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Executive Branch Usurpation of Power: Corporations and Capital Markets

ABSTRACT. Agencies in the executive branch are better situated than other political institutions to take advantage of opportunities to expand their power base by responding quickly and decisively to real or imagined crises. The executive has structural advantages over the other branches because it can respond faster to perceived emergencies. Congress is hampered more than the executive by gridlock caused by special-interest group pressures when it tries to act quickly. The legislative process is also inherently slower than the executive process because the executive can launch into unilateral action, as by filing a lawsuit. The executive's structural advantage over the judiciary is even more complete than its advantage over Congress because the judiciary has no power to initiate action. Executive action, particularly that of agencies, determines the course of law. This Essay argues that the ascendancy of the executive branch in policymaking is an unintended consequence of the modern administrative state. The emergence of the executive as the fulcrum of power within the administrative state upsets the traditional balance of powers among the three branches of government. This imbalance can be counteracted only by a concerted effort by the federal judiciary to rein in executive power that improperly usurps Congress's authority to make law.

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INTRODUCTION

This Symposium announces that the executive branch is "the most accessible, politically accountable force in government at the local, state, and national levels"[1]—and that statement is accurate, at least insofar as accountability is measured by the force of the response, rather than the long-term desirability of that response. Due to certain structural advantages, executive branch agencies are better situated to respond quickly and decisively to emergencies. As a result, they can expand their power base more readily than the other branches of government.

Basic political science shows us why this is so. Gridlock—caused by special-interest group pressures and the delays of bicameral decision-making—hampers Congress. The judiciary is no better off in terms of policymaking. Judges must wait until a plaintiff musters the initiative to file a lawsuit, and then they must further wait through the tedious processes of evidence-gathering, motions practice, and trial before they can formulate new policy (or confirm old policy).

Unlike the judiciary, executive branch agencies can take unilateral action by filing lawsuits, and unlike Congress, they can act quickly because of streamlined decision-making processes. In the realm of corporate law, the Securities and Exchange Commission (SEC)—the focus of this Essay—can institute civil litigation in the form of enforcement actions, while the Justice Department and state attorneys general can institute criminal litigation.

Thanks to these structural advantages, executive action, particularly agency action, determines the course of law. Indeed, even when Congress acts by passing massive reform legislation, as it did in 2002 with the Sarbanes-Oxley Act, the ultimate result is an increase in the power of the executive to create policy, not a reallocation of power to the legislative or judicial branches.

The ascendancy of the executive branch in policymaking is an unintended consequence of the modern administrative state. The emergence of the executive branch as the fulcrum of power within the administrative state represents a deviation from the traditional balance of powers among the three branches of government. Only a concerted effort by the federal judiciary can rein in agencies that improperly usurp the authority of the legislative branch through the enforcement process.

Using the SEC as an example, Part I demonstrates how the flexibility and forcefulness of agency action has altered the traditional balance of power among the branches. Rather than sharing power, the SEC has become the

1. Judy Coleman, Introduction to Symposium, *The Most Dangerous Branch? Mayors, Governors, Presidents, and the Rule of Law*, 115 YALE L.J. 2215, 2216 (2006).

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locus of power in corporate law enforcement. The legislative and judicial branches, ostensibly charged with making law and interpreting the law, have taken on merely supporting roles. The result has been that the agency most willing to exercise power immediately appropriates lawmaking authority.

Part II illustrates the theory developed in Part I with three recent interactions between the executive and its rival branches. In addition to showing how the executive has seized power horizontally from the other branches, each example illustrates how the federal executive acts in a policymaking role parallel to that traditionally held by the states.

Part III analyzes the various mechanisms used by the branches to implement policy, with particular emphasis on relative efficiency, ability to control an agenda, and susceptibility to political influence.

The implication of this analysis is rather radical: It suggests a new justification for more activist judicial intervention to dampen the power of the executive. If the executive branch is more powerful than the Framers intended, then something should be done to redress this constitutional disequilibrium and reduce the probability that such concentrated power will be abused. A logical possibility would be for the judiciary to develop legal doctrines that are less deferential to the executive. Yet recent jurisprudential trends, which give ever-increasing deference to the facts as found and the law as interpreted by executive agencies, indicate that there is a vast distance between the judicial approach that is desired and the reality that is observed.

I. SHARED POWER IN THEORY AND PRACTICE: THE EXECUTIVE AND SUPERIOR RESPONSE TIME

Traditional theory posits that the U.S. constitutional system is most accurately described as a power-sharing arrangement among the various branches of government.[2] Because the executive branch has a different agenda and different interests and powers from the judges and legislators who populate the other branches, this power-sharing is not always harmonious.[3] These structural differences inevitably lead the executive into conflict with the other branches.[4] Such conflict is healthy. It mitigates the onslaught of special-

2. *See* RICHARD E. NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN 7-9 (1990); MARK A. PETERSON, LEGISLATING TOGETHER: THE WHITE HOUSE AND CAPITOL HILL FROM EISENHOWER TO REAGAN 76-99 (1990).

3. *See* Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, LAW & CONTEMP. PROBS., Spring 1994, at 1, 3 (making this point in the context of the President and Congress).

4. *Id.*

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interest group pressure for legislation during times of ordinary politics.[5] In addition, conflict is an integral aspect of the separation of powers, designed to protect limited government.

This point has been powerfully made by Professors Terry Moe and Scott Wilson:

> There is nothing that Congress can do to eliminate the president's executive power. He is not Congress's agent. He has his own constitutional role to play and his own constitutional powers to exercise, powers that are not delegated to him by Congress and cannot be taken away. Any notion that Congress makes the laws and that the president's job is simply to execute them—to follow orders, in effect—overlooks the essence of separation of powers. The president is an authority in his own right, coequal to Congress and not subordinate to it.[6]

It is probably true that the executive branch started out as (at most) coequal to Congress.[7] However, due to a variety of structural factors that probably were not anticipated by the Framers, the relationship between the executive and the other branches has evolved over time.

This Part will consider four primary factors driving that shift: (1) the President's unique power to act unilaterally to implement policy; (2) the increased salience and brevity of policy windows (those periods of time in which it is possible to make new policy); (3) the rise of participatory democracy (in which it is considered legitimate for the groups most affected by new policy to influence its formation); and (4) the substitution of procedural rights for substantive rights.

A. The Executive's Power To Act Unilaterally

The executive possesses considerable power to affect policy unilaterally both in the implementation of laws and in the preemption of legislative activity through the use of executive orders, proclamations, and memoranda. One of the odd consequences of our lawmaking process is that it is virtually impossible for Congress to act without increasing the power of the executive branch,

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5. Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 225-27 (1986).

6. Moe & Wilson, *supra* note 3, at 21.

7. *See* Charles Gardner Geyh & Emily Field Van Tassel, *The Independence of the Judicial Branch in the New Republic*, 74 CHI.-KENT L. REV. 31, 47 (1998) (describing the perception among members of the Constitutional Convention that the three branches of government were coequal).

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which must implement new statutes that the legislature produces.[8] The resources and discretion that accompany that task inevitably lead to an increase in the executive branch's power.

Once a statute is in place, the executive has enormous discretion to decide how and when—or whether—to implement it. For example, the President can undermine the statute creating the Federal Emergency Management Agency simply by staffing the agency with political cronies, unless and until an outraged public demands that the situation be corrected. The SEC can take a hands-off regulatory approach with respect to corporate governance issues until it becomes politically expedient for the agency to inject itself into this arena. The Department of Education can take the view that education policy is best left to the states until it perceives that aggressively asserting its own policies is in its best political or institutional self-interest.

With such wide-ranging control, as well as a streamlined system for choosing who wields that control, the executive has the power to act unilaterally when it implements laws. This power to take unilateral action can be seen as part of a "residuum of unenumerated power" contained in Article II of the Constitution,[9] which otherwise bestows on the President "the executive Power" and the authority to "take Care that the Laws be faithfully executed."[10] Moreover, this power is streamlined within the executive branch. As Professors Moe and Wilson observe, whenever the President feels so inclined, he can "review or reverse agency decisions, coordinate agency actions, make changes in agency leadership, or otherwise impose his views on government . . . ."[11] The other branches, by contrast, are characterized by process, disagreement, and deliberation.

Checks provided by the other branches have turned out to be weak in the face of the modern administrative state. While at first blush it might appear that Congress's so-called "power of the purse" is a significant check on the

8. Moe & Wilson, *supra* note 3, at 23 ("[A]lthough Congress can try to limit presidential prerogatives through statute, the president is greatly *empowered* through statutory law whether Congress intends it or not.").

9. RICHARD M. PIOUS, THE AMERICAN PRESIDENCY 38 (1979).

10. U.S. CONST. art. II, § 1, cl. 1; *id.* § 3; *see also* Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280 (2006) (arguing that the Take Care Clause is a positive grant of power to the executive).

11. Moe & Wilson, *supra* note 3, at 20. For discussions of the theory of the unitary executive, see Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451 (1997); and Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 HARV. J.L. & PUB. POL'Y 667 (2003).

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executive's power,[12] in reality it is politically costly for Congress to withhold funding from administrative agencies. Such political costs take the form of loss of support from interest groups, bad publicity, and loss of cooperation from agencies. Congress is also inherently constrained in its ability to take the initiative in making policy because the laws enacted by a legislature are not self-enforcing: They must be executed by the executive and the bureaucracy under its supervision. Courts clearly cannot take the initiative in making new policy. They must wait for cases to come to them, and even then their sphere of action is highly constrained by procedural rules and tradition and by the requirement that their decisions be justified by written opinions, all of which combine to limit judges' flexibility.

Moreover, political scientists have noted that Presidents regularly effect policy change outside of any "bargaining framework" with Congress via national security directives, executive orders, proclamations, executive agreements, and memoranda to agency heads.[13] The increase in the number of presidential memoranda and executive orders in recent years supports the conventional wisdom that the ability to act unilaterally is a vitally important attribute of the modern presidency.[14]

To this well-developed literature, I add the insight that Presidents act entrepreneurially as well as unilaterally. Presidents can preempt legislative action by acting first. Recent Presidents have acted entrepreneurially to affect the law in a range of policy areas. President Clinton issued executive orders to bar federal contracts with companies that permanently replace striking workers and to prohibit the federal government from discriminating against workers on the basis of sexual orientation.[15] President George W. Bush used an executive order to launch his Faith-Based Initiative, which encourages religious organizations to seek federal funds to treat social problems.[16] Thus, Presidents can not only act without Congress, but can also deprive Congress of the initiative to act. As elaborated in the following Section, the power to act quickly

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12. *See* U.S. CONST. art. I, § 9 (prohibiting the withdrawal of money from the Treasury without prior congressional appropriation).

13. *See* WILLIAM G. HOWELL, POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION 5-24 (2003).

14. *See, e.g.*, PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION 68-70 (2002); Phillip J. Cooper, *Power Tools for an Effective and Responsible Presidency*, 29 ADMIN. & SOC'Y 529, 532-33 (1997); Phillip J. Cooper, *Presidential Memoranda and Executive Orders: Of Patchwork Quilts, Trump Cards, and Shell Games*, 31 PRESIDENTIAL STUD. Q. 126, 136-39 (2001); William G. Howell, *Unilateral Powers: A Brief Overview*, 35 PRESIDENTIAL STUD. Q. 417, 421 (2005).

15. Exec. Order No. 13,087, 63 Fed. Reg. 30,097 (May 28, 1998) (prohibiting discrimination); Exec. Order No. 12,954, 60 Fed. Reg. 13,023 (Mar. 8, 1995) (barring contracts).

16. Exec. Order No. 13,199, 66 Fed. Reg. 8499 (Jan. 29, 2001).

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in the information age translates into the power to command vital interest group support.

B. The Disappearing Policy Window

When the Framers designed the basic constitutional scheme in place today, they were constructing an institutional framework on a legal landscape wholly devoid of both administrative agencies and federal statutes. The primary source of law was common law. In the Framers' world, judges had significant power. Legislatures had the potential to affect policy outcomes by passing statutes that encroached on the existing common-law rules. Executives had no administrative agencies to command and fewer laws to execute. The presidency was, of course, a considerable position, but in that era a President's power lay more in his ability to persuade than in his power to command. The Framers designed a constitutional system founded on the principle of separation of powers. The executive was not empowered to create laws or adjudicate disputes. Instead, searching review of executive and legislative action by an independent judiciary was deemed essential "to provide a check against self-judging by the political branches."[17]

Over the course of the twentieth century, the power of the judiciary has decreased in relation to that of the executive and legislative branches. We currently live in what Judge Guido Calabresi has accurately described as the "age of statutes."[18] Written laws have replaced common-law rules as the primary source of public and private ordering. In his important and influential book, *A Common Law for the Age of Statutes*, Judge Calabresi argues that the massive outpouring of statutes in the post-New Deal era has upset the traditional balance of power between the legislature and the judiciary.[19] He contends that courts should restore the traditional balance between the judiciary and the legislature by applying common-law techniques of judging to update both common-law and statutory rules.[20]

Though I agree with Judge Calabresi's prescription for the expansion of judicial power, I would argue that the constitutional disequilibrium is largely due to an expansion in the executive's power within the constitutional scheme, rather than to an expansion in the legislature's power. Doctrines of judicial deference toward administrative agencies have eroded the separation of powers

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17. Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 132 (1994) (citing THE FEDERALIST NO. 78 (Alexander Hamilton)).

18. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

19. *Id.* at 6.

20. *Id.* at 82, 101-09.

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as originally conceived by the Framers and have enabled executive agencies to exercise legislative and judicial powers—to self-judge.[21] The executive increasingly generates the policies that shape our everyday world, and the judiciary has not shown much interest in checking the executive's actions, despite encouragement from Congress to do so.[22]

The modern presidency has expanded its power relative to the other branches of government in part because of the increasingly streamlined nature of preference formation within the executive branch itself. Unlike Congress and the courts, the executive branch has its own well-defined, highly entrenched set of bureaucratic preferences. The administration, including its agencies, knows where it stands on virtually every issue—unlike a Congress divided starkly by party lines and even within parties. The executive is an institution with a powerful hierarchical structure that promotes efficiency relative to the far more diffusely organized Congress. Because Congress cannot act without first achieving internal consensus, the executive's structure allows it to act much more quickly and effectively.

The window for making policy, in the age of the Internet, has become shorter and more salient when an important issue arises. The increase in the speed of communications has translated directly into a reduction in the time given to politicians to respond effectively to new information and events. This trend tends to allocate power to the branch with the fewest constraints on its ability to enact policy.[23] Because the executive branch is characterized by streamlined policy preferences, it can take advantage of policy windows without having to mediate among members with competing preferences. While Congress has difficulty coordinating its response to rapidly changing events, the executive branch can capitalize on its ability to act quickly and unilaterally to structure agendas and create new policies before the other branches can organize a response.[24]

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21. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).

22. See discussion *infra* Part III about Congress's interesting exhortation of judges to take an activist role in constitutional interpretation. These exhortations are observed most notably during confirmation hearings.

23. For excellent descriptions of the way that public-policy entrepreneurs can use policy windows to pursue long-sought objectives, see JOHN W. KINGDON, AGENDAS, ALTERNATIVES AND PUBLIC POLICIES 165-94 (2d ed. 1995); and MARGARET LEVI, OF RULE AND REVENUE 21 (1988).

24. *See, e.g.*, HOWELL, *supra* note 13, at 6-23 (describing the ability of Presidents to effect policy change outside a bargaining framework); KENNETH R. MAYER, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER 4-6 (2001) (describing how Presidents can use executive orders to make important policy choices); PETER M. SHANE & HAROLD H. BRUFF, THE LAW OF PRESIDENTIAL POWER: CASES AND MATERIALS 88 (1988) ("Presidents use executive orders to implement many of their most important initiatives.").

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C. Participatory Democracy

The speed of executive response time makes the executive appear to be the most efficient branch of government. The executive's responsiveness puts it in a better position, vis-à-vis the other branches, in the political context of a participatory democracy. The rise of participatory democracy, which has been facilitated by technological changes that have reduced the costs of communicating with politicians, has put increased demands on elected officials to respond quickly to pressure from a highly engaged public.[25] The electorate tends to evaluate elected officials' effectiveness based on the timeliness of their responses, and developments in technology and the media have increased the public's expectations.[26] The executive branch clearly has advantages in this arena over the legislature and the judiciary.

It was not always this way. The Framers' conception of human nature was highly realistic.[27] They envisioned a polity composed of citizens who might engage in occasional episodes of civic engagement but during ordinary times would be far less concerned with politics and public values than with commercial issues and their private lives and personal interests.[28] In such a polity, people are poorly informed, and, to the extent that they inject themselves into the political sphere at all, such incursions are more in the nature of a hobby than anything else.[29] Politicians are merely agents, operating at a vast distance from their principals—geographically as well as

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25. *See* BRAD FITCH & KATHY GOLDSCHMIDT, COMMUNICATING WITH CONGRESS: HOW CAPITOL HILL IS COPING WITH THE SURGE IN CITIZEN ADVOCACY 15 (2005), http://www.cmfweb.org/SupportingFiles/documents/Communicating_with_Congress_-_Report_1.pdf (discussing the rise of participatory democracy as measured by citizen communications with elected officials via e-mail as well as faxes, telegrams, and postcards generated online).

26. *Id.* at 41 ("Constituents now expect on-demand access to information, services available 24-7, and rapid responses to communications . . . .").

27. *See* Roger Scruton, *Limits to Democracy*, NEW CRITERION, Jan. 2006, at 20, 20 (noting that the American Constitution was "designed both to permit democratic government and to restrain it in the interests of freedom" and was "based on a realistic view of human nature").

28. 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 230-43 (1991); 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 6 (1998).

29. Thus, the Framers' view closely tracks that of Joseph Schumpeter, *see* JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 261-63 (Harper Colophon 1975) (1942) (arguing that citizens in democracies are ignorant of the information required to make policy judgments and generally have a "reduced sense of responsibility"), and of Jean Jacques Rousseau, *see* JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT 94 (G.D.H. Cole trans., E.P. Dutton & Co. 1950) (1762) ("The people of England regards itself as free: but it is grossly mistaken: it is free only during the election of members of parliament. As soon as they are elected, slavery overtakes it, and [the freedom expressed by voting] is nothing.").

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psychologically. The Constitution, according to this paradigm, organizes the decision-making processes of government to compensate for agency costs between citizens and their representatives. It increases the transaction costs of lawmaking to make it easy to monitor and thwart governmental actors.

Among the Framers, the Federalists, and Madison in particular, worried about the influence of factions and sought to design a constitutional structure that would encourage representatives to act for the common good.[30] The Federalists understood that the ordinary politics that follows in the wake of constitutional lawmaking is narrow, oriented toward special-interest groups, partisan, and not widely participatory.[31] Madison's solution was to abandon "the classical republican understanding that citizens generally should participate directly in the processes of government," and instead to use representation to guard against "interest-group struggle," trusting that the separation of powers among three branches would provide meaningful checks in the event that one branch became dominated by a particular interest group.[32]

Participatory democracy competes with the agency-cost theory of democratic lawmaking and threatens the kind of "interest-group struggle" that Madison and his fellow Federalists feared.[33] Political scientists associate the increase in participatory democracy with the protest movements of the 1960s.[34] The idea of participatory democracy has become increasingly trendy, with the Internet viewed as the means by which broad participation in political decision-making can be effectuated.[35]

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30. *See* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 39-42 (1985).

31. *See* ROBERT E. MCCORMICK & ROBERT D. TOLLISON, POLITICIANS, LEGISLATION, AND THE ECONOMY: AN INQUIRY INTO THE INTEREST-GROUP THEORY OF GOVERNMENT 5-12 (1981); Macey, *supra* note 5, at 229-30. For an excellent account of public choice theory in action, see E.E. SCHATTSCHNEIDER, POLITICS, PRESSURES AND THE TARIFF: A STUDY OF FREE PRIVATE ENTERPRISE IN PRESSURE POLITICS, AS SHOWN IN THE 1929-1930 REVISION OF THE TARIFF (1935).

32. Sunstein, *supra* note 30, at 42-44.

33. *Cf.* Morris P. Fiorina, *Extreme Voices: A Dark Side of Civic Engagement*, *in* CIVIC ENGAGEMENT IN AMERICAN DEMOCRACY 395, 405-13 (Theda Skocpol & Morris P. Fiorina eds., 1999) (describing the ways in which officeholders have become more exposed to direct public pressure, especially to interest-group pressure, in the second half of the twentieth century).

34. *See, e.g.*, TOM HAYDEN ET AL., THE PORT HURON STATEMENT OF THE STUDENTS FOR A DEMOCRATIC SOCIETY (1962), *available at* http://www.studentsforademocraticsociety.org/documents/port_huron.html ("As a social system we seek the establishment of a democracy of individual participation . . . .").

35. *See* Michael Hauben, Participatory Democracy from the 1960s and SDS into the Future Online, http://www.columbia.edu/~hauben/CS/netdemocracy-60s.txt (last visited Aug. 6, 2006).

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Participatory democracy poses a threat to representative democracy because it replaces the decision-making authority of elected officials and other designated government officials with decision-making by citizens acting through various instrumentalities of direct, "real time" participation. The re-invigorated radical group Students for a Democratic Society is one example of an organization that has recognized the potential for creating "a community of active citizens [who] discuss and debate the issues affecting their lives" and thereby "bring about a more democratic society" via the Internet.[36]

For the executive branch, however, participatory democracy poses more of an opportunity than a threat. Even those who advocate participatory democracy recognize that actual implementation of policies still requires the intervention of the executive. Presidents can justify taking the sorts of unilateral actions described in Section I.A on the ground that such actions are legitimated by the public's direct demands, rather than by expressions of popular will that have been mediated through democratic institutions like the legislature.

The President's unilateral and preemptive response to the September 11 terrorist attacks on the United States provides a useful illustration of the way in which the executive can take advantage of popular outcry to expand his own power, as well as the power of the institution. In the wake of the attacks, the public demanded government action to protect the country from future acts of terrorism.[37] National security crises of this magnitude open gaping policy windows of the kind discussed in the previous Section. These events expand the power of the executive. And once the executive exercises powers for the first time, it is unlikely to relinquish them readily.

Following the terrorist strikes, President Bush issued an executive order creating a new cabinet position, the Secretary of Homeland Security, who was given the power to coordinate the efforts of federal, state, and local agencies and private entities to fight terrorism.[38] Then, in early October, when a bill to federalize airport security was languishing in Congress, President Bush broke the impasse by promising to issue an executive order to accomplish the same result.[39] In addition to these preemptive executive acts, President Bush ordered an ultimately successful military invasion of Afghanistan, which accomplished

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36. *Id.*

37. *See, e.g.*, Peter Whoriskey, *A Town Hall on Terror: Residents Push Members of Congress for Security*, WASH. POST, Sept. 30, 2001, at C1. Families of September 11, Inc. was formed in October 2001 to lobby for policies that reduce the threat of terrorism. *See* Families of September 11, http://www.familiesofseptember11.org (last visited Aug. 6, 2006).

38. Exec. Order No. 13,228, 66 Fed. Reg. 51,812 (Oct. 8, 2001).

39. *See* Lizette Alvarez, *A Nation Challenged: Airport Security; White House Battles Plan on Airports*, N.Y. TIMES, Oct. 13, 2001, at B1.

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its goal of toppling the Taliban regime without a formal declaration of war by Congress.[40]

The most impressive display of presidential power after September 11 was President Bush's creation of "an entirely new court system to mete out justice in [the administration's] efforts to hunt down and punish suspected terrorists."[41] On November 13, 2001, the President signed an executive order allowing special military tribunals to try any non-citizen suspected of plotting or committing terrorist acts or harboring known terrorists.[42] The order gave these tribunals the power to conduct closed trials anywhere inside the United States or abroad and to impose the death penalty.[43]

The executive had no need for congressional assistance. The President's decision not to consult with Congress was not due to reluctance or ineffectiveness on the legislature's part. As Professors Neal Katyal and Laurence Tribe observe in their criticism of this display of presidential power, "[f]or the President to proceed on his own to alter the jurisdiction of the federal courts, redesigning the very architecture of justice, without any colorable claim that time is too short for Congress to act, is to succumb to an executive unilateralism all too familiar in recent days."[44] This was a clear example of the use of presidential authority in a context in which it was highly

40. Exec. Order No. 13,239, 66 Fed. Reg. 64,907 (Dec. 12, 2001). While it did not pass a formal declaration of war, Congress did pass the Authorization for Use of Military Force one week after September 11, authorizing the President to use "all necessary and appropriate force" against any country or person involved in planning the attacks. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (Supp. III 2003)).

41. HOWELL, *supra* note 13, at 2. President Bush's creation of a separate court system for non-citizens suspected of being terrorists was not entirely unprecedented. *See Ex parte* Quirin, 317 U.S. 1 (1942). However, the indefinite duration of the war on terror means that individuals may be denied access to civilian courts for many years to come; thus, the scope of President Bush's action far exceeds that of any prior use of military tribunals.

42. Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

43. Originally, the Executive Order required the vote of two-thirds of the judges on a panel to impose any sentence, including the death penalty. *Id.* at 57,835. However, in response to heavy criticism, the Defense Department began amending the regulations governing military tribunals in March 2002. *See* Note, *Secret Evidence in the War on Terror*, 118 HARV. L. REV. 1962, 1971-73 (2005) (explaining the criticism and amendments). One amendment requires a unanimous vote for a sentence of death. Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, 32 C.F.R. § 9.6(f) (2005); *see also* HOWELL, *supra* note 13, at 2.

44. Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1260 (2002).

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unlikely that the executive would have been able to obtain the congressional consent envisioned by the Constitution.[45]

President Clinton also used power this way,[46] though President Bush's actions may have since overshadowed any executive branch overreaching during the Clinton years. As Professor Howell remarks, "[r]ather than wait on Congress, Clinton simply acted, daring his Republican opponents and the courts to try to overturn him. With a few notable exceptions, neither did."[47] Among the more notorious of President Clinton's uses of executive power was his invocation of his powers under the Antiquities Act of 1906 to designate millions of acres of federal land as protected national monuments.[48] President Clinton also issued Executive Order No. 12,866, which diluted the cost-benefit analysis that agencies are required to prepare for review by the Office of Management and Budget.[49]

The rise of participatory democracy has enhanced the ability and the power of Presidents to act quickly in response to public pressure without timely checks by Congress or the judiciary. This destabilizes the constitutional equilibrium that the Federalists hoped would result from the separation of powers.[50]

To this point, the focus has been on the interplay between the executive and the other branches at the federal level, but it should be noted that the dynamic discussed here also applies to state government. In 2004, the Governors of Washington, Oregon, and California issued a series of recommendations aimed at reducing emissions that contribute to global

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45. Not surprisingly, it appears that presidential authority is often analyzed in a partisan manner. *See, e.g.*, TODD F. GAZIANO, THE HERITAGE FOUNDATION, THE USE AND ABUSE OF EXECUTIVE ORDERS AND OTHER PRESIDENTIAL DIRECTIVES (2001), http://www.heritage.org/Research/LegalIssues/LM2.cfm (arguing that President Clinton abused his constitutional authority by his use of executive power, but making only sparing mention of similar uses of such authority by Republican Presidents).

46. In fact, it was President Clinton who was said to have "perfected the art of go-alone governing." HOWELL, *supra* note 13, at 5 (internal citation omitted). President Clinton "issued a blizzard of executive orders, regulations, proclamations and other decrees to achieve his goals, with or without the blessing of Congress." *Id.* (internal citation omitted). Indeed, even in the waning days of his presidency, executive orders "fl[ew] off Clinton's desk, mandating government action on issues from mental health to food safety." *Id.* (internal citation omitted); *see also id.* at 5-6 (providing additional examples of Clinton's displays of unilateral, preemptive power in the healthcare and gun control policy arenas).

47. *Id.* at 5.

48. *See* GAZIANO, *supra* note 45 (criticizing Clinton's use of his Antiquities Act powers).

49. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

50. *See* Sunstein, *supra* note 30, at 43-44 (explicating James Madison's views on the separation of powers).

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warming as part of the West Coast Governors' Global Warming Initiative.[51] The Governors also pledged to explore the adoption of standards that would reduce the emissions of greenhouse gases from vehicles and to establish regional goals for the reduction of greenhouse gas emissions.[52] In 2005, New York Governor George Pataki announced an initiative to reduce homelessness in New York City by building additional housing units for those living on the streets or in emergency shelters.[53] Thus, like Presidents, governors enjoy the ability to act preemptively and entrepreneurially.

D. Procedure Versus Substance

The erosion of the separation of powers has been described as "the crowning jewel of the modern administrative revolution."[54] Executive agencies routinely issue rules and regulations—essentially lawmaking activities—and adjudicate enforcement actions. As administrative agencies have taken on more legislative and judicial functions, the judiciary's abdication of searching, independent review of agency lawmaking has further increased the power of the executive. Process-oriented decision-making in the judiciary only exacerbates the executive branch's ability to overstep and take up policymaking space belonging to the other branches. The *Chevron* doctrine has diminished the judiciary's role as a source of substantive review of agency action.[55] In fact, *Chevron* and a subsequent case, *United States v. Mead*,[56] contribute to a doctrine that enables the executive to neutralize the judiciary's capacity to influence its decisions by completing certain procedural formalities prior to acting. The judiciary's role has also been restricted by the *Seminole Rock* principle, according to which judges are to defer to an agency's interpretation of an ambiguous regulation.[57] As long as the process required under the Administrative Procedure Act is followed, an agency can promulgate

51. West Coast Governors' Global Warming Initiative, http://www.ef.org/westcoastclimate (last visited Aug. 6, 2006).

52. *Id.*

53. *See* Press Release, Governor George E. Pataki, Governor Pataki, Mayor Bloomberg Announce Unprecedented Partnership To Reduce Homelessness in New York City (Nov. 7, 2005), http://www.ny.gov/governor/press/05/1107051.htm.

54. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1248 (1994).

55. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). *But see* Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power To Say What the Law Is*, 115 YALE L.J. 2580 (2006) (pointing out that certain Justices continue to overturn agency action at rates similar to those present before *Chevron*).

56. 533 U.S. 218 (2001).

57. Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).

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ambiguous rules and later declare their meanings when it implements the rules through adjudication.[58] In effect, an agency has the power to displace judicial judgment on the meaning of the laws that it writes.[59]

While the necessity of complying with procedural formalities may limit executive action in some modest ways, these procedural requirements do not significantly impede the executive's ability to shape the law's practical effects through enforcement and regulation. Even with respect to procedural requirements, the Supreme Court has upheld informal rulemaking and has deferred to agency choices of rules of procedure, an approach that further limits judicial checks on agency power.[60] Deference to agency interpretations of statutes and regulations reduces the ability of the judiciary to serve as a meaningful check on executive action.

II. CASE STUDIES IN POLITICAL INFLUENCE

In no realm of politics are the interactions among the various branches and levels of government as interesting and as complicated as in the field of business organizations and corporate law. The federal government makes frequent and important incursions into this regulatory space. At the same time, however, there is an ongoing, vigorous competition for corporate charters among the states. Moreover, all three branches of government—at both the state and the federal level—have, at various times, staked out important policy positions in this area.

The following Sections present case studies that illustrate the interplay between the executive branch and the other branches at both the federal and the state level in the field of corporate law and finance.

A. The Delaware Courts Versus the SEC on Shareholder Voting

The most important vote-buying case in the past decade is *Hewlett v. Hewlett-Packard Co.*, which arose out of Hewlett-Packard's proposed merger with Compaq.[61] At the time, Hewlett-Packard and Compaq were, respectively, the second- and third-largest computer companies in the United States. The basis for the plaintiffs' vote-buying claim involved a telephone conversation

58. John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 662 (1996).

59. *Id.* at 682.

60. *See* E.P. Krauss, *Unchecked Powers: The Supreme Court and Administrative Law*, 75 MARQ. L. REV. 797, 815-16 (1992).

61. No. CIV.A. 19513-NC, 2002 WL 549137 (Del. Ch. Apr. 8, 2002).

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that Carly Fiorina, Hewlett-Packard's CEO, had with officials of Deutsche Asset Management (DeAM), which owned seventeen million shares of the company and had voted against the merger.[62] During the conversation, Fiorina told the DeAM managers that a vote for the merger was "of great importance to our ongoing relationship."[63]

On March 19, 2002, following the personal appeal by Fiorina, the DeAM fund manager switched its vote in favor of the merger. The vote switch occurred shortly after Deutsche Bank signed a $4 billion revolving credit facility with Hewlett-Packard to provide Hewlett-Packard with the financing necessary to pay for the merger. The transaction was attacked both by aggrieved shareholders in the Delaware state courts and by a federal administrative agency, the SEC.

This case illustrates the extent to which statutes have vested broad power in federal administrative agencies to cross into what were once state-regulated arenas. In particular, there traditionally has been a strong line of demarcation between the jurisdiction of the states, which regulated corporate governance and the internal affairs of domestically chartered companies, and the jurisdiction of the SEC, whose purview was the regulation of matters related to corporate disclosure and securities trading.[64] The SEC's regulatory efforts in the Hewlett-Packard vote-buying case indicate that this traditional boundary is no longer policed by the courts as it once was.

Though the SEC is an independent agency,[65] the President still wields substantial influence over its actions. For example, the President has unfettered power to remove the chairs of administrative agencies such as the SEC from their positions and broad power to dismiss other commissioners as well, at least "for cause," a term that is broadly defined.[66] Professors Lawrence Lessig and Cass Sunstein even argue that the President has the authority to fire commissioners of independent agencies who have acted in ways that are inconsistent with the President's views of sound public policy.[67] The

62. Voting in corporate law is not anonymous, and shareholders may cancel previous proxies simply by executing subsequent proxies.

63. Steve Lohr, *Hewlett's Chief, Back in Court, Scoffs at Accusation of Coercion*, N.Y. TIMES, Apr. 26, 2002, at C1.

64. The classic case describing the distribution of authority between the SEC and the states and defending the states' authority against attempted encroachment by the SEC is *Business Roundtable v. SEC*, 905 F.2d 406, 416-17 (D.C. Cir. 1990).

65. For example, SEC commissioners serve five-year terms, which means that their terms exceed the four-year term of the President.

66. *See* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 110-11 (1994).

67. *Id.* at 111.

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President's power to appoint agency officials, both in executive agencies and in independent agencies, permits him to control agency policy and performance.[68] Thus, the SEC's intrusion into the states' traditional regulation of corporate fiduciary duties is yet another example of the expanded power and reach of the President.

Before the SEC's involvement in the Hewlett-Packard case, the Delaware Court of Chancery had already ruled on the issues. The court rather stunningly had accepted Hewlett-Packard's argument that Fiorina was not trying to influence DeAM's vote on the merger in her call to DeAM.[69] The court held that the plaintiff shareholders failed to meet their "significant burden" of showing that DeAM's decision to switch its vote had not been for independent business reasons.[70] Instead of focusing on DeAM's motives, the court's critical inquiry concerned Hewlett-Packard's motivations, and the court found the evidence insufficient to find fault with the private dealings between Hewlett-Packard and the bank.[71]

The Delaware court's hands-off approach starkly contrasts with the SEC's approach, which was to sue DeAM for breaching its fiduciary duties as an investment manager to its clients.[72] The SEC argued that by failing to inform its advisory clients of the existence of its material conflict of interest, DeAM willfully violated Section 206(2) of the Advisers Act.[73] The SEC took the position that investment advisers with material conflicts of interest must tell their clients about those conflicts before voting on the basis of shares held for the clients.[74] This would empower clients "to decide—with their eyes wide open—whether they want to vote the proxies themselves, allow the adviser to vote them, or make some other arrangement."[75] In settlement of the matter,

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68. ERNEST GELLHORN & RONALD M. LEVIN, ADMINISTRATIVE LAW AND PROCESS 49-59 (1997).

69. Hewlett v. Hewlett-Packard Co., No. CIV.A. 19513-NC, 2002 WL 818091, at *13-*15 (Del. Ch. Apr. 30, 2002).

70. *Id.* at *12, *15-*16.

71. *Id.* at *12.

72. *See* Deutsche Asset Management, Inc., Securities Act of 1933 Release No. 33-8268, 80 SEC Docket 2584 (Aug. 19, 2003).

73. *Id.*

74. Deutsche Asset Management, Inc., Investment Advisers Act of 1940 Release No. IA-2160, 80 SEC Docket 2714 (Aug. 19, 2003).

75. Stephen M. Cutler, Dir., Div. of Enforcement, SEC, Remarks Before the National Regulatory Services Investment Adviser and Broker-Dealer Compliance/Risk Management Conference (Sept. 9, 2003), *available at* http://www.sec.gov/news/speech/spch090903smc.htm.

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DeAM agreed to be censured, to cease and desist from further violations, and to pay a civil penalty of $750,000.[76]

The SEC litigation against DeAM and the litigation in Delaware against Hewlett-Packard concerned the same central issue—fiduciary duties in the context of conflicts of interest. Deutsche Bank was conflicted because the firm's fiduciary duties to its asset management clients conflicted with its corporate self-interest in pursuing Hewlett-Packard's lucrative investment banking business. Hewlett-Packard was conflicted because, like many bidders, its management team's personal interest in accomplishing the merger conflicted with its obligation to enhance shareholder welfare. Moreover, consistent with the Hubris Hypothesis of corporate takeovers,[77] Hewlett-Packard may have been convinced that its valuation was correct, despite the contrary views of Hewlett-Packard shareholders and the capital markets. The fact that the Delaware courts and the SEC both sought to resolve the same aspect of the Hewlett-Packard transaction shows how seamlessly the SEC, a federal administrative agency, insinuated itself into a policy space traditionally reserved to the states.

As the Supreme Court has long recognized, "[c]orporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law *expressly* requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation."[78] In *Business Roundtable v. SEC*, the D.C. Circuit recognized corporate governance to be an area of "firmly established" state jurisdiction and noted that Congress did not contemplate that the securities laws would permit the SEC to expand its jurisdiction into this area.[79] Indeed, to do so "would circumvent the legislative process that is virtually the sole protection for state interests."[80] Thus, although it may be the case, as the court observed in *Business Roundtable*, that the legislative process provides the principal protection for state interests, it is clear that the courts are required to protect the legislative process from intrusion by agency officials or other policymakers.

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76. *Deutsche Asset Management*, 80 SEC Docket 2714.

77. *See* Richard Roll, *The Hubris Hypothesis of Corporate Takeovers*, 59 J. BUS. 197, 197-216 (1986) (asserting that the phenomenon of corporate takeovers depends on the bidder's presumption that its valuation is correct).

78. Cort v. Ash, 422 U.S. 66, 84 (1975) (internal quotation marks omitted) (emphasis added).

79. 905 F.2d 406, 413 (D.C. Cir. 1990) (citing CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 89 (1987)).

80. *Id.*

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B. Stock Exchange Governance and State Corporate Law Rules

In a more subtle way, the SEC has leveraged its authority over the self-regulatory organizations that govern the stock exchanges. In effect, it has bestowed upon itself virtually plenary regulatory authority over corporate governance.[81] The SEC has commandeered the responsibility for formulating the rules of internal governance of U.S. corporations, traditionally the province of state legislatures and state courts.

Directors and officers of stock exchanges, such as the New York Stock Exchange (NYSE), are like the members of any other corporate board, and regulation of corporate boards has traditionally been the province of state law. Furthermore, the stock exchanges, for the most part, traditionally have regulated themselves: Each exchange sets its own standards for companies and traders. However, the SEC's assertion of power has changed that structure of regulation. While the SEC has long regulated the actual exchange of stock to ensure its compliance with federal securities law, the SEC has now made inroads into regulating the governance of stock exchanges.

This usurpation of traditional state power has occurred gradually. The SEC began by encouraging the exchanges to adopt corporate governance listing standards "voluntarily."[82] The stock exchanges were to reach their own consensus on what rules should govern. During the 1970s, the SEC urged the exchanges to adopt rules that required corporate audit committees to be composed of independent directors.[83] The rules began changing with the approval in March 1977 of a new NYSE rule requiring all listed domestic companies to establish and maintain audit committees independent of management and free from any relationship that might prevent the audit committee member from exercising his or her independent judgment.[84]

In 1998, with the support and encouragement of the SEC, the NYSE and the NASDAQ agreed to "sponsor a 'blue ribbon panel' . . . to make recommendations on strengthening the role of audit committees in overseeing

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81. *See generally* Order Approving NYSE and NASD Rulemaking Relating to Corporate Governance, 68 Fed. Reg. 64,154 (Nov. 12, 2003) (approving changes to listing standards that would ensure the independence of directors and strengthen the corporate governance practices of listed companies).

82. SPECIAL STUDY GROUP OF THE COMM. ON FED. REG. OF SEC., AM. BAR ASS'N, SPECIAL STUDY ON MARKET STRUCTURE, LISTING STANDARDS AND CORPORATE GOVERNANCE 15 (2002), *reprinted in* 57 BUS. LAW. 1487, 1503 (2002).

83. *Id.* at 1506-07.

84. *Id.* at 1507 (citing N.Y. Stock Exch., Inc., Order Approving Proposed Rule Change, Exchange Act Release No. 13,346, 1977 SEC LEXIS 2252, at 1 (Mar. 9, 1977)).

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the corporate financial reporting process."[85] Within one year of the release of the panel's report, all of its recommendations were proposed simultaneously as rules by the NYSE, NASDAQ, and the American Stock and Options Exchange; the rules were later approved en masse on December 21, 1999 by the SEC under its statutory authority pursuant to section 19(b) of the Securities and Exchange Act of 1934.[86] The same joint approach was followed under both Chairman Arthur Levitt and Chairman Harvey Pitt as they began to coordinate the stock exchanges' rulemaking on executive compensation and stock options. The SEC in 2000 (and again in 2001) called for a collaborative resolution of the issue of the role of audit committees.[87]

The culmination of this process came in February 2002, when Chairman Pitt sent a letter addressed to the chief executive officers of both the NYSE and NASDAQ "asking" them to review their corporate governance listing standards.[88] Pitt requested that the securities trading venues implement mandatory codes of conduct, provide continuing education and ethical training for officers and directors, and investigate whether audit committee requirements should be strengthened by, for example, giving audit committees the exclusive authority to hire and fire the outside auditor.[89] He went so far as to say that although the SEC's letter to the exchange leaders was worded as "a request, it was expected to be implemented. They should move with alacrity."[90] Thus, in a regulatory area to which it was once foreign, the SEC is now making rules that must be followed.

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85. Press Release, Sec. & Exch. Comm'n, SEC, NYSE and NASD Announce Blue Ribbon Panel To Improve Corporate Audit Committees (Sept. 28, 1998), http://www.sec.gov/news/press/pressarchive/1998/98-96.txt.

86. Order Approving Proposed Rule Change by the American Stock Exchange, 64 Fed. Reg. 71,518 (Dec. 21, 1999); Order Approving Proposed Rule Change by the National Association of Securities Dealers, Inc., 64 Fed. Reg. 71,523 (Dec. 21, 1999); Order Approving Proposed Rule Change by the New York Stock Exchange, Inc., 64 Fed. Reg. 71,529 (Dec. 21, 1999).

87. *See* Vicky Stamas, *Options-Disclosure Rule OKd: SEC Requires Firms To Tell Shareholders More About Stock Offered to Workers in Compensation Plans*, L.A. TIMES, Dec. 20, 2001, at C4; Arthur Levitt, SEC Chairman, Remarks Before the 2000 Annual Meeting of the Securities Industry Association (Nov. 9, 2000), *available at* http://www.sec.gov/news/speech/spch420.htm.

88. Press Release, Sec. & Exch. Comm'n, Pitt Seeks Review of Corporate Governance, Conduct Codes (Feb. 13, 2002), *available at* http://www.sec.gov/news/press/2002-23.txt (discussing the letter).

89. *See* Gibson, Dunn & Crutcher LLP, Recent Post-Enron Corporate Governance Developments (June 25, 2002), http://www.cybersecuritieslaw.com/GDC/Post_Enron.htm (describing Pitt's letter).

90. Stamas, *supra* note 87.

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C. Sarbanes-Oxley: Usurping the Authority of State Judges and Legislatures

As noted above, every legislative intrusion into a policy space is accompanied by a corresponding increase in executive power. So it is with the Sarbanes-Oxley Act of 2002,[91] the most important piece of federal law in the corporate and securities fields since the New Deal.[92] Congress, of course, was trying to take advantage of the policy window created by the wave of corporate scandals that immediately preceded the statute's enactment.[93]

While in reality an unimportant event in the economic life of the nation, Enron's downfall created a unique policy window that facilitated the implementation of corporate governance initiatives despite the fact that those initiatives "had minimal or absolutely no relation to the source of that firm's demise."[94] Sarbanes-Oxley was passed in a panicked frenzy as Congress and the President attempted to quell the public outrage over Enron and perhaps even to gain some measure of political advantage from the scandals.[95]

Considering the broad scope of Sarbanes-Oxley and its unprecedented intrusion into corporate governance—a traditional domain of state law—the law's provisions are cursory and its structure skeletal. This cursory treatment reflects the hasty legislative consideration given to the Act. From the outset, Sarbanes-Oxley was criticized by corporate governance experts. As one commentator observed, lawyers described the Act as a "sparsely worded law [that] is both poorly written and hastily put together so there's little to go on when it comes to interpreting some of its murkier provisions."[96] Another commentator asserted that the Act is "a telling example of the law of unintended consequences. It will have wide-ranging effects on securities, derivative and other [private] shareholder lawsuits."[97] In general, analysts criticized the legislation on four grounds:

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91. Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 15 and 18 U.S.C.).

92. At the signing ceremony, President Bush described the statute as the "most far-reaching [set of] reforms of American business practices since the time of Franklin Delano Roosevelt." Elisabeth Bumiller, *Bush Signs Bill Aimed at Fraud in Corporations*, N.Y. TIMES, July 31, 2002, at A1.

93. *See* Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1523-26 (2005).

94. *Id.* at 1526.

95. *See* David S. Hilzenrath et al., *How Congress Rode a "Storm" to Corporate Reform*, WASH. POST, July 28, 2002, at A1 (depicting the passage of Sarbanes-Oxley as the result of a political process that "harnessed" the "perfect storm" created by the "convergence of concerns over the plummeting stock market and a string of revelations about corporate malfeasance").

96. Renee Deger, *New Law Has Corporate Lawyers Scrambling*, RECORDER, Aug. 8, 2002, at 1.

97. Gregory P. Joseph, *Master Class: Corporate Fraud Act*, NAT'L L.J., Aug. 5, 2002, at B9.

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> (1) that it was unnecessary, (2) that the changes it made were at best only incremental, (3) that on balance it was undesirable because it would impose significant new costs on US firms, or (4) that it was probably unnecessary because modern markets were liquid and quite capable of responding adequately to fraud on their own without additional regulation.[98]

The statute vastly increased the power of a federal agency, the SEC, at the expense of state courts, particularly the Delaware judiciary. Notably, provisions of Sarbanes-Oxley govern the duties of corporate directors to monitor the ongoing operations of their corporations.[99] Under state law prior to Sarbanes-Oxley, directors' duties included the duty "to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists."[100] Failure to fulfill this duty may have rendered a director "liable for losses caused by non-compliance with applicable legal standards."[101] The state-law approach to the issue of ongoing monitoring of the corporation is reflected in the seminal case *In re Caremark International Inc. Derivative Litigation*, in which the Delaware Court of Chancery held, in accordance with the business judgment rule, that "only a sustained or systemic failure of the board to exercise oversight—such as an utter failure to attempt to assure a reasonable information and reporting system exists—will establish the lack of good faith that is a necessary condition to liability."[102]

Sarbanes-Oxley, on the other hand, significantly restricts the authority of corporate boards to determine, on the basis of their own business judgment, the sort of internal corporate monitoring systems that their corporations should have in place. In particular, section 404 of the Act requires companies to publish in their annual reports an acknowledgement of management's responsibility to establish internal controls and procedures for financial disclosure, an assessment by management of the effectiveness of these controls and procedures, and an independent auditor's report.[103] Section 302 of Sarbanes-Oxley also requires the SEC to adopt and enforce rules requiring the

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98. ROBERT W. HAMILTON & JONATHAN R. MACEY, CASES AND MATERIALS ON CORPORATIONS, INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES 595 (9th ed. 2005).

99. Sarbanes Oxley Act of 2002, Pub. L. No. 107-204, § 404, 116 Stat. 745, 789 (codified at 15 U.S.C. § 7262 (Supp. II 2002)). The principal cases articulating the nature and scope of directors' duties to provide ongoing monitoring of corporate activities are *In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996), and *Graham v. Allis-Chalmers Manufacturing Co.*, 188 A.2d 125 (Del. 1963).

100. *Caremark*, 698 A.2d at 970.

101. *Id.*

102. *Id.* at 971.

103. Sarbanes-Oxley Act § 404, 116 Stat. at 789.

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chief executive officers and the chief financial officers of public corporations to certify that the periodic reports filed by their companies with the agency do not contain material misrepresentations or omissions and "fairly present" their firms' financial conditions and the results of operations.[104]

In her benchmark article on Sarbanes-Oxley, Professor Roberta Romano argues that the certification provisions are a "less explicit infringement on state corporate law" than other provisions of Sarbanes-Oxley.[105] Even provisions—like the certification requirements—that may not directly intrude into the domain of state corporate law nevertheless crowd the states' traditional authority to regulate the internal corporate governance of firms. In particular, Sarbanes-Oxley intrudes into the state laws that govern the directors' authority to determine what sort of internal controls are appropriate for their firms on a case-by-case basis. The point here is not simply that these provisions conflict with the laws promulgated by the states, although they most certainly do. Other substantive corporate governance provisions of Sarbanes-Oxley relate to executive loans,[106] the provision of non-audit services,[107] and independent audit committees.[108] These provisions displace or depart from traditional state law approaches. What is significant is that in passing Sarbanes-Oxley, Congress greatly enhanced the power not only of the SEC, but also of the President, who retains influence over the day-to-day implementation of the statute through his influence over the SEC.

Though Congress received much of the initial credit for acting decisively to address the alleged crisis of investor confidence, the real winners from these initiatives were the federal executive branch and its agencies. For example, whatever short-run benefits inured to Congress pale in comparison with the massive increases in the SEC's budget that followed the corporate scandals: The SEC received a $100 million budget increase in 2003 and was the only federal agency to receive substantial budget increases in both 2003 and 2004.[109]

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104. *Id.* § 302, 116 Stat. at 777.

105. Romano, *supra* note 93, at 1540.

106. An exception is made for loans by corporations that are financial institutions offering credit in the ordinary course of their business, provided that the terms of the credit are the same as those offered to the public. Sarbanes-Oxley Act § 402(a), 116 Stat. at 783.

107. *Id.* § 201(a), 116 Stat. at 771.

108. *Id.* § 301, 116 Stat. at 775.

109. Jonathan R. Macey, *Wall Street in Turmoil: State-Federal Relations Post-Eliot Spitzer*, 70 BROOK. L. REV. 117, 119 (2004).

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III. MECHANISMS OF INFLUENCE

The most effective weapon in the arsenal of the executive branch is its ability to litigate. Litigation accomplishes the political objectives of the executive far faster than regulation. Litigating does not require the tedious deliberative process and the built-in delays required by the notice-and-comment periods necessarily associated with rule-making. For this reason, administrative agencies have succumbed to the temptation of litigating instead of regulating.[110] In terms of projecting authority and obtaining influence, it is worth noting that, while the litigation process is slow, litigation can be initiated instantaneously. Generally, the initiation of litigation against a high-profile defendant garners headlines. The mere filing of a complaint and the attendant publicity accomplish for the executive its political objective of appearing decisive, responsive, and effective. Even if the action is ultimately unsuccessful, the issue is unlikely to remain politically salient by the time it is finally resolved on the merits. This, in turn, reduces the perceived cost to the executive of initiating frivolous lawsuits.

In theory, a trial before an independent court affords the regulated entity protection from abuses of administrative discretion. In practice, however, the remote possibility of judicial review of agency decisions does not come close to mitigating the reality that the initial indictment or complaint can end the business of the firms and the careers of the individuals. In fact, the possibility of meaningful judicial review can best be described as a pleasant fiction that lends a patina of legitimacy to the modern administrative agency practice of regulating by litigating. If courts are to be taken seriously as a hedge against potentially overly aggressive regulation, they will have to be more active in the face of the increasing power of the executive branch.

One need not embrace the view that regulation is systematically over-intrusive to reach this result. Rather, one need only take the view that regulatory initiatives sometimes reflect bureaucratic turf-grabbing and other inappropriate uses of regulation. The role of courts is not to strike down all attempts to regulate, but rather to monitor the executive in order to check what may be occasional bureaucratic excess. Some have suggested that this monitoring function could be accomplished by a revision of the *Chevron* doctrine. For example, rather than deferring to any rational application of an ambiguous statute, courts could conduct a searching review into legislative

110. For overviews of the SEC's turn toward more aggressive enforcement, see U.S. CHAMBER OF COMMERCE, REPORT ON THE CURRENT ENFORCEMENT PROGRAM OF THE SECURITIES AND EXCHANGE COMMISSION 9-26 (2006); and Harvey L. Pitt & Karen L. Shapiro, *Securities Regulation by Enforcement: A Look Ahead at the Next Decade*, 7 YALE J. ON REG. 149, 157-58 (1990).

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intent to see whether the agency interpretation comports with the best reading of that intent.[111] Courts could also rein in the discretion of agencies by striking down ambiguous regulations. By forcing agencies to write clear rules, courts would limit the arbitrary exercise of executive power.[112] Another alternative would be for courts to recognize the legislative veto as a legitimate way of restoring the constitutional equilibrium that has been disrupted by the rise of the administrative state.[113]

The emergence of executive power explains several puzzling features of modern political life. First, it provides one reason for the hostility of the judicial confirmation process. In recent years, confirmation hearings have been characterized by the perplexing spectacle of senators imploring nominees to be more active and interventionist in their scrutiny of legislation.[114] This is a highly confusing situation because one would suppose that Congress, which enacts the statutes that the federal courts are construing, would prefer that the courts adopt a deferential attitude toward Congress in their review of such statutes. However, in line with the idea that the executive has assumed an increasing amount of control over legislative enactments, Congress prefers an activist judiciary as a means of curbing executive power.

The congressional preference for an activist judiciary has been in evidence since at least the confirmation hearings of Robert Bork. More recently, during the confirmation hearings of Justice Samuel Alito, this preference became even more sharply focused. In speeches on the Senate floor, for example, Democratic senators complained that during his career as a federal appellate judge Alito had appeared to defer to executive authority to such a degree that they feared he would acquiesce to presidential claims of expanded powers.[115] Thus, Congress's commitment to judicial power is a measure of the extent to which

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111. *See* Greene, *supra* note 17, at 185-86 (discussing such review as one alternative).

112. *See* Manning, *supra* note 58, at 655-60.

113. *See* Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1 (1994).

114. *See, e.g., Confirmation Hearing on the Nomination of John G. Roberts, Jr., To Be Chief Justice of the United States: Hearing Before the Comm. on the Judiciary*, 109th Cong. 117-18 (2005) (statement of Sen. Biden) (discussing judicial activism in the context of sex discrimination).

115. *See* Maura Reynolds, *Alito Debate Focuses on Executive Power*, L.A. TIMES, Jan. 26, 2006, at A10. Similarly, Senator Edward Kennedy emphasized his view that an activist judiciary is needed to curb executive power, observing that "[e]specially when we have a president who wants to stretch his powers to and beyond constitutional limits, we need judges who can be independent of the president and act to preserve the balance of powers that provides a strong and fair foundation for our free society." Tony Mauro, *A Field Guide to the Alito Confirmation Hearings*, LEGAL TIMES, Jan. 9, 2006, *available at* http://www.law.com/jsp/article.jsp?id=1136541915440. Of course, Congress is unlikely to be as supportive of judicial activism where such activism manifests itself in the form of applying the Commerce Clause narrowly.

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Congress views the judiciary as a potential ally in its losing war against the increasing power of the executive.

Second, the judiciary's acquiescence in the increase in executive power has enabled the executive to create administrative agencies solely on the basis of an executive order.[116] Presidents acting unilaterally created the National Security Agency, the Occupational Safety and Health Administration, and the Bureau of Alcohol, Tobacco, and Firearms.[117] Not surprisingly, agencies created by the executive branch tend to be organized to maximize the President's control over those agencies.[118]

This analysis sheds new light on Professor William Riker's seminal observation that Congress's willingness to create administrative agencies and the consequent rise of the administrative state can be explained by the fact that the creation of such agencies enables Congress to deflect blame from itself for bad or politically unpopular outcomes.[119] When Congress acts directly, it must accept the blame for its actions. When administrative agencies are created, Congress can not only take the credit for acting decisively to address the issues for which the agency is responsible, but can also deflect the blame if, later on, the agency makes decisions and promulgates policies that prove to be unpopular.

Presidents, however, tend to be blamed for administrative agency decisions because such agencies are viewed as vehicles for diffusing presidential power to a particularized level. It is widely known that Presidents are increasingly held responsible for a wide variety of issues, from the state of the economy,[120] to

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116. *See* DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN 75-76 (2003); William G. Howell & David E. Lewis, *Agencies by Presidential Design*, 64 J. POL. 1095, 1096 (2002).

117. HOWELL, *supra* note 13, at 128.

118. Sixty-seven percent of agencies created by the President and eighty-four percent of agencies created by executive subordinates are placed either within the Cabinet or directly within the Executive Office of the President. *Id.* at 127. Only fifty-seven percent of agencies created by Congress are organized in such ways. *Id.* In addition, Presidents control agencies by removing restrictions that limit their own discretion to make political appointments; by having agencies report directly to themselves, rather than to independent boards or commissions; and by giving themselves unfettered power to fire appointees to the agencies they unilaterally create. *Id.* at 129-30.

119. WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE 233-53 (1982); *see also* WILLIAM H. RIKER, THE ART OF POLITICAL MANIPULATION (1986); WILLIAM H. RIKER, THE THEORY OF POLITICAL COALITIONS (1962).

120. Ray C. Fair, *Econometrics and Presidential Elections*, J. ECON. PERSP., Summer 1996, at 89; Ray C. Fair, *The Effect of Economic Events on Votes for President*, 60 REV. ECON. & STAT. 159 (1978).

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casualty rates in war,[121] to the fallout from natural disasters like Hurricane Katrina. It seems clear that, just as the executive has demonstrated a relentless ability to act unilaterally, so too has the public demonstrated a concomitant tendency to hold the President primarily responsible for all sorts of problems that may not, in fact, really be within the President's control. This fact probably provides an added incentive (if any was needed) for Presidents to attempt to amass power. It stands to reason that if the President is being held responsible for outcomes, he should at least have the power to influence those outcomes.

Third, the rise of executive power influences how we come to measure modern political accountability. If the analysis here is correct, then it is no longer accurate to evaluate the success of Presidents using the traditional method of political science—the extent to which they succeed in persuading Congress to enact into law their policy agendas.[122] There are plenty of rules and regulations and administrative agencies that Presidents use to accomplish their objectives without the need to consult Congress. Direct action, executive orders, and agency jawboning are tools that allow Presidents to take the initiative to accomplish their goals on their own, without the need for new legislation. Because Presidents are much less reliant on Congress than they once were, they seldom need to succeed in the legislature to achieve their own policy goals. Therefore, as a purely descriptive matter, it is no longer appropriate to measure the performance of the executive branch by how often it succeeds in getting its policies enacted into law.

CONCLUSION

The emergence of the executive branch as the first among equals in the formation and implementation of U.S. policy is largely attributable to inherent structural differences among the three branches of government. However, the executive's structural advantage, particularly the fact that it can act preemptively by initiating litigation, was a necessary but not a sufficient condition for its predominance.

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121. RICHARD C. EICHENBERG & RICHARD J. STOLL, THE POLITICAL FORTUNES OF WAR: IRAQ AND THE DOMESTIC STANDING OF PRESIDENT GEORGE W. BUSH 8 (2004), *available at* http://ase.tufts.edu/polsci/faculty/eichenberg/political-fortunes.pdf.

122. HOWELL, *supra* note 13, at 177. Howell argues that theories about presidential power to act unilaterally "turn[] on its head the conventional account of presidential power. Strong presidents, it is generally supposed, distinguish themselves with a long record of legislative successes. The hallmark of weak presidents, meanwhile, is an inability to convince Congress to enact legislative proposals." *Id.*

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The other critical element in the executive's success was the acquiescence of the other branches to its usurpation of power. The judiciary could have implemented rules to check executive power but instead has done the opposite and has refused to intervene in agency action under almost any circumstance.[123] Similarly, Congress could use its various powers, particularly its control over the budget, to exert its will over the executive, but it has chosen instead to refrain from challenging the executive. Congress has also contributed to the executive's usurpation of power by passing statutes such as Sarbanes-Oxley that further consolidate power in the executive.

A divided government characterized by checks and balances and separated powers is the cornerstone of the American constitutional system. At least according to the Framers, tyranny can best be avoided by preventing one branch of government from becoming too powerful. The emergence of the modern administrative state, and particularly the emergence of the presidency as the most powerful branch of government, is troubling from the perspective of constitutional theory. Equally alarming is the fact that the other branches not only acquiesce but also actively participate in the gradual amassing of power by the executive branch. Thus, the lack of any conflict among the branches as a result of the executive's usurpation of power should give us pause.

The question now raised by this analysis is whether some strategy can be designed to energize the judiciary so that it is less acquiescent to executive branch imperialism. The problem is not that the judicial branch lacks the tools to redress the tilt of power toward the executive. Courts could reassert their authority in a number of ways, such as by rejecting the *Chevron* doctrine and reasserting the authority of the judiciary over administrative agencies in the realm of statutory interpretation. Even short of adopting a Calabresian approach to updating statutes, courts could aggressively interpret statutes such as the Administrative Procedure Act to make agencies more accountable. And, of course, the time-honored doctrines of procedural and substantive due process could be deployed to strike down executive actions that are viewed as too aggressive.

The problem of constitutional disequilibrium has resulted in part from a judicial culture in which courts routinely subordinate their authority to that of the executive. The objective of reforming this culture would not be merely to empower Congress. By undertaking more active review of agency interpretations of statutes and regulations, the judiciary can rein in executive lawmaking authority and restore the traditional system of checks and balances among the three branches of government.

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123. *See supra* notes 55-59 and accompanying text.

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