

PREVENTING ELECTION SUBVERSION WITHOUT AGENCY  
INDEPENDENCE

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#### ABSTRACT

*Since Donald Trump’s inauguration to his second term in January 2025, the President has taken unprecedented steps to undermine the functions of independent federal agencies. Such actions have included unlawful firings of multiple independent agency heads and the issuance of Executive Order 14215 calling for “Presidential supervision and control of the entire executive branch,” including independent agencies. Through both emergency docket rulings and merits decisions, the Supreme Court has demonstrated its openness to undermining longstanding precedents protecting independent agencies from presidential interference. These developments have particularly dangerous implications for our democracy. Among the independent agencies targeted by Trump, several have historically played a key role in promoting free and fair elections: The Federal Election Commission (FEC), the Election Administration Commission (EAC), the Federal Communications Commission (FCC), and the United States Postal Service (USPS). Part I describes the rise of independent agencies and the recent emergence of election subversion threats. Part II explains why Congress created several distinct independent agencies to oversee the administration of federal elections and describes their election-related functions. Part III outlines the unprecedented steps President Trump has taken since regaining power to undermine the independent functioning of these and other independent agencies and details the Supreme Court’s acquiescence of these actions. Part IV explains the implications for future federal elections if the President is able to effectuate direct control over the policies and programs administered by the FEC, EAC, FCC, and USPS. Part V argues that, in order to safeguard the fairness of future federal elections, Congress should reassert control over core federal election administration functions by placing the enforcement of relevant statutes in either Article I courts or in new or existing Congressional committees.*

## INTRODUCTION

It is one week after the November 2026 midterm elections. Chamber control of the U.S. House of Representatives is down to three “too close to call” races in Orange County, California, where ballots are still being counted. If history is any indicator, the mail ballots that continue to arrive, and which can be counted up until to two weeks after Election Day, will give the three Democratic candidates a narrow edge. If two out of the three candidates win, the national Democratic Party will take control of Congress and effectively end President Trump’s two years of unchecked power. The process will be long, and expensive recounts will be necessary to prove the Democratic victory, but all projections indicate that at least two of the three Democratic candidates are likely to prevail.

Foreseeing a potentially insurmountable hurdle to implementing his policy agenda for the remainder of his term, President Trump and his team begin acting on strategies they put in place at the dawn of his second administration. The President directs the United States Postal Service (“USPS”) to instruct all postal carriers in Southern California to stop delivering mail ballots. Meanwhile, the Republican National Committee files a lawsuit in federal court to stop ballot tabulation on the grounds that California’s election equipment does not comply with recently promulgated Election Assistance Commission (“EAC”) voting equipment guidelines. The California Democratic Party files a request for an advisory opinion with the Federal Election Commission (“FEC”), seeking permission to establish a new type of legal defense fund to subsidize its efforts in these races, but the FEC unanimously denies the request as improper under federal campaign finance law.

Observing this series of actions and its potential erosive impact on democratic safeguards, a nonpartisan nonprofit organization purchases a television ad on stations across Southern California calling for mass protests. The Federal Communications Commission (“FCC”) immediately threatens to revoke the FCC licenses of all stations that run the ad, and all stations stop airing the call to protest. As a result, the general public remains largely unaware of the stakes of these three California races. Given this combination of actions, by Thanksgiving, it begins to look like only one of the Democratic candidates will win. As a result, the Republicans retain a narrow majority in the House.

This hypothetical scenario demonstrates the dangers posed by the ongoing erosion of the independence of federal agencies, such as the FEC, EAC, FCC, and USPS, which have control over core election administration-related functions. Part I of this Article describes the history of independent federal agencies and the recent rise of election subversion threats. Part II

explains why Congress chose to establish the FEC, EAC, FCC, and USPS as independent agencies that would be free from direct presidential control and outlines the core functions currently exercised by each agency. Part III details the doctrinal erosion of *Humphrey's Executor* through both merits decisions and emergency docket decisions that together have allowed President Trump to fire principal officers who enjoy statutory for-cause removal protections. Part IV describes recent efforts to assert presidential control of the functions of independent federal election agencies, foreshadowing the type of control that will likely be asserted if *Humphrey's Executor* is overturned. Part V argues that Congress should reassert control over core election-related functions currently housed in the FEC, EAC, FCC, and USPS, either through the establishment of new Article I courts or the empowerment of new or existing congressional committees.

## I. THE RISE OF INDEPENDENT AGENCIES AND ELECTION SUBVERSION THREATS

### A. Foundations of Agency Power

Although the U.S. Constitution does not mention federal agencies, the valid existence of such "...department[s] or other instrumentalit[ies] of the executive branch of the federal government..."<sup>1</sup> is now well-established. As the Supreme Court opined in *Myers v. United States*, the Constitution's authors understood that the "President alone and unaided could not execute the laws," but rather would need "the assistance of subordinates."<sup>2</sup> Article II, therefore, explicitly gives the President the power to appoint principal officers to assist in carrying out presidential responsibilities.<sup>3</sup>

While the Constitution envisions a role for agency heads, the departments they are appointed to help run typically "owes its existence to Congress."<sup>4</sup> Acting pursuant to its Article I power to "make all Laws which shall be necessary and proper"<sup>5</sup> to execute other valid acts of legislation, Congress has used its authority both to establish federal agencies and to define the scope of their powers since the beginning of the nation.<sup>6</sup> As a result, the executive branch today leans heavily on the work of myriad federal

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<sup>1</sup> *Federal Agency*, BLACK'S LAW DICTIONARY (12th ed. 2024).

<sup>2</sup> *Myers v. United States*, 272 U.S. 52, 117 (1926).

<sup>3</sup> U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to . . . appoint . . . all other Officers of the United States . . .").

<sup>4</sup> *See Myers*, 272 U.S. at 295 (Holmes, J., dissenting).

<sup>5</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>6</sup> *See, e.g.*, An Act to provide for the safe keeping of the Acts, Records, and Seals of the United States, and for other purposes., ch. 14, 1 Stat. 68 (1789) (obsolete) (establishing the State Department); *see also* An Act to Establish the Treasury Department, ch. 12, 1 Stat. 12 (1789) (establishing the Treasury Department).

agencies that were created by acts of Congress and are now led by principal officers appointed by the President with the advice and consent of the U.S. Senate.<sup>7</sup>

Given the shared responsibility for the creation and administration of federal agencies, tensions have frequently emerged around the limits of both presidential and congressional power over these entities. For example, in *Myers v. United States*,<sup>8</sup> the Court considered the constitutionality of an 1876 statute establishing the structure of the U.S. Postal Service (“USPS”), which provided that the President could only remove regional postmasters before the expiration of their terms with the advice and consent of the Senate.<sup>9</sup> Chief Justice William Howard Taft, a former president himself, struck down the statute as an unconstitutional interference with the President’s Article II power to “take care” that the laws are faithfully executed, concluding that the removal power “is an incident of the power to appoint them, and is in its nature an executive power.”<sup>10</sup> Yet Taft also acknowledged that there “may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions . . . the President cannot in a particular case properly influence or control.”<sup>11</sup> Although this statement was *dictum*, it would come to play an essential role in the Court’s cabining of the *Myers* decision less than a decade later in *Humphrey’s Executor v. United States*.<sup>12</sup>

### B. The Rise of Independent Agencies

In the years after the *Myers* decision, Congress established several new powerful agencies, including the Federal Radio Commission (“FRC”), the Federal Power Commission (“FPC”), the Securities and Exchange Commission (“SEC”), the Federal Communications Commission (“FCC”), and the National Labor Relations Board (“NLRB”).<sup>13</sup> Unlike traditional executive branch agencies like the Department of State and the Treasury Department, which are run by a sole agency head, Congress established these new agencies as multi-member boards to be led by several principal

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<sup>7</sup> The exact number depends on whether one includes executive departments, sub-agencies and bureaus, and certain boards, commissions, and committees. For purposes of this Article, the authors are primarily concerned with the 81 agencies analyzed by Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 784, 825–29 (2013).

<sup>8</sup> See *Myers*, 272 U.S. at 106.

<sup>9</sup> *Id.* at 107.

<sup>10</sup> *Id.* at 161.

<sup>11</sup> *Id.* at 135.

<sup>12</sup> *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935).

<sup>13</sup> See Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1116, n.14 (2000).

officers.<sup>14</sup> Commissioners heading these new multi-member commissions or boards served for fixed terms and could only be removed before the end of their term for “inefficiency, neglect of duty, or malfeasance in office[.]”<sup>15</sup> or “for-cause” as opposed to at-will.<sup>16</sup>

Congress also required partisan balance among the multiple agency heads, stipulating that “[n]o more than a bare majority can come from the same political party.”<sup>17</sup> Initially, Congress required fixed terms and partisan balance as a way to ensure that the agencies would serve as sources of “expert, impartial decision making.”<sup>18</sup> Yet by the time multi-member commissions proliferated in the 1930s, Congress also sought to include such provisions to guarantee that the agencies could “be a bulwark against the expansion of presidential power.”<sup>19</sup>

The constitutionality of these limits on the President’s removal power reached the Supreme Court in 1935, when President Franklin Delano Roosevelt fired FTC Commissioner William Humphrey.<sup>20</sup> Although Humphrey’s term was not set to expire until 1938, Roosevelt sought Humphrey’s resignation and proceeded to fire him without cause when Humphrey refused to comply.<sup>21</sup> Upholding the constitutionality of Congress’s establishment of for-cause removal restrictions, the Court in *Humphrey’s Executor v. United States*<sup>22</sup> emphasized the type of power exercised by FTC Commissioners. The Court characterized the regional postmaster position at issue in *Myers* as “an executive officer restricted to the performance of executive functions” who is “charged with no duty at all related to either the legislative or judicial power.”<sup>23</sup> By contrast, the Court concluded that Congress established the FTC to serve as “a legislative or judicial aid,” which “cannot in any proper sense be characterized as an arm or an eye of the executive.”<sup>24</sup>

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<sup>14</sup> *Id.* at 1117. These new agencies were modeled after the Interstate Commerce Commission (“ICC”), which Congress created in 1887 to regulate the railroad system, and which is often credited as being the first independent agency. See Datla & Revesz, *supra* note 7, at 776. But see Breger & Edles, *supra* note 13, at 1117–18 (arguing that the concept of an independent agency dates back to the establishment of the Treasury Department in 1789, which “possessed indicia of independence from the executive and indeed ‘was not referred to as an “executive” department.’” (quoting GERHARD CASPER, SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD 42 (1997))).

<sup>15</sup> Interstate Commerce Act, § 11, 24 Stat. 379, 383 (1887).

<sup>16</sup> See Datla & Revesz, *supra* note 7, at 786–87 (defining “for-cause” removal as the standard for independent agencies, as opposed to the “at-will” status of executive officers); see also *Humphrey’s Ex’r*, 295 U.S. at 631–32 (upholding “for-cause” removal protections for offices of independent agencies).

<sup>17</sup> Interstate Commerce Act § 11.

<sup>18</sup> See Datla & Revesz, *supra* note 7, at 777.

<sup>19</sup> *Id.*

<sup>20</sup> *Humphrey’s Ex’r*, 295 U.S. at 619.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 631–32.

<sup>23</sup> *Id.* at 627.

<sup>24</sup> *Id.* at 628.

*Humphrey's Executor* thus affirmed Congress's power to "creat[e] quasi-legislative or quasi-judicial agencies" which can "discharge []their duties independently of executive control."<sup>25</sup> Such authority, the Court reasoned, inherently includes Congress's power to prescribe a fixed term for its principal officers, "and to forbid their removal except for cause in the meantime."<sup>26</sup> Otherwise, the Court concluded, Congress would be powerless to prevent agencies like the FTC from the "coercive influence" of the executive branch of government.<sup>27</sup>

### C. Defining Modern Independent Agencies

Black's Law Dictionary defines the term "independent agency" as a "federal agency, commission, or board that is not under the direction of the executive, such as the Federal Trade Commission or the National Labor Relations Board."<sup>28</sup> This definition recognizes a scholarly consensus that the "defining feature of an independent agency . . . is the statutory limitation on the President's authority to remove the agency head or heads."<sup>29</sup> Whether an agency is executive or independent has, therefore, traditionally "turn[ed] exclusively on one consideration: whether the President has the authority to remove senior agency officials at will."<sup>30</sup>

However, many congressional statutes establishing agencies long thought to be independent do not actually contain for-cause removal restrictions. For example, while the SEC is often considered a classic independent agency, the Securities and Exchange Act of 1934 does not explicitly restrict the President's ability to remove commissioners before the end of their terms without cause.<sup>31</sup> Nonetheless, myriad courts, including the Supreme Court, have long held that the President only has the power to remove SEC Commissioners for inefficiency, neglect of duty, or malfeasance

<sup>25</sup> *Id.* at 629.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Independent Agency*, BLACK'S LAW DICTIONARY (12th ed. 2024).

<sup>29</sup> MATTHEW C. STEPHENSON & JOHN F. MANNING, LEGISLATION AND REGULATION 700 (4th ed. 2021); *see also* Datla & Revesz, *supra* note 7, at 771 (noting that independent agencies are "[g]enerally defined as entities whose heads enjoy (or are believed to enjoy) for-cause removal protection"); Jacob E. Gersen, *Designing Agencies*, RSCH. HANDBOOK ON PUB. CHOICE & PUB. L. 333, 347 (2010) ("Independence is a legal term of art . . . referring to agencies headed by officials that the President may not remove without cause. Such agencies are, by definition, independent agencies; all other agencies are not.").

<sup>30</sup> STEPHENSON & MANNING, *supra* note 29, at 705.

<sup>31</sup> Jameson M. Payne, *Taken for Granted? SEC Implied For-Cause Removal Protection and Its Implications*, YALE J. ON REG. (2022).

in office.<sup>32</sup> The same logic has been applied to other multi-member commissions and boards featuring fixed terms but lacking explicit for-cause removal statutory language,<sup>33</sup> including some election-related agencies like the FEC and FCC.

This longstanding practice was recently called into question by Justice Brett Kavanaugh in *FCC v. Consumers' Research*.<sup>34</sup> Rejecting a non-delegation challenge to the FCC's power, Kavanaugh, concurring in the judgment, defined an independent agency as one that is "headed by officers who are not removable at will by the President and who thus operate largely independently of Presidential supervision and direction."<sup>35</sup> Despite acknowledging that the "FCC has commonly been viewed as an independent agency," Kavanaugh took the position that the FCC "formally is *not* an independent agency because the FCC does not have statutory for-cause removal protections[.]"<sup>36</sup> Asserting that it is the Supreme Court's practice "not to infer for-cause removal protections from statutory silence[.]" Kavanaugh thus concluded that "the FCC, in light of the statutory text, should not be considered an independent agency."<sup>37</sup>

Professors Kirti Datla and Richard Revesz have argued against a "binary view" of agency independence, arguing instead that "all agencies fall on a *spectrum* ranging from most insulated from presidential control to least insulated . . . determined by reference to the agency's enabling statute."<sup>38</sup> Datla and Revesz went on to identify seven such "indicia" of agency independence: (1) statutory for-cause removal restrictions; (2) specified tenure for agency heads; (3) a multi-member structure; (4) a partisan balance requirement; (5) independent litigation authority; (6) budgetary bypass authority; and (7) adjudication authority.<sup>39</sup> After analyzing the extent to which each federal agency possesses or lacks these indicia of independence,

<sup>32</sup> See *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 487 (2010) ("The parties agree that the [SEC] Commissioners cannot themselves be removed by the President except under the *Humphrey's Executor* standard of 'inefficiency, neglect of duty, or malfeasance in office,' . . . and we decide the case with that understanding"); *S.E.C. v. Blinder, Robinson & Co.*, 855 F.2d 677, 682 (10th Cir. 1988) ("the President has the power to remove a commissioner for inefficiency, neglect of duty, or malfeasance in office.").

<sup>33</sup> See STEPHENSON & MANNING, *supra* note 29, at 706 (explaining that the "SEC is not an isolated anomaly" and that other agencies "widely regarded as 'independent'" such as the FCC and FEC lack for-cause removal language); *cf.* Datla & Revesz, *supra* note 7, at 834 (arguing that "there is good reason to believe that Congress intentionally chose not to endow agencies [like the SEC] with removal protection," and that the absence of for-cause removal restrictions in statutes "looks more like a deliberate choice than a drafting error.").

<sup>34</sup> *FCC v. Consumers' Rsch.*, 1245 S.Ct. 2482, 2511–2514 (2025) (Kavanaugh, J., concurring).

<sup>35</sup> *Id.* at 2517 (Kavanaugh, J., concurring).

<sup>36</sup> *Id.* (internal quotation marks and citations omitted) (emphasis added).

<sup>37</sup> *Id.*; see also *Kennedy v. Braidwood Mgmt., Inc.*, 145 S.Ct. 2427, 2448 (2025) ("In essence, Braidwood invites the Court to read a for-cause removal restriction into a statute that does not explicitly provide for one. We decline to do so.").

<sup>38</sup> Datla & Revesz, *supra* note 7, at 824–25 (emphasis added).

<sup>39</sup> *Id.* at 769, 786–812.

they found that “[n]ot all agencies thought of as independent possess all of the indicia of independence.”<sup>40</sup> As a result, they concluded that the binary view of agencies as either independent or executive misleadingly “forces agencies into one of two categories even though there is no clear dividing line.”<sup>41</sup>

As discussed in detail *infra* in Part II, each of the agencies Congress has tasked with election administration-related responsibilities possesses some, but not all, of Datla and Revesz’s seven indicia of independence. Evaluating agency independence on a continuum, rather than as a binary, is helpful in assessing the extent to which each of these agencies will remain free from presidential control moving forward. This is especially true given the Supreme Court’s shifting guidance on agency independence.<sup>42</sup> As the next section explains, the question of whether federal agencies tasked with election administration responsibilities will remain free from direct presidential control has serious implications for our democracy.

#### D. The Emergence of Election Subversion Threats

Voter suppression is a centuries-old tradition in America and stains its legacy.<sup>43</sup> Voter suppression can be defined as any effort—whether taken under color of law or otherwise—to prevent certain voters from being able to register to vote or vote in an election.<sup>44</sup> Voter suppression places unnecessary, burdensome, or technical access limitations on the act of voting with the nefarious intent of keeping voters or classes of voters—typically Black and Brown voters—from casting a ballot to begin with.<sup>45</sup> Yet while voter suppression has been with us since the founding,<sup>46</sup> election subversion

<sup>40</sup> *Id.* at 826.

<sup>41</sup> *Id.*

<sup>42</sup> Richard Re, *Defending the Fed: Agency Independence in Three Dimensions*, SCOTUSBLOG (Jan. 27, 2026), <https://www.scotusblog.com/2026/01/defending-the-fed-agency-independence-in-three-dimensions/> [<https://perma.cc/MY9S-EMAB>].

<sup>43</sup> See, e.g., Gilda R. Daniels, *Ending the Cycles of Voter Suppression*, 60 HARV. C.R.-C.L.L. REV. 373, 377–80 (2025).

<sup>44</sup> See *Understanding Voter Suppression: Why Your Voice Matters*, NAT’L UNDERGROUND R.R. FREEDOM CTR., <https://freedomcenter.org/voice/understanding-voter-suppression> [<https://perma.cc/635Q-2TWM>] (last visited Mar. 2, 2026); *Fighting Voter Suppression*, LEAGUE OF WOMEN VOTERS, <https://www.lwv.org/voting-rights/fighting-voter-suppression> [<https://perma.cc/N243-MR3U>] (last visited Apr. 3, 2026).

<sup>45</sup> LEAGUE OF WOMEN VOTERS, *supra* note 44.

<sup>46</sup> See *Voting Rights Act of 1965*, NAACP, <https://naacp.org/find-resources/history-explained/legislative-milestones/voting-rights-act-1965> [<https://perma.cc/3UWZ-43DG>] (last visited Feb. 25, 2026); see generally Brandon Tensley, *America’s Long History of Black Voter Suppression*, CNN: Politics (2021), <https://www.cnn.com/interactive/2021/05/politics/black-voting-rights-suppression-timeline/> [<https://perma.cc/7DBM-2R8T>] (explaining the history of black voter suppression

is largely a new threat. Election subversion (or election “sabotage”), refers to attacks on *elections themselves* meant to either undermine the true results of a given election or cast doubt on the underlying integrity of the entire election system on which those results are based (e.g., the trustworthiness of the election officials who administered the elections or the security of the machines on which votes were cast and counted).<sup>47</sup>

Election subversion takes many forms: often, it occurs after voting takes place as election saboteurs seek to interrupt or undermine the casting of ballots and certification of verified results in an attempt to subvert the results of a single election.<sup>48</sup> However, efforts to undermine confidence in elections (and, therefore, subvert the long-term integrity of the system) can begin long before Election Day. For example, unsupported statements by government officials that ineligible citizens are registered and may vote in large numbers; unfounded claims that certain voting methods—such as voting by mail—are highly susceptible to voter fraud; curtailing or intimidating the free press; criminalizing dissent; and normalizing the deployment of federal law enforcement and military personnel to U.S. cities create preconditions that help subvert elections.

Importantly, there is no bright dividing line that separates acts of voter suppression and acts of election subversion. Indeed, any given act of voter suppression can often become a pretext for later attempts at election subversion. For example, policies that attempts to require voters to provide documentation proving their U.S. citizenship status are often cited as attempts at voter suppression because tens of millions of Americans do not possess the forms of identification these laws would require for participation.<sup>49</sup> Calls for such documentary proof of citizenship requirements are predicated on unsupported and repeatedly disproven claims that millions of noncitizens are registered and voting in American elections.<sup>50</sup> These same

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and the lack of voting rights provided to anyone who was not a white male from the time of the founding until the Reconstruction era).

<sup>47</sup> See Rachel Homer & Jessica Marsden, *What Is Election Subversion?*, PROTECT DEMOCRACY (Aug. 14, 2023), <https://protectdemocracy.org/work/what-is-election-subversion/> [<https://perma.cc/H3WD-6YR4>].

<sup>48</sup> *Id.*

<sup>49</sup> See, e.g., Gréta Bedekovics & Sydney Bryant, *The SAVE Act Would Disenfranchise Millions of Citizens*, CTR. FOR AM. PROGRESS (Jan. 26, 2026), <https://www.americanprogress.org/article/the-save-act-would-disenfranchise-millions-of-citizens> [<https://perma.cc/3NDW-2QLW>] (estimating that 69 million married American women do not have a birth certificate matching their legal name, which could disenfranchise them under proposed federal legislation requiring certain documentary proof of citizenship to register and vote).

<sup>50</sup> See, e.g., Miles Parks, *Republicans Aim to Stop Noncitizen Voting in Federal Elections. It's Already Illegal*, NPR: ELECTIONS (Apr. 12, 2024, at 18:36 ET), <https://www.npr.org/2024/04/12/1244302080/trump-johnson-noncitizen-voting-bill> [<https://perma.cc/BU5K-LF4S>]; Laura Doan, *Trump Falsely Claims Noncitizen Voter Fraud Is Widespread. Here are 5 Facts*, CBS NEWS: POLITICS (Oct. 30, 2024, at 14:35 ET), <https://www.cbsnews.com/news/trump-noncitizen-voter-fraud-fact-check/> [<https://perma.cc/3RMG-KJSA>].

unfounded claims could later provide grounds for questioning the validity of the results of a legitimate election.

While both voter suppression and election subversion are two prongs of the same, centuries-old strategy to undermine elections as a way of grabbing and holding onto power—and disenfranchising historically marginalized groups and individuals—practically, we can distinguish the two concepts. Voter suppression activities are actions that are fundamentally (and often overtly) driven by discriminatory intent toward voters or classes of voters, while election subversion activities are characterized by attempts to tamper with or manipulate the administration of elections themselves (even if those attempts are, at their core, racially motivated attempts to maintain white supremacy).

Statutes giving the executive branch authority to regulate election administration—such as the Federal Election Campaign Act (“FECA”) and the Help America Vote Act (“HAVA”)—are typically tied to Congress’s authority under the Constitution’s Elections Clause to “make or alter” state election regulations.<sup>51</sup> Accordingly, these statutes address the mechanics by which elections are administered, such as campaign finance, voter registration, and voting machine certification. Because these statutes are more likely to be implicated as part of election subversion efforts than are voter suppression-related statutes like the Voting Rights Act of 1965 (“VRA”), the next section focuses on Congress’s decision to enact these laws and to create independent agencies to wield the federal government’s power over election administration.

## II. CONGRESS’S ESTABLISHMENT OF INDEPENDENT ELECTION-RELATED AGENCIES

### A. *The Federal Elections Commission*

While the 1965 VRA created a powerful new role for the Department of Justice (“DOJ”) in preventing voter suppression,<sup>52</sup> Congress did not empower a federal agency to regulate election administration until the 1970s. The absence of federal involvement in this space can be attributed to the constitutional and historical reservation of election administration to the

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<sup>51</sup> See *Buckley v. Valeo*, 424 U.S. 1, 13, n.16 (1976) (FECA); see *Reschenthaler v. Schmidt*, 776 F. Supp. 3d 280, 285 (M.D. Pa. 2024).

<sup>52</sup> See 52 U.S.C. §10304 (requiring DOJ to preclear new voting laws); *About Federal Observers and Election Monitoring*, U.S. DEP’T JUST., <https://www.justice.gov/crt/about-federal-observers-and-election-monitoring> [<https://perma.cc/2ZWN-QPJT>] (last visited Mar. 1, 2026) (establishing federal observers in certain jurisdictions).

states. The Elections Clause provides that the “Times, Places and Manner of holding Elections” for members of Congress “shall be prescribed in each State by the Legislature thereof.”<sup>53</sup> Yet the clause also reserves an explicit role for Congress to “at any time by Law make or alter such Regulations” pursuant to its Article I legislative powers.<sup>54</sup> While the extent of the authority the clause actually grants to Congress to regulate elections remains a topic of debate,<sup>55</sup> it has provided the foundation for the creation of the federal agencies discussed in this section.

### 1. The Establishment of the FEC as an Independent Agency

In response to mounting public pressure to enact campaign finance reform, Congress enacted the Federal Election Campaign Act of 1971 (“FECA”), the first comprehensive statute regulating campaign finance in federal elections.<sup>56</sup> FECA aimed to improve the integrity of federal elections by setting limits on campaign contributions, creating rules for how political committees could operate, establishing reporting requirements for political committees, and implementing new disclosure requirements for political advertising.<sup>57</sup> Just months after FECA’s enactment, however, the news broke that President Richard Nixon had used campaign contributions to pay for the burglary and wiretapping of the Democratic National Committee.<sup>58</sup> The Watergate scandal’s high-profile arrests, resignations, and televised hearings led to public outrage and renewed bipartisan congressional interest in shoring up FECA’s enforcement mechanisms.<sup>59</sup> The Senate Watergate Committee ultimately recommended that Congress establish an independent, nonpartisan agency to enforce FECA, characterizing such a step as “the most significant reform that could emerge from the Watergate scandal.”<sup>60</sup>

Congress in 1974 thus enacted a series of amendments to FECA, which established the Federal Election Commission (“FEC”), a bipartisan oversight board tasked with interpreting and enforcing FECA.<sup>61</sup> Congress’s desire for

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<sup>53</sup> U.S. CONST. art. I, § 4, cl. 1.

<sup>54</sup> *Id.*

<sup>55</sup> See Hope C. Kashatus, *Ready to Roll: How the U.S. Election Assistance Commission Can Strengthen State Compliance with Federal Voter Roll Maintenance Requirements*, 73 ADMIN. L. REV. 901, 908 (2021).

<sup>56</sup> Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 52 U.S.C. § 30101–30146 (2018) (“FECA”).

<sup>57</sup> *Democratic Nat’l Comm. v. Trump*, No. 25-CV-00587, 2025 WL 1573181, at \*1 (D.D.C. June 3, 2025).

<sup>58</sup> *Id.*

<sup>59</sup> Lauren Eber, Note, *Waiting for Watergate: The Long Road to FEC Reform*, 79 S. CAL. L. REV. 1155, 1159–60 (2006).

<sup>60</sup> *Id.* at 1164 (quoting S. REP. No. 93-981, at 564 (1973)).

<sup>61</sup> *Id.* at 1164–65.

the FEC to function as an independent agency is clear from the legislative history, which repeatedly describes the entity as an “independent establishment of the executive branch.”<sup>62</sup> Congress also “patterned” the FEC “on the classic independent regulatory agency sanctioned . . . in *Humphrey’s Executor*[.]”<sup>63</sup> Congress envisioned an entity made up of principal officers who would be “chosen on the basis of their maturity, experience, integrity, *impartiality*, and good judgment.”<sup>64</sup> The FEC possesses six out of the seven indicia of independence identified by Datla and Revesz: (1) a multi-member structure (the FEC is comprised of six Commissioners);<sup>65</sup> (2) specified tenure (Commissioners serve for staggered six-year terms);<sup>66</sup> (3) partisan balance requirements (no more than three Commissioners can represent the same political party);<sup>67</sup> (4) independent litigating authority (the FEC can file civil enforcement actions in federal district court);<sup>68</sup> (5) budget bypass authority (the FEC transmits requests concurrently to Congress and the President);<sup>69</sup> and (6) adjudication authority (e.g., the power to impose civil monetary penalties).<sup>70</sup>

As a result, the Supreme Court, Congress, and the White House have all repeatedly recognized the FEC as an independent, bipartisan agency falling under the purview of *Humphrey’s Executor*.<sup>71</sup> This is true even though the FEC lacks statutory removal protection; the indicium of independence is often viewed as most important. Unlike the statute at issue in *Humphrey’s Executor*, which prohibited the President from removing FTC Commissioners before the end of their terms unless for “inefficiency, neglect of duty, or malfeasance in office,” FECA contains no language limiting the President’s removal power.<sup>72</sup> Nonetheless, the presumption that FEC commissioners still enjoy for-cause removal protections “is so central to most

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<sup>62</sup> H.R. REP. NO. 93-1239, at 127 (1974); *see also* 120 CONG. REC. 4459, 27492 (1974) (describing the FEC as “self-starting, self-propelled, free-wheeling” agency that would “need no one’s permission to exercise its police powers with respect to electioneering by candidates for all the Federal elective offices.”)

<sup>63</sup> *FEC v. NRA Pol. Victory Fund*, 6 F.3d 821, 826 (D.C. Cir. 1993).

<sup>64</sup> H.R. REP. NO. 93-1438 (1974) (Conf. Rep.).

<sup>65</sup> *Leadership and Structure*, FEC, <https://www.fec.gov/about/leadership-and-structure/> [<https://perma.cc/VS6M-N7EX>] (last visited Feb. 28, 2026).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> 52 U.S.C. § 30109(a)(6)(A).

<sup>69</sup> *Strategy, Budget and Performance*, FEC, <https://www.fec.gov/about/reports-about-fec/strategy-budget-and-performance> [<https://perma.cc/U25F-S99C>] (last visited Mar. 2, 2026).

<sup>70</sup> 52 U.S.C. § 30109(a)(4).

<sup>71</sup> Brief of Ellen L. Weintraub as Amicus Curiae at 13, *Democratic Nat’l Comm. v. Trump*, No. 1:25-cv-00587-AHA (D.D.C. June 3, 2025) (detailing “fifty years of presidential practice as well as Congress’s unmistakable intent that the FEC be insulated from total presidential control.”).

<sup>72</sup> *See* 15 U.S.C. § 41 (permitting removal of FTC commissioners only for “inefficiency, neglect of duty, or malfeasance in office”); *see also* 52 U.S.C. § 30106 (establishing the Federal Election Commission without imposing any limitation on presidential removal).

conceptions of agency independence that courts have assumed it is included in the design of the FEC.”<sup>73</sup> Despite Justice Kavanaugh’s recent assertion that it is the Supreme Court’s practice “not to infer for-cause removal protections from statutory silence,” this is precisely what lower courts, including the D.C. Circuit, have done when interpreting FECA.<sup>74</sup>

Although the FEC has been criticized as largely ineffective,<sup>75</sup> the agency is still responsible for exercising important federal election-related powers today. Even critics of the FEC’s effectiveness recognize that the agency remains the “sole, centralized authority over civil campaign law violations and rulemaking pertaining to federal elections[.]”<sup>76</sup> This power is particularly important because the FEC does not currently “share significant overlapping authority over the substantive issues of federal election regulation and law enforcement” with any other agency.<sup>77</sup> In an era in which election subversion threats are on the rise, the FEC’s campaign finance authority remains critical, as does its independence from presidential control.

## 2. The FEC’s Role in Preventing Election Subversion

Nearly seven out of ten Americans believe the role of big money in politics represents “a very big problem in the country today.”<sup>78</sup> In light of this consensus, FECA and FEC regulations limit the amount of money federal candidates and political parties are allowed to receive from any given source—ranging from relatively small dollar amounts to the unlimited spending so-called “super PACs” now engage in. In the most recent election cycle, for example, the largest total amount a given campaign, such as the Trump or Harris campaign, could receive from an individual donor was \$3,300 per election (or \$6,600 for the primary and general election

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<sup>73</sup> Note, *Eliminating the FEC: The Best Hope for Campaign Finance Regulation?*, 131 HARV. L. REV. 1421, 1426 (2018).

<sup>74</sup> See *FEC v. NRA Pol. Victory Fund*, 6 F.3d 821, 826 (D.C. Cir. 1993) (agreeing with the FEC’s assertion that “the President can remove the commissioners only for good cause, which limitation is implied by the Commission’s structure and mission as well as the commissioners’ terms” despite statutory silence on the matter).

<sup>75</sup> See, e.g., Bradley A. Smith, *Feckless: A Critique of Critiques of the Federal Election Commission*, 27 GEO. MASON L. REV. 503, 506 (2020); *Eliminating the FEC: The Best Hope for Campaign Finance Regulation?*, *supra* note 73; Bradley A. Smith & Stephen M. Hoerstering, *A Toothless Anaconda: Innovation, Impotence, and Overenforcement at the Federal Election Commission*, 1 ELECTION L. J. 145 (2002).

<sup>76</sup> Arnab Datta, *Supporting the Agency “Designed to Do Nothing”*: *Creating a Regulatory Safety Net for the FEC*, 88 GEO. WASH. L. REV. 1259, 1272 (2020).

<sup>77</sup> *Id.*

<sup>78</sup> PEW RSCH. CTR. AMERICANS CONTINUE TO VIEW SEVERAL ECONOMIC ISSUES AS TOP NATIONAL PROBLEMS, (Feb. 20, 2025), <https://www.pewresearch.org/politics/2025/02/20/americans-continue-to-view-several-economic-issues-as-top-national-problems/> [<https://perma.cc/SKC3-HH7D>].

combined).<sup>79</sup> The limits to national political parties such as the Democratic National Committee and Republican National Committee<sup>80</sup> are significantly higher,<sup>81</sup> and there are no limits on how much super PACs can raise or spend as long as they don't coordinate their activities with the candidates or parties they seek to benefit when they spend it.<sup>82</sup>

Against this intersection of tight limits on direct contributions to candidates and attractive workarounds by channeling money and electoral activity through aligned third parties, the FEC's interpretation and enforcement of FECA loom large among campaign fundraising and legal professionals. Despite criticisms about the FEC's effectiveness, the major political parties that recruit, fund, and otherwise support candidates for elected office maintain that "[v]irtually every aspect of their activity . . . is regulated by FECA."<sup>83</sup> According to the parties themselves, they still "rely on impartial guidance from the FEC for virtually everything they do—soliciting contributions, making expenditures and other disbursements, coordinating campaign activity, and reporting [their financial activity] to the Commission."<sup>84</sup>

The agency's exercise of these broadly applicable campaign finance regulatory powers can be acute and impactful within the context of any given election for federal office. Today's races are decided by exceedingly narrow margins,<sup>85</sup> and any advantage can be outcome-determinative. In an age where campaign spending is higher than any decade in history,<sup>86</sup> the advantage cannot be overstated of having a favorable interpretation (or favorable interpreter) of the law on one's side when that law dictates how one can raise

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<sup>79</sup> FEC, CONTRIBUTION LIMITS FOR 2023–2024, (Feb. 2023), [https://www.fec.gov/resources/cms-content/documents/contribution\\_limits\\_chart\\_2023-2024.pdf](https://www.fec.gov/resources/cms-content/documents/contribution_limits_chart_2023-2024.pdf) [<https://perma.cc/7U3W-5BMM>].

<sup>80</sup> See 11 C.F.R. § 106.1; see also *Coordinated Party Expenditures*, FEC, <https://www.fec.gov/help-candidates-and-committees/making-disbursements-political-party/coordinated-party-expenditures/> [<https://perma.cc/3LAC-2MNZ>] (last visited Mar. 2, 2026) (explaining the special expenditure that national party committees and state party committees can make in connection with the general election campaigns of federal candidates).

<sup>81</sup> 11 C.F.R. § 106.1.

<sup>82</sup> *SpeechNow.org v. FEC*, 599 F.3d 686, 693 (D.C. Cir. 2010).

<sup>83</sup> Complaint at 8, 16, *Democratic Nat'l Comm. v. Trump*, No. 1:25-CV-00587, 2025 WL 662062 (D.D.C. Feb. 28, 2025).

<sup>84</sup> *Id.* at 8.

<sup>85</sup> See ZACHARY GEIGER & REBECCA MEARS, *THE POWER OF ONE VOTE*, (2024), <https://www.americanprogress.org/article/the-power-of-one-vote/> [<https://perma.cc/ZTC7-ZNGJ>].

<sup>86</sup> See Anna Massoglia, *Dark Money Hit a Record High of \$1.9 Billion in 2024 Federal Races*, BRENNAN CTR.: EXPERT BRIEF (May 7, 2025), <https://www.brennancenter.org/our-work/research-reports/dark-money-hit-record-high-19-billion-2024-federal-races> [<https://perma.cc/P9XB-V3T8>]; Hannah Grabenstein, *The Cost of This Election*, PBS NEWS (Nov. 5, 2024, at 18:50 ET), <https://www.pbs.org/newshour/live-update/election-news-2024/the-cost-of-this-election> [<https://perma.cc/YF33-UZR2>].

and spend funds in a tight race. If not wielded impartially, even the regulatory powers of the “Feckless FEC”<sup>87</sup> can tilt the scales.

## 2. Advisory Opinions

The FEC issues advisory opinions, generally defined as “official Commission responses to questions about how federal campaign finance law applies to specific, factual situations.”<sup>88</sup> The FEC issues this written guidance to the regulated community on the application of federal campaign finance law and FEC regulations “with respect to a specific transaction or activity by the person” submitting the request.<sup>89</sup> Any person who (1) relies on the advice of the Commission’s advisory opinion and (2) acts in good faith in accordance with the opinion has statutory protection from legal sanction.<sup>90</sup> Thus, in the midst of a hard-fought campaign where any misstep can translate to lost votes, “the advisory opinion process [is] a shield against future enforcement actions” filed by a political opponent.<sup>91</sup>

An advisory opinion “provides [parties and candidates] with certainty and predictability with respect to potential courses of action.”<sup>92</sup> Frequently, candidates and parties organize their campaign finance and fundraising apparatus differently—especially as technologies change and new and innovative legal interpretations of campaign finance rules emerge.<sup>93</sup> The advisory opinion process affords any party or candidate who believes their innovative or novel interpretation of the law could put them at a competitive advantage in their ability to raise or spend money an opportunity to test that theory, risk-free. Without an advisory opinion, candidates and parties are forced to choose between gaining a competitive advantage and risking potential legal and political fallout from the accusation of lawbreaking.

Campaigns looking to press any advantage against political opponents have availed themselves of the advisory opinion process to seek the FEC’s guidance on a range of high-stakes, high-profile activities. For example, following the emergence of cryptocurrency, a political action committee (“PAC”) requested and received an advisory opinion on whether it could

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<sup>87</sup> N.Y. Times Editorial Board, Opinion, *The Feckless F.E.C., Rebuked*, N.Y. TIMES (Sep. 23, 2016), <https://www.nytimes.com/2016/09/24/opinion/the-feckless-fec-rebuked.html> [<https://perma.cc/XV65-A32X>].

<sup>88</sup> *Advisory Opinions*, FEC, <https://www.fec.gov/data/legal/advisory-opinions/> [<https://perma.cc/8RUG-P9MV>] (last visited Mar. 2, 2026).

<sup>89</sup> 52 U.S.C. § 30108(a)(1).

<sup>90</sup> 52 U.S.C. § 30108(c)(2).

<sup>91</sup> Brief of Ellen L. Weintraub, *supra* note 71, at 10.

<sup>92</sup> Complaint at 48, *Democratic Nat’l Comm. v. Trump*, No. 25-CV-00587, 2025 WL 662062 (D.D.C. Feb. 28, 2025).

<sup>93</sup> Brief of Ellen L. Weintraub, *supra* note 71, at 10.

accept cryptocurrency contributions.<sup>94</sup> More recently, in response to rising political violence and cyber-attacks against elected officials and campaign infrastructure, the FEC provided guidance to campaigns on using political campaign funds for candidates' and campaigns' security.<sup>95</sup> And in 2024, the FEC permitted candidates to receive significant grassroots assistance from outside entities without running up against campaign finance contribution limits.<sup>96</sup>

### 3. Enforcement Proceedings

If the advisory opinion process is a shield, FECA's enforcement process is a campaigner's sword. The FEC's enforcement function enables parties and candidates to hold their opponents to account and force a level playing field.<sup>97</sup> "*Any person* who believes a violation of the Act has occurred . . . may file a complaint with the Commission."<sup>98</sup> If four commissioners find "reason to believe" that a violation of the Act has occurred or is about to occur, then the Commission proceeds to investigate.<sup>99</sup> FECA provides the FEC with the power to subpoena, audit, and conduct "field investigation[s.]"<sup>100</sup> The FEC can also issue civil penalties, and it may refer suspected knowing and willful violations of the Act to the Department of Justice.<sup>101</sup> The Commission, pursuant to this power, has imposed dozens of penalties in the six figures and even some stretching into the millions.<sup>102</sup>

Because there is no evidentiary threshold for filing a complaint,<sup>103</sup> the slightest appearance of wrongdoing is fair game for triggering an enforcement action by one's opponent. The potential political and reputational damage of an FEC complaint being filed is immediate: while the Commission is required to keep the matter confidential until it is resolved, the person filing the complaint can and most often does leak it to the media,

<sup>94</sup> Make Your Own Laws PAC, 2014-02 FEC (2014).

<sup>95</sup> See, e.g., Guy for Congress, 2023-04 FEC (2023); Warren Democrats, Inc., 2022-17 FEC (2022).

<sup>96</sup> Texas Majority PAC, 2024-01 FEC (2024).

<sup>97</sup> CAMPAIGN LEGAL CTR., ADVISORY OPINION REQUEST (2025), <https://campaignlegal.org/sites/default/files/2025-03/CLC%20Advisory%20Opinion%20Request%203.10.2025.pdf> [<https://perma.cc/UT3N-VU7P>].

<sup>98</sup> 52 U.S.C. § 30109(a)(1) (emphasis added).

<sup>99</sup> 52 U.S.C. § 30109(a)(2).

<sup>100</sup> *Id.*; see also 52 U.S.C. § 30107(a)(3) (granting the Commission subpoena power "relating to the execution of its duties[.]").

<sup>101</sup> 52 U.S.C. § 30109(a)(5)(C).

<sup>102</sup> FEC, SELECTED CASES IN WHICH THE CIVIL PENALTIES ARE \$50,000 OR GREATER MADE PUBLIC BETWEEN 1980 AND PRESENT, (2025), [https://www.fec.gov/resources/cms-content/documents/Civil\\_Penalties\\_50k.pdf](https://www.fec.gov/resources/cms-content/documents/Civil_Penalties_50k.pdf) [<https://perma.cc/PHB7-B8HJ>].

<sup>103</sup> 11 C.F.R. § 111.4.

where it then becomes fodder for political attack ads.<sup>104</sup> If the FEC does find that a complaint has merit and takes the enforcement actions described above, the confidentiality protections no longer apply and the complaint—now a formal agency finding of legal wrongdoing—becomes a public, credible basis upon which political candidates or parties can continue to discredit their opponents.<sup>105</sup>

#### 4. Transparency Functions

The FEC shines a light for voters about who is financially supporting candidates for federal office by providing public information about how those candidates direct the financial resources that have been donated to them. The FEC provides this transparency by: (1) enforcing the suite of laws and regulations that require candidates, political parties, and political action committees to submit reports of their contributions and financial activity to the FEC;<sup>106</sup> (2) publishing copies of those reports on the FEC’s website;<sup>107</sup> and (3) enforcing the “paid for by” disclaimer and sponsorship disclosure rules that accompany political advertisements.<sup>108</sup>

These disclosure and disclaimer requirements allow voters “to evaluate the arguments to which they are being subjected.”<sup>109</sup> Indeed, “[w]ith the advent of the internet, prompt disclosure of expenditures can provide . . . citizens with the information needed to hold . . . officials accountable for their positions and supporters,” because citizens can “see whether elected officials are ‘in the pocket’ of so-called moneyed interests.”<sup>110</sup>

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<sup>104</sup> See, e.g., *CREW Files FEC Complaint Over Trump Campaign Coordination with Outside Groups*, CREW (May 30, 2025), <https://www.citizensforethics.org/legal-action/legal-complaints/crew-files-fec-complaint-targeting-trump-campaign-coordination-with-outside-groups/> [<https://perma.cc/M5PV-GAHS>] (press release announcing filing of complaint with FEC dated one day after the complaint itself).

<sup>105</sup> See *How to File a Complaint with the FEC*, FEC, <https://www.fec.gov/legal-resources/enforcement/complaints-process/how-to-file-complaint-with-fec/> [<https://perma.cc/PW95-BXHK>] (last visited Mar. 19, 2026).

<sup>106</sup> *Enforcing Federal Campaign Finance Law*, FEC, <https://www.fec.gov/legal-resources/enforcement/> [<https://perma.cc/GA2M-WH9P>] (last visited Mar. 19, 2026).

<sup>107</sup> See *Campaign Finance Data*, FEC, <https://www.fec.gov/data/> [<https://perma.cc/6GAK-Y5NP>] (last visited Mar. 19, 2026).

<sup>108</sup> *Advertising and Disclaimers*, FEC, <https://www.fec.gov/help-candidates-and-committees/advertising-and-disclaimers/> [<https://perma.cc/PD64-4AXY>] (last visited Mar. 19, 2026).

<sup>109</sup> *Citizens United v. FEC*, 558 U.S. 310, 368 (2010) (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 792 n.32 (1978)).

<sup>110</sup> *Id.* at 370 (citing *McConnell v. FEC*, 540 U.S. 93, 256 (2003) (opinion of Scalia, J.)).

Even if the contributions and expenditures disclosed on a report are entirely legal, they can often be fodder for campaign attacks. For example, candidates attack each other for accepting contributions from lobbyists or from big-money interests in certain industries.<sup>111</sup> These reports also provide an important means for the public and the press to shed light on a candidate's behavior on the campaign trail, for example, to expose publicly that a candidate is spending donors' funds on luxury hotel rooms or first-class plane tickets.<sup>112</sup> Without the FEC enforcing FECA's transparency requirements, there would be no information available on the public record on which to base such enforcement actions or press reports.

Without an independent Federal Election Commission to oversee and enforce these functions, "sensitive, election-related determinations [would] be under the plenary control of a political actor."<sup>113</sup> This is important to more than just candidates' and political parties' strategic decisions; indeed, "*the nation* relies on the FEC to operate as an independent arbiter that interprets and implements federal law in a neutral and nonpartisan manner."<sup>114</sup> Putting the FEC under executive branch, partisan control provides the President with a veritable cafeteria menu of election subversion options: the White House could, as we saw in the hypothetical in the Introduction, cut off funding mechanisms to its political opponents during crucial recount situations; it could require the FEC to issue authoritative interpretations of law that favor its own election or post-election strategy; or it could force the agency to enter determinations of wrongdoing against opposition party candidates while allowing allies' cases on similar sets of facts to be dismissed.

### B. *The Election Assistance Commission*

While Congress vested the FEC with authority over federal campaign finance issues, it did not initially provide the agency with power to regulate election administration.<sup>115</sup> That changed in 1993 when Congress enacted the National Voter Registration Act ("NVRA") to increase the number of eligible

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<sup>111</sup> See, e.g., Jeffrey H. Birnbaum, *Candidates Taking Aim at Lobbyists: The Dirtiest Word on the Campaign Trail this Year is "Lobbyist."*, NBC NEWS: POLITICAL NEWS (Oct. 15, 2006, at 2:04 ET), <https://www.nbcnews.com/id/wbna15269155> [<https://perma.cc/7LV5-LBMH>].

<sup>112</sup> Jonathan Swan & Amie Parnes, *Kamala Harris's Spending on Upscale Hotels, First-Class Airfare Draws Scrutiny*, HILL (Dec. 9, 2015), <https://thehill.com/homenews/campaign/262570-spending-under-scrutiny/> [<https://perma.cc/U9WD-Q8BZ>].

<sup>113</sup> Transcript of Oral Argument at 161–62, *Trump v. Slaughter*, 146 S. Ct. 18 (2025) (No. 25-332).

<sup>114</sup> Brief of Campaign Legal Center as Amicus Curiae at 2, *Democratic Nat'l Comm. v. Trump*, No. 1:25-CV-00587 (AHA), 2025 WL 1573181 (D.D.C. June 3, 2025) (emphasis added).

<sup>115</sup> See Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified at 52 U.S.C. §§ 30101–30146 (2018)); see also 52 U.S.C. § 30106 (establishing the FEC).

citizens who register to vote in elections for federal office.<sup>116</sup> Rather than establishing a new federal agency to oversee the administration of the NVRA, Congress tasked the FEC with promulgating regulations to implement the statute.<sup>117</sup>

Congress's desire to carve out a federal role in election administration intensified after the 2000 election, when problems with both ballots and recount procedures in Florida required the U.S. Supreme Court to controversially weigh in on the outcome of the presidential race in *Bush v. Gore*.<sup>118</sup> In response, Congress enacted the Help America Vote Act ("HAVA") of 2002.<sup>119</sup> HAVA provided federal funding to states to improve election administration and established minimum election administration standards for states and localities.<sup>120</sup> HAVA represented a fundamental shift in the traditional role of the federal government as an observer, not a partner, in the conduct of elections for Federal office.<sup>121</sup> While previous legislation, such as the VRA, "told States what not to do," HAVA for the first time provided a role for the federal government to tell states "what we must do together to make our elections stronger."

## 1. The Establishment of the EAC as an Independent Agency

Congress established the EAC to serve as a "national clearinghouse and resource for the compilation of information and review of procedures with respect to the administration of Federal elections."<sup>122</sup> Specifically, HAVA tasked the EAC with the following: (1) adopting voluntary guidance for voting systems; (2) testing, certifying, decertifying, and recertifying voting system hardware and software; (3) conducting studies and carrying out other activities to promote the effective administration of Federal elections; (4) providing support for federal payments and grants to help states improve

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<sup>116</sup> 52 U.S.C. § 20501(b)(1). For example, the NVRA requires that states offer voter registration opportunities at state motor vehicle agencies, by mail-in application, and at certain state and local offices, *id.* § 20504(a)(1).

<sup>117</sup> *Id.* § 30106(a)(1), (b)(1).

<sup>118</sup> See generally *Bush v. Gore*, 531 U.S. 98 (2000) (noting the "practicality" and "necessity" of uniform voting rules).

<sup>119</sup> Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified as amended at 52 U.S.C. §§ 20901-21145).

<sup>120</sup> *Id.* §§ 101-03 (codified as amended at 52 U.S.C. §§ 20901-03) (federal funding to states); *id.* §§ 301-3 (codified as amended at 52 U.S.C. §§ 21081-83) (minimum election administration standards).

<sup>121</sup> *Id.* § 902 (establishing the authority to audit); but see 52 U.S.C. § 21083a (describing congressional election observers) (as amended by the Confirmation of Congressional Observer Access Act of 2024, Pub. L. No. 118-06).

<sup>122</sup> Help America Vote Act § 202 (codified as amended at 52 U.S.C. § 20922).

election administration; and (5) developing and carrying out a new program to encourage college students to serve as nonpartisan poll workers.<sup>123</sup>

The plain text of HAVA explicitly characterizes the EAC “as an independent entity.”<sup>124</sup> The congressional record provides further support for this legislative intent.<sup>125</sup> Congress’s decision to label the EAC as independent was not merely semantic; rather, it reflected Congress’s desire for the EAC to act as a “repository of objective advice” that would be free from undue influence.<sup>126</sup> In the wake of the highly partisan and controversial results of the 2000 election, Congress envisioned the EAC’s independence as central to its role in “protecting against the abuses in which some may wish to engage” related to federal elections.<sup>127</sup>

The agency is characterized by at least three<sup>128</sup> out of the seven indicia of independence identified by Datla and Revesz: (1) a multimember structure (the EAC is composed of four commissioners);<sup>129</sup> (2) specified tenure (Commissioners serve for staggered four-year terms and can be reappointed only once);<sup>130</sup> and (3) partisan balance requirements (no more than two of the four commissioners may be affiliated with the same political party).<sup>131</sup> As with FECA, however, HAVA likewise failed to provide statutory removal protection for EAC Commissioners.

Despite the bipartisan support in both Congress and the White House for the EAC’s creation,<sup>132</sup> the agency suffered from staffing, budgetary, and

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* § 201 (codified as amended at 52 U.S.C. § 20921) (“There is hereby established as an independent entity the Election Assistance Commission . . . consisting of members appointed under this part.”) (emphasis added).

<sup>125</sup> *See, e.g., Election Reform: Hearing Before the S. Comm. on Com., Sci., & Transp.*, 107th Cong. 17 (2001) (statement of Sen. Charles E. Schumer) (envisioning a federal election body as an “independent . . . panel to study the way we vote and make recommendations on better voting machines, mail-in voting and other new ideas about how to vote.”); 148 CONG. REC. 10493 (2002) (statement of Sen. Mitch McConnell) (describing HAVA as a statute that would “usher in tremendous improvements to the elections process across this country . . . [t]hrough the establishment of an independent bipartisan commission.”).

<sup>126</sup> 148 CONG. REC. 712 (2002) (statement of Sen. Christopher Dodd); *see also* H.R. REP. NO. 107-329, pt. 1 (2001) (describing Commissioners as having “experience or expertise in election administration or the study of elections.”).

<sup>127</sup> 148 CONG. REC. 20651 (2002).

<sup>128</sup> Although Datla and Revesz state in Table 8 that the EAC possesses four indicia of independence, Tables 1 through 7 demonstrate support for only two indicia: specified tenure and a multimember structure. Datla & Revesz, *supra* note 7, at 786, 825. Our own research determined that the EAC also possesses a third indicia: a partisan balance requirement. *See* Help America Vote Act § 203(b)(2) (codified as amended at 52 U.S.C. § 20923).

<sup>129</sup> Help America Vote Act § 203(a)(1).

<sup>130</sup> *Id.* § 203(b)(1).

<sup>131</sup> *Id.* § 203(b)(2).

<sup>132</sup> *See, e.g.,* 148 CONG. REC. 20650 (2002) (Sen. Dodd describing HAVA as “a rather historic piece of legislation” that will “make our democracy work better and be stronger”); Remarks on the Signing of the Help America Vote Act of 2002, 2 PUB. PAPERS 1926 (Oct. 29, 2002) (explaining that HAVA “will add to the nation’s confidence” in elections and is a “vital contribution to the democratic process”).

practical shortcomings that curbed its authority for many years.<sup>133</sup> Since the 2016 presidential election, however, the EAC's role has received renewed attention. Allegations of foreign interference in the 2016 election prompted Congress to initiate \$380 million in new funding under HAVA.<sup>134</sup> The onset of the COVID-19 pandemic in the 2020 election cycle prompted additional funding to manage necessary changes to election administration.<sup>135</sup> Questions about the integrity of the 2020 election raised by President Trump, together with the related increase in threats to election workers in subsequent election cycles, have led Congress to place even more funding under the EAC's administration.<sup>136</sup> As a result, recent events have largely displaced the mid-2010s perception of the EAC as a "bureaucracy in search of a mission."<sup>137</sup> Instead, as the next section explains, key political stakeholders, including the President, are increasingly aware of the important role the EAC can play in either preventing or furthering election subversion.

## 2. The EAC's Role in Preventing Election Subversion

The EAC, as its name indicates, is an assistance agency. Its primary functions are to help state and local officials administer the elections and, in turn, to facilitate voters' participation in the electoral process itself.<sup>138</sup>

Just as the Constitution designates primary authority to the various states' legislatures to dictate the "time, place, and manner" of federal elections while reserving a more limited role for Congress,<sup>139</sup> the EAC's authority as a federal rulemaking agency to impose mandatory election administration requirements on the states is limited.<sup>140</sup> The agency's primary functions are to: (1) facilitate voter registration by promulgating a federal mail-in voter registration form that can be used by voters in all states; (2) adopt guidelines that set voluntary standards for the performance and operation of voting machines and other election equipment (including by testing and certifying such equipment); (3) administer federal grant programs

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<sup>133</sup> See, e.g., KAREN L. SHANTON, CONG. RSCH. SERV., R45770, THE U.S. ELECTION ASSISTANCE COMMISSION (EAC): OVERVIEW AND SELECTED ISSUES FOR CONGRESS (2026); Jessie Ojeda, *Carrot & Stick: Reorganizing and Empowering the Election Assistance Commission*, 90 GEO. WASH. L. REV. 1354, 1375 (2022).

<sup>134</sup> KAREN L. SHANTON, CONG. RSCH. SERV., R46646, ELECTION ADMINISTRATION: FEDERAL GRANT PROGRAMS FOR STATES AND LOCALITIES 4 (2025).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 15–16.

<sup>137</sup> H.R. REP. 114-361, at 2 (2015).

<sup>138</sup> See CONG. RSCH. SERV., R45770, *supra* note 133, at 1.

<sup>139</sup> U.S. CONST., art. I, § 4.

<sup>140</sup> See SARAH J. ECKMAN, CONG. RSCH. SERV. R45030, FEDERAL ROLE IN VOTER REGISTRATION: THE NATIONAL VOTER REGISTRATION ACT OF 1993 (NVRA) AND SUBSEQUENT DEVELOPMENTS 3–4 (2019).

to aid state and local election administration; and (4) generally conduct research, identify best practices, and serve as a national information clearinghouse for improved election administration.<sup>141</sup>

The EAC's importance as an "assistance" agency goes beyond increasing participation rates and improving administration in the current democratic climate, however. Research comparing voter attitudes before and after the 2024 election shows that years of election denialism and attacks on the integrity of election systems have taken a toll on voter confidence in elections, and that this, in turn, is having a downward impact on voter turnout.<sup>142</sup> This research suggests that up to 5.7 million additional votes might have been cast in 2024 if voters had been more confident in the process.<sup>143</sup> Against this backdrop, the EAC's role in buttressing resilient, trustworthy election structures is critical to refuting allegations of malfeasance in our elections. The EAC therefore, plays a key role in maintaining voter confidence in the election system and increasing turnout rates.<sup>144</sup>

#### i. The National Mail-In Voter Registration Form

The EAC's most voter-facing function is its promulgation of the National Mail Voter Registration Form (the "Federal Form").<sup>145</sup> Congress mandated the creation and use of a Federal Form in the NVRA as a way to increase voter registration rates and protect the integrity of American elections<sup>146</sup> by creating one simplified document that provides voter registration rules and regulations for every state and territory.<sup>147</sup> The NVRA requires all states to allow their voters to accept and use the mail-in Federal Form, which is available in 21 languages,<sup>148</sup> as a method to register to vote.<sup>149</sup> Voters can

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<sup>141</sup> See generally 52 U.S.C. § 20922 (duties of the EAC); see also CONG. RSCH. SERV., R45030, *supra* note 140, at 3–12.

<sup>142</sup> *NEW DATA: After Years of Election Denial, Decreased Voter Confidence in Elections Impacted 2024 Turnout Across Parties*, STATES UNITED DEMOCRACY CTR.: PRESS RELEASE (July 14, 2025), <https://statesunited.org/when-americans-trust-elections/> [https://perma.cc/E3EC-2WT4].

<sup>143</sup> *Id.*

<sup>144</sup> See Hope C. Kashatus, *Ready to Roll: How the U.S. Election Assistance Comm'n Can Strengthen State Compliance with Federal Voter Roll Maintenance Requirements*, 73 ADMIN. L. REV. 901, 905 (2021).

<sup>145</sup> See *National Mail Voter Registration Form*, U.S. ELECTION ASSISTANCE COMM'N (Nov. 6, 2025), <https://www.eac.gov/voters/national-mail-voter-registration-form> [https://perma.cc/58SD-37XL].

<sup>146</sup> 52 U.S.C. §§ 20501, 20505, 20508. The NVRA originally charged the Federal Election Commission with promulgating the Federal Form. *Id.* § 20508(a)(2).

<sup>147</sup> U.S. ELECTION. ASSISTANCE COMM'N, *supra* note 145.

<sup>148</sup> *Id.*

<sup>149</sup> 52 U.S.C. § 20505(a)(1).

also use the form to update their registration due to a change of address or name.<sup>150</sup>

Congress has twice exercised its Article I authority to specify the required contents of the Federal Form: first when it initially created the form via the NVRA,<sup>151</sup> and then when it added several new requirements with the passage of HAVA in 2002.<sup>152</sup> Congress has also expressly delegated rulemaking authority to the EAC to implement the requirements for issuing the Federal Form—one of just two areas where Congress has delegated such authority to the agency.<sup>153</sup>

## ii. Voluntary Voting System Guidelines, Testing, and Certification

The EAC's second direct impact on America's election administration landscape lies in its statutory authority to issue Voluntary Voting System Guidelines ("VVSG").<sup>154</sup> The VVSG is a set of standards against which new voting systems (e.g., equipment for the casting and/or counting of ballots) can be tested before manufacturers market, sell, or use them in elections.<sup>155</sup> The standards codified in the VVSG are intended to ensure basic functionality, accessibility, and security of voting system equipment.<sup>156</sup> By issuing VVSG, the EAC directly ensures that the systems that Americans use to vote are safe and accurate.

Voting system manufacturers seek approval from the EAC. Such manufacturers, who want to obtain federal certification of their voting products before marketing them to state and local election officials, must meet certain requirements to comply with the EAC's VVSG.<sup>157</sup> Obtaining such certification is, as the guidelines' name suggests, voluntary. There is no federal requirement that voting equipment must meet the VVSG standards before it can be sold to state and local election officials and used to cast or tabulate votes in federal, state, or local elections. However, 38 states and the District of Columbia incorporate some or all of the EAC's VVSG testing and

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<sup>150</sup> See U.S. ELECTION ASSISTANCE COMM'N, NATIONAL MAIL VOTER REGISTRATION FORM 1, [https://www.eac.gov/sites/default/files/eac\\_assets/1/6/Federal\\_Voter\\_Registration\\_ENG.pdf](https://www.eac.gov/sites/default/files/eac_assets/1/6/Federal_Voter_Registration_ENG.pdf) [<https://perma.cc/3T45-UW2J>] (last visited Mar. 19, 2026).

<sup>151</sup> 52 U.S.C. § 20508(b).

<sup>152</sup> 52 U.S.C. § 21083(b)(4)(A).

<sup>153</sup> 52 U.S.C. § 20508(a)(1). The EAC's regulations for the Federal Voter Registration Form are at 11 C.F.R. 9428.1 *et seq.* The EAC's other rulemaking authority relates to its statutory duties to issue reports to Congress on the impact of the NVRA. 52 U.S.C. § 20508(a)(3).

<sup>154</sup> 52 U.S.C. § 20962.

<sup>155</sup> *Voluntary Voting System Guidelines*, U.S. ELECTION ASSISTANCE COMM'N (Jan. 30, 2026), <https://www.eac.gov/voting-equipment/voluntary-voting-system-guidelines> [<https://perma.cc/GM98-7WL7>].

<sup>156</sup> *Id.*

<sup>157</sup> CONG. RSCH. SERV., R45030, *supra* note 140, at 9–10.

certification requirements into their election codes.<sup>158</sup> In other words, the local election administrators responsible for selecting voting equipment in those jurisdictions can only choose from equipment that meets federal requirements.<sup>159</sup> Because these states represent a critical mass of voting jurisdictions in the country (76% of jurisdictions require some aspect of the EAC's testing or certification, comprising over 73% of Americans),<sup>160</sup> the EAC's voluntary guidelines have essentially become mandatory, such that vendors have little choice but to design products that comply with the VVSG.<sup>161</sup>

The EAC passed the first set of VVSG in 2005 (VVSG 1.0).<sup>162</sup> The EAC adopted VVSG 2.0 in February 2021,<sup>163</sup> and that set of standards was fully operational for testing and certification by late 2022.<sup>164</sup> The first equipment was certified in accordance with the new guidelines in July 2025.<sup>165</sup> The VVSG 2.0 is based on a number of principles aimed at increasing the security and integrity of elections, including, for example, new or enhanced requirements that voting systems be auditable for accuracy, that login access requires multi-factor authentication, and that tabulation or vote-

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<sup>158</sup> Wren Orey & William T. Adler, *What Are the Federal Voluntary Voting System Guidelines?*, BIPARTISAN POL'Y CTR. (Aug. 6, 2025), <https://bipartisanpolicy.org/explainer/what-are-the-federal-voluntary-voting-system-guidelines/> [<https://perma.cc/B4QF-RZ8P>]. A state-by-state breakdown of testing and certification requirements—including the extent to which states incorporate federal certification requirements—is available from the EAC at U.S. ELECTION ASSISTANCE COMM'N, OVERVIEW OF VOTING SYSTEMS TESTING AND CERTIFICATION IN THE UNITED STATES (2025), [https://www.eac.gov/sites/default/files/2025-07/Overview\\_of\\_Testing\\_and\\_Certification\\_In\\_The\\_United\\_States\\_508.pdf](https://www.eac.gov/sites/default/files/2025-07/Overview_of_Testing_and_Certification_In_The_United_States_508.pdf) [<https://perma.cc/M3X8-9UEB>].

<sup>159</sup> *Id.*

<sup>160</sup> *Voting System Standards, Testing and Certification*, NCSL (Aug. 21, 2025), <https://www.ncsl.org/elections-and-campaigns/voting-system-standards-testing-and-certification> [<https://perma.cc/3HDX-U8XQ>]; *State Population Totals and Components of Change: 2020-2025*, U.S. CENSUS BUREAU (Jan. 2026), <https://www.census.gov/data/tables/time-series/demo/pepost/2020s-state-total.html> [<https://perma.cc/U8RN-4CQN>].

<sup>161</sup> See PENN WHARTON PUB. POL'Y INITIATIVE, THE BUSINESS OF VOTING 38, <https://verifiedvoting.org/wp-content/uploads/2021/05/the-business-of-voting-single-page.pdf> [<https://perma.cc/VUN8-FX2P>] (last visited Feb. 26, 2026).

<sup>162</sup> U.S. ELECTION ASSISTANCE COMM'N, VOLUNTARY VOTING SYSTEM GUIDELINES (2005), [https://www.eac.gov/sites/default/files/eac\\_assets/1/28/VVSG.1.0\\_Volume\\_1.PDF](https://www.eac.gov/sites/default/files/eac_assets/1/28/VVSG.1.0_Volume_1.PDF) [<https://perma.cc/KQY3-2PYF>].

<sup>163</sup> U.S. ELECTION ASSISTANCE COMM'N, VOLUNTARY VOTING SYSTEM GUIDELINES VVSG 2.0 (2021), [https://www.eac.gov/sites/default/files/TestingCertification/Voluntary\\_Voting\\_System\\_Guidelines\\_Version\\_2\\_0.pdf](https://www.eac.gov/sites/default/files/TestingCertification/Voluntary_Voting_System_Guidelines_Version_2_0.pdf) [<https://perma.cc/Y6AD-HLCE>].

<sup>164</sup> *Voluntary Voting System Guidelines*, U.S. ELECTION ASSISTANCE COMM'N (Jan. 30, 2026), <https://www.eac.gov/voting-equipment/voluntary-voting-system-guidelines> [<https://perma.cc/NM25-2JTF>].

<sup>165</sup> *The EAC Announces First Certified Voting System to Voluntary Voting System Guidelines (VVSG) 2.0*, U.S. ELECTION ASSISTANCE COMM'N: PRESS RELEASE (July 10, 2025), <https://www.eac.gov/news/2025/07/10/eac-announces-first-certified-voting-system-voluntary-voting-system-guidelines-vvsg> [<https://perma.cc/Y6FE-Y57Q>].

counting systems be “air-gapped,” meaning cut off from internet systems and external networks.<sup>166</sup>

When issued in a nonpartisan and bipartisan manner, the VVSG helps promote the overall fairness and integrity of federal elections by creating trust in the systems voters use to cast their ballots. However, if manipulated by individuals with a desire to subvert election results, the VVSG could be used to improperly discredit valid methods of voting. For example, the process of reviewing voting equipment for potential compliance with the VVSG could be manipulated to issue misleading government reports about the safety, security, and reliability of that equipment. Such unfounded accusations could lead voters to distrust machines that states around the country currently use. It could also compel election administrators to insist on hand-counting ballots, which is slower, more expensive, and less accurate than counting ballots by machine.<sup>167</sup>

### iii. Grant Programs

Through HAVA, Congress also authorized the first series of major federal grant programs to improve state election administration and charged the EAC with administering that funding.<sup>168</sup> HAVA established three primary grant programs and a range of smaller programs, including: (1) a general improvement grant program, intended initially to help states meet the new election administration requirements established by HAVA and thereafter to support general election improvement, voter education, poll worker training, and similar advancements;<sup>169</sup> (2) a grant program to replace lever and punch card voting systems with less error-prone alternatives;<sup>170</sup> and (3) a “requirements payment” grant program to be used for complying with HAVA, with the Military and Overseas Voter Empowerment (MOVE) Act of 2009, or for other improvements to federal elections.<sup>171</sup>

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<sup>166</sup> U.S. Election Assistance Commission Adopts New Voluntary Voting System Guidelines 2.0, U.S. ELECTION ASSISTANCE COMMISSION: PRESS RELEASE (Feb. 10, 2021), <https://www.eac.gov/news/2021/02/10/us-election-assistance-commission-adopts-new-voluntary-voting-system-guidelines-20> [<https://perma.cc/7H5Q-3VQV>].

<sup>167</sup> Miles Parks, *Research Finds Hand Counting Ballots to be Less Accurate and More Expensive*, NPR: ELECTIONS (Oct. 11, 2022), <https://www.npr.org/2022/10/11/1128197774/research-finds-hand-counting-ballots-to-be-less-accurate-and-more-expensive> [<https://perma.cc/6J56-74ZC>].

<sup>168</sup> CONG. RSCH. SERV., R45030, *supra* note 140, at 4.

<sup>169</sup> 52 U.S.C. § 20901(b).

<sup>170</sup> 52 U.S.C. § 20902.

<sup>171</sup> 52 U.S.C. § 21001; *see also* CONG. RSCH. SERV., R46646, ELECTION ADMINISTRATION: FEDERAL GRANT PROGRAMS FOR STATES AND LOCALITIES (2025) (describing the full set of HAVA grants).

The grants the EAC administers under HAVA are almost entirely awarded based on formulas that Congress established via statute.<sup>172</sup> As the agency explains, “[s]tates and territories do not compete for the funds which are distributed based on predetermined formulas and eligibility requirements.”<sup>173</sup> Rather, in order to receive the funds, states must simply “submit a letter requesting the funds, signed terms and conditions, a program narrative describing how funds will be used, [a] proposed budget . . .” and certify that they are in compliance with HAVA and with the conditions of their existing HAVA grants.<sup>174</sup>

### C. Other Election-Related Agencies

While the FEC and the EAC are the two primary agencies Congress has tasked with election-related responsibilities, at least two other independent agencies exercise powers that can impact the outcome of federal elections: the Federal Communications Commission (“FCC”) and the United States Postal Service (“USPS”). The following sections describe the extent to which each of these agencies can be characterized as independent and detail the election-related responsibilities under their respective purviews.

#### 1. The Federal Communications Commission

##### i. The Establishment of the FCC as an Independent Agency

Because Congress only began to establish centralized roles for the federal government in election administration in the 1970s, the FEC and EAC were both created long after the Supreme Court established a framework for independent agencies in *Humphrey’s Executor*.<sup>175</sup> Many other independent agencies, however, were created by Congress much earlier—either before the Court’s decision in *Humphrey’s Executor* came down or in the immediate aftermath, as part of the early growth of the modern administrative state.<sup>176</sup>

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<sup>172</sup> See, e.g., 52 U.S.C. § 20903 (formula for general assistance grants and lever/punch card replacement grants); see also 52 U.S.C. § 21002 (formula for requirements program grants).

<sup>173</sup> *HAVA Grant Programs*, U.S. ELECTION ASSISTANCE COMM’N (FEB 23, 2026), <https://www.eac.gov/grants/hava-grant-programs> [https://perma.cc/N7AE-KS6S].

<sup>174</sup> *Id.*; see also 52 U.S.C. §§ 20901(c), 21003 (stating requirements to receive HAVA grant funds).

<sup>175</sup> See *Mission and History*, FEC, <https://www.fec.gov/about/mission-and-history/> [https://perma.cc/5MQE-MNLA] (last visited Mar. 1, 2026); *About the EAC*, U.S. ELECTION ASSISTANCE COMM’N, <https://www.eac.gov/about> [https://perma.cc/3TZ8-5TAG] (last visited Mar. 1, 2026).

<sup>176</sup> Datla & Revesz, *supra* note 7, at 770, 776.

One such agency is the FCC, which Congress created through the Communications Act of 1934.<sup>177</sup> As was true of many other federal agencies created in the 1930s, Congress established the FCC as a way to respond to changing technology and to regulate an increasingly complex society. The Communications Act tasked the FCC with “regulating interstate and foreign commerce in communication by wire and radio[.]”<sup>178</sup> The FCC consolidated regulatory authority previously dispersed among distinct entities.<sup>179</sup>

Like the FEC and EAC, the FCC has traditionally been categorized as an independent agency, despite the absence of statutory for-cause removal restrictions.<sup>180</sup> This characterization is supported by the legislative history, which explains that the FCC was an outgrowth of the independent Radio Commission and the Interstate Commerce Commission (“ICC”),<sup>181</sup> which is widely considered to be the first independent agency.<sup>182</sup> The FCC’s authorizing statute is thus “largely based on existing legislation” establishing the ICC and “contains procedural and administrative provisions substantially the same as those from the Interstate Commerce Act.”<sup>183</sup>

While the framework that exists today to distinguish independent agencies from executive agencies was in flux at the time the FCC was created, the FCC has traditionally been recognized as an independent agency by scholars, the courts, and Congress.<sup>184</sup> The FCC contains four of Datla and Revesz’s indicia of independence: (1) specified tenure;<sup>185</sup> (2) a multimember structure;<sup>186</sup> (3) partisan balance requirements;<sup>187</sup> and (4) independent adjudication authority.<sup>188</sup>

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<sup>177</sup> See PATRICIA MOLONEY FIGLIOLA, CONG. RSCH. SERV. R45699, THE FEDERAL COMMUNICATIONS COMMISSION: STRUCTURE, OPERATIONS, AND BUDGET (2025).

<sup>178</sup> 47 U.S.C. § 151.

<sup>179</sup> See H.R. REP. NO. 73-1850, at 2 (1934) (describing the FCC as assuming and consolidating functions exercised by the Radio Commission and the ICC).

<sup>180</sup> See Datla & Revesz, *supra* note 7, at 834 (explaining that, although the FCC has historically been considered independent, “there is good reason to believe that Congress intentionally chose[] not to endow” the FCC with removal protections, given that Congress has amended the FCC’s authorizing statute twenty-one times since *Humphrey’s Executor* and has never included such language in the statute despite ample opportunity to do so.).

<sup>181</sup> See H.R. REP. NO. 73-1850, at 3 (1934) (explaining that the FCC shall “have the authority to hear and determine cases in the same manner as the Interstate Commerce Commission[.]”)

<sup>182</sup> See Datla & Revesz, *supra* note 7, at 776 (“Congress established the first independent agency, the Interstate Commerce Commission (ICC), in 1887.”).

<sup>183</sup> See *id.* at 777.

<sup>184</sup> Datla & Revesz, *supra* note 7, at 780 (explaining that, although “there is no court decision on point,” the FCC has “historically been treated as independent.”).

<sup>185</sup> 47 U.S.C. § 154(c).

<sup>186</sup> 47 U.S.C. § 154(a).

<sup>187</sup> 47 U.S.C. § 154(b)(5).

<sup>188</sup> 47 U.S.C. § 154(j).

## ii. The FCC’s Role in Preventing Election Subversion

The FCC adds a third key pillar of the federal executive branch’s protection of free and fair elections: it enforces laws meant to ensure a degree of fairness in the media and broadcast platforms that deliver political advertisements as candidates run ads to earn voters’ support.<sup>189</sup>

The FCC administers portions of the Communications Act that primarily govern the conduct of the television (“TV”), cable, and radio broadcast stations that run political advertisements or otherwise allow candidates access to their systems as a means to reach voters.<sup>190</sup> The FCC also promulgates and enforces rules implementing that Act.<sup>191</sup> Before issuing a broadcast license to a TV, cable, or radio station, the FCC must decide that the station will operate in “the public interest, convenience, and necessity.”<sup>192</sup> The FCC can revoke any station’s license if it deems the station to ever be out of compliance with this “public interest” standard.<sup>193</sup>

The FCC regulates how political candidates communicate with the American people. FCC-licensed stations must provide comparable time and placement to opposing candidates if that station provides one candidate airtime.<sup>194</sup> FCC-licensed stations are also prohibited from censoring ads placed by candidates.<sup>195</sup> Stations must also maintain a public “political file” of information regarding who bought political advertisements on their station, how much was paid for the ad, and when the ad was aired.<sup>196</sup> The

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<sup>189</sup> See generally *Statutes & Rules on Candidate Appearances & Advertising*, FCC (Dec. 10, 2015), <https://www.fcc.gov/media/policy/statutes-and-rules-candidate-appearances-advertising> [<https://perma.cc/6CLX-NNVL>] (transcribing relevant provisions of Communications Act of 1934, as amended, and FCC rules).

<sup>190</sup> 47 U.S.C. § 154(b)(3)(A–D).

<sup>191</sup> 47 U.S.C. § 152(a).

<sup>192</sup> 47 U.S.C. § 309(a).

<sup>193</sup> 47 U.S.C. §§ 312(a)(2), (4); see also *The Public and Broadcasting*, FCC (Sep. 13, 2022), <https://www.fcc.gov/media/radio/public-and-broadcasting> [<https://perma.cc/UX47-6ZW3>] (“In exchange for obtaining a valuable license to operate a broadcast station using the public airwaves, each radio and television licensee is required by law to operate its station in the “public interest, convenience and necessity.” Generally, this means it must air programming that is responsive to the needs and problems of its local community of license.”).

<sup>194</sup> See 47 U.S.C. § 315(a); 47 C.F.R. § 73.1941. Certain exemptions and limitations to the “equal opportunity” rule apply. For example, the station simply needs to provide “comparable time and placement,” not identical access. The station needs to make the comparable time and placement readily available, but the station isn’t required to affirmatively seek out and offer access to opposing candidates. Only “legally qualified candidates” for the same office are eligible for the equal opportunity allowance. Finally, an exemption for bona fide news coverage exists. FCC, FACT SHEET: FCC POLITICAL PROGRAMMING RULES (Aug. 18, 2022), [https://www.fcc.gov/sites/default/files/political\\_programming\\_fact\\_sheet.pdf](https://www.fcc.gov/sites/default/files/political_programming_fact_sheet.pdf) [<https://perma.cc/F7L3-PPP5?type=image>].

<sup>195</sup> 47 U.S.C. § 315(a); 47 C.F.R. § 73.1941.

<sup>196</sup> 47 U.S.C. § 315(e); 47 C.F.R. §§ 73.1943, 73.1212.

FCC also requires candidates and others who run ads related to federal elections or national political issues to disclaim who paid for the ad.<sup>197</sup>

While the FCC does regulate the methods by which candidates and stations provide information to Americans, the FCC does not moderate the content itself. Specifically, the agency does not: (1) pre-review or approve the content of political advertisements; (2) review candidates' advertisements for accuracy; (3) require regulated broadcast stations to air every side of a given issue; or (4) "oversee the nature and extent of" news coverage that candidates receive from regulated broadcasters.<sup>198</sup>

It is unsettled what role the FCC will play in the world of social media political advertising. As an initial matter, the Communications Act equal opportunity, political file, and sponsorship identification requirements discussed above do not apply to digital platforms or advertiser activity on those platforms.<sup>199</sup> Section 230 of the Communications Act does provide an immunity structure for social media platforms that shields platforms from liability for misinformation in political ads.<sup>200</sup> Additionally, Section 230 does not provide express statutory authorization to the FCC to promulgate implementing rules or regulate social media platforms.<sup>201</sup> Following *Loper Bright Enterprises v. Raimondo*, the FCC's ability to issue formal regulations interpreting vague or contentious provisions of the statute appears limited.<sup>202</sup>

## 2. The United States Postal System

### i. The Establishment of the USPS as an Independent Agency

While the FEC, EAC, and FCC bear many traditional hallmarks of independent agencies, the modern United States Postal Service ("USPS") is perhaps one of the most independent agencies in the federal system. The USPS is one of only four agencies that contain all seven of Datla and Revesz's indicia of independence: (1) statutory removal protections;<sup>203</sup> (2)

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<sup>197</sup> 47 U.S.C. §§ 315(b)(2)(C)-(D), 317; 47 C.F.R. § 73.1212.

<sup>198</sup> FCC, POLITICAL PROGRAMMING (Oct. 26, 2022), <https://www.fcc.gov/media/policy/political-programming> [<https://perma.cc/7L92-HXGU>].

<sup>199</sup> Separate FEC regulations require sponsorship identification disclaimers on certain digital advertisements. 52 U.S.C. § 30120.

<sup>200</sup> See generally VALERIE C. BRANNON & ERIC N. HOLMES, CONG. RSCH. SERV., R46751, SECTION 230: AN OVERVIEW (2024) (outlining how two key provisions of Section 230 establish a federal statutory immunity structure precluding social media companies from being liable for information another person provides on their platform).

<sup>201</sup> *Id.* at § 104.

<sup>202</sup> *Loper Bright Enters. v. Raimondo*, 144 S.Ct. 2244, 2247 (2024) ("Even when an ambiguity happens to implicate a technical matter, it does not follow that Congress has taken the power to authoritatively interpret the statute from the courts and given it to [an administrative] agency. Congress expects courts to handle technical statutory questions[.]").

<sup>203</sup> 39 U.S.C. § 202(a)(1).

specified tenure;<sup>204</sup> (3) a multimember structure;<sup>205</sup> (4) partisan balance requirements;<sup>206</sup> (5) independent litigation authority;<sup>207</sup> (6) budgetary bypass authority;<sup>208</sup> and (7) independent adjudication authority.<sup>209</sup>

The highly independent structure of the USPS may come as a surprise, given that it was the Postal Service itself that provided the impetus for the Supreme Court's decision in *Myers v. United States*.<sup>210</sup> The direct influence of politics and patronage over the USPS changed, however, with Congress's enactment of the Postal Reorganization Act of 1970.<sup>211</sup> The Postal Reorganization Act restructured the Post Office Department from a cabinet-level agency under executive control to an independent agency called the USPS.<sup>212</sup> The explicit goal of this legislative reform effort, championed by President Nixon, was to remove "the postal system from politics and the Post Office Department from the Cabinet."<sup>213</sup> Nixon thus helped convert the USPS into an "independent establishment" that is intended to be "freed from direct political pressures and endowed with the means of building a truly superior mail service."<sup>214</sup>

## ii. The USPS's Role in Preventing Election Subversion

As mail voting expands, the USPS is playing an increasingly important role in elections. The USPS processes and delivers political mail from candidates and other political advertisers to voters; transmits ballots and other election mail from election officials to voters; and returns completed ballots from voters back to election officials. Political mail is mail sent by a candidate, campaign, political party, or other political actor for political campaign purposes.<sup>215</sup> Election mail is mail sent by authorized election

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<sup>204</sup> 39 U.S.C. § 202(b)(1).

<sup>205</sup> 39 U.S.C. § 202(a)(1).

<sup>206</sup> *Id.*

<sup>207</sup> 39 U.S.C. § 409.

<sup>208</sup> 39 U.S.C. § 2401(e).

<sup>209</sup> 39 U.S.C. § 5005.

<sup>210</sup> *Myers v. United States*, 272 U.S. 52, 122 (1926).

<sup>211</sup> Postal Reorganization Act, Pub. L. No. 91-375, 84 Stat. 719 (1970).

<sup>212</sup> *A Half-Century of Operating Independently While Continuing to Bind the Nation Together*, U.S. POSTAL SERV.: NATIONAL NEWS (July 1, 2021), <https://about.usps.com/newsroom/national-releases/2021/0701-usps-marks-its-50th-anniversary-as-an-independent-agency.htm> [<https://perma.cc/3HAQ-9GNZ>].

<sup>213</sup> PRESIDENT RICHARD NIXON, REFORM OF THE NATION'S POSTAL SYSTEM, H.R. DOC. 91-121, at 5 (1969).

<sup>214</sup> PRESIDENT RICHARD NIXON, REORGANIZATION OF THE POST OFFICE DEPARTMENT, H.R. DOC. No. 91-313, at 1 (1970).

<sup>215</sup> 29 C.F.R. § 3055.100(d).

officials to voters, such as voter registration cards, applications for a vote-by-mail or absentee ballot, or a ballot itself.<sup>216</sup>

More voters are choosing to mail their ballots as regulators are simultaneously expanding mail voting options. From 2000 to 2016, the percentage of Americans choosing to cast a ballot by mail rather than appear in person at a polling place gradually increased from one in ten to one in five.<sup>217</sup> Reliance on the USPS to cast ballots by mail spiked during the COVID-19 pandemic in 2020, reaching a height of 43% of voters choosing to cast a mail ballot.<sup>218</sup> Mail voting rates fell in 2022 and 2024, but remained above pre-pandemic levels.<sup>219</sup> In 2020, the USPS processed a combined 4.6 billion pieces of political and election mail—a 114% increase from 2016.<sup>220</sup> Political and election mail in 2024 surpassed pre-pandemic volume, at over 3.3 billion pieces combined.<sup>221</sup>

Political mail is emerging as an effective tool for campaigns to reach young voters in a crowded political advertising landscape. Gen Z and millennial voters report generally positive attitudes about political mail, and younger voters are more likely to research an electoral race online after receiving physical mail about it than are older voters.<sup>222</sup>

The increase in candidates' dependence on mail to reach voters and voters' reliance on it to cast their votes corresponds with regulatory decisions across the country to expand access to voting by mail. In 2000, less than half of the states offered voters a so-called “no excuse” absentee voting option.<sup>223</sup> More than fifty percent of states only allowed voters to cast ballots by mail if they met a statutory qualification, such as being absent from their voting

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<sup>216</sup> *Id.* at (b).

<sup>217</sup> *Voting by Mail and Absentee Voting*, MIT ELECTION DATA SCI. LAB (Feb. 28, 2024), <https://electionlab.mit.edu/research/voting-mail-and-absentee-voting> [https://perma.cc/PM75-USGE].

<sup>218</sup> *Id.*

<sup>219</sup> *How Many Voters Cast Ballots Early and by Mail?*, USA FACTS: POPULATION (Sep. 8, 2025), <https://usafacts.org/articles/how-many-voters-cast-ballots-early-and-by-mail/> [https://perma.cc/CWA8-V3R5].

<sup>220</sup> *U.S. Postal Service Releases Updated 2020 Post-Election Analysis Highlighting Extraordinary Lengths to Deliver Ballots During Historic General Election Season*, U.S. POSTAL SERV. (Jan. 19, 2021),

<https://about.usps.com/newsroom/national-releases/2021/0119-usps-releases-updated-2020-post-election-analysis-report.htm> [https://perma.cc/7SVP-D2YJ].

<sup>221</sup> U.S. POSTAL SERV., 2024 POST-ELECTION ANALYSIS REPORT: DELIVERING THE NATION'S ELECTION MAIL SECURELY AND EFFECTIVELY 1, 3, <https://about.usps.com/what/government-services/election-mail/pdf/usps-post-election-report-2024-12-02.pdf> [https://perma.cc/QD2Y-TZXS] (last visited Mar. 2, 2026).

<sup>222</sup> U.S. POSTAL SERV. & AAPC, HOW TO TACKLE CAMPAIGN CHALLENGES WITH DIRECT MAIL 18 (2024), <https://www.deliverthewin.com/wp-content/uploads/how-to-tackle-campaign-challenges-with-direct-mail.pdf> [https://perma.cc/VZ9W-NTM7].

<sup>223</sup> *Voting in the United States Has Never Been Easier*, U.S. VOTE FOUNDATION: BLOG, <https://www.usvotefoundation.org/voting-united-states-has-never-been-easier> [https://perma.cc/3UEG-5NZM] (last visited Mar. 2, 2026).

jurisdiction on Election Day.<sup>224</sup> Today, 28 states offer “no excuse” absentee voting.<sup>225</sup> Ten years ago, just two states—Colorado and Oregon—voted entirely by mail.<sup>226</sup> Now, eight additional states and the District of Columbia send all registered voters mail ballots automatically.<sup>227</sup> The vast majority of Americans have two options: they can vote in person or return a mail ballot via the USPS. While electronic ballot return online or via email exists in many states,<sup>228</sup> its availability is strictly limited to military voters, voters living overseas, voters living with a disability, or other qualifying circumstances.<sup>229</sup>

### III. THE DOWNFALL OF AGENCY INDEPENDENCE

In the context of the FEC, EAC, FCC, and USPS, agency independence provides critical insulation from the White House on sensitive and highly politicized decisions that could influence the outcome of an election. As the hypothetical in the Introduction posits, plenary presidential control over the FEC could result in decisions to enforce campaign finance laws disproportionately against certain candidates or parties that might oppose the President. Likewise, presidential control of the EAC could result in changes to the VVSG that could discredit certain voting machines and perpetuate misinformation about the integrity of certain ballots, should such actions serve the President’s political interests. In the context of the FCC, presidential control could lead to unprecedented power over decisions regarding which political advertisements air on TV or radio. Finally, given the increasing role mail-in voting plays in federal elections, control over the USPS could lead to politically motivated influence over when, where, and

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<sup>224</sup> KYLE YODER, APRIL TAN & STEFAN MARTINEZ-RUIZ, THE EXPANSION OF VOTING BEFORE ELECTION DAY, 2000, 2024 1, [https://electioninnovation.org/wp-content/uploads/The-Expansion-of-Voting-Before-Election-Day-2000-to-2024\\_March-2024\\_Vfinal.pdf](https://electioninnovation.org/wp-content/uploads/The-Expansion-of-Voting-Before-Election-Day-2000-to-2024_March-2024_Vfinal.pdf) [<https://perma.cc/QX2D-ARVY>] (last visited Mar. 2, 2026).

<sup>225</sup> *Requesting Mail Ballots*, VOTING RIGHTS LAB, <https://tracker.votingrightslab.org/issues/requesting-mail-ballots> [<https://perma.cc/2PFG-TM83>] (last visited Mar. 2, 2026).

<sup>226</sup> *Table 18: States with Mostly Mail Elections*, NCSL (Oct. 11, 2024), <https://www.ncsl.org/elections-and-campaigns/table-18-states-with-all-mail-elections> [<https://perma.cc/EB98-SCA8>] (noting the year in which each state implemented elections fully by mail).

<sup>227</sup> *Id.* (noting the additional jurisdictions as California, Colorado, Hawaii, Nevada, Oregon, Utah, Vermont, Washington state, and Washington, DC). Nine additional states allow smaller local elections to be conducted entirely by mail. *Id.* (noting these states as Alaska, Arizona, Florida, Kansas, Maryland, Missouri, Montana, New Mexico, and Wyoming).

<sup>228</sup> *Electronic Ballot Return*, NCSL (Feb. 24, 2026), <https://www.ncsl.org/elections-and-campaigns/electronic-ballot-return-internet-voting> [<https://perma.cc/YKR4-D2JQ>].

<sup>229</sup> *Id.*

how the USPS delivers mail ballots, particularly in close or tightly contested elections. Yet, despite the importance of ensuring these functions remain independent of political influence, the Court appears poised to erode longstanding precedent affirming the constitutional legitimacy of independent agencies.

### B. *The Doctrinal Erosion of Humphrey's Executor*

Although the *Humphrey's Executor* framework has governed the law around statutory removal protections for almost a century, sustained criticism of independent agencies, together with congressional expansion of agency power, has rendered its holding vulnerable. While this reality has culminated during the second Trump Administration, ideological shifts on the Supreme Court, along with congressional efforts to create new independent agency structures, affected the doctrinal landscape long before President Trump entered office.<sup>230</sup> As a result, by the beginning of Trump's second term, many legal scholars "regarded *Humphrey's Executor* as effectively on life support."<sup>231</sup> Perhaps understanding the likelihood that *Humphrey's Executor* would not pose a meaningful obstacle to his actions, Trump almost immediately began ignoring statutory removal protections and firing heads of independent agencies without cause.<sup>232</sup> These actions have led to a series of Supreme Court emergency docket decisions that have functionally eviscerated the *Humphrey's Executor* framework.

### C. *The Functional Overturning of Humphrey's Executor*

During the first year of Trump's second term in office, the President fired an unprecedented number of agency heads who had traditionally enjoyed removal protections.<sup>233</sup> Soon after taking office in January 2025, he fired

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<sup>230</sup> See, e.g., *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 492 (2010) (striking down dual for-cause limitations on members of the Public Company Accountability Oversight Board); *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 204 (2020) (striking down statutory for-cause removal restrictions on sole-director independent agencies such as the Consumer Financial Protection Bureau).

<sup>231</sup> Nick Bednar, '*Slaughter*'-ing *Humphrey's Executor*, *LAWFARE* (Oct. 15, 2025, at 13:00 ET), <https://www.lawfaremedia.org/article/slaughter--ing-humphrey-s-executor> [<https://perma.cc/6KMK-FB63>].

<sup>232</sup> *Id.*

<sup>233</sup> For a complete list of agency heads President Trump fired since his inauguration to a second term on January 20, 2025, see Gabriella Cantor & Hannah Sobran, *Tracking Trump's Unprecedented—Often Illegal—Firings of Political Appointees and Watchdogs*, *CREW* (Nov. 26, 2025), <https://www.citizenforethics.org/reports-investigations/crew-reports/tracking-trumps-unprecedented-often-illegal-firings-of-political-appointees-and-watchdogs/> [<https://perma.cc/J8RT-TV6A>]. Although

Gwynne Wilcox, the Chair of the National Labor Relations Board (“NLRB”) and another NLRB Board member prior to the expiration of their terms.<sup>234</sup> NLRB Board Members are protected from removal by statutory for-cause restrictions that mirror the language the Court upheld in the context of the FTC in *Humphrey’s Executor*.<sup>235</sup> Three days later, Trump fired FEC Commissioner Ellen Weintraub.<sup>236</sup> Weintraub elected not to challenge her termination in court, but Wilcox filed litigation in federal court.

Although Wilcox won her challenge in the district court, the Supreme Court granted the Trump Administration’s request for a stay of the district court’s decision in *Trump v. Wilcox*.<sup>237</sup> In a short, unsigned opinion, the Court explained that, as a result of the Constitution’s Vesting Clause, “[the President] may remove without cause executive officers who exercise that power on his behalf, subject to narrow exceptions recognized by our precedents.”<sup>238</sup> Although the NLRB arguably falls under such an exception because its Board Members are protected by the same statutory for-cause removal restrictions at issue in *Humphrey’s Executor*, the Court granted the President’s application for a stay because of its “judgment that the Government is likely to show that [] the NLRB . . . exercise[s] considerable executive power.”<sup>239</sup>

In dissent, Justice Kagan, joined by Justices Sotomayor and Jackson, argued that *Humphrey’s Executor* “remains good law” and “forecloses both the President’s firings and the Court’s decision to award emergency relief.”<sup>240</sup> Drawing parallels between the NLRB’s statutory for-cause removal restrictions and those in the FTC’s authorizing statute, Kagan argued that “this case is easy” under *Humphrey’s Executor*.<sup>241</sup> As a result, “to fire their members, the President—under existing law—needs good cause, which

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this includes many firings of agency heads from agencies that meet many of Datla & Revesz’s indicia of independence—including leaders of the Equal Employment Opportunity Commission (5 indicia); the Federal Labor Relations Authority (6 indicia, including statutory for-cause removal restrictions); the National Credit Union Administration (5 indicia); and the Nuclear Regulatory Commission (5 indicia, including statutory for-cause removal restrictions), Datla & Revesz, *supra* note 7, at 825, this Article focuses on firings that either implicate election-related agencies or which generated litigation leading to the Court’s decision to grant certiorari in *Trump v. Slaughter*.

<sup>234</sup> See Cantor & Sobran, *supra* note 233.

<sup>235</sup> 29 U.S.C. § 153(a).

<sup>236</sup> See Cantor & Sobran, *supra* note 233.

<sup>237</sup> *Trump v. Wilcox*, No. 24A966, 605 U.S. \_\_\_, at 1 (2025).

<sup>238</sup> *Id.*

<sup>239</sup> The emergency docket decision also addressed Trump’s Feb. 10, 2025, firing of Cathy Harris, a member of the Merit Systems Protection Board (“MSPB”), who is likewise protected from removal by statutory for-cause restrictions. See 5 U.S.C. § 1202(d). The Court granted the Trump Administration’s stay in that case as well on the same grounds. See *id.*

<sup>240</sup> *Trump v. Wilcox*, No. 24A966, 605 U.S. \_\_\_, at 2 (Kagan, J., dissenting).

<sup>241</sup> *Id.* at 3.

he admits he does not have.”<sup>242</sup> Blasting the Court for using the emergency docket to “overrule or revise existing law,”<sup>243</sup> Kagan concluded that the “only way out of that box is to upend *Humphrey’s*,”<sup>244</sup> a decision which should not “skip the usual appellate process” by occurring through an interim docket decision.<sup>245</sup>

The Court subsequently decided to address the question on the merits in a case challenging President Trump’s decision to fire FTC Commissioner Rebecca Slaughter. Because Slaughter’s firing directly implicated *Humphrey’s Executor*, which upheld the FTC’s statutory removal restrictions, the Court treated the Trump Administration’s application for a stay “as a petition for a writ of certiorari before judgment” and granted both the stay and the petition.<sup>246</sup> The Court directed the parties to brief and argue the question of whether “the statutory removal protections for members of the Federal Trade Commission violate the separation of powers, and, if so, whether *Humphrey’s Executor* . . . should be overruled.”<sup>247</sup> As Kagan pointed out in her dissent, the Court’s decision to grant certiorari before judgment suggests that a majority of Justices on the Court are “raring to” overturn “the rule stated in *Humphrey’s*.”<sup>248</sup>

At oral argument on December 8, 2025, a majority of the Justices indeed demonstrated their willingness to overturn *Humphrey’s Executor*. Legal analysts almost unanimously agreed that the Supreme Court during oral argument “signaled that it was likely to strike down” *Humphrey’s Executor*, thereby increasing the “president’s power over not only the FTC but roughly two dozen other multi-member agencies that Congress intended to be independent.”<sup>249</sup> While some amici urged the Court to recognize an exception

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<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 2.

<sup>244</sup> *Id.* at 3.

<sup>245</sup> *Id.* at 2.

<sup>246</sup> *Trump v. Slaughter*, No. 25-332, 606 U.S. \_\_\_, 1 (2025).

<sup>247</sup> *Id.* The Court also asked the parties to brief and argue the question of “[w]hether a federal court may prevent a person’s removal from public office.”

<sup>248</sup> *Id.* at 3 (Kagan, J., dissenting).

<sup>249</sup> Amy Howe, *Court Seems Likely to Side with Trump on President’s Power to Fire FTC Commissioner*, SCOTUSBLOG: ARGUMENT ANALYSIS (Dec. 8, 2025), <https://www.scotusblog.com/2025/12/court-seems-likely-to-side-with-trump-on-presidents-power-to-fire-ftc-commissioner/> [<https://perma.cc/L5KF-EWML>]; see also, e.g., Ann E. Marimow, *Justices Seem Ready to Give Trump More Power to Fire Independent Government Officials*, N.Y. TIMES (Dec. 8, 2025, at 11:12 ET), <https://www.nytimes.com/2025/12/08/us/politics/supreme-court-trump-presidential-power.html> [<https://perma.cc/6V2V-JR9R>] (observing it appeared the Court “ma[d]e it easier for President Trump to fire independent government officials.”); James Romoser, *Supreme Court Appears Ready to Give President More Power to Fire Government Officials*, WALL ST. J. (Dec. 8, 2025, at 16:09 ET), [https://www.wsj.com/politics/policy/supreme-court-appears-poised-to-give-president-more-power-to-fire-government-officials-d36a0302?mod=author\\_content\\_page\\_1\\_pos\\_33](https://www.wsj.com/politics/policy/supreme-court-appears-poised-to-give-president-more-power-to-fire-government-officials-d36a0302?mod=author_content_page_1_pos_33) [<https://perma.cc/H9V2-CUX9>].

for purely adjudicatory bodies,<sup>250</sup> the Court’s determination that both the NLRB and the MSPB exercise “considerable executive power” in *Wilcox* is likely to hold weight. As a result, the Court’s decision in *Slaughter* is set to “dramatically expand presidential authority over broad swaths of American life,” including election administration, in ways Congress never intended.<sup>251</sup>

If the prediction that the Court will overturn *Humphrey’s Executor* proves to be correct, the *Slaughter* decision will allow the President to remove the heads of the FEC, EAC, FCC, and the USPS without cause.<sup>252</sup> If the President has plenary power to fire those individuals, they will face strong pressure to carry out the President’s directives with the understanding that, should they resist, they will find themselves out of a job.<sup>253</sup> As the next section explains, the President has already attempted to assert unprecedented control over these agencies, even without plenary officer removal power. These measures provide an important indicator of what the current administration will do if the Court “increases [the President’s] direct control over every statutory provision and regulation the agency enforces, interprets, or administers”<sup>254</sup> by allowing him to remove agency heads at will, despite congressional intent to the contrary.

#### IV. PRESIDENTIAL CONTROL OF INDEPENDENT ELECTION AGENCIES

President Trump has already previewed what a post-*Humphrey’s Executor* world will look like for agencies like the FEC, EAC, FCC, and the USPS. This section describes numerous attempts the President has already made to assert control over these agencies. It also explains how these efforts foreshadow the election subversion threats that likely follow from plenary Presidential control over election-related independent agencies.

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<sup>250</sup> See Brief for Cathy Harris as Amicus Curiae in Support of Neither Party at 14, *Trump v. Slaughter*, No. 25-332, 606 U.S. \_\_\_\_ (U.S. Oct. 2025).

<sup>251</sup> See Brief for Professor Michael T. Morley as Amicus Curiae in Support of Neither Party at 5, *Trump v. Slaughter*, No. 25-332, 606 U.S. \_\_\_\_ (U.S. Cir. Oct. 2025).

<sup>252</sup> In *Trump v. Wilcox*, No. 24A966, 605 U.S. \_\_\_\_ (2025), the Court made clear that its conclusions regarding the NLRB and MSPB did not “necessarily implicate the constitutionality of for-cause removal protections for members of the Federal Reserve’s Board of Governors.” *Wilcox*, 605 U.S. \_\_\_\_ at 2. This conclusion could have implications for the USPS, which President Nixon described during debate around the Postal Reorganization Act as being organized “in a way designed to make it at least as free from partisan political pressure as are such presently existing independent establishments as the Board of Governors of the Federal Reserve System . . . .” H.R. DOC. No. 91-313 (Apr. 16, 1970).

<sup>253</sup> Samuel L. Bray, *Remedies in the Officer Removal Cases*, 17 J. OF LEGAL ANALYSIS 236, 255 (2025).

<sup>254</sup> Brief for Professor Michael T. Morley, *supra* note 251, at 6.

### A. *The Federal Election Commission*

On February 18, 2025, President Trump issued Executive Order 14215, entitled “Ensuring Accountability for All Agencies.”<sup>255</sup> Executive Order 14215 seeks to assert “many of the same supervisory measures as [apply to] typical federal executive agencies” over independent agencies.<sup>256</sup> This erosion of congressionally mandated independence by presidential fiat “is without historical precedent.”<sup>257</sup>

Executive Order 14215 requires independent agencies to submit any new proposed regulations to the White House Office of Information and Regulatory Affairs (“OIRA”) for pre-approval.<sup>258</sup> Previously, independent agencies’ regulations were specifically exempt from OIRA review.<sup>259</sup> OIRA exerts “significant” influence over agencies’ rulemaking authority “by ensuring... agencies’ actions are consistent with the President’s policy preferences.”<sup>260</sup>

Executive Order 14215 also vests “[t]he President and the Attorney General, subject to the President’s supervision and control,” with the power to “provide authoritative interpretations of law for the executive branch.”<sup>261</sup> In so doing, Executive Order 14215 prohibits independent agencies from taking any legal position “that contravenes the President or the Attorney General’s opinion[.]”<sup>262</sup> The Executive Order also requires independent agencies to establish a White House Liaison and submit strategic plans to the White House Director of the Office of Management and Budget (“OMB”).<sup>263</sup>

These requirements are intended to “ensure Presidential supervision and control of the entire executive branch[.]”<sup>264</sup> including independent agencies. Executive Order 14215 reimagines *Humphrey*’s holding, reasoning that because independent agencies have rulemaking and other “substantial”

<sup>255</sup> Exec. Order No. 14215, 90 C.F.R. 10447 (Feb. 18, 2025).

<sup>256</sup> *Trump EO Extends Unprecedented Supervision to Independent Agencies, Creating New Opportunities for Regulated Entities*, MCGUIREWOODS (Feb. 24, 2025) <https://www.mcguirewoods.com/client-resources/alerts/2025/2/executive-order-extends-unprecedented-supervision-to-independent-agencies-creating-new-opportunities-for-regulated-entities/> [<https://perma.cc/E52D-P74G>].

<sup>257</sup> *New Executive Orders Assert Increased Control and Oversight Over SEC and Other Independent Agencies and Promote Deregulation*, SIDLEY (Feb. 28, 2025), <https://www.sidley.com/en/insights/newsupdates/2025/02/new-executive-orders-assert-increased-control-and-oversight-over-sec-and-other-independent-agencies> [<https://perma.cc/5HCS-7XZY>].

<sup>258</sup> Exec. Order No. 14215, 90 C.F.R. 10447 at § 3 (Feb. 18, 2025).

<sup>259</sup> See SIDLEY, *supra* note 257.

<sup>260</sup> MAEVE P. CAREY ET. AL., CONG. RSCH. SERV., R48546, THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS (OIRA): OVERVIEW AND MAJOR RESPONSIBILITIES 8 (2025).

<sup>261</sup> Exec. Order No. 14215, 90 C.F.R. 10447 at § 7 (Feb. 18, 2025).

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at § 6.

<sup>264</sup> *Id.* at § 1.

authority, they “must be supervised and controlled by the people’s elected President.”<sup>265</sup>

Executive Order 14215’s various attempts to assert executive branch control over independent agencies foreshadow a world without *Humphrey’s Executor* and the leverage the White House could assert over agencies like the FEC if the President has unrestricted authority to remove FEC Commissioners who fail to align with the administration’s policy priorities or legal interpretations. Without FEC independence, the “party controlling the White House [could] unilaterally structure campaign rules and adjudicate disputes to disadvantage its electoral competitors.”<sup>266</sup> When these political parties seek advice from the FEC on how to conduct their core activities within the bounds of the campaign finance law, they “rely on the fundamental premise that the FEC’s decisions will be rendered by a bipartisan Commission[.]”<sup>267</sup> This bipartisan Commission is presumed “not [to] take positions on questions of law for the partisan purpose of disadvantaging Democratic campaigns and Democratic candidates.”<sup>268</sup> Executive Order 14215 “obliterates this understanding” because it provides the President “with the ability to order the FEC to take particular positions on any question of law.”<sup>269</sup>

In an amicus brief filed as part of the Democratic Party’s challenge to Executive Order 14215, former FEC Commissioner Ellen Weintraub put a finer point on the electoral implications of Executive Order 14215, stating, “[i]f there is any agency that partisan officials—including the President—must not be allowed to bend to their will, it is the body that regulates them when they run for office.”<sup>270</sup> Taking a broader view, Weintraub observed that:

[M]ost Western democracies rely on independent election administrators. And for good reason: Elections are run impartially—and, equally critically, in a manner *perceived* to be impartial—only if election administrators (including those implementing campaign finance laws) are independent of the executive. Consequently, Executive Order 14215

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<sup>265</sup> *Id.*

<sup>266</sup> Complaint for Declaratory & Injunctive Relief ¶ 9, *Democratic Nat’l Comm. v. Donald J. Trump*, Civ. No. 1:25-CV-00587 (D.D.C. 2025).

<sup>267</sup> *Id.* ¶¶ 56–57.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* ¶ 58.

<sup>270</sup> Brief for Ellen L. Weintraub as Amicus Curiae at 1, *Democratic Nat’l Comm. v. Trump*, No. 25-CV-00587 (D.D.C. 2025).

diverges from the global consensus on the proper administration of elections.<sup>271</sup>

Executive Order 14215, she further concluded, “is inconsistent with . . . the independent character of the FEC that is fundamental to its operations.”<sup>272</sup>

### B. *The Election Assistance Commission*

Just as Executive Order 14215 attempts to assert direct presidential control over the FEC, Executive Order 14248, “Preserving and Protecting the Integrity of American Elections,” attempts to undermine the independence of the EAC.<sup>273</sup> Specifically, it impacts voter registration requirements, the nationwide availability of voting by mail, and requirements for federal certification of voting equipment.<sup>274</sup> As this section explains, increased presidential control over these election functions through expanded control over the EAC hinders free and fair elections.

Executive Order 14248 instructs federal agencies to take an extensive range of actions related to the administration of federal elections.<sup>275</sup> Several provisions of Executive Order 14248 apply to the EAC and preview the extent of direct policymaking authority and decision-making influence the President would have over the EAC if it were no longer independent.<sup>276</sup>

First, Executive Order 14248 requires the EAC to decertify all voting equipment based on existing VVSG (which were most recently updated in 2021)<sup>277</sup> and issue new, revised guidelines consistent with the Order’s requirements.<sup>278</sup> Increased political control over election machinery creates an opening for election subversion to occur.<sup>279</sup> For example, if the EAC

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<sup>271</sup> *Id.* at 4.

<sup>272</sup> *Id.* at 11.

<sup>273</sup> See Exec. Order No. 14248, 90 C.F.R. 14005 (Mar. 28, 2025).

<sup>274</sup> *Id.* at 3–4.

<sup>275</sup> *Id.* at 3–4.

<sup>276</sup> Multiple lawsuits have been filed over the validity of various provisions of Executive Order 14248. In *League of United Latin American Citizens v. Executive Office of the President*, plaintiffs in several consolidated cases challenged sections 2, 3(d), 4(a), and 7 of Executive Order 14248. See *Complaint for Declaratory and Injunctive Relief* at 7–9, *League of United Latin Am. Citizens v. Exec. Off. of the President*, No. 1:25-cv-00946 (D.D.C. Mar. 31, 2025). In October 2025, the court entered a permanent injunction against the implementation of Section 2(a). See *Memorandum Opinion* at 71, *League of United Latin Am. Citizens v. Exec. Off. of the President*, No. 1:25-cv-00946 (D.D.C. Oct. 31, 2025). Final judgment has not been entered on the other challenged sections in those consolidated cases. In a separate case, Washington State and Oregon challenged sections 2, 4(b), and 7 of the Executive Order. See *Complaint for Declaratory and Injunctive Relief* at 7, *State of Washington v. Trump*, No. 2:25-cv-00602 (W.D. Wash. Apr. 4, 2025). There has been no ruling in that litigation.

<sup>277</sup> See Exec. Order No. 14248 (4)(b)(ii). (Mar. 28, 2025).

<sup>278</sup> *Id.* § (4)(b).

<sup>279</sup> See Lawrence Norden & Derek Tisler, *Addressing Insider Threats in Elections*, BRENNAN CTR. FOR JUST.: ANALYSIS (Dec. 8, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/addressing-insider-threats-elections> [<https://perma.cc/QSW3-MQBM>]; VOTING RIGHTS LAB, A

follows the President's directive to decertify all voting equipment in the country and issues new guidelines based on requirements set forth in Executive Order 14248, observers note there is currently no equipment available on the market that meets those standards.<sup>280</sup> This, some have argued, makes the "worst case" scenario for election subversion "simple."<sup>281</sup> Someone looking to undermine an upcoming election could simply point to Executive Order 14248 and argue that, "[m]achines don't meet [the EAC's new] standards, and all previous certifications have been rescinded: the election was therefore run on unreliable machines associated with fraud."<sup>282</sup> If litigation prevents the EAC from issuing new guidelines, "the executive order [nonetheless] lays fresh groundwork for an attack on the outcome of elections" because those seeking to subvert the election can claim the President "sought to protect the election, through enhanced security of the machinery," but litigants and the courts prevented him from doing so.<sup>283</sup>

Second, Executive Order 14248 requires the EAC to amend the Federal Form to add a requirement that all voters using the form provide "documentary proof of citizenship" to register to vote.<sup>284</sup> The only documents valid to prove an individual's citizenship under Executive Order 14248 are (i) a U.S. passport, or (ii) a REAL ID, military ID, or other federal or state government-issued ID containing a marker of citizenship status.<sup>285</sup> This predicates two restrictions on the franchise: a citizenship requirement and a curtailment of mail-in voting, on the alleged need to "protect[] voters" and keep elections "unmarred by fraud[.]"<sup>286</sup> This allegation of fraud, without an evidentiary citation, lays the foundation for election subversion in numerous ways. First, claims of fraud can be used as grounds to file a legal challenge over the results of a given election on the basis that improper votes were cast. Second, such claims amplify the impact of that legal challenge because they undermine the public's confidence in the security of the electoral system.<sup>287</sup>

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THREAT TO OUR DEMOCRACY: ELECTION SUBVERSION IN THE 2021 LEGISLATIVE SESSION (Sep. 29, 2021), <https://votingrightslab.org/report/a-threat-to-our-democracy-election-subversion-in-the-2021-legislative-session/> [<https://perma.cc/GND8-BNGG>].

<sup>280</sup> Wendy R. Weiser, *The President's Executive Order on Elections*, BRENNAN CTR. FOR JUST.: EXPLAINER (Oct. 31, 2025), <https://www.brennancenter.org/our-work/research-reports/presidents-executive-order-elections-explained> [<https://perma.cc/FSQ9-HLB7>].

<sup>281</sup> Bob Bauer, *Trump's Elections Power Play and the Voting Machines*, EXEC. FUNCTIONS (Apr. 23, 2025) <https://www.execfunctions.org/p/trumps-elections-power-play-and-the> [<https://perma.cc/3GFQ-A65Q>].

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> Exec. Order No. 14248 § (2)(a)(ii).

<sup>285</sup> *Id.*

<sup>286</sup> *Id.* § (1).

<sup>287</sup> See Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, 135 HARV. L. REV. 265 (2022).

Although, as discussed *supra*, the line between an election subversion risk and a voter suppression risk is murky,<sup>288</sup> this citizenship restriction is a good example of an action that implicates both. Research shows that identification and citizenship verification restrictions disproportionately impact Black and Hispanic voters, young voters, and lower-income voters in the U.S.<sup>289</sup> Thus, this requirement both perpetuates misinformation about alleged problems with non-citizen voting (which could be wielded to cast doubt on the overall validity of an election outcome, resulting in election subversion) and limits access to the polls among historically marginalized populations, resulting in voter suppression.

Finally, Executive Order 14248 mandates that the EAC condition the availability of federal election assistance grants<sup>290</sup> upon states setting a “ballot receipt deadline of Election Day for all methods of voting[.]”<sup>291</sup> There are currently sixteen states (and the District of Columbia) that allow ballots sent by mail to be received and counted as long as voters postmark the ballot by Election Day and the election official receives the ballot within a certain grace period after Election Day.<sup>292</sup> Under Executive Order 14248 (or if the President is otherwise able to impose his will over EAC actions in a world where *Humphrey’s Executor* is overturned), these states must either shorten the amount of time their citizens have to cast and return mail ballots or forfeit their eligibility for EAC-administered grants.<sup>293</sup> As the next section explains, this could also create grounds for the President to order the USPS to stop delivering ballots that fail to comply with the EAC’s dictated ballot receipt deadline.

#### D. Other Election-Related Agencies

As with the FEC and EAC, President Trump has already taken unprecedented steps to assert control over the functions of the FCC and the USPS. This section describes those actions and explains their implications for the potential subversion of future elections.

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<sup>288</sup> See discussion *supra* Part I Section D, at p. 7–9.

<sup>289</sup> See Jillian A. Rothschild, Samuel B. Novey & Michael J. Hanmer, *Who Lacks ID in America Today? An Exploration of Voter ID Access, Barriers and Knowledge*, CTR. FOR DEMOCRACY & CIVIC ENGAGEMENT 3 (June 2024), <https://cdce.umd.edu/sites/cdce.umd.edu/files/pubs/Voter%20ID%20survey%20Key%20Results%20June%202024.pdf?inline=1> [<https://perma.cc/JV6Q-NYYS?type=image>].

<sup>290</sup> Exec. Order No. 14248 § (5)(b)(ii).

<sup>291</sup> *Id.* § (7)(b).

<sup>292</sup> *Table 11: Receipt and Postmark Deadlines for Absentee/Mail Ballots*, NCSL (Mar. 24, 2026), <https://www.ncsl.org/elections-and-campaigns/table-11-receipt-and-postmark-deadlines-for-absentee-mail-ballots> [<https://perma.cc/6YTY-WJVZ>].

<sup>293</sup> The Order also instructs the Attorney General to take unspecified “necessary action” against states that set a ballot receipt deadline for any day after Election Day. See Exec. Order No. 14248 § 7(a).

## 1. The FCC

As discussed *supra*, Justice Kavanaugh has taken the position that the FCC “formally is not an independent agency,”<sup>294</sup> and President Trump’s appointed FCC Chair Brendan Carr seemingly concurs. Chair Carr’s recent actions already suggest a close functional policy alignment between the President and the FCC. Such collaboration, which could become legally formalized in a post-*Humphrey’s Executor* world, has dire consequences for free and fair elections.

In September 2025, President Trump said that “overly” negative news coverage of him by television networks should be grounds for the FCC to revoke broadcasters’ licenses.<sup>295</sup> This statement echoed comments the President made during the 2024 presidential campaign in response to a television interview with Vice President Kamala Harris. President Trump conceives of a broadcast license contingent on honesty and views the editing of an interview with Vice President Harris as grounds for the FCC “to take their license away.”<sup>296</sup>

President Trump reiterated this belief in September 2025 in response to criticism faced by FCC Chair Brendan Carr. Chair Carr had, in previous days, pressured ABC to suspend late-night host Jimmy Kimmel over his comments on the death of Charlie Kirk.<sup>297</sup> In “a remarkable escalation . . . using the threat of the power of the American government to silence criticism or dissent,” President Trump “indicated that Mr. Carr should go even further and scrutinize the broadcast licenses of local television stations that run programming from the major networks[.]”<sup>298</sup> Chair Carr indicated he was willing to follow the President’s directive, commenting that “broadcast licenses are not sacred cows[.]”<sup>299</sup> The FCC has not revoked a broadcaster’s

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<sup>294</sup> FCC v. Consumers’ Rsch., 606 U.S. 656, 708 (2025).

<sup>295</sup> Zolan Kanno-Youngs, *Trump Pressures Broadcasters Over Critical Coverage, Escalating Attack on Speech*, N.Y. TIMES (Sep. 18, 2025, at 03:23 ET), <https://www.nytimes.com/2025/09/18/us/politics/trump-fcc-licenses.html> [<https://perma.cc/Z5YS-PZ4B>]; Joey Garrison, *Trump Suggests FCC Should Consider Revoking TV Licenses Over Negative Coverage of Him*, USA TODAY: POLITICS (Sep. 18, 2025), <https://www.usatoday.com/story/news/politics/2025/09/18/trump-fcc-revoke-tv-licenses-negative-coverage/86223851007/> [<https://perma.cc/M73B-7NZY>].

<sup>296</sup> Donald J. Trump, President of the United States, Speech at Campaign Rally in Aurora, Colorado (Oct. 11, 2024) (transcript available at Speech: Donald Trump Holds a Campaign Rally in Aurora, Colorado—October 11, 2024, ROLLCALL, <https://rollcall.com/factbase/trump/transcript/donald-trump-speech-campaign-rally-aurora-colorado-october-11-2024/> [<https://perma.cc/T3AS-8LSY>]).

<sup>297</sup> Kanno-Youngs, *supra* note 295.

<sup>298</sup> *Id.*

<sup>299</sup> Ronald K. L. Collins, *Media on the Run: A Sign of Things to Come in Trump Times?—First Amendment News 451*, FIRE (Dec. 18, 2024), <https://www.fire.org/news/blogs/ronald-kl-collins-first-amendment-news/media-run-sign-things-come-trump-times-first> [<https://perma.cc/SA7X-L6MZ>].

license on “public interest” grounds since 1971.<sup>300</sup> Chair Carr used the power and authority of his FCC chairmanship to make threatening statements to ABC, stating: “[w]e can do this the easy way or the hard way. These companies can find ways to change conduct to take action on Kimmel or, you know, there’s going to be additional work for the FCC ahead.”<sup>301</sup> Following these statements, Jimmy Kimmel was suspended.

These emboldened, coordinated threats to local broadcasters who air content that the White House and its allies find objectionable could have dire consequences for free and fair elections. Political advertising over local TV and radio airwaves remains a primary method of reaching, persuading, and turning out voters for political parties and their candidates.<sup>302</sup> Even if the FCC successfully intimidates just one network into removing content that it or the White House objects to, the rising fragmentation in media consumption could mean that that network’s viewers don’t watch any other network and will therefore not see the offending advertisement at all.<sup>303</sup> Moreover, increased consolidation of station ownership likely means that if even just one station owner is intimidated into removing content, that one owner owns multiple stations and will remove the ad from all stations it’s airing on, cutting off a substantial portion of voters from accurate information.<sup>304</sup>

Imagine a scenario in which a political party airs an effective TV ad that supports its candidate in a tight 2026 U.S. Senate race in Georgia by attacking another candidate for having controversial ties with President Trump. The recent history of events described above suggests the President could take issue with such an “overly negative” ad and encourage the FCC to revoke the license of any TV stations in Atlanta that continue to air the ad on the grounds that it is not in the “public interest.” Pressure from the White House and the FCC could quickly lead to a chain of events where stations refuse to air that political party’s ad for fear of losing their license. The prospect that the

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<sup>300</sup> Don R. Pember, *The Broadcaster and the Public Interest: A Proposal to Replace an Unfaithful Servant*, 4 Loy. L.A. L. Rev. 83 (1971). The FCC revoked the license of a station in Jackson, Mississippi in 1971 when the station defended segregation. *Id.*

<sup>301</sup> David Folkenflik, *Jimmy Kimmel’s Suspension Shows Power of FCC’s Brendan Carr*, NPR: MEDIA (Sep. 19, 2025, at 13:27 ET), <https://www.npr.org/2025/09/19/nx-s1-5546764/fcc-brendan-carr-kimmel-trump-free-speech> [<https://perma.cc/TH7Y-FUFJ>].

<sup>302</sup> JÖRG L. SPENKUCH & DAVID TONIATTI, *POLITICAL ADVERTISING AND ELECTION OUTCOMES 6* (Kilts Center for Marketing at Chicago Booth–Nielsen Dataset Paper Series 1-046, 2016).

<sup>303</sup> *See, e.g.*, PEW RSCH. CTR., *POLITICAL POLARIZATION & MEDIA HABITS* (Oct. 21, 2014), <https://www.pewresearch.org/journalism/2014/10/21/political-polarization-media-habits/> [<https://perma.cc/28LQ-VCM3>] (finding many Americans rely on a single primary news source and show limited cross-outlet overlap; for example, consistent conservatives were found to have consistently relied on a single source of news).

<sup>304</sup> *See* Amy Merrick, *How Media Consolidation Affects the News You See*, CHI. BOOTH REV. (Mar. 4, 2025), <https://www.chicagobooth.edu/review/how-media-consolidation-affects-news-you-see> [<https://perma.cc/NZU8-MSWD>] (reporting that the three largest broadcast groups each own roughly 100 stations operating in more than 80% of U.S. media markets and that consolidated owners air centrally produced content across their stations).

President and the FCC would align to pressure stations against airing certain political views could chill political speech and the public availability of diverse political viewpoints nationwide, just as voters are researching and deciding who to elect in crucial races. This risk is also highlighted by the hypothetical scenario described in the Introduction, whereby the FCC could effectively prevent non-profit, non-partisan advertisements highlighting election subversion threats themselves, further impeding democratic accountability.

## 2. The USPS

In February 2025, in remarks delivered at the swearing-in ceremony of new Commerce Secretary Howard Lutnick, President Trump suggested he was considering a “merger” between the USPS and the Commerce Department,<sup>305</sup> confirming earlier reports that Trump is open to dissolving the independent leadership of the agency—perhaps by bringing it under the control of the Commerce Department, which is an executive branch agency.<sup>306</sup> In response to these reports, the USPS Board of Governors proactively retained outside counsel to fight for the agency’s right to independent governance and argued that any attempt to change the governance structure of the USPS without Congressional approval would be unconstitutional.<sup>307</sup>

Democrats in Congress urged Trump to abandon any attempt to disrupt the USPS’s independence, warning his plans would “put at risk the timely, affordable delivery of,” among other critical items, “mail-in ballots.”<sup>308</sup> The Congressional Democrats detailed several harmful outcomes if the USPS was brought under executive control or potentially privatized, including that such an effort could “subject the Postal Service and the entire mail network to political interference” and that service could be particularly impacted “in rural or less-profitable areas that the private sector refuses to service.”<sup>309</sup>

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<sup>305</sup> Chris Cameron, *Trump Suggests Taking Control of the Postal Service*, N.Y. TIMES (Feb. 21, 2025, at 10: 01 ET), <https://www.nytimes.com/2025/02/21/us/politics/trump-usps.html> [<https://perma.cc/HKZ8-AMX5>].

<sup>306</sup> Jacob Bogage, *Trump Expected to Take Control of USPS, Fire Postal Board, Officials Say*, WASH. POST (Feb. 21, 2025), <https://www.washingtonpost.com/business/2025/02/20/trump-usps-takeover-dejoy/> [<https://perma.cc/HD26-92SY>].

<sup>307</sup> Julie Tsirkin et al., *Postal Service Braces for Potential Takeover by Trump’s Commerce Department*, NBC NEWS: TRUMP ADMIN. (Feb. 22, 2025, at 10:19 ET), <https://www.nbcnews.com/politics/trump-administration/postal-service-braces-potential-takeover-trump-commerce-department-rcna193291> [<https://perma.cc/9NTD-BLW6>].

<sup>308</sup> Letter from Democratic Members, House Committee on Oversight and Government Reform, to Donald J. Trump, President (Feb. 22, 2025) (on file at <https://perma.cc/2YCQ-Z53H>).

<sup>309</sup> *Id.*

Trump’s plan, they explained, “would put at risk the independence and nonpartisan actions of . . . the Postal Service, potentially allowing rates, rulemaking, and other actions to favor certain industries, individuals, and regions[.]”<sup>310</sup>

If the Court overrules *Humphrey’s Executor*, this risk will no longer be theoretical. As the only election-related agency discussed in this Article with explicit statutory for-cause removal restrictions, the USPS is poised to be the most directly impacted by a decision invalidating such language as unconstitutional. Politicized, executive branch control over USPS operations provides a means for manipulation of future elections by creating the ability for partisan control of the speed and quality of mail service for both senders and recipients of both political (i.e., campaign-related) and election (i.e., ballot or registration-related) mail. Although not directly related to elections, concerns about excessive presidential and political control over the USPS provided the impetus for the 1970 Postal Reorganization Act—a statute that would, in many important respects, be invalidated by a decision overturning *Humphrey’s Executor*.<sup>311</sup>

If the President gains increased control over the USPS (whether through unrestricted removal authority over the agency or by merging the agency with the Commerce Department), he could, for example, conceivably impose different rates, rules, or qualities of service for different candidates or political parties, for voters who were registered with certain political parties, or for ZIP codes or regions depending on whether voters in those geographies supported him in previous elections. As raised in hypothetical in the Introduction, the President could also direct the USPS to stop delivering certain mail ballots in a close election, especially after Election Day, in contravention of the laws currently on the books in 16 states and D.C. These powers would, of course, be available not just to President Trump, but to any future individual to win the presidency and seek to potentially safeguard their reelection prospects.

## V. REASSERTING CONGRESSIONAL CONTROL OVER FEDERAL ELECTION ADMINISTRATION

While the precise scope of the *Slaughter* holding remains uncertain, a decision overturning *Humphrey’s Executor* would “create . . . new executive agencies Congress never intended, dramatically expanding the

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<sup>310</sup> *Id.*

<sup>311</sup> Ryan Ellis, *The Birth of the USPS and the Politics of Postal Reform*, MIT PRESS READER (Aug. 17, 2020), <https://thereader.mitpress.mit.edu/birth-of-usps-politics-of-postal-reform/> [<https://perma.cc/6S3W-YTMT>].

President’s authority over”<sup>312</sup> many areas of law, including federal election administration. To remedy such an eventuality, Congress should exercise its legislative power under Article I of the Constitution to reassert control over the federal election administration functions it has statutorily vested in independent agencies that might no longer function independently from the President. This section suggests two paths for preventing election subversion without agency independence: (1) by creating new Article I courts and (2) by empowering new or existing congressional committees.

### A. Article I Courts

Much of the debate around the constitutionality of statutory for-cause restrictions lies in the fact that the principal officers insulated from presidential removal sit within the executive branch of government. As Solicitor General Sauer put it during oral argument, opponents of *Humphrey’s Executor* believe that the Court has a “duty to ensure that the executive branch is overseen by a President accountable to the people.”<sup>313</sup> This separation of powers-related concern may not extend, however, to individuals who sit within the legislative branch of government, such as judicial officers who preside over legislative, or so-called Article I courts.

Article I of the Constitution gives Congress the power “[t]o constitute tribunals inferior to the supreme Court.”<sup>314</sup> Together with the Necessary and Proper Clause, this provision has generally been interpreted to allow Congress to create adjudicatory tribunals led by individuals who serve for fixed terms in office and who are protected from removal before the end of their terms.<sup>315</sup> These tribunals generally fall into two categories: legislative courts, such as the U.S. Tax Court, which perform primarily judicial functions, and other tribunals that serve as “adjuncts” to Article III courts, such as certain administrative agencies and magistrate judges.<sup>316</sup>

The FEC, EAC, FCC, and USPS currently perform a variety of functions, such as issuing advisory opinions, promulgating both rules and non-binding guidance, bringing enforcement actions, and adjudicating disputes. While many of these powers might not properly be relocated to an Article I court, Congress could consider placing some of these agencies’ most sensitive adjudication-related functions in a dedicated legislative court as a way to

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<sup>312</sup> Brief for Professor Michael T. Morley, *supra* note 251, at 1.

<sup>313</sup> Transcript of Oral Argument at 5:1–3, *Trump v. Slaughter*, No. 25-332, 606 U.S. \_\_\_\_ (U.S. Cir. Oct. 2025).

<sup>314</sup> U.S. CONST. art. I, § 8, cl. 9.

<sup>315</sup> ANDREW NOLAN & RICHARD M. THOMPSON II, CONG. RSCH. SERV., R43746, CONGRESSIONAL POWER TO CREATE FEDERAL COURTS: A LEGAL OVERVIEW (2015).

<sup>316</sup> *Id.*

preserve important aspects of election-related independence. For example, Congress could create an Article I court tasked with adjudicating questions involving the interpretation of FECA, or potential violations of campaign finance law. This would prevent the President from overseeing adjudications about his own potential violations of campaign finance law or pressuring the FEC on how to decide disputes involving his political allies or opponents. Such a system would better effectuate Congress's original, clear desire to place campaign finance administration in a body independent of the White House in the post-Watergate era.

Returning to the hypothetical scenario posited in the Introduction to this Article, placing decisions about whether a political party or candidate can establish a new type of legal defense fund in an Article I court, as opposed to in a presidentially controlled FEC, would prevent the President from stymying efforts by his political opponents to fund their own recount efforts. Similarly, should the President violate campaign finance laws by, for example, illegally accepting direct foreign or corporate donations, placing adjudication of those disputes in an Article I court would better ensure accountability and oversight than allowing a presidentially controlled FEC to decide such cases. The same arguments hold true for the adjudication-related powers currently exercised by the FCC (such as decisions about whether certain broadcast licenses should be suspended on subjective grounds that the broadcast station failed to operate in the "public interest") and the USPS (such as decisions about how to resolve issues involving undelivered ballots or other political or election-related mail).

Scholars assessing the impact of a potential overturning of *Humphrey's Executor* in other contexts, such as labor and employment regulation, have similarly pointed to Article I courts as a potential solution. For example, recognizing the need for an "impartial decision-making body to resolve workplace labor disputes" if the NLRB becomes directly controlled by the President, experts in the labor field have urged Congress to create a new Article I labor court.<sup>317</sup> Like the original structure of the FEC, the proposed labor court "would consist of two independent, two Democrat, and two Republican judges," all of whom would serve for staggered six-year terms.<sup>318</sup> Although the new entity would "act only as an adjudicatory body" and would "not have any authority to engage in substantive rulemaking" or exercise executive power,<sup>319</sup> it would allow for the continued independent enforcement of essential aspects of the National Labor Relations Act. A

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<sup>317</sup> Samuel Estreicher, G. Roger King & David S. Sherwyn, Opinion, *The Labor Board Needs Restructuring, Not Destruction*, REGUL. REV.: PROCESS (May 27, 2025), <https://www.theregreview.org/2025/05/27/estreicher-king-sherwyn-the-labor-board-needs-restructuring-not-destruction/> [https://perma.cc/LV5F-HH3K].

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

similar model could allow for the continued independent adjudication of key election-related matters currently presided over by the FEC, FCC, and USPS.<sup>320</sup>

One potential drawback to this solution is the uncertain extent to which the Court's decision in *Trump v. Slaughter* could call into question the constitutionality of Article I courts. While the Supreme Court has long recognized Congress's power to impose statutory for-cause removal restrictions on Article I court judges,<sup>321</sup> Justices Kagan and Sotomayor raised concerns about the possible implications of overturning *Humphrey's Executor* for these bodies during oral argument. Although Solicitor General Sauer made clear that the government was not explicitly challenging removal restrictions for Article I judges in the *Slaughter* case, Justice Sotomayor maintained that the "logic" of the government's argument could put "at risk the independence of the Tax Court" and other "Article I courts."<sup>322</sup> While Sauer acknowledged that there could be "line-drawing issues" about the permissibility of for-cause restrictions on Article I judges in the wake of the Court's decision in *Slaughter*, he nonetheless stressed that such questions are not currently before the Court.<sup>323</sup>

In the short term at least, the Court is likely to adopt Sauer's suggested framework whereby for-cause removal restrictions are deemed impermissible for officers sitting in the executive branch, but not for those sitting in Article I courts in the legislative branch.<sup>324</sup> Thus, placing sensitive election-related adjudication powers currently housed in the FEC, FCC, and USPS in new Article I courts could be one way for Congress to protect these disputes from potential election subversion-related manipulation by the President, at least in the short term. In the longer term, however, Congress should heed Justice Kagan's warning that the logic employed by the Court in *Slaughter* could have consequences that might eventually justify a future Court opinion invalidating for-cause removal protections for Article I judges.<sup>325</sup>

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<sup>320</sup> See discussion *supra* Part II(B). The EAC does not currently possess adjudication authority. Thus, an Article I court would not provide a solution to preserving independence over the powers exercised by the EAC.

<sup>321</sup> See, e.g., *Wiener v. United States*, 357 U.S. 349 (1958) (upholding for-cause removal restrictions on members of the War Claims Commission); *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868 (1991) (upholding for-cause removal restrictions on Special Trial Judges in the U.S. Tax Courts).

<sup>322</sup> Transcript of Oral Argument at 14:16–25, *Trump v. Slaughter*, No. 25-332, 606 U.S. \_\_\_\_ (U.S. Cir. Oct. 2025).

<sup>323</sup> *Id.* at 15:8–12.

<sup>324</sup> *Id.* at 57:4–7.

<sup>325</sup> *Id.* at 27:11–20 ("Once you use a particular kind of argument to justify one thing, you can't turn your back on that kind of argument if it also justifies another thing in the exact same way. And so, you know, putting a footnote in an opinion saying we don't decide X, Y, and Z because it's not before us doesn't do much good if the entire logic of the opinion drives you there.").

### B. Congressional Committees

Another potential solution, particularly as it relates to non-adjudicatory functions, is for Congress to empower congressional committees to exercise certain regulatory functions currently housed in the FEC, EAC, FCC, and USPS. This avenue has the added benefit of utilizing entities that already interact with these agencies on a regular basis through the congressional appropriations and oversight processes. It also could provide a way for Congress to retain the use of non-partisan, independent, expert-led advisory commissions and panels to advise on sensitive election-related matters.

For example, the Committee on House Administration and the Senate Rules Committee each currently have jurisdiction over FECA, HAVA, and the NVRA.<sup>326</sup> Although Congress has chosen to delegate the enforcement of these statutes to agencies like the FEC and EAC, it could properly reassert control over those functions in a post-*Humphrey's Executor* world. For example, as discussed *supra* in Part II(B), one key function of the EAC is to promulgate the VVSG to inform certification of voting machines. If Congress is concerned about the potential manipulation of the process of issuing those guidelines by a presidentially controlled EAC, it could instead create its own advisory body or committee tasked with promulgating—or advising on the promulgation of—the VVSG moving forward. Examples can be found in other bipartisan congressionally created expert commissions, such as the 2016 creation of the Commission on Evidence-Based Policymaking.<sup>327</sup> Rather than creating a panel of experts to advise the EAC on promulgating the VVSG, Congress could impanel an expert commission to make recommendations directly to lawmakers on how to do so. The same structure could be employed with respect to other rulemaking functions currently exercised by the FEC, FCC, and USPS.

The drawbacks of such an approach relate to the original reasons Congress chose to place the enforcement of certain statutes in administrative agencies to begin with. Although Congress's lack of expertise on certain matters (such as voting machine certification) could be resolved through the creation of expert panels as proposed above, Congress is neither flexible nor politically aligned enough to regularly enact binding regulations. Indeed, it is unclear that Congress even possesses the political will to amend FECA, HAVA, or other relevant authorizing statutes “to restore its intended balance of powers” should the Court overrule *Humphrey's Executor*.<sup>328</sup> Even if a

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<sup>326</sup> See, e.g., 52 U.S.C. §§ 20901–21145 (HAVA); 42 U.S.C. § 1973gg-7(a) (NVRA) (Transferred to 52 U.S.C. § 20508).

<sup>327</sup> See Evidence-Based Policymaking Commission Act of 2016, Pub. L. No. 114-140, 130 Stat. 317 (2016).

<sup>328</sup> Brief for Michael T. Morley, *supra* note 251, at 2.

majority of members of Congress wish to enact a particular piece of legislation, such as codifying new VVSG, there is often “no political incentive to push them onto Congress’s limited legislative agenda.”<sup>329</sup> This is partly because all legislative efforts must compete against “budgets, appropriations measures, and other bills responding to crises or other more immediate, tangible concerns,” not to mention bills that have the benefit of support from “concentrated, well financed constituencies.”<sup>330</sup>

These drawbacks also apply to Congress’s ability to create new Article I courts, as such entities would likewise require authorization through legislation. Nonetheless, if Congress believes that the federal government should retain a role in regulating areas like campaign finance, election administration, political advertising, and mail-in voting, it would be wise to consider relocating such authority to entities free from direct presidential control.

## VI. CONCLUSION

The downfall of agency independence has serious implications for the integrity of future federal elections. In a post-*Humphrey’s Executor* world, the President could assert complete control over critical functions currently exercised by the FEC, EAC, FCC, and USPS in ways that could subvert the outcome of elections in order to benefit the President or his political allies. While Congress awaits the Court’s ruling in *Trump v. Slaughter*, it should begin to consider how to restructure federal election administration in a post-*Humphrey’s Executor* world. If Congress had known that the statutory indicia of independence it codified for agencies like the FEC, EAC, FCC, and USPS “were unconstitutional, Congress would most likely have either reduced the substantive authority it delegated to the Executive Branch or incorporated different methods of cabining that power.”<sup>331</sup> Congress can still do so, either by reducing the powers vested in these agencies or transferring them to Article I courts or congressional committees. As the hypothetical scenario described at the beginning of this Article warns, Congress should act before control of its own chambers becomes susceptible to manipulation by the President.

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<sup>329</sup> *Id.* at 10.

<sup>330</sup> *Id.*

<sup>331</sup> Brief for Professor Michael T. Morley, *supra* note 251, at 2.