The Trump administration and its strategy to seize control over independent agencies

di Claudia Sartoretti

Abstract: L'amministrazione Trump e la sua strategia per il controllo delle independent agencies – The Trump administration has tried since his official assignement a new strategy to seize control over independent agencies' rulemaking processes and the guidance they issue, inside a more general and broader attempt to reform the entire public administration.
Since his election, Donald Trump has introduced significant measures that undermine the independence of independent agencies, including through deregulation actions, undertaken through executive orders or presidential appointments that have increasingly diminished the technocratic expertise needed to implement public policy and could have potential far-reaching impacts on the federal administration.
In this context, the article intends to examine the multiple forms in which Trump's presidential policy towards federal agencies has taken shape, especially with regard to the power of appointment and removal, and with reference to an increasingly incinsive control over agencies that should instead be, independent in relations with the executive.

Keywords: Independent agencies; control; public administration; Trump presidency; independence.

1. The Trump's administration efforts to control the independent agencies

The Trump administration has tried since his official assignement a new strategy to seize control over independent agencies' rulemaking processes and the guidance they issue.

To tell the truth, the changes (or attempted changes) made by Trump to the independent agencies (IA) are part of a broader attempt to reform the entire public administration as it has gradually come to shape in over two centuries of administrative history. One of the President's most trusted political advisers, Steve Bannon, had in fact immediately stated after the elections within the *Conservative Political Action Conference* in Maryland that the federal administration must be deeply deconstructed[1]. The deconstruction had to involve specifically a profound privatization, a

[1] G. Krieg, *What the "deconstruction of the administrative state" really looks like*, in *CNN politics*, 30 March 2017 notes that the term in vogue was the "deconstruction of the administrative state".

widespread deregulation and a radical downsizing of the traditional administrative functions. Since his 2016 election campaign, Trump promised to "deconstruct the administrative State" and to restore the spoils system, overcoming the 'system of merit' on which the management of federal and State public administrations in the United States has been recently based[2].

The tendency to consider the President as the subject capable of recomposing the administrative system and the propensity to strengthen the so-called 'personal presidency' are not new in American federal administration history. As has been observed[3], references to the neo-liberal theory of public administration advocated by Ronald Reagan in the United States of the 70s and 80s of the last century are recurrent in the words of Trump and his trusted staff[4]. And in this sense, it explains the start by Trump of a strategy to increase its power over federal administration, reducing the impact of separation of powers and lessening the influence of Congress and the Judiciary on administration, even going beyond what his predecessor Reagan[5] did.

The far-reaching reform that Trump initiated during his presidency over the public administration obviously also affected the independent authorities against which, according to some authors[6], Trump would have waged a sort of 'war' in order to regain greater control over them.

[2] D. Schultz, *Public Administration in the Age of Trump*, in *Journal of Public Affairs Education*, Vol.23, No.1, 2017, 557-562 highlights how "Trumpism is a challenge to public administration and affairs". For the author, more specifically: "Trump's victory represents a repudiation of both the U.S. government and public administration. It represents a vote of no confidence in the status quo means of governance, declaring that the government has not been representing critical voices in society or delivering the goods to those who feel like they work hard but are kept down by unfair rules".

[3] G. d'Ignazio, *Poteri presidenziali e amministrazione federale negli Stati Uniti d'America: la 'prevedibile' discontinuità del presidente Trump*, in *DPCE*, special number, 2019, 251-293

[4] Schultz, 557, notices that global trends explain Trump's victory and that, at the same time, these trends have been building since the 1970s. Late in that decade, global stagflation and economically poor performances across the world, but especially in the United Kingdom and the United States, ushered in Prime Minister Margaret Thatcher and President Ronald Reagan. Together, these leaders represented the emergence of neoliberal economic policies, both domestically and globally.

[5] About Ronald Reagan's attack to the independent agencies, see S. Bartlet, *Independent agencies under attack: a skeptical view of the importance of the debate*, in *Duke L. J.*, Vol. 1988, 1988, 223-237, who, in particular, observes that President Reagan's election in 1980 presaged a resurgent executive branch that challenged the hegemony of Congress (224). See also, J.L. Mashaw, D. Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, in *Yale J. On. Reg.*, Vol. 35, 2018, pp.549-616, and E. Kagan, *Presidential Administration*, in *Harv. L. Rev.*, Vol. 114, 2001, 2245 – 2385, who notices how "Presidents historically had shunned direct intervention in rulemaking and that they had been loath to let it appear that they were influencing regulatory agencies, even those within the executive branch, to write their regulations one way rather than another" and how Reagan, "by contrast, self-consciously and openly adopted strategies to exert this influence" (2277)

[6] P. M. Shane, *Donald Trump and the War Against Independent Agencies*, in *Washington montly*, 26 November 2016

In order to better understand the scope of Trump's intervention on independent agencies, it may be useful a brief introduction about this category of administrative authorities, highlighting first how the structure of USA administration is complex; there are in fact different categories of administrative agencies into which the entire US administration can be divided[7], nevertheless federal agencies in the executive branch may be divided into two broad categories, executive agencies such as EPA and the Office of Management and Budget, and independent agencies, especially regulatory agencies such as FCC (Federal Communications Commission), FTC (Federal Trade Commission), NLRB (National Labor Relations Board). Generally speaking, executive agencies are subject to direct presidential control, while independent agencies are typically designed by statute to be comparatively free from presidential control. In essence, each type of agency comes with a set of rules that govern how the President can interact with them.

The consensus view is that the dividing line is the presence of a for-cause removal protection clause, but not all agencies considered independent possess such a clause[8]. This is one of the reason because the distinction between executive and independent agencies is not peacefully accepted by the whole doctrine. Some scholars don't not agree indeed with the fact that the independent agencies are clearly distinct from the executive ones.

In substance, for a part of the american doctrine, agencies cannot be neatly divided into two categories but there is rather a quite confusion surrounding the distinction of independent agencies from executive ones. Independent agencies are almost always defined as agencies with a for-cause removal provision limiting the President's power to remove the agencies' heads to cases of "inefficiency, neglect of duty, or malfeasance in office"[9]. Nevertheless, as some scholars acknowledge, the so-called independent agencies do not share a single form[10] and this confusion could have in a sense favored Trump in his policy of introducing more control of these agencies, even going where other Presidents have not dared.

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[7] See, e.g., R. Pierce, S.A. Shapiro, P.R. Verkueil, *Administrative Law and Process*, New York, 1999

[8] M.J. Breger, G.J. Edles, *Independent Agencies in the United States*, Oxford, 2015, 4, undelines how the same concept of 'independent' is "somewhat arbitrary, but the lack of both doctrinal cohesion and comprehensive information makes the task of definition difficult".

[9] Quoting Humphrey's Executor'r v. United States 295 U.S. 602, 620 (1935). See, J. Manners, L. Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, in *Columbia L. Rev.*, 2020, rorthcoming, available at: ssrn.com/abstract=3520377 who observes that, despite the critical role these terms play in shaping the relationship between independent agencies and the President, there is no consensus about what they actually mean.

[10] G. P. Miller, *Independent Agencies*, in *Supreme Court Review*, 1986, 41-97, but see 51, who observes: "It is not entirely clear exactly what features of the independent regulatory commissions are essential and what are merely incidental."

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Not everyone agrees in accepting a binary view, preferring rather a continuum view in which the agencies fall along a continuum ranging from most independent from presidential influence to least independent[11]. Basically, for some the so-called independent agencies are simply a type of executive agency and this uncertainty that reigns around independent agencies has most likely contributed or otherwise facilitated the Trump administration to act in an attempt to bring these agencies back under presidential control by extending to them rules that are specific to the executive agencies.

Add to this the absence of constitutional guarantees of independence: some scholars[12] point out affording a constitutionalized status to independent agencies must be considered improper, because there is no basis for doing so, and there is no reliable way to define what that status means or what protections it brings. The question is not new: already in the Eighties american scholars[13] were wondering how independent agencies really were, putting in evidence the lack of an official definition of an independent agency, either in Consitution or in the Administrative Procedure Act, or elsewhere[14]. This allowed, for example, President Reagan to achieve significant policy changes by appointing agency heads who shared his objectives of reducing the burden of regulation on business[15]

As has been highlighted[16], the debate on the independent authorities does not seem to settle down, but rather continues not just only about the precise extent of the President's control over the independent agencies

[11] See again, e.g., Breger *et al*., 7 to whom spectrum or continuum (terms which are interchangeably) approach should replace the historic dichotomy between independent and executive branch agencies); K. Datla, R.L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, in *Cornell L. Rev*., Vol. 98, No. 4, 2013, 769-844, but in particular 827, who observe that: "agencies cannot be divided into two categories based on their common structural or functional features. Of the seven structural features surveyed, none correlates perfectly with another. Not all agencies thought of as independent possess all of the indicia of independence. All of the indicia of independence, with the exception of for-cause removal, are present in agencies thought of as executive as well. And the indicia of independence themselves do not come in one form, but instead have stronger and weaker forms. The binary view forces agencies into one of two categories even though there is no clear dividing line. In doing so, the binary view fails to acknowledge the diversity of agency form".

[12] See, again, Datla *et al*., 827

[13] A. Morrison, *How independent are independent regulatory agencies?*, in *Duke L. J*., Vol. 1988, No. 2/3, 1988, 252-256

[14] P. R. Verkuil, *The Purposes and Limits of Independent Agencies*, in *Duke L.J*., Vol. 1988, No. 2/3, 1988, 257-279, but in particular 258, asserts: "What is lacking in the creation of independent agencies is any attempt in the legislative history to explain why Congress (or the President, for that matter) preferred one organizational format over the other".

[15] See, S. Lavrijssen, *The constitutional position of the US independent agencies*, in R. Caranta, M. Andenas, D. Faigrave (Ed.), *Independent Administrative Authorities*, London, 2004, 1-46

[16] D. Halberstam, *The promise of comparative administrative law: a constitutional perspective on independent agencies*, in S. Rose-Ackerman, P.L. Lindseth (Ed.), *Comparative Administrative Law*, Northampton, 2010, 185-204

themselves but also about the extent of the President's control over their more ordinary executive branch agency counterparts. That's why perhaps Trump has so successfully managed to introduce new controls over these kind of agencies.

Made this premise, in this framework in which a general authoritative definition of IA is missing and there are difficult to draw a clear dividing line between executive and independent agencies[17], we can however highlight as in the doctrine there also an opinion which still believes that IA are distinguished by operating separately from the executive branch structure and that they can be identified somewhat insulated from the executive branch hierarchy, often taking the form of a bipartisan body of Commissioners whom the President can remove only "for cause".

In accordance with this last line of thought based on the the assumption that independent agencies occupy a different legal and political space than executive branch agencies, Professor Geoffrey Miller[18] argues that IA almost uniformly display several characteristics: a multimember structure, a bipartisanship requirement, rulemaking authority, adjudication authority, enforcement authority, a narrow mandate, and removal protection. Of these, Miller believes that the "limits on presidential removal are distinctive".

More in particular the creation of independent agencies in the United States has been mainly finalized to inject expertise, professionalism, and bi-partnership into a system of governance that is otherwise (perceived as being) dominated by the politics of the winning party[19]. The creation of the Independent Interstate Commerce Commission, the Federal Trade Commission and others soon followed further to shield many regulatory decisions from the immediate influence of the affected industries as well as party politics.

Add to this fact that the expanded functions of the State have almost universally led to the feel need for growth in the machinery of governance. Governance is understood as a complex system of management, resulting from the set of autonomous sub-systems of development and direction of public policies, called networks, which give the State no longer a pyramidal structure but an archipelago one. We can think of the metaphor of the network in which the independent agencies constitute "nodes" called to

[17] Breger *et al.*, 9-10 points out such as at the creation of the EPA (Environmental protection Agency) in 1970, President Nixon referred to it as a "strong independent agency", nevertheless, "while it can at the times be described as independent or quasi-independent, the president has plenary power to remove its head".

[18] Miller, 51

[19] Halberstam, 194. See also the research of P. M. Corrigan, R. L. Revesz, *The genesis of independent agencies*, in *New York L. Rev.*, Vol. 92, No. 3, 2017, 637-697 who notice how the probability that agencies will have indicia of
independence is affected, in a far wider set of circumstances, by the approval rating of the President, the size of the Senate majority, and whether this majority is of the same party as the President.

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exercise decision-making powers that have emigrated outside the State, while still remaining public[20].

In this sense, independent agencies are part of national governance systems and have raisen because the classic separation of powers model was unable to provide regulation to the emergent capitalism.

2. Trump's attacks on the bipartisan composition of independent agencies

In this unresolved debate around the independent agencies, these agencies can be considered a novelty in the federal institutional system as for the first time in American constitutional history the administrative power is located outside the executive and is independent of it.

With particular reference to the regulatory authorities, the expression "to keep regulation out of politics" is used to highlight that the objective of these agencies is twofold: to modify the rules governing the interaction between parties and the administrative apparatus (spoils system), allowing greater incisiveness of the control action on economic powers; mitigate the dangers of the tyranny of political majorities and find suitable institutional venues for mediation between two fundamental values of the American constitution: the protection of property rights and the development of the democratic process.

In substance, what emerges from the doctrine that supports the specificity of the category of the independent agencies is that the independent in US independent agencies was not primarily about independence from the President as such, let alone independence from Congress or the Courts, but about insulation from american style, two partisan politics. And, consequently, the Supreme Court decision (*Humphrey's Executor v. United States*, issued in 1935) limiting the President's dismissal powers was not designed to suppress presidential control as such but to insure that each commission was headed by a relatively balanced mix of Democrats and Republicans[21].

[20] See, A. Predieri, *L'erompere delle autorità amministrative indipendenti*, Firenze, 1997

[21] J. L. Selin, *What makes an agency independent?* in *American Journal of Political Science*, Vol. 59, No. 4, 2015, 971-987, notes: "Just as defining "agency" is a complicated task, determining what it means for an agency to be "independent" is also difficult. The most commonly cited statutory definition of independence comes from the Administrative Procedure Act (APA), which defines an independent establishment in the federal government as 'an establishment in the executive branch (other than the United States Postal Service or the Postal Regulatory Commission) which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment.' In contrast to this inclusive definition of an independent agency, the definition of independent agency most commonly cited by federal courts comes from the description in *Humphrey's Executor v. United States*, which suggests that a truly independent agency is one that is headed by a multi-member body whose members serve fixed terms and are protected from removal except for cause.

As Martin Shapiro[22] observed the first independent regulatory commission like ICC were not designed to be independent of the President or Congress as such but to be independent of partisan Republican and Democrat politics. And also the decision to forbid a President to dismiss commission members was not much designed to protect the institutional independence of the commissions from the Presidency as such but to prevent a President from replacing commissioners of the other party with members of his own party. In other words: the result (to make agencies independent) was achieved not by banning partisan political influences but disarming them in multi-headed commission executives that balanced Republicans against Democrats. The creation of independent agencies basically represents a kind of attempt to give life to administrative entities relatively free of partisan politics, by constructing bipartisan commissions and boards.

Ultimately, independent regulatory agencies are considered independent not so much because their regulation differs from executive agencies, but rather because Congress has limited (either by statute or tradition) the President's power to remove their top officials. And removal for cause, in turn, is justified by the need to ensure bipartisan participation. Presidents normally do have the authority to remove heads of independent agencies, but they must meet the statutory requirements for removal, such as demonstrating that the individual has committed malfeasance. In contrast, the President can remove regular executive agency heads at will.

In substance, good cause does not include partisan affiliation or policy disagreement with the President. A President could fire a member of the Federal Trade Commission for breaking the law, but not because the commissioner supports neoclassical economics, while the President sustains the study of psychology as it relates to the economic decision-making processes of individuals and institutions (behavioralist economics). Independent agencies very often have multiple chiefs, that is, commissioners or board members, and presidents typically choose which one becomes the President. New Presidents can also appoint replacements to fill vacancies.

But the existence of independent agencies sometimes acts as a modest brake on rank partisanship in government or full takeover by any narrow ideology. And that's what appears to have happened under the Trump presidency[23].

It is precisely on this aspect, the bipartisan composition of the IA, that the Trump administration has often intervened, thanks also to the support of the Supreme Court' s interpretation of the clause of removal for cause, giving – in a recent case[24] – President power to fire key independent agency

[22] M. Shapiro, *European independent agencies in the light of United States Experience*, in B. Marchetti (Ed.), *L'Amministrazione comunitaria. Caratteri, accountability e sindacato giurisdizionale*, Padova, 2009, 45-60.
[23] See, again, Shane
[24] *Seila Law LLC v. Consumer Fin. Protection Bureau*, S. Ct., 2020 WL 3492641, No. 19-7, slip op. (June 29, 2020).

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chief. We can say that in a certain sense Trump administration tried to limit the bipartisan bradition which characterizes independent agencies.

For decades, Presidents have leveraged Republican and Democratic candidates in tandem to fill open slots on the Federal Energy Regulatory Commission, the Federal Communications Commission, and many other independent bodies, yet the Trump administration and Senate leadership have moved on with the Republican candidates to key committees, bucking long-standing protocol to confirm candidates from both sides in tandem. Most members of the U.S. Postal Service's board of governors have, for example, numerous ties to the Republican Party as well as to President Donald Trump's associates and administration. Recently, Senators have confirmed Republican Robert Duncan to another term as chairman at the United States Postal Service Board of Governors, without a Democratic companion.

In January 2018, for example, there were two vacancies on the board of directors of the Federal Deposit Insurance Corporation, but Trump has only put forward a candidacy for the Republican seat. In May, his choice for the presidency, Jelena McWilliams, had been confirmed but the seat of the Democratic vice-president was still empty. To date, Trump not only has not yet advanced a proposal of candidate to fill it (despite being given a name in July 2018), but he has not even nominated anyone yet to replace the company's only incumbent Democrat, Martin Gruenberg, whose mandate expired in December 2018.

Independent agencies like the Securities and Exchange Commission (SEC) are also required to have both Republican and Democratic commissioners, and the Senate has traditionally advanced nominations in pairs to incentivize bipartisan cooperation and smooth the confirmation process. On June 3, President Trump appointed Republican Commissioner Hester Peirce for a second term on the SEC. A couple of weeks later, Trump finally appointed Caroline Crenshaw to fill a Democratic seat that has been vacant since February, when Commissioner Rob Jackson left to return to teaching law at New York University. But there was no guarantee that Crenshaw will team up with Peirce to fill the vacancy. It has already taken several months for President Trump to come up with Crenshaw after the Senate Democrats recommended her as their candidate of choice, and just two months later, in august, the Senate Majority Leader Mitch McConnell performed the pairing, allowing the Democratic seat to be filled as well.

As has been noted[25], Trump has repeatedly nominated unpaired Republican nominees to independent agency boards, creating persistent imbalances across the regulatory apparatus. This has invariably shifted the balance of power even further toward corporate America's interests. And since commissioners stay on after the President that appointed them leaves

[25] D. Segal, J. Hauser, E. Eagan, *The Quiet Seizure of Independent Agencies*, in *The American Prospect*, 24 june 2020

office, corporate America may continue to enjoy this easy ride at the regulatory agencies even if the new President is Biden.

3. The support of the Supreme Court at the Trump policy for the control of independent agencies

It should also be emphasized that Trump's attempts to control independent agencies have found some support from the Supreme Court. The Supreme Court has, in fact, 'destabilized' principles on federal agencies' structures and for-cause removal.

Since the founding itself — and with mounting intensity over the 40 years — the United States has been divided over two visions of the Constitution[26]. The first insists that we have a "strongly unitary executive," which means that the President must be in charge of all those who implement federal law. For those who believe in a strongly unitary executive, all departments, all agencies and all administrators work under one person: the commander in chief. It follows that the Congress is considered devoid of the power to create "independent" agencies, headed by people whom the President cannot fire, and who are not subject to his will.

In accordance with the second vision, instead, we have a 'weakly unitary executive' which means that Congress has the authority to restrict the President's power to control some officials who implement federal law.

If Congress wants to create independent regulators, such as the Federal Trade Commission, the Federal Communications Commission and the Consumer Financial Protection Bureau, it is perfectly entitled to do that. The President must obviously be allowed to perform his constitutional functions, which means that he must be authorized to control the secretary of state and the secretary of defense (and perhaps the attorney general). But for those who believe in a weakly unified executive, Congress can make some regulators independent of the President.

Article II, section 1 of the U.S. Constitution attributes the executive power to "a President of the United States": these words did not seem ambiguous for the Supreme Court which in the case *Myers v. United States* (1926)[27] embraced enthusiastically the idea that under the Constitution, the President, and no one else, has namely executive power and the executive must be therefore "unitary". This case presented the question whether under the Constitution the President had the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate. In that occasion, the Court found that

[26] See, e.g., R. C. Sunstein, A. Vermeule, *The Unitary Executive: Past, Present, Future*, in *Supreme Court Review*, 2020, Forthcoming, ssrn.com/abstract=3666130
[27] Myers *v.* United States - 272 U.S. 52, 47 S. Ct. 21 (1926). See, e.g., C. R. Sunstein, L. Lessig, *The President and the Administration*, in *Columbia L. Rev.*, Vol.94, No. 1, 1994, 2-123; G.S. Calabresi, C.S. Yoo, Christopher, *The Unitary Executive During the First Half-Century*, in *Case W. Res. L. Rev.*, Vol. 47, 1997, 1451 - 1561.

the power to remove appointed officials, with the exception of federal judges, rested solely with the President and did not require congressional approval.

Later, after ten years, in the famous case *Humphrey's Executor v. United States*, in full New Deal the Supreme Court upheld the independence of the Federal Trade Commission, whose five members could be discharged by the President only for cause "inefficiency, neglect of duty, or malfeasance in office."

In that occasion, the Court introduced a new definition to qualify and to justify some agencies as bodies with quasi-legislative or quasi-judicial powers and as "bodies of experts which shall be independent of executive authority except in its judgement without the leave or hindrance of any other official or any department of government". In essence, to offer for the first time a basis for the constitutional status of independent agencies in the silence of the Constitution, are therefore the enduring dicta of *Humphrey's Executor v. United States*. Indeed, the Constitution does not mention administrative agencies, much less independent agencies. The constitutional status of the independent agency instead comes from *Humphrey's executor*, where the Court found that Congress could constitutionally limit the President's power of removal over agencies that performed quasi-judicial or quasi-legislative functions.

As it has been observed[28], since the day it was decided, *Humphrey's Executor* case has shaped the judicial understanding of the independence concept in administrative. This case has long formed a stable basis for assessing the U.S. Congress's power to provide executive branch officials with for-cause removal protections, and this, despite some subsequent decisions[29] which in some ways destabilized this foundation a bit, holding that even some purely executive officials, such as individuals appointed as special counsel, could receive for-cause protection when warranted by their functions.

In the face of the instability of doctrine and the renewed attention to presidential control over the agency's officials, there has nevertheless been a return, under the Trump administration, to formalism, that effectly denies agencies a distinct location outside the tripartite structure of powers. An exemple of this is the recent case *Seila Law v. Consumer Financial Protection Bureau*[30] that re-examined the extent of the President's appointment and removal powers, establishing that an executive officer who is the sole head of an agency (as in the case of the Consumer Financial Protection Bureau)

[28] P. R. Verkuil, *The status of independent agencies after Bowsher v. Synar*, in *Duke L. J.*, Vol. 1986, No.5, 1986, 770-805, but, in particular, 781

[29] See, for e.g., Morrison *v.* Olson, 487 U.S. 654 (1988); Free Enterprise Fund v. Public Company Accounting Oversight Board, 561 U.S. 477 (2010).

[30] See *supra* note 24. For a comment, see, for e.g., G. Sitaraman, *The political economy of the removal power*, in *Hard.L.Rev.*, Vol. 134, 352-408; T. A. Barnico, *Seila Law LLC v. CFPB: "Humphrey's Pre-emptor"?* in *Yale Journal on Regulation* online, 13 april 2020; P. Valerio, Unitary executive claims *e tutela dei consumatori nel settore finanziario alla luce della sentenza* Seila Law, in *DPCE online*, No. 2, 2020, 3255-3266

cannot have for-cause removal protection, even if that officer exercises only quasi-judicial or quasi-legislative functions. Such an official's powers must be cabined—either by having to work within a multi-member board or commission framework, or by being subject to at-will removal by the President. The Court, in this case, ruled that the President has absolute authority to remove the director of the Consumer Financial Protection Bureau.

It should also be noted that that independent structure was challenged by the Trump administration and by a firm that was being investigated by the CFPB for misleading financial practices. Both claimed that the limits on the President's power to fire the agency head were unconstitutional, and the Supreme Court agreed. Writing for the majority, Chief Justice John Roberts said the "the CFPB's leadership by a single individual removable only for inefficiency, neglect, or malfeasance violates the separation of powers".

The main difference between the CFPB and the other independent agencies is based – as we have just seen – on the fact tha the CFPB is led by a single administrator, while the other independent agencies are led by a multi-member group. Does that make a constitutional difference? It could be argued that it shouldn't because if a multi-member commission might seem more constrained (no single person is responsible), with only one head there is however a greater responsibility. If things go wrong, you know who to blame.

Nevertheless, the majority, led by Chief Judge John Roberts saw things very differently. Hence the resounding words of Roberts, from the beginning: "According to our Constitution, 'executive power' - all of this - is 'vested in a President'". In his view, "*Humphrey's executor* allowed Congress to provide protections for removal for cause to a corps of multi-member experts, balanced on partisan lines, who performed legislative and judicial functions and were said to exercise no executive power." From the point of view of the constitutional structure, it is particularly worrying to concentrate power in the hands of a single individual, in this case the director of the agency. According to the majority of the court, this is an inadmissible - and unconstitutional - threat to freedom[31].

Definitely, the majority opinion refused, in other words, to extend *Humphrey's Executor* case beyond the multi-member commission setting because it is necessary to ensure that the President remained politically responsible for the actions of key officials within the executive branch. As noted by the Justice dissent Elena Kagan, however, the size of the multi-member commission complicates presidential control since a single bank manager is easier to control a commission or multi-member council.

[31] C.R Sustein, *Supreme Court Puts Independent Agencies at Risk*, 29 June 2020, available at: www.bloomberg.com/opinion/articles/2020-06-29/supreme-court-risks-independent-agencies-with-cfpb-decision

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One might wonder whether the Court does not make too much distinction between single-member agencies and multi-member entities. Given the current political polarization, how to appoint and confirm the officials of multi-member bodies, and the considerable powers that hold many committees and council presidents, some agencies, like the Federal Reserve, the Securities and Exchange Commission and the Federal Communication Commission seems to be largely run by individual chairs of their committees or councils.

In the context of the CFPB director, the majority may be right. In the creation of the CFPB, not only the Congress had protected its director with a removal arrangement for cause, but Congress had also allowed the director to serve for a term of five years. This meant that a President could serve a full term without having the opportunity to replace the director of the CFPB with someone more in tune with the President's philosophy. The combination of director and long-term protection for just cause, as well as the independent budgetary and litigation authority of the agency controlled by a single individual, is likely a troubling concentration of power.

Nevertheless, what would be the result if the majority relied on the troubling characteristics of the CFPB and the protection of the mandate enjoyed by its director to believe that in combination these factors made the structure of the agency too independent of the President and Congress? Such a ruling – as has been observed[32] – would have been more restrictive, based on the specific facts of the case, and perhaps easier to defend against Judge Kagan's challenge. But it would also mean that many agreements that provide protection for cause may be subject to functionalist analysis must take into account all the circumstances, rather than formalistic relatively simple rule that a majority imposed prohibiting the protection due to unilateral agencies.

Overall there has been a real Trump administration campaign aimed at undermining (weakening) independent agencies. The Justice Department under Trump, however, has worked hard to push the Supreme Court to determine that any statutory limitations to presidential-willed removal authority are categorically unconstitutional or that "inefficiency, misconduct or neglect of the office" must be interpreted broadly enough that failure to comply with any presidential directive would become a "good cause" for dismissal[33]. This would effectively end, for example, the independence of the Federal Reserve System.

The Department of Justice's first attempt to curtail independence came in a 2018 case called *Lucia v. Securities and Exchange Commission*[34].

[32] B.W.Bell, *Revisiting the Constitutionality of Independent Agencies*, in *The Regulatory Review* online, 21 July 2020
[33] P. M. Shane, *Trump's Quiet Power Grab*, in *The Atlantic* online, 26 February 2020
[34] *Lucia v. SEC*, 138 S. Ct. 2044 (2018).

It is a decision by the Supreme Court of the United States on the status of administrative law judges (ALJ) of the Securities and Exchange Commission. The Securities and Exchange Commission (SEC) has the power, enshrined in law, to enforce US legislation on financial instruments. Among the faculties falling within this power is that of initiating an administrative procedure relating to an illegal act. Generally, the SEC delegates the task of presiding over such a proceeding to the so-called administrative law judge. The Court held that they are considered inferior officers of the United States (and not emplyees) and so are subject to the Appointments Clause (art. II, section 2, clause 2, Consitution) which establishes that "Officers of the United States" may be vested by Congress "in the President alone, in the Courts of Law, or in the Heads of Departments". And although the SEC itself is a "Head of Department," the SEC had delegated the appointment of ALJs to SEC staff members.

The Court reversed the decision of an improperly-appointed ALJ and sent the case back to the SEC for a new hearing, with a different, properly-appointed ALJ.

The Justice Department actually wanted the Court to go further, arguing that if ALJs are "official" then the statute that protects them from at-will leave should be construed narrowly so that they can be fired simply for not following instructions. The Court has expressly refused to discuss the matter, however the Sollicitor General proceeded to issue a memorandum to all of the agency's general advisers, publicizing the Department's enthusiasm to whip up this matter in a future case.

For one thing, the case deals with only a technical and position-specific question under a relatively clear textual provision, the Appointments Clause. As it has been observed[35], at first glance, *Lucia* namely appears to be a narrow ruling, with little, if any, application or relevance outside of like cases. Neverthess, focusing on the deeper aspects of the case, seeing beyond those that are most easily identified or merely superficial, we see that *Lucia* case has actually significant implications for presidential authority and the separation of powers. Following the Supreme Court decision *Lucia v. Securities and Exchange Commission*, which found that administrative law judges at the SEC are inferior officers for the Appointments Clause of the Constitution and required direct agency head appointment, President Trump issued an executive order (July 2018)[36] moving all ALJ hiring to the "excepted service", giving the President and agency heads broader latitude in appointments.

[35] See, S. D. Schwinn, *Lucia v. SEC and the Attack on the Administrative State*, in *American Constitution Society Supreme Court Review*, 2017-2018, (2018), 241-259; J. M. Beermann, *The never-ending assault on the administrative state*, in *Notre Dame L. Rev.*, Vol. 93, No. 4, 2018, 1599-1652

[36] Exec. Order No. 13,843, 83 Fed. Reg. 32,755 (July 10, 2018). See, for further information, *Article II — Appointments Clause — Officers of the United States — Lucia v. SEC*, in *Harv. L. Rev.*, Vol. 132, 2018, 287-296

DPCE online
ISSN: 2037-6677

Currently, federal agencies hire ALJs through a competitive merit-selection process administered by the Office of Personnel Management (OPM). The Executive Order removes instead ALJs from the competitive merit-selection process administered by the Office of Personnel Management (OPM) and places them into the "excepted service," a category of federal workers who are subject to a different hiring process. In sum, *Lucia* case gave President Trump constitutional "window dressing"[37] for his executive order removing ALJs from competitive examination and competitive service selection procedures, and instead to be hired at the discretion of agency heads: a move that could politicize the ALJ corps and, by extension, other politically independent and expert executive positions that are subject to merit-based appointments.

4. Trump's attempts to subordinate the independent agencies to executive branch

Independent agencies - agencies whose heads cannot be fired by the President at will - raise profound questions of constitutional structure and political responsibility. The Constitution confers executive power on only one person: the President of the United States. However, independent agencies can exercise some of that power outside of presidential control. Democratic political theory rewards political accountability to elected officials. Neverthess, once appointed, the chief officers of independent agencies are not directly accountable to anyone. Such agencies, such as the Securities and Exchange Commission (SEC) and the Federal Trade Commission (FTC), continue to grow in importance as the administrative state flourishes. But Donald Trump could be (or rather could have been, after Biden's victory in the White House) the catalyst to reduce their numbers and dismantle the power of those who remain. Originalism – as has been pointed out[38] – "sits uneasily with the constitutional concept of independent agencies[39], and textualism raises questions about whether some agencies thought to be independent actually have a statutory basis for being so". In the *Seila* case – as we have seen – Chief Justice John Roberts openly supports the theory of the unitary executive and this approach is John Robert's distinctive way of using originalism, not to overthrow a precedent that contradicts the original meaning, but to limit its generative force.

Both originalism and textualism seem to have been on the rise in no small part because of Trump's judicial appointments[40]. Trump, particularly,

[37] See, again, Schwinn, 254
[38] J. O. Mcginnis, *Independent Agencies Brought to Heel?*, 27 February, 2020, available at: lawliberty.org/independent-agencies-brought-to-heel/
[39] See P. M .Shane, *The Originalist Myth of the Unitary Executive*, in *U. Pa. J. Const. L.*, Vol. 19, 2016, 323- 348
[40] J. F. Addicott, *Reshaping American Jurisprudence in the Trump Era - The Rise of Originalist Judges*, in *Cal. W. L. Rev.*, Vol. 54, 2019, 341-362.

if he had been re-elected, might have even gone as far as taming independent agencies by ordering them to follow his oversight and even firing those who pursue a different view of the law than his own.

In general Presidents often interfere in the workings of supposedly "independent" agencies. President Obama, for e.g. publicly expressed his preference for how the Federal Communications Commission should regulate broadband[41]. President Reagan reportedly met secretly with then FCC Chairman Mark Fowler about the Commission's "Financial Interest and Syndication Rules": chairs are frequently personal friends of the President who appointed them.

Nevertheless those examples are all considered "tan suit scandals"[42] if they are compared to President Trump's sudden and unexpected withdrawal of FCC Commissioner Michael O'Rielly's (re)nomination. Although the President gave no reason, it is widely believed that Trump fired O'Rielly because the commissioner dared to express deep reservations about the wisdom and legality of the President's proposal for social media platforms censorship of the FCC[43]. Presidents can nominate whoever they want, so on balance, President Trump did nothing wrong by withdrawing the nomination. At the same time, the President appoints commissioners for a five-year term and can't fire them just to avoid being influenced by the President's whims. As has been pointed out[44], in this case, given the section 230 debate (and O'Rielly's reservations), Trump took advantage of the FCC nomination process to, in effect, fire an 'inconvenient' member anyway. How? Just not re-appointing him. Commissioner O'Rielly's first term expired in fact in late June, the President appointed him for a second term, and the Senate was evaluating the appointment. As the commissioner's re-appointment was still pending, the President could simply react by revoking the appointment: and that's what he did.

[41] K. M. Stack, *Obama's Equivocal Defense of Agency Independence*, in *Constitutional Commentary*, Vol. 62, 2010, 583-601, who comparing President Obama to President Reagan observes how actually both claim a similar level of control over independent agencies, just on different legal grounds. "For President Reagan, this control was warranted by Article II, and achievable only through constitutional invalidation of removal restrictions; for President Obama, the statutory good cause removal protections do not impede nearplenary presidential supervision of the agency" (584). See also, R.V. Percival, *Who's in Charge? Does the President Have Directive Authority Over Agency Regulatory*, in *Fordham L. Rev.*, Vol. 79, 2001, 2487-2540

[42] The expression is from S. Wallsten, *President Trump vs. Integrity and Independence*, 10 August 2020, available at techpolicyinstitute.org/2020/08/10/president-trump-vs-integrity-and-independence/

[43] Section 230 of the Communications Decency Act of 1996 establishes: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider". Trump tried to attack the section 230, signing an executive order on 28 May 2020 with which the President asked the FTC to step up regulation of social media sites and reconsider whether they should be allowed to broadly protect themselves under Section 230

[44] *Ibidem*

DPCE online
ISSN: 2037-6677

The FCC, like many expert agencies, should be independent of the executive branch. This independence is intended to help it remain objective and not unduly influenced by short-term partisan politics. In other words, the President's behavior shows us why independence can be a desirable - if not necessary - peculiarity of an agency and how difficult it is to maintain that independence, and it help to understand better the importance of the Commissioner O'Rielly' s initiative finalized to guarantee a fair trial to make decisions.

That said, President Trump has also tried to subordinate independent agencies to executive branch processes subjecting them to the standing orders that other executive branch agencies must follow, such as submit its rules to the Office of Management and Budget (OMB) for review, and obtain approval for the promulgation of significant new rules or amendments to rules.

OMB is an important instrument for the President to check the actions of the administrative agencies because it is due to President's responsability to present the budget. All but few administrative agencies must have their budgets approved by the President's policy-coordinating, agent, the Office of Mangement and Budget (OMB). The OMB (which is a component of the Executive Office of the President) plays an important role in reviewing and influencing the substance of proposed agencies'rules. The process of budget approval gives the President the opportunity to review agency performance and establish priorities[45].

Since the Reagan administration, the budget process has played an important role over the control of regulatory agencies. President Ronald Reagan issued Executive Order (EO)[46] 12291, which established centralized regulatory review in the newly created Office of Information and Regulatory Affairs (OIRA), located within OMB and required executive branch agencies to analyze the benefits and costs of their proposed regulations and to promulgate rules only if the benefits outweigh the costs. The order, simply intitled "Federal regulation" was namely designed "to reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions, provide for presidential oversight of the regulatory process, minimize duplication and conflict of regulations, and insure well-reasoned regulations," according to the stated purpose. The independent authorities were instead exempted from applying the provision, albeit more for political rather than legal reasons[47] and in particular for fear that the extension might be struck down in court and cast a cloud on the entire process.

[45] See, for e.g., Lavrijssen, 28
[46] Executive Order 12291, promulgated on [17 ELR 10018] February 17, 1981
[47] C. Boyden Gray, *The President's Constitutional Power to Order Cost-Benefit Analysis and Centralized Review of Independent Agency Rulemaking?*, (unpublished manuscript) (on file with Mercatus Center at George Mason University), www.mercatus .org/system/files/mercatus-gray-executive-power-independent-agencies-v 1.pdf

Similarly, President Clinton, who replaced EO 12291 with EO 12866[48] in 1993, he also chose to exempt Independent Regulatory Commissions from its requirements for OIRA review and cost-benefit analysis, reportedly for the same reasons. This exemption has likely further isolated independent agencies from presidential influence because OIRA does not necessarily have the opportunity to suggest changes to proposed regulations in order to make those rules conform to the President's political priorities[49].

Under Trump administration the Office of Management and Budget (OMB) issued a memorandum on April 11, for all federal agencies, including independent agencies, to establish a centralized review of agency rules by OMB's Office of Information and Regulatory Affairs (OIRA). Starting from May 11, regulations and official guidances of agencies must, in fact, be submit to the OIRA for review by the budget office. If the rules or guidances are deemed to be "major," (rule with economic impacts) the agencies also will be required to submit them to Congress under the Congressional Review Act.

More specifically, the memorandum "reaffirms the broad applicability of the CRA" (the Congressional Review Act, enacted in 1996, which requires federal agencies to send newly adopted rules to the House and Senate before the rules become effective)[50] to all federal agencies, "including the historically independent agencies" but, at the same time, introduces "a wide range of rules; sets forth a process for OIRA to make major determinations; and provides guidance for the type of analysis required for these determinations"[51].

So, if there is no doubt that the CRA applies both to executive agencies and independent agencies, what constitutes a novelty that could open new horizons is the OMB's assertion that the CRA requires an independent agency to coordinate with OIRA regarding whether an independent agency's forthcoming rule is a major rule. The OMB memorandum establishes indeed first of all that instead of an independent agency determining on its own whether a forthcoming rule is a "major rule" under the CRA criteria, that determination must be coordinated with the Office of Information and Regulatory Affairs (OIRA) irrespective of whether a rule would otherwise be submitted to OIRA for regulatory review. Furthermore,

[48] Executive Order 12866, Regulatory Planning and Review, 58 Fed. Reg. 51735 (Oct. 4, 1993)

[49] See, in more detail, J. P. Cole, D. T. Shedd, *Administrative Law Primer: Statutory Definitions of "Agency" and Characteristics of Agency Independence*, Congressional Research Service, Washington, 2014

[50] The CRA provides that Congress can veto or invalidate an agency's rule and for that it is considered an oversight tool that Congress may use to pass legislation overturning a rule issued by a federal agency. Major rules under the CRA are subject to an expedited procedure by which Congress may overturn regulatory actions, albeit with the consent of the president (or enough votes to override a veto).

[51] So verbatim the OBM memorandum available at www.whitehouse.gov/wp-content/uploads/2019/04/M-19-14.pdf

if an independent agency believes that one of its upcoming rules is an important rule, or if OIRA has not previously designated the rule as no major, the independent agency should submit the rule to the OIRA at least 30 days before the rule is published in the *Federal Register*. The independent agency should also include its analysis with each rule sufficient to allow OIRA to determine if the rule is important under the CRA criteria. Finally, in the case the independent agency's analysis is not satisfactory for OIRA, OIRA may postpone the publication of the rule until the independent agency's analysis is satisfactory as required[52].

Centralizing all independent agency 'major rule' determinations in the OIRA it would permit OIRA itself and, therefore, the executive branch, to affect the rules that an IA proposes to adopt.

The risk that the President's policy preferences might influence OIRA's review is there and cannot be denied, as well as the hypothesis in which OIRA does not allow an agency to move forward with a rule because it is not in alignment with the President's policy preferences.

5. Conclusions

Since his election, Donald Trump has introduced significant measures that undermine the independence of independent agencies, including through deregulation actions, undertaken through executive orders or presidential appointments that have increasingly diminished the technocratic expertise needed to implement public policy and could have potential far-reaching impacts on the federal administration[53].

Even where the intervention appears softer, less invasive for IA, such as with the Executive order on social media signed by President Trump and issued on 28 May 2020, for some[54] it actually hides the hope of the administration to influence IA's action without being seen as compelling it. Where the EO specifically directs the actions of independent agencies, these

[52] On the content of the OBM memorandum, see H. S. Scott, *OMB's Guidance Memorandum to Independent Agencies*, June 26, 2019, available at corpgov.law.harvard.edu/2019/06/26/ombs-guidance-memorandum-to-independent-agencies/; S. Batkins, I. Brannon, *What Does the OMB Memo Mean for Review of Independent Agency Actions, Regulation*, Vol. 42, 2019, 14-16 who wonder if the OMB memo will fundamentally change independent agency behavior or the relationship between the executive branch and the agencies. They observe indeed that spirit of the memo certainly contemplates a sea change, even if it does not explicitly demand strict performance through a formal executive order.

[53] See, for e.g., S. Rose-Ackerman, *"Slash and Burn" in the U.S. Congress and the Trump administration: permanent damage or short-term Setback?*, in *Revue française d'administration publique*, vol. 170, No. 2, 2019, 421-432.

[54] See D. Bosh, *The Administration's View of Its Ability to Direct Independent Agencies*, 29 May 2020, www.americanactionforum.org/insight/the-administrations-view-of-its-ability-to-direct-independent-agencies/; R- Wayne, *President Trump Signs Executive Order Attempting To Control Social Media*', 28 May 2020, www.forbes.com/sites/waynerash/2020/05/28/president-trump-signs-executive-order-attempting-to-control-social-media/?sh=5c3e389f3500

actions are in fact not very invasive. For example, it orders the Federal Trade Commission (FTC) to develop a report describing the politically motivated content moderation complaints it receives. A relationship is not an overly invasive opening at the discretion of the FTC.

On the contrary, on actions that would be invasive, such as the discretion to apply the FTC, the EO states that the agency must consider "taking action, as appropriate and consistent with applicable law, to prohibit unfair or deceptive acts or practices. or that affect commerce". In other words, the President asks the FTC to consider using the authority it already has, but does not constrain the agency to use it. The administration likely considers his request sufficient to 'persuade' the FTC to use its authority to increase enforcement, but it also considers it legally dangerous to enforce action.

In the same way, Section 3 of the EO prohibits, for e.g., executive agencies from spending money on advertising or marketing on a platform that the administration believes violates the "principles of free speech". Nevertheless, it does not prevent independent agencies from doing so as the administration appears to believe these agencies have the discretion to use the money allocated by Congress for marketing purposes as they see fit. Again, this provision appears mostly to be built to avoid a legal actions, rather than being driven by the need to protect the independence of certain agencies[55].

In a completely analogous way, one of the EO's objectives - to issue a regulation specifying the conditions under which a social media platform would violate the "good faith" provision of section 230 of the Communications Decency Act - calls into question the FCC. Note, however, that in this case the EO does not specifically order the FCC to issue a regulation, but rather orders the Secretary of Commerce to petition the FCC for such regulation. So, the FCC would be free to act or reject the petition in the same way it can do for any petition submitted by the public. Once more time, this structure implies that the administration believes that directing the FCC to issue a rule is too invasive and may facilitate an appeal against the EO.

So, in conclusion, almost all Presidents, try to bend the bureaucracy to their will and try to enact policies that they support[56], nevertheless, that effort appeared particularly aggressive under Trump administration.

In addition to specific changes, the Trump administration has then above all pursued aggressive deregulatory agenda, while independent agencies, on the contrary, have been introduced in USA to regulate! Independent agencies are part of national governance systems and have raisen because the classic separation of powers model was unable to provide regulation to the emergent capitalism: in the United States there has been a

[55] See, again, Bosh
[56] See again the careful reconstruction of Kagan

DPCE online
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shift from the absence of market discipline to regulation, unlike in Europe where we moved from a high level of centralisation in administration and policy making to a 'regulation' based on a broad delegation of powers to independent institutions. There, in USA, it was necessary to overcome a system of spoils systems and introduce a merit system. Here, in Europe, auhorities arise from the ashes of a State that at a certain point appears unable to manage the economy indiscriminately, thus marking the transition from interventionist to regulatory State[57].

The regulatory State presupposes, at least implicitly, a constitutional order inspired by the model of liberal democracy which, as is well known, provides for the existence of an articulated system of checks and balances aimed at avoiding the tyranny of the winning majority in a electoral competition. At the same time the populist and sovereign tendencies that have emerged in this historical phase in the United States (and Trump has been an example) but also in Europe have inevitably shifted the balance towards an extreme which, although formally safeguarding the method of electoral competition, calls into question the role of institutional counterweights (Constitutional Court, Judiciary, parliamentary minorities, independent press, international organizations, etc.)[58].

The doctrine[59] has observed that "what characterizes populists in power are their constant attempts to dismantle the system of checks and balances and to bring independent institutions like courts, central banks, medial outlets, and civil society organizations under their control".

In this sense, the attack on independent powers and authorities seems to be a common trait of populist governments.

It should therefore not be surprising that in this historical phase, independent regulation and the agencies responsible for it face growing opposition. And that because the independent agencies are structurally part of the institutional counterweights that are reconnected to the liberal principle.

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[57] See, for further information, G. Majone, *From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance*, in *Journal of Public Policy*, Vol. 17, No. 2, 1997, 139–167. For a comparative perspective, let me refer to C. Sartoretti (ed.), *Le autorità amministartive indipendenti nel diritto costituzionale comparato. Indirizzo politico e mercato nel mondo latino-americano*, Bologna, 2018

[58] M. Clarich, *Populismo, sovranismo e Stato regolatore: verso il tramonto di un modello?* in *Rivista della regolazione dei mercati*, No. 1, 2018, 2-15

[59] See, for e.g., I. Krastev (Ed.), *After Europe*, Philadelphia, 2017, 75-76; C. Goodhart, R. Lastra, *Populism and Central Bank Independence*, in *Open Econ Rev*, Vol. 29, 2018, 49–68.