwork reduction and Reg-Flex analysis established by Congress (p. 58-59).

Each branch, not just the executive has a role to play in administration, and as such, has the right and duty to make sure the values at the heart of their respective branches are present.

After Congress began to consider administrators as extensions of the legislative branch, its next step was acting to provide closer oversight of them. Beginning with the LRA, Congress reorganized itself to provide legislative "watchfulness" (Rosenbloom, 2000a, p. 2) over administrative agencies it was delegating power and responsibility to and gave itself more resources and ability to begin to re-assert itself against the executive branch. Providing more and better oversight was not the LRA's only purpose, but it was an important part of the law, as evidenced by the parallel committee structure in the House and Senate being organized to follow the general structure of the federal administration. The LRA was subsequently revised or amplified by future reorganization and statutes to improve the legislative process, congressional budgeting and oversight.

Subsequent legislation has expanded the concept of oversight into outright supervision by expanding committee mandates and budgets, giving committees professional staff, researchers, and investigators, and involving committees in strategic planning. For Rosenbloom, "the primary purpose of congressional direction of administration is to improve the *legislative function* by providing feedback, reducing slippage through maladministration, and securing more faithful implementation of statutory goals." Administrative legitimacy "flows at least as much from supervision by elected representatives as from scientific and managerial expertise or direction by political executives" (p. 62). This supervision is meant to ensure administrative

www.manaraa.com

agencies embrace core legislative values, such as "representativeness, openness, participation, responsiveness, and public accountability" (p. 102).

While those in the orthodox public administration tradition (Brownlow, 1949 and Gore, 1993) have maintained Congress should be less involved in administration in order to increase the efficiency of the bureaucracy, Rosenbloom argues doing so upsets the constitutional system of checks and balances. Legislative-centered public administration protects the "vibrancy of constitutional government by strengthening Congress's participation in federal administration" (p.139). It also provides legitimacy to public administration within a separation-of-powers system by understanding that because public administrators perform legislative, executive, and judicial functions, they are answerable in turn to all three branches, not just the executive.

This "tripartite custody" adds complexity and causes conflict, but to Rosenbloom, legislative-centered public administration provides the answer to the question of the appropriate relationship between a national legislature and public administration in a separation-of-powers system. Even with Congress' sometimes problematic and selfish behavior one cannot dismiss, as some reformers such as the reinventing government movement (Osborne and Gaebler, 1993) do, the "congressional role simply as interference or micromanagement," as doing so is to "seriously misunderstand its overall constitutional function." If the field of Public Administration ignores Congress' proper role in administration, as Rosenbloom argues it largely has since its founding, it will continue to promote "a constitutionally and politically untenable version of public administration as simply an executive-centered, managerial endeavor; it will neglect the full range of values that public administration entails, and it will prescribe faulty reforms" (2000a, p. 154-155; see also Willoughby 1927 and 1934, Meriam, 1939, Aberbach, 1990, and MacDonald, 2013).

www.manaraa.com

So then, for Rosenbloom, since 1946, Congress has acted to assert its proper constitutional role in a separation-of-powers system by legally and practically transforming the federal administration into extensions of Congress when it is exercising legislative functions it has been delegated. Congress dictates the procedures and methods administrators can use as it performs its quasi-legislative function to infuse legislative values, such as openness, transparency, and participation into administrative processes, and it has organized its committee structure into robust mechanisms of oversight and supervision. In Rosenbloom's view, this is a healthy and necessary development in the separation of powers system, just as the judicial branches concurrent efforts to infuse judicial values into public administration when it performs quasi-judicial functions. For public administration to be legitimate in America's constitutional system, it cannot answer to or be treated as part of the executive branch alone; it must be considered part of and subservient to that branch of government it is performing the functions of – executive, legislative, and judicial in turn.

Elsewhere, Rosenbloom (1987, 2000b) details how judicial branch infused its values into the administrative state. This retrofitting, to force "constitutional rights, reasoning, and values into public administrative practice at all levels of government," has been the result of four complementary steps (p. 44). First, starting in the 1950s, the federal courts recognized many previously undeclared rights for individuals as they interacted with public administrators, such as procedural due process protections and much greater equal protection of the laws. Second, the courts lowered the threshold for individuals to gain standing to sue administrative agencies for violations of their rights. Third, federal courts created a new type of lawsuit to facilitate their intervention in administrative operations to protect the rights of individuals. Finally, the courts

www.manaraa.com

greatly increased the liability of most public employees for violating "clearly established constitutional rights of which a reasonable person should have known" (p. 44).

Rosenbloom's retrofitting model does not spend much time discussing executive values, but it does acknowledge the important role of the executive branch in administration through performing the traditional managerial role in executing the law emphasized in orthodox public administration scholarship. While Congress ensures legislative values are respected when administrators perform legislative functions, and the courts ensure judicial values are respected when administrators perform judicial functions, the role of the president and political executives is to ensure that the executive values of efficiency, economy, and effectiveness are respected when administrators perform executive functions, such as implementing legislation and coordinating and managing agencies in their daily duties.

Retrofitting into Formalism

David Rosenbloom's understanding of how Congress and the courts have retrofit the administrative state to reflect the values of their branches provides the key to fitting the administrative state into a formal understanding of the separation of powers. As discussed in Chapter One, the formal view of separation of powers interprets the Constitution as dividing three powers of government into categories and assigning each to branch of government which was to be limited to that responsibility. In this understanding, the executive branch only executes the law, the legislative branch only legislates, and the judicial branch only adjudicates.

The administrative state, where administrators may perform executive, legislative, or judicial tasks would then seemingly be anathema to the formal understanding. But in the retrofitting understanding of public administration, administrators are not merely understood as agents performing delegated tasks, but rather, through a series of laws and judicial decisions,

www.manaraa.com

administrators have been made a part of the legislative and judicial branches of government when they act legislatively through rulemaking or judicially through adjudication. This tri-partite custody can lead to conflict between the branches, as the executive branch resists any encroachment on what it sees as its sphere of influence, and where the boundaries lie in each case is not always simple. However, through retrofitting one can reconcile the current large and active administrative state with an understanding of separation of powers that dictates strict separation between the branches. When an administrator, through rulemaking, performs a legislative function, he or she is not a member of the executive branch exercising legislative power, but rather, because of retrofitting, that administrator is a member of the legislative branch. Similarly, when an administrator adjudicates a dispute, it is not a case of a member of the executive branch exercising judicial power – he or she has been retrofit into the judicial branch.

This framework of legislative-centered public administration, which describes how the administrative state has been "retrofit" into a formal understanding of the constitutional framework of separation of powers, provides the coherent framework from which to understand separation of powers case law and legislation. This dissertation will build upon and add to this framework by applying it to contemporary separations of powers cases in three areas of conflict in separation of powers case law – executive removal power, the non-delegation doctrine, and independent agencies.

Methodology

Case Study Research

This dissertation will employ case study research to apply black letter legal methodology to unique cases, using Rosenbloom's theory of retrofitting to resolve contemporary separation of powers controversies by marrying a formal understanding of separation of powers and an

www.manaraa.com

acceptance of the modern administrative state. In a case study, a researcher examines one or more events, organizations, events, individuals, or some other topic(s) of interest in great detail, within parameters of time and activity set by the researcher, using a variety of methods to collect data over time (Stake, 1995). Robert Yin (2009) argues that the case study as a research method is advantageous over other research techniques in answering a "how" or "why" question concerning "a contemporary set of events over which a researcher has little or no control" (p. 13).

The case study method has been critiqued as being unable to produce generalizable statistics for general populations, due to its reliance on small, often unrepresentative sample sizes (Flyvberg, 2006; Yin, 2009). Responding to this critique, Yin (2009) compares case studies to experiments, which are also not generalizable to population. Like an experiment, the goal in case study research is to expand and generalize theories (what Yin calls "analytical generalization"), rather than extrapolating probabilities ("statistical generalizations") (2009, p. 15). Further, Bent Fylvberg (2006) contends that while rule-based theories produce limited, general understandings of reality, case study research leads to a "nuanced view of reality" (p. 223), which in turn produces deep expertise, rather shallow general knowledge on a topic of study.

Primarily relying on Robert Stake's (1995) approach, John Creswell (2007) incorporates some elements from Merriam (1998) and Yin in his list of the five basic steps of conducting case study research. First, a researcher needs to determine if the case study method is the best approach for their research question. As noted above, Yin (2009) believes the approach is advantageous when seeking to answer "how" and "why" questions about contemporary events which the researcher cannot manipulate; Creswell adds that the approach requires a desire to

www.manaraa.com

uncover an in-depth understanding of a case or several cases which are clearly defined and have clear boundaries.

Next, a researcher needs to identify his or her case(s) to study, which may be one or more individuals, events, programs, or activities (Creswell, 2007). One also must determine what type of case study is to be conducted: whether single or collective, intrinsic (focused on a case) or instrumental (using a case or cases to study a larger issue) (Stake 1995). In selecting a case or cases, rather than utilizing random sampling of some large population, case studies, like other qualitative research, utilize purposeful sampling, in which the researcher "selects individuals and sites for study because they can purposefully inform an understanding of the research problem and central phenomenon in the study" (Creswell, 2007, p. 125). Cases can be selected to show different perspectives on an issue, or for their uniqueness, commonness, accessibility, or for a number of other reasons. The third step, following the selection of cases, is an extensive period of data collection, seeking information on each case from a variety of sources, such as "observations, interviews, documents, and audiovisual materials" (Creswell, 2007, p. 75). Yin (2009) points to six major sources of data for used in case study: documents, archival records interviews, direct observations, participant-observations, and physical artifacts (p.101).

After the data is collected, it is analyzed. This can take the form of holistic analysis of an entire case or an embedded analysis of a particular feature of a case (Yin, 2009). Through the collection of data, a detailed description of each case can be built containing histories and other uncontroversial information. When the study contains multiple cases, Creswell notes a typical format is to first produce an in-depth description of each case and themes within the case, termed a within-case analysis, then provide a thematic study across the cases, named a cross-case analysis, and lastly set forth assertions interpreting the meaning of the cases. The final step of the

www.manaraa.com

study entails the researcher interpreting and reporting the meaning of the case, whether that meaning has to do with a larger, theoretical issue, as in an instrumental study, or about the unique process, situation, etc., studied in an intrinsic case (2007, p. 75).

This research will use the collective case study method, studying three contemporary cases in public administration where there has been controversy over whether the separation of powers is being respected or violated, seeking to understand how the separation of powers can be applied in specific administrative settings. Each of the three main areas of controversy detailed above will be studied through the lens of a contemporary case. To explore the conflict around delegation and the nondelegation doctrine, this paper will examine the debate around the Environmental Protection Agency's (EPA) 2015 rules on greenhouse gas emissions from power plants. The dispute over whether Congress can shield administrators from presidential removal power will be studied by detailing the arguments around the constitutionality of the Consumer Financial Protection Bureau, created in 2011 by the Dodd-Frank Wall Street Reform and Consumer Protection Act, whose director can only be removed by the president for cause. Finally, in studying the separation of powers controversy around independent agencies, this research will analyze a controversial action taken by one independent agency, the Federal Communication Commission, to adopt a strong rule in favor of "net neutrality" governing internet traffic in 2015.

These cases were selected through the purposeful sampling technique described above. Using the sampling typologies defined Miles and Huberman (1994), cases were identified for this paper using the "theory based" and "politically important" sampling criteria. That is, cases were selected which would test or refine Rosenbloom's theory that the constitutional principle of separation of powers is preserved in public administration through what he terms "retrofitting."

www.manaraa.com

Further, cases were selected which were politically important at the time of this writing, and salient to contemporary political controversies. Using Stake's (1995) categories, these case studies will be a collective of instrumental studies rather than intrinsic studies. In other words, the cases were not selected for their own intrinsic value as cases to study, but rather because they will collectively be useful instruments in examining a theory – primarily Rosenbloom's retrofitting. Further, the case studies will be examined via embedded analysis (one aspect of the cases will be examined) rather than a holistic analysis (every aspect of the cases is examined) (Yin, 2009); the aspect of the cases this paper is interested in is the manner in which separation of powers conflicts present themselves in each case.

Through examining these three cases in great depth, this research will be able to study the similarities and differences of the three separation of powers controversies in public administration to see if the underlying logic of legislative-centered public administration's retrofitting framework in defending the constitutionality of public administration is effective in these three contemporary cases. After analyzing these three cases, following Yin (2009) and Stake (1995), a cross-case analysis will be performed to see what larger lessons can be drawn from them, and what analytic generalizations can be drawn from those three cases.

The use of black letter law in the dissertation will complement its use of case study research and help maximize its analytical potential. As black letter law is used by researchers to examine a series of legal cases around a subject to find patterns in those cases and locate those cases within a larger system of case law in an effort to create coherent frameworks, in case study research, a scholar examines one or more subjects in great detail to expand and generalize scholarly theories and uncover a more in-depth understanding about the case or cases.

www.manaraa.com

In this dissertation, then, black letter law methodology will be used to build upon David Rosenbloom's retrofitting framework to show how recent separation of powers cases can fit within separation of powers case law and a formal understanding of the separation of powers. This retrofitting framework will then be applied to three contemporary separation of powers cases to show how the controversies at issues can be resolved while both accepting the legitimacy of the administrative state and a formal understanding of the separation of powers.

Data Collection

This research will employ historical material and documentation. Given the importance of the principal of separation of powers in our constitutional system, the rise of the administrative state in the 20th Century, and the controversy surrounding the three cases this study will feature, much has been written about this topic and the cases. These sources include news accounts, editorials, Supreme Court opinions, scholarly journal articles, and governmental reports and documentation. Yin (2009) notes that, excepting preliterate societies, documentary information is "likely to be relevant to every case study topic" (p. 101). Among the strengths of documentary evidence are its stability of the evidence, which allow repeated viewings of the evidence; its unobtrusiveness, in that it is not created by the case study itself; its exactness in providing exact names, references, and details of an event; and the broadness of its coverage, spanning great lengths of time, and many events and settings (p.102). These strengths make this type of evidence ideal for this study, as it focuses on legal controversies over one of the most fundamental constitutional issues and the constitutionality of public administration itself which have developed over the past century, often resulting in Supreme Court decisions. Material from these important cases, along with materials written about important cases should provide much useful data in understanding the development of jurisprudence around the three areas of conflict.

www.manaraa.com

Furthermore, the three cases to be analyzed in this project were (and continue to be) highly controversial and the subject of much political and legal debate. Given the salience, controversy, and ongoing debate on these cases, materials will be relatively simple to locate regarding them. This is especially true for the materials produced by the governmental agencies in the middle of these controversies. In collecting this data, the documents will provide the rich context and detail for each issue and case, the kind of context that Flyvberg (2006) argues is essential in gaining a nuanced view of reality leading to expertise on an issue and which is essential in case study research. In order to understand how the separation of powers is applied in particular administrative settings, it is necessary to collect enough data through historical and contemporary documents to understand the development of the controversies around the separation of powers in public administration and their current state. By analyzing this data through case study research and the in-depth, detailed cases contained therein, one can gain true expertise in these issues.

Data Analysis

The analysis of this material will follow the embedded analysis approach (Yin, 2009), focusing on the separation of powers issues and controversies surrounding each case. This will be combined with the within-case analysis and cross-case analysis (Stake, 1995; Yin, 2009) wherein each case will be examined through the themes of each controversy – delegation and the nondelegation doctrine, removal power, and independent agencies. After each case is analyzed, a cross-case analysis will be performed to study the themes across cases to see which are common among all cases.

Additionally, I will analyze historical documents with special attention focused on how different understandings of the separation of powers as a constitutional principle impacts how

www.manaraa.com

individuals, including Supreme Court justices and presidents, view the role of each branch in overseeing administrative agencies and whether various congressional or presidential actions are constitutional or not. By probing and analyzing the material with this in mind, this research will provide a solid foundation for understanding how different theories of the proper role and place of public administration within the constitutional framework of government are incorporated into laws, executive actions, and judicial opinions. The case study research method will be a good tool in uncovering how these theories are applied to particular administrative settings.

Limitations

There are several potential limitations in this project. First, in case study research there is always the potential verification bias; that is, the researcher purposefully selecting a case or cases which will "confirm the researcher's preconceived notions, so that the study therefore becomes of doubtful scientific value" (Flyvberg, 2006, p. 234). However, as Flyvberg argues, this concern is not unique to case study methods but is in fact a concern in every research method and case study researchers often report that previous assumptions were challenged or even disproven by their studies (p. 235). Using the purposeful sampling methods as defined above will also alleviate this concern as it imposes some guidelines and boundaries to guide the selection of cases. A second concern is that the analytical methods in case study research are not very well defined, and no analytical strategy is simple or straightforward. As Yin professes, no technique can be applied "mechanically, following any simple cookbook procedure" (2009, p. 162). Thus, I will need to be clear and transparent in which techniques I am using and how I am interpreting them, as another researcher might have different interpretation and produce a case study research project different from mine even though using similar techniques.

www.manaraa.com

Finally, while selecting cases from current political controversies increases the salience of the study, three potential problems emerge. First, a body of scholarly analysis has not yet been developed around these particular cases. While this means it is more likely this research can contribute something new to the literature, it is also more likely this research could miss an interpretation because not all the facts or arguments around these cases have been revealed. Second, these cases have been embroiled in partisan political controversies, with one's political affiliation – whether he or she is a politician, lawyer, judge, or student of public administration – potentially influencing their approval or disapproval of the administrative actions detailed in each case. For example, in the debate over presidential removal power, whenever political party holds the presidency, the party seems to have a more robust understanding of presidential removal powers. So, during the George W. Bush administration, Democrats were very suspicious of executive power. When Barack Obama became president, however, Democrats had a newfound appreciation for energy in the executive. Likewise, during the Bush administration, Republicans in Congress were defenders an active executive branch with broad powers. Miraculously, they too sang a different tune during the Obama administration – suddenly, it was very important for Congress to provide a check on the executive branch. With this in mind, a researcher must be aware of his or her political biases and be willing to listen to and understand other points of view in these matters, and to be able to present and analyze them fairly. The researcher must also be careful not to let his or her biases unduly influence the description and analysis of the cases, or how my understanding of separation of powers issues in administrative settings.

Despite these limitations, the purpose of this research is to show how a formal understanding of the separation of powers can be applied in current administrative settings using

www.manaraa.com

David Rosenbloom's understanding of how Congress and the courts have retrofit the administrative state to reflect the values of their branches – not just by treating them as their agents, but through a series of laws and judicial systems making administrators a part of their branches of government when they act legislatively through rulemaking or judicially through adjudication. The following case studies will show how this retrofitting model can be applied in contemporary separation of powers controversies.

www.manaraa.com

III. CHAPTER THREE

NONDELEGATION CASE STUDY: THE CLEAN POWER PLAN

This chapter will examine the application of formalist thinking known as the nondelegation (and sometimes delegation) doctrine. It will begin by defining the doctrine and laying out the arguments for the doctrine – namely, its proponents believe it is necessary to maintain the political accountability and rule of law that the separation of powers was meant to ensure. Then the chapter will turn to criticism of the doctrine; focusing on the arguments that it is unenforceable and is not supported by the text of the constitution or history. Next, it will examine a contemporary case study from public administration where nondelegation issues are at stake: the debate over former President Barack Obama's "Clean Power Plan." It will conclude by analyzing how Rosenbloom's retrofitting framework can be used to uphold the constitutionality of the Clean Power Plan and alleviate nondelegation concerns more generally.

The Nondelegation Doctrine

The nondelegation doctrine states that one branch of government many not delegate its powers to another branch without an intelligible principle, which is something its adherents believe happens in the administrative state all the time (Schoenbrod, 1993; Lawson 1994). Proponents of the doctrine locate its constitutional source in the Vesting Clause of Article I of the Constitution: "All legislative Powers herein granted shall be vested in a Congress of the United States." Proponents interpret this clause as vesting legislative powers exclusively in Congress; being there vested, these powers cannot be transferred to another branch of government or other entity (Volokh, 2014; Driesen 2002; Lawson, 2002). Formalist nondelegation proponents believe that allowing one branch to delegate its powers to another branch could eventually lead to what James Madison warned against in *Federalist 47*, "The

www.manaraa.com

accumulation of all powers legislative, executive and judiciary in the same hands," which could "justly be pronounced the very definition of tyranny" (Madison, 2003, p. 298).

Excessive delegation undermines two key aspects of constitutional democracy that the separation of powers is meant to protect – the rule of law and political accountability. The rule of law is undermined because administrative agencies are delegated the authority to create rules with the force of statute and adjudicate disputes on violations of these rules, nondelegation advocates argue these agencies have the power to create, execute, and interpret the law with little to no outside checks on their powers. Nondelegation proponents see accountability being undermined as delegation allows unelected administrators create rules with the force of law instead of duly elected representatives of the people (Hamburger, 2014; Pestritto, 2007b).

Formalist opponents of the administrative state argue that it is built on just the kind of accumulation of powers the Founders warned against and which they argue is forbidden in the Constitution, due to the excessive delegation from the legislative branch to the executive branch and allowed by the judicial branch. In fact, Pestritto (2007b) argues the modern administrative state is built on the "death" of the nondelegation doctrine. This "death" has freed the legislative branch to delegate large amounts of authority to agencies and administrators in the executive branch, which has in turn freed administrators to exercise great discretion. Supporters of the nondelegation doctrine decry the fact that the question is no longer whether or not administrative agencies can be delegated legislative and judicial powers, but how that discretion can be used (Pestritto, 2007b; Lawson, 2010).

Nondelegation advocates acknowledge that some amount of executive discretion in implementing laws is inevitable and can occur within constitutional bounds (Driesen 2002; Prestritto 2007a; Lawson 2002). However, they argue that until the New Deal, the judiciary

www.manaraa.com

distinguished between statutes which contained the necessary and inevitable level of discretion to execute those statutes, and statutes which improperly delegates legislative lawmaking power. These advocates point to the language of Chief Justice William Howard Taft's ruling in the *J.W. Hampton* (1928) case stating there is a distinction between delegating lawmaking power, or the power to decide what the law will be and delegating the authority to determine the execution of the law the law may be carried out or enforced. In other words, congressional chefs cannot delegate the authority to determine that spaghetti will be for dinner tonight, but they can delegate the decision of how long to boil the noodles to their administrative sous-chefs. Congress is allowed to delegate authority to the executive branch to carry out legislation if it "lay[s] down by legislative act an intelligible principle to which the person or body authorized . . . is directed to conform" (276 U.S. 394, p. 409).

The Supreme Court has only used this principle to strike down an act of Congress twice – both times in the same year, 1935 and in cases (*A.L.A. Schechter Poultry Corp. v. United States* and *Panama Refining Corp. v. Ryan*) concerning the same act: The National Industrial Recovery Act of 1933 (Ginsburg and Menashi, 2010, Sunstein, 2000). Nondelegation advocates claim the main factor keeping courts from re-discovering this distinction in their jurisprudence since 1935 is the belief that doing so would cause a collapse of the administrative state; to these advocates, congressional delegation to administrators maintaining the administrative state is the equivalent of a bad addiction our country cannot break. The courts do not step in because they fear the consequences of forcing American to quit the drug of the administrative state cold turkey.

In two essays written 16 years apart, Professor Gary Lawson (1994 and 2010) describes how agencies and programs of the modern administrative state violate the nondelegation doctrine, and thus the principle of separation of powers and why he thinks the validation of the

www.manaraa.com

administrative state "openly flouts almost every important structural precept of the American constitutional order" (1994, p. 1233). In the first essay, to show how absurd and dangerous he thinks the abandonment of the nondelegation principle in the administrative state is, Lawson pointed to the example of the Federal Trade Commission (FTC). Like many other administrative agencies, the FTC develops rules to guide conduct in its area of authority, then decides whether its rules have been violated. If it decides its rules have been violated, the FTC then authorizes an investigation into these violations, which it then conducts. The agency then decides whether the findings of its investigation; if so, then it issues a complaint, which is then prosecuted by the FTC and adjudicated by the FTC – either by the full FTC or an administrative law judge. If the FTC does not like the decision of the administrative law judge, it can appeal the decision…to the FTC. Only after the FTC decides there has been a violation can the accused private party appeal to an Article III court. However, Lawson notes, agency decisions often carry "a very strong presumption of correctness on matters of both fact and of law" (p. 1249).

Later, Lawson (2010), used the Troubled Assets Relief Program (TARP) as a case study in what is wrong and unconstitutional in the modern administrative state, writing that TARP is "a constitutional monstrosity, and many of the problems with it are endemic to the modern administrative state." In the case of TARP:

> Congress had no power to enact the program in the first place, Congress violated the nondelegation doctrine when enacting it, Congress and the President may have violated the Appointments Clause in the bargain, and President Bush grossly exceeded his constitutional "executive Power" when implementing it. Not bad for $750 billion (p. 58).

Two aspects of the program, its funding and the discretion given the Treasury Secretary, are of particular constitutional concern to Lawson, and he expands these concerns to the appropriation of funds to and discretion given to the modern administrative state. As unprecedented as TARP may have been, the only thing exceptional about the program in relation to the rest of the

www.manaraa.com

administrative state, in Lawson's view, was its size; for him, "unconstitutionally spending money" is the administrative state's "most common activity." Agencies such as the Social Security Administration, the Department of Education, and the Federal Emergency Management Agency, are collectively a "monument to the administrative state's war on the Constitution" (p. 61).

Just as with the appropriation granted, the only thing remarkable about the discretion given to the Treasury Secretary in the context of the modern administrative state is "the size of the relevant budget;" the grant of authority, constitutionally speaking, was routine. The authorization for the Treasury Secretary to buy up mortgages to stabilize the market was no more open-ended the power given to the EPA to set whatever air quality it deems necessary to protect public health and safety. Further, the factors Congress instructed the Secretary of the Treasury to consider in implanting the TARP program are similar to the broad set of factors and considerations that the United States Sentencing Commission is supposed to consider when adopting sentencing guidelines. The broad discretion granted the EPA and the Sentencing Commission have both been challenged, and both been upheld as constitutional by unanimous decisions of the Supreme Court (p. 66).

Nondelegation advocates see the prevalence of delegation to the administrative state leads to a spread of the breakdown of the separation of powers from administrative agencies to the three branches of government themselves. While agencies are subject to checks from the constitutional branches, West (2001) notes that as a result of providing the needed oversight to the administrative state, the three branches are all exercising legislative, executive, and judicial powers in a way never intended by the Founders. To West, the system of separation of powers has been transformed into a reality where the courts "not only adjudicate the law, but legislate

www.manaraa.com

and execute as well," the president "not only executes the law, but finds his powers confined by a bureaucracy beyond his control," and the Congress still makes laws, but "increasingly administers them as well" (p. 96). As a result, it has become incredibly difficult for the average citizen to understand the policymaking process, and to assign proper credit or blame for policy outcomes.

Adding to the confusion, and lack of constitutionality, is the fact that because the laws created by agencies in the rulemaking process are not laws passed by Congress, agencies can and do frequently make exceptions to their own rules. Further, some agencies created by Congress to enforce the law end up repealing laws passed by Congress by replacing them with contradictory agency rules. Sometimes, as West believes it the case with the EPA, Congress does not even attempt to make specific laws or rules, they instead create and agency and give it the authority to create whatever rules the agency believes necessary to fulfill its mandate or tackle the problem at hand.

Critique of the Nondelegation Doctrine

While the nondelegation doctrine is a deeply held maxim by many formalist scholars, it is not unanimously shared among all constitutional scholars. Functional criticisms of the nondelegation doctrine focus on two basic critiques: first, the doctrine has little support in the Constitution or American history, and, second, it is unenforceable judicial principle that would wreak havoc in the stability of government, especially by placing a huge burden on the legal system. This section will examine these two critiques of the nondelegation doctrine before transitioning to a case study of how the debate over the nondelegation doctrine has influenced the debate over former President Barack Obama's Clean Power Plan.

www.manaraa.com

The first basic critique of the nondelegation is that it has little support in the text of the Constitution or American history. Contrary to the advocates of the nondelegation doctrine, who see the doctrine necessarily rising from Article I's Vesting Clause, critics claim that the text of Vesting Clause can be read in different ways that do not necessitate a nondelegation doctrine – or at least the unambiguous, strict nondelegation doctrine outlined above (Krent, 1994; Merrill, 2004; and Sunstein 1999 and 2000). Some critics (Krent, 1994; Merrill, 2004) posit that while the Constitution gives the legislative power to Congress, Congress can decide how that power is exercised in policymaking. The legislature has the authority to create rules for private behavior, but it is not follow that those rules are necessarily what is meant by "legislative powers." Krent (1994) finds it more likely the term refers to the authority pass laws to carry out the tasks listed in Article I, section 8, i.e., regulating commerce. Congress cannot delegate the power to pass laws, but Krent argues the Constitution's "necessary and proper" clause could be interpreted as delegating policymaking authority to administrators to create, interpret, and apply rules to new situations. The Vesting Clause is more likely to refer to the authority to pass laws for the purposes listed in Article I than the power to creating rules dictating private conduct (p. 736). As long as Congress is understood as the source of legislative power, policymaking power such as rulemaking can be delegated to administrators to ensure the American system of government is able to deal with issues "of a magnitude and complexity far beyond anything imaginable" when the constitution was ratified (Merrill, 2004, p. 2181).

Other functionalist scholars (Posner and Vermuele, 2002 and 2003) go even further, arguing the existing literature has not been critical enough of the nondelegation doctrine as the doctrine "lacks any foundation in constitutional text and structure, in standard originalist sources, or in sound economic and political theory;" rather, it is "is nothing more than a controversial

www.manaraa.com

theory that floated around the margins of nineteenth-century constitutionalism" (2002, p. 1722). Endeavoring to, in their words "to lay the doctrine to rest once and for all, in an unmarked grave" (p. 1723), Posner and Vermuele argue that statutory grants from the legislative branch to the executive branch can "never" be a delegation of legislative power, as those agents are exercising executive power, not legislative power. They find the nondelegation doctrine nothing more than a "a vague and ultimately uncashable metaphor" (2003, p.1331).

These critics also claim there is little support for the doctrine in American history. To the contrary, they find little evidence that the Framers of the Constitution, those who ratified it, or those in early congresses believed a nondelegation doctrine existed in the text; to the contrary, the find in their practices a "considerable willingness" to delegate authority to administrators (Sunstein, 1999, p. 331). While delegations were occasionally criticized, Congress did delegate and courts upheld the delegations, such as creating military pensions to be guided by regulations determined by the President and authorizing the executive branch to license individuals to trade with Native American tribes (Sunstein, 2000 and Krent, 1994).

Functionalist critics also argue the nondelegation doctrine is not some long-standing legal doctrine, but rather something that does not have much support in judicial practice and precedent. As noted above, the Supreme Court last struck down a federal statute using nondelegation grounds in 1935. However, critics note, 1935 is also the first time the Court used the nondelegation to strike down a statute (Sunstein 1999 and 2000). Other than 1935, the Court has upheld numerous delegations of varying degrees of depth and breadth. Therefore, according to one scholar, the nondelegation doctrine "has had one good year, and 211 bad ones (and counting)" (Sunstein, 2000, p. 323).

www.manaraa.com

In fact, the nondelegation doctrine might not have had that one good year, at least not in the way its proponents would think; Ernst (2014) suggests a much more nuanced and pragmatic reading of the opinions written by Chief Justice Charles Hughes in *Panama Refining* and *Schechter*. In these rulings, Hughes did not declare the delegations at issue unconstitutional simply because he felt delegation was unconstitutional, but because the delegations in question delegated essential constitutional functions from the legislative to the executive branch, and did not correspondingly outline standards for the delegated authority. So then, to Hughes, the delegations were not done in a responsible way - with no standards to guide the use of delegated authority and no accountability to make sure constitutional values were being respected. The system of administrative law which developed since that time was intended to make sure these standards and accountability are in place to guide and constrain administrators (Bertilli and Lynn, 2006).

The second critique of the nondelegation centers around the claim that the nondelegation doctrine is unnecessary for the accountability its proponents desire, and that it would have serious, problematic consequences – namely, causing great instability in government, especially by putting a great deal of weight on justices to adjudicate whether each decision made by administrators was constitutional or not. While formalist proponents believe the nondelegation doctrine is necessary to ensure political accountability in policymaking by ensuring all laws and rules governing private behavior is made by elected officials in Congress and the President in the normal legislative process, functionalist critics of the nondelegation doctrine counter that it is unnecessary to that desired political accountability. Even with delegation, there are still a number of institutional and informal controls to keep administrators accountable; surrounding agencies are "watchdogs with sharp, penetrating teeth" (Schuck, 1999, p. 783). Unlike other countries, the

www.manaraa.com

American administrative state is subordinated to several power-checking institutions which can shape and even control the exercise of discretion by simultaneously monitoring and pressuring administrators: (1) Congress; (2) the Executive Office of the President; (3) judicial review; (4) interest group monitors; (5) media; and (6) informal agency norms (p. 784). In particular, Congress can and does monitor the actions of agencies, and can and does enact laws to reverse agency decisions, reduce agency powers, confine agency discretion, and even abolish agencies (Posner and Vermuele, 2002).

Besides it being unnecessary, critics of the nondelegation argue that the reason it has not been enforced by the courts is that it is simply unenforceable, and courts have been wise enough to understand enforcing a robust nondelegation doctrine would not only put judges in the untenable position of adjudicating matters beyond their expertise but it would also introduce a great deal of instability into the policymaking process (Manning, 2000; Merrill, 2004; Shuck, 1999; Sunstein 1999 and 2000).

While nondelegation proponents decry the Supreme Court allowing just about anything to count as an "intelligible principle" to avoid striking down a statute, critics counter that the Court is showing proper judicial restraint. Rather than wade into the murky waters of the nondelegation doctrine, the Court has indicated it understands Congress must have the flexibility to delegate discretion to administrators in order for the government to function in a complex, modern society, and, further, it has indicated that it acknowledges the limits of its own competence to draw lines between permissible and impermissible delegations in matters of public policy (Manning, 2000, p. 241). This deferential understanding has also led to Court showing deference to agency interpretations of ambiguous statutes if the agency is acting with the force of law and the interpretation is a reasonable one (*Chevron U.S.A, Inc., v. Natural*

www.manaraa.com

Resources Defense Council, 1984), or, if the agency is not acting with the force of law and the agency interpretation is persuasive (*United States v. Mead Corp*., 2001); the Court has also ruled it will show deference to agency interpretations ambiguous statutes if it concerns the scope of the agency's authority (*City of Arlington v. FCC*, 2013).

If the Court were to shift its stance and begin to enforce a robust nondelegation doctrine, critics argue that it would amount to a "massive shift of power to unelected federal judges" (Schuck, 1999, p. 791) which would lead to "ad hoc, highly discretionary rulings, giving little guidance to lower courts or to Congress itself" (Sunstein, 2000, p. 327), and would be "little better than the courts making it up as it goes along" (Schuck, p. 792). In fact, the enforcement of the nondelegation doctrine could be said to violate the doctrine itself as it would mean delegating massive new authority to the federal judiciary – the authority to second-guess legislative judgments about how much discretion is too much, "without clear constitutional standards for answering that question" (Sunstein, 2000, p. 327).

Formalist advocates of the nondelegation doctrine acknowledge there would be disruption if the Court began to seriously enforce the doctrine, and thus do not expect the Court's jurisprudence to change anytime soon. However, they argue, some disruption of the administrative state would be worth enforcing what they see is a clear constitutional doctrine necessary to uphold the separation of powers. While critics of the doctrine do answer the concerns about accountability and the democratic process raised by the advocates of the doctrine, when they do explicitly address separation of powers concerns, they do so from a functionalist perspective. The following case study will show how Rosenbloom's retrofitting framework can answer the separation of powers concerns of the advocates of the nondelegation from a formalist perspective while also defending the legitimacy of the administrative state.

www.manaraa.com

Case Study

Saying it had a "moral obligation to leave our children a planet that's not polluted or damaged" (White House, 2015, para 2), the administration of former President Barack Obama released its final rule to regulate the amount of carbon pollution allowable by power plants in 2015. Dubbed the "Clean Power Plan," it was the first time the government set such a rule, and set reduction goals for power plants and states with the aim of lowering the nation's carbon dioxide emissions by "32 percent from 2005 levels by 2030." The rule did not dictate the methods to reach those goals, but instead allowed each state to develop its own "tailored implementation plans to meet those goals" (para 4). The administration claimed the final rule was the result of "unprecedented input," including 4 million comments the Environmental Protection Agency received during the public comment period (para 5). The rule also included a provision granting states the ability to apply for extensions if disruptions in the energy grid developed during the transition to new energy sources.

The Plan focused on reducing carbon dioxide emissions from power plants by creating and setting standards for "carbon dioxide emission rates." The EPA delegated responsibility the states to create and implement their own plans on how to ensure the power plants in their state met these standards. The Plan gave states the opportunity to "to include proven strategies like trading and demand-side energy efficiency in their plans," and allowed states to "develop "trading ready" plans to participate in "opt in" to an emission credit trading market with other states taking parallel approaches without the need for interstate agreements" (para 15). The Plan also set the goal of renewable energy sources providing 28 percent of the nation's energy by 2030 and established a "Clean Energy Incentive Program" to push earlier development of "renewable energy and low-income energy development" by awarding credits to projects

www.manaraa.com

constructed after states submitted their implementation plans and prioritizing investment in renewable energy projects in low-income areas (para 18).

The plan drew heavy criticism from members of Congress and elected officials from coal-mining states, as well as energy companies. As soon as the rule was published in the Federal Register on October 23, 2015, 26 states, several energy companies, and business groups including the U.S. Chamber of Commerce and National Federation of Independent Businesses (NFIB) filed lawsuits against the rule – the first day legal challenges of the rule could be filed (Cama, 2015a and 2015b). Opponents to the Clean Power Plan charged the EPA overstepped the bounds of its legal authority given to it by Congress and said the plan would devastate the economies of coal-producing states and place an undue burden on businesses. West Virginia Attorney General Patrick Morrissey said the rule was "flatly illegal," and "one of the most aggressive executive branch power grabs we've seen in a long time" (Cama, 2015a, para 6), and the Executive Director of the NFIB's Small Business Legal Center called the rule a "crystal clear violation of the separation of powers," and "an end-run around Congress" (Cama, 2015b, para 5 and 6). A spokeswoman for the National Rural Electric Cooperative Association added that "This rule goes far beyond what the Clean Air Act authorizes the EPA to do" (para 11).

EPA Administrator Gina McCarthy disagreed, responding that the Clean Power Plan had "strong scientific and legal foundations" and was "clearly within EPA's authority under the Clean Air Act" (para 18). In its rule, the EPA pointed to its authority under the Clean Air act to regulate sources of greenhouse gas pollution to protect public health and welfare. Specifically, the EPA pointed to Section 111, which gives the EPA authority to "set emission standards for air pollutants emitted by new and existing industrial sources," and section 111(d), which "creates a

www.manaraa.com

partnership between EPA, states and tribes for regulating existing sources – with EPA setting the standards and states and tribes choosing how they will meet it" (EPA, 2015, p. 2).

While the legal process began, members of congress used the tools available to them to block the rule. On November 17, 2015, the Senate passed two disapproval resolutions under the Congressional Review Act to block the rule from taking effect, largely on party lines (Restuccia and Goode, 2015). The House followed suit a couple weeks later, passing the resolutions on December 1, again largely on party lines (Walsh, 2015). President Obama vetoed this attempt to overturn the Clean Power Plan a couple weeks after that, however, meaning the rule stayed in place pending the outcome of the legal process (Korte, 2015).

On February 9, 2016, the Supreme Court granted a stay to the states and utilities challenging the Clean Power Plan in a 5-4 decision, blocking the rule from taking effect. Neither the majority or dissenters explained their votes for or against the stay, nor did the justices address the underlying legal questions of the case. The stay meant that the legal issues around the case would outlast the Obama administration, which in turn meant that the future of the rule hinged on who was elected to be Obama's successor as president (Barnes and Mufson, 2016).

Unfortunately for President Obama's Clean Power Plan, his successor did not share his views on the methods to combat climate change, or even his views on climate science in general. During the 2016 campaign, Republican nominee Donald Trump promised repeatedly to undo the Obama administration's environmental policies, including the Clean Power Plan. After his surprise victory over former Secretary of State Hillary Clinton, Trump moved quickly to fulfill his campaign promise, issuing an executive order on March 28, 2017 – just over two months into his term in office – to begin the legal process of reversing the Clean Power Plan (Davenport and Rubin, 2017). The legal process involves the EPA first receiving permission to review the rule

المنارة للاستشارات
www.manaraa.com

from the court hearing the legal challenge to the Clean Power Plan, the U.S. Court of Appeals for the D.C. Circuit. If granted permission by the D.C. Circuit to review its previous decision, the EPA will next have to provide the reasons why it decided it was not technically reasonable or legally justified to reduce carbon levels by the amount stated in the Clean Power Plan. Both proponents and opponents of Trump's order reversing the Plan agreed the process would be a lengthy one, with environment groups pledging to challenge the Trump administration process at every possible opportunity (Eilperin and Dennis, 2017).

The legal challenges to the Clean Power Plan and whether the Obama overstepped its authority can be traced back to the seemingly open-ended nature of the EPA's authority under the Clean Air Act. While the Supreme Court has upheld the EPA's authority to, for example, regulate greenhouse gas emissions (*Massachusetts v. EPA*, 2007 and *Utility Air Regulatory Group v. EPA*, 2014) and ambient air standards (Whitman v. American Trucking Associations, Inc., 2001), the Clean Air Act is held up by nondelegation proponents as a piece of legislation delegation too much authority to administrators with too little guidance, or intelligible standards (Driesen, 2002 and Lawson, 2002). Without the proper guidance from intelligible standards, nondelegation opponents see the Clean Air Act as giving administrators in the EPA the room to create laws, which is the purview of the legislative branch, instead of merely executing the law – their proper role as members of the executive branch.

The case of the Clean Power Plan shows how Rosenbloom's retrofitting concept can bring the current administrative state into compliance with the formal understanding of separation of powers, including resolving nondelegation concerns. As discussed in Chapter Two, under the retrofitting concept, administrators are not merely executive branch agents delegated rulemaking authority by congressional masters. Rather, due to the reorganization of Congress

www.manaraa.com

after 1946, and legislation enacted by Congress in the same time frame, administrators are treated as part of the legislative branch when they perform legislative functions, like rulemaking. Thus, Congress is not delegating authority to another branch when it delegates functions to administrators, but to fellow members of the legislative branch.

Further, Congress has given itself tools to ensure administrators respect legislative values like openness and transparency when performing legislative functions, and these values were honored in the formulation of the Clean Power Plan. As noted above, the EPA's rulemaking process in formulating its final rule involved a wide range of input from the public and stakeholders, such as states and the energy industry. The EPA received 4 million comments during the comment period, and the final rule reflected this input from the public and stakeholders, giving states and utilities more flexibility in reaching emissions targets. Additionally, Congress made use of the Congressional Review Act to block the Clean Power Plan. Though this effort was unsuccessful, Congress could have overridden President Obama's veto if enough of its members had agreed the EPA had overstepped its bounds. States and utilities also took advantage of the legal processes in place to challenge the rule. Despite its broad interpretation of its authority, EPA administrators were not just able to just create and implement law at will, measures put into place by Congress in the retrofitting process ensured its prerogatives were protected, as were the public's.

Congressional delegations to administrators without the guidance of intelligible principles is not the only constitutional concern about the administrative state raised by those with a formal view of the separation of powers. Formalists do not only worry about the executive branch interfering in the affairs of the legislative branch through delegations of legislative power, they are also concerned with the legislative branch interfering with the affairs of the executive

www.manaraa.com

branch – namely with Congress interfering with the President's prerogative to control executive branch staffing decisions. The next chapter will discuss this controversy surrounding presidential removal power.

www.manaraa.com

IV. CHAPTER FOUR

REMOVAL POWER CASE STUDY: THE CONSUMER FINANCE PROTECTION BUREAU

The focus of this chapter is the debates between formalist and functionalist scholars surrounding the issue of presidential removal power and how Rosenbloom's retrofitting concept can be used to resolve the controversy while both respecting a formal understanding of the separation of powers and accepting the legitimacy of the administrative state. The chapter will start by summarizing how the formalist and functionalist views of presidential removal power are rooted in disputes over how to interpret the Constitution, the intent of the Founders, and how to interpret the outcome of an early congressional debate over removal known as the "Decision of 1789." The chapter will then review the major disputes between the president and Congress over the removal, and the how the Supreme Court has alternated between resolutions based on formalist and functionalist reasoning. The chapter will then review a case study dealing with the removal power controversy: a challenge to the constitutionality of the Consumer Financial Protection Bureau (CFPB). Finally, the chapter will analyze how Rosenbloom's retrofitting concept can be applied in that case and more broadly to resolve the removal power dispute

Constitutional Interpretation and The Decision of 1789

Key to understanding the disputes around presidential removal are the different interpretation of the Founders' views of the removal power and what is known as the "Decision of 1789." Formalists (Calabresi and Yoo, 2008; Pakrash, 2006; Rao, 2014) interpret the Vesting Clause of Article II of the Constitution ("the executive Power shall be vested in a President of the United States of America") as granting the president "the power to remove and direct all lower-level executive officials" (Calabresi and Yoo, p. 4). They also rely on other writings and actions

www.manaraa.com

of the Framers of the Constitution in the early days of the republic for support of their theory. For example, they claim the Federalist Papers' essays on the executive provide strong support for a unitary executive in order to provide energy in government, guarantee accountability for the use of executive power, and protect the separation of powers by giving the president the ability to defend against encroachments on presidential power by the legislative branch (Calabresi, 1995 p. 35).

Formalists also point to the "Decision of 1789," wherein the first Congress gave the president the implied power to remove the heads of the Foreign Affairs, War, and Treasury Departments[4] (Rohr and O'Leary, 1989 and Pakrash, 2006). Further, Pakrash (2006) claims that the first Congress reaffirmed the Decision of 1789 in numerous statutes that followed, such as declaring the president had the power to revoke commissions and recall officers appointed by the Continental Congress for the Northwest Territory, providing that the marshals created by the Judiciary Act served at pleasure (implying the president's pleasure), and creating several offices without specifying anything about removal. "Given the celebrated Decision of 1789," Pakrash argues, "statutes that said nothing about removal were undoubtedly understood as leaving intact the settled congressional conclusion that the President had a constitutional removal power" (p. 1827). For formalists, in the Decision of 1789, Congress affirmed that the Constitution gave president broad removal power, and in this decision, the question of whether the president had almost unlimited power of removal was settled once and for all (Calabresi and Yoo, 2008).

[4] While the different legislation creating the Departments of War, Foreign Affairs, and Treasury might have implied that the president had a constitutional right to remove the heads of each department (Pakrash, 2006), an important distinction was made in the legislation creating the Treasury Department. It specifically shielded the office of comptroller from presidential direction (Huq, 2013). Also, the Senate initially voted to delete the language concerning removal from the legislation creating the Treasury, but eventually gave in to the House's insistence on its inclusion, with Vice President John Adams casting the tie-breaking vote for the bill with the removal language (Alvis, Bailey, and Taylor, 2013).

www.manaraa.com

Functionalists (Strauss, 1984 and Gedid, 1989) counter these claims by arguing that while the Constitution gives the power to appoint, it is silent, or at most ambiguous regarding the power of removal, nor does it provide the clear lines of separation disallowing Congress placing limits on the president's power of removal that formalists see. Fisher (2010) notes that the Constitution does not give the president the power to "carry out the law," but instead to see that "the law is faithfully carried out;" much of this work of carrying out the law is carried out by "by Executive Branch employees who remain legitimately outside the President's direct control provided they faithfully discharge their assigned tasks" (p. 591). Further, the practice of the Founding period shows that the Founders had a complex and pragmatic understanding of the structure and control of administration, which included at least some administrators were subject to vigorous congressional oversight and direction (Mashaw, 2006).

While formalists see the Decision of 1789 as an unambiguously favorable to the view that the president should have unfettered removal power of executive branch officials, functionalists such as Entin (1987) note that since the participants in the debate disagreed about the significance and scope of the Decision, it does not definitively settle the question of whether the Constitution demands that the president have this authority or whether it allows Congress to regulate this authority, and if so, to what degree it is allowed to do so. Therefore, the Decision of 1789 was not so much the end of the debate over removal power but rather of the beginning of it. In fact, some scholars (Rohr and O'Leary, 1989; Alvis, Bailey, and Taylor, 2013) maintain there are as many as four different answers to the question of how executive branch officers may be removed with support in the Constitution, and all have been a part of the removal power debate since the time of the Founding and the Decision of 1789. Alvis, Bailey, and Taylor (2013) identify these four schools of thought as impeachment, advise and consent, congressional

www.manaraa.com

delegation, and executive authority. In the impeachment school of thought, executive officials can only be removed through the impeachment process; in the advise and consent school of thought, the president must consult with the Senate and receive its consent before removing any official. Those in the congressional delegation school (which most closely aligns with contemporary functionalists) argue that a president may remove an official at will if first given the authority by Congress. Lastly, in the executive authority school of thought (which most closely aligns with contemporary formalists), the power to remove executive officials totally belongs to the president, who can remove them at will.

When disputes between presidents and the Congress have arisen over removal power, presidents and members of Congress have unsurprisingly sided with the position which protects their institutional prerogatives – presidents taking the formalist point of view arguing for almost no limits on presidential removal power and members of Congress adopting the functionalist point of view arguing that Congress does have the right to limit the president's power. The chapter will next turn to a review of these disputes, and how the Supreme Court has decided when these disputes have come before it.

Battle over the Bank of the United States

Battles between Congress and the president over presidential removal power date to the early decades of the country. In 1833, President Andrew Jackson ordered Treasury Secretary William Duane to remove all deposits of the federal government from the Bank of the United States, an institution Jackson vehemently opposed. Duane refused, and in response Jackson fired him and named Attorney General Roger Taney as acting Treasury Secretary in a recess appointment. Shortly after his appointment, Taney fulfilled Jackson's wishes and removed federal funds from the Bank. The Senate was angered at Jackson's actions; not only was Jackson

www.manaraa.com

singlehandedly acting to exterminate the Bank, but also to remove a cabinet officer without any consultation with the Senate. In response, the Senate did not confirm Taney's appointment, and passed a resolution censuring Jackson (Nichols, 1994).

In language similar to modern formalists, Jackson argued that he had the power to take such action; he took the view that except for situations enumerated in the Constitution, a president was free to control the executive branch as he saw fit without congressional interference. To force a president to keep a cabinet official he wanted to remove would hinder the president's constitutionally prescribed role to head the executive branch. The Senate response was led by the famous trio of John Calhoun, Henry Clay, and Daniel Webster. In language similar to that of modern functionalists Webster claimed that because the Senate had a say in approving the appointment, it should have a say in the removal process. To give the president unlimited power over the executive branch could ultimately give the president unlimited control over the whole government (Nichols, 1994; Lessig and Sunstein, 1994).

In the end, Jackson came out of the conflict victorious (Nichols, 1994). The deposits were removed from the Bank, Secretary Duane was no longer Secretary of the Treasury, and though he was censured by the Senate, the censure against him was expunged from the congressional record after Democrats regained control of the Congress in 1836. The arguments from Jackson and Webster in this episode would re-emerge time and again the arguments from formalists and functionalists, respectively, in the political, scholarly, and legal debates over presidential since that time. In the 20th Century, removal power debate would move from the political arena to the legal arena, with the formalist view and functional view of removal power trading victories in a series of Supreme Court decisions.

www.manaraa.com

Myers v. The United States (1926)

Formalists won an important victory in the opinion in the Supreme Court case *Myers v. United States* (1926). Frank Myers was a postmaster first-class in Oregon removed from his office by the Postmaster General on orders of President Woodrow Wilson before the expiration of his four-year term of office. Myers sued, claiming his removal by the president without the consent of the Senate was in violation of the 1876 postal statute, which required that the Senate approve of removals of first, second, and third-class postmasters before the expiration of their term of office (Alvis, Bailey, and Taylor, 2013).

In an opinion written by Chief Justice (and former president) William Howard Taft, the Court sided against Myers and struck down the postal statute. For Taft, the Decision of 1789 decided the question of removal power once and for all in favor of nearly unlimited presidential removal power. In his opinion, Taft wrote that "the reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires" (272 U.S. 52, p.116), and "the provision of the law of 1876, by which the unrestricted power of removal is denied to the President, is in violation of the Constitution, and invalid" (p. 176).

Taft's formalist majority opinion drew sharp dissents from other justices, including Louis Brandeis and James Clark McReynolds, who drew on reasoning familiar to modern functionalists to dispute Taft's conclusions. In his dissent, Justice Brandeis argued that Taft's understanding of the Decision of 1789 was too simplistic; Brandeis saw the Decision not as granting presidents unlimited removal, but rather as deciding that without being granted the power through legislation, the Senate does not "have the right to share in the removal of an

www.manaraa.com

officer appointed with its consent; and that the president has, in the absence of restrictive legislation, the constitutional power of removal without such consent" (p. 284). Where Taft saw the Constitution of strictly separating the branches of government into their own spheres of influence, Brandeis interpreted the Constitution as more concerned with preventing abuses of power by one branch. To prevent these abuses of power, the Constitution left each of the three branches "in some measure dependent upon the others, as it left to each power to exercise, in some respects, functions in their nature executive, legislative and judicial" (p. 291). Justice McReynolds went even further, arguing that presidential removal power was not specifically enumerated in the Constitution, and concluding that because "no hint can be found of any executive power except those definitely enumerated or inferable therefrom or from the duty to enforce the laws" (p. 205) in the proceedings of the Constitutional Convention, the power to remove officials was not an executive power at all. Instead Congress had the power to define and limit the executive removal power.

Humphrey's Executor (1935)

Nine years later, the Court swung away from Taft's formalistic reasoning in *Myers* to issue a decidedly functional ruling in *Humphrey's Executor v. United States*. Writing for a unanimous Court, Justice George Sutherland found that President Franklin Roosevelt did not have the power to remove Federal Trade Commissioner William Humphrey before his term expired without cause, and, more importantly, that Congress could shield certain administrators from the president's removal powers. In the opinion, Sutherland insisted this decision did not overrule the Myers decision, despite its seemingly opposite conclusion. Rather, he argued, Myers applied only to those administrators in purely executive branch offices, and not to those agencies whose duties are "neither political nor executive, but predominantly quasi-judicial and quasi-

www.manaraa.com

legislative," (295 U.S. 602, p. 624) and who must be free to exercise expert judgment free from political influence.

Sutherland acknowledged the centrality of the separation of powers principle to the constitutional system, writing that the "fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others has often been stressed, and is hardly open to serious question" (p. 629). This decision, though seemingly allowing the legislative branch to influence and control an aspect of the executive's power, did not violate the separation of powers because:

> The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave, and, in the contemplation of the statute, must be free from executive control (p. 628).

Rather than infringing on the powers of the executive branch, the creation of independent agencies and limiting presidential removal power over officials in these agencies was instead a matter of Congress and the courts acting to protect the independence and impartiality of administrators performing legislative and judicial duties (Gedid, 1989). This is a quintessentially functionalist opinion – instead of focusing on the formal place of the Federal Trade Commission (FTC) within the government, it focuses on the functions of the FTC and the need of each branch to be protected from infringement of its functions by another branch.

Bowsher v. Synar (1986)

The next major Supreme Court decision in the debate over control of the bureaucracy was handed down over 50 years after *Humphrey's Executor* in *Bowsher v. Synar* (1986), with the majority endorsing a more formalistic view of the separation of powers – so formalistic, in fact, that it has been called the "highwater mark of formalism" (Martin, 2000, p. 534). At dispute was

www.manaraa.com

the authority given to the Comptroller General to recommend particular budget cuts to the president under the Gramm-Rudman-Hollings Act, which the Court ruled unconstitutional. Writing for the majority, Chief Justice Warren Burger found that the Comptroller General was a legislative agent because Congress could remove whoever was serving in that capacity by means other than impeachment – namely, by joint resolution for "permanent disability," "inefficiency," "neglect of duty," "malfeasance," or "a felony or conduct involving moral turpitude" (Manning, 2011, p. 1962). However, the functions assigned to the Comptroller General under the act, such as exercising "judgment concerning facts that affect the application of the Act" and interpreting "the provisions of the Act to determine precisely what budgetary calculations are required," are the very essence of "executing" the law (474 U.S. 714, p. 733). By assigning the execution of a law to a legislative agent, "Congress in effect has retained control over the execution of the Act and has intruded into the executive function" (p. 734).

Justice John Paul Stevens concurred in the opinion, but disagreed with the formalist reasoning of Chief Justice Burger's opinion. Stevens was not troubled by what Burger saw as the mixing of legislative and executive powers, as he saw each branch as exercising functions which might be thought of as executive, legislative, and judicial. "[G]overnmental power cannot always be readily characterized with only one of those three labels," Stevens wrote, because "a particular function, like a chameleon, will often take on the aspect of the office to which it is assigned" (p. 749). The Act was unconstitutional, Stevens maintained, because it allowed Congress to delegate policymaking to a legislative agent who could create policy without following the constitutionally mandated bicameral procedure for creating law[5].

[5] In his concurrence, Stevens relied in part on Burger's reasoning in the *INS v. Chadha* (1983) majority opinion (which Stevens joined) striking down the legislative veto for failure to comply with Article I's bicameral process for enacting legislation.

www.manaraa.com

The dissents by Justice Byron White and Justice Harry Blackmun countered that the claims the Comptroller General was subservient to Congress were unrealistic and the Court overstepped the boundaries of the case in its decision. White went further, calling the majority's opinion a "distressingly formalistic view of separation of powers as a bar to the attainment of governmental objectives" (p. 759). White argued that since the Constitution charged the Congress with appropriation responsibilities, the authority given to the Comptroller General would not deprive the President of any powers or responsibilities he would have otherwise had. Overturning a law allowing congressional involvement in the removal process of an administrator was the result of the Court subscribing to a "rigid dogma" (p. 776), an "unyielding principle to strike down a statute posing no real danger of aggrandizement of congressional power is extremely misguided and insensitive to our constitutional role" (p. 776). Instead, in words representative of the functionalist paradigm of the separation of powers, White argued that the Court should only concern itself with "determining whether the Act so alters the balance of authority among the branches of government as to pose a genuine threat to the basic division between the lawmaking power and the power to execute the law" (p. 776).

Morrison v. Olson (1988)

Just two years later, the Court returned to a more functional interpretation of the separation of powers and its application to presidential removal power in *Morrison v. Olson* (1988), in which the Court upheld the constitutionality of the independent counsel provision of the Ethics in Government Act of 1978. Writing for the Court's majority, Chief Justice William Rehnquist found that the Act did not violate the separation of powers because the Act did not cause Congress to improperly interfere with the functions of the executive branch or the President's ability to "faithfully execute" the laws. The Act's provision that the Attorney General

www.manaraa.com

may only remove an independent counsel for good cause, the Rehnquist decided, did not unduly inhibit presidential control over the executive branch and its officers, but gives some degree of "necessary independence" to independent counsels from some degree of political pressure (though still allowing for removal) (487 U.S. 654, p. 693). Further, the Act as a whole did not violate the separation of powers by strengthening either legislative or judicial branches at the expense of the executive branch. While independent counsels are to some extent freer from executive supervision than other federal prosecutors, the fact that an independent counsel may only be appointed at the request at of the Attorney General, and the Attorney General retains the ability to remove an independent counsel for "good cause," give the executive branch "sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties" (p. 696).

In a scathing dissent, Justice Scalia used strongly formalist reasoning to argue the Act was an unconstitutional violation of the separation of powers principle for two main reasons. First, independent counsels were charged with the conduct of a criminal prosecution (and an investigation to determine the necessity of prosecution), and this is a "purely executive" power. Second, the Act deprived the President of "exclusive control over that quintessentially executive activity" (pp. 705-706). As a result, the Court's decision basically declared "open season upon the President's removal power for all executive officers" (p. 727), and by setting the bar so high for removal of an independent prosecutor, the Act (and the Court upholding the Act) opened the door to the possibility of impropriety and abuse of power by the independent counsel[6].

[6] While one may disagree with Scalia's constitutional reasoning, his warning of the potential of an independent counsel to wreak havoc and be weaponized against the president proved prophetic. Eleven more independent counsel investigations were started by both Republicans and Democrats after the Morrison v. Olson case before the statute was allowed to expire in 1999 after Kenneth Starr's investigation of President Bill Clinton. Ironically, note Alvis, Bailey, Taylor (2013), the independent prosecutor became a "symbol of odious witch-hunting and petty politics" (p. 208).

www.manaraa.com

Free Enterprise Fund v. Public Company Accounting Oversight Board (PCAOB) (2010)

The Court swung back to a formalist stance – similar to what Scalia had advocated in *Morrison v. Olson* – in the 2010 case *Free Enterprise Fund v. PCAOB.* Members of the PCAOB, created by the Sarbanes-Oxley Act of 2002, could only be removed for cause by the Security and Exchange Commission, whose members themselves could only be removed by the president for cause. The majority opinion, written by Chief Justice John Roberts, found that this structure of dual for-cause limitations for removal violated the separation of powers. The precedents of the *Humphrey's Executor* and *Morrison v. Olson*, which allowed for limits in presidential removal power, did not apply in this case, Roberts argued, because they only dealt with a single-layer of for-cause removal protections and not the dual-layer structure of the PCAOB. For Roberts, Sarbanes-Oxley "withdraws from the President any decision on whether that good cause exists" (561 U.S. 477, p. 479); the result of its dual-protection structure is "a Board that is not accountable to the President, and a President who is not responsible for the Board" (p. 495).

Justice Stephen Breyer disagreed with the majority in dissent which leaned heavily on functionalist thinking. Under the necessary and proper clause of the Constitution, Congress could limit the president's removal power at times, depending on "the nature of the office, its function, or its subject matter" (p. 516). For Breyer, the PCAOB's structure was in line with the Court' previous decisions, despite the majority's refusal to acknowledge that fact. "The functional approach required by our precedents recognizes this administrative complexity," Breyer argued, "and, more importantly, recognizes the various ways presidential power operates within this context— and the various ways in which a removal provision might affect that power" (p. 522).

www.manaraa.com

Case Study

The controversy over presidential removal power will be examined through constitutional challenges to the Consumer Finance Protection Bureau (CFPB). Created as part of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act – legislation passed in the wake of the financial crisis of 2008 – the CFPB was created to protect consumers from unfair practices by banks and other financial institutions (Martinez, 2015). According to the CFPB (2017), it's role is to:

> make consumer financial markets work for consumers, responsible providers, and the economy as a whole. We protect consumers from unfair, deceptive, or abusive practices and take action against companies that break the law. We arm people with the information, steps, and tools that they need to make smart financial decisions (para 1).

Before its formation, several agencies were responsible for administering consumer financial protection laws; the CFPB was intended to create a "single point of accountability" for enforcing these laws (para 3). The agency is headed by a single director, appointed to a five-year term of service by the president with the advice and consent of the Senate.

In August 2013, the CFPB filed a lawsuit against debt-relief services company Morgan Drexen and its chief executive officer, Walter Ledda, in U.S. District Court for the Central District of California, alleging (among other charges) that the company charged illegal upfront fees and deceived its clients (Hamilton, 2013). "This company took advantage of people who were struggling," CFPB Director Richard Cordray said in a written statement. "The company charged consumers illegal fees and deceived them about the services provided. We will hold them accountable for these actions" (CFPB, 2013, para 2)." Specifically, the CFPB's suit alleged that Morgan Drexen violated the Telemarketing Sales Rule prohibiting "deception in telemarketing" and debt-relief providers from "charging a fee for any debt-relief service until it has actually settled, reduced, or otherwise altered the terms of at least one of the consumer's

www.manaraa.com

debts;" it also violated the Dodd-Frank Wall Street Reform and Consumer Protection Act, which prohibits "deceptive acts or practices in the consumer financial marketplace" (para 4).

Morgan Drexen denied the CFPB's charges, and anticipating the CFPB's suit, sued the agency first, claiming it was unconstitutional in order to avoid the agency's legal action (Hamilton, 2013; Witkowski, 2016). Morgan Drexen's suit claimed that the CFPB lacked the proper accountability and that the law establishing the CFPB did not provide definitions of the unfair practices the agency is empowered to police (Hamilton, 2013). Morgan Drexen's suit was dismissed by a Washington federal district court in October 2013, an action upheld by the D.C. Circuit Court of Appeals (Witkowski, 2016). However, while dismissing the suit, the district court noted that Morgan Drexen could raise their constitutional concerns about the CFPB in their defense against the CFPB's suit against them, which Morgan Drexen did in its motion to dismiss the CFPB's charges (Niemann, 2014).

In its motion to dismiss the CFPB's suit against them, Morgan Drexen charged that five structural features of the CFPB combined to cause it to be in violation of the separation of powers established by Articles I, II, and III of the Constitution:

> (1) The President may remove the Director of the CFPB only for cause (12 U.S.C. § 5491(c)(3));
> (2) The CFPB is led by a Director, not a multi-member commission (id. § 5491(b)(1));
> (3) The CFPB is funded from the earnings of the Federal Reserve System, and not by regular congressional appropriations (id. § 5497(a)(1));
> (4) The CFPB may take action to prevent "unfair, deceptive, or abusive act[s] or practice[s] under Federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service" (id. § 5531(a)); and
> (5) The CFPB's interpretations of federal consumer financial laws are afforded deference as if the CFPB were the only agency authorized to interpret those laws (id. § 5512(b)(4)(B)) (U.S. District Court of Central California, 2014 p. 5)

www.manaraa.com

The district court rejected all of these arguments and dismissed Morgan Drexen's motion to dismiss the CFPB's suit. While all of Morgan Drexen's charges posed interesting constitutional questions, this chapter will focus on the decision's discussion of the first one, which is relevant to the one relevant to its subject: the critique that the head of the CFPB cannot be removed by the president except for cause, which contravenes the constitutional grant of removal power to the president. In its argument that the law establishing the CFPB violated the president's executive power to remove executive officers, Morgan Drexen's legal team relied heavily on the formalist reasoning found in the seminal Supreme Court case *Myers v. United States* (1926) which, as discussed above, held that the president has almost unlimited power of removal and has been interpreted to by some (Calabresi and Yoo) to forbid any attempts by Congress to limit that power.

The district court's opinion, however, pointed to another seminal Court decision as the precedent which should be the controlling one in this case – the functionalist opinion of *Humphrey's Executor v. United States* (1935), which as discussed previously, found that Congress could place limitations on a president's power to remove some administrators without improperly interfering with the president's executive power. The district court noted that the language describing the causes for which the CFPB director may be removed ("for inefficiency, neglect of duty, or malfeasance") matched the language upheld in *Humphrey's Executor* for the removal of a FTC commissioner ("inefficiency, neglect of duty, or malfeasance"). Therefore, the district court ruled, "the President therefore retains ample authority to assure the Director is competently leading the CFPB in its mission to enforce federal consumer financial laws" (p. 7).

Morgan Drexen had argued that this case was different from *Humphrey's Executor* because that case concerned a multi-member commission, the FTC, and not a single director, as

www.manaraa.com

is the case with the CFPB and in *Myers v. United States*. The district court disagreed with this reasoning, ruling that what distinguished *Myers* from *Humphrey's Executor* was that *Myers* involved a postmaster performing executive functions and FTC concerned an administrative agency implementing a legislative statute according to the standards prescribed by the legislative branch. For the district court, the CFPB's duties more closely resembled those of the FTC than those of a postmaster – the position at issue in *Myers*. Further, the district court cited another major case in removal power jurisprudence, *Morrison v. Olson* (1988), which set the standard for determining whether a statute improperly restricts a president's removal power at whether it impedes a president's ability to carry out the constitutional duties of his office. In the case of the CFPB, the for-cause removal provision for the removal of the CFPB director, "when considered as a part of the CFPB's overall structure and mission, does not impermissibly interfere with the President's power to assure that the laws be faithfully executed" (p. 8). With this favorable district court ruling, the CFPB had survived the first decision ruling on the merits of challenges to its constitutionality (Niemann, 2014).

At the time of this writing, other constitutional challenges to the CFPB's constitutionality are working their way through the courts – in part based on the same challenge that the structure improperly interferes with the president's removal power (Lane, 2017). Further challenging the CFPB is the change in the stance of the sitting president toward the CFPB and its structure. Where former President Barack Obama supported the agency and its independence (and had signed the law creating it), President Donald Trump is not a supporter of the agency. In the first months of his presidency, Trump's Justice Department filed a brief in one of the previously mentioned legal challenges, arguing that the president should have the power to fire the CFPB director, using the same logic of Morgan Drexen – because the CFPB is an independent agency

www.manaraa.com

with one director, and not a multi-member commission, the president should have the power to remove him or her.

The case of the CFPB and the legal challenges to it provides another way to see how Rosenbloom's retrofitting concept can bring the current administrative state into compliance with the formal understanding of separation of powers, including controversies around presidential removal power. As discussed previously, under the retrofitting concept, administrators are not merely executive-branch agents but have been retrofitted as part of the legislative branch when they perform legislative functions, like rulemaking and the judicial branch when they perform judicial functions, like adjudication. Rosenbloom even terms this retrofitted arrangement "tri-partite custody."

Correspondingly, the outline of guidelines can be formed to determine the when Congress can place limits on the president's power to remove an administrator, and when such limits are unconstitutional: when administrators perform legislative or judicial functions and are therefore part of the legislative or judicial branches, and not the executive branch, Congress and the courts can set the terms of that administrator's removal without violating the separation of powers. In the case of Morgan Drexen's challenge to the CFPB, the CFPB was found to be performing legislative functions, and therefore, the for-cause removal protection given to its director by Congress was constitutional. Where there has been some inconsistency in Supreme Court's decisions on removal power, retrofitting has the potential to bring some predictability to the Supreme Court's jurisprudence on the matter, and guide future legislative and judicial decisions.

Applying this approach to the seminal cases summarized above shows the promise of this approach. In *Myers*, the administrator in question was a postmaster, one performing almost

www.manaraa.com

entirely executive functions, so this approach would come to the same conclusion as the majority in that case, without relying on Chief Justice Taft's disputed interpretation of the Decision of 1789. In *Humphrey's Executor*, this approach would reach the same conclusion as well, as Humphrey as a member of the FTC performed largely legislative functions. As the comptroller in *Bowsher* was assigned executive functions, this approach would come to a similar conclusion in that case as well. *Morrison*, however, is a more complicated question. Is the independent counsel justified, because as one summary of the Court's thinking put it, Congress has a responsibility to see that the laws it passes are executed properly (Alvis, Bailey, and Taylor, 2013), and therefore the independent prosecutor was performing a legislative function and therefore a part of the legislative branch? Or, as Justice Scalia argued, is it as simple as prosecution is an executive function, and therefore an independent prosecutor is really a part of the executive branch? According to Rosenbloom, while the lines of separation could be clearer, the "indisputable fact" is that while independent prosecutors may conflict with "orthodox and contemporary public managerial values," they are "wholly constitutional" (2000a, p. 101). Thus, it would agree with the majority in this case as well. The one exception to the retrofitting approach's agreement with the outcome reached by the Court would be in *Free Enterprise Fund*; the members of the PCAOB were performing legislative functions, and therefore Congress should be allowed to dictate how these officers are removed.

This paper has, to this point, discussed two of the fiercest and longest-running separation of powers controversies concerning the administrative state: improper interference of a president's power to remove subordinates, and congressional delegations to administrators without the guidance of intelligible principles. The next chapter will examine a third area of controversy – the "headless forth branch" of independent agencies. In the case of independent

www.manaraa.com

agencies, the formalist concern is not just about the legislative branch interfering with the affairs of the executive branch by restricting the president's ability to control executive branch staffing decisions, but with the legislative and judicial branch interfering with the president's ability to control the direction of the executive branch, to the point of interfering with the president's ability to discharge his duty of ensuring that the laws are faithfully executed.

www.manaraa.com

V. CHAPTER FIVE

INDEPENDENT AGENCIES CASE STUDY: THE FCC AND NET NEUTRALITY

This chapter concerns how Rosenbloom's retrofitting framework can bring resolution to the constitutional debate between formalists and functionalists around independent agencies. It also seeks to locate these agencies, which by are shielded from interference from the each of the three branches yet exercise "broad rule-making, adjudicatory, and prosecutorial powers" (Miller, 1986, p. 51) in the Constitution's separation of powers framework. The chapter begins with an attempt to define independent agencies and explain what makes these agencies independent. It then briefly reviews the functionalist arguments for the independence of these agencies – namely, by shielding these agencies from political pressure, experts in specific areas of policy are able to make rules and adjudicatory and prosecutorial decisions based on evidence, not political considerations.

Following this exposition, the chapter will examine formalist critiques of independent agencies, which center on the arguments that these agencies' placement outside direct control of the executive branch violates the constitution's separation of powers and leads to a lack of accountability for the administrators in these agencies. The chapter will then explore responses of functionalists to the formalist critiques, namely, that these agencies do fit in the constitutional system, and the concerns of critics on the lack of accountability is overstated as there are formal and informal ways independent agencies are held accountable. After this synopsis of the scholarly debate concerning independent agencies, the chapter will review a legal challenge to the Federal Communications Commission's 2015 decision in favor of strong "net neutrality" on the basis of its status as an independent agency. The chapter will conclude by analyzing of

www.manaraa.com

Rosenbloom's retrofitting concept espoused by Rosenbloom can show how independent agencies can fit within a formal understanding of the separation of powers.

Independent Agencies

The closest thing to a definition of an independent agency can be found in the APA (Selin, 2015), which defines an "independent establishment" in the federal government as an "an establishment in the executive branch (other than the United States Postal Service or the Postal Regulatory Commission) which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment" (5 U.S.C. § 104). Key characteristics of independent agencies identified by scholars include that they exist outside of cabinet department (Custos, 2006; Bressman and Thompson, 2010), they perform rulemaking, adjudicatory, and prosecutorial functions (Miller, 1986; Morrison, 1988; Meazell, 2012), they have bipartisan membership requirements (Bressman, 2007; Verkuil, 1986), and they have the three features identified in *Humphrey's Executor* as markers of independent agencies: they are multi-member bodies (Custos, 2006; Meazell, 2012; Bressman and Thompson, 2010), their members serve fixed terms (Bressman, 2007; Verkuil, 1986; Selin, 2015), and these members are protected from removal by the president except for cause (Bressman, 2007; Meazell, 2012; Bressman and Thompson, 2010).

It is this last feature – members who are protected from removal except for cause – which is pointed to as the key feature of independent agencies, and the feature that truly sets these agencies apart from executive agencies as truly independent (Sunstein, 1990; Morrison, 1988). Independent agencies are created with the intent of being shielded from political pressure (Miller, 1986; Sunstein, 1990), and it is this protection from removal, more than other features (such as fixed terms) which give the members of these agencies their greatest source of

www.manaraa.com

independence (Verkuil, 1986). It is also why independent agencies tend to be created when Congress is in a position of relative strength compared to the president (Bressman, 2007).

Independent agencies fulfill the great goal of Progressive Era's reformers to create a politics-administration dichotomy (Wilson 1887, Goodnow 1900) which is meant to separate the expert execution of the law by learned administrators from the often-corrupt political process. Many of the arguments given by contemporary functionalists in favor of this protection from political pressure are similar to those made by their proponents in the Progressive Era. Independence is meant to aid agencies in maintaining a focused agenda (Miller, 1986) and provide policy stability over time, even with changes in presidential administrations (Bressman, 2007; Meazell, 2012). Independence can also allow for compromise between competing interest groups (Miller, 1986) and better partnerships with the private sector (Selin, 2015), while also giving administrators protections from interest-group capture (Meazell, 2012). In sum, according to Sunstein (1990), the reasoning behind creating independent agencies "stems largely from a belief in the need for expert, apolitical, and technically sophisticated administration of the laws" (p. 426). This expert, apolitical administration allows administrators to focus on long-term policy concerns rather than short-term political interests and is especially important when agencies perform their adjudicatory functions in the interest of due process (Bressman and Thompson, 2010).

The constitutionality of independent agencies has been at question in several cases before the Supreme Court, several of which were discussed in Chapter Four. *Humphrey's Executor* (1935) held that Congress could restrict presidential removal of administrators performing quasi-legislative and quasi-judicial powers. The opinion also laid out a justification for independent expert agencies, free from political influence of the president or Congress:

www.manaraa.com

> The commission is to be nonpartisan, and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative (295 U.S. 602, p. 624).

The Court determined the presence of independent agencies did not undermine the separation of powers because the FTC was merely an "administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid" (p. 628). Since "its duties are performed without executive leave, and, in the contemplation of the statute," the FTC must be "free from executive control" (p. 628).

Another opinion which helped solidify the status of administrative agencies is *SEC v. Chenery* (1947). In that decision, the Court reinforced a rule from an earlier opinion in the dispute (*SEC v. Chenery*, 1943) that "a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency" (332 U.S. 194, p. 196). In another boost to independent agencies, and administrative agencies in general, the Court also ruled that administrators could decide whether to use rulemaking or adjudication on a case by case basis, because they might not have had enough experience with an issue to create a rule, or a problem might be so specialized it would be impossible to create a rule. So then, "there is thus a very definite place for the case-by-case evolution of statutory standards," and "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency" (p. 203).

Later, in *Weiner v. United States* (1958), the Court emphatically upheld Humphrey's Executor, holding that Congress could limit presidential removal power over an administrator if that administrator required independence from the executive branch in the discharge of his or her

www.manaraa.com

duties. However, in *Buckley v. Valeo* (1976), the Court placed an important restriction on congressional control over independent agencies, ruling that neither Congress nor its elected officials could appoint heads of agencies or other agency personnel outside of the legislative branch.

A decade later, Chief Justice Warren Burger's opinion in *Bowsher v. Synar* (1986) in part relied upon *Buckley v. Valeo* to strike down Gramm-Rudman-Hollings Act due to Congress giving itself removal power over the Comptroller General, who considered its agent. While the status of independent agencies was challenged in *Bowsher v. Synar* (1986), and the Court struck down the delegation in question, the Court also took pains to make clear its decision was not meant to undermine the constitutionality of independent agencies, with Justice Burger writing that "appellants therefore are wide of the mark in arguing that an affirmance in this case requires casting doubt on the status of 'independent' agencies, because no issues involving such agencies are presented here" (478 U.S. 714, p. 736).

However, the concurrence and the dissents noted that the decision's logic – if Congress did not have the power to control an officer like the Comptroller, its power to limit a president's ability to remove administrators in independent agencies was in jeopardy. Justice Byron White even went so far as to argue in his dissent that the question in this case and in independent agencies was the same (Alvis, Bailey, and Taylor, 2013). Decades after the *Bowsher* decision, in *Free Enterprise Fund v. PCAOB* (2010), the majority – as in *Bowsher* – carefully limited its decision to the dual-layer removal structure at issue in the case, and not independent agencies as a whole. However, similar to the dissents in *Bowsher*, Justice Breyer's dissent claimed the majority's decision would put the status of many independent agencies into doubt.

www.manaraa.com

Critiques of Independent Agencies

Formalist opponents of the administrative state see independent agencies as the ultimate symbol of the victory of the Progressive vision of a separation between politics and administration over the Founders' vision of system separation of powers, as well as the victory of functionalism over formalism (Pestritto 2007a and 2007b). Independent agencies combine the two controversies discussed in the previous two chapters by combining the functions of the three branches of government and by giving administrators for-cause protection from presidential removal. To formalists, because these agencies blend the powers of the three branches, yet are not under the direct control any branch, they are unconstitutional (Foote, 1988), and because these agencies do not directly answer to the president, or any branch, they unaccountable, unresponsive, and vulnerable to outside influence (Verkuil, 1986). According to Sunstein (1990), because agency decisions on policy cannot be based solely on expertise or technocratic judgments, those decisions belong in the political sphere. Only by placing these agencies under direct presidential control can these agencies be brought into the proper constitutional order; independent expertise and technical knowledge are far less important than the political accountability which comes with executive control (Calabresi and Yoo, 2008). This section will explore these critiques of independent agencies; focusing first on the constitutional arguments against them and then on the related critiques of what critics see as a lack of accountability and responsiveness in independent agencies.

Critics of independent agencies argue that the Framers of the Constitution never intended for Congress to be able to create independent administrative agencies outside of the direct control of any of the three branches, especially the executive (Calabresi and Pakrash, 1994). Because these agencies are empowered by Congress to perform executive functions while

www.manaraa.com

shielding administrators within those agencies from presidential removal, except for cause, several critics (Calabresi and Yoo, 2008; Calabresi, 1995; Casazza, 2015) claim they are an unconstitutional usurpation of the president's executive power. Thus, formalists see the current state of administrative law – which allows Congress to delegate executive functions to officers and agencies independent of the President – as allowing Congress to violate the separation of powers, as Congress is able to bring executive functions under its control, or at very least to take them away from their proper place, which is under the President's control.

In fact, critics question the very notion that an agency can truly be independent, noting that not only can the president still exercise influence on independent agencies through their appointments to the agency and their appointments to be chair of those committees (Morrison, 1988), but also that those who are members of these agencies receive pressure from several other influences outside the executive branch (Robinson, 1988). Professor Steven Calabresi (1995) goes so far as to argue that there are no independent actors in the federal government, only "actors influenced by the President, actors influenced by the Congress and its committee shadow governments, and actors who are tugged one way or the other" (p. 83). Therefore, anything that weakens presidential control over these actors strengthens congressional control over them, and whatever weakens congressional control strengthens presidential control – there is "no such thing as a truly independent agency in Washington, D.C." (p. 84).

Not only do these independent agencies increase the risk of administration being captured by factions, such geographic interests through congressional committees, industry and interest groups (Foote, 1988; Calabresi, 1995). Opponents of independent agencies claim they are more susceptible to the political pressure of interest groups than executive agencies. Because they are not insulated by presidential control, these agencies are "vulnerable both to individual members

www.manaraa.com

and committees of Congress, which sometimes represent narrow factions and well-organized private groups with significant stakes in the outcome of regulatory decisions" (Sunstein, 1990, p. 427). Ironically, it is these agencies' very independence which leads these to their vulnerability to capture by organized interest groups.

Beyond their vulnerability to interest group captures, Calabresi and Yoo (2008) argue that these unconstitutional independent agencies reduce accountability in government, not only for the administrators, but also for the political branches. On top of reducing accountability, independent agencies reduce the responsiveness of government bureaucracies, which they call a "one of the biggest issues of our time" (p. 6). As the size of the government workforce has increased, they argue, so have the complaints about bureaucratic incompetence (p. 7). Direct control over administrators by the president allows a president to be in complete control of administration; because of these direct lines of control, the public knows who to hold accountable when there are problems, and therefore a president will make sure the bureaucracy works well. In this model of presidential control, a president can ensure that administrators not only have the proper expertise to do their jobs well, but they also display the proper responsiveness to the needs and concerns of citizens.

Besides the concern over independent agencies shielding their administrators from presidential removal except for cause, formalists also take issue with these agencies being delegated authority to perform executive, legislative, and judicial functions. Formalists see these agencies as key to fulfilling the Progressive goal of establishing a large and active administrative state, a goal which is contrary to what formalists interpret as the Founders' intent of a limited and modest government (Lawson 1994). To achieve this goal, formalists argue, the fathers of progressive liberalism:

www.manaraa.com

> envisioned a delegation of rulemaking, or regulatory, power from congressional lawmakers to an enlarged national administrative apparatus, which would be much more capable of managing the intricacies of a modern, complex economy because of its expertise and its ability to specialize. And because of the complexities involved with regulating a modern economy, it would be much more efficient for a single agency, with its expertise, to be made responsible within its area of competence for setting specific policies, investigating violations of those policies, and adjudicating disputes (Pestritto, 2007a, pp. 4-5).

In independent agencies, formalists claim, the administrative values of efficiency and expertise have been allowed to trump the constitutional values of representative government and accountability.

The prevalence of independent agencies, combined with the Court's failure to enforce the nondelegation doctrine is seen by critics as an especially dangerous combination (Casazza, 2015). By not enforcing the nondelegation doctrine, the Court has broken the chains of political accountability from the people to Congress and from Congress to independent agencies. By allowing independent agencies to persist, and weakening the president's removal power, the Court has similarly broken the chains of political accountability extending from the people to the president and from the president to independent agencies. Each of these by themselves would be bad enough to formalist critics of the administrative state, but together "they do even greater damage to the Constitution's foundational principles of self-government," by allowing "the establishment of a fourth branch of government that is unaccountable to the people yet wields enormous regulatory power over them" (p. 755).

Another formalist critique of independent agencies argues that the mixing of powers within them is itself a means to shield them – and their congressional creators – from proper accountability. Former FTC Director of Policy Development Nolan E. Clark (1988) argues that Congress creates independent agencies and allows the blending executive, legislative, and judicial powers within them to "create the appearance they belong somewhere else" (p. 282) than

www.manaraa.com

the executive branch and thereby weaken the control of the executive branch officials over them. The independence of independent agencies is an illusion created by Congress, in part by legislating to these agencies legislative and judicial functions to cloud the issue of who should properly have control over them - the president. Contrary to popular belief, independent agencies are a "fourth branch of government only insofar as Congress is able to divide the executive branch in two" (p. 289).

Defense of Independent Agencies

Functionalist defenders of independent agencies counter that these agencies do fit in the constitutional system (Bressman, 2007; Froomkin 1987), and the concerns of critics on the lack of accountability is overstated as formal structure as there are formal and informal ways independent agencies are held accountable (Custos, 2006; Vermeule, 2013). Further, concerns about taking power away from the executive are exaggerated, as formal structure is just one factor in determining the influence a president or Congress has on an agency (Foote, 1988) and it is not clear if direct presidential control over these agencies would be a normatively good thing (Bressman and Thompson, 2010). Further, nondelegation concerns are dismissed as functionalists believe the fact that each branch can exercise some kind of control over the agencies keeps those agencies within constitutional boundaries, even if they do not formally belong to any of the three branches (Strauss, 1984).

One argument advanced by functionalist proponents of how independent agencies fit into the constitutional system is that the constitution distinguishes presidential powers, which belong to the president alone, and executive powers, which do not. Froomkin (1987) distinguishes between the two types of powers: the presidential functions the decision places off-limits to independent agencies – such as the veto power and other powers enumerated in Article II - and

www.manaraa.com

executive branch functions – such as rulemaking and adjudication – which the Court determined could be carried out by administrators shielded from presidential removal power are executive functions (p. 794). Independent agencies are constitutional if they stay within the bounds of the general executive power and do not encroach on the more specific presidential power. In this view, independent agencies are an important tool to check against presidential discretion, and a middle ground between the extremes of simply going along with whatever the president wants on one end or impeachment on the other. This view is careful to make clear it does not favor a plural executive, or considering independent agencies a fourth branch of government. Independent agencies are simply a type of executive agency; while this approach claims that Congress can protect many functions from direct presidential control, it also acknowledges there are several functions it cannot do.

A second, more compelling, answer to the question of how to fold independent agencies into the constitutional system – similar to Rosenbloom's retrofitting – lies in the use of administrative procedures (Bressman 2007). Independent agencies are subject to oversight from Congress and the courts as they fall under the auspices of the APA and other procedural guidelines, so they follow notice-and-comment procedures for rulemaking, their decisions are subject to judicial review, their commissioners can be called to testify before Congress, and even in informal rulemaking, their procedures make oversight from Congress more likely. Independent agencies also are subject to guidance from the executive branch, as the president can appoint the chairs of commissions and independent agencies at times share areas of authority and responsibility with executive agencies. For example, the Federal Communications Commission (FCC) and the Department of Justice both must approve a merger of communications companies before it is completed. Despite the concerns of formalists, even

www.manaraa.com

though independent agencies are not subject to direct presidential control, they are not "renegade governments;" as "the practical control that administrative procedures furnish Congress helps to explain why independent agencies are constitutionally acceptable and deserving of judicial deference" (Bressman, 2007, p. 808).

Functionalists note that, contrary to the concerns of formalists, accountability does not go out the window when an independent agency is created. While these agencies are not directly accountable to the president and the president alone, they are held accountable for their actions by the president, Congress, the courts, and regulated industries (Custos, 2006; Vermeule, 2013). By focusing on the formal structure of agencies, such as whether an agency is independent or executive, defenders claim that formalists miss the informal ways in which agencies are influenced; both independent and executive agencies are held accountable and influenced by a variety of formal and informal factors. Both Congress and the president have tools to influence agency decisions, and outcomes "cannot be predicted simply by a look at the formal ties of government. The political environment, and the nature of political pressure, is much more complex and subtle" (Foote, 1988, p. 233).

Even with executive agency administrators – held up by formalists as the example of those subject to proper accountability to the president – formal structures do not tell the full story, and agency independence occurs more on a spectrum than a simple binary distinction (Bressman and Thompson, 2010). As Professor Peter Strauss (1984) notes, even in executive agencies, "the layer over which the President enjoys direct control of personnel is very thin and political factors may make it difficult for him to exercise even those controls to the fullest," as an administrator "with a public constituency and mandate, such as William Ruckelshaus, cannot be discharged – and understands that he cannot be discharged – without substantial political cost"

www.manaraa.com

(p. 590). The existence of all these informal methods of influence by the branches of government and interest groups on both independent and executive agencies leads proponents of independent agencies to conclude that independence is just one factor of many in "the complex political environment in which regulatory policy is made" (Foote, 1988, p. 237). Given that structures are do not play the determinative role that formalists claim, Foote argues formalist critics of independent agencies are less concerned with constitutional concerns about accountability, and more with empowering the office of the president, which was occupied at the time by a political conservative supported by many formalist scholars.

Further, proponents assert, direct presidential control of agencies might not always be the best option to ensure democratic accountability or positive policy outcomes in all circumstances (Bressman and Thompson, 2010). It is positive when it advances democratic values, like responsiveness and transparency, but presidential involvement might not necessarily advance those values – instead seeking to advance their short-term political interests over the public good. Even if one believes a president should have direct control over most administrative decisions, that person should also understand there are areas of policy where that power is dangerous, and where additional safeguards might necessary. One such area is market stability, because of its significance, and "also because of the predictable conflict between short-term and long-term interests;" the necessary structural protections "come in the form of modified or collaborative agency independence" (pp. 636-637).

Concerning the formalist worry about the blending of powers of independent agencies, functionalists counter that the fact that each agency - whether independent or not - can be controlled in some way by one or all three of the constitutional branches gives the same kind of protections that the separation of powers protections given to the named branches; this

www.manaraa.com

arrangement provides the "assurance" that administrators will not "pass out of control" (Strauss, 1984, p. 579). As noted above, Bressman (2007) argues that with the Court's blessing, Congress can and does use administrative procedures to control independent agencies and ensure they adhere to the APA and other provisions. As a result, independent agencies follow notice-and-comment rulemaking and are subject to judicial review when the legality or constitutionality of their actions is questioned. The control given to Congress by these procedures reconciles independent agencies with the constitutional structure and is grounds for them to receive the same judicial deference as agencies located firmly in the executive branch.

While functionalists acknowledge that independent agencies frequently exercise all three functions of government, this is blending of powers in agencies is constitutionally allowable because they are not blended in one of the three named branches (Strass 1984 and 1987). Further, it is "unavoidable" because of "Congress's need to delegate at some level the making of policy for a complex and interdependent economy, and the equal incapacity (and undesirability) of the courts to resolve all matters appropriately characterized as involving 'adjudication'" (Strauss, 1987, p. 493).

For functionalists, the formalist insistence on keeping the powers strictly separated and in placing an agency in one of the three branches is not desirable or necessary, and not truly in keeping with the Founders' intent. Respecting the intent of the Founders, is, according to Peter Strauss, is possible only "in the context of the actual present," and could "require some selectivity in just what it is we choose to respect – the open-ended text, the indeterminacy of governmental form, the vision of a changing future, and the general purpose to avoid tyrannical government," instead of merely insisting a "particular three-part model" (p. 493).

www.manaraa.com

Using similar logic, Greene (1994) argues that if governmental functions are to be blended, independent agencies are more desirable place for this blending to occur than the executive branch – which would lead the aggrandizement and domination of the executive branch over the other branches. Though an imperfect solution, combining the functions of government in independent agencies helps to curtail presidential power. Allowing the combining of functions in the executive branch – which is what would happen without independent agencies – would reduce the multiple sources of power created by the Constitution. By contrast, allowing the blending of functions in independent agencies for certain areas of policy, subject to judicial review, ensures that the sources of governmental power are not concentrated in one source.

Case Study

The controversy around independent agencies will be examined through the case of the Federal Communications Commission's (FCC) adoption of open Internet rules to provide what supporters of the rules call "net neutrality." After describing the history and arguments surrounding the decision, this section will next summarize the legal challenge and the court ruling upholding the net neutrality rules. The section will then explore what has happened to net neutrality since the inauguration of Donald Trump led to one of net neutrality's strongest critics becoming the FCC Chair. The section will conclude by applying Rosenbloom's retrofitting concept to show how independent agencies fit into the constitutional separation of powers system.

On February 26, 2015, the FCC voted 3-2 to adopt a series of open Internet, or "net neutrality" rules. The vote fell along partisan lines, with the Commission's three Democrats voting in favor of the rules and its two Republicans voting against them. As part of the rules, the FCC classified internet service providers as public utilities subject to strict regulation under Title

www.manaraa.com

II of the Telecommunications Act of 1934, meaning internet providers would be subject to the same type of regulations as phone companies (Kang and Fung, 2015).

In explaining its decision, the Commission said that to ensure a "fast, fair and open internet," it had enacted rules which were "strong," "sustainable," and "grounded in multiple sources of legal authority (FCC, 2015, p. 1)." Central to the Commission's decision was its adoption of three "bright line rules" which incorporated advocates of net neutrality saw as its core principles (Ruiz and Lohr, 2015):

- **No Blocking**: broadband providers may not block access to legal content, applications, services, or non-harmful devices.
- **No Throttling**: broadband providers may not impair or degrade lawful Internet traffic on the basis of content, applications, services, or non-harmful devices.
- **No Paid Prioritization**: broadband providers may not favor some lawful Internet traffic over other lawful traffic in exchange for consideration of any kind—in other words, no "fast lanes." This rule also bans ISPs from prioritizing content and services of their affiliates (FCC, 2015, p. 2).

The rules also included provisions concerning privacy protections and Internet access for those with disabilities or who live in rural areas. The adopted rules applied not only to wired lines of Internet service but also data providers for smart phones and tablets (Ruiz and Lohr, 2015). Other aspects of the rule included a provision providing that if it received complaints, the Commission would review "inter-connection deals," which allow for content providers to tap directly into networks (Gryta, 2015).

Before the vote to adopt the rules, all five commissioners spoke to explain their vote. Speaking in favor of the rules, then-FCC Chair Tom Wheeler noted that the FCC had received an incredible 4 million comments from the public on the issue, with the overwhelming majority in favor of strong net neutrality rules. Wheeler said that the rules were needed because "The Internet has replaced the functions of the telephone," and argued that the Internet "is simply too important to allow broadband providers to be the ones making the rules" (Kang and Fung, 2015,

www.manaraa.com

para 4). Opposing the rules, Republican FCC Commissioner Ajit Pai countered that the rules amounted to government interfering in a well-functioning market and would lead to less investment and innovation and higher prices for consumers. “The Internet is not broken,” Pai said, “There is no problem to solve” (Ruiz and Lohr, 2015, para 7).

These actions by the FCC followed a decade of it trying to find a way to enact open Internet rules using guidelines or rules without treating broadband as a public utility under Title II, efforts which were blocked by intense lobbying from cable and telecommunications companies and a series of negative court rulings (Gryta, 2015). They also followed then-President Barack Obama publicly announcing his support of the strongest possible net neutrality rules in November of 2014. Obama had previously promised to work to enact strong net neutrality rules in his first campaign for president, even discussing the issues during the primary campaign in 2007. While some opponents said the rules were a result of Obama’s comments, Wheeler maintained the rules were reached independently (Kang and Fung, 2015).

Those in favor of the new rules included consumer protection and public interest groups, small Internet start-up companies, and major companies such as Facebook and Netflix, who called the rule a “win for consumers” (Gyrta, 2015, para 6). Opponents included cable and telecommunication companies and Republican members of Congress, who denounced the decision as government overreach. While they said that they supported the principles behind the rules (Gryta, 2015), they claimed that Internet providers should be able to force online companies whose content uses up a lot of the bandwidth, such as those providing streaming videos – like Netflix – to help pay for the maintenance and expansion of the providers’ delivery infrastructure (Kang and Fung, 2015).

www.manaraa.com

Republicans in Congress argued the FCC had overstepped its authority and pledged to write legislation to supersede the FCC while calling the decision bureaucratic overreach. In a statement, then-House Speaker John Boehner said that "Overzealous government bureaucrats should keep their hands off the Internet" (Kang and Fung, 2015, para 21). Further, they argued that the decision could lead to bureaucratic overreach into the business of Internet providers, and would lead to less investment in Internet infrastructure, less innovation in products and services, and higher prices for consumers (Ruiz and Lohr, 2015).

After the rules were finalized and published in the Federal Register in April of 2015, lobbyists from five of the top Internet providers - the National Cable and Telecommunications Association; CTIA (representing the wireless industry's top trade group); the American Cable Association (representing small and independent cable companies), AT&T, and USTelecom (representing the country's largest telecommunications firms) – filed suit against them (Fung, 2015). In their lawsuits, the industry groups argued that broadband service was not the same thing as phone services, and therefore should not be subjected to the same level of regulation from the FCC. They also said that the FCC did not have the authority to reclassify Internet providers as they did, and did not follow proper rulemaking procedures and guidelines to do so, acting arbitrarily and capriciously in violation of the APA. Because the FCC's actions were illegal, the Internet providers maintained, the rules should be overturned. The FCC countered that it did have the authority to reclassify these providers, and that it was forced to do so after previous open Internet rules were overturned (Kang, 2015).

In what was called a "slam-dunk" ruling for the FCC, the D.C. Circuit Court fully upheld the FCC's rules by a 2 to 1 vote on June 14, 2016 (Selyukh, 2016). AT&T immediately pledged to appeal the ruling to the Supreme Court, joined by other industry groups (Byers, 2016). Using

www.manaraa.com

the two-step "Chevron test" made famous in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (1984), the majority opinion agreed with the FCC that it did have the authority to reclassify Internet providers and that its interpretation of its delegated statutory authority fit the *Chevron* standard of reasonableness which entitled it to deference. Further, the Court found the FCC used the proper procedures to formulate its rule, did not act arbitrarily or capriciously, and did not violate of the APA. Finally, the Circuit Court agreed with the FCC's approach to regulating Internet providers the same way as phone companies, as well as the Commission's decision to apply the rules to wireless providers serving those accessing the Internet through smartphones or tablets (*United States Telecom Association, et. al., v. Federal Communications Commission*, 2016). After having similar net neutrality overturned twice by D.C. Circuit, this decision meant the FCC had finally prevailed in court, and that its rules would remain in effect – at least until the Supreme Court ruled.

Net neutrality's victory would be short-lived, however. After Republican Donald Trump replaced Barack Obama as president, Tom Wheeler followed the tradition of stepping down as FCC Chair before his term expired when a candidate of the other party wins the presidency (Fiegerman, 2016). Once in office, Trump named Republican FCC Commissioner Ajit Pai as the new chair of the FCC (Fiegerman, 2017). As noted above, Pai was a vocal critic of the net neutrality rules, and in the first months of 2017, he moved to undo them. On May 18, 2017, the FCC voted 2-1 to move forward with Pai's "Restoring Internet Freedom" plan to unwind the net neutrality rules, with both the Commission's Republican members voting in favor of the proposal and the lone Democratic member voting against it. Following the vote, the FCC began the process of drafting new rules, which were expected to be friendlier to and provide more discretion to broadband internet providers (McKinnon, 2017). The decision was met with

www.manaraa.com

protests by public interest groups outside of the FCC's offices, who planned to use the public comment period which began after the May vote to rally supporters of net neutrality to rally to its defense (Breland and Neidig, 2017). Senator John Thune (R-S.D.), chairman of the Senate Commerce committee responded positively to the decision, but also emphasized the role of Congress in this policy area, saying Congress needed work on compromise legislation to create a permanent statute to provide "clear and enduring rules that balance innovation and investment throughout the entire internet ecosystem" (McKinnon, 2017, para 26).

The debate over net neutrality, and the FCC's authority to enact such rules, provides yet another example of how Rosenbloom's retrofitting concept can be utilized to bring the administrative state into harmony with a formal understanding of separation of powers. In Rosenbloom's system, independent agencies do not exist outside of the three branches as its own separate branch, free of oversight and accountability, as formalist critics fear. Instead, as with each administrative agency, the administrators within those agencies reside under whichever branch's tasks they are performing at any given time. Each branch can hold these administrators to account, and can and will take actions to influence their decisions. In following the tradition of stepping down as FCC Chair before his term expired when a candidate of the other party wins the presidency, Tom Wheeler allowed President Trump to appoint Ajit Pai – a Republican likely to hold similar positions and priorities as Trump – as FCC Chair. In this position, Pai plays a significant role in guiding the FCC in a direction more in line with those shared positions and priorities. In the case of net neutrality, both chairs of the FCC, Wheeler the Democrat and Pai the Republican, acted independently – though the policy preferences they pursued aligned with the presidents who appointed them. Had the rules stayed in place, and the majority of Congress disapproved, those members of Congress could have tried to repeal them through the

www.manaraa.com

Congressional Review Act, which Republicans in Congress have used in 2017 to repeal several Obama-era regulations (Miller, 2017). Finally, the courts had a chance to review the rules, and had they stayed in place, it is possible the Supreme Court could have given the ultimate decision on their constitutional and legal appropriateness.

The nondelegation concerns, as discussed in Chapter Threef, are resolved as well, as procedures put in place by the three branches to make sure the values of each branch are upheld when administrators act as part of that branch. In this case, both in creating the net neutrality rules in 2015, and in the unwinding of them in 2017, the FCC followed procedures placed on them by Congress to ensure transparency and openness, such as holding open meetings and publicly publishing proposed rules to allow for public comment. The 2015 rules had to withstand the scrutiny of judicial review to make sure the FCC was not acting arbitrarily or capriciously in interpreting its powers to regulate cable and telecommunications companies, and it is likely whatever rules the current commission will draft will be challenged in court as well.

In this chapter, and in the two before it, three controversies surrounding the administrative state have been examined through case studies – the nondelegation doctrine through the Clean Power Plan, the removal power debate through the Consumer Financial Protection Bureau, and finally the independent agency controversy through net neutrality rules. In each case, Rosenbloom's retrofitting theory has been used to resolve these controversies and harmonize the administrative state. In the final chapter, this dissertation will summarize its findings and use cross-case study analysis to examine the similarities and differences between the three cases to determine what larger themes and lessons can be drawn from them.

www.manaraa.com

VI. CHAPTER SIX

CONCLUSION

This research has aimed to show how the modern administrative state fits within the American constitutional system of government, using David Rosenbloom's concept of how the administrative state was "retrofit" to conform to a formal understanding of separation of powers (2000a, 2000b). It did so by examining the formalist and functionalist understanding of the separation of powers and the debates of scholars belonging to each school of thought around three areas of controversy: nondelegation, removal power, and independent agencies. By applying Rosenbloom's retrofitting to three case studies from current examples of those controversies – the 2015 rules created by the Environmental Protection Agency on carbon emissions at the direction of President Obama (nondelegation), the 2011 formation of the Consumer Financial Protection Bureau (removal power), and the 2015 rule on net neutrality formulated by the Federal Communication Commission (independent agencies) – this dissertation sought to show how separation of powers can be applied in specific administrative settings of the contemporary administrative state.

While there have been several attempts to defend the constitutional legitimacy of public administration (Wamsley, et. al., 1990; Rohr, 1986; Bertelli and Lynn, 2006), this dissertation represents the first attempt to use Rosenbloom's retrofitting paradigm to systematically answer potentially unconstitutional aspects of administrative state from a formalist perspective. In the following pages, this chapter will offer a conclusion to the dissertation. It will begin by summarizing the findings of the previous chapters, and then turn to a cross-case study analysis to examine the similarities and differences between the three examined cases and what larger themes and lessons can be drawn about the application of separation of powers in specific

www.manaraa.com

administrative settings. The chapter will conclude by discussing the limitations of the research and possibilities for future research.

Summary

The dissertation began by defining the parameters of the debate between the formalist and functionalist interpretations of the separation of powers and the formalist critiques of the administrative state. The functionalist view claims that other than "core functions" laid out in the Constitution, which branch does what task is to be decided through the political process; the Constitution only requires a "proper balance" to be preserved between the three branches (Strauss, 1984). While functionalists do acknowledge the needs of the day in interpreting the constitutional text, they argue their understanding is still bound by the limits of that text (Strauss, 2011). Conversely, formalists claim "that the Constitution draws sharply defined and judicially enforceable lines among the three distinct branches of government" and "resist efforts to reallocate power outright from the particular branch to which a given Vesting Clause has assigned it" (Manning, 2011, p. 1944). In this view of the separation of powers, the Constitution divides the three powers of government into distinct categories – executive, legislative, and judicial – and assigns each to one branch of government. Each branch is to be limited to that responsibility and is not to be interfered with in the carrying out of that responsibility.

Formalists see this strict separation of powers as necessary in preventing tyranny and ensuring the rule of law. For formalists, the modern administrative runs afoul of the Constitution by violating three key principles of the separation of powers and rule of law: (1) the principle of nondelegation, which dictates one branch may not delegate its powers to another branch; (2) the related principle that multiple governmental powers may not be combined within the same branch; and (3) finally, the principle that administrative discretion must be exercised within the

www.manaraa.com

confines of political accountability (Pestritto, 2007a, pp. 3-4). As (1) Congress often delegates its lawmaking power to agencies and administrators within the executive branch, (2) these agencies often exercise executive, legislative, and judicial powers, and (3) Congress has created many independent agencies where powers are blended and administrators are shielded from direct removal by the president (except for cause), protecting them from political accountability, the administrative state is unconstitutional, Q.E.D.

Despite the arguments from many formalists, however, acknowledging the legitimacy of the administrative state need not be incommensurable with a formal understanding of the separation of powers. In the "retrofitting" concept central to his theory of legislative-centered public administration, David Rosenbloom (2000a) explains how Congress and the courts acted through a series of laws and judicial decision in the wake of the New Deal to "retrofit" the administrative state to conform to a formal understanding of the constitutional system, and how it can be made to reflect constitutional values such as accountability, responsiveness, openness, and the due process of law.

The dissertation then explores the retrofitting concept in greater depth and how it fits into the formalism school of thought. Following World War II, Congress became worried about the growing power of the executive branch resulting from the birth of the modern administrative state after the New Deal. Congress responded by adopting a series of legislation which had the cumulative result of making administrators a part of the legislative branch when they performed legislative functions. Because they are legislative extensions, Congress (as the legislative branch) has the right to control administrative procedures when administrators perform legislative functions. This understanding of agencies as legislative *extensions* sees a much stronger link between the legislative branch and administrators than the traditional understanding of them as

www.manaraa.com

merely Congress' *agents*. As extensions, agencies are joined to the legislature, and exercise its core constitutional responsibility – legislation; therefore, Congress may direct administration by specifying its procedures and values (Rosenbloom, 2000a, p. 24).

Elsewhere, Rosenbloom (1987, 2000b) details how judicial branch infused its values into the administrative state. This retrofitting, aimed at infusing "constitutional rights, reasoning, and values into public administrative practice at all levels of government," has been the result of four complementary steps (p. 44). First, the federal courts recognized many previously undeclared rights for individuals as they interacted with public administrators, such as procedural due process protections. Second, the courts lowered the threshold for individuals to gain standing to sue administrative agencies for violations of their rights. Third, federal courts created a new type of lawsuit so they could better protect the rights of individuals in administrative procedures. Finally, the courts greatly increased the liability of most public employees for violating a citizen's constitutional rights in carrying out their work.

Through the steps outlined in the preceding paragraphs, Congress and the courts "retrofit" the burgeoning administrative state to the Constitution and created a "tri-partite custody" of it. Rosenbloom's retrofitting model also acknowledges the important role of the executive branch in administration through performing the traditional managerial role in executing the law. While Congress ensures legislative values are respected when administrators perform legislative functions, and the courts ensure judicial values are respected when administrators perform judicial functions, the role of the president and political executives is to ensure that the executive values of efficiency, economy, and effectiveness are respected when administrators perform executive functions, such as implementing legislation and coordinating and managing agencies in their daily duties.

www.manaraa.com

In the retrofitting understanding of public administration, then, administrators are not merely understood as agents performing delegated tasks, but rather, through a series of laws and judicial decisions, administrators have been made a part of the legislative and judicial branches of government when they act legislatively through rulemaking or judicially through adjudication. Through retrofitting, one can reconcile the current large and active administrative state with an understanding of separation of powers that dictates strict separation between the branches. When an administrator, through rulemaking, performs a legislative function, he or she is not a member of the executive branch exercising legislative power, but rather, because of retrofitting, that administrator is a member of the legislative branch. Similarly, when an administrator adjudicates a dispute, it is not a case of a member of the executive branch exercising judicial power – he or she has been retrofit into the judicial branch.

Next, the dissertation discusses the formalist and functionalist debates around three issues of controversy: the nondelegation doctrine, presidential removal power, and independent agencies, and applies Rosenbloom's retrofitting concept to contemporary case studies in each area of controversy to show how it can resolve those controversies. The first of these areas of controversy discussed is the nondelegation doctrine, which states that one branch of government many not delegate its powers to another branch without an intelligible principle, something formalists believe happens in the administrative state all the time (Schoenbrod, 1993; Lawson 1994). Proponents of the doctrine locate its constitutional source in the Vesting Clause of Article I of the Constitution: "All legislative Powers herein granted shall be vested in a Congress of the United States." Proponents interpret this clause as vesting legislative powers exclusively in Congress; being there vested, these powers cannot be transferred to another branch of government or other entity (Volokh, 2014; Driesen 2002; Lawson, 2002). Formalist

www.manaraa.com

nondelegation proponents believe that allowing one branch to delegate its powers to another branch could eventually lead to what James Madison warned against in *Federalist 47*, "the accumulation of all powers legislative, executive and judiciary in the same hands," which could "justly be pronounced the very definition of tyranny" (Madison, 2003, p. 298).

Functionalist responses to the nondelegation focus on two basic critiques. First, opponents of the nondelegation doctrine state that it has little support in the text of the Constitution or American history. Contrary to the advocates of the nondelegation doctrine, who see the doctrine necessarily rising from Article I's Vesting Clause, critics claim that the text of Vesting Clause can be read in different ways that do not necessitate a nondelegation doctrine – or at least the unambiguous, strict nondelegation doctrine outlined above (Krent, 1994; Merrill, 2004; and Sunstein 1999 and 2000). The second critique of the nondelegation centers around the claim that the nondelegation doctrine is unnecessary for the accountability its proponents desire, and that it would have serious, problematic consequences – namely, causing great instability in government, especially by putting a great deal of weight on justices to adjudicate whether each decision made by administrators was constitutional or not. While proponents believe the nondelegation doctrine is necessary to ensure political accountability in policymaking by ensuring all laws and rules governing private behavior is made by elected officials in Congress and the President in the normal legislative process, critics of the nondelegation doctrine counter that it is unnecessary to that desired political accountability. Even with delegation, there are still a number of institutional and informal controls to keep administrators accountable (Schuck, 1999). In particular, Congress can and does monitor the actions of agencies, and can and does enact laws to reverse agency decisions, reduce agency powers, confine agency discretion, and even abolish agencies (Posner and Vermuele, 2002).

www.manaraa.com

The dissertation then used the case of the Clean Power Plan shows to show how Rosenbloom's retrofitting concept can be used to resolve formalist nondelegation concerns. In the retrofitting concept, administrators are not merely executive-branch agents delegated rulemaking authority by congressional masters but are treated as part of the legislative branch when they perform legislative functions, like rulemaking. Thus, when Congress delegates authority to administrators, it is not delegating authority to another branch, but to fellow members of the legislative branch. Beyond this, Congress has given itself tools to ensure administrators respect legislative values like openness and transparency when performing legislative functions. As previously noted, the EPA's rulemaking process in formulating its final rule involved a wide range of input from the public and stakeholders, such as states and the energy industry. The EPA's final rule reflected this input from the public and stakeholders, and as a result gave states and utilities more flexibility in reaching emissions targets. Additionally, Congress made use of the Congressional Review Act to block the Clean Power Plan. Though this effort was unsuccessful, Congress could have overridden President Obama's veto if enough of its members had agreed the EPA had overstepped its bounds. States and utilities also took advantage of the legal processes in place to challenge the rule. Simply put, the measures put into place by Congress in the retrofitting process ensured its prerogatives were protected, as were the public's.

The next area of controversy examined was the formalist and functionalist debate around presidential removal power, which is rooted in disputes how to interpret the Constitution, the intent of the Founders, and the outcome of an early congressional debate over removal known as the "Decision of 1789." Formalists (Calabresi and Yoo, 2008; Pakrash, 2006; Rao, 2014) interpret the Vesting Clause of Article II of the Constitution ("the executive Power shall be

www.manaraa.com

vested in a President of the United States of America") as granting the president "the power to remove and direct all lower-level executive officials" (Calabresi and Yoo, p. 4). They also refer to other writings and actions of the Framers of the Constitution in the early days of the republic for support of their theory. Formalists also point to the "Decision of 1789," wherein the first Congress gave the president the implied power to remove the heads of the Foreign Affairs, War, and Treasury Departments (Rohr and O'Leary, 1989 and Pakrash, 2006). Additionally, Pakrash (2006) claims that the first Congress reaffirmed the Decision of 1789 in numerous statutes that followed.

Functionalists (Strauss, 1984 and Gedid, 1989) counter these claims by arguing that while the Constitution gives the power to appoint, it is silent (or at most ambiguous) regarding the power of removal, and it does not provide the clear lines of separation disallowing Congress placing limits on the president's power of removal that formalists claim. While formalists see the Decision of 1789 as an unambiguously favorable to the view that the president should have unfettered removal power of executive branch officials, functionalists such as Entin (1987) note that since the participants in the debate disagreed about the significance and scope of the Decision, it does not definitively settle the question of whether the Constitution demands that the president have this authority or whether it allows Congress to regulate this authority, and if so, to what degree it is allowed to do so.

This dissertation also reviewed the major disputes between the president and Congress over the removal, and the how the Supreme Court has alternated between resolutions based on formalist and functionalist reasoning. The first conflict examined was the controversy surrounding President Andrew Jackson firing his Treasury Secretary for not removing deposits from the Bank of United States despite Jackson's orders to do so. In language similar to modern

www.manaraa.com

formalists, Jackson argued that he had the power to take such action; he took the view that except for situations enumerated in the Constitution, a president is free to control the executive branch as he sees fit without congressional interference. In language similar to that of modern functionalists, Senator Daniel Webster claimed that because the Senate had a say in approving the appointment, it should have a say in the removal process. To give the president unlimited power over the executive branch could ultimately give the president unlimited control over the whole government (Lessig and Sunstein, 1994). In the end, Jackson came out of the conflict victorious (Nichols, 1994). The deposits were removed from the Bank, Secretary Duane was no longer Secretary of the Treasury, and though he was censured by the Senate, after Democrats regained control of the Congress in 1836, the censure against him was expunged from the congressional record.

Nearly 100 years later, formalists won an important victory in the opinion written by Chief Justice (and former president) William Howard Taft in *Myers v. United States* (1926), which struck down a statute requiring a president to seek the advice and consent of the Senate when removing most postmasters. Nine years later, the Court swung from Taft's formalistic reasoning in *Myers* to issue a decidedly functional ruling in *Humphrey's Executor v. United States*. Writing for a unanimous Court, Justice George Sutherland found that President Franklin Roosevelt did not have the power to remove Federal Trade Commissioner William Humphrey before his term expired without cause, and, more importantly, that Congress could shield certain administrators from the president's removal powers.

The next major Supreme Court decision in the debate over control of the bureaucracy was handed down over 50 years after *Humphrey's Executor* in *Bowsher v. Synar* (1986), with the majority endorsing a more formalistic view of the separation of powers – so formalistic, in fact,

www.manaraa.com

that it has been called the "highwater mark of formalism" (Martin, 2000, p. 534). Just two years later, the Court returned to a more functional interpretation of the separation of powers and its application to presidential removal power in *Morrison v. Olson* (1988), in which the Court upheld the constitutionality of the independent counsel provision of the Ethics in Government Act of 1978. Writing for the Court's majority, Chief Justice William Rehnquist found that the Act did not violate the separation of powers; the Act did not cause Congress to improperly interfere with the functions of the executive branch, or the President's ability to "faithfully execute" the laws. The Court swung back to a formalist stance in the 2010 case *Free Enterprise Fund v. PCAOB*. Members of the PCAOB, created by the Sarbanes-Oxley Act of 2002, could only be removed for cause by the Security and Exchange Commission, whose members themselves could only be removed by the president for cause. The majority opinion, written by Chief Justice John Roberts, found that this structure of dual for-cause limitations for removal violated the separation of powers.

The controversy over presidential removal power was examined through constitutional challenges to the Consumer Finance Protection Bureau (CFPB), including that the CFPB Director was unconstitutionally protected from presidential removal. Rosenbloom's retrofitting concept was then applied to the case to show how it could be used to resolve controversies around presidential removal power. Under the retrofitting concept, administrators are not merely executive branch agents but have been retrofitted as part of the legislative branch when they perform legislative functions, like rulemaking and the judicial branch when they perform judicial functions, like adjudication. Rosenbloom even terms this retrofitted arrangement "tri-partite custody." Correspondingly, the outline of guidelines can be formed to determine the when Congress can place limits on the president's power to remove an administrator, and when such

www.manaraa.com

limits are unconstitutional: when administrators perform legislative or judicial functions and are therefore part of the legislative or judicial branches, and not the executive branch, Congress and the courts can set the terms of that administrator's removal without violating the separation of powers. In the case of Morgan Drexen's challenge to the CFPB, the CFPB was found to be performing legislative functions, and therefore, the for-cause removal protection given to its director by Congress was constitutional. Where there has been some inconsistency in Supreme Court's decisions on removal power, retrofitting has the potential to bring some predictability to the Supreme Court's jurisprudence on the matter, and guide future legislative and judicial decisions.

The last separation of powers controversy explored was that of independent agencies, which have flourished since the Supreme Court's ruling in *Humphrey's Executor* allowing Congress to place limits on presidential removal of administrators. Key characteristics of independent agencies identified by scholars include that they exist outside of cabinet department (Custos, 2006; Bressman and Thompson, 2010), they perform rulemaking, adjudicatory, and prosecutorial functions (Miller, 1986; Morrison, 1988; Meazell, 2012), they have bipartisan membership requirements (Bressman, 2007; Verkuil, 1986), and they have the three features identified in *Humphrey's Executor* as markers of independent agencies: they are multi-member bodies (Custos, 2006; Meazell, 2012; Bressman and Thompson, 2010), their members serve fixed terms (Bressman, 2007; Verkuil, 1986; Selin, 2015), and these members are protected from removal by the president except for cause (Bressman, 2007; Meazell, 2012; Bressman and Thompson, 2010).

Independent agencies fulfill the great goal of the Progressive Era's reformers to create a politics-administration dichotomy (Wilson 1887, Goodnow 1900); that is, to separate the expert

www.manaraa.com

execution of the law by learned administrators from the often-corrupt political process. Many of the arguments given by functionalists in favor of this protection from political pressure are similar to those made by their Progressive proponents. In sum, according to Sunstein (1990), the reasoning behind creating independent agencies "stems largely from a belief in the need for expert, apolitical, and technically sophisticated administration of the laws" (p. 426). This expert, apolitical administration allows administrators to focus on long-term policy concerns rather than short-term political interests and is especially important when agencies perform their adjudicatory functions in the interest of due process (Bressman and Thompson, 2010).

Formalist opponents of the administrative state see independent agencies as the ultimate symbol of the victory of the Progressive vision of a separation between politics and administration over the Founders' vision of system separation of powers, and the victory of functionalism over formalism (Pestritto 2007a and 2007b). Independent agencies combine the two controversies discussed in the previous two chapters by combining the functions of the three branches of government in administrative agencies and by giving administrators for-cause protection from presidential removal. To formalists, because these agencies blend the powers of the three branches, yet are not under the direct control any branch, they are unconstitutional (Foote, 1988), and because these agencies do not directly answer to the president, or any branch, they unaccountable, unresponsive, and vulnerable to outside influence (Verkuil, 1986). According to Sunstein (1990), because agency decisions on policy cannot be based solely on expertise or technocratic judgments, those decisions belong in the political sphere. Only by placing these agencies under direct presidential control can these agencies be brought into the proper constitutional order; independent expertise and technical knowledge are far less important than the political accountability which comes with executive control (Calabresi and Yoo, 2008).

www.manaraa.com

The dissertation turned then to a case study of the FCC to show how Rosenbloom's retrofitting concept can bring independent agencies into harmony with a formalist understanding of the separation of powers. In Rosenbloom's system, independent agencies do not exist outside of the three branches as its own separate branch, free of oversight and accountability, as formalist critics fear. Instead, as with each administrative agency, the administrators within those agencies reside under whichever branch's tasks they are performing at any given time. Each branch can hold these administrators to account, and can and will influence their decisions. For example, in following the tradition of stepping down as FCC Chair before his term expired when a candidate of the other party wins the presidency, Tom Wheeler allowed President Trump to appoint Ajit Pai – a Republican likely to hold similar positions and priorities as Trump – as FCC Chair. In this role, Pai can play a significant role in guiding the FCC in a direction more in line with those shared positions and priorities. If the rules had stayed in place, Congress could have used the Congressional Review Act to undo them. Finally, the judicial system had a chance to weigh in on the rules, though due to the change in administrations, the Supreme Court likely will not have a chance to weigh in on them.

Nondelegation concerns are resolved as well, as procedures put in place by the three branches to make sure the values of each branch are upheld when administrators act as part of that branch. In this case, both in creating the net neutrality rules in 2015, and in the unwinding of them in 2017, the FCC followed procedures placed on them by Congress to ensure transparency and openness, such as holding open meetings and publicly publishing proposed rules to allow for public comment. The 2015 rules had to withstand the scrutiny of judicial review to make sure the FCC was not acting arbitrarily or capriciously in interpreting its powers to regulate cable and

www.manaraa.com

telecommunications companies, and it is likely whatever rules the current commission will draft will be challenged in court as well.

Conclusions: A Cross-case Analysis

Through applying Rosenbloom's retrofitting concept to three cases representing three famous separation of powers controversies in public administration, this dissertation has shown how a formalist understanding of the separation of powers can be applied in administrative settings and how a formalist understanding of the separation of powers can be harmonized with the modern administrative state. The key to this harmony comes from the tri-partite custody of the administrative state which has happened as a result the retrofitting of it to the constitutional separation of powers structure by Congress and the courts since 1946. When one views administrators not as agents belonging to one branch of government delegated authority from principals in another, separate branch, but as members of a branch when they perform the functions of that branch, resolution can come to the controversies addressed in this dissertation. Rosenbloom's retrofitting holds true to the strict separation of powers insisted on by formalists, while also accepting the existence and constitutional legitimacy of the administrative state.

One could even argue that the retrofitting structure also allows government to meet the "needs of the day" (which is important to functionalists) while staying true to the Constitution. So then, through this research, one can answer the questions presented in each case the same way a functionalist would, except with formalist reasoning.

- Is the delegation of legislative functions to administrative agencies, as in the EPA's Clean Power Plan, a violation of the separations of powers?
- Is the shielding of certain administrative officers from presidential removal except for cause, as is the case in the CFPB, a violation of the separation of powers?

www.manaraa.com

- Is the existence of independent agencies, such as the FCC, whose administrators are shielded from presidential removal except for cause, and which perform executive, legislative, and judicial functions – as the FCC did in its net neutrality rules – in violation of the separation of powers?

In each case, one can answer *no*. But in explaining that answer, that person need not utilize the functionalist reasoning, which would say, *No, because in each case, while there might be some mixing of government functions by administrators and the branches in their interactions with administrators, the core functions of each branch are protected and no branch is unduly gaining power at the expense of another branch.*

Instead, one can use the retrofitting concept to give an answer which respects the strict separation of powers formalists argue the Constitution demands, which would say, *No, because in each case, no governmental function is being delegated outside of its constitutionally assigned branch, because when an administrator performs that function, he or she is part of that branch. In addition, when an administrator regularly performs legislative or judicial functions, and therefore is part of the legislative or judicial branch, those branches can set parameters of how that administrator may be removed from his or her position without violating the separation of powers. Further, in each case, each branch used the legal and procedural tools available to them the ensure their prerogatives and values were present and respected.* Retrofitting places the administrative state on formal and firm constitutional ground.

Limitations and Possibilities for Future Research

While this dissertation has endeavored to minimize the limitations identified at the beginning of the study, several potential limitations remain. While the use of purposeful sampling of case studies was used to lessen the possibility of confirmation bias in case selection,

www.manaraa.com

and make the cases as salient and applicable as possible, it is possible some other cases might be considered more appropriate by other scholars. A second limitation is the potential trade-off of selecting cases from current political controversies; while this choice increases the salience of the study, these cases have been embroiled in partisan political controversies, and one's political affiliation might influence that person's opinion of the constitutional issues at stake in the cases. A Democrat may be more likely to consider the actions taken by administrators appointed by former President Obama to be constitutional because they are sympathetic to the policy goals of the administrators, regardless of the legal and constitutional concerns. Conversely, a Republican might be more likely to consider them unconstitutional and magnify may legal and constitutional concerns more than is warranted. Selecting cases from decades or centuries ago might have increased the possible objectivity of author and reader, while reducing the salience.

A final limitation is that, despite this dissertation's best efforts, the retrofitting concept might not be enough to convince many of the formalist scholars cited above of the constitutional legitimacy of the administrative state, or functionalist scholars of the importance of grounding public administration in a formal understanding of the separation of powers. Formalist scholars might in part be reluctant adopt the retrofitting framework due to the commitment of many of them (Pestritto, 2007a; Lawson, 1994; Calabresi and Yoo, 2008) to twin ideas mentioned in earlier chapters: first, that the Founders intended a much more limited role for the national government than it is performing currently, and second, that all administration should fall under the direct control of the president. While those are not ideas are not necessary for one to subscribe to the formalist interpretation of the separation of powers, for those scholars above, those ideas might prevent any acceptance of the administrative state or any attempt to show its

www.manaraa.com

legitimacy, even on formalist grounds. Any instance where and administrator performs or is assigned to perform legislative or judicial tasks is unconstitutional.

Functionalists as well might not find this dissertation convincing; since they do not subscribe to the formalist interpretation of the separation of powers, it is possible they would not see the necessity of the study. As long as one branch did not intrude on the core functions of another branch, then the administrative actions in explored in the case studies would be constitutional; if the first branch did intrude on the core functions, then the action would be unconstitutional – the question is as simple as that.

The potential reluctance of both formalists and functionalists is to accept the conclusion of this research would be reflective of the reluctance of the larger field of Public Administration to accept Rosenbloom's retrofitting framework. As the field of Public Administration largely is descended from the Progressive Era-founders of modern public administration, with their functionalist view of separation of powers, this dissertation's continuation Rosenbloom's insistence on a formal separation of powers will also likely struggle to find wide acceptance.

At the same time, some formalists might come to accept this dissertation's application of Rosenbloom's framework. It both allows these scholars to both keep their commitment to a formal interpretation of the separation of powers and join the larger field of Public Administration by accepting the legitimacy of the administrative state. The formalist/functional debate can then move past questions on whether the administrative state should exist, with formalists lamenting that the genie of the administrative state is already out of the bottle and, however unconstitutional it is, it probably cannot be put back in the bottle. Instead, the formalists can turn to advocating those policies and developments they believe can keep the administrative state within the bounds of the retrofitting framework.

www.manaraa.com

Whether or not staunch formalists or functionalists accept the application of retrofitting to bridge the gap between formalism and acceptance of the administrative state, this dissertation's contribution to the field of Public Administration is that it shows how it is possible to both make the administrative state more acceptable to formalists and show the importance of grounding the administrative state in the Constitution. No less a functionalist than Peter Strauss – perhaps the foremost functionalist scholar – has argued that functionalists should (and do) deeply respect the text of the Constitution, and limit their analysis to the bounds of the text (Strauss, 2011). The application of retrofitting in this dissertation can constructively dialogue with Strauss's essay to further to square the circle of what could be considered functionalist ends and formalist means. The Constitution is this nation's founding document, and our government – including administration – should reflect its values. This dissertation shows how the administrative state has been retrofit to do so, while also allowing for the needed flexibility for innovation and development to meet the needs of a nation large in area and population, with an increasingly complicated and globally-interconnected economy. In so doing, it resolves a key controversy in the field of Public Administration: that of its constitutional legitimacy.

For future research, there are many, many historical and contemporary cases of separation of powers controversies in public administration which the retrofitting model explored in this dissertation could examine – and there are likely to be more in the future. Another possible avenue of research would be to explore how vigilant the different branches have been in exercising the tools they have due to retrofitting to exert control on administrators when they are acting as part of their branch. In addition, one could seek to find how effective different measures, such as the Congressional Review Act have been at giving the branches the proper control of administrators when they are part of their branch. Further, one might examine whether

www.manaraa.com

any future measures might be needed for the retrofitting model to work more effectively, or more in line with what Congress and the courts have intended in the actions taken to retrofit administration to the constitution. Finally, another important issue to examine would be how to rank and order the different roles of administrators – when is the legislative or judicial portion of their responsibilities more important than the executive portion? This would be especially important in the removal power controversy.

Conclusion

Perhaps neither Progressives like Woodrow Wilson or Frank Goodnow or the most stringent formalists like Gary Lawson or Ronald Pestritto would be satisfied with the retrofitting framework presented in this dissertation. But this framework does hold the potential to moving scholarship beyond the traditional formalist-functionalist debates. We don't have to choose between the administrative state and the Constitution. What we do need to ensure is that Congress and the courts are holding up their end of the bargain and using the tools their predecessors have given them to make sure the retrofitting concept is respected and lived out the way it was intended.

www.manaraa.com

References

Aberbach, J.D. 1990. *Keeping a Watchful Eye: The Politics of Congressional Oversight*. Washington, DC: Brookings Institution.

A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495 (1935).

Alvis, J.D., Bailey, J.D., and Talyor IV, F.F. (2013). *The Contested Removal Power, 1789-2010*. Lawrence, KS: University Press of Kansas.

American Power & Light Co. v. SEC, 329 U. S. 90 (1946).

Barnes, R. & Mufson, S. (2016, February 9). Supreme Court freezes Obama plan to limit carbon emissions. *The Washington Post*. Retrieved from: https://www.washingtonpost.com/politics/courts_law/supreme-court-freezes-obama-plan-to-limit-carbon-emissions/2016/02/09/ac9dfad8-cf85-11e5-abc9-ea152f0b9561_story.html?utm_term=.62509f7e0faf

Bertelli, A. M. and Lynn, Jr., L. E. (2006) *Madison's managers: Public administration and the Constitution.* Baltimore, MD: The Johns Hopkins University Press.

Bowsher v. Synar, 478 U.S. 714 (1986)

Breland, A. and Neidig, H. (2017, May 18). FCC votes to advance net neutrality repeal. The Hill. Retrieved at: http://thehill.com/policy/technology/334050-fcc-votes-to-advance-net-neutrality-repeal

Bressman, L.S. (2007). Procedures as politics in administrative law. *Columbia Law Review, 107*(8), 1749-1821.

Bressman, L.S. and Thompson, R.B. (2010). The future of agency independence. *Vanderbilt Law Review*, 63(3), 599-672.

www.manaraa.com

Brown, K.S. and Candeub, A. (2010). Partisans & partisan commissions. *George Mason Law Review*, *17*(3), 789-822.

Brownlow, L. (1949). *The President and the Presidency*. Chicago, IL: Public Administration Service.

Buckley v. Valeo, 424 U.S. 1 (1976)

Bump, P. (2015, December 24). The 114th Congress had a pretty productive year (by recent standards at least. *The Washington Post*. Retrieved at: https://www.washingtonpost.com/news/the-fix/wp/2015/12/24/the-114th-congress-had-a-pretty-productive-year-by-recent-standards-at-least/

Byers, A. (2016, June 14). Court upholds Obama-backed net neutrality rules. *Politico*. Retrieved at: http://www.politico.com/story/2016/06/court-upholds-obama-backed-net-neutrality-rules-224309

Calabresi, S.G. (1995) Some normative arguments for the unitary executive. *Arkansas Law Review*, *48*(23), 23-104.

Calabresi, S.G. and Pakrash, S.B. (1994). The president's power to execute the laws. *Yale Law Journal*, 104, 541-665.

Calabresi, S. G. & Rhodes, K. H. (1992). The structural constitution: Unitary executive, plural judiciary. *Harvard Law Review 105*(6), 1155-1261.

Calabresi, S. G. and Yoo, C. S. (2008). *The unitary executive: Presidential power from Washington to Bush*. New Haven, CT: Yale University Press.

Cama, T. (2015, October 23). Two dozen states sue Obama over coal plant emissions rule. *The Hill*. Retrieved from: http://thehill.com/policy/energy-environment/257856-24-states-coal-company-sue-obama-over-climate-rule

www.manaraa.com

Cama, T. (2015, October 23). Lawsuits pile up against Obama's climate rule. *The Hill*. Retrieved from: http://thehill.com/policy/energy-environment/257958-lawsuits-pile-up-against-obamas-climate-rule

Casazza, D. (2015). Liberty requires accountability: Checking delegations to independent agencies. *Harvard Journal of Law & Public Policy, 38*(2), 729-760.

Chevron v. Natural Resources Defense Council, Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

City of Arlington v. FCC, 569 U.S. 1863 (2013).

Choper, J.H. (1980). *Judicial review and the national political process: A functional reconsideration of the role of the Supreme Court*. Chicago, IL: University of Chicago Press.

Clark, N. E. (1988). The headless fourth branch. In G.S. Jones and J.A. Marini (Eds.), *The Imperial Congress: Crisis in the Separation of Powers* (pp. 268-292). New York, NY: Pharos Books.

Consumer Finance Protection Bureau. (2013, August 20). Complaint for permanent injunction and other relief against Morgan Drexen, Inc., and Walter Ledda, individually, and as owner, officer, or manager of Morgan Drexen, Inc. Retrieved from: http://files.consumerfinance.gov/f/201308_cfpb_complaint_morgan-drexen.pdf

Consumer Financial Protection Bureau (2017). *The Bureau*. Retrieved from: https://www.consumerfinance.gov/about-us/the-bureau/

Consumer Financial Protection Bureau v. Morgan Drexen. (2014) United States District Court Central District of California. Retrieved from: http://www.cfpbmonitor.com/wp-content/uploads/sites/5/2014/01/Morgan-Drexen-opinion.pdf

www.manaraa.com

Creswell, J.W. (2007). *Qualitative inquiry & research design: Choosing among five approaches* (2nd ed.). Thousand Oaks, CA: Sage.

Custos, D. (2006). The rulemaking power of independent regulatory agencies. *The American Journal of Comparative Law*, *54*, 615-639.

Datla, K. and Revesz, R.L. (2013). Deconstructing independent agencies (and executive agencies. *Cornell Law Review*, *98*, 769-843.

Davenport, C. and Harris, G. (2015, August 2). Obama to unveil tougher environmental plan with his legacy in mind. *The New York Times*. Retrieved from: http://www.nytimes.com/2015/08/02/us/obama-to-unveil-tougher-climate-plan-with-his-legacy-in-mind.html?_r=2

Davenport, C. & Rubin, A. J. (2017, March 28). Trump signs executive order unwinding Obama climate policies. The New York Times. Retrieved from: https://www.nytimes.com/2017/03/28/climate/trump-executive-order-climate-change.html?_r=0

Dixon, M. (2014). A doctrinal approach to property law scholarship: Who cares and why? *Property Law Review, 3*, 160-165.

Driesen, D.M. (2002). Loose canons: Statutory construction and the new nondelegation doctrine. *University of Pittsburgh Law Review, 64*, 1-73.

Eilperin, J. (2014, January 14). Obama promises to use a 'pen and a phone' to push his agenda. The Washington Post. Retrieved at: https://www.washingtonpost.com/news/post-politics/wp/2014/01/14/obama-promises-to-use-a-pen-and-a-phone-to-push-his-agenda/

Eilperin, J. & Dennis, B. (2017, March 28). Trump moves decisively to wipe out Obama's climate change record. The Washington Post. Retrieved from:

www.manaraa.com

https://www.washingtonpost.com/national/health-science/trump-moves-decisively-to-wipe-out-obamas-climate-change-record/2017/03/27/411043d4-132c-11e7-9e4f-09aa75d3ec57_story.html?utm_term=.b17961bf7906&wpisrc=nl_politics-pm&wpmm=1

Entin, J.L. (1987). The removal power and the federal deficit: Form, substance, and administrative independence. *Kentucky Law Journal*, *75*, 699-792.

Environmental Protection Agency (2015). Built on a solid legal and scientific foundation. Retrieved from: https://www.epa.gov/sites/production/files/2015-08/documents/fs-cpp-legal.pdf

Epstein, J. (2014, January 14). Obama's pen-and-phone strategy. *Politico*. Retrieved at: http://www.politico.com/story/2014/01/obama-state-of-the-union-2014-strategy-102151

Ernst, D.R. (2014). *Tocqueville's Nightmare*. Oxford, Oxford University Press.

"FCC Adopts Strong, Sustainable Rules to Protect the Open Internet," Federal Communications Commission, February 26, 2015, Retrieved at: https://www.fcc.gov/document/fcc-adopts-strong-sustainable-rules-protect-open-internet

Fiegerman, S. (2016, December 15). FCC Chairman to step down. *CNN*. Retrieved at: http://money.cnn.com/2016/12/15/technology/tom-wheeler-fcc/?iid=EL

Fiegerman, S (2017, January 24). Trump names new FCC Chairman. *CNN*. Retrieved at: http://money.cnn.com/2017/01/23/technology/trump-fcc-chairman/index.html

Fisher, L. (2010). The unitary executive and inherent executive power. *Journal of Constitutional Law*, *12*(2), 569-591.

Flyvberg, B. (2006). Five misunderstandings about case study research. *Qualitative Inquiry, 12* (2), 219-245.

www.manaraa.com

Foote, S.B. (1988). Independent agencies under attack: A skeptical view of the importance of the debate. *Duke Law Journal*, *1988*(2/3), 223-237.

Free Enterprise Fund v. Public Company Accounting Oversight Board, 561 U.S. 477 (2010)

Froomkin, A.M. (1987). In defense of administrative agency autonomy. *The Yale Law Journal*, *96*(4), 787-814.

Fung, B. (2015, April 14). The real net neutrality lawsuits are finally here. *The Washington Post*. Retrieved at: https://www.washingtonpost.com/news/the-switch/wp/2015/04/14/the-real-net-neutrality-lawsuits-are-finally-here/?utm_term=.cdbad71df036

Fung, B. (2015, April 15). Here's what will happen next with the net neutrality lawsuits. *The Washington Post*. Retrieved from: https://www.washingtonpost.com/news/the-switch/wp/2015/04/15/heres-what-will-happen-next-with-the-net-neutrality-lawsuits/

Gedid, J.L. (1989). History and executive removal power: *Morrison v. Olson* and separation of powers. *Campbell Law Review*, *11*(2), 175-242.

Ginsburg, D.H. & Menashi, S. (2010). Nondelegation and the unitary executive. *Journal of Constitutional Law, 12,* 251-276.

Goodnow, F. J. (1900). *Politics and Administration: A Study in Government*. New York: Russell and Russell.

Gore, A. (1993). *From Red Tape to Results: Creating a Government That Works Better & Costs Less*. Washington, DC: U.S. Government Printing Office.

Green, R.T. (2002). Alexander Hamilton: Founder of the American Public Administration *Administration & Society*, *34*(5), 541-562F

Greene, A.S. (1994). Checks and balances in an Era of presidential lawmaking. *The University of Chicago Law Review*, *61*, 123-196.

www.manaraa.com

Gross, G. (2015, April 15). The six net neutrality lawsuits: What are the complaints about? *PC World*. Retrieved from: http://www.pcworld.com/article/2910432/six-net-neutrality-lawsuits-what-are-the-complaints-about.html

Gryta, T. (2015, February 26). FCC approves net neutrality rules, setting stage for legal battle. *The Wall Street Journal*. Retrieved at: https://www.wsj.com/articles/fcc-approves-net-neutrality-rules-setting-stage-for-legal-battle-1424974319

Hamburger, P. (2014). *Is administrative law unlawful?* Chicago, IL: The University of Chicago Press.

Hamilton, J. (2013, August 20). Morgan Drexen sued by U.S. consumer agency over debt-relief fees. *Bloomberg*. Retrieved at: https://www.bloomberg.com/news/articles/2013-08-20/morgan-drexen-sued-by-u-s-consumer-agency-over-debt-relief-fees

Humphrey's Executor v. United States, 295 U.S. 602 (1935)

Immigration and Naturalization Service v. Chadha, 462, U.S. 919 (1983)

Ingraham, P.W. and Rosenbloom, D. H. (1990). Political foundations of the American federal service: Rebuilding a crumbling base. *Public Administration Review*, *50*(2), 210-219.

Ingram, D. (2015, August 3). U.S. court to hear lawsuits over 'net neutrality' in December. *Reuters*. Retrieved from: http://www.reuters.com/article/2015/08/03/us-fcc-netneutrality-idUSKCN0Q825620150803

J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928).

Kang, C. (2015, December 4). In net neutrality hearing, judge signals comfort with F.C.C.'s defense. *The New York Times*. Retrieved at: https://bits.blogs.nytimes.com/2015/12/04/in-net-neutrality-hearing-judge-signals-comfort-with-f-c-c-s-defense/

www.manaraa.com

Kang, C and Fung, B. (2015, February 26). The FCC approves strong net neutrality rules. *The Washington Post*. Retrieved from: https://www.washingtonpost.com/news/the-switch/wp/2015/02/26/the-fcc-set-to-approve-strong-net-neutrality-rules/

Keith, T. (2014, January 20). Wielding a pen and a phone, Obama goes it alone. *National Public Radio*. Retrieved at: http://www.npr.org/2014/01/20/263766043/wielding-a-pen-and-a-phone-obama-goes-it-alone

Krent, H.J. (1994). Delegation and its discontents. *Columbia Law Review*, *94*, 710-752.

Korte, G. (2015, December 19). Using pocket vetoes, Obama rebuffs GOP attempt to kill Clean Power Plan. *USA Today*. Retrieved from: http://www.usatoday.com/story/news/politics/2015/12/19/obama-pocket-veto-clean-power-plan-climate-change/77619582/

Lane, S. (2017, March 17). DOJ files brief arguing Trump can fire consumer bureau chief. *The Hill*. Retrieved from: http://thehill.com/policy/finance/324561-justice-department-argues-trump-has-power-to-fire-consumer-bureau-chief

Lawson, G. (1994). The rise and rise of the administrative state. *Harvard Law Review*, Vol. 107, 1231-1254.

Lawson, Gary. (2002). Delegation and Original Meaning. *Virginia Law Review, 88*(2), 327-404.

Lawson, Gary. (2010). Burying the Constitution under a TARP. *Harvard Journal of Law & Public Policy*, *33*(1), 55-72.

Lessig, L. & Sunstein, C.R. (1994). The President and the Administration. *Columbia Law Review, 94*(1), 1-123.

Lichter v. United States, 334 U. S. 742 (1948).

www.manaraa.com

Lowi, T.L. (1985). *The personal president: Power invested, promise unfulfilled*. Ithaca, NY: Cornell University Press.

Lynn, Jr., L.E. (2013). America's "broken government": What would James Madison say? *Administration & Society*, *45*(5), 610–624.

MacDonald, J.A. (2013). Congressional power over executive branch policy making: Limitations on bureaucratic regulations. *Presidential Studies Quarterly, 43*(3), 523-537.

Madison, J. (2003). Federalist 47. In C. Rossiter (Ed.), *The Federalist Papers* (pp. 297-304). New York, NY: Penguin Group.

Mann, T.E. and Ornstein, N.J. (2006). *The Broken Branch: How Congress is Failing America and How to Get It Back on Track.* New York, NY: Oxford University Press.

Mann, T.E. and Ornstein, N.J. (2012). *It's Even Worse Than It Looks: How the American Constitutional System Collided with the New Politics of Extremism*. New York, NY: Basic Books.

Manning, J.F. (2000). The nondelegation doctrine as a canon of avoidance. Supreme Court Law Review, 2000(1), 223-277.

Manning, J.F. (2011). Separation of powers as ordinary interpretation. *Harvard Law Review*, *124*, 1939-2040.

Martin, J.R. (2000). *Morrison v. Olson* and executive power. *Texas Review of Law and Politics*, *4*(2), 511-541.

Martinez, Z.Q. (2015, July 15). Four years working for you. Consumer Finance Protection Bureau. Retrieved from: http://www.consumerfinance.gov/blog/four-years-working-for-you/

www.manaraa.com

Mashaw, J.L. (2006). Recovering American administrative law: Federalist foundations, 1787-1801. *The Yale Law Journal*, *115*(6), 1256-1344.

Mashaw, J.L. (2012). *Creating the administrative constitution: The lost one hundred years of American administrative law*. New Haven, CT: Yale University Press.

Massachusetts v. Environmental Protection Agency, 549 U.S. 497 (2007)

McConville, M. and Chui, W.H. (2014). Introduction and Overview. In M. McConville and W.H. Chui (Eds.), *Research Methods for Law* (pp. 1-15). Edinburgh, UK: Edinburgh University Press Ltd.

McKinnon, J.D. (2017, May 18). FCC votes to scale down net neutrality rules. *The Wall Street Journal*. Retrieved at: https://www.wsj.com/articles/fcc-votes-to-scale-down-net-neutrality-rules-1495124194

Meazell, E.H. (2012). Presidential control, expertise, and the deference dilemma. *Duke Law Journal*, *61*, 1763-1810.

Memoli, M.A. (2014, March 12). House passes GOP-backed bill aimed at Obama's 'imperial presidency'. *The Los Angeles Times*. Retrieved at: http://articles.latimes.com/2014/mar/12/news/la-pn-house-imperial-presidency-bills-20140312

Meriam, L. (1939). *Reorganization of the National Government: Part I: An Analysis of the Problem.* Washington, DC: Brookings Institution.

Merriam, S.B. (1998). *Qualitative Research and Case Study Applications in Education*. San Francisco, CA: Jossey-Bass Publishers.

www.manaraa.com

Merrill, T.W. (1991). The constitutional principle of separation of powers. In D.J. Hutchinson, D.A. Strauss, & G.R. Stone (Eds.), *The Supreme Court Review* (225-260). Chicago, IL: The University of Chicago Press.

Merrill, T.W. (2004). Rethinking Article I, Section 1: From nondelegation to exclusive delegation. *Columbia Law Review, 104*(8), 2097-2181.

Miles, M.B., & Huberman, A.M. (1994). *Qualitative data analysis: A sourcebook of new methods* (2nd ed.). Thousand Oaks, CA: Sage.

Miller, G.P. (1986). Independent agencies. *The Supreme Court Review, 1986*, 41-97.

Miller, J. (2017, May 15). Congressional Review Act gets a workout. *Roll Call*. Retrieved at: http://www.rollcall.com/news/politics/congressional-review-act-gets-a-workout

Mistretta v United States 488 U.S. 361 (1989).

Morrison, A.B. (1988). How independent are independent regulatory agencies? *Duke Law Journal, 1988*(2/3), 252-256.

Morrison v. Olson, 487 U.S. 654, 691 (1988)

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

Nichols, D.K. (1994). *The Myth of the Modern Presidency*. University Park, PA: The Penn State University Press.

Niemann, J. (2014, February 7). Constitutionality of CFPB upheld in federal court. *CFPB Journal*. Retrieved from: http://cfpbjournal.com/issue/cfpb-journal/article/constitutionality-of-cfpb-upheld-in-federal-court

Neuhauser, A. (2015, July 15). EPA may strengthen Clean Power Plan. *U.S. News & World Report*. Retrieved from: http://www.usnews.com/news/articles/2015/07/15/epa-likely-to-strengthen-clean-power-plan-proponent-says

www.manaraa.com

Neustadt, R. E. (1960). *Presidential power*. New York, NY: Wiley.

Osborne, D. and Gaebler, T. (1993). *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector*. New York, NY: Plume.

Pakrash, S.B. (2006). Removal and tenure in office. *Virginia Law Review*, *92*, 1779-1852.

Panama Refining Co., et al. v. Ryan, et al., 293 U.S. 388 (1935).

Pestritto, R. J. (2005). What America owes Woodrow Wilson. *Society, 43* (1), 57-66.

Pestritto, R. J. (2007a). The birth of the administrative state: Where it came from and what it means for limited government. *The Heritage Foundation: First Principles Series*, no. 16. http://www.heritage.org/research/reports/2007/11/the-birth-of-the-administrative-state-where-it-came-from-and-what-it-means-for-limited-government.

Pestritto, R. J. (2007b) The Progressive origins of the administrative state: Wilson, Goodnow, and Landis. *Social Philosophy and Policy, 24*(1), 16–54.

Pestritto, R.J. (2012). Roosevelt, Wilson, and the democratic theory of national progressivism. *Social Philosophy & Policy, 29*(2), 318-334.

Posner, E. & Vermeule, A. (2002). Interring the nondelegation doctrine. *University of Chicago Law Review, 69*, 1721-1762.

Posner, E. & Vermeule, A. (2003). Nondelegation: A post-mortem. *University of Chicago Law Review, 70*, 1331-1344.

Rao, N. (2014). Removal: Necessary and sufficient for presidential control. *Alabama Law Review, 65*(5), 1205-1276.

Restuccia, A. & Goode, D. (2015, November 17). Senate votes to upend centerpiece of Obama climate pledge. *Politico*. Retrieved from: http://www.politico.com/story/2015/11/senate-rejects-obama-climate-rule-215984

www.manaraa.com

Robinson, G.O. (1988) Independent agencies: Form and substance in executive prerogative, *Duke Law Journal, 1988,* 238-251.

Rohr, J. A. (1986). *To run a Constitution*. Lawrence, KS: University Press of Kansas.

Rohr, J.A. and O'Leary, R. (1989). Public administration, executive power, and constitutional confusion. *Public Administration Review, 49*(2), 108-115.

Rosenbloom, D. H. (1983). Public administrative theory and the separation of powers. *Public Administration Review, 43*(3), 219-227.

Rosenbloom, D. H. (1987). Public administrators and the Judiciary: The "new partnership." *Public Administration Review, 47*(1), 75-83.

Rosenbloom, D. H. (1998). *Public administration: Understanding management, politics, and law in the public sector* (4th ed.). New York, NY: McGraw Hill.

Rosenbloom, D. H. (2000a). *Building a legislative-centered public administration: Congress and the administrative state, 1946-1999.* Tuscaloosa, AL: The University of Alabama Press.

Rosenbloom, D. H. (2000b). Retrofitting the administrative state to the Constitution: Congress and the Judiciary's Twentieth-Century progress. *Public Administration Review, 60*(1), 39-46.

Rosenbloom, D.H. (2003). *Administrative Law for Public Managers*. Boulder, CO: Westview.

Rosser, C. (2010). Woodrow Wilson's administrative thought and German political theory. *Public Administration Review, 70*(4), 547-556.

Rosser, C. (2012). Examining Frank J. Goodnow's Hegelian heritage: A contribution to understanding Progressive administrative theory. *Administration & Society, 45*(9), 1063–1094.

www.manaraa.com

Ruiz, R.R. and Lohr, S. (2015, February 26). F.C.C. approves net neutrality rules, classifying broadband Internet service as a utility. *The New York Times*. Retrieved at: https://www.nytimes.com/2015/02/27/technology/net-neutrality-fcc-vote-internet-utility.html?_r=0

Rutgers, M.R. (2000). Public Administration and the separation of powers in a cross-Atlantic perspective. *Administrative Theory & Praxis, 22*(2), 287–308.

Salter, M. and Mason, J. (2007). *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research*. Harlow, UK: Pearson Education Limited.

Sargentich, T.O. (1987). Contemporary debate about legislative-executive separation of powers. *Cornell Law Review, 72*, 430-487.

Schlag, P. (1985). Rules and standards. *UCLA Law Review, 33*, 379-430.

Schoenbrod, D.H. (1993). *Power without Responsibility: How Congress Abuses the People through Delegation*. New Haven, CT: Yale University Press.

Schuck, P.H. (1999). Delegation and democracy: Comments on David Schoenbrod. *Cardozo Law Review, 20*, 775-793.

SEC. v. Chenery Corporation, 318 U.S. 80, (1943)

*SEC v. Chenery Corp*oration, 332 U.S. 194 (1947)

Selin, J.L. (2015). What makes an agency independent? *American Journal of Political Science, 59*(4), 971-987.

Selyukh, A. (2016, June 14). U.S. Appeals Court upholds net neutrality rules in full. *National Public Radio*. Retrieved at: http://www.npr.org/sections/thetwo-way/2016/06/14/471286113/u-s-appeals-court-holds-up-net-neutrality-rules-in-full

Stake, R. (1995). *The art of case study research*. Thousand Oaks, CA: Sage.

www.manaraa.com

Strauss, P.L. (1984). The place of agencies in government: Separation of powers and the fourth branch. *Columbia Law Review, 84*(3), 573-669.

Strauss, P.L. (1987). Formal and functional approaches to separation of powers questions: A foolish inconsistency? *Cornell Law Review*, 72, 488-526.

Strauss, P.L. (2011). A softer formalism. *Harvard Law Review Forum, 124*, 55-61.

Sunstein, C.R. (1990). Paradoxes of the regulatory state. The University of Chicago Law Review, 57(2), 407-441.

Sunstein, C.R. (1999). Is the Clean Air Act unconstitutional? *Michigan Law Review, 98*(2), 303-394.

Sunstein, C.R. (2000). Nondelegation canons. *University of Chicago Law Review, 67*(2), 315-343.

United States v. Mead Corp., 533 U.S. 218 (218).

United States Telecom Association, et. al., v. Federal Communications Commission, 2016.

Utility Air Regulatory Group v. Environmental Protection Agency, 573 U.S. ___ (2014)

Viebeck, E. (2014, July 19). GOP slams 'pen-and-phone' strategy. *The Hill*. Retrieved at: http://thehill.com/homenews/house/212750-republican-slams-obama-for-pen-and-phone-strategy

Verkuil, P.R. (1986). The status of independent agencies after *Bowsher v. Synar*. *Duke Law Journal*, *1986*(5), 779-805.

Vermeule, A. (2013). Conventions of agency independence. *Columbia Law Review*, *113*, 1163-1238.

Volokh, A. (2014). The new private-regulation skepticism: Due process, non-delegation, and anti-trust challenges. *Harvard Journal of Law & Public Policy*, *37*(3), 931-1007.

www.manaraa.com

Walsh, D. (2015, December 1). House votes to reject Obama climate change regulations. *CNN*. Retrieved from: http://www.cnn.com/2015/12/01/politics/house-climate-change-obama-epa/

Wamsley, Gary L., Bacher, Robert N., Goodsell, Charles T., Kronenberg, Philip S., Rohr, John A., Stivers, Camillia M., Wolf, James F. (Eds.). (1990). Refounding public administration. Newbury Park: SAGE Publications.

Weiner v. United States, 357 U.S. 349 (1958)

West, T.G. "The Constitutionalism of the Founders vs. Modern Liberalism," *Nexus: A Journal of Opinion*, *6* (1), 75-98.

White House Office of the Press Secretary (2015). Fact sheet: President Obama to announce historic carbon pollution standards for power plants. Retrieved from: https://obamawhitehouse.archives.gov/the-press-office/2015/08/03/fact-sheet-president-obama-announce-historic-carbon-pollution-standards

Wilson, W. (1887). The study of administration. *Political Science Quarterly, 2*, 197-222.

Willoughby, W.F. (1927). *Principles of Public Administration*. Washington, DC: Brookings Institution.

Whitman v. American Trucking Associations, Inc., 531 U.S. 457 (2001)

Witkowski, R. (2016, March 18). CFPB wins final judgment in long-running Morgan Drexen battle. *The Wall Street Journal*. Retrieved from: https://www.wsj.com/articles/cfpb-wins-final-judgment-in-long-running-morgan-drexen-battle-1458340920?mg=id-wsj

Willoughby, W.F. (1934). *Principles of Legislative Reorganization and Administration*. Washington, DC: Brookings Institution.

Yin, R.K. (2009). *Case study research: Design and methods* (4th ed.). Thousand Oaks, CA: Sage.

www.manaraa.com