

# FERC: Energy Policy Today and the Story of an Independent Agency<sup>†</sup>

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*This article not only offers the first comprehensive treatment of the Federal Energy Regulatory Commission’s (FERC) history, but it further examines how FERC as an independent regulatory body might fare under a constitutional shift that would allow the President to remove without cause commissioners from an independent commission such as FERC. FERC, after all, is an apt agency for exploring the status and function of independent agencies and what such a constitutional shift might foster. Energy and climate are areas of intense political discourse, and as a policy arena, FERC offers a unique window into whether and how Presidential removal power could shape energy or climate policy moving forward. The article, consequently, offers insights into FERC’s historic role, if any, in establishing energy policy. It then situates FERC within the broader context of conversations surrounding the efficacy of independent agencies, with an eye toward examining whether or how these dialogues could be informed by critical inquiries into the operations of specific independent agencies—in this case, FERC. And when that occurs, at least for FERC, the conclusion might suggest that our assumptions about independent agencies in the modern era require further exploration.*

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<sup>†</sup> This article was completed before the decision in *Trump v. Slaughter*, 606 U.S. \_\_\_\_ (2025).

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## I. INTRODUCTION

When William P. Phillips relinquished his seat as Chairman of the Federal Energy Regulatory Commission (FERC) on April 24, 2025, more was at stake than who would serve as the next Chairman. Since the inaugural FERC Chairman, Charles B. Curtis, the Chair routinely would change following a shift in which political party controlled the White House. FERC’s General Counsel was similarly expected to change.<sup>1</sup> Any changes, though, in the Commission’s policy choices occurred generally at the margins, with disagreements, to be sure. Still, the agency itself and its initiatives remained somewhat steady from one administration to another. FERC is an independent federal agency within the Department of Energy (DOE) and is primarily responsible, among other things, for regulating aspects of interstate natural gas pipelines,<sup>2</sup> interstate oil

1. See, e.g., FERC News Release, *FERC Chairman Makes Chief of Staff, General Counsel Appointments*, (Feb. 1, 2021), at <https://www.ferc.gov/news-events/news/ferc-chairman-makes-chief-staff-general-counsel-appointments> [<https://perma.cc/Z3CU-B29K>]. For the listing of some former commissioners and general counsel, and the times when they served, see <https://www.ferc.gov/about/commission-members/current-previous-chairmen> [<https://perma.cc/BB4B-AAUC>].

2. 15 U.S.C. § 717.

pipelines,<sup>3</sup> wholesale electric generation, and the interstate electric transmission grid and hydroelectric generation.<sup>4</sup>

Yet three reasons suggest this 2025 change at FERC is unique. First, it occurred as President Trump was engaged in firing other agency commissioners as well as reshaping the administrative state. The President issued Nuclear Regulatory Commission (NRC) commissioner Christopher Hanson a short note saying, “Thank you for your service,” and that he was being terminated “effective immediately.”<sup>5</sup> He similarly dismissed, without suggesting a cause, the Chair of the National Labor Relations Board, the head of the Merit Systems Protection Board, and three members of the Consumer Product Safety Commission.<sup>6</sup> The administration also targeted two Democratic commissioners on the Federal Trade Commission (FTC) as well.<sup>7</sup> The seminal decision in *Humphrey’s Executor v. United States*,<sup>8</sup> after all, involved the FTC, where the Court upheld Congress’ limitation on President Roosevelt’s authority to remove

3. 49 U.S.C. App. §§ 1(1)(b), (5). Congress transferred the authority over oil pipelines to FERC in 1977. 49 U.S.C. § 60502. Interstate oil pipelines can only charge market-based rates (or even higher) if the pipeline can demonstrate it lacks market power. 18 C.F.R. § 342.4(b). *See generally* Brief for Respondents, *West Texas Gulf Pipeline Line Co. v. FERC*, No. 23-60601, (5<sup>th</sup> Cir. Jan. 13, 2025). (FERC summarizing its authority).

4. 16 U.S.C. § 791a.

5. Peter Behr, *White House Fires NRC Commissioner*, GREENWIRE, (June 16, 2025) <https://www.eenews.net/articles/white-house-fires-nrc-commissioner/> [https://perma.cc/KT32-TQCF]; *see also* Peter Behr, *Trump Firing of NRC Commissioner Jars Agency’s Leadership*, E&E NEWS, (June 17, 2025) <https://www.eenews.net/articles/trump-firing-of-nrc-commissioner-jars-agencys-leadership/> [https://perma.cc/3TTE-Q7UP]. President Trump’s changes at the NRC prompted a concern by Democrats over the agency’s “independence.” *See* Nico Portuondo, *Democrats Decry Trump Actions at NRC; Republicans Shrug*, E&E DAILY, June 26, 2025. <https://subscriber.politicopro.com/article/eenews/2025/06/26/dems-decry-trump-actions-at-nrc-republicans-shrug-00423426> [https://perma.cc/KV5H-UPYZ] Later, the President replaced the agency’s chair to “remake” the agency. *See* Francisco A.J. Camacho, *Trump Replaces NRC Chair as He Remakes Agency*, E&E NEWS, Jan. 9, 2026. <https://www.eenews.net/articles/trump-replaces-nrc-chair-as-he-remakes-agency/> [https://perma.cc/HS2T-CQ75]

6. *See Harris v. Bessent*, *Wilcox v. Trump*, 2025 WL 1021435 (Apr. 7, 2025), *on request for stay*, *Trump v. Wilcox*, 145 S. Ct. 1415 (May 22, 2025) (per curiam), *pet. for writ of cert. before judgment denied*, 2025 WL 2692047 (Sept. 22, 2025). Relatedly, the new head of the CFPB sought to halt all agency activities. *National Treasury Employees Union v. Vought*, 774 F. Supp.3d 1 (D.D.C. 2025) (preliminarily enjoining), *vacated by National Treasury Employees Union v. Vought*, 149 F.4th 762 (D.C. Cir. 2025). And for the first time, an Executive removed a member of the Federal Mine Safety and Health Review Commission, prompting a lawsuit. *See Hannah Northey, Mine Safety Official Sues Trump for “Unlawful” Firing*, E&E NEWS, May 7, 2026. <https://www.eenews.net/articles/mine-safety-official-sues-trump-for-unlawful-firing/> [https://perma.cc/HS2T-CQ75]

7. *See Trump v. Slaughter*, No. 25A264 (25-332), (argued Dec. 8, 2025). Eli Nachmany suggests that changes in FTC since *Humphrey’s Executor* might justify departing from the *Humphrey’s* precedent. Eli Nachmany, *The Original FTC*, 77 ALA. L. REV. 1 (2025). Earlier Daniel Crane raised a similar point. Daniel A. Crane, *Debunking Humphrey’s Executor*, 83 GEO. WASH. L. REV. 1835 (2015).

8. *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935).

a commissioner for cause. Even the Chair of the Federal Reserve Board felt compelled to assert his independence, sparking concerns over the operation of the Federal Reserve as President Trump rolled out his agenda.<sup>9</sup> And whether at FERC or NRC, the administration unabashedly is exploring how to become more “involved” in the activities of independent agencies, including FERC.<sup>10</sup> This led some former FERC commissioners, in an amicus brief before the Court on the future of *Humphreys’ Executor*, to argue that FERC must maintain its independence.<sup>11</sup>

Second, the administration has pressed a constitutional claim that the Executive enjoys unconstrained power to remove commissioners from independent agencies to ensure the laws are faithfully executed—furthering the notion of a unitary executive.<sup>12</sup> Although Chair Phillips’ term would have ended soon and nothing signaled an urgency for immediate change to alter some policy,<sup>13</sup> the Trump administration’s

9. Lauren Aratani, *Federal Reserve Issues Rare Statement Asserting Independence Amid Trump Pressure*, GUARDIAN (May 29, 2025), <https://www.theguardian.com/business/2025/may/29/federal-reserve-chair-powell-trump> [<https://perma.cc/BG4T-69PY>]. The President subsequently attempted to remove Lisa D. Cook from the Federal Reserve Board, suggesting he had “cause” for the removal. See *Cook v. Trump*, 2025 WL 2654786 (D.C. Cir. Sept. 15, 2025) (denying stay pending appeal of the administrative stay preventing removal). And when the Board presumably acted against the White House’s interests, it began an inquiry into Chair Powell. See Jerome H. Powell, Statement from Federal Reserve Chair Jerome H. Powell (Jan. 11, 2026), <https://www.federalreserve.gov/newsevents/speech/powell20260111a.html> [<https://perma.cc/B6KY-6ARU>].

10. See Manuel Quinones, *E&E News Reporters Discuss Trump’s Influence on Independent Agencies*, ENERGYWIRE (Aug. 1, 2025), <https://www.eenews.net/articles/ee-news-reporters-discuss-trumps-influence-on-independent-agencies-3/> [<https://perma.cc/4FVT-LPS2>].

11. Brief for Rebecca Kelly Slaughter et al. as Amici Curiae Supporting Respondents, *Trump v. Slaughter*, No. 25-332 (Nov. 14, 2025).

12. For the history surrounding the notion that Congress cannot intrude into the President’s authority to ensure that the laws are faithfully executed under a unitary executive theory, see generally Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601 (2005); Christopher S. Yoo, Steven G. Calabresi, Laurence D. Nee, *The Unitary Executive During the Third Half-Century, 1889–1945*, 80 NOTRE DAME L. REV. 1 (2004); Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 HARV. J. L. & PUB. POL’Y 668 (2003); Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451 (1997). See also Steven G. Calabresi, *The Vesting Clause as Power Grants*, 88 NW. U. L. REV. 1377 (1994); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L. J. 541 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992). Much of this debate, according to Jonathan Gienapp, ignores the historical context of nascent discussions involving Article II. Jonathan Gienapp, *Removal and the Changing Debate Over Executive Power at the Founding*, 63 AM. J. LEGAL HIST. 229 (2023).

13. When Commissioner Christie temporarily replaced Chair Phillips, his initial remarks suggested little change. Gary E. Guy & David Martin Connelly, *New FERC Chairman Mark Christie Aims to Keep Things Running Smoothly at FERC Despite Challenges*, ENERGY BAR ASS’N (Feb. 12, 2025), <https://www.eba-net.org/new-ferc-chairman-mark-c-christie-aims-to-keep-things-running-smoothly->

unparalleled attempt to solidify the unitary executive theory, shifting power from Congress to the Executive Branch, had already infused its approach toward independent agencies. The administration argued that Congress could not inhibit the President's authority to remove a commissioner from a multi-member agency, such as the FERC.<sup>14</sup>

To be sure, the scope of the President's removal power is a ceaseless controversy.<sup>15</sup> In *Seila Law v. Consumer Financial Protection Bureau*,<sup>16</sup> the Court energized the conversation when it announced that Congress violated separation of powers by constraining the President's power to remove a single-person Director of the Consumer Financial Protection Bureau (CFPB). Also, the historical circumstances surrounding the nascent efforts to establish independent regulatory agencies, or commissions, render the dialogue complex.<sup>17</sup> A principal factor for the emergence of independent agencies involved constructing a jurisprudential paradigm explaining how the Constitution allows a singular entity to exercise legislative, executive, and judicial power—and, in particular, avoid problematic due process concerns.<sup>18</sup> That paradigm

at-ferc-despite-challenges/ [https://perma.cc/B3WP-ZRM8]. Indeed, Christie had praised the decision to elevate Phillips to the Chair. Press Release, Fed. Energy Regul. Comm'n, President Biden Names Willie Phillips Acting Chairman (Jan. 3, 2023), <https://www.ferc.gov/news-events/news/president-biden-names-willie-phillips-acting-chairman> [https://perma.cc/FEN6-RV4B]. And while Chair Phillips and Commissioner Christie treated differently how to address greenhouse gas emissions associated with natural gas infrastructure, Chair Phillips approved new natural gas infrastructure projects. Carlos Anchondo & Joel Kirkland, *FERC Chair Sounds Alarm Over Grid Reliability*, ENERGYWIRE (Oct. 18, 2024), <https://www.eenews.net/articles/ferc-chair-sounds-alarm-over-grid-reliability/> [https://perma.cc/92P3-2ZW8]. Commissioner Christie's term on the Commission expired on August 8, 2025. Chairman Mark C. Christie Submits Resignation & Final Letter on Major FERC Actions (Aug. 8, 2025), <https://www.ferc.gov/news-events/news/chairman-mark-c-christie-submits-resignation-final-letter-major-ferc-actions> [https://perma.cc/Z93W-7PV6].

14. On February 12, 2025, the Justice Department officially noted its disagreement with *Humphrey's Executor*, asserting the Executive's Constitutional duty to ensure the laws are faithfully executed. Letter from Sarah M. Harris, Acting Solic. Gen., to Hon. Mike Johnson, Speaker, U.S. House of Representatives, Re: Restrictions on the Removal of Certain Principal Officers of the United States (Feb. 12, 2025).

15. See generally Kent H. Barnett, *Avoiding Independent Agency Armageddon*, 87 NOTRE DAME L. REV. 1349, 1350 (2012) (noting the debate); see, e.g., Paul R. Verkuil, *The Status of Independent Agencies after Bowsher v. Synar*, 1986 DUKE L.J. 779 (1986).

16. *Seila Law LLC v. Consumer Financial Prot. Bureau*, 591 U.S. 197 (2020).

17. We might be cautious about emphasizing the concept of "independent agencies," as Brian D. Feinstein & Jennifer Nou suggest, because many decisions are delegated to units that operate like independent agencies. Brian D. Feinstein & Jennifer Nou, *Submerged Independent Agencies*, 171 U. PA. L. REV. 945, 1017 (2022) ("Executive branch actors have been creating submerged independent agencies for decades, suggesting that they serve an important function and perceived need.").

18. Paul Verkuil suggests the hallmark of independent agencies is their independence, often coupled with their bi-partisan composition and terms of years and for cause removal. Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 261. He recognizes other characteristics, such as their collegiality and jurisdictional scope. *Id.* at 262. Yet he avoids any meaningful inquiry into the jurisdictional paradigm initially justifying independent agencies and

seems illusory today, perhaps an unnecessary constraint on how Congress in the modern administrative law realm could establish agencies and ensure against violations of due process or arbitrary and capricious decision-making. Yet the precedent of *Humphrey's Executor*, insulating independent regulatory commissions such as FERC from direct White House authority to remove commissioners, is heralded by many as “the backbone of agencies’ authority to operate without direct control from the White House.”<sup>19</sup>

Third, present-day energy-laden discussions engender political battles between advocates for energy dominance<sup>20</sup> and others who recognize that energy policy ought to be driven by a realization that addressing climate change is the priority, while ensuring that the electric grid and our transportation and heating systems are sufficient.<sup>21</sup> While the selection of FERC commissioners was never shielded from public scrutiny, the media attention and campaigns involving possible commissioners have seemingly intensified during the past several years as the narrative surrounding energy and climate infuses modern political discourse.<sup>22</sup> For instance, the Commission’s oversight in promoting renewable energy’s access to the electric grid as well as its function in addressing greenhouse gas emissions associated with natural gas infrastructure contributed to an increased politicization of the Commission. When the Commission was chaired by a Republican appointee, Democratic attorneys general wrote the Commission encouraging it to remove barriers to renewable energy’s penetration into the electric grid and to allow states the ability to “shape

instead focuses on the shift toward rulemaking and away from adjudication that animated many agencies’ behavior in the 1970s. *Id.* at 265. He also recognizes but skirts any detailed exploration into the organizational structure of independent agencies to ensure separation-of-functions and due process protections. *Id.* at 266–67.

19. Jacob Knutson, *Trump’s Firings Target 90-Year-Old Precedent Protection Independent Agencies*, DEMOCRACY DOCKET (Mar. 10, 2025), <https://www.democracydocket.com/analysis/trump-firings-supreme-court-humphreys-executor/> [<https://perma.cc/V77E-C28V>].

20. See Christa Marshall, *Chris Wright Details DOE ‘Energy Dominance’ Plans*, E&E NEWS (Feb. 6, 2025), <https://www.eenews.net/articles/chris-wright-details-doe-energy-dominance-plans/> [<https://perma.cc/6NTH-ZZ49>].

21. See generally MICHAEL B. GERRARD, JODY FREEMAN & MICHAEL BURGER, *GLOBAL CLIMATE CHANGE AND U.S. LAW* (2023); MICHAEL B. GERRARD, JOHN C. DERNBACH, *LEGAL PATHWAYS TO DEEP DECARBONIZATION IN THE UNITED STATES* (2019); see also Marianne Lavelle, *Trump’s “Energy Dominance” Agenda Sounds like a Petrostate Plan to Some*, INSIDE CLIMATE NEWS (Nov. 26, 2024), <https://insideclimatenews.org/news/26112024/will-the-united-states-be-a-petrostate-under-trump/> [<https://perma.cc/UM2K-RRKJ>].

22. See, e.g., Timothy Cama, *Green Group Targets FERC Nominee in Ad Campaign*, E&E NEWS (Mar. 20, 2024), <https://www.eenews.net/articles/green-group-targets-ferc-nominee-in-ad-campaign/> [<https://perma.cc/Q529-6A6Z>].

their resource mixes.”<sup>23</sup> Republican Chairman Chatterjee wrote EPA Acting Administrator Wheeler expressing concern with the Clean Power Plan and how it might impact the electric grid, observing how “[a]s the head of the federal agency specifically charged with the statutory duty to ‘keep the lights on,’” he “welcome[d]” the opportunity to share his views.<sup>24</sup> During the Biden administration, conversely, Republican Senators engaged FERC in an effort to thwart EPA’s Clean Power Plan.<sup>25</sup> And only a few years earlier, Democratic appointee Commissioner (and later acting Chair) Richard Glick lamented at a meeting of the Independent Power Producers of New York that the agency needed to take a “less combative approach” toward state climate polices.<sup>26</sup> And now President Trump has tapped FERC commissioners who seemingly will favor fossil fuels.<sup>27</sup>

23. See Letter from Mass. Att’y Gen. Maura Healey et al., to Chairman Chatterjee, Comm’r Glick & Comm’r McNamee, *State Clean Energy Policy Priorities* (Oct. 28, 2019). [On File with Columbia Journal of Environmental Law]

24. Letter from Chairman Neil Chatterjee, Office of the Chairman, FERC, to Acting Administrator Wheeler, Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program, Docket ID No. EPA-HQ-Oar-2017-0355, Oct. 31, 2018.

25. Letter from John Barrasso & Shelly Moore Capito, to Chairman Phillips and Commissioners (Dec. 20, 2023), <https://www.epw.senate.gov/public/index.cfm/2023/12/capito-barrasso-to-epa-illegal-proposal-to-close-power-plants-will-jeopardize-america-s-grid-raise-costs-for-consumers> [<https://perma.cc/K5BV-KQTJ>]; see also Emma Dumain, *GOP Senators Pressure FERC to “Fix” Power Plant Rule*, GREENWIRE (Dec. 21, 2023), <https://subscriber.politicopro.com/article/eenews/2023/12/21/gop-senators-pressure-ferc-to-fix-power-plant-rule-00132872> [<https://perma.cc/6Q78-NE6Z>]. One Republican congressman even charged the Commission with promoting an environmental agenda that favored blue rather than red states. See Nico Portuondo, *Republicans Clash with FERC Chair Over Transmission Rule*, E&E DAILY (July 25, 2025), <https://www.eenews.net/articles/republicans-clash-with-ferc-chair-over-transmission-rule-ee/> [<https://perma.cc/42LS-AZ6Z>]. A former Republican-appointed general counsel, commissioner, and short-term Chair James Danly considered climate change considerations irrelevant in FERC’s decision making. *Commissioner James Danly Dissent Regarding Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews*, FERC (Feb. 18, 2022), <https://www.ferc.gov/news-events/news/item-c-2-commissioner-james-danly-dissent-regarding-consideration-greenhouse-gas> [<https://perma.cc/5F9T-VYW5>]. Arguably this issue has fostered the most intense dissension among the commissioners. See Daniel Moore, *FERC Members Disagree Over Regulating Gas Project Carbon Impacts*, E&E NEWS (Nov. 19, 2021), <https://news.bloomberglaw.com/environment-and-energy/ferc-members-disagree-over-regulating-gas-project-carbon-impacts> [<https://perma.cc/2J38-WQAC>].

26. Keshia Clukey, *Energy Regulatory Needs to Be Less Combative, Commissioner Says*, E&E NEWS (Sept. 17, 2019).

27. See Francisco “A.J.” Camacho, *Trump Taps Ex-Louisiana VA Chief for FERC*, GREENWIRE (July 17, 2025) <https://subscriber.politicopro.com/article/eenews/2025/07/17/trump-taps-controversial-ex-louisiana-va-chief-for-ferc-00459583> [<https://perma.cc/LM8W-BLX5>]; Isa Dominguez, Zack Colman, & Josh Siegel, *White House Said to Eye LaCrete for Open FERC Seat*, GREENWIRE, (July 16, 2025) (noting how nominee lacked an energy background but suggesting that favors natural gas), <https://www.eenews.net/articles/white-house-said-to-eye-lacerte-for-open-ferc-seat/> [<https://perma.cc/XHX3-ZLRS>]. Not surprisingly, therefore, when congressional members and

During both its terms, the Trump administration has also deployed relics from the Department of Energy Organization Act to usurp FERC and state authority over the operation of coal-fired electric generating units. Section 202(c) of the Federal Power Act (FPA) allows DOE Secretary to issue temporary orders during “wartime” or an “emergency” to prevent “sudden” spikes in electricity demand.<sup>28</sup> This is a remnant of the authority Congress granted to President Carter to issue emergency orders for increasing the flow of natural gas into interstate markets. And its use to sustain uneconomic coal-fired power plants in Michigan and elsewhere is testing how far this authority reaches.<sup>29</sup> Next, section 403 of the Act allows the Secretary to request that the Commission adopt a proposed policy,<sup>30</sup> and during President Trump’s first term Secretary Perry did precisely that when he suggested the electric grid required new tariffs favoring coal-fired power plants.<sup>31</sup>

industry perceive FERC as being friendly toward fossil fuels, they suggest expanding FERC’s jurisdiction to ensure faster approval for energy projects—primarily for natural gas infrastructure. *See* Ben Lefebvre & Marie J. French, *Pipeline CEO Urges Republicans to Put FERC in Charge of Energy Permits*, ENERGYWIRE (Dec. 4, 2025), <https://www.eenews.net/articles/pipeline-ceo-urges-republicans-to-put-ferc-in-charge-of-energy-permits/> [<https://perma.cc/4GJ2-89L2>]; Nico Portuondo, *Republicans Embrace FERC as an Ally Against Biden Energy Agenda*, E&E DAILY (Mar. 20, 2024), <https://www.eenews.net/articles/republicans-embrace-ferc-as-an-ally-against-biden-energy-agenda/> [<https://perma.cc/E6P7-CF7L>]. President Trump appointee Laura Swett reportedly has solicited policy advice from the Trump White House. Carlos Anchondo & Francisco “A.J.” Camacho, *FERC’s Swett Casts a Wide Net for Policy Advice*, ENERGYWIRE (Apr. 28, 2026).

28. 16 U.S.C. § 824a(c).

29. *See* Hannah Northey, *Trump’s Michigan Coal Order Draws Legal Challenge*, GREENWIRE (July 25, 2025), <https://subscriber.politicopro.com/article/eenews/2025/07/25/trumps-michigan-coal-order-draws-legal-challenge-00476980> [<https://perma.cc/4Y69-U984>]. Similar orders exist for a plant in Pennsylvania, Indiana, Colorado, and Washington. *See e.g.*, Kelsey Tamborrino, *Washington State, Greens Sue to Overturn DOE Coal Order*, GREENWIRE (Mar. 4, 2026). Section 202(c) also surfaced during President Trump’s first term. *See* Hannah Northey, *FERC Members Throw Cold Water on Trump’s Grid Plan*, E&E NEWS (June 12, 2018), <https://subscriber.politicopro.com/article/eenews/1060084211> [<https://perma.cc/DG8P-5U58>]. In March 2018, DOE received a request to use Section 202(c) of the FPA and declare an emergency to protect coal fired power plants. *See* Rod Kuckro, *DOE’s Coal Fight Keeps Focus on “National Security”*, E&E NEWS (May 11, 2018), <https://subscriber.politicopro.com/article/eenews/2018/05/11/does-coal-fight-keeps-focus-on-national-security-043810> [<https://perma.cc/7ZMJ-4J8A>]. Earlier Secretary Rick Perry employed 202(c) in April 2017 to direct the continued operation of an Oklahoma plant, although he dined a request that summer by Murray Energy; *See generally* Sharon Jacobs, & Ari Peksoe, *Energy Emergencies vs. Manufactured Crises: The Limits of Federal Authority to Disrupt Power Markets*, GETCHES-WILKINSON CENTER (June 3, 2019). The Executive office invoked the Defense Production Act as well. *See* Peter Behr, *White House Challenges FERC on Grid Security*, E&E NEWS (June 7, 2018), <https://www.eenews.net/articles/white-house-challenges-ferc-on-grid-security/> [<https://perma.cc/2CH7-YTN4>].

30. Initiation of Rulemaking Proceedings Before the Commission, Title V, § 403, Pub. L. No. 95-91, 91 Stat. 565, 585 (Aug. 5, 1977) (codified at 42 U.S.C. § 7173 note).

31. FERC rejected Secretary Perry’s request to boost the financial security of some coal-fired plants. *See* FERC, *Grid Reliability and Resilience Pricing*, 162 FERC ¶ 61,012 (Jan. 8, 2018) (terminating

This article, consequently, chronicles FERC's history, the Commission's identity as an independent agency, and whether or how energy policy could be altered by the current constitutional inquiry into the Executive's power to remove independent agency commissioners. Before the 2024 election, uncertainty surrounded FERC's recent signature initiative on transmission planning should candidate Trump prevail and Republican commissioners become the majority.<sup>32</sup> Then, before the inauguration, one article posited that FERC "is one of the vaunted independent agencies that could be a mark for Trump's White House team."<sup>33</sup> And more recently, Law360 opined how the administration's efforts toward independent agencies "paint[] a target on the [FERC] that would create instability within the energy industry if at-will removal of commissioners becomes a reality."<sup>34</sup>

While any prognosis of whether a not-so-independent FERC will upset energy markets is fraught with variables, it also implicitly assumes something about FERC as an independent agency. This article engages that assumption by examining the history of FERC as well as its role in the evolution of independent agencies to discern trends and the Commission's historical role in influencing energy policy. This requires telling not only the history of FERC, but also its place among conversations about independent agencies. Part 2, therefore, traces how the original Federal Power Commission (FPC) came into existence and its almost immediate failure and subsequent congressional response that

proceeding). See Darius Dixon & Eric Wolff, *Energy Regulator Rejects Perry's Plan to Boost Coal*, POLITICO (Jan. 8, 2018), <https://www.politico.com/story/2018/01/08/rick-perry-energy-coal-nuclear-269263> [https://perma.cc/J3MH-AGFT]. Former FERC commissioners urged the Commission to maintain the "policy-centered manner for which this Commission has long been respected" and avoid allowing DOE's proposal to proceed which would disrupt energy markets. See Comments of The Bipartisan Former FERC Commissioners, Grid Resiliency Pricing Rule, Docket RM18-1-000 (Oct. 19, 2017), <https://www.ferc.gov/media/grid-reliability-and-resilience-pricing-docket-no-rm18-1-000> [https://perma.cc/3QLP-CWLC]. FERC's first Chairman suggests this provision was left in the DOE Organization Act in part because he and Secretary Schlesinger enjoyed a cordial relationship, see *infra* note 285 and accompanying text, and so the Commission would have been expected to respect any request from the Secretary. Ps. Convers. with Charles B. Curtis (Apr. 2, 2024).

32. See Zach Bright, *What A Full FERC Panel Means for the Grid*, ENERGYWIRE (June 14, 2024), <https://www.eenews.net/articles/what-a-full-ferc-panel-means-for-the-grid/> [https://perma.cc/NK64-7GQB].

33. Francisco "A.J." Camacho, *Trump Wants Agencies on a Short Leash. What Does that Mean for FERC?*, ENERGYWIRE (Dec. 10, 2024), <https://www.eenews.net/articles/trump-wants-agencies-on-a-short-leash-what-does-that-mean-for-ferc/> [https://perma.cc/3AHL-TPYJ].

34. Keith Goldberg, *Demise of Humphrey's Executor Could Sow Chaos at FERC*, LAW360 (Feb. 14, 2025), <https://www.law360.com/articles/2298151/demise-of-humphrey-s-executor-could-sow-chaos-at-ferc> [https://perma.cc/7YKL-X4D4]; see also Francisco "A.J." Camacho, *Legal Experts Sound Alarm Over Trump Bid to Control FERC*, ENERGYWIRE (Feb. 20, 2025), <https://www.eenews.net/articles/legal-experts-sound-alarm-over-trump-bid-to-control-ferc/> [https://perma.cc/TH25-FS25].

created its current form as an independent agency. Part 3 then continues our story with how the new Commission unfolded and became a rate and consumer-oriented agency,<sup>35</sup> with little notoriety for any policy expertise—indeed, in the natural gas regulation arena, it endured considerable criticism. That criticism dovetailed with paradigmatic shifts in how administrative law continued to grow and corresponding inquiries into the role of independent agencies, as explained in this part. Part 4 then chronicles how an urgent concern with coordinating energy policy and managing the 1970s energy crises led to the Department of Energy Organization Act and the transition of FPC to FERC, retaining the Commission’s status as an independent agency.

With that background, Part 5 canvasses the evolving administrative law paradigm that began exploring the genesis, efficacy—and the role of the Executive Branch—in the functioning of independent agencies, such as FERC. Any contemporary inquiry into the vitality of *Humphrey’s Executor* and how and whether independent agencies should be immune from the President’s power to remove a commissioner should not be divorced from historical roots, or from the consequences surrounding the rise of the Executive Branch’s influence over policy generally, as this part explains. Once that is appreciated, we can then examine, as I do in Part 6, the significance of FERC’s status as an independent regulatory commission and how it is situated in modern discourses on energy—or more aptly climate—policy. Here, I suggest that energy policy is more accurately understood as climate policy, with FERC serving a vital but far from determinative role. That suggests that, while I personally prefer having FERC remain as an independent agency, we must be cautious about proclaiming a threat to energy markets should *Humphrey’s Executor* no longer insulate commissioners from presidential removal.

## II. ESTABLISHING THE FEDERAL POWER COMMISSION AS AN INDEPENDENT AGENCY

### A. Establishing the Commission

The question of how and who, if at all, should regulate the construction of hydroelectric generation resources along the nation’s navigable waterways eventually propelled the passage of the 1920 Federal Water

35. In 1977, Senator Glenn described the Commission as “having been a consumer watchdog, more or less, on pricing and so on.” Department of Energy Organization Act: Hearings Before the Comm. on Governmental Affairs United U.S. Senate on S. 826 and S. 591, 95th Cong. 176 (1977) (statement of Sen. Glenn).

Act.<sup>36</sup> Sites for waterpower development in the nineteenth century reportedly “were frittered away” and “passed into private ownership beyond regulation, beyond control.”<sup>37</sup> Consequently, soon after Congress passed the “revocable permit law” in 1901<sup>38</sup> and then the 1906 General Dam Act,<sup>39</sup> the Progressives—including President Theodore Roosevelt and Gifford Pinchot—targeted water resource reform.<sup>40</sup> President Roosevelt precipitated reform dialogues by vetoing a few congressionally authorized projects.<sup>41</sup> And he called for assembling “experts” (a progressive tenet) to aid in managing the nation’s resources.<sup>42</sup> Then, from roughly 1916 to 1920, Congress debated politically-charged questions such as whether hydroelectric projects and their accompanying dams should be privately or publicly owned, and if privately owned, who should regulate them—the states or the federal government, and whether sites should be owned or leased, and whether municipal entities ought to be afforded a preference for developing available sites.<sup>43</sup>

36. See generally Sam Kalen, *Essay: Historical Flow of Hydroelectric Regulation: A Brief History*, 53 IDAHO L. REV. 1 (2017) (recounting history).

37. Water-Power Development and Use of Public Lands, H.R. Rep. No. 64-16 (1916.)

38. 31 Stat. 790 (1901) (the law authorized the Interior Secretary to issue rights of way across public lands and reservations for, *inter alia*, hydroelectric generation). Congress transferred certain Department of the Interior authorities to the Department of Agriculture in 1905. Pub. L. No. 58-34, 33 Stat. 628 (1905); *see also* Pub. L. No. 61-478, 36 Stat. 1235, 1253 (1911) (electrical facilities for agricultural lands). When Congress passed the 1920 Federal Water Power Act, almost one third of hydroelectric generation resources were on forest system lands. MILTON CONOVER, THE FEDERAL POWER COMMISSION: ITS HISTORY, ACTIVITIES AND ORGANIZATION 45 (1923).

39. Pub. L. No. 59-262, 34 Stat. 386 (1906) (the law reversed course from the 1901 Act and required congressional assent for new hydroelectric projects).

40. Douglas Brinkley describes how Roosevelt sought to irrigate and “conquest” the west and had both Gifford Pinchot and Frederick H. Newell aiding him. DOUGLAS BRINKLEY, THE WILDERNESS WARRIOR: THEODORE ROOSEVELT AND THE CRUSADE FOR AMERICA 422–26 (2009); *see also* JAMES R. KLUGER, TURNING ON WATER WITH A SHOVEL: THE CAREER OF ELWOOD MEAD 32 (1992) (noting how Newell and Pinchot helped form his conservation and irrigation policy).

41. *See* GIFFORD PINCHOT, BREAKING NEW GROUND 327 (1947).

42. PRELIMINARY REPORT OF THE INLAND WATERWAYS COMMISSION, S. Doc. No. 325, at vi (1908). From 1910 to 1912, “the water power question” dominated the discussions during the annual National Conservation Congress meetings. SAMUEL P. HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT, 1890–1920 183 (1959). And in 1915, Senate Resolution No. 544 tasked the Agriculture Secretary with compiling information on the ownership and control of water-power sites. ELECTRIC POWER DEVELOPMENT IN THE UNITED STATES, LETTER FROM THE SECRETARY OF AGRICULTURE, TRANSMITTING A REPORT IN RESPONSE TO A SENATE RESOLUTION OF FEB. 13, 1915, AS TO THE OWNERSHIP AND CONTROL OF THE WATER-POWER SITES IN THE UNITED STATES, S. Doc. No. 316, at 11 (1916). That same year, the Western Water Power Conference illustrated the unfolding conversation when it favored state control over the resources, rather than the progressive approach of federal regulation championed by former President Roosevelt. CONOVER, *supra* note 38, at 15; THEODORE ROOSEVELT, THE NEW NATIONALISM 58–62, 95–99 (1911). The Forest Service similarly favored federal oversight. CONOVER, *supra* note 38, at 45.

43. *See* Kalen, *supra* note 36, at 16. E. Louise Peffer posits how “[t]he water-power question represented the most clear-cut example of the efforts by a major private interest to produce a law favorable to itself.” E. LOUISE PEFFER, THE CLOSING OF THE PUBLIC DOMAIN: DISPOSAL AND

For federal oversight, a commission model surfaced in 1917 when Agriculture Secretary Houston explained how such a model could protect not only the public interest but also the private sector.<sup>44</sup> Even before then, congressional members appreciated how the Secretaries of War, Agriculture, and Interior all were involved in water power development and involving those three agencies collectively seemed appropriate.<sup>45</sup> And Joshua Macy and Brian Richardson detail how states and public utility regulation had begun to mature by the 1920s and 1930s, but had emerged even earlier.<sup>46</sup> Congress too already employed a commission in the Pendleton Act of 1883 (Civil Service Commission),<sup>47</sup> the Interstate Commerce Commission in the 1887 Interstate Commerce Act,<sup>48</sup> the Food and Drug Administration in the 1906 Pure Food and Drug Act,<sup>49</sup> the Federal Reserve Board in the 1913 Federal Reserve Act,<sup>50</sup> the Federal Trade Commission Act of 1914 (FTC Act),<sup>51</sup> and then the Tariff

RESERVATION POLICIES 1900–50 120 (1951). The archetypal conservationist Gifford Pinchot opined that “[i]t is of the first importance to prevent our water powers from passing into private ownership as they have been doing.” GIFFORD PINCHOT, *THE FIGHT FOR CONSERVATION* 83 (1910). Debates over private versus public ownership and preference continued well after 1920. *See* Confirmation of the Federal Power Commission: Hearings Before the S. Comm. on Interstate Commerce, 71st Cong. 25–34 (1930).

44. JEROME G. KERWIN, *FEDERAL WATER – POWER LEGISLATION* 204 (1926) (noting commission model not new). *See also* CONOVER, *supra* note 38, at 46 (quoting 1917 Department of Agriculture, Annual Report, at p. 37); *see also* CONOVER, *supra* note 38, at 69. Earlier, when Congress considered the Newlands plan for coordinated water resource planning, President Wilson in 1913 presaged this approach when appointing two members from each of these three agencies to a special inter-departmental committee to report on the plan. *See* HAYES, *supra* note 42, at 200–212. At the time, the Newlands plan then before Congress would have established a River Regulation Commission, composed of the Secretaries of War, Interior, Agriculture, and Commerce and Labor, two senators and two representatives,” and it would investigate, “draw up plans, and organize a coordinated Water Development Service.” *Id.* at 233.

45. *See* KERWIN, *supra* note 44, at 205, 244–45.

46. Joshua C. Macey & Brian Richardson, *The Public Law of Public Utilities*, 42 *YALE J. REG.* 179 (2025). They explore how the pre-New Deal debates “highlight the extent to which the constitutional basis of modern administrative law is built on precedents take from internally coherent but mutually exclusive theories of public utility regulation.” *Id.* at 186.

47. Act of Jan. 16, 1883, ch. 27, 22 Stat. 403. Congress also had employed a model for bi-partisan membership. Merchant Marine Commission (1904); Employee’s Compensation Commission (1916); Jury Commission (1917); the Federal Radio Commission; Federal Farm Loan Board; World War Commission (1928).

48. Act of Feb. 4, 1887, ch. 104, 24 Stat. 379. The Interstate Commerce Commission model received a boost when Congress enlarged its authority and size in the 1906 Hepburn Act. Pub. L. No. 59-337, 34 Stat. 584 (1906).

49. Pub. L. No. 59-384, 34 Stat. 768 (1906).

50. Pub. L. No. 63-43, 38 Stat. 251 (1913).

51. Pub. L. No. 63-203, 38 Stat. 717 (1914). The previous year Congress authorized the President to appoint a Rural Credits Commission, addressing how best to deliver agricultural credits, culminating in the Federal Farm Loan Act. And in the 1916 Shipping Act, Congress created a 5-member board appointed by the President and confirmed by the Senate, charged with facilitating foreign commerce and energized for WWI. Pub. L. No. 64-260, §3, 39 Stat. 729 (1916).

Commission in 1916.<sup>52</sup> As one contemporary writer in the *Yale Law Journal* observed, “[t]he necessity for an authorized body to act for the public, because either an individual is not sufficiently affected or the matter of so great magnitude or the alleged violator so powerful as to make individual action unprofitable, and may hap impolitic, is the cornerstone of the many Commissions now existing in the Federal and State governments.”<sup>53</sup>

The commission model prevailed after a roughly 15-year-long conservation dialogue over safeguarding the nation’s water resources.<sup>54</sup> This commission was unique, though: it consisted not of presidentially appointed and Senate-confirmed members, but instead of the Secretaries of Agriculture, Interior, and War. The eventual legislation was influenced primarily by the Department of Agriculture’s O.C. Merrill, chief engineer of the Forest Service who would become the Commission’s inaugural executive officer—the Commission Executive Secretary.<sup>55</sup> The structure seemed justified, after all, because the War Department had provided engineering advice for prior projects on either Interior or Agriculture managed lands, and with the new Act “the jurisdiction previously exercised by the three departments [would] now [be] concentrated in the Federal Power Commission, making it possible to establish a uniform policy and to coordinate more effectively the activities of the several agencies hitherto charged with individual responsibility.”<sup>56</sup>

## B. Fixing the Commission.

The new commission with department secretaries at the helm proved ineffective, however.<sup>57</sup> Within its first year, O.C. Merrill described the

52. Congress passed the Underwood-Simmons Tariff Act, Oct. 3, 1913, and then created the Commission in 1916. Pub. L. No. 64-271, 39 Stat. 795 (1916).

53. John B. Daish, *Federal Trade Commission*, 24 *YALE L. J.* 43 (1914–1915). Daish notes how the Bureau of Corporations Act of Feb. 14, 1903, 32 Stat. 828, suggested the need for such an entity inside the Treasury Department. *Id.* at 44. And President Wilson in 1914 called for the establishment of a commission. *Id.* at 46.

54. See Frank R. McNinch, *The Evolution of Federal Control of Electric Power*, 12 *J. OF LAND & PUB. UTIL. ECON.* 11, 114 (1936) (a subsequent chairman of the Commission describing history). For another history, see Charles K. McFarland, *The Federal Government and Water Power, 101-1913: A Legislative Study in the Nascence of Regulation*, 42 *LAND ECON.* 441 (1966).

55. See Kalen, *supra* note 36, at 20. A year later Congress removed the Commission’s authority to issue licenses in national parks. Pub. L. No. 66-129, 41 Stat. 1353 (1921).

56. First Annual Report of the Federal Power Commission, H.R. Doc. No. 67-242, at 10 (1921) [hereinafter First Ann. Rep.].

57. The debate surrounding water power persisted as well, with controversy over who should control water power at Muscle Shoals and whether, in fact, the Federal Water Power Act was constitutional. See KERWIN, *supra* note 44, at 274–91.

new model as flawed.<sup>58</sup> It was marred by a lack of both resources and even secretarial interest.<sup>59</sup> Lacking a sufficient independent staff, the Commission relied on employees (such as engineers) from the three agencies who were otherwise preoccupied with their own work.<sup>60</sup> And to make matters worse, the Comptroller of the Treasury concluded the Commission lacked authority to hire its own staff.<sup>61</sup> It equally lacked its own building, and was instead assigned space in the Interior Department offices.<sup>62</sup> The Commission also lacked field employees capable of examining projects and preparing reports addressing applications for new power projects, relying instead on the three agencies' available staff.<sup>63</sup> During its first decade, the Commission barely convened and when it did, its meetings were short, lasting less than thirty minutes.<sup>64</sup> The budgetary constraints became so pronounced by 1927 that the Commission warned it could not enforce the Act absent additional money and personnel.<sup>65</sup> And while the Commission's advocate O.C. Merrill had envisioned an expert regulatory body, what occurred instead was a commission bowing to the entreaties of the burgeoning electric utility industry.<sup>66</sup> Merrill himself became so frustrated that he resigned in June 1929, illustrating the urgency of further reform.<sup>67</sup>

President Hoover joined the conversation in 1929 and supported establishing a "full-time commission."<sup>68</sup> The politics for Hoover were complicated: when appointing able and independent commissioners, he

58. *Id.* at 16 (noting how in lieu of making the process more efficient, just added a "fourth" agency and need for an expert agency).

59. See DONALD C. SWAIN, *FEDERAL CONSERVATION POLICY 1921-1933* 113 (1963).

60. *Id.* at 113-14.

61. First Ann. Rep., *supra* note 56, at 11-12; see also *id.* at 15 (noting issues with lack of ability to hire).

62. First Ann. Rep., *supra* note 56, at 11.

63. *Id.* at 13. The Commission noted how "important general investigations upon which must be based the action of the Commission with respect to pending applications have been delayed on account of lack of any personnel with which to undertake the work." *Id.* at 15.

64. *Id.* at 115.

65. Fed. Power Comm'n, Seventh Annual Report 2 (1927); see Order No. 27 (1928). See also Robert D. BAUM, *THE FEDERAL POWER COMMISSION AND STATE UTILITY REGULATION* 23-26 (1942) (describing the commission's early limitations). Congress appropriated funds when the Commission delayed issuing any new licenses. SWAIN, *supra* note 59, at 115.

66. *Id.* at 114. O.C. Merrill's successor testified differently, suggesting the Commission was not captured by industry. See JUDSON KING, *THE CONSERVATION FIGHT: FROM THEODORE ROOSEVELT TO THE TENNESSEE VALLEY AUTHORITY* 211-50 (1959).

67. A secret memorandum surfaced that criticized Merrill's alleged bias against the power industry, fueling the controversy over oversight of the industry. For an account of this history, see KING, *supra* note 66, at 211-50. In 1922, when Merrill discussed the administration of the Tennessee Valley Authority, he seemingly favored a three-member board with a chairman exercising administrative authority. See C. HERMAN PRITCHETT, *THE TENNESSEE VALLEY AUTHORITY: A STUDY IN PUBLIC ADMINISTRATION* 152 (1943).

68. See BAUM, *supra* note 65, at 27.

might upset power industry supporters, while something different might trouble voters.<sup>69</sup> The month Merrill resigned from Congress, at Senator Couzens's urging, the legislators launched an investigation into the Commission's ineffectiveness.<sup>70</sup> Senator Couzens reported how "[t]he whole set-up of the Commission is so incomprehensible that it is one of the rottenest exhibitions of government I have ever heard of."<sup>71</sup> A committee report accompanying the House proposed bill explained how "[t]he primary purpose of this bill . . . is to provide for the reorganization of the Federal Power Commission so that it will be composed of commissioners able to devote their whole time to the work of the commission."<sup>72</sup> Yet, neither the Forest Service nor the War Department seemed enthusiastic.<sup>73</sup> The Agriculture Secretary, conversely, testified that an independent commission was "necessary."<sup>74</sup>

The result was the creation of an independent agency composed of commissioners who would not otherwise be distracted from their mission by secretarial responsibilities.<sup>75</sup> Congress delegated to the President the authority to appoint five commissioners with the advice and consent of the Senate, with one commissioner serving as the "chairman" and "principal executive officer."<sup>76</sup> It further directed that, "after the expiration of the original term of the commissioner so designated as chairman by the President, chairmen shall be elected by the commission itself, each chairman when so elected to act as such until the expiration of his term of

69. See KING, *supra* note 66, at 225–27.

70. See SWAIN, *supra* note 59, at 115.

71. See KING, *supra* note 66, at 217 (quoting Senator Couzen's remarks). According to Phillip J. Funigiello, Couzens' bill not only addressed the commission problem, but "signified that between 1920 and 1930 neither the private-utility industry nor the reformers were wholly successful in imposing their views upon the other." PHILLIP J. FUNIGIELLO, TOWARD A NATIONAL POWER POLICY: THE NEW DEAL AND THE ELECTRIC INDUSTRY, 1933-1941 20 (1973).

72. To Reorganize the Federal Power Commission, H.R. Rep. No. 71-1793, at 2 (1930). The House bill also would have addressed the Supreme Court's decision in *Pub. Utils. Comm'n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927). Federal Power Commission: Hearing Before the H. Comm. on Interstate & Foreign Commerce on H.R. 11408, 71st Cong. (1930); see Sam Kalen, *Muddling Through Modern Energy Policy: The Dormant Commerce Clause and Unmasking the Illusion of an Attleboro Line*, 24 N.Y.U. ENV'T L.J. 283 (2016) (discussing *Attleboro* case). The House bill reportedly embodied President Hoover's recommendations. H.R. 11408, at 5.

73. The Forest Service exhibited concern with removing aspects of its authority to assess the appropriateness of certain waterpower sites on forest lands, although not objecting to a new commission. *Id.* at 7–8. The War Department's witness testified that "I think an all-time commission, independent of the Cabinet officers entirely, would lead to difficulties. The Cabinet officers then would not have control over subjects relating to their departments that are involved in the matter." *Id.* at 20; see also *id.* at 22–23.

74. *Id.* at 31; see also *id.* at 36–37, 39. He further questioned dialogues about independence and non-partisanship, favoring instead appreciating the need for bipartisanship. *Id.* at 41.

75. Pub. L. No. 71-412, 46 Stat. 797 (1930); see SWAIN, *supra* note 59, at 115.

76. 46 Stat. 797.

office.”<sup>77</sup> And the Act authorized paying a salary, established terms and rotations, bared appointing potentially biased commissioners, created an office in Washington, D.C., and afforded the sought-after authority to appoint and compensate staff.<sup>78</sup>

### III. THE FPC’S LIMITS & SEARCHING FOR AN ENERGY POLICY

#### A. Expanding the Commission’s Powers.

The newly constituted Federal Power Commission (FPC) remained stunted, nonetheless. During the 1930s, the monopolization of the energy industry remained a prominent political issue. For both electric generation and transmission as well as natural gas production and distribution, concern over monopolization and the power industry “trusts” spawned countless studies, commentaries, and legislative proposals.<sup>79</sup> Congress, moreover, recognized the necessity for new federal legislation to close a regulatory gap the Supreme Court created in both the natural gas and electric industries.<sup>80</sup> Indeed, whether or how the FPC could address interstate transmission of electric energy surfaced during the 1930 confirmation hearings for the new commissioners.<sup>81</sup>

But aside from serving tangentially as an information shop, the Executive Office rarely touted the Commission as a forum for energy

77. *Id.*

78. The character of the Commission avoided discussion, members instead asked whether President Hoover’s selection of McNinch as a commissioner was appropriate, whether McNinch was qualified and whether he was Democrat or Republican. Confirmation of Nominees to the Federal Power Commission: Hearings Before the S. Comm. on Interstate Commerce, 71st Cong., 3d Sess. (1930). Senator Barkley, for instance, asked “[h]ow far we should go in excluding a man from the claim of being a Democrat because either once or even twice he may vote for somebody on the other ticket?” *Id.* at 200. And Senator Dill described the Commission as a “hybrid organization” when emphasizing careful examination of nominees. Confirmation of Nominees to the Federal Power Commission, Hearings Before the Committee on Interstate Commerce, U.S. Senate, 71st Cong., 3d Sess., Dec. 11, 12, 1930, at 34-5 (“there is no way to reach this commission after it is once confirmed”).

79. See ROBERT R. NORDHAUS & SAM KALEN, ENERGY FOLLIES: MISSTEPS, FIASCOS, AND SUCCESSES OF AMERICA’S ENERGY POLICY (2018); Kalen, *supra* note 72.

80. Letter to Secretary of the Interior Harold L. Ickes Establishing the National Power Policy Committee, July 5, 1934; *Roosevelt Names New Power Board; National Policy Committee is Created to Help in Reducing Electricity Rates*, N.Y. TIMES, (July 16, 1934). <https://www.nytimes.com/1934/07/16/archives/roosevelt-names-new-power-board-national-policy-committee-is.html> [<https://perma.cc/K7EW-PXH8>]

81. Senators discussed various topics, including the respective authority of states and the federal government, interstate electric transmission regulation and the out-of-state export of energy. Confirmation to the Federal Power Commission: Hearings Before the S. Comm. on Interstate Commerce, 71st Cong., 3d Sess. (1930). To Reorganize the Federal Power Commission, H.R. Rep. No. 71-1793 (1930), at 23, 40–41, 60, 81.

policy.<sup>82</sup> President Franklin Roosevelt, instead, sought to elevate the Interior Department's involvement in developing and coordinating energy policy when he established the National Power Policy Committee (NPPC).<sup>83</sup> In 1932, he remarked in a campaign speech how "[t]he history of the Federal Power Commission, prior to the creation of a full-time commission under the Couzens bill after a Congressional investigation, the character of the appointments made when this Commission took office," along with some decisions on federal hydroelectric development "all demonstrate that the policy of the present Republican leadership is dominated by private rather than public interest."<sup>84</sup> And while, in 1935, Congress not only passed the Federal Power Act (FPA) and closed the regulatory gap by expanding the Commission's jurisdiction over electric power beyond hydroelectric facilities,<sup>85</sup> it also ostensibly addressed the monopolization and trust problem by contemporaneously passing the Public Utility Holding Company Act (PUHCA).<sup>86</sup> Then three years later it closed the regulatory gap for natural gas moving in interstate commerce

82. FPC operated primarily through adjudication, arguably curbing capacity for policy-level functions. It also, until 1936, operated clumsily with the entire Commission having to designate hearing examiners. *See generally* Att'y Gen.'s Comm. on Admin. Procedure, *Administrative Procedure in Government Agencies: Monograph Pt. 12, Federal Power Commission*, S. Doc. No. 77-10 (1941); Att'y Gen.'s Comm. on Admin. Procedure, *Administrative Procedure in Government Agencies*, S. Doc. No. 77-8, at 180-82 (1941), at 180-182. Nevertheless, FDR's Executive Order No. 6251, Aug. 19, 1933, directed the Commission to survey the nation's power resources and develop a hydroelectric public works program. Also, Senate Resolution No. 80, May 29, 1933, tasked the FPC with reporting on electric power rates. *Investigation of Executive Agencies of the Government: Preliminary Report of the Select Committee to Investigate the Executive Agencies of the Government, Pursuant to Senate Res. 217, S. Rep. No. 75-1275*, at 328 (1937) at 328 (S. Rep. 1275). And in Executive Order 8202, July 13, 1939, the President tapped the FPC to work with the Secretaries of State and War on the exportation of electric energy and imports and exports of natural gas.

83. *See* FUNIGIELLO, *supra* note 71, at 38. That effort failed, *id.* at 39, and in lieu of the NPPC, FDR as part of the war effort enlisted FPC for additional expertise. *Id.* at 251-53. In 1934, FDR nevertheless favored having the Interior Department lead an effort to explore a national energy policy. S. Rep. 1275, *supra* note 82, at 329.

84. Franklin D. Roosevelt, Campaign Address in Portland, Oregon on Public Utilities and Development of Hydro-Electric Power, (Sep. 21, 1932), <https://www.presidency.ucsb.edu/documents/campaign-address-portland-oregon-public-utilities-and-development-hydro-electric-power> [<https://perma.cc/NVG8-CZD8>] [hereinafter FDR 1932 Campaign Speech].

85. Public Utility Holding Company Act of 1935, Pub. L. 74-333, 49 Stat. 803, 838, Title II, Aug. 26, 1935. FPC Commissioner Clyde Seavey reportedly "supervised" the drafting of the legislation and, although the 1935 federal power legislation avoided addressing natural gas, Seavey's background was in the natural gas industry. *See* GERALD D. NASH, *UNITED STATES OIL POLICY: 1890-1964* 213 (1968).

86. Pub. L. 74-333, 49 Stat. 803, Aug. 26, 1935. Prior to the PUHCA, President Roosevelt's remarks about the interstate electric power grid reflect his concern with the power trusts and the need for sharing information among state utility commissions and the FPC. *E.g.*, FDR 1932 Campaign Speech, *supra* note 84.

with the passage of the Natural Gas Act (NGA).<sup>87</sup> This suite of legislative activity, though, did little to advance the Commission's stature as an effective forum for energy policy formation.<sup>88</sup>

### B. Building Around the Commission.

Indeed, the Commission's ability to engage in policy formulation remained stymied throughout the subsequent decades. I suggest four principal factors produced this result. To begin with, the FPC generally mirrored state utility commissions and became perceived as a rate-making machine, balancing consumer and industry need, not formulating national policy.<sup>89</sup>

Second, and more significantly, successive administrations explored various avenues beyond the FPC for coordinating the nation's energy policy—ensuring the availability of sufficient energy resources to accommodate the nation's growing dependence on energy. The Commission's cabined jurisdiction naturally justified these non-FPC-focused efforts, as matters like oil and natural gas production and supply at first appeared beyond its ken.<sup>90</sup> After the 1930 legislative activity,<sup>91</sup>

87. Natural Gas Act of 1938, Pub. L. No. 75-688, 52 Stat. 821 (1938).

88. The Commission's disagreement over its authority to address natural gas producers and gatherers likely tarnished its image. *See infra* notes 123–29 and accompanying text.

89. A 1974 Brookings Institute study by former Justice Breyer and Paul MacAvoy chronicled the Commission's regulatory efforts (for electric and natural gas), and suggested the need for deregulation and “coordination in planning and operating electricity systems... that each serve several states and include several companies,” observing that “[FPC's] history suggests that it cannot be relied upon to bring about any major change in industry structure.” STEPHEN G. BREYER & PAUL MACAVOY, ENERGY REGULATION BY THE FEDERAL POWER COMMISSION 133 (1974). Their study, moreover, responds to the Ash Council's recommendations for agency reorganization. *Id.* at 127; *see also infra* note 244 and accompanying text. Paul MacAvoy, a noted economist, had earlier examined FPC's effectiveness primarily over natural gas regulation, noting how FPC “is viewed as an organization using resources and commanding their use by others for the purpose of changing incomes and outputs in electricity and gas markets.” Paul W. MacAvoy, *The Effectiveness of the Federal Power Commission*, 1 BELL J. OF ECON. & MGMT. SCI. 271, 272 (1970).

90. During WWI President Wilson relied on the Federal Fuel Administration; and President Coolidge established the Federal Oil Conservation Board. The 1946 Interior Department reorganization (pursuant to Reorganization Plan No. 3, combining the General Land Office and Grazing Service into the Bureau of Land Management with a minerals branch) facilitated Interior's leasing of mineral resources. *See* JAMES MUHN, HANSON R. STUART, OPPORTUNITY AND CHALLENGE: THE STORY OF BLM 74 (U.S. Dept. of the Interior 1988). Acting at the President's direction, in May 1946 the Interior Department established an Oil and Gas Division and then an Office of the Assistant Secretary for Mineral Resources. *See Federal Energy Administration: Hearing on H.R. 11793 Before the Subcomm. of the Comm. on Gov't Operations*, 93d Cong. 71-2 (1973) (reproducing Order No. 2193, May 6, 1946; Order No. 2602, Dec. 1, 1950). And as the nation approached the 1970's, Interior's leasing of onshore oil and gas increased dramatically from the post war till the mid 1960's. *See* MARION CLAWSON, THE FEDERAL LANDS REVISITED 87–91 (1983).

91. Prior to the 1935 amendments, President Roosevelt tasked Interior Secretary Lane with establishing in PWA a National Power Policy Committee., and then later FDR established a new power

consequently, the FDR administration touted the National Planning Board, changed later to the Natural Resources Planning Board, as a possible coordinating body.<sup>92</sup> It also favored advancing the use of public power,<sup>93</sup> supporting new public entities such as the Tennessee Valley Authority and championing the importance of advancing rural electrification.<sup>94</sup> A report during the Truman administration suggested little progress toward a coordinated energy policy.<sup>95</sup> A consequential 1955 Materials Policy (or “Paley Commission”) Report addressed the nation’s energy needs—albeit suggesting less governmental regulation in some areas.<sup>96</sup> But matters thereafter only became worse when President Eisenhower inaugurated the ill-fated mandatory oil imports program.<sup>97</sup> This was followed by President Kennedy’s support for an Interdepartmental Energy Steering Committee and then President Johnson’s Natural Resources Task Force.<sup>98</sup>

policy committee in 1937. ARTHUR M. SCHLESINGER, JR., *THE AGE OF ROOSEVELT: THE POLITICS OF UPHEAVAL* 279 (1960).

92. *See generally* Marion Clawson, *New Deal Planning: The National Resources Planning Board* (1981) (canvassing the history).

93. FDR 1932 Campaign Speech, *supra* note 84 (“State owned or Federal owned power sites can and should and must properly be developed by Government itself.”). FPC participated in a 1937 report favoring an energy policy for Bonneville, and Congress passed the Bonneville Power Administration Act in 1937. 50 Stat. 731.

94. President Roosevelt employed the Emergency Relief Appropriation Act of 1935, 49 Stat. 115, to create Rural Electrification Administration, yet another regulatory agency—albeit for facilitating energy resources to rural areas. Executive Order No. 7037, 1935; *see also* Rural Electrification Act, Pub. L. No. 74-605, 49 Stat. 1363 (1936). The REA became the Rural Utilities Service in 1994. *See generally* RICHARD F. HIRSCH, *POWERING AMERICAN FARMS: THE OVERLOOKED ORIGINS OF RURAL ELECTRIFICATION* (2022); Jim Cooper, *Policy Essay: Electric Co-Operatives: From New Deal to Bad Deal?*, 45 HARV. J. LEG. 44 (2008); Gabriel Pacyniak, *Greening the Old New Deal: Strengthening Rural Electric Cooperative Supports and Oversight to Combat Climate Change*, 85 MO. L. REV. 409 (2020). As Gabriel Pacyniak explains, “the effort to electrify rural American became wrapped up in the great debate of private versus public power in the 1920s.” *Id.* at 421.

95. Craufurd D. Goodwin, *The Truman Administration: Toward a National Energy Policy, in ENERGY POLICY IN PERSPECTIVE: TODAY’S PROBLEMS, YESTERDAY’S SOLUTIONS* 1, 40 (1981) (describing 1949 report). Congress, moreover, choose another new agency to address peaceful uses of atomic energy. The Atomic Energy Act of 1946, ch. 724, 60 Stat. 755 (1946).

96. *See* VITO A. STAGLIANO, *A POLICY OF DISCONTENT: THE MAKING OF A NATIONAL ENERGY STRATEGY* 10 (2001) (“The Paley Commission had been chartered by Truman to assess long-range prospects for minerals and resources independently of assessments typically carried out by competing self-interested bureaucracies.”).

97. *Id.* at 11 (“The mandatory controls on oil imports distorted U.S. oil policy for the entire period in which they were in effect.”); *see also* NORDHAUS, *supra* note 79, at 103-04. For a history of energy policy during the Eisenhower administration, *see* William J. Barber, *The Eisenhower Energy Policy: Reluctant Intervention*, in CRAUFURD D. GOODWIN, *ENERGY POLICY IN PERSPECTIVE: TODAY’S PROBLEMS, YESTERDAY’S SOLUTIONS* 205 (1981).

98. REPORT TO THE PRESIDENT BY THE TASK FORCE ON NATURAL RESOURCES, *RESOURCE POLICIES FOR A GREAT SOCIETY* (Nov. 11, 1964) [hereinafter *The Task Force*]. “Like Paley,” the *Resources for a Great Society* report, prepared by Resources for the Future, “advanced the art of energy analysis but not of policy formulation and decision-making.” STAGLIANO, *supra* note 96, at 18.

Notably, a 1960 report prepared for President Kennedy characterized the FPC as an “outstanding example in the Federal Government of the breakdown of the administrative process.”<sup>99</sup> The FPC at the time had over a thousand employees, many of whom had technical expertise, but its staff did not participate in proceedings and the Commission merely acted like a judge mediating adversarial positions.<sup>100</sup> Not surprisingly, the Second Circuit chastised this practice when famously observing how the Commission’s charge to protect the public interest “does not permit it to act as an umpire calling balls and strikes for adversaries appearing before it.”<sup>101</sup> Even so, President Johnson telephoned the FPC after the historic northeast blackout on November 9, 1965 and tasked the Commission with exploring its causes and the Commission dispatched his entreaty quickly.<sup>102</sup>

99. James M. Landis, Report on Regulatory Agencies to the President-Elect (1960), Submitted by the Chairman of the Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary, U.S. Senate, Comm. Print, 86th Cong., 2d Sess. (Dec. 1960). See generally Carl McFarland, *Landis’ Report: The Voice of One Crying in the Wilderness*, 47 VA. L. REV. 373 (1961) (criticizing the agency and suggesting its chairman should serve at the President’s pleasure). It characterized the Commission as overwhelmed by natural gas rate cases, following the Supreme Court’s decision in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954). See also J.R.B. et al., *The Progress of Federal Agency Reorganization Under the Kennedy Administration*, 38 VA. L. REV. 300, 307-8, 353-56 (1962) (discussing FPC). One difficulty for the Commission was its lack of authority to delegate decision making either to a subset of the Commission or to staff. *Id.* at 354-5. For a study of energy policy during the Kennedy administration, see William J. Barber, in *ENERGY POLICY IN PERSPECTIVE: TODAY’S PROBLEMS, YESTERDAY’S SOLUTIONS* 287 (Craufurd D. Goodwin ed., 1981).

100. See JOSEPH C. SWIDLER, *POWER AND THE PUBLIC INTEREST: THE MEMOIRS OF JOSEPH C. SWIDLER* 130-31 (2002). As Chairman, Swidler sought to address the various concerns at the FPC and “submitted to Congress the most comprehensive legislative program in the history of the Commission.” Harry J. Trainor, *The Administrative Revolution at the Federal Power Commission*, 14 ADMIN. L. REV. 148, 156 (1962).

101. *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 620 (1965). Possibly responding to Landis’ report and *Scenic Hudson*, the Commission changed how it assigned the drafting and finalization of orders, as well as established separated staff—distinguishing trial staff from those assisting commissioners. See SWIDLER, *supra* note 100, at 132-33. According to Commissioner Swidler, FPC during this period also began attracting more talented staff. *Id.* at 135. He further opines, without elaboration, that he considered the FPC as able to “exert a considerable influence on the energy marketplace.” *Id.*

102. See S. DAVID FREEMAN, *WINNING OUR ENERGY INDEPENDENCE: AN ENERGY INSIDER SHOWS HOW* 71-72 (2007) (explaining his involvement). And according to Freeman, Johnson issued press releases touting the Commission’s consumer-favored decisions. *Id.* at 159. FPC requested additional statutory authority for grid reliability (Electric Power Reliability Act of 1967), but instead reliability then was addressed through an agreement with the formation of the North American Electric Reliability Council in 1968. DAVID NEVIUS, *THE HISTORY OF THE NORTH AMERICAN ELECTRIC RELIABILITY CORPORATION* (2020), at <https://www.nerc.com/news/Documents/NERCHistoryBook.pdf> [<https://perma.cc/GFX8-7YSE>]. For a history of energy policy during the Johnson administration, see James L. Cochrane, *Energy Policy in the Johnson Administration: Logical Order Versus Economic Pluralism*, in *ENERGY POLICY IN PERSPECTIVE: TODAY’S PROBLEMS, YESTERDAY’S SOLUTIONS* 337 (Craufurd D. Goodwin ed., 1981).

The Nixon administration also advanced the conversation for energy policy reform.<sup>103</sup> The President informed Congress about the energy crisis and the urgency, in the words of a subsequent Department of Energy senior official, of “bring[ing] cohesion to energy policymaking.”<sup>104</sup> Rather than elevate the FPC, the Nixon White House favored a new entity for coordinating energy policy: a department of energy and natural resources.<sup>105</sup> Contemporary energy experts noted how a new agency capable of coordinating energy policy was essential.<sup>106</sup> While his administration urged an elevated role for the Interior Department,<sup>107</sup> it also created a Federal Office of Energy Conservation, and later the Energy Policy Office—mostly addressing oil, petroleum and petroleum products, and liquefied natural gas (LNG).<sup>108</sup>

In December 1973, that Energy Policy Office morphed into the Federal Energy Office (FEO).<sup>109</sup> The administration then successfully requested that Congress establish an Energy Research and Development (R&D) Administration, as an energy planning and R&D organization.<sup>110</sup> In that

103. See generally Neil De Marchi, *Energy Policy Under Nixon: Mainly Putting Out Fires*, in ENERGY POLICY IN PERSPECTIVE: TODAY’S PROBLEMS, YESTERDAY’S SOLUTIONS 395 (Crauford D. Goodwin ed., 1981).

104. STAGLIANO, *supra* note 96, at 20.

105. NORDHAUS, *supra* note 79, at 100–01, 106.

106. See generally De Marchi, *supra* note 103. With funding from the Ford Foundation and under the energy expertise of David S. Freeman, the Energy Policy Project produced Exploring Energy Choices. ENERGY POLICY PROJECT OF THE FORD FOUNDATION, EXPLORING ENERGY CHOICES: A PRELIMINARY REPORT (1974) [hereinafter FORD FOUNDATION REPORT]. The report observed how “responsibility for government energy policy planning has long been fragmented into many different agencies which tend to deal with emergencies as they arise; but they are ill-equipped to formulate long term strategies which consider the impacts of alternative courses of action.” *Id.* at 27. Tellingly, the report’s Advisory Committee included just one former member of the FPC. *Id.* at 114.

107. Notably, for instance, in 1973, it was the Secretary of the Interior Rogers Morton who recounted the Nixon administration’s efforts on energy policy. Rogers C. B. Morton, *The Nixon Administration Energy Policy*, 410 ANNALS OF AM. ACAD. OF POL. SCI. 65 (1973). Interior’s role for both onshore and offshore oil and gas leasing, and subsequently for the development of coal from the public lands, seemingly justified its role as an energy department. See, e.g., *id.* at 68–69 (describing Interior activities). The circumstances surrounding the Nixon administration’s efforts to coordinate energy policy reflected, according to some conservative scholars, the administration’s antipathy toward the administrative state. See JOHN MARINI & KEN MASUGI, UNMASKING THE ADMINISTRATIVE STATE: THE CRISIS OF AMERICAN POLITICS IN THE TWENTY-FIRST CENTURY 136–37 (2019).

108. Exec. Order No. 11726, 38 Fed. Reg. 17711 (June 29, 1973); see also Statement Announcing Additional Energy Policy Measures, June 29, 1973, PUB PAPERS 625.

109. Exec. Order No. 11748, 38 Fed. Reg. 33575 (Dec. 4, 1973). FEO grew within weeks “from just a few staffers to a thousand-employee agency with five hundred regional offices.” MEG JACOBS, PANIC AT THE PUMP: THE ENERGY CRISIS AND THE TRANSFORMATION OF AMERICAN POLITICS 105 (2016).

110. Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1233 (1974); see generally Energy Reorganization Act of 1974, S. Rep. No. 93-980, at 2–6 (1974) (chronicling Nixon administration proposals). The new entity would assist in facilitating increased energy supply and coordinating energy research and development. 88 Stat. 1233 at 1234. This Act also abolished the

1974 legislation, Congress created the Energy Resources Council inside the Executive Office, but notably absent from this council was a member of the FPC.<sup>111</sup> Congress also directed the Executive to submit, by June 30, 1975, recommendations “for [the] organization of energy and related functions in the Federal Government, including, but not limited to, whether or not there shall be established (1) a Department of Energy and Natural Resources, (2) an Energy Policy Council, and (3) a consolidation in whole or in part of regulatory functions concerning energy.”<sup>112</sup>

Third, in 1974 Congress already had established the Federal Energy Administration (FEA), absorbing the functions of the prior FEO and presaging an impending reorganization focused on energy policy, the contours of which had not yet coalesced around any solution.<sup>113</sup> The FEA, though, operated as a temporary agency primarily established to address fossil fuel supply.<sup>114</sup> Congress also expected it would advance the essential need for collection, coordination, and dissemination of energy-related information.<sup>115</sup> But whether it was the Ash Council, James Landis, or, more importantly, the U.S. Senate, all sectors voiced support for something other than just FPC to address energy policy and, in particular, advance the nation’s hunger for energy resources. Senator Jackson that year pressed his colleagues to develop

organizational arrangements which are capable of administering national energy policies for many years to come. They should be adequate to cope

Atomic Energy Commission, transferring its functions to the Nuclear Regulatory Commission. *Id.* at 1237, 1242–44, §§ 201, 202.

111. *Id.* at 1241, § 108(a). FPC’s status as an independent agency could explain this omission, but Congress could have acted otherwise. This Council would “have responsibilities for the development and implementation of energy policy or for the management of energy resources.” *Id.* at 1242, § 108(b). TFPC also was not included in the Nixon administration’s Cabinet-level (with other members) Energy Emergency Action Group. Federal Energy Administration, Hearings Before a Subcommittee of the Committee on Government Operations, on H.R. 11793, U.S. House, 93d Cong., 1st Sess., at 49 (1973) (Roy Ash describing membership).

112. Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1233, 1242, § 109(a) (1974).

113. Federal Energy Administration Act of 1974, Pub. L. 93-275, 88 Stat. 96 (1974). Congress’ stated objective was “to reorganize and consolidate certain functions of the federal Government in a new Federal Energy Administration in order to promote more efficient management of such functions.” Federal Energy Administration, Rep. No. 93-748, 93d Cong., 1st Sess. (1973). Congress the following year passed the Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 871 (1975). For the complicated politics surrounding the 1975 EPCA, see MEG JACOBS, PANIC AT THE PUMP: THE ENERGY CRISIS AND THE TRANSFORMATION OF AMERICAN POLITICS IN THE 1970S 148-51 (2016).

114. FEA’s authority expired, as amended, on Dec. 31, 1977. Energy Conservation and Production Act of Aug. 14, 1976. Pub. L. No. 94-385, 90 Stat. 1125, 1132, § 112 (1976) (amending the 1974 Federal Energy Administration Act).

115. *Id.* at 1135, § 141 (establishing inside FEA an Office of Energy Information and Analysis).

with the present crisis, to anticipate new developments and to prevent the recurrence of the disastrous conditions of the past few months.<sup>116</sup>

Senator Percy, an active participant in the energy debates, similarly lamented how

Because Congress has failed to act, the real power over energy matters now resides in an agency that has no separate statutory identity and inadequate authorities, the Federal Energy Office. This is a situation that must not be allowed to continue.<sup>117</sup>

Testifying on establishing FEA in 1973, even FPC Chairman John N. Nassikas (who began as Chairman in August 1969), fully endorsed legislation creating a new agency.<sup>118</sup> He favored “the centralization of responsibility and accountability for energy programs within a central administration.”<sup>119</sup> But he cautioned that vague language ought to avoid being construed as to not upset the Commission’s responsibilities under the FPA and the NGA.<sup>120</sup> When asked about the relationship between the Commission and FEA, he observed that “there is some ambiguity,” but it “could be easily cleared up.”<sup>121</sup> Echoing the White House sentiment and speaking for the Interior Department, Under Secretary John Whitaker enthusiastically endorsed the need for a centralized and coordinated organization.<sup>122</sup>

116. To Establish a Department of Energy and Natural Resources, Energy Research and Development Administration, and a Nuclear Safety and Licensing Commission, Hearings on S. 2135, S. 2744, 93d Cong., 2d Sess. 5 (1974). Senate Resolution 45, adopted by the Senate in 1971, directed the preparation of a National Fuels and Energy Policy Study. 93d Cong., History of Federal Energy Organization: A Staff Analysis, Serial No. 93-19 at 92–154 (Comm. Print 1973) (“Federal energy organization today reflects this random development of energy policy throughout our history as a nation. It is fragmented, uncoordinated and largely unrelated to the energy policy needs of the present.”).

117. To Establish a Department of Energy and Natural Resources, Energy Research and Development Administration, and a Nuclear Safety and Licensing Commission, Hearings on S. 2135 & S. 2744 Before the Subcomm. on Reorganization, Rsch., & Int’l Org. of the S. Comm. on Gov’t Operations, 93d Cong. 7 (1974).

118. *Federal Energy Administration, Hearings on H.R. 11793 Before the Subcomm. of the H. Comm. on Gov’t Operations*, 93d Cong., 1st Sess. 158 (1973). At the same hearing Roy Ash testified about the urgency of and necessity for establishing a temporary FEA. *Id.* at 17–22. He still favored a department of energy and natural resources and indicated that FEA could not exercise authority over other agencies, absent “special powers vested in the President or provided by” Congress’ new emergency powers. *Id.* at 20, 48. He curiously omitted discussing the FPC. *Id.* at 19.

119. *Id.* at 158.

120. *Id.* at 158, 167. The Chairman added how his Commission had issued orders facilitating resource conservation. *Id.* at 168, 170; *see also id.* at 250, 280, 281, 303 (some Orders). And while accepting FEA data collection function, he observed how the Commission “probably collects as much information on energy as any other single agency of Government.” *Id.* at 169. He also informed that National Association of Regulatory Utility Commissioners (NARUC) that FPC would work with NARUC and FEA to coordinate activities. *Id.* at 220.

121. *Id.* at 168.

122. *Id.* at 59.

And finally, the Commission's approach toward regulating natural gas in the interstate market proved disastrous, although the Supreme Court precipitated the problem and Congress twice failed to accede to the Commission's requests. In the 1940s, the Commission grappled with whether to regulate production and gathering of natural gas destined for interstate markets.<sup>123</sup> All FPC Commissioners initially requested clarifying legislation from Congress, but shortly thereafter that unanimity dissipated and tensions surfaced between some in Congress and the Commission, particularly after a 1947 investigation into the natural gas industry.<sup>124</sup> The politics in Congress and inside the White House became complicated; and while Congress attempted to resolve the jurisdictional problem, President Truman vetoed the measure.<sup>125</sup> By 1950, the Executive Director of the FPC wrote about the maligned commission and observed that its problem with natural gas had "been so staggering that the President, in a Message to Congress on the Regulatory Agencies, singled out [FPC's] 'incredible backlog of cases' to emphasize the adverse effect on the Nation's economy."<sup>126</sup> Matters intensified a few years later when the Supreme Court sent shock waves through the industry by holding in *Phillips Petroleum Co. v. Wisconsin*<sup>127</sup> that the Commission must regulate independent natural gas producers' wholesale sales of natural gas destined for interstate pipelines. The initial result of expanding the Commission's rate oversight was that producers preferred to keep their gas in the less-regulated intrastate markets. The need to legislatively reverse the *Phillips* decision surfaced immediately; eventually, the interstate markets became so starved that the effects of the case became a principal catalyst for the

123. *See, e.g.*, *Interstate Natural Gas, Inc. v. FPC*, 331 U.S. 682 (1947); *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581 (1945); *People's Natural Gas Co. v. FPC*, 127 F.2d 153 (D.C. Cir. 1942); *see generally* NASH, *supra* note 85, at 213–37.

124. *See* NASH, *supra* note 85, at 218–19. In 1947, Congress amended NGA to afford interstate natural gas companies eminent domain authority. National Security Act of 1947, Pub. L. No. 245, 61 Stat. 459 (July 25, 1947).

125. *Id.* FPC Commissioner Olds, who was being reappointed to the Commission by President Truman, subsequently objected to limiting the Commission's jurisdiction and he persuaded two others to join him. *Id.* at 223. Then Senator Lyndon Johnson supported the legislation (what became the Kerr bill) and objected to Olds, *id.* at 225, possibly tainting his views of the Commission when he became President. The Olds "affair was not merely a struggle over the appointment of a public servant, but one involving pressure groups with conflicting economic interests." *Id.* at 227. The Senate rejected Olds and passed the Kerr bill with the support of Senator Johnson, but it was over the opposition of Senator Hubert Humphrey and then vetoed by the President. *Id.* at 230.

126. Trainor, *supra* note 100, at 148. The Director added that the Commission had a different problem with electric power—mostly involving stagnation rather than a backlog, and that FPC was making changes to address natural gas. *Id.* (*e.g.*, noting new Bureau of Natural Gas).

127. *Phillips Petroleum Co. v. State of Wis.*, 347 U.S. 672 (1954).

1970s energy crisis.<sup>128</sup> Indeed, by the end of the Ford administration in 1976, the FPC and the White House were urging Congress to grant emergency authority to address the effects of the imbalance in natural gas markets.<sup>129</sup>

#### IV. BECOMING FERC & AN ENERGY POLICY SHOP

The 1976 Presidential election almost assuredly demanded the winner reorganize national energy policy functions inside the Executive Branch. Congress that year had passed the Energy Conservation and Production Act (ECPA), not only targeting increasing conservation efforts and removing some regulatory hurdles for oil production, but also establishing an Office of Energy Information (precursor to the existing Energy Information Administration) and directing the next President to prepare a plan for reorganizing energy and natural resources policy.<sup>130</sup> And before the election, the Ford administration, as part of a broad review of regulatory reform, released its *The Task Force on Reform of Federal Energy Administration Regulation*.<sup>131</sup> The Energy Resources Council's principal conclusion in its 1976 report for the incoming Carter administration urged the need to recognize the energy functions of the government and "eliminate fragmented responsibilities."<sup>132</sup> Building off this ample foundation, the Carter administration immediately assembled a team to craft quickly a national energy plan.<sup>133</sup> In March, Carter asked Congress to create a Department of Energy—with James Schlesinger understood as its apparent steward.<sup>134</sup> In January, Carter enlisted

128. See Morton, *supra* note 107, at 68 (discussing the President's call end wellhead natural gas regulation). Congress attempted a fix shortly thereafter, but a bribery scandal undermined a legislative solution. See *Probe Called by Knowland: Would See if Case Offer Concerned Gas Vote*, BALTIMORE SUN, at 7 (Feb. 6, 1956). The FPC's 1960's attempts to mitigate *Phillips* and facilitate more gas flowing into interstate markets was too slow to offset the looming crisis. See NORDHAUS, *supra* note 79, at 80-86.

129. Elliot L. Richardson & Frank G. Zarb, *Energy Resources Council, Perspective on Energy Policy* 20 (Dec. 16, 1976) (on file with author).

130. Energy Conservation and Production Act, Pub. L. No. 94-385, 90 Stat. 1125 (Aug. 14, 1976) (amending the 1974 Federal Energy Administration Act). In a nod toward coordinating energy and environmental policy, Congress (absent an emergency) required that FEA furnish EPA with advance notice of any regulations or policies affecting air quality. *Id.* at 1127, § 103.

131. See PAUL W. MACAVOY, ED., *FEDERAL ENERGY ADMINISTRATION REGULATION: REPORT OF THE PRESIDENTIAL TASK FORCE* (1977).

132. Richardson & Zarb, *supra* note 129, at 113.

133. See STAGLIANO, *supra* note 96, at 33; see also NORDHAUS, *supra* note 79, at 119; James L. Cochrane, *Carter Energy Policy and the Ninety-Fifth Congress*, in *ENERGY POLICY IN PERSPECTIVE* 551 (1981) (Robert Nordhaus helped draft some of the programs, while his brother became the Chair of President Carter's Council on Economic Advisors).

134. See JACOBS, *supra* note 109, at 172. Identifying Schlesinger as the agency's heir apparent likely secured Senator Jackson's support. *Id.* at 57 (noting the relationship). Economist Milton

Schlesinger, who had chaired the Atomic Energy Commission, served as Secretary of Defense, as well as directed the Central Intelligence Agency, as an “energy czar” to aid in addressing the natural gas crisis.<sup>135</sup> Then, in April, President Carter not only delivered his famous remarks to the nation explaining how the energy crisis posed the “moral equivalent of war” but also submitted five bills to Congress.<sup>136</sup>

But how FPC might fare under Carter’s National Energy Plan and a DOE remained obscure as Congress deliberated. Questions surrounded the constitutional ability of Congress to delegate to the Executive rather than an independent agency the authority to establish policy and engage in ratemaking.<sup>137</sup> And if the President enjoyed the power to remove a commissioner exercising judicial functions should the FPC lose its independent status, the constitutional objection seemed “serious.”<sup>138</sup> This was particularly problematic for the FPC, which some considered as having been unduly influenced by industry.<sup>139</sup> The White House communicated that its reorganization plan was not intended to initiate new substantive energy programs, but instead merely designed “to simplify and rationalize Government” by addressing fragmentation of decision-making and overlapping or duplicative functions.<sup>140</sup> Only a few years earlier Congress entertained the merits of establishing the Consumer Product Safety Commission as an independent agency, insulating it from political and economic pressures.<sup>141</sup> That suggested retaining the FPC’s

Friedman adamantly opposed its creation, fearing it would become a “monster.” *Id.* at 178–79. Schlesinger, though, commanded conservative respect—and contributed toward the quick passage of DOE Act. See David Howard Davis, *Establishing the Department of Energy*, 4 J. OF ENERGY & DEVELOPMENT 29, 33 (1978).

135. U.S. DEP’T OF ENERGY, DEPARTMENT OF ENERGY 1977-1994: A SUMMARY HISTORY 21; DAVIS, *supra* note 134, at 30.

136. See STAGLIANO, *supra* note 96, at 36. President Carter urged FPC to increase the flow of natural gas out of Texas, but the subsequently controversial James Watt on the Commission objected. See JACOBS, *supra* note 109, at 165. Of course, Congress gave the President emergency authority in the 1977 Emergency Natural Gas Act, Pub. L. 95-2, 91 Stat. 4 (Feb. 2, 1977). JACOBS, *supra* note 109, at 167.

137. See Federal Energy Reorganization: Historical Perspective, Prepared by the Cong. Rsch. Serv. at the Request of Sen. Henry M. Jackson, Pursuant to S. Res. 45, The Nat’l Fuels and Energy Pol’y Study, Serial No. 94-96 (92-136), 94th Cong., 2d Sess. 24 (1976).

138. *Id.*

139. *Id.* at 24–25.

140. Davis, *supra* note 134, at 33–34.

141. See GARY C. BRYNER, BUREAUCRATIC DISCRETION: LAW AND POLICY IN FEDERAL REGULATORY AGENCIES 150 (1987) (quoting from legislative history). He observes how Congress “sought to assure that the commission would be free from presidential influence by requiring that the chair of the commission not serve at the pleasure of the president.” *Id.* at 151. The 1961 Reorganization Plan No. 7 echoed a commission model for the Federal Maritime Commission. 75 Stat. 840. When considering the 1974 Energy Reorganization Act, the notion of a bi-partisan commission—in that case, for a nuclear safety and licensing commission—seemed almost a foregone conclusion. Energy Reorganization Act of 1974, Report of the Committee on Government Operations, S. 2744, U.S.

independent status might be favored. Schlesinger, though, announced how energy policy demanded greater use of informal rulemaking and that the nation could “no longer live with the fragmentation, the duplication, and the overlapping jurisdictions.”<sup>142</sup>

Yet, the initial proposal envisioned subsuming the FPC’s functions into DOE.<sup>143</sup> The FPC’s involvement with the natural gas shortage, whether fairly attributable to it or not, apparently led the White House to consider incorporating the functions of FPC directly into the new department, and it crafted an administrative structure around evolving administrative law principles to ensure that decisions would remain insulated from politics and guarantee due process.<sup>144</sup> DOE would have had a Board of Hearings and Appeals “‘free from the control of the Secretary of Energy’ to settle regulatory conflicts and hear appeals of department rules.”<sup>145</sup> While reports confirm that my former co-author, Robert Nordhaus, was involved in developing the plan, I suspect—albeit without confirmation—that he drafted much of the detailed language.

The press reported that the decision to keep FERC as an independent agency inside DOE was because the Commission’s ratemaking power involved “multibillion-dollar decisions” that ought not be “lodged in a single person and should be given to a commission insulated from political pressures.”<sup>146</sup> And because the principal issue animating the Carter energy plan surrounded how to address natural gas and its pricing, handing the reins over it to Schlesinger troubled some Democrats.<sup>147</sup> Also, Senators such as William Roth (R-Del.) questioned whether Congress could “discuss folding in the Federal Power Commission and other regulatory programs, without really knowing whether we are going to have more or

Senate, 93d Cong., 2d Sess., Rep. No. 93-980, at 22, June 27, 1974. The Carter administration considered FPC’s “preventing efficient allocation of natural gas” as illustrative of the need to shift authority to the new agency, according to David Howard Davis, while others who favored industry seemingly joined with Congress in accepting the “naive faith in the myth of the ‘independent regulatory commission.’” Davis, *supra* note 134, at 35.

142. J.P. Smith, Schlesinger *Says Energy Plan to Stress Conservation*, Coal, WASH. POST, Mar. 7, 1977, at A4.

143. Peter Z. Grossman, U.S. ENERGY POLICY AND THE PURSUIT OF FAILURE 181 (2013).

144. *See generally Department of Energy Organization Act, Hearings on S. 826 and S. 591 Before the Comm. on Gov’t Aff., 95th Cong.* (1977). One of Senator Percy’s chief objections apparently centered on the treatment of FPC, and his apparent preference for certain provisions of S. 591. *See id.* at 164-65.

145. *Id.* at 1261. Also, the board members would be presidentially appointed with four-year fixed terms, all designed “to protect the board members from political pressures.” *Id.*; *see also id.* at 12 (Title IV Board of Hearings and Appeals).

146. Richard L. Lyons, *Hill Approves Department of Energy: Department of Energy Established*, WASH. POST, Aug. 3, 1977, at A1-2; *see also* GROSSMAN, *supra* note 143 (noting decision).

147. *Id.* at 181. Davis credits energy lawyers and interest groups with tilting the balance toward retaining FPC as an independent agency. Davis, *supra* note 134, at 36.

less regulations?”<sup>148</sup> The Senate’s energy expert, Senator Henry Jackson (D-Wash.), stressed the urgency of organizational reform, but in his opening remarks ignored the issue of folding in FPC’s functions.<sup>149</sup> Senator Metcalf (D-Mont.) raised due process concerns about any entity other than a commission engaging in judicial functions or possibly employing regulations to establish rates.<sup>150</sup> The soon to be Secretary Schlesinger expressed the exigency of governmental organization and avoiding overlapping jurisdictional boundaries,<sup>151</sup> and even the Chair of FPC dutifully testified in favor of the administration’s proposal.<sup>152</sup> The momentum though favored caution for reorganizing the FPC, as expressed by former Chairman Joseph Swidler, who testified how the “record of FPC is not as bad as it has been painted” and Congress should be careful not to throw out the good with the bad.”<sup>153</sup>

Eventually, as Meg Jacobs explains, DOE reorganization and retaining an independent commission “sailed through” Congress.<sup>154</sup> Notably, for LNG imports, a program where FEA limited FPC’s authority by exercising its own discretion, Congress transferred authority over LNG imports (and exports) to the new DOE.<sup>155</sup> The final vote on the August 4, 1977 Reorganization Act<sup>156</sup> in the House was 353 to 57, and in the Senate 76 to 14.<sup>157</sup> Within a year, the nascent DOE had 20,000 employees and a 10.4 billion budget.<sup>158</sup>

## V. FERC AND INDEPENDENT AGENCIES ON THE BRINK

With Congress converting the FPC into FERC and retaining the Commission’s status as an independent agency, FERC’s role in facilitating

148. 1977 DOE Reorganization Act, *supra* note 35, at 105. Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 578 (Aug. 4, 1977).

149. *Id.* at 107.

150. *Id.* at 108–09. The White House responded to these concerns in answers to questions. *See id.* at 115–20.

151. *Id.* at 122. Schlesinger favored having one agency in the administration treat all fuels equally, adding how “on-the-record hearings by the Federal Power Commission have been most time consuming,” suggesting a need for change. *Id.* at 131. He also testified that FPC already enjoyed authority to choose between rulemaking and adjudication. *Id.* at 132. Senator Roth pressed Schlesinger on how a unitary budget process would be utilized for the prospective Board of Hearings and Appeals. *Id.* at 139.

152. *Id.* at 167–68 (testimony of Hon. Richard L. Dunham).

153. *Id.* at 204.

154. JACOBS, *supra* note 109, at 181.

155. *See* RICHARD H. K. VIETOR, ENERGY POLICY IN AMERICA SINCE 1945: A STUDY OF BUSINESS-GOVERNMENT RELATIONS 296 (1984). The first imported LNG project had been approved in 1972. *Id.* at 295–96.

156. Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 578 (1977).

157. Lyons, *supra* note 146, at A1.

158. GROSSMAN, *supra* note 143, at 182.

a transformation in the nation's energy—or today, more aptly climate—policy provides a unique opportunity to explore the debate surrounding the future of independent agencies. One reason seems apparent. Climate change populates modern political discourse about energy policy, while past conversations by Presidents Nixon, Ford, Carter, Reagan, both Bushes, and even to some extent President Clinton, have called for energy independence, an all-of-the-above energy strategy under President Obama, or now under the second Trump administration, energy dominance.<sup>159</sup> Whether an emphasis on energy dominance could diminish FERC's puissance for independent decision making capable of fostering a transition away from fossil fuels seems questionable. Yet the Trump administration has unleashed DOE and issued a flurry of Presidential directives that collectively appear designed—albeit unlikely—to usurp FERC's influence on energy markets.<sup>160</sup>

The administration's impulse in shaping energy policy by commandeering FERC's hand is part of its agenda to alter the administrative state.<sup>161</sup> There are two dimensions to this agenda: first, as we have witnessed since the outset of the administration, the White House's stated objective has been to shrink dramatically the administrative state; and the second objective is to facilitate a complete transition to a unitary executive theory, where the Chief Executive, or President, enjoys almost *carte blanche* oversight authority over the Executive Branch, including over independent agencies. This has become apparent as the administration has pressed its constitutional argument that it can force the resignation of independent agency commissioners.

But how current independent agencies, such as FERC can, or should, operate and be shielded from White House influence is a conversation initiated long ago, when progressives first envisioned independent agencies as unique because they combined the functions of legislating, enforcing, and adjudicating. This next Part, therefore, examines how the dialogue surrounding independent agencies unfolded, including how the FPC became an aspect of those conversations.

159. White House, American Energy Dominance Is Back Under President Trump, Feb. 24, 2026, White House Press Release, at <https://www.whitehouse.gov/releases/2026/02/american-energy-dominance-is-back-under-president-trump/>.

160. See *infra* notes 302, 330 and accompanying text.

161. This began during the first Trump administration. See William W. Buzbee, Deregulatory Splintering, 94 CHI.-KENT L. REV. 439 (2019); see also Rebecca Bratspies, The Trump Administration Versus the Administrative State: A Response to Professor Buzbee's Deregulatory Splintering, 94 CHI.-KENT L. REV. 685 (2020).

### A. Solidifying Agency Theory

Countless pages chart the growth of administrative agencies—today often pejoratively referred to as the administrative state.<sup>162</sup> This growth coincides with what I suggest are five phases in the evolution of administrative law.<sup>163</sup> Phase I witnessed the emergence of *de facto* administrative practice, where behavior was regulated by forces other than federal agencies, and non-judicial bodies adjudicated facts—with judicial review effectively circumscribed to enforcing ministerial, non-discretionary prescriptions.<sup>164</sup> Louis Jaffe posits the next phase occurred with the creation of the 1887 Interstate Commerce Commission, which “broke new ground” even though states through the Granger Movement presaged its development.<sup>165</sup> This facilitated an exploration into the role, functions, contours, as well as constitutional dimensions surrounding administrative agencies (or commissions) and the corresponding function of the judiciary. As such, scholars around the turn of the century began writing about and teaching “administrative law.”<sup>166</sup> While some “elite” law schools favored exploring the sociological dimensions of law, Harvard instead focused a bit more on administrative governance.<sup>167</sup> Not surprisingly, therefore, Harvard apparently offered the nascent Administrative Law course, taught by Bruce Wyman.<sup>168</sup> But other inquiries surfaced as well.<sup>169</sup>

162. I previously described this as a “growing *geist*.” Sam Kalen, *The Death of Administrative Common Law, or the Rise of the Administrative Procedure Act*, 68 RUTGERS L. REV. 605, 609 (2016).

163. *Id.* at 614–15.

164. *Id.* at 615–20. For the early role of administrative agencies, see JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW (2012); WILLIAM E. NELSON, THE ROOTS OF AMERICAN BUREAUCRACY 1830-1900 (1982); WILLIAM J. NOVAK, THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996); Jerry L. Mashaw, *The American Model of Federal Administrative Law: Remembering the First One Hundred Years*, 78 GEO. WASH. L. REV. 975, 976 (2010) (detailing origins of the federal administrative law structure); Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256 (2006); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986); see also Comm. on Admin. Procedure, *Administrative Procedure in Government Agencies*, S. Doc. No. 77-8, at 7–11 (1941)(committee report describing early history).

165. LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 9 (1965).

166. See, e.g., Ernst Freund, *The Law of the Administration in America*, 9 POL. SCI. Q. 403, 414 (1894).

167. See Peter Irons, *The New Deal Lawyers* 7–8 (1982).

168. BRUCE WYMAN, THE PRINCIPLES OF THE ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS (1903). See WILLIAM C. CHASE, THE AMERICAN LAW SCHOOL AND THE RISE OF ADMINISTRATIVE GOVERNMENT 60–65 (1982).

169. See FRANK J. GOODNOW, COMPARATIVE ADMINISTRATIVE LAW: AN ANALYSIS OF THE ADMINISTRATIVE SYSTEMS NATIONAL AND LOCAL, OF THE UNITED STATES, ENGLAND, FRANCE AND GERMANY (1893) (comparing the administrative structures of the United States, England, France, and Germany). See generally Nathan D. Grundstein, *Presidential Power, Administration and*

And by the New Deal and our third phase's characteristic push toward later codifying principles through the Administrative Procedure Act (APA), Justice Frankfurter confidently commented on "the place of administrative agencies in enforcing legislative policies."<sup>170</sup> The Progressive Era had laid the foundation, focusing on infusing administrative law into our constitutional structure and elevating the role of federal administrative bodies and their purported technical expertise in addressing social and economic behavior.<sup>171</sup> Franklin D. Roosevelt's administration imbued, according to Reuel Schiller, "a commitment to administrative government on a unprecedented scale."<sup>172</sup> Felix Frankfurter and other New Dealers entrusted technocrats with adequately assessing appropriate policy choices.<sup>173</sup> James Landis, perhaps more than any other, exemplifies the confidence in a commission's ability to make unbiased, reasoned policy choices for society's betterment.<sup>174</sup> And as Louis Jaffee later recounts, the New Deal fostered a robust dialogue on the nature of administrative agencies in the modern democratic society.<sup>175</sup> In 1939, therefore, President Roosevelt requested a report on administrative law procedural reforms.<sup>176</sup> And eventually following WWII Congress passed the APA in 1946.<sup>177</sup> Since then, the APA has facilitated legal scholars'

*Administrative Law*, 18 GEO. WASH. L. REV. 285, 287–92 (1950) (describing Wyman and Goodnow's approach). Louis Jaffe credits Ernst Freund with being the "first American master of" administrative law. Louis L. Jaffee, *An Essay on Delegation of Legislative Power*, 47 COLUM. L. REV. 359, 360 (1947). Freund published his first administrative law casebook in 1911 and a second one in 1928. See Ernst Freund, *Cases on Administrative Law* (1911); Ernst Freund, *Administrative Power Over Persons and Property* (1928). In 1894, Freund previously lamented the lack of enough appreciation for administrative governance among jurists. Freund, *supra* note 166, at 403. And he championed the need for the subject to "become one of the recognized branches of public law." *Id.* at 404.

170. *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 138 (1939).

171. See SAMUEL HABER, *EFFICIENCY AND UPLIFT: SCIENTIFIC MANAGEMENT IN THE PROGRESSIVE ERA, 1890–1920* 75–98 (1964); see also Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 413 (2007). For a masterful account of progressive ideology and the tendency toward totalitarianism and the efficacy of Hegelian progressivism, see BLAKE EMERSON, *THE PUBLIC'S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY* (2019). Emerson's account seeks to "establish that the resources exist within our philosophical tradition, political history, and legal repertoire to better realize the Progressive conception of the democratic state." *Id.* at 11.

172. Schiller, *supra* note 171, at 404.

173. *Id.* at 406; see also FELIX FRANKFURTER, *THE PUBLIC AND ITS GOVERNMENT* 87–88 (1930).

174. See THOMAS K. MCCRAW, *PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS, ALFRED E. KAHN* 212–16 (1984).

175. Jaffee, *supra* note 169, at 363.

176. See Joanna Grisinger, *Law in Action: The Attorney General's Committee on Administrative Procedure*, 20 J. POL'Y HIST. 379, 380 (2008); Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 274 nn. 80 & 82 (1972) (noting earlier 1936 study).

177. FDR vetoed the ABA's more conservative 1939 Walter-Logan bill. Then, in 1941, the Attorney General's Committee on Administrative Procedure issued a comprehensive examination of

emphasis on process; and this focus on process shifted in the 1970's from policy through adjudication toward rulemaking.<sup>178</sup>

## B. Regulatory Commissions

Since the New Deal, Presidents have sought to wield greater influence even as a commission model continued to resonate with Congress. Arthur Schlesinger's *The Imperial Presidency* aptly captures the gravitational forces toward Executive control. As Heidi Kitrosser notes, Schlesinger's "presidential mystique" has become "a cultural feature of the imperial presidency," which "amounts to a belief that the president alone has the knowledge, expertise, resources, and other tools to discern what is best for the nation."<sup>179</sup> Expanding on the reforms during the Progressive Era, the New Deal established "new regulatory commissions" for some sectors of the economy to serve as "orderly forums where the rules of competition could be agreed on and the clash of interests accommodated."<sup>180</sup> The powerful Texas Congressman Sam Rayburn, for instance, observed how the Securities and Exchange Commission served as an exemplar for the operation of an independent agency.<sup>181</sup>

Yet by the 1960s, the allure of truly independent agencies seemed awkward considering emerging principles of governmental organization.<sup>182</sup> To begin with, the office of the President, and

administrative procedure—embodying principles of the legal process school. *See* Grisinger, *supra* note 176, at 380, 389, 391, 400. Joanna Grisinger provides a detailed account of agencies during this period. JOANNA L. GRISINGER, *THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLICIES SINCE THE NEW DEAL* (2012).

178. *See generally* CONF. ON ADMIN. PROC., REPORT ON THE PROCEEDINGS CALLED BY THE PRESIDENT ON APRIL 29, 1953, §§ 9–14 (1953); Ferrel Heady, *The New Reform Movement in Regulatory Administration*, 19 PUB. ADMIN. REV. 89 (1959); Victor G. Rosenblum & Ruth Smalley, *Report of the Committee on Agency Rule Making*, 12 ADMIN. L. BULL. 180 (1960). A 1950's task force unsuccessfully favored certain changes, notably such as creating an Administrative Court. COMM'N ON ORG. OF THE EXEC. BRANCH OF THE GOV'T, LEGAL SERVICES AND PROCEDURE 31–93 (1955); *see also* Act of May 23, 1955, Pub. L. No. 84-41, 69 Stat. 64 (1955); Act of July 10, 1953, Pub. L. No. 83-108, 67 Stat. 142 (1953).

179. HEIDI KITROSSER, *RECLAIMING ACCOUNTABILITY: TRANSPARENCY, EXECUTIVE POWER, AND THE U.S. CONSTITUTION* 7 (2015).

180. DAVID M. KENNEDY, *THE AMERICAN PEOPLE IN THE GREAT DEPRESSION: FREEDOM FROM FEAR: PART 1* 371 (1999).

181. *Id.* at 367.

182. Four governmental studies prior to 1970 examined independent regulatory commissions: the Brownlow Report in 1937, the First and then Second Hoover Commission Task Forces on Independent Regulatory Commissions (in 1949 and 1955), and finally the Landis Report (1961). *See* Norman C. Thomas, *Politics, Structure, and Personnel in Administrative Regulation*, 57 VA. L. REV. 1033, 1036–1040 (1971). A 1955 Hoover Commission report suggested significant changes to the APA, as well as measures to make the process across agencies more uniform. *See generally* Whitney R. Harris, *The Hoover Commission Report: Improvement of Legal Services and Procedure*, 41 A.B.A. J. 497, 558 (1955).

correspondingly executive prerogative, received increased attention. The rise of progressivism and the expansion of the administrative state allowed new avenues for achieving policy preferences, and with it the ability of a President to promote a policy agenda.<sup>183</sup> Theodore Roosevelt, consequently, employed his bully pulpit as a “platform for his own policy preferences.”<sup>184</sup> This became more pronounced during Franklin D. Roosevelt’s tenure, as he used the office as a platform for reshaping the administrative landscape and promoting the New Deal.<sup>185</sup> And it continued with subsequent administrations, including the Kennedy and Johnson administrations.<sup>186</sup> This inertia toward the imperial presidency coalesced with three other forces to weaken the foundations for continued support for independent agencies.<sup>187</sup>

183. Morton Keller’s seminal *Affairs of State* chronicles how the rise of a new political science in the late nineteenth century, appreciating how technical expertise could be deployed to aid governmental administration, was a precursor to the Progressive Era, and that until then “party” generally dominated how a President would articulate policies. See MORTON KELLER, *AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA* 294–97 (1977). He also posits that patronage was the office’s “chief responsibility.” *Id.* at 298. This morphed into what others describe as the rise of the Administrator-in-Chief, with progressives believing “the new presidency embodied a particular role for the officeholder as the people’s representative, chief policymaker, and main government administrator.” Andrea Scoseria Katz & Noah A. Rosenblum, *Becoming the Administrator-In-Chief: Myers and the Progressive Presidency*, 123 COLUM. L. REV. 2153, 2163, 2165, 2210–13 (2023). President Taft, soon to be Chief Justice, embraced this role. *Id.* at 2218–20, 2227.

184. PERI E. ARNOLD, *REMAKING THE PRESIDENCY: ROOSEVELT, TAFT, AND WILSON, 1901–1916* 2 (2009); see generally DORIS KEARNS GOODWIN, *THE BULLY PULPIT: THEODORE ROOSEVELT, WILLIAM HOWARD TAFT, AND THE GOLDEN AGE OF JOURNALISM* (2013) (describing how President Theodore Roosevelt used his office and the press to shape popular opinion toward Roosevelt’s objectives). According to Peri Arnold, Roosevelt changed the presidency by “stimulating new public expectations for what presidents might do and illustrating the uses of new levers of power.” Arnold, *supra*, at 196. President Hoover, though, reportedly even interceded successfully in an Interstate Commerce Commission rate case. See LOUIS M. KOHLMEIER, JR., *THE REGULATORS: WATCHDOG AGENCIES AND THE PUBLIC INTEREST* 40 (1969).

185. Daniel Boorstin suggests that “technological and institutional innovations had in many ways prepared the way for a transformation of the relation between President and People,” which translated into FDR being the nation’s first “‘nationally advertised’ President.” Daniel J. Boorstin, *Selling the President to the People*, in *THE NEW DEAL: WHAT WAS IT?* 13, 13 (Morton Keller ed., 1963).

186. See DAVID M. WELBORN, *REGULATION IN THE WHITE HOUSE: THE JOHNSON PRESIDENCY* 58–162 (1993) (chapters “Attending to Commission Regulation” and “Executive Regulation”).

187. Brian D. Feinstein and Jennifer Nou explain that, as independent agencies surfaced in the “judicial crosshairs,” they became a keen topic of academic inquiry. Feinstein & Nou, *supra* note 17, at 946. They have been a topic of academic inquiry for quite some time. E.g., Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 CARDOZO L. REV. 273 (1993); Robert G. Dixon Jr., *The Independent Commissions and Political Responsibility*, 27 ADMIN. L. REV. 1 (1975); Sarah Megan Erb, *Independent Agencies: A Constitutional Violation with a Negligible Remedy*, 75 BAYLOR L. REV. 518 (2023); Walker J. Gray, “Dependent” Independent Agencies: How Humphrey’s Executor Envisioned Independent Agencies and the NLRB’s Inconsistency with This Vision, 53 CUMB. L. REV. 77 (2023); Nathaniel L. Nathanson, *Separation of Powers and Administrative Law: Delegation, the Legislative Veto, and the “Independent” Agencies*, 75 NW. U. L. REV. 1064 (1981); Glen O. Robinson, *On Reorganizing the Independent Agencies*, 57

### C. Enlisting the Judiciary as a Check on Agency Behavior

To begin with, the heightened emphasis on participatory democracy and its ancillary need for public disclosure of governmental information and active citizen engagement subtly marred the Progressive Era notion of dispassionate scientific management by expert, independent agency technocrats.<sup>188</sup> Historians began portraying how administrative governance, including by agencies seemingly staffed by technocrats, nevertheless engaged in policy choices influenced by surrounding societal factors.<sup>189</sup> Professor Joseph Sax's seminal work on citizen enforcement of environmental programs stemmed from a distrust of agency governance.<sup>190</sup> Paul Sabin, for instance, discusses how post-WWII liberalism, infused with public engagement, challenged big government and its sometimes-lax oversight.<sup>191</sup> He explores how Ralph Nader's inquiry into the FTC illustrated the relevance of citizen engagement in policy-making. And Nader described the FTC as a "self-parody of bureaucracy, fat with cronyism, torpid through an inbreeding unusual even for Washington, manipulated by the agents of commercial predators, impervious to governmental and citizen monitoring."<sup>192</sup> Such ostensible institutional agency biases occasionally manifested amid dialogues about rent seeking behavior and how agencies could become "captured" by (or overly deferential to) the agencies they regulated.<sup>193</sup> As such, starting

VA. L. REV. 947 (1971); Charles N. Steele & Jeffrey H. Bowman, *The Constitutionality of Independent Regulatory Agencies Under the Necessary and Proper Clause: The Case of the Federal Election Commission*, 4 YALE J. ON REG. 363 (1987); Sally Katzen et al., *Independent Agencies—Independent From Whom?*, 41 ADMIN. L. REV. 491 (1989); Susan Sommer, *Independent Agencies as Article One Tribunals: Foundations of a Theory of Agency Independence*, 39 ADMIN. L. REV. 83 (1987); Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L. J. 257 (1988).

188. "During the last few years of the 1960s the word 'participation' became part of the popular political vocabulary." CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 1 (1970). Cass Sunstein aptly notes the dominant modern liberal sentiment when he explains how governmental officials "know a lot," although "inevitably, they lack important information that members of the public have" and governmental regulation needs to be, in his words, "simpler." CASS R. SUNSTEIN, SIMPLER: THE FUTURE OF GOVERNMENT 216 (2013). He further explains how, when he led the Office of Information and Regulatory Affairs, the White House exercised its prerogative and rejected the Environmental Protection Agency's proposed change in the national ambient air quality standards for ozone under the Clean Air Act. *Id.* at 27.

189. See Samuel P. Hayes, *Political Choice in Regulatory Administration*, in REGULATION IN PERSPECTIVE 124, 126 (Thomas K. McCraw ed., 1981).

190. See Sam Kalen, *Policing Federal Supremacy: Preemption and Common Law Damage Claims as a Ceiling to the Clean Air Act Regulatory Floor*, 68 FLA. L. REV. 1597 (2016).

191. See PAUL SABIN, PUBLIC CITIZENS: THE ATTACK ON BIG GOVERNMENT AND THE REMAKING OF AMERICAN LIBERALISM (2021).

192. *Id.* at 38.

193. See generally DANIEL CARPENTER & DAVID A. MOSS, PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT (2013); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. OF ECON. AND MGMT. SCI. 3 (1971) (article often credited with

around the 1960s the notion of agency accountability prompted “consumer and environmental advocates . . . to prevent agency capture by regulated interests.”<sup>194</sup> Indeed, following BP’s Macondo Well blowout in the Gulf of Mexico, a chorus of voices argued how the Minerals Management Service had become captured by the industry and lax in its enforcement.<sup>195</sup> Of course, modern agencies often have institutional mechanisms designed to prevent agency capture.<sup>196</sup>

Regardless of whether agency capture and public choice theory accurately characterize actors engaging in rent-seeking behavior, citizen engagement necessarily diminishes the idealistic vision of administrative agencies. From my own experience inside the Interior Department, federal officials work diligently to craft and implement policies in the public interest.<sup>197</sup> But policy choices invariably are influenced by societal pressures, political pressures, existing legal constraints, and participation by stakeholders. Jim Rossi aptly explains this behavior as regulatory bargaining.<sup>198</sup> Yet, however we describe the sociological behavior animating agency behavior, once that behavior is recognized as a discretionary process capable of arriving at a range of outcomes, the need for citizen engagement becomes apparent; and as such, we can no longer accept agency choice as simply a product of a technical expert.<sup>199</sup> This

developing theory); *see also* Scott Hempling, “Regulatory Capture”: Sources and Solutions, 1 EMORY CORP. GOVERNANCE & ACCOUNTABILITY REV. 23 (2014) (written by an energy law practitioner and scholar); *Cf.* William J. Novak, *A Revisionist History of Regulatory Capture*, in Carpenter, *supra* at 25.

194. Sidney A. Shapiro & Rena I. Steinzor, *Capture, Accountability, and Regulatory Metrics*, 86 TEX. L. REV. 1741, 1742 (2008).

195. *E.g.*, *BP and Other Companies Exploited a Regulatory Agency to Continue Negligent Offshore Drilling*, UNION OF CONCERNED SCIENTISTS (Oct. 12, 2017), <https://www.ucs.org/resources/bp-and-other-companies-exploited-regulatory-agency-continue-negligent-offshore-drilling> [<https://perma.cc/ZUY9-E9L5>]. *See generally* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 37–41 (2010); Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L. J. 1337 (2013).

196. Barkow, *supra* note 195, at 7, 18; Livermore & Revesz, *supra* note 195, at 1377–78.

197. Cass Sunstein makes this point. *See* Sunstein, *supra* note 188, at 149–50, 177, 180, 215.

198. JIM ROSSI, REGULATORY BARGAINING & PUBLIC LAW (2005).

199. “The theory and practice of administrative government must satisfy the competing expectations of discretion, on the one hand, and political accountability and the rule of law on the other.” BRYNER, *supra* note 141, at 9. Process might cabin discretion, but the seminal cases, of *Chevron v. NRDC*, 467 U.S. 837 (1984), and *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983), reflected how a decision from one administration could be altered by the next, a reality now readily apparent since the Obama administration. It would be up to the judiciary, therefore, to review possibly aberrant behavior for arbitrariness or capriciousness. *See* Michael A. Livermore & Daniel Richardson, *Administrative Law in an Era of Partisan Volatility*, 69 EMORY L. J. 1 (2019); Sidney A. Shapiro & Richard W. Murphy, *Arbitrariness Review Made Reasonable: Structural and Conceptual Reform of the “Hard Look,”* 92 NOTRE DAME L. REV. 331 (2016). But political influence might creep in, and as Mark Seidenfeld warns, should be avoided as a sufficient justification upon review. Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious*

recognition took on added force as citizen enforcement became more frequent.

#### D. Presidential Control and the Presidential Removal Power?

Second, the 1970s explored more critically the necessity for independent regulatory bodies.<sup>200</sup> Indeed, by 1970, prominent voices suggested that the independent commission model ought to be jettisoned.<sup>201</sup> But dialogues surrounding the nature and function of independent commissions had surfaced earlier, particularly when President Franklin D. Roosevelt's fired Federal Trade Commissioner William Humphrey, precipitating the Supreme Court's decision in *Humphrey's Executor v. United States*.<sup>202</sup> And our contemporary debate is whether that decision ought to be overruled and, correspondingly, what ought to be the function, if any, of independent agencies. When examining *Humphrey's Executor*, however, we should appreciate how the opinion occurred under unique circumstances that ought to tell us little about Presidential control over independent agencies.

The favoritism during the New Deal toward a new paradigm of administrative governance partially explains the opinion in *Humphrey's Executor*. Not all scholars championed affording experts considerable unsupervised power to adjust economic and social relations. For instance, while Frankfurter's allegiance to agencies suggested limited judicial review, Freund conversely feared delegating too much authority to agencies—absent effective oversight.<sup>203</sup> Roscoe Pound similarly expressed trepidation on allowing experts to wield too much authority, suggesting that political pressure is necessary as a check.<sup>204</sup> But more significantly, Justice George Sutherland, the author of *Humphrey's Executor*, warned in 1917 when serving as President of the American Bar

*Review*, 90 WASH. U. L. REV. 141, 197 (2012); see also Ron Levin, *Hard Look Review, Policy Change, and Fox Television*, 65 U. MIA. L. REV. 555, 561, 571, 573 (2011) (accepting changing administration's policy preferences if justified on merits).

200. See WILLIAM L. CARY, *POLITICS AND THE REGULATORY AGENCIES* 60–89 (1967) (Chairman of the SEC during the early 1960s, discussing role of such agencies); R. W. Lishman, "Independence" in *the Independent Regulatory Agencies*, 13 ADMIN. L. REV. 133, 135 (1961) (former Chief Counsel, House Special Subcommittee on Legislative Oversight); see also ROBERT E. CUSHMAN, *THE INDEPENDENT REGULATORY COMMISSIONS* 146–491 (1941); Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORN. L. REV. 769, 771–72 (2013).

201. See *infra* notes 244–46 and accompanying text.

202. *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

203. See Ernst Freund, *Historical Survey*, in *THE GROWTH OF AMERICAN ADMINISTRATIVE LAW* 9, 24 (Ernst Freund et al. eds., 1923); see also Grundstein, *supra* note 169, at 324–25.

204. See Schiller, *supra* note 171, at 423.

Association that administrative agencies threatened liberty.<sup>205</sup> Ostensibly echoing aspects of earlier remarks by Elihu Root,<sup>206</sup> Sutherland questioned whether Congress adequately appreciated the consequences of creating what he perceived as unbridled agencies with inadequate staff.<sup>207</sup> Then, as a Justice, Sutherland subsequently warned that, while administrative agencies may be necessary, absent sufficient judicial oversight against arbitrary behavior they might threaten “fundamental rights, privileges, and immunities of the people.”<sup>208</sup> And his opinion in *Humphrey’s Executor* became the third of the Supreme Court’s May 27, 1935 Black Monday dramatic decisions.<sup>209</sup>

As Justice Jackson observed, the FTC “had notoriously failed to carry out the expectations of President Wilson in its creation.”<sup>210</sup> Years later

205. George Sutherland, President of the American Bar Ass’n, *Private Rights and Government Control*, in Report of the Fortieth Annual Meeting of the American Bar Association 197, 204 (Sep. 4, 1917), reprinted in S. Doc. No. 119 (1917). That same year, one lower court observed:

The question of delegation of power by the Legislature, and especially legislative power to other branches of the government, to administrative boards or to individuals, has been a question that has caused a great deal of controversy in the courts, not only in the state courts, but also in the federal courts. It has been said that the Legislature makes the law, that the executive executes the law, and that the judiciary expounds or determines what the law is.

Cook v. Burnquist, 242 F. 321, 324 (D. Minn. 1917).

206. In 1909, Root warned that centralization of authority at the federal level was reaching a breaking point, and in 1916 he addressed the need to police agency behavior. Elihu Root, *Public Service by the Bar* (Aug. 30, 1916), in REPORT OF THE THIRTY-NINTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 355, 368–69 (1916). But Root was a prominent progressive who favored regulating industry and whom President Franklin D. Roosevelt would later quote in a fireside chat. DAVID M. KENNEDY, *THE AMERICAN PEOPLE IN THE GREAT DEPRESSION: FREEDOM FROM FEAR: PART 1* 246 (1999).

207. See Sutherland, *supra* note 205, at 204, 206. See Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 265 (1978) (suggesting concern could stem from classical liberalism’s tether to procedure and an adversarial system).

208. *Jones v. SEC*, 298 U.S. 1, 23–25 (1936). See Mark Tushnet, Lecture, *Administrative Law in the 1930s: The Supreme Court’s Accommodation of Progressive Legal Theory*, 60 DUKE L.J. 1565, 1610–12 (2011) (discussing case).

209. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) was the first, while *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935) was the second one, invalidating the Federal Farm Bankruptcy Act of 1934. *Schechter*, though, striking down part of the NIRA and garnering concurrences by even progressive Chief Justice Stone and Justice Cardozo, “seemed to be based more on the extremity of the delegation than upon any inherent objection to delegation itself.” WILLIAM G. ROSS, *THE CHIEF JUSTICESHIP OF CHARLES EVANS HUGHES, 1930-1941* 68 (2007). Of course, in January “[t]he first storm warning that the Nine Old Men had not been wholly converted to Mr. Roosevelt’s philosophy came on January 7, 1935, when Chief Justice Hughes read the majority opinion in the hot-oil case.” DREW PEARSON AND ROBERT S. ALLEN, *THE NINE OLD MEN* 242–43 (1936). Yet, even Justice Frankfurter reportedly warned that any early test of the NIRA would prove suicidal. *Id.* at 268. See also IRONS, *supra* note 167, at 14 (discussing Frankfurter’s view); AMITY SHLAES, *THE FORGOTTEN MAN: A NEW HISTORY OF THE GREAT DEPRESSION* 239 (2007) (Frankfurter counseled against having *Schechter* as a test case at the Court).

210. ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS* 107 (1941).

President Roosevelt “became convinced that it could never function successfully without changes in its personnel.”<sup>211</sup> One such change involved Humphrey, appointed first by President Coolidge in 1925 and then again by Hoover in 1931 and considered a “reactionary and dilatory” member by Robert (Justice) Jackson.<sup>212</sup> Soon after his inauguration, therefore, Roosevelt fired Humphrey (after Humphrey refused to resign) with an explanation that he had lost confidence that Humphrey would follow the policies of the administration or adequately administer the FTC.<sup>213</sup> Humphrey in several letters objected vigorously to Roosevelt’s action and eventually sued seeking back pay—and his estate continued the lawsuit after Humphrey died shortly after filing his case.<sup>214</sup>

According to Jackson, Humphrey’s obstinacy was an adequate justification for his dismissal.<sup>215</sup> After all, the Supreme Court in *Myers v. United States* had sided with the President.<sup>216</sup> President Roosevelt even consulted with James Landis, a former law clerk to Justice Brandeis who had dissented in the *Myers* case and allegedly gave FDR some assurances,<sup>217</sup> although Landis later suggested that *Humphrey’s* was

211. *Id.*

212. *Id.*; see also ROSS, *supra* note 209, at 70–71 (describing him as “pugnacious conservative Republican”). Humphrey opposed reform, effectively protecting industry. *Id.* See generally William E. Leuchtenberg, *The Case of the Contentious Commissioner: Humphrey’s Executor v. U.S.*, in FREEDOM AND REFORM: ESSAYS IN HONOR OF HENRY STEELE COMMAGER 276 (Harold M. Hyman & Leonard W. Levy, eds., 1967). For a thorough account of the *Humphrey’s* incident, see MARK V. TUSHNET, *THE HUGHES COURT: FROM PROGRESSIVISM TO PLURALISM, 1930-1941, VOL. XI THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 480–84 (2021).

213. ROSS, *supra* note 209, at 70. Roosevelt’s removal of the Chair of the Tennessee Valley Authority is another instance where the President injected himself into the management of federal organizations. By early 1938, he lost respect for Chair Morgan and convened White House investigatory meetings and eventually removed Morgan from the TVA. See PRITCHETT, *supra* note 67, at 203–07. In one communication, the President opined how he could not countenance “any subordinate in the executive branch of the Government . . . refus[ing] to give his superior or to the Chief Executive himself facts sought” and that there must be “accountability.” *Id.* at 206.

214. TUSHNET, *supra* note 209, at 483–84. William J. Donovan, who reportedly enjoyed a close historical relationship with FDR, represented Humphrey’s executor. Brian Sullivan, *William J. Donovan*, COLUMBIA250, [https://c250.columbia.edu/c250\\_celebrates/your\\_columbians/william\\_j\\_donovan.html](https://c250.columbia.edu/c250_celebrates/your_columbians/william_j_donovan.html) [https://perma.cc/T52G-XE9P].

215. JACKSON, *supra* note 210, at 107 (relying on *Myers v. United States*, 272 U.S. 135 (1926)).

216. *Myers v. United States*, 272 U.S. 135. (2016).

217. James M. Landis, *Mr. Justice Brandeis: A Law Clerk’s View*, 46 PUBL’N OF THE AM. JEWISH HIST. SOC’Y 467, 472 (1957); see also ROBERT C. POST, *THE TAFT COURT: MAKING LAW FOR A DIVIDED NATION, 1921-1930, VOL. X.I THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 445 n. 172 (2024) (noting Landis’s article); MELVIN I. UROFSKY, *LOUIS D. BRANDEIS: A LIFE* 704 (2009); ARTHUR M. SCHLESINGER, JR., *THE AGE OF ROOSEVELT: THE POLITICS OF UPHEAVAL* 279 (1960).

correctly decided.<sup>218</sup> William Myers was the postmaster for the Portland, Oregon office and engaged in questionable practices that led national managers to call for his resignation in January 1920, but he refused to resign (his term ending in 1921) and argued that only the Senate could remove him and requested a Senate hearing.<sup>219</sup> Wilson instead fired him, and Myers initiated his lawsuit seeking compensation for the remainder of his term—and his wife continued the lawsuit once Myers passed away.<sup>220</sup> Chief Justice Taft held that Congress could not restrict the President’s power to remove Myers, exhibiting concern with limiting the President’s power and reasoning that tradition suggested no limits on removal.<sup>221</sup>

In *Humphrey’s Executor*, though, the Court announced that FDR had gone too far. Samuel F. Rathbun, as the Executor, argued that Congress most likely intended to limit the President’s authority to remove a commissioner except for the stated reasons, and invoked the debates surrounding the Decision of 1789 to distinguish between those officers

218. Later in life Landis seemingly favored “a more robust presidential role.” Mariano-Florentino Cuéllar, *James Landis and the Dilemmas of Administrative Government*, 83 GEO. WASH. L. REV. 1330, 1338 (2015). Landis’ later reference to *Humphrey’s* simply reported that the scope of the removal power was unclear, although if a statute expressly requires for “cause” it would apply. JAMES M. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 30 (Dec. 1960), Submitted by the Chairman of the Subcommittee on Administrative Practice and Procedure to the Committee on the Judiciary, U.S. Senate, Comm. Print, 86th Cong., 2d Sess., Dec. 1960 (hereinafter “Landis Report”).

219. See POST, *supra* note 217, at 401–47; TUSHNET, *supra* note 212, at 476. Mark Tushnet notes how others suggest the Senate would have removed him, if asked, but that President Wilson for “an accumulation of reasons” opted against asking. *Id.* at 476 n.11. Katz and Rosenblum chronicle the communications between Myers and his superiors asking that he resign. Katz & Rosenblum, *supra* note 183, at 2178–79. The reason why President Wilson may have chosen to test his authority to remove Myers are explored in Jonathan L. Entin, *The Curious Case of the Pompous Postmaster: Myers v. United States*, 65 CASE W. L. REV. 1059 (2015). Entin suggests Wilson might have become “increasingly sensitive to presidential prerogative.” *Id.* at 1072. Conversely, Katz and Rosenblum posit that the historic practice of simply submitting a replacement postmaster to Congress for its assent might be explained by Wilson’s stroke and the leadership vacuum inside the White House. Katz & Rosenblum, *supra* note 183, at 2181–82.

220. POST, *supra* note 217, at 401–02; Tushnet, *supra* note 208, at 476.

221. *Id.* at 478. Professor Tushnet describes the history surrounding the Decision of 1789, representing a “deliberate endorsement” against allowing the Senate the power to condition removal. *Id.* at 478–79. See also Jed H. Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. PA. L. REV. 753 (2023) (exploring the decision of 1789). Edwin Corwin endorsed Justice Brandeis’ dissent and wrote how the Decision of 1789 did not justify the *Myers* outcome. EDWARD S. CORWIN, THE PRESIDENT’S REMOVAL POWER UNDER THE CONSTITUTION vi (1927). Three conservative Justices joined Taft’s opinion out of deference to the Chief Justice rather than because they agreed with the outcome. UROFSKY, *supra* note 217, at 704. Taft had previously advocated for greater presidential prerogative and arguably it was Taft more than Wilson that sought to secure a heightened executive power. POST, *supra* note 217, at 403–04; Entin, *supra* note 219, at 1073–75. In a thoughtful article, professors’ Katz and Rosenblum explain why *Myers* ought to be considered as an aberration, and further that subsequent Justices ignore the “case’s place in history.” Katz & Rosenblum, *supra* note 183, at 2159–61, 2164. They further describe how Taft used the *Myers* case as a forum for advancing his “theory of the presidency.” *Id.* at 2227.

whose duties were purely executive and those whose nature and function allowed Congress the ability to impose reasonable restrictions on removal.<sup>222</sup> He abjured *Myers*' application, because there removal was not "necessary to protect the executive branch of the government in its power to control through the power of removal officers exercising executive functions."<sup>223</sup> The Court agreed; it construed the FTC's language as limiting a President's power to remove a commissioner only for "inefficiency, neglect of duty or malfeasance in office." And it rejected Stanley Reed's argument for FDR that the functions of the FTC were no different than other agencies where the President's removal power was accepted.<sup>224</sup> He warned of "[t]he 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."<sup>225</sup>

Although Justice Brandeis respected FDR's political leadership, he subsequently remarked that agency commissioners must be "allowed to exercise their independent judgment [or] we should have in effect a dictatorship or a totalitarian state."<sup>226</sup> A few years later, Robert Jackson observed:

Small wonder that the decision became a political instrument. Those who saw executive dictatorship just round the corner had their fears confirmed: the President could be restrained only by the Court. Those who thought the ghost of dictatorship wore judicial robes had their fears, too, confirmed: the Court was apply to President Roosevelt rules different from those it had applied to his predecessors.<sup>227</sup>

222. Brief for Samuel F. Rathbun as Executor of the Estate of William E. Humphrey, Deceased at 7, 18, 36-37, *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935) (No. 667). The Executor distinguished *Myers* because there "Congress attempted to appropriate the power of removal by requiring the assent of the Senate to removals. Such a restriction is clearly to be distinguished from the statute here concerned in which the President has the exclusive power to remove in accordance with a standard enacted by Congress." *Id.* at 7, 26. The government argued that *Shurtleff v. United States*, 189 U.S. 311 (1903) justified expanding the basis for removal, while the Executor dispatched any suggested similarity with *Shurtleff* by noting how the commissioners' terms are limited, thus justifying the general canon of construction ignored by the Court in *Shurtleff*, *expressio unius est exclusio alterius*. *Id.* at 10-11. Also, "[w]ithout exception, textbooks and State decisions hold that where a statute provides that an officer may be removed by the Executive for specified cause the Executive has no power to remove him for any other cause." *Id.* at 14.

223. *Id.* at 22-23. An FTC commissioner, the Executor observed, acts as an agent both for Congress when performing legislative functions and for the courts when engaging in adjudicatory functions, and not simply as an agent of the executive. *Id.* at 23.

224. Brief for the United States at 24-25, *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935) (No. 667).

225. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935).

226. ALPHEUS THOMAS MASON, *BRANDEIS: A FREE MAN'S LIFE* 619, 621 (1946).

227. ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS* 109 (1941).

And Roosevelt considered the opinion a personal affront against him and his New Deal program.<sup>228</sup>

In 1936, Roosevelt established the Brownlow Commission, charged with examining governmental reorganization, and it issued a report in January 1937. The report referred to the “irresponsible and headless ‘fourth branch’ of the Government” and criticized the use of boards and commissions.<sup>229</sup> When urging consideration of the report, FDR posited that the report was not suggesting increasing presidential power, although he then continued by claiming that instead he sought “the tools of management and the authority to distribute the work so that the President can effectively discharge those powers which the Constitution now places upon him.”<sup>230</sup> In draft remarks before he passed away, former Justice Jackson commented on the Brownlow report and how commissions had become accepted under our constitutional system, although “for three quarters of a century Congress has continued to launch these agencies without facing and resolving the administrative law problems which their functions precipitated.”<sup>231</sup>

#### E. From James Landis to Roy Ash, and Beyond

New Deal champion James Landis defended the administrative state, including the need for independent agencies when he prepared his report for President Kennedy. He explained how agencies could advance the ideals of the New Deal while the judiciary could not.<sup>232</sup> He ostensibly championed the *Humphrey’s Executor* decision while decrying *Myers*.<sup>233</sup> Yet he questioned the progressive-era tenet of decisions made by expert technocrats.<sup>234</sup> When addressing the notion of “independence,” he favored increased power for commission chairmen and commented how “[t]here

228. ROSS, *supra* note 209, at 72. FDR may have been isolated on this issue; not only had Justice Brandeis favored *Humphrey’s executor*, but FDR’s ally Justice Frankfurter would later endorse Brandeis’ sentiment and affirm the principle of *Humphrey’s*. *Wiener v. United States*, 357 U.S. 349 (1958) (War Claims Commission). Justice Frankfurter commented how the “[c]ontroversy pertaining to the scope and limits of the President’s power of removal fills a thick chapter of our political and judicial history.” *Id.* at 351.

229. PRESIDENT’S COMM’N. ON ADMIN. MGMT., *Administrative Management in the Government of the United States* 46 (1937).

230. President Franklin D. Roosevelt, *Message to Congress Recommending Reorganization of the Executive Branch* (Jan. 12, 1937), <https://www.presidency.ucsb.edu/documents/message-congress-recommending-reorganization-the-executive-branch> [<https://perma.cc/75KV-WX23>].

231. Robert H. Jackson, *The Supreme Court in the American System of Government* 45–46 (1957).

232. See James M. Landis, *The Administrative Process-The Third Decade*, 13 ADMIN. L. REV. 17, 18 (1961).

233. *Id.*

234. *Id.* at 21. He directed his criticism toward agencies’ failure to engage in transparent reasoned decision-making. *Id.* at 21. He posited better agency appointments as one solution. *Id.* at 22.

is much to be said for this change since the broad policy pursued by the agencies should fall in line with that of the Administration as a whole.”<sup>235</sup> He further questioned the notion of true “independence” when discussing the impact of congressional oversight.<sup>236</sup> And most likely because he considered the FPC as “without question represent[ing] the outstanding example of . . . the breakdown of the administrative process,”<sup>237</sup> he suggested enhancing the powers of the FPC Chairman and increasing the size of the Commission, as well as having the chair serve at the President’s pleasure.<sup>238</sup> This, to him, seemed logical, because in the energy policy arena he considered “interaction” among agencies “essential” and yet “substantially” nonexistent.<sup>239</sup> Indeed, presaging today’s constitutional arguments pressed by the Trump administration, he noted how the President has a “constitutional duty to see that the laws are faithfully executed and this duty” applies to all regulatory agencies, including independent ones.<sup>240</sup> And for him, the FPC’s “patent failure . . . to execute” the Natural Gas Act (NGA) served as a prime example.<sup>241</sup> The Landis report, however, became according to Carl McFarland simply “The Voice of One Crying in the Wilderness.”<sup>242</sup>

That voice nevertheless lingered and grew increasingly louder over the next decades. By 1971, continuing efforts to coordinate and reorganize the government had once again captured the Executive Office and congressional attention. Indeed, one of the animating forces behind

235. *Id.* at 23. Landis added that a rotating commission model does not favor expertise development. *Id.*

236. *Id.* at 24.

237. Landis, *supra* note 99, at 54, 66, 71. Landis reported the Commission’s backlog amounted to an “interminable delay,” beyond that of any other agency. *Id.* at 6. He recognized, however, that the Court’s *Phillips* decision contributed to the Commission’s enormous backlog. *Id.* at 7, 10.

238. *Id.* at 58, 85.

239. *Id.* at 28. His report emphasized the urgency of mechanisms for coordinating agencies to address national problems. *Id.* at 32.

240. *Id.* at 32.

241. *Id.* at 32–33, 55–57. His overly stern critique of the Commission’s response to *Phillips* overlooks how the Court created the problem and Congress failed to fix it; and further that the Commission engaged in area-wide ratemaking to mitigate the lengthy process, but it still required time. See NORDHAUS, *supra* note 79, at 83–84.

242. Carl McFarland, *Landis’ Report: The Voice of One Crying in the Wilderness*, 47 VA. L. REV. 373 (1961). President Kennedy’s message to Congress on Reorganization Plan No. 6, in June 1961, echoed a concern that the chair of commissions such as the FPC should have authority for “day-to-day administration” rather than it being entrusted to the entire commission. President John F. Kennedy, Special Message to the Congress Transmitting Reorganization Plan 6 of 1961 (June 12, 1961), <https://www.presidency.ucsb.edu/documents/special-message-the-congress-transmitting-reorganization-plan-6-1961> [<https://perma.cc/9CWK-TGVN>]. See also Reorganization Plan No. 3 of 1961, 75 Stat. 837, July 3, 1961 (Civil Aeronautics Board); Reorganization Plan No. 4 of 1961, 75 Stat. 837, July 9, 1961 (FTC); Reorganization Plan No. 6, of 1961, 75 Stat. 838, Aug. 12, 1961, 75 Stat. 838 (Federal Home Loan Bank Board).

Congress' passage of the National Environmental Policy Act in 1969, and the creation of the Council on Environmental Quality, was to foster greater coordination and communication among agencies.<sup>243</sup> That sentiment infused President Nixon's Reorganizational Council led by Roy Ash. The Council scorned independent commissions,<sup>244</sup> and its resulting 1971 recommendations included, for instance, having the FPC (and other commissions) run by a single administrator.<sup>245</sup> Soon to be Justice Breyer echoed the dominant response to the Ash Council report by suggesting it failed to delve deeply enough into the actual "functional" problems with agencies.<sup>246</sup> And when addressing the FPC, Breyer intimated that greater coordination might be appropriate because the Commission had not adequately addressed environmental issues associated with its energy decisions.<sup>247</sup> Then, by the 1980s, a conservative ideology would join with the inertia toward the imperial presidency and the desire for increased White House control and solidify into an ideological battle to establish a unified executive.<sup>248</sup> The forces promoting a unified executive became pronounced first during President Reagan's tenure and then during Vice President Dick Cheney's reign inside the Bush White House.<sup>249</sup>

Liberals, too, while disclaiming acceptance of the unitary executive theory, advanced a willingness to promote executive flexibility. For instance, before she joined the Court, Elena Kagan wrote a seminal article accepting a principle of presidential administration,<sup>250</sup> as others also endorsed enhancing executive flexibility in response to congressional

243. See SAM KALEN, *ECOLOGY COMES OF AGE: THE RISE AND FALL OF THE NATION'S MAGNA CARTA, THE NATIONAL ENVIRONMENTAL POLICY ACT* (unpublished manuscript) (on file with author).

244. See Robinson, *supra* note 187, at 948.

245. Thomas, *supra* note 182, at 1054. The report by James Landis was the principal study during the Kennedy administration. JAMES LANDIS, *REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT* (1960). Less formal task force reports surfaced during the Johnson Administration. See Glen O. Robinson, *On Reorganizing the Independent Regulatory Agencies*, 57 VA. L. REV. 947, 947 n.3 (1971).

246. Stephen Breyer, *The Ash Council's Report on the Independent Regulatory Agencies*, 2 BELL J. OF ECON. & MGMT. SCI. 638, 637 (1971). Breyer waffled on generally replacing a commission with a single head. *Id.* at 630.

247. *Id.* at 635–36. He further suggested that the FPC's natural gas ratemaking was not being performed correctly. *Id.* at 632.

248. See generally STEVEN CALABRESI & CHRISTOPHEHR YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008); Cass R. Sunstein and Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 SUP. CT. REV. 83.

249. According to Judge Lessig and Cass Sunstein, the movement gained currency during "President Reagan's efforts to assert hierarchical control over the bureaucracy." Lawrence Lessig and Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 5 (1994).

250. See generally Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (defending the trend of presidents increasingly using the administrative state to affect their policy goals and political agenda).

gridlock.<sup>251</sup> She yielded to presidential oversight and control of administrations as an accepted norm for the modern administrative state: it arguably promotes democracy by embracing accountability through the political process.<sup>252</sup> Jim Rossi and Jody Freeman similarly favor presidential oversight as an appropriate mechanism for addressing matters involving shared regulatory space by various agencies.<sup>253</sup> Indeed, Jody Freeman and Sharon Jacobs discuss how subtle presidential decisions, on matters such as leadership, staffing, budgets, allocating resources and the like can impact agency behavior and, in their words, attack the core aspect of the modern administrative state.<sup>254</sup> Of course, while Freeman and Jacobs suggest this type of structural deregulation as they call it is not only problematic but also stealthy,<sup>255</sup> the stealthy nature seems no longer true during the second Trump administration.

All this counsels, at the very least, the need to explore the function and appropriateness of “independent” regulatory commissions in the modern era, including the FERC. Their genesis, after all, was the ICC and the political aspects associated with railroad regulation rather than any grand theory.<sup>256</sup> Back in 1975, Robert G. Dixon, Jr., called for a “Separation of

251. See, e.g., Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1130 (2010); Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141, 144–45 (2012); see also Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 507–13 (1985) (favoring increased presidential control); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 452–63 (1987) (supporting presidential control cabined by sufficient checks and balances).

252. Kagan, *supra* note 250, at 2331–39. Presidential administration seemingly undermines the progressive era tenet of technocratic decision making. See Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L. J. 1811, 1814 (2012).

253. Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1135–36 (2012).

254. Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585 (2021). It would take us too far afield to discuss more fully, but the role of the Office of Management Budget and the “blood sport” nature of rulemaking, as Thomas McGarity coins it, Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L. J. 1681 (2012) (parroting refrain from an SEC official), all contribute to the structural deregulation. See generally Lisa Heinzerling, *Response, Classical Administrative Law in the Era of Presidential Administration*, 92 TEX. L. REV. 171, 172–73 (2014) (discussing approvingly Farber and O’Connell’s observation that classical administrative law has been superseded by informal administrative practices); see also Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1261–62 (2006) (arguing that agencies do not tend to overregulate, counter to the expectations of the OMB); Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 533 (1989) (arguing that presidential oversight of the administrative state is legitimate so long as it is constrained within appropriate bounds of law and policy).

255. See Freeman & Jacobs, *supra* note 254, at 590.

256. See Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1115–16 (2000).

Powers Commission to look at these questions systematically for the first time since 1787 and to make recommendations.”<sup>257</sup> Probing the nature of independent agencies gained considerable attention later on as the unitary executive theory percolated during the Reagan administration.<sup>258</sup> A former General Counsel of the Federal Election Commission, for instance, elevated the role of the Constitution’s necessary and proper clause to defend the constitutionality of independent agencies.<sup>259</sup> But others posit that exploring independent agencies’ independence is a nuanced inquiry. When detailing the history of independent regulatory commissions, Marshall Breger and Gary J. Edles explain how their justification and necessity are demonstrated by how independent agencies have operated in practice, more than on any theory operative today.<sup>260</sup> And Aaron Nielson and Christopher Walker provide an alternative framework for examining how Congress can craft mechanisms for hindering an Executive’s ability to remove independent agency commissioners.<sup>261</sup>

Kirti Datla and Richard Revesz, conversely, favor abandoning the chimera that “independent” federal agencies are different from other executive agencies, recognizing that all agencies act within the confines of executive control to the degree permitted under Article II of the Constitution.<sup>262</sup> Neal Devins and David E. Lewis go further and posit that the independent agency design and its continued use is a failure and ignores realities of how they operate.<sup>263</sup> In their words, “they highlight

257. Robert G. Dixon, Jr., *The Independent Commissions and Political Responsibility*, 27 ADMIN. L. REV. 1, 16 (1975).

258. One contemporary commentator suggested that both Congress and the Court “failed to offer a coherent constitutional theory” for their support. Susan Sommer, *Independent Agencies as Article One Tribunals: Foundations of a Theory of Agency Independence*, 39 ADMIN. L. REV. 83 (1987). See also Sally Katzen et al, *Independent Agencies—Independent From Whom?*, 41 ADMIN. L. REV. 491 (1988) (Sally Katzen moderating discussion about continued efficacy of independent agencies); Symposium, *The Independence of Independent Agencies*, 1988 DUKE L.J. 215; Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41; Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

259. Charles N. Steele & Jeffrey H. Bowman, *The Constitutionality of Independent Regulatory Agencies Under the Necessary and Proper Clause: The Case of the Federal Election Commission*, 4 YALE J. ON REG. 363, 363–64 (1987).

260. Marshall J. Breger & Gary J. Edles, *Established By Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1117 (2000).

261. Aaron L. Nielson & Christopher J. Walker, *Congress’s Anti-Removal Power*, 76 VAND. L. REV. 1, 2 (2023).

262. Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORN. L. REV. 769, 772 (2013) (“Agencies cannot be neatly divided into two categories.”).

263. Neal Devins & David E. Lewis, *The Independent Agency Myth*, 108 CORN. L. REV. 1305, 1309–10 (2023). Earlier work from Neal Devins explored how the notion of independence is conceptually problematic because of the myriad factors affecting agency behavior. Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 CARDOZO L. REV. 273 (1993) (control through the Department of Justice and access to courts).

the mismatch between the presuppositions of the independent agency design and the realities of the politics of the last forty years.”<sup>264</sup> Employing surveys and other extrinsic empirical evidence, they conclude that the “independent agency design rarely serves its intended purposes. [They] are less influential than executive agencies, [they] are not particularly insulated, and [their] policymaking is not especially stable.”<sup>265</sup> And still others parse the *Myers* and *Humphrey’s Executor* opinions, both products of their unique temporal context, coupled with more recent Supreme Court gloss,<sup>266</sup> to posit how some independent agencies, such as the Federal Reserve or the NLRB ought to remain “independent”—not allowing the President the ability to remove commissioners absent “cause.”<sup>267</sup> Meanwhile, Eli Nachmany counters that even the FTC today is different from the FTC in *Humphrey’s Executor* and that the President might have the power to remove a FTC commissioner consistent with *Humphrey’s Executor*.<sup>268</sup>

If, therefore, *Humphrey’s* is overruled or limited, the question is how will this affect FERC or energy policy? In the next Part, consequently, I explore the significance of FERC’s status as an independent regulatory commission in the modern era, particularly because today’s energy policy generally addresses the existential threat of climate change rather than fostering the availability of enough oil, natural gas, or electricity.

## VI. ENERGY POLICY MOVING FORWARD: FERC OR DOE?

Energy policy today is an oxymoron. The genesis for developing an *energy* policy surfaced to ensure the availability of enough resources to serve the two world war efforts, and then afterward to promote our economic growth. For almost 100 years, the nation has witnessed efforts to coordinate *energy* policy, and yet even after agency reorganizations, little has changed. At the outset, decision-making on energy-related matters remains dispersed, with agencies and regulatory authorities siloed and meaningful policy coordination cumbersome at best. When, for instance, the Biden administration DOE announced a pause on LNG imports, the Commission continued to process and approve certificates of

264. Devins & Lewis, *supra* note 263, at 1310.

265. *Id.* at 1311.

266. *See* Collins v. Yellen, 594 U.S. 220 (2021); *Seila Law, LLC v. Consumer Financial Protection Bureau*, 591 U.S. 197 (2020); *Wiener v. United States*, 357 U.S. 349 (1958).

267. Samuel Estreicher et al., *Dealing with the Likely Demise of Humphrey’s Executor*, ONLABOR (June 25, 2025), <https://onlabor.org/dealing-with-the-likely-demise-of-humphreys-executor/> [<https://perma.cc/4LTR-L4HY>].

268. Eli Nachmany, *The Original FTC*, 77 ALA. L. REV. 1, 3 (2025).

public and convenience and necessity under the NGA.<sup>269</sup> A coordinated policy would have had FERC, DOE, EPA, the State Department, and states collectively exploring how to address emissions associated with natural gas and the appropriateness of building out LNG export infrastructure.<sup>270</sup> Instead, FERC naturally prioritizes approving requests necessary to avert possible energy shortages.<sup>271</sup> Next, the notion of an “energy” policy obscures how energy production no longer drives the nation’s GNP and our energy transition involves a climate, not an energy policy.<sup>272</sup> Consequently, whether an independent commission remains vital for ensuring stable energy markets seems unclear.<sup>273</sup> And whether or how the

269. Sam Kalen, *The Gas Hydrogen Gambit: Natural Gas Folly or Future Climate Policy?*, 76 ADMIN. L. REV. 159, 171–72 (2024); Carlos Anchondo, *FERC Removes Regulatory Barriers to Gas Pipeline Construction*, ENERGYWIRE (Apr. 27, 2025), <https://www.eenews.net/articles/ferc-removes-regulatory-barriers-to-gas-pipeline-construction/> [<https://perma.cc/5KZP-EMUX>].

270. See Kalen, *supra* note 269, at 170–73. This list could include the Pipeline and Hazardous Materials Safety Administration, discussed in the article, *id.* at 170, and which has since considered relaxing safety rules that might foster more LNG exports. Mike Soraghan, *Gas Industry Sees Big Savings from Rewriting LNG Rules*, ENERGYWIRE (July 11, 2025), <https://www.eenews.net/articles/gas-industry-sees-big-savings-from-rewriting-lng-rules/> [<https://perma.cc/5XEM-KZRH>]. Indeed, FERC Chairman Phillips touted the notion of allowing more direct regulation of natural gas and its connection to and coordination with the electric grid, an issue that has engaged FERC now for years. See Zach Bright, *FERC Chair Wants Congress to Create a New Gas Regulator*, ENERGYWIRE (June 6, 2024), <https://www.eenews.net/articles/ferc-chair-wants-congress-to-create-a-new-gas-regulator/> [<https://perma.cc/K5V8-EAMX>].

271. See *id.* Grid operators pressure FERC by suggesting an energy shortfall could loom absent its approval. E.g., Jeffery Tomich, *FERC Approves Grid Operators’ Requests to Fast-Track Projects*, ENERGYWIRE (July 23, 2025), <https://subscriber.politicopro.com/article/eenews/2025/07/23/ferc-approves-grid-operators-requests-to-fast-track-projects-00467148> [<https://perma.cc/5YJS-G255>]; Carlos Anchondo, Joel Kirkland, *FERC Chair Sounds Alarm Over Grid Reliability*, ENERGYWIRE (Oct. 18, 2024), <https://www.eenews.net/articles/ferc-chair-sounds-alarm-over-grid-reliability/> [<https://perma.cc/KTD3-QL5Q>].

272. The notion that energy growth (and correspondingly CO<sub>2</sub> emissions) is necessary for economic growth is somewhat antiquated and now involves inquiries into “decoupling.” See Hannah Ritchie, *A Number of Countries Have Decoupled Economic Growth from Energy Use, Even if we Take Offshored Production into Account*, OUR WORLD IN DATA (Nov. 30, 2021), <https://ourworldindata.org/energy-gdp-decoupling> [<https://perma.cc/3K2E-DPDF>]; Namit Sharma, *The Decoupling of GDP and Energy Growth: A CEO Guide*, MCKINSEY & CO. (Apr. 24, 2019), <https://www.mckinsey.com/industries/electric-power-and-natural-gas/our-insights/the-decoupling-of-gdp-and-energy-growth-a-ceo-guide> [<https://perma.cc/3FT2-EEHN>]. Some scholars suggest that decoupling is less apparent in less developed countries. E.g., Ali Abbas, *Decoupling Economic Growth from Energy Consumption: Review of Global Trends and Policy Implications*, 1 HABITABLE PLANET 157, 158 (2025).

273. Goldberg, *supra* note 34. Professor Joel Eisen opines that initiatives such as Order 1920 on regional transmission planning might not emerge from a non-independent commission. *Id.* Order 1920’s future may depend upon the application of *Loper Bright*, although Former Chair Phillips believes the order can and should be sustained. Zach Bright, *FERC Chair Defends Grid Rule in Post-Chevron Era*, ENERGYWIRE (July 2, 2025), <https://subscriber.politicopro.com/article/eenews/2024/07/02/ferc-chair-defends-grid-rule-in-post-chevron-era-00166051> [<https://perma.cc/VSB6-536R>]. Its fate, however, could rest in hands of the future Commission, as the current temporary chair believes the rule requires changing. *Id.*

loss of for cause removal for FERC commissioners will hinder sound energy policies is equally complicated.

The former FERC commissioners' amici brief in *Slaughter* emphasizes the Commission's function as a "ratemaking" commission and the special historical status insulating ratemaking, which is tantamount to a "judicial" function, from executive intervention—an early jurisprudential justification for independent agencies in the first place.<sup>274</sup> The brief also recognizes that many of FERC's initiatives are "legislative" in nature, similarly suggesting the need for upholding for cause removal protection for commissioners.<sup>275</sup> And these commissioners further claim that, "[w]ith FERC currently sitting at the center of the nation's energy renaissance, discarding its structure could damage America's global economic position."<sup>276</sup> Perhaps.

But how one predicts FERC's future, in conceivably what could be its new frontier, requires exploring how Congress, DOE, EPA, and the White House have intervened to shape the energy transition and whether or how those interventions inform dialogues about FERC's status as an independent agency. After all, shifting from *energy* toward a "sustainable climate policy" somewhat relegates FERC's role as a policy forum. My objective here is not to diminish FERC's importance or question its possible future role, merely to identify why this shift warrants further inquiry.

To begin with, it's worth appreciating how several signature FERC initiatives *follow* market and policy shifts and are designed to remove barriers in the energy transition—by adopting policies such as for distributed energy resources and storage, or to facilitate interstate transmission and renewable interconnections with the electric grid or reviewing possibly discriminatory tariffs in organized (RTO or ISO) markets. Only after the market and scholars encouraged greater deployment of demand-side management (DSM), did FERC, with Congress' further assistance, solidify policies toward DSM.<sup>277</sup> Only after

274. Brief of Amici Curiae Bipartisan Former Commissioners of the Federal Energy Regulatory Commission (FERC) in Support of Respondents at 2–3, 15, 16–22, *Trump v. Slaughter*, 146 S. Ct. 18 (2025) (No. 25-332). The brief relies principally on how the prevailing doctrine in the late nineteenth century addressed ratemaking functions, and the establishment of the ICC. It also briefly summarized FERC's establishment in 1977, *id.* at 11–12, although it naturally avoids some of the nuances in that history discussed in this article.

275. *Id.* at 21–22.

276. *Id.* at 23.

277. Mathew R. Christiansen, *Essay: FERC v. EPSA, Functionalism and the Electricity Industry of the Future*, 68 STAN. L. REV. ONLINE 100, 101 (2016). EPCAct 2005 required an assessment and plan for demand response and advance metering, and EPCAct 2007 required an action plan for demand response. In Orders No. 719, 125 FERC ¶ 61,071 (Oct. 17, 2008), Order No. 719-A, 74 Fed. Reg. 37776, 37777 (Jul. 29, 2009), Order No. 719-B, 129 FERC ¶ 61,252 (Dec. 17, 2009), Order No. 745,

a critical response did FERC alter its treatment toward calculating whether an electric generating unit would qualify under the Public Utility Regulatory Policies Act (PURPA).<sup>278</sup> Only recently, after FERC retarded interconnections for AI data centers, did external pressures surface and demand a change.<sup>279</sup> The White House and several state governors even injected themselves into conversations about how one regional

134 FERC ¶61,187 (Mar. 15, 2011), Order No. 745-A, 137 FERC ¶61,215 (Dec. 15, 2011), FERC adopted reforms for promoting DSM. Fed. Energy Regul. Comm'n v. Electric Power Supply Ass'n, 577 U.S. 260, 272 (2016). FERC issued its latest assessment on demand response and advance metering in late 2024. FED. ENERGY REGUL. COMM'N, 2024 ASSESSMENT OF DEMAND RESPONSE AND ADVANCED METERING, PURSUANT TO ENERGY POLICY ACT OF 2005 § 1252(E)(3) (Dec. 2024).

278. Broadview Solar, LLC, 172 FERC ¶ 61,194 (2020), *order in reh'g*, 174 FERC ¶ 61,199 (2021), *reh'g denied and modified*, 175 FERC ¶ 61,228 (2021). In response to market changes, FERC reformed its approach toward qualifying facilities in 2020. Order No. 872; Order No. 872-A. See Solar Energy Industries Ass'n v. Fed. Energy Regul. Comm'n, 80 F.4th 956, 969 (9th Cir. 2023). *Loper Bright* could retard FERC's initiatives to the extent that prior cases relied on affording FERC deference under *Chevron. E.g.*, Edison Electric Institute v. Fed. Energy Regul. Comm'n, 144 S. Ct. 2705 (2024) (Mem.) (vacating and remanding the PURPA issue in *Solar Energy Indus. v. FERC*, 59 F.4th 1287 (D.C. Cir. 2023) for further consideration in light of *Loper Bright*).

279. PJM Interconnection, L.L.C., 190 FERC ¶ 61,115, Docket EL25-49-000 (Feb. 20, 2025) ("Co-located load arrangements are becoming increasingly common in PJM"). When FERC rejected the first high-profile interconnection request for an AI data center, the negative reaction was immediate. The White House even issued its own plan for winning the race to build AI datacenters. See Mohar Chatterjee, *Trump AI Action Plan to Slash Regulations, Streamline Permits*, ENERGYWIRE (July 21, 2025), <https://subscriber.politicopro.com/article/eenews/2025/07/21/exclusive-trump-ai-action-plan-to-slash-regulations-streamline-permits-ee-00463464> [<https://perma.cc/UU32-WVTH>]; Christa Marshall, & Jason Plautz, *Trump Details \$90B AI Plan to Transform Pennsylvania Grid*, ENERGYWIRE (July 16, 2025), <https://www.eenews.net/articles/trump-details-90b-ai-plan-to-transform-pennsylvania-grid/> [<https://perma.cc/QHM7-2LBJ>]. Since then, FERC has favored some plans for faster integration of data centers. E.g., Jason Plautz, *FERC Approves Central US Grid Plan for Connecting AI Data Centers*, ENERGYWIRE (Jan. 20, 2026), <https://www.eenews.net/articles/ferc-approves-central-us-grid-plan-for-connecting-ai-data-centers/> [<https://perma.cc/8DFV-ATVP>]. The administration, moreover, suggests it will use DOE lands for data centers. Christa Marshall, *DOE Picks 4 Sites to Build Data Centers on Federal Land*, E&E NEWS (July 24, 2025), <https://www.eenews.net/articles/doe-picks-4-sites-to-build-data-centers-on-federal-land/> [<https://perma.cc/2JLH-8NAU>]. There are a host of issues when utilizing DOE lands, as a National Academy of Sciences report (on which I served as a member) chronicles. THE NAT'L ACADS OF SCIS., ENG'G, & MED., *Utilizing the Energy Resources of DOE Lands* (2017). Moreover, utilities and states lament how datacenters could drain energy capacity or raise consumer rates. See Jason Plautz, *Rulemakers Play Catch-Up as Data Centers Multiply*, ENERGYWIRE (July 18, 2025), <https://www.eenews.net/articles/rulemakers-play-catch-up-as-data-centers-multiply/> [<https://perma.cc/A2LH-K8DJ>]; see also Jason Plautz, Christa Marshall, *Trump's AI Plan Meets a Stressed American Electric Grid*, ENERGYWIRE, (July 24, 2025) <https://subscriber.politicopro.com/article/eenews/2025/07/24/trumps-ai-plan-meets-a-stressed-american-electric-grid-00473312> [<https://perma.cc/83S5-5NTZ>]; Peter Beher, *NERC: Data Center Growth Ranks Among "Greatest Near-Term Reliability Challenges,"* ENERGYWIRE (June 13, 2025), <https://www.eenews.net/articles/nerc-data-center-growth-ranks-among-greatest-near-term-reliability-challenges/> [<https://perma.cc/5M49-GVFX>]. EPA too is attempting to spur installation of data centers. Sean Reilly, *Zeldin Outlines Permitting Rule Revamp to Boost AI*, GREENWIRE (July 17, 2025), <https://subscriber.politicopro.com/article/eenews/2025/07/17/zeldin-outlines-permitting-rule-revamp-to-boost-ai-00459406> [<https://perma.cc/9QNA-34RK>].

transmission organization, PJM, ought to address costs associated with the increasing demand for data centers.<sup>280</sup> Admittedly, FERC's recent order fostering a sound interconnection policy preventing discrimination against renewables is both laudable and transformational,<sup>281</sup> yet it took years and followed a bipartisan push to allow enhanced access to the grid. The same is true for FERC's landmark Regional Transmission Planning and Cost Allocation Rule.<sup>282</sup> And similarly, the commissioners worked assiduously in a bipartisan manner to adopt new policies for distributed resources and energy storage,<sup>283</sup> as the market already begged for action.

280. Peter Behr, *White House, States Plunge into Power Market Politics*, ENERGYWIRE (Jan. 20, 2026) <https://subscriber.politicopro.com/article/eenews/2026/01/20/white-house-states-plunge-into-power-market-politics-00736044> [<https://perma.cc/Q3YS-XDBF>]; Matt Daily, *Trump, Governors to Seek Power Auction for Data Centers*, ENERGYWIRE (Jan. 16, 2026), <https://www.eenews.net/articles/trump-governors-to-seek-power-auction-for-data-centers/> [<https://perma.cc/RE8B-MADE>]; Zach Colman, Josh Siegel, *Trump Launches Bid to Tame Electricity Prices in the Northeast*, GREENWIRE (Jan. 16, 2026) <https://www.politico.com/news/2026/01/16/trump-tame-electricity-prices-00733422> [<https://perma.cc/RZH7-T2DA>]. FERC “greeted [this] sudden burst of political pressure and reform proposals . . . with a mix of enthusiasm and caution.” Francisco “A.J.” Camacho, *FERC Commissioners Praise Efforts to Address PJM Reliability Crisis*, ENERGYWIRE (Jan. 23, 2026), <https://www.eenews.net/articles/ferc-commissioners-praise-efforts-to-address-pjm-reliability-crisis/> [<https://perma.cc/9S5P-JJ8V>].

281. Order No. 2023, Improvements to Generator Interconnection Procedures and Agreements, 184 FERC ¶ 61,054 (2023), *order on reh'g*, 185 FERC ¶ 61,063 (2023), *order on reh'g*, Order No. 2023-A, 186 FERC ¶ 61,199, *errata notice*, 188 FERC ¶ 61,134 (2024). Yet, studies demonstrated that renewable projects such as wind encountered considerably longer timelines for having interconnections approved. Joseph Rand et al., *Queued Up: 2024 Edition—Characteristics of Power Plants Seeking Transmission Interconnection as of the End of 2023*, LAWRENCE BERKELEY NAT'L LAB. 43 (2024).

282. Order No. 1920, Building for the Future Through Electric Regional Transmission Planning and Cost Allocation, 89 Fed. Reg. 49,280 (June 11, 2024), 187 FERC ¶ 61,068 (2024), *on reh'g*, Order No. 1920-A, 189 FERC ¶ 61,126 (2024), 89 Fed. Reg. 97174 (Dec. 6, 2024). Notably, The Commission amended aspects of Order 1920 to address concerns by the Republican member Commissioner Christie and others on the role of states. See Francisco “A.J.” Camacho, *FERC Boosts State Role in Contentious Grid Planning*, ENERGYWIRE, (Nov. 22, 2024), <https://www.eenews.net/articles/ferc-boosts-state-role-in-contentious-grid-planning/> [<https://perma.cc/P4SE-Q2UG>]. Then Chairman Phillips disagreed with Commissioner Christie on whether, after *Loper Bright*, the Commission has the authority to engage in regional planning and cost allocation. Willie L. Phillips, *Chairman Willie Phillips' Statement Concerning Order No. 1920*, FED. ENERGY REGUL. COMM'N (July 1, 2024), <https://www.ferc.gov/news-events/news/chairman-willie-phillips-statement-concerning-order-no-1920> [<https://perma.cc/R7JW-633A>]; Zach Bright, *FERC Chair Defends Grid Rule in Post-Chevron Era*, ENERGYWIRE (July 2, 2025), <https://subscriber.politicopro.com/article/eenews/2024/07/02/ferc-chair-defends-grid-rule-in-post-chevron-era-00166051> [<https://perma.cc/4WY9-WUUM>].

283. Order No. 2222, 85 Fed. Reg. 67094 (Oct. 21, 2020), *order on reh'g*, Order No. 2222-A, 86 Fed. Reg. 16511 (Mar. 30, 2021), 174 FERC ¶ 61,197 (Mar. 18, 2021); 175 FERC ¶ 61,227 (June 17, 2021), 86 Fed. Reg. 33853 (June 28, 2021); Order No. 841, 162 FERC ¶ 61,127 (Feb. 15, 2018), Order No. 841-A, 84 Fed. Reg. 23902 (May 23, 2019). To address how inverter-based resources such as batter storage (often coupled with utility-scale solar projects today) connect with the grid, FERC's Order No. 901 subsequently ordered the North American Reliability Corporation to adopt reliability

This seems different from FERC's innovations during its first roughly thirty years. The new organizational structure established by the DOE Act elided resolving how, or who, would coordinate and promote a White House energy policy. But few likely cared. Enough members of Congress trusted James Schlesinger; and Secretary Schlesinger in turn trusted Charles B. Curtis, the individual he tapped to lead the newly established FERC.<sup>284</sup> According to Chairman Curtis, Secretary Schlesinger, and the Chairman enjoyed a good working relationship and level of trust,<sup>285</sup> which I suspect contributed to FERC's flexibility to address the FPC's historic shortcomings. And joining Chairman Curtis at the Commission as the inaugural general counsel was Robert R. Nordhaus, who helped transform FERC by, among other things, working with the Commission to employ rulemaking rather than adjudicatory orders to facilitate quicker agency action.<sup>286</sup> Meanwhile, Secretary Schlesinger focused his attention on specific matters: U.S. produced oil and natural gas shortages, imported gas, and even the development of more coal resources.<sup>287</sup> And due to the unique issues and importance surrounding natural gas in Alaska, Schlesinger's DOE championed the Alaskan Natural Gas Transportation project,<sup>288</sup> while the Interior Department and Congress changed the program for offshore oil and gas leasing. But during the next few decades, the Commission rather than DOE emerged at the epicenter of energy policy.

While DOE managed seemingly intractable nuclear waste matters and the energy efficiency program, FERC crafted regulations for advancing small scale renewable energy projects and cogeneration pursuant to the Public Utility Regulatory Policies Act (PURPA);<sup>289</sup> it responded to the Natural Gas Policy Act (NGPA);<sup>290</sup> and then in the 1980s it grappled with

standards. 185 FERC ¶ 61,042 (Oct. 19, 2023); 88 Fed. Reg. 74,250 (Oct. 30, 2023); 192 FERC ¶ 61,076 (July 24, 2025).

284. Mr. Curtis had served on the Carter transition team, and had gone into private practice, and knew Secretary Schlesinger who called him in the summer and asked him to join the FPC, which soon would become the FERC. Prs. Convers. with Charles B. Curtis, (2024).

285. *Id.*

286. *Id.*

287. See CONG. Q., INC., ENERGY POLICY: TIMELY REPORTS TO KEEP JOURNALISTS, SCHOLARS, AND THE PUBLIC ABREAST OF DEVELOPING ISSUES, EVENTS, AND TRENDS 67–69 (Apr. 1979).

288. Alaska Natural Gas Transportation Act, 15 U.S.C. § 719; Pub. L. No. 95-158, 91 Stat. 1268 (1977).

289. Pub. L. No. 95-617, 92 Stat. 3117, (Nov. 9, 1978). Facilitating the expansion of cogeneration facilities contributed toward incentivizing non-traditional utility players into the industry. Navigant Consulting, *Evolution of the Electric Industry Structure in the U.S. and Resulting Issues* vii (Oct. 8, 2013).

290. Pub. L. 95-621, 92 Stat. 2250, (1978). On July 27, 1976, the FPC increased the rate for new natural gas and some existing natural gas, relieving some urgency for immediate deregulation. Steven Rattner, *F.P.C. Gas Price Rise 25%; Admits an Error in July Estimates*, N.Y. TIMES, Oct. 21, 1976.

deregulating oil pipeline regulation under the authority transferred to it under the Interstate Commerce Act.<sup>291</sup> Also, without congressional guidance, it embarked on, first, deregulating the natural gas industry, and second, deregulating the electric utility industry.<sup>292</sup> It facilitated a restructuring of the electric and natural gas industries by developing new regulatory regimes to unbundle the traditional vertical utility model. It favored open, competitive markets to ensure access to the electric and natural gas transmission and transportation systems. Notably, its trust in markets rather than traditional cost-of-service ratemaking had been a bipartisan reform suggestion for decades.<sup>293</sup> It designed our modern organized market system for the electric grid, by establishing Independent System Operators (ISOs) and Regional Transmission Organizations (RTOs). A dominant theme for the modern FERC, consequently, is protecting against market manipulation or a discriminatory exercise of market power. The history of energy policy, after all, demonstrated how past programs operated perversely to constrain supply and foster energy shortages.<sup>294</sup>

Second, commissioners do not operate in a vacuum. FERC's contemporary implementation of the NGA illustrates how external forces affect the agency. For years, the Commission struggled with whether or how it should consider the effects of additional greenhouse gas emissions associated with approvals of new natural gas infrastructure.<sup>295</sup> While courts considered FERC's obligation to consider downstream or upstream effects on climate change from adding additional natural gas infrastructure, the commissioners themselves plodded through disagreements on their role under the NGA.<sup>296</sup> And when Chairman Glick announced a long-awaited need for the Commission to consider revising its somewhat dated policies for considering new section 7 certificates of public convenience and necessity for interstate natural gas pipelines, the reaction from industry and some in Congress was quick: the Commission almost immediately withdrew its proposal and Chairman Glick lost his bid

291. U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION, OIL PIPELINE DEREGULATION: REPORT OF THE DEPARTMENT OF JUSTICE vii (1986).

292. See NORDHAUS, *supra* note 79, at 58–76, 93–96.

293. The 1974 Ford Foundation Report made this point. FORD FOUNDATION REPORT, *supra* note 106, at 107–09. The Nixon administration staff sought to boost energy supply by deregulating markets. JACOBS, *supra* note 109, at 36.

294. This theme pervades the history of energy policy. See NORDHAUS, *supra* note 79. To be sure, Congress aided FERC's efforts: it passed the 1992 Energy Policy Act; it repealed PUHCA; it gave FERC authority over NERC; and it strengthened FERC's policies in the Energy Policy Acts' of 2005 and 2007.

295. See Kalen, *supra* note 269; Sam Kalen, *A Bridge to Nowhere? Our Energy Transition and the Natural Gas Pipeline Wars*, 9 MICH. J. ENV'T & ADMIN. L. 319 (2020).

296. *Id.*

for a second term on the Commission.<sup>297</sup> Senate Energy and Natural Resources Committee Chairman Joe Manchin, the West Virginia Democrat, refused to hold a hearing on President Biden's nomination of Glick. The reason was Chairman Glick's effort to change the Commission's approach toward natural gas approvals.<sup>298</sup> Also, before his term ended, temporary Chairman Christie responded to the changes in Washington by announcing plans to follow the Trump administration and shutter and rebrand the Commission's Office of Energy Policy and Innovation.<sup>299</sup> He also hinted that the Commission might consider following the administration's approach toward sunset regulations.<sup>300</sup> He seemingly exhibited little concern that the administration was intruding into FERC's independence.<sup>301</sup> Since then, the Commission won praise from the Trump administration's National Energy Dominance Council when the Commission changed its policy toward allowing construction of certificated natural gas pipelines while it considered a request for rehearing on that approval.<sup>302</sup>

297. See Miranda Willson, *FERC Retreats on Gas Policies as Chair Pursues Clarity*, E&E NEWS (Mar. 25, 2022), <https://www.eenews.net/articles/ferc-retreats-on-gas-policies-as-chair-pursues-clarity/> [https://perma.cc/K4FU-ZL34]; Ethan Howland, *FERC Chairman Glick to Exit Agency by Early January, Setting Up Possible Tied-Vote Deadlocks*, UTILITYDIVE (Dec. 16, 2022), <https://www.utilitydive.com/news/ferc-glick-retire-leave-deadlock/638944/> [https://perma.cc/4Z2L-ZECT]; Miranda Willson, *FERC Climate Reviews in Limbo as Glick Departs*, E&E NEWS (Dec. 15, 2022), <https://www.eenews.net/articles/ferc-climate-reviews-in-limbo-as-chair-departs/> [https://perma.cc/GC48-K4NL].

298. See Miranda Willson & Nico Portuondo, *Manchin FERC Shake-Up May Stymie Biden's Clean Energy Plans*, E&E NEWS (Nov. 11, 2022) <https://www.eenews.net/articles/manchin-ferc-shake-up-may-stymie-bidens-clean-energy-plans/> [https://perma.cc/5347-XD75]. Chairman Christie eventually shuttered any reconsideration of the Commission's natural gas policies. See Catherine Morehouse, *FERC Axes Contentious Greenhouse Gas Proceeding*, ENERGYWIRE (Jan. 27, 2025), <https://www.eenews.net/articles/ferc-axes-contentious-greenhouse-gas-proceeding/#:~:text=By%20Catherine%20Morehouse%20%7C%2001/27,President%20Donald%20Trump%20last%20week> [https://perma.cc/6VCP-V649].

299. See Francisco "A.J." Camacho, *FERC to Kill Policy Office Under Trump-Ordered Reorg.*, ENERGYWIRE (Aug. 1, 2025), <https://www.eenews.net/articles/ferc-to-kill-policy-office-under-trump-ordered-reorg/> [https://perma.cc/X5GF-3GC9].

300. See Francisco "A.J." Camacho, *FERC Proceeds Cautiously with Trump-Ordered "Sunset" for Energy Rules*, ENERGYWIRE (July 8, 2025), <https://www.eenews.net/articles/ferc-proceeds-cautiously-with-trump-ordered-sunset-for-energy-rules/> [https://perma.cc/5NQ5-REKL]. By the end of 2025, FERC had taken steps to "sunset" 53 regulations pursuant to President Trump's Executive Order. Francisco "A.J." Camacho, *FERC to Sunset 53 Regulations Under Trump Executive Order*, ENERGYWIRE (Oct. 2, 2025), <https://www.ferc.gov/news-events/news/ferc-acts-sunset-outdated-regulations> [https://perma.cc/6QZ6-T4VV].

301. See Francisco "A.J." Camacho, *FERC Chair Says Trump Order Doesn't Steamroll Agency Independence*, ENERGYWIRE (Feb. 2, 2025), <https://www.eenews.net/articles/ferc-chair-says-trump-order-doesnt-steamroll-agency-independence/> [https://perma.cc/K4MK-ZPQ3].

302. See Carlos Anchondo, *FERC Nixes Rule that Critics Said Impeded Energy Projects*, ENERGYWIRE (Oct. 9, 2025), <https://www.eenews.net/articles/ferc-nixes-rule-that-critics-said-impeded-energy-projects/> [https://perma.cc/C5FB-4V6T]. For AI data centers, an apparent priority of

Historical analogues suggest this is not a modern phenomenon. For instance, former FPC Chair Swidler reported how he shied away from actions potentially harmful to President Kennedy's agenda.<sup>303</sup> The selection of commissioners, moreover, is where external pressures often are observable.<sup>304</sup> President Kennedy, for instance, appointed a commissioner at the request of Senator Sam Rayburn.<sup>305</sup> Senator Everett Dirksen, a powerful Senator at the time, picked another Kennedy choice.<sup>306</sup> It was Secretary Schlesinger who tapped FERC's first Chair, both of whom enjoyed a good relationship with Senator Jackson.<sup>307</sup> Other more recent nominees similarly trace their ties to Congress. Energy professor, scholar, and regulatory counsel Suedeen G. Kelly (nominated by President Bush for the "Democratic" slot) served as a legislative aide to Senator Jeff Bingaman before joining the commission for two terms, as a way to facilitate the appointment of the Republican Joseph T. Kelliher on the Commission. Natural gas expert Don Santa, the majority counsel for the Senate Committee on Energy and Natural Resources for Senator

the Trump administration, tellingly President Trump's pick as the Chair declined to recuse herself from cases involving data centers even though her prior practice may raise the appearance of bias. *See* Francisco "A.J." Camacho & Kevin Bogardus, *FERC Chair Cleared for Data Centers Case*, ENERGYWIRE (Jan. 21, 2026), <https://www.eenews.net/articles/ferc-chair-cleared-for-data-centers-case/> [<https://perma.cc/TB2L-4NGM>]; Francisco "A.J." Camacho, *FERC Chair Says She Won't Recuse Herself from Data Center Cases*, ENERGYWIRE (Oct. 31, 2025), <https://www.eenews.net/articles/ferc-chair-says-she-wont-recuse-herself-from-data-center-cases/> [<https://perma.cc/Y45F-3UZ6>]. And the Commission seemingly is attempting to take whatever actions it can to facilitate interconnections for data centers. *See* Francisco "A.J." Camacho, *FERC Confronts Consumer Angst Amid Trump Push for AI*, ENERGYWIRE (Nov. 21, 2025), <https://www.eenews.net/articles/ferc-confronts-consumer-angst-amid-trump-push-for-ai/> [<https://perma.cc/VS6N-NZ7B>]; Francisco "A.J." Camacho, *Regulators Press FERC on State Authority as Trump Promotes Data Centers*, ENERGYWIRE (Nov. 13, 2025), <https://www.eenews.net/articles/regulators-press-ferc-on-state-authority-as-trump-promotes-data-centers/> [<https://perma.cc/GG2X-8W7J>]; Josh Siegel, *Lee, Heinrich Press FERC on Data Center Grid Connections*, E&E DAILY (Nov. 19, 2025), <https://www.eenews.net/articles/lee-heinrich-press-ferc-on-data-center-grid-connections/> [<https://perma.cc/4R8V-FQWN>]; Francisco "A.J." Camacho, *FERC to Move "Promptly" on Plan for Speedier Grid Hookups*, ENERGYWIRE (Oct. 27, 2025), <https://www.eenews.net/articles/ferc-to-move-promptly-on-plan-for-speedier-grid-hookups/> [<https://perma.cc/XEL8-WZC5>] (describing DOE's request for FERC to create rules for faster approvals).

303. SWIDLER, *supra* note 100, at 137.

304. *E.g.*, Timothy Cama, *Green Group Targets FERC Nominee in Ad Campaign*, E&E NEWS (Mar. 20, 2024), <https://www.eenews.net/articles/green-group-targets-ferc-nominee-in-ad-campaign/> [<https://perma.cc/MK3P-NCU7>]. Senator Manchin, who blocked Richard Glick's elevation to the chairmanship, favored his own candidate for the Commission. *See* Nico Portuondo, *Manchin Expects FERC Nominations in the Coming Weeks*, ENERGYWIRE (Feb. 28, 2024), <https://www.eenews.net/articles/manchin-expects-ferc-nominations-in-the-coming-weeks/> [<https://perma.cc/388G-PT7R>].

305. SWIDLER, *supra* note 100, at 138.

306. *Id.* at 138–89.

307. *See supra* notes 284–86 and accompanying text.

Johnston, was tapped as an independent on the Commission. Serving under three different Presidents, Elizabeth “Betsy” Moler chaired the commission and served as a member after having worked a senior counsel for the Senate Committee on Energy and Natural Resources for over ten years. That the appointment process has become a principal mechanism for incoming presidents is acutely demonstrated by President Trump’s choice not to have the expertise of Chairman Christie remain on the Commission, a decision that surprised both Democrats and Republicans.<sup>308</sup> According to Professor Farber, the nominee’s record “is almost devoid of relevant experience and expertise.”<sup>309</sup> But even President Biden’s choice of David Rosner, a centrist Democrat favored by Senator Manchin, was considered along with President Trump’s choice willing to follow the Trump administration’s energy agenda.<sup>310</sup>

Third, entities other than FERC contribute toward energy market shifts. FERC, after all, lacks jurisdiction over the production of fossil fuels; it lacks authority over what electric generating units get built and where, and the same with the transmission lines; and it lacks jurisdiction over nuclear energy as the nation witnesses a resurgent interest in advanced nuclear technology and small modular reactors.<sup>311</sup> This is a historic and well-documented problem, recently highlighted by Alexandra Klass and others in their seminal article on grid reliability, where they discuss energy policy governance and the effects of siloed decision-making.<sup>312</sup>

Along with the split in authority between the states and the federal government, energy production decisions historically have been

308. See Nico Portuondo & Timothy Cama, *Trump Surprises Lawmakers with FERC Move*, E&E DAILY (June 4, 2025), <https://www.eenews.net/articles/trump-surprises-lawmakers-with-ferc-move/> [https://perma.cc/JF5R-M2K2]. Cf. Francisco “A.J.” Camacho, *Mark Christie Emerges as Trump’s Pick to Lead FERC*, ENERGYWIRE (Jan. 21, 2025), <https://www.eenews.net/articles/mark-christie-emerges-as-trumps-pick-to-lead-ferc/> [https://perma.cc/N96W-JSWP] (noting his expertise and his selection as Chair).

309. Daniel Farber, *Perhaps the Least Qualified FERC Nominee in History*, LEGAL PLANET (July 21, 2025), <https://legal-planet.org/2025/07/21/the-least-qualified-ferc-nominee-in-history/> [https://perma.cc/8FDJ-RSYZ].

310. See Francisco “A.J.” Camacho, *White House: New FERC Chair Committed to Trump’s Energy Agenda*, ENERGYWIRE (Aug. 14, 2025), <https://www.eenews.net/articles/white-house-new-ferc-chair-committed-to-trumps-energy-agenda/> [https://perma.cc/ZMW6-UWRP]. This article suggests that former Chair Rosner’s favoritism toward data centers played a significant role in President Trump’s decision to elevate him to the Chair, a position now held by Chair Laura Swett. Her appointment occurred shortly after Energy Secretary pressed for new regulations to address large loads, such as data centers. See Francisco “A.J.” Camacho, *Trump Makes Laura Swett FERC Chair: What Will be Her Focus*, GREENWIRE (Oct. 24, 2025), <https://www.eenews.net/articles/trump-makes-laura-swett-ferc-chair-what-will-be-her-focus/> [https://perma.cc/L2HB-84MN] (noting that both Swett and Rosner likely share same priorities).

311. See generally, FED. ENERGY REGUL. COMM’N, WHAT FERC DOES (2025), <https://www.ferc.gov/what-ferc-does> [https://perma.cc/QSS6-K4LS].

312. Alexandra Klass et al., *Grid Reliability Through Clean Energy*, 74 STAN. L. REV. 969 (2022).

influenced by White House and Department of the Interior policies, too. Whether or how much oil and gas is produced from the nation's onshore and offshore public lands involves White House policy,<sup>313</sup> the same is true for coal, particularly for the nation's largest coal resource, in Wyoming.<sup>314</sup> The White House similarly has influenced whether additional oil production in Alaska ought to be allowed.<sup>315</sup> During the Obama and Biden administrations, the Interior Department developed streamlined methods for facilitating the siting and permitting of wind, solar, and geothermal projects on public lands. Today, although the Bureau of Land Management continues to process additional solar projects in the southwest, the new administration has questioned solar and offshore wind power on public lands.<sup>316</sup> Indeed, it even issued stop work orders for offshore wind projects, which if enforceable according to the companies would force the abandonment of projects necessary for the grid.<sup>317</sup> Also, the administration

313. See, e.g., Ian M. Stevenson, *Interior Plans Gulf Oil Lease Sale in December*, ENERGYWIRE (June 26, 2025), <https://www.eenews.net/articles/interior-plans-gulf-oil-lease-sale-in-december/> [<https://perma.cc/U5TV-AUDP>]. The administration also is seeking to entice further oil and gas development by reducing the royalty rates for oil and gas producers. See Ian M. Stevenson, *What the Megalaw's Royalty Rate Cuts Mean for Oil and Gas Producers*, ENERGYWIRE (July 16, 2025), <https://www.eenews.net/articles/what-the-megalaws-royalty-rate-cuts-mean-for-oil-and-gas-producers/> [<https://perma.cc/Q388-3JG6>].

314. See Hannah Northey & Scott Streater, *Trump Moves to Crack Open Powder River Basin to Coal Leasing*, GREENWIRE (July 7, 2025), <https://www.eenews.net/articles/trump-moves-to-crack-open-powder-river-basin-to-coal-leasing/> [<https://perma.cc/4NXZ-FJ2J>]; Hannah Northey, *Trump's Coal Frenzy Clashes with Market Realities*, GREENWIRE (June 6, 2025), <https://www.eenews.net/articles/trumps-coal-frenzy-clashes-with-market-realities/> [<https://perma.cc/82CV-FL4X>].

315. See, e.g., Ian M. Stevenson, *Interior Yanks Biden Plan on Alaska Energy Development*, E&E NEWS (July 28, 2025), <https://www.eenews.net/articles/interior-yanks-biden-plan-on-alaska-energy-development/> [<https://perma.cc/UDK5-9H9Z>]; Ian M. Stevenson, *Trump to Open Over 80% of Alaskan Reserve to Oil Leasing*, ENERGYWIRE (June 18, 2025), <https://www.eenews.net/articles/trump-to-open-over-80-of-alaskan-reserve-to-oil-leasing/> [<https://perma.cc/HWM5-Q6KA>].

316. See Benjamin Storrow, *Trump is Escalating his Attacks on Wind, Solar*, CLIMATEWIRE (July 22, 2025), <https://www.eenews.net/articles/trump-is-escalating-his-attacks-on-wind-solar/> [<https://perma.cc/S7XU-ENE7>]. In July 2025, for instance, Interior Secretary Burgum required his (or his deputy's) approval before approving new onshore renewable projects. See Josh Siegel and Jack Colman, *Trump Administration Taking New Steps to Block Wind and Solar Projects, Undisclosed Memo Says*, POLITICO (July 16, 2025), <https://www.politico.com/news/2025/07/16/interior-requires-burgum-sign-off-for-solar-wind-projects-00458999> [<https://perma.cc/59U7-9M4G>]; Scott Streater, *Interior's New Solar, Wind Policy Sparks Concerns of "Shadow Ban,"* GREENWIRE (July 18, 2025), <https://www.eenews.net/articles/interiors-new-solar-wind-policy-sparks-concerns-of-shadow-ban-2/> [<https://perma.cc/7XYW-JZ7D>]; Ian M. Stevenson, *Interior Order Targets "Preferential Treatment" for Wind and Solar*, ENERGYWIRE (July 30, 2025), <https://www.eenews.net/articles/interior-order-targets-preferential-treatment-for-wind-and-solar/> [<https://perma.cc/ED8A-34WV>].

317. *Virginia Electric and Power Co. v. Interior*, 2026 WL 125783 (E.D. Va. Jan. 16, 2026); *New York v. Trump*, 811 F. Supp.3d 215 (D. Mass.), *appeal filed*; cf. *Mayor and City Council of Ocean City, Md. v. Interior*, 2025 WL 3628137 (D. Md. Dec. 15, 2025).

has signaled its objection to renewable energy tax credits.<sup>318</sup> Whether an energy-related project is slated for streamlined permitting by the Federal Permitting Council could be influenced by the White House as well. What energy resources the Defense Department consumes, or whether federal entities change their sources for transportation, all influence the national market and are under the purview of Congress and the White House.

Although market forces explain the shuttering of coal-fired power plants, the EPA's Clean Air Act and Clean Water Act regulations affecting electric steam generating units contributed to the choice by some to abandon coal-fired plants. Tax policy also can drive investment decisions, whether an investment or production tax credit, for solar or wind, respectively, as operative during the past several years.<sup>319</sup> Congress, after all, passed the largest climate (energy) program, the Inflation Reduction Act, influencing energy markets through tax policies, loans, grants, and a host of specific programs all outside FERC's realm.<sup>320</sup> Of course, the Trump administration is seeking to remove such incentives.<sup>321</sup>

And contemporary congressional policies, several of which elevate DOE's energy policy profile, drive *energy* market choices perhaps as much as any FERC initiative. Congress passed energy policy acts in 1992,<sup>322</sup> 2005,<sup>323</sup> 2007,<sup>324</sup> and 2020.<sup>325</sup> The Energy Act of 2020, for instance, includes an array of measures designed to address climate change

318. See Benjamin Storrow, *Megalaw Complicates Trump's Plans to Quickly Ax Renewable Credits*, ENERGYWIRE (July 11, 2025), <https://www.eenews.net/articles/megalaw-complicates-trumps-plans-to-quickly-ax-renewable-credits/> [<https://perma.cc/7PLF-7ZUZ>].

319. TRIEU MAI ET AL., NREL, IMPACTS OF FEDERAL TAX CREDIT EXTENSIONS ON RENEWABLE DEPLOYMENT AND POWER SECTOR EMISSIONS 1 (Nat'l Renewable Energy Lab., 2016) (noting impact of early tax credits). For analysis of the impact of the tax credits, see, for example, Samantha Strimling, *Clean Energy Tax Credits & Changes Made by the IRA*, HARV. L. SCH. ENV'T & ENERGY L. PROGRAM (Nov. 20, 2023). Cf. William Boyd, *The Tax Struggle & Renewable Power*, 79 TAX L. REV. (forthcoming 2026) (for insights into how tax policy can shape public finance decisions).

320. Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818 (2022). See generally Greg Dotson & Dustin Maghamfar, *The Clean Air Act Amendments of 2022: Clear Air, Climate Change, and the Inflation Reduction Act*, 53 ENV'T. L. REP. 10017 (2023).

321. See Benjamin Storrow, *Trump Admin Tightens Rules for Renewable Energy Tax Credits*, GREENWIRE (Aug. 15, 2025), <https://subscriber.politicopro.com/article/eenews/2025/08/15/treasury-reportedly-tightens-screws-on-tax-credits-for-renewables-00512110> [<https://perma.cc/ME9H-8VDD>]. The 2025 One Big Beautiful Bill Act altered the tax incentives, and as the solar industry explains, could slow the pace of solar deployment. See SEIA Fact Sheet, *Explained: The Clean Energy Provisions in the "One Big Beautiful Bill"*, SOLAR ENERGY INDUS. ASS'N, (July 21, 2025), <https://seia.org/research-resources/clean-energy-provisions-big-beautiful-bill/> [<https://perma.cc/YE5G-UX57>].

322. Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (1992).

323. Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).

324. Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492 (2007).

325. Consolidated Appropriations Act, FY 2021, Pub. L. No. 116-260, 134 Stat. 1182, 1363, 2211, 2243, 2418 (Division Z, Energy Act of 2020).

by furthering innovation and R&D programs at DOE.<sup>326</sup> Senator Lisa Murkowski praised that act as “represent[ing] the first modernization of our nation’s energy policies in well over a decade.”<sup>327</sup> But DOE’s role has become even more pronounced for natural gas and electric transmission. Only six months into the Biden administration, DOE Secretary Granholm touted producing more “clean” natural gas, particularly as LNG for overseas markets, and the corresponding need to build more natural gas pipelines—entering FERC’s regulatory domain.<sup>328</sup> Later ironically, when DOE initiated a pause on approving LNG exports, FERC still approved natural gas infrastructure under the NGA, seemingly fearing undermining grid reliability.<sup>329</sup> And more recently, Energy Secretary Wright has issued several orders under FPA section 202(c) directing coal-fired power plants to continue to operate, even if the state or the utility might otherwise have favored it being shuttered.<sup>330</sup>

DOE and FERC generally operate cooperatively, however, on electric transmission. Conversations about clean energy policy often gravitate toward grid expansion, building additional high-voltage interstate transmission lines capable of transmitting clean energy from the point of generation to a load.<sup>331</sup> Unlike interstate natural gas pipelines, interstate

326. *Id.*

327. *ICYMI: What They’re Saying About the Energy Act of 2020*, SENATE COMM. ON ENERGY & NAT. RES. (Dec. 29, 2020), <https://www.energy.senate.gov/2020/12/icymi-what-they-re-saying-about-the-energy-act-of-2020> [<https://perma.cc/7PHQ-3W37>].

328. See Lesley Clark, *Granholm on Pipelines: “We Want to Build More,”* E&E NEWS (June 1, 2021), <https://subscriber.politicopro.com/article/eenews/1063733839> [<https://perma.cc/9TVX-5RFV>].

329. See Kalen, *supra* note 269, at 177, 193–94.

330. Unrelated to grid reliability, President Trump early in his administration sought to promote coal-fired generation. See Peter Behr & Hannah Northey & Sean Reilly, *Trump Breathes New Life into Coal-Fired Power*, ENERGYWIRE (Apr. 9, 2025), <https://www.eenews.net/articles/trump-breathes-new-life-into-coal-fired-power/> [<https://perma.cc/4NA2-G5NV>]. To date, the Secretary has ordered plants in Pennsylvania, Maryland, Michigan, and Indiana to continue to operate. This use of FPA section 202(c) is unique, and currently in litigation. See generally Peter Behr, *DOE Order Keeps Michigan Coal Plant Open, Slams Wind and Solar*, ENERGYWIRE (Aug. 22, 2025), <https://www.eenews.net/articles/doe-order-keeps-michigan-coal-plant-open-slams-wind-and-solar/> [<https://perma.cc/4ZCC-ZH3Z>]; Zach Colman, *Trump Energy Department Eyes New Must-Run Orders for Power Plants*, E&E NEWS (Sept. 9, 2025), <https://www.eenews.net/articles/trump-energy-department-eyes-new-must-run-orders-for-power-plants/> [<https://perma.cc/PWL8-NZZ4>]. Also, DOE allocated \$100 million in grants for coal-fired plants to install new water systems, and to upgrade to co-firing with natural gas. Brian Dabs, *DOE Announces \$100M to Refurbish Coal Plants*, ENERGYWIRE (Nov. 3, 2025), <https://subscriber.politicopro.com/article/eenews/2025/11/03/doe-announces-100m-to-refurbish-coal-plants-00632862> [<https://perma.cc/H9N6-BXF3>].

331. *E.g.*, Jeffery Tomich, *Historic Grid Expansion Plans Advance in the Central U.S.*, ENERGYWIRE (Oct. 31, 2024), <https://www.eenews.net/articles/historic-grid-expansion-plans-advance-in-the-central-us/> [<https://perma.cc/LX24-G3V8>]; Peter Behr, *Grid Expansion Plans Get Traction in the Northeast and West*, ENERGYWIRE (Oct. 25, 2024), <https://www.eenews.net/articles/grid-expansion-plans-get-traction-in-the-northeast-and-west/>

electric transmission lines lack federal eminent domain authority. According to many, the absence of such authority retards the construction and operation of new high-voltage transmission lines.<sup>332</sup>

Congress bolstered FERC's transmission planning and interconnection efforts when it entrusted DOE with potentially significant power to facilitate transmission of renewable electric energy.<sup>333</sup> And DOE has been instrumental in preparing reports on the urgency of additional transmission systems.<sup>334</sup> Under section 1221 of the 2005 Energy Policy Act, DOE and FERC can provide backstop siting authority for transmission projects inside National Interest Electric Transmission Corridors (NITCs).<sup>335</sup> DOE, though, must first designate areas, or transmission corridors,<sup>336</sup> where

[<https://perma.cc/UNE4-JW4P>]; Jeffery Tomich, *Midwest Grid Operator Proposes Express Lane for Generation*, ENERGYWIRE (Mar. 20, 2025), <https://www.eenews.net/articles/midwest-grid-operator-proposes-express-lane-for-generation/> [<https://perma.cc/NL9E-X4F2>]. Of course, additional generation is necessary should the reports about increased electricity demand prove accurate. See Jason Plautz, *Electricity Demand Projected to Rise 25% by 2030*, ENERGYWIRE (May 21, 2025), <https://www.eenews.net/articles/electricity-demand-projected-to-rise-25-by-2030/> [<https://perma.cc/3PMK-446C>]. See also Catherine Morehouse, *Grid Reliability Problems Cannot be Solved Through Transmission Fixes Alone, NERC CEO Says*, ENERGYWIRE (Oct. 17, 2024) (reporting on comments by the CEO of the North American Electric Reliability Council), <https://www.eenews.net/articles/grid-reliability-problems-cannot-be-solved-through-transmission-fixes-alone-nerc-ceo-says/> [<https://perma.cc/9ZUL-WEKA>]. At the outset of 2026, the U.S. Energy Information Administration forecasted the largest growth in "electricity demand since 2000, fueled by data centers." Press Release, U.S. Energy Information Administration, EIA forecasts strongest four-year growth in U.S. electricity demand since 2000, fueled by data centers (Jan. 13, 2026), <https://www.eia.gov/pressroom/releases/press582.php> [<https://perma.cc/8U3J-8ZX9>].

332. See Michael B. Gerrard, *Legal Pathways for a Massive Increase in Utility-Scale Renewable Generation Capacity*, 47 ENV'T L. REP. 10591 (2017).

333. See *supra* note 282 and accompanying text.

334. E.g., DEP'T OF ENERGY, NATIONAL TRANSMISSION PLANNING STUDY (2024).

335. Initially, this program seemed morbid after the Court in *Piedmont Env't. Council v. FERC*, 558 F.3d 304 (4th Cir. 2009) concluded that the law only operated when a state failed to act. See also *Cal. Wilderness Coalition v. DOE*, 631 F.3d 1072 (9th Cir. 2011) (invalidating DOE's NIETC implementation). Congress fixed this problem in 2021, with the Infrastructure Investment and Jobs Act. See Justin Gundlach, *Transmission Siting Reforms in the Infrastructure Investment and Jobs Act of 2021*, INST. FOR POL'Y INTEGRITY (Dec. 2021).

336. See, e.g., Dept. of Energy, Notice of Early Public and Governmental Engagement and Request for Comment, 90 Fed. Reg. 14648 (Apr. 3, 2025). The Biden DOE released streamlining efforts for transmission projects. See Catherine Morehouse, *DOE Proposes Streamlined NEPA Review for Transmission, Solar and Storage*, E&E NEWS (Nov. 16, 2023), <https://subscriber.politicopro.com/article/eenews/2023/11/16/doe-proposes-streamlined-nepa-review-for-transmission-solar-and-storage-ee-00127495> [<https://perma.cc/E72F-Q5TY>]; see also Final Rule, 89 Fed. Reg. 34074 (Apr. 30, 2024). On January 17, 2025, DOE issued interim guidance for reviewing transmission projects. DEPT. OF ENERGY, CONSIDERATION OF ELECTRICAL GENERATION IN NEPA REVIEWS OF ELECTRIC TRANSMISSION PROJECTS OTHER THAN GENERATION INTERCONNECTION LINES (INTERIM GUIDANCE) (Jan. 2025). DOE is further changing its implementation of NEPA to "streamline" the process for projects involving renewable energy. See Dept. of Energy, Revisions of National Environmental Policy Act Implementing Procedures, 90 Fed. Reg. 29676 (July 3, 2025).

FERC can then supersede state siting authority.<sup>337</sup> Also, under section 1222, DOE in two areas of the country can participate with a private transmission project developer in the development of an interstate transmission line, and when doing so, the project can tap DOE's eminent domain authority and preempt state law.<sup>338</sup> Next, pursuant to the Energy Policy Act of 2005,<sup>339</sup> DOE can offer projects financial support, as it did with the high voltage line proposed by Grain Belt Express, LLC, which sought federal financial assistance from the Energy Department for its project.<sup>340</sup> As such, today's DOE plays a prominent role in promoting whatever energy (or climate) policy is favored by the White House or Congress.

## VII. CONCLUSION

How energy policy organization and decision-making might unfold amid conversations about the administrative state, and particularly independent agencies, seems beyond any easy prognosis. When Amory B. Lovins offered a "soft path" for an energy future in the 1970s, he aptly captured our hubris when positing what might happen.<sup>341</sup> We, of course, veered from his preferred renewable energy, conservation, and efficiency path that could have avoided aspects of the calamitous consequences we now confront. His contemporary, S. David Freeman, among the first in the

337. In May 2024, FERC (unanimously) issued Order No. 1977 establishing procedures under section 216 of the FPA for implementing the program. 187 FERC ¶ 61,069 (May 13, 2024), *order on reh'g, modifying in part*, 89 Fed. Reg. 84465 (Oct. 23, 2024).

338. 42 U.S.C. § 16421; Request for Project Proposals, 75 Fed. Reg. 32940 (June 10, 2010). This occurred with Clean Line Energy's project to transmit over 700 miles renewable energy from Oklahoma to the southeast. Jeffery Tomich, Kristi E. Swartz, *DOE Agrees to Involvement in Clean Line Transmission Project*, E&E NEWS (March 28, 2016) <https://www.eenews.net/articles/doe-agrees-to-involvement-in-clean-line-transmission-project/> [<https://perma.cc/WL2F-AAQM>]. Cf. Robert Walton, *DOE Terminates Partnership with Clean Line Energy Partners*, UTILITYDIVE (Mar. 26, 2018) (noting DOE terminating involvement) <https://www.utilitydive.com/news/doe-terminates-partnership-with-clean-line-energy-partners/519995/> [<https://perma.cc/24LV-TXZW>].

339. 42 U.S.C. § 16513.

340. U.S. DOE, Loan Programs Office, Grain Belt Express Transmission Line Final Environmental Impact Statement, DOE/EIS-0554, July 2025. Cf. Robert Walton, *DOE Cancels \$4.9B Conditional Loan Commitment for Grain Belt Express*, UTILITYDIVE (July 23, 2025), <https://www.utilitydive.com/news/doe-cancels-conditional-loan-commitment-grain-belt-express/753828/> [<https://perma.cc/PWB3-77TC>]. Missouri Senator Joh Hawley opposed the project. *Hawley Demands Energy Department Terminate Government Funding Grain Belt Express*, JOSH HAWLEY (June 25, 2025), <https://www.hawley.senate.gov/hawley-demands-energy-department-terminate-government-funding-grain-belt-express/> [<https://perma.cc/Y7YV-MYCW>].

341. AMORY B. LOVINS, *SOFT ENERGY PATHS: TOWARD A DURABLE PEACE* 63 (1977). S. David Freeman's widely circulated Ford Foundation report *A Time to Choose* favored a slower path, and of course he already had been pegged earlier, in his own words, as a socialist by some in the industry. FREEMAN, *supra* note 102, at 96–97. See also FINAL REPORT BY THE ENERGY POLICY PROJECT OF THE FORD FOUNDATION, *A TIME TO CHOOSE: AMERICA'S ENERGY FUTURE* (1974).

modern era to assist in drafting national energy policies, later in 2007 explained how he feared back in 1974 what eventually happened: we wandered along the path that has led us to an environmental crisis.<sup>342</sup> And in one relevant way for our purposes here, we ignored Freeman's admonition to avoid too much "centralized management."<sup>343</sup>

Does that mean that we ought to worry less about an independent and centralized agency such as FERC? Does it suggest that energy choices today will be driven instead by climate change considerations, market forces and technological innovations? Should we simply agree with Blake Emerson that "[a]dministrative agencies must become sites to rationalize political conflict into an inclusive account of our shared obligations, and to institute these obligations in our social life"?<sup>344</sup> And for FERC does that mean it should continue to operate as a window into our shifting political discourse?

In 1970, Paul MacAvoy observed how the FPC as an "independent regulatory commission has a mandate from Congress and the Federal courts to provide a complex set of services to the regulated industry" and, while it might be "possible to contemplate a world without a Federal Power Commission, or at least one in which the Commission is concerned only with the regulation of safety or the public convenience," such a future remains to be written.<sup>345</sup> We are possibly at an inflection point in the history of independent regulatory commissions such as FERC, and once again we can mirror MacAvoy and ask what that future should look like. The difficulty today, though, is that we no longer must bend to the geopolitical forces possibly constraining energy supply or worry about the lack of sufficient resources to supply customer demand. We instead must address how to avoid the existential climate change path and follow the "soft" path championed back in the mid 1970's. A 1974 New York Times article entitled *Anarchy in Energy* warned readers that energy policy was a chimera.<sup>346</sup> Absent thoughtful responses today we, unfortunately, will have *Anarchy in Climate Policy* as we debate the merits of independent agencies such as FERC.

342. FREEMAN, *supra* note 102, at 128, 181.

343. *Id.* at 149, 153. By 2007, he favored decentralized electric power plants. *Id.* at 72 ("Decentralized power sources coupled with efficiency can provide sizeable replacements for coal and nuclear power."); *see also id.* at 150.

344. EMERSON, *supra* note 171 at 21.

345. MACAVOY, *supra* note 89, at 2, 20.

346. Editorial, *Anarchy in Energy*, N.Y. TIMES, May 27, 1974, at 16.