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The Federal Inaction Commission

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THE FEDERAL INACTION COMMISSION

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ABSTRACT

This Article proposes the establishment of a "Federal Inaction Commission" (FIC). This new, independent agency would be charged with investigating and reviewing the inaction of Executive Branch agencies and reporting its findings and recommendations to elected officials and the public. The FIC would provide many of the same benefits that would result from increasing the availability of judicial review of non-enforcement decisions and other regulatory inaction. At the same time, the FIC would be in a position to minimize the practical disadvantages that have been identified with judicial review of such decisions. Not only would the establishment of the FIC therefore provide a more workable solution to the problem of agency inaction than other commentators have offered, but the agency would also provide a political solution to what the staunchest defenders of the status quo have maintained is solely a "political" problem.

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INTRODUCTION

Congress routinely delegates broad authority to administrative agencies to implement federal programs in the modern regulatory state. When agencies make policy decisions pursuant to this authority, they can err by going too far in either of two fundamentally different directions. On one hand, agencies can implement their programs in an unduly aggressive fashion and potentially exceed the scope of their statutory authority or engage in arbitrary governmental action. By and large, the law does a pretty good job of dealing with this concern—regulated persons who are adversely affected by final agency action can typically obtain judicial review and invalidate governmental decisions that are deemed arbitrary and capricious or contrary to law.[1]

On the other hand, agencies can implement federal programs in an unduly lenient fashion and potentially render arbitrary decisions by refusing to take action that is authorized by statute.[2] In contrast to challenged agency action, federal courts are often reluctant to conduct meaningful judicial review of agency inaction. For example, the Supreme Court has held that federal courts lack subject matter jurisdiction over generalized grievances against Executive Branch agencies based on their alleged failure to comply with the terms of regulatory statutes, even when Congress has expressly authorized such adjudication.[3] Similarly, the Court has held that administrative decisions declining to take enforcement action are presumptively immune from judicial review under the Administrative Procedure Act (APA).[4]

Commentators have recognized that the current state of affairs is problematic because it creates an unwarranted asymmetry between the legal treatment of regulated entities and regulatory beneficiaries.[5] Simply put,

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[1] *See* 5 U.S.C. § 706(2)(A) (2006) (providing that a reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

[2] For a classic description of the Administrative Procedure Act's arbitrary and capricious standard of review, see *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–43 (1983).

[3] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 571, 578 (1992) (holding that, despite the existence of a citizen-suit provision in the Endangered Species Act, the plaintiffs lacked standing because they did not suffer a concrete injury).

[4] *See* Heckler v. Chaney, 470 U.S. 821, 832 (1985).

[5] *See* Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1692 (2004) (claiming that nonreviewability and standing doctrines facilitate faction because "[t]hey make it more likely that agencies will respond to private or political pressure rather than public welfare by giving those typically harmed by agency action (i.e., regulated entities) more power to protest than

regulated entities have access to legal relief when they challenge unduly aggressive agency action, whereas regulatory beneficiaries do not have access to legal relief when they allege that an agency has failed to implement its statutory mandate. This asymmetry creates incentives for agencies to pay more attention to the interests and perspectives of regulated entities—and to ignore the views of regulatory beneficiaries—during the administrative process.[6]

Critics of the status quo typically advocate some form of judicial review of non-enforcement decisions and other inaction by administrative agencies.[7] The idea is that if those decisions were subject to judicial review under the arbitrary and capricious standard, agencies would be obligated to provide reasoned explanations for their non-enforcement decisions and other inaction. This obligation would, in turn, compel agencies to consider all of the relevant interests and perspectives during their decision-making processes, in addition to preventing arbitrary governmental action and securing a meaningful form of democratic accountability.[8]

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those typically harmed by agency inaction (i.e., regulatory beneficiaries)"); Richard J. Pierce, Jr., Lujan v. Defenders of Wildlife*: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1194–95 (1993) (explaining that *Lujan* threatens to "create a legal regime in which only regulated firms have standing to obtain judicial review of most broadly applicable agency actions" and that "[i]n a world in which agencies can predict with confidence that every decision unfavorable to regulated firms will be subjected to judicial review and that no decision unfavorable to unregulated firms is reviewable, they inevitably will begin to act in accordance with this new incentive structure"); Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 656, 666–67 (1985) [hereinafter Sunstein, *Reviewing Agency Inaction*] (criticizing the Court's distinction between agency action and inaction in the modern regulatory state and emphasizing that "the availability of review will often serve as an important constraint on regulators during the decisionmaking process long before review actually comes into play" and that "[r]eview at the behest of statutory beneficiaries may perform a critical function in ensuring against unduly lax enforcement that would violate statutory requirements"); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 188 (1993) [hereinafter Sunstein, *What's Standing?*] ("The rise of the regulatory state rendered the distinction between regulatory objects and regulatory beneficiaries a conceptual anachronism, a relic of the *Lochner* period.").

[6] *See supra* note 5. *See also* Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 414–20 (2007) (explaining that the leading theories of the legitimacy of the administrative state "suggest that whether regulatory beneficiaries can hold an agency accountable for implementing a particular statutory program will depend on the ability of beneficiaries to invoke external mechanisms of control," such as judicial review).

[7] *See, e.g.*, *Heckler*, 470 U.S. at 840 (Marshall, J., concurring) ("[R]efusals to enforce, like other agency actions, are reviewable in the absence of a 'clear and convincing' congressional intent to the contrary . . . ."); Bressman, *supra* note 5, at 1693 ("[C]ourts generally should reject special rules for agency inaction and should apply the same principles that apply to agency action.").

[8] *See* Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1278–84 (2009) (describing the value of requiring public officials in a democracy to give reasoned explanations for their decisions).

Critics of these reform proposals contend that enforcement decisions are a political matter and, therefore, none of the judiciary's business.[9] At the same time, even the proponents of meaningful judicial review of agency inaction acknowledge the serious practical difficulties such review would present.[10] Thus, as things currently stand, non-enforcement decisions and other forms of regulatory inaction remain a serious problem in search of a workable solution.

This Article proposes the establishment of the "Federal Inaction Commission" (FIC). This new, independent federal administrative agency would be charged with (1) identifying policy areas in which Executive Branch agencies have declined to exercise their delegated statutory authority; (2) directing agencies to adopt sensible enforcement guidelines for implementing their existing programs; (3) investigating and resolving complaints regarding particular non-enforcement decisions; (4) securing reasoned explanations from Executive Branch agencies for any perceived deficiencies in the foregoing areas; (5) reporting to elected officials and the public on the nature and scope of regulatory inaction by Executive Branch agencies; and (6) making recommendations regarding budgetary matters and substantive legislation that could alleviate perceived deficiencies.

The FIC would provide the same benefits that are expected to result from judicial review of non-enforcement decisions and other inaction by administrative agencies. At the same time, the FIC would be in a position to minimize the practical disadvantages that would accompany judicial review of administrative decisions of this nature. Not only would the FIC provide a more workable solution to the problem of agency inaction than other commentators have offered, but such an agency would also provide a political solution to what the staunchest defenders of the status quo have maintained is solely a "political" problem.

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[9] *See, e.g.*, Antonin Scalia, *Responsibilities of Regulatory Agencies Under Environmental Laws*, 24 HOUS. L. REV. 97, 107 (1987) (justifying enforcement discretion and other nonreviewable exercises of administrative discretion on the grounds that "the decisions are supposed to be political ones—made by institutions whose managers change with each presidential election and which are under the constant political pressure of the congressional authorization and appropriations processes").

[10] *See* Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 716 (1990) ("Even many observers who favor a narrow application of [*Heckler v.*] *Chaney* concede that the managerial nature of agencies' decisions about how they can best deploy scarce resources warrants considerable solicitude from the courts during judicial review.").

I. THE PROBLEM OF AGENCY INACTION

There are two different worlds of modern administrative law. The first, which is governed by the rule of law, imposes procedural obligations on agencies and subjects most of their final decisions to judicial review. The second, which is better characterized by its "lawful lawlessness,"[11] is largely devoid of procedural obligations or meaningful judicial review. This Part explains that when agencies take action to implement their statutory mandates, regulated entities are generally entitled to the protections of the first world of administrative law. In contrast, regulatory beneficiaries who are adversely affected by "agency inaction" are often relegated to the second world (or third world?) of administrative law.[12] As a result, agencies have powerful incentives to give more weight to the interests and perspectives of regulated entities than to the views of regulatory beneficiaries during the administrative process.

This is not merely an academic concern. The goals of modern regulatory statutes simply cannot be achieved without administrative action to implement and enforce their provisions. For example, in any area where Congress has delegated broad authority to administrative agencies to promote public health and safety or to protect the environment, regulatory inaction threatens to undermine those goals with potentially devastating consequences. Scholars have therefore sharply criticized the most recent Bush Administration for failing to implement the Clear Air Act, the Clean Water Act, and the federal

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[11] *Cf.* Austin Sarat & Conor Clarke, *Beyond Discretion*: *Prosecution, the Logic of Sovereignty, and the Limits of Law*, 33 LAW & SOC. INQUIRY 387, 390 (2008) ("Decisions not to prosecute are instances of what Sarat and Hussain . . . call 'lawful lawlessness'—actions that are legally authorized, but not legally regulated." (citing Austin Sarat & Nasser Hussain, *On Lawful Lawlessness*: *George Ryan, Executive Clemency, and the Rhetoric of Sparing Life*, 56 STAN. L. REV. 1307 (2004))).

[12] Although the distinction between agency action and inaction is notoriously vague, this Article's use of the term "agency inaction" refers to an agency's express or implied refusal to take action to implement its statutory authority. As defined, agency inaction is a broad concept that potentially encompasses a wide variety of (in)activities, including the refusal or failure to promulgate rules, initiate investigations, or take enforcement action. Agency inaction could also extend, in principle, to relatively informal decisions such as the failure or refusal to promulgate guidance documents or even to return a phone call. As this partial list suggests, some forms of agency inaction are more problematic than others, and different forms of inaction might call for different forms or levels of external review. This Article does not attempt to provide a comprehensive taxonomy of the full range of agency inaction or its proper treatment in every context. The proposal that is set forth above was, however, written with a few assumptions: (1) an *unreasonable delay* in taking certain action, such as the initiation of rule making, would fall within the FIC's jurisdiction; (2) the FIC should otherwise focus primarily on significant forms of agency inaction that are not subject to judicial review under existing doctrine; and (3) the FIC would be expected to identify different types of agency inaction, determine which are most problematic, and establish its own priorities accordingly. In effect, the FIC would become the nation's leading expert on the scope and appropriate treatment of various types of agency inaction.

Superfund Program in an adequate fashion.[13] Moreover, some of the most challenging problems currently facing our society could potentially have been alleviated or avoided if agencies had exercised their existing legal authority in a more proactive fashion. For example, the Environmental Protection Agency (EPA) has notoriously refused to take action to limit greenhouse gas emissions from new motor vehicles despite its authority to do so under the Clean Air Act.[14] Similarly, the Securities and Exchange Commission (SEC) reportedly failed to take any legal action to address a variety of abuses in the mutual fund industry until the New York Attorney General's Office began putting pressure on the industry.[15]

Finally, structural flaws in the existing legal and political processes predictably facilitate inaction of this nature. In this regard, one prominent group of administrative law scholars has explained that "[i]n many ways, the regulatory process provides the ideal setting for . . . collusion between the administration and corporate interests because there are numerous subtle and quiet ways to scuttle regulatory protections even while the laws embodying those protections remain in force."[16] Another respected commentator provided the following explanation in response to the SEC's failure to take action against the mutual fund industry prior to the financial crisis:

> Deep down, what is at work here is less a formal policy of accommodation than the habitual response of overworked bureaucrats operating in an esoteric and insular field of law that the

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[13] *See, e.g.*, WILLIAM W. BUZBEE ET AL., CTR. FOR PROGRESSIVE REGULATION, REGULATORY UNDERKILL: THE BUSH ADMINISTRATION'S INSIDIOUS DISMANTLING OF PUBLIC HEALTH AND ENVIRONMENTAL PROTECTIONS (2005), *available at* http://www.progressivereform.org/articles/Underkill_503.pdf. *See also* GOV'T ACCOUNTABILITY OFFICE (GAO), SUPERFUND: BETTER FINANCIAL ASSURANCES AND MORE EFFECTIVE IMPLEMENTATION OF INSTITUTIONAL CONTROLS ARE NEEDED TO PROTECT THE PUBLIC (2006) (Statement for the Record by John B. Stephenson, Director of Natural Resources and Environment, providing testimony before the Senate Subcommittee on Superfund and Waste Management, Committee on Environment and Public Works). The Superfund Program is designed to facilitate the clean-up of toxic waste sites and impose the costs of those efforts on responsible companies. *See id.* at 1.

[14] *See* Massachusetts v. EPA, 549 U.S. 497, 511 (2007) (explaining EPA's argument that even if it has the authority to issue mandatory regulations to address climate change, it would be unwise to exercise that authority).

[15] *See* Rachel E. Barkow, *The Prosecutor as Regulatory Agency* 26–28 (N.Y. Univ. Sch. of Law, Pub. Law & Legal Theory Research Paper Series, Working Paper No. 09-40, 2009; N. Y. Univ. Sch. of Law, Law & Econ. Research Paper Series, Working Paper No. 09-30, 2009) (forthcoming *in* PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT (Anthony Barkow & Rachel Barkow eds.)), *available at* http://ssrn.com/abstract=1428934; John C. Coffee, Jr., *A Course of Inaction*, LEGAL AFFS., Mar./Apr. 2004, at 46. For a discussion of the potential application of this proposal to independent agencies, such as the SEC, see *infra* note 110.

[16] BUZBEE ET AL., *supra* note 13, at 1.

> public does not understand and that is dominated by a powerful lobby playing the role of the 600-pound gorilla. Add to this mix a rapidly revolving door between the SEC and private legal practice, and SEC staffers tend to learn that, unless an issue has become high profile, it is best not to rock the boat. Efforts to expand the law only gain a staffer the reputation of a troublesome dissident and interfere with his ability to return to private practice with an enhanced resume.[17]

Because the SEC eventually took action in response to the work of the New York Attorney General's Office, the same commentator concluded that "[s]ome measure of regulatory competition may be necessary to protect the public from the danger that federal agencies, even prestigious ones like the SEC, may be captured or stalemated by interest groups and their lobbies."[18] This Article's proposal to establish the FIC would provide a measure of "regulatory competition," and would therefore help to protect the public from arbitrary regulatory inaction and promote the rule of law.

A. The Asymmetry in Administrative Law Doctrine

Modern regulatory action is typically preceded by a broad delegation of authority from Congress to an administrative agency to implement a federal program.[19] The agency is usually authorized to promulgate regulations to implement its statutory authority and take enforcement action against regulated entities that violate the statute or the implementing regulations adopted by the agency. For example, Congress may delegate authority to the EPA to promote clean air, and the agency could establish limitations on air pollution that it could subsequently enforce against alleged violators of the law.[20]

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[17] Coffee, *supra* note 15, at 49.

[18] *Id.* at 46.

[19] *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."). For a discussion and critique of the increasingly broad scope of congressional delegations of authority to agencies, see DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993).

[20] Private rights of action to enforce federal statutes would also alleviate some of the problems that are described above, but an evaluation of this potential solution is beyond the scope of this Article. For a comprehensive treatment of private rights of action, see Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982). Another possible solution to the problems posed by regulatory inaction would be the increased use of "prompt letters" by the Office of Information and Regulatory Affairs (OIRA). For a discussion of this process and some of its limitations, see Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1277–80 (2006).

Regulated entities that oppose aggressive regulatory action or believe that an agency is exceeding its statutory authority ordinarily have several opportunities to voice their concerns and challenge the legality of agency action. In addition to participating in the legislative process that resulted in the initial delegation of administrative authority, regulated entities are entitled to notice and an opportunity to comment on proposed regulations,[21] and they can typically challenge an agency's final rules in federal court based on procedural defects or on the grounds that they are arbitrary and capricious or contrary to law.[22] If an agency's regulations are deemed facially valid, subsequent enforcement action must still be consistent with procedural due process and, if applicable, the Administrative Procedure Act's requirements for formal adjudication.[23] At the close of an agency's adjudicatory proceedings, regulated entities that are adversely affected or aggrieved by agency action can obtain judicial review of the agency's findings of fact, conclusions of law, and related policy determinations.[24]

The prevailing rules of administrative law make it far more difficult to challenge an agency's refusal to take action on the grounds that the decision is arbitrary and capricious or contrary to law. First, a plaintiff may have difficulty establishing standing to challenge an agency's unduly lenient enforcement of its statutory mandate. In *Lujan v. Defenders of Wildlife*, the Supreme Court held that Article III of the Constitution requires a plaintiff in federal court to prove that she is facing a concrete and particularized injury in fact, which is fairly traceable to the defendant's conduct and likely to be redressed by a judgment in the plaintiff's favor.[25] In the process, the Court determined that the citizen-suit provision of the Endangered Species Act, which authorized "any person" to commence a civil suit to enjoin alleged violations of the statute, was unconstitutional as applied.[26] The Court acknowledged that under its analysis, a litigant's standing will often be affected by "whether the plaintiff is himself an object of the action (or

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[21] 5 U.S.C. § 553(b)–(c) (2006). Regulatory beneficiaries can, of course, also participate in notice-and-comment rulemaking, but their comments may be less influential than those of regulated entities for reasons explored in the rest of this Part. *See infra* notes 25–47 and accompanying text.

[22] *See* 5 U.S.C. § 706(2) (2006) (authorizing judicial review of final agency action on various grounds).

[23] *See* RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS 239–93, 316–26 (5th ed. 2009) (discussing procedural due process and formal adjudication).

[24] *See* 5 U.S.C. §§ 702, 706(2) (2006).

[25] 504 U.S. 555, 560 (1992) (listing the requirements for standing). *See also* Sunstein, *What's Standing?*, *supra* note 5, at 197–202 (analyzing the Court's decision in *Lujan*).

[26] *Lujan*, 504 U.S. at 565–66.

foregone action) at issue."[27] If the plaintiff is an "object" of regulation, the requirements of standing will ordinarily be met.[28] On the other hand, when an "injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed."[29] This dichotomy is required, according to the Court, by separation of powers principles:

> To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed."[30]

Even if a plaintiff is able to establish standing, an agency's failure to implement its statutory mandate may not be subject to judicial review under the APA. At first blush, this is a surprising outcome under the APA, which expressly defines "agency action" to include the "failure to act,"[31] and obligates courts to "compel agency action unlawfully withheld or unreasonably delayed."[32] Nonetheless, in *Norton v. Southern Utah Wilderness Alliance* (*SUWA*), the Supreme Court unanimously held that a claim under Section 706(1) of the APA "can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*."[33] Accordingly, the Court determined that the Bureau of Land Management's refusal to prohibit the use of off-road vehicles (ORVs) in wilderness study areas was not subject to judicial review under the APA—even though the Federal Land Policy and Management Act of 1976 required the Secretary to "manage such lands . . . in a manner so as not to impair the suitability of such areas for preservation as wilderness."[34] The Court noted that while this provision "is mandatory as to the object to be achieved," it leaves the agency with "a great deal of discretion in deciding how to achieve it," and "[i]t assuredly does not mandate, with the clarity necessary to support judicial action under [the APA], the total exclusion of ORV use."[35] These limitations

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27 *Id.* at 561.
28 *Id.* at 561–62.
29 *Id.* at 562.
30 *Id.* at 577 (quoting U.S. CONST. art. II, § 3).
31 5 U.S.C. § 551(13) (2006).
32 5 U.S.C. § 706(1) (2006).
33 542 U.S. 55, 64 (2004).
34 *Id.* at 59, 66 (citing 43 U.S.C. § 1782(c) (1976)).
35 *Id.* at 66.

on judicial review were deemed necessary "to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve."[36] The Court emphasized:

> [If judges] were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved—which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management.[37]

While the decision in *SUWA* prevents judicial review of an agency's alleged failure to implement a "broad" statutory mandate,[38] the Court has also declared that an agency's refusal to take enforcement action against alleged violations of existing legal prohibitions is presumptively unreviewable. In *Heckler v. Chaney*, the Court held that a non-enforcement decision by the Food and Drug Administration was "'committed to agency discretion by law'" and therefore precluded from judicial review under the APA.[39] The Court distinguished *Citizens to Preserve Overton Park v. Volpe*, which adopted a presumption in favor of judicial review, on the ground that it involved a challenge to "an affirmative act . . . under a statute that set clear guidelines" for the agency to follow in making a decision.[40] The Court explained that "[r]efusals to take enforcement steps generally involve precisely the opposite situation, and in that situation we think the presumption is that judicial review is not available."[41]

The Court articulated several reasons for its conclusion that non-enforcement decisions are "generally committed to an agency's absolute discretion."[42] Most fundamentally, it claimed that the judiciary is generally unsuited for the task of reviewing non-enforcement decisions because they

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[36] *Id.*

[37] *Id.* at 66–67.

[38] It is certainly possible to read the relevant statutory language to require the Bureau of Land Management to take action to prohibit the use of ORVs in wilderness study areas. Nonetheless, the Court would apparently require this directive to be explicit in the statutory text to justify judicial review under the APA.

[39] 470 U.S. 821, 830–35 (1985) (quoting 5 U.S.C. § 701(a)(2) (1966)).

[40] *Id.* at 831 (distinguishing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971)).

[41] *Id.*

[42] *Id.* at 831–32.

involve "a complicated balancing of a number of factors which are peculiarly within [an agency's] expertise."[43] In this regard, the Court emphasized that agencies are necessarily required to establish enforcement priorities in order to make the best use of their limited resources.[44] The Court also pointed out that non-enforcement decisions are less likely to implicate protected liberty or property interests than agency action because they are typically non-coercive in nature.[45] The Court further explained that agency action provides a focus for judicial review—whether the agency has exceeded its statutory authority—which is generally missing from non-enforcement decisions, where the Court found that there is "no law to apply."[46] Finally, the Court claimed that:

> [A]n agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to "take Care that the Laws be faithfully executed."[47]

Each of the foregoing decisions leaves agencies with substantial, unreviewable discretion to decline to take action that is allegedly authorized or mandated by their governing statutes. Moreover, the rationale for each decision is essentially the same—to prevent the judiciary from interfering with the Executive Branch's obligation to "take Care that the Laws be faithfully executed." At the same time, if an agency had reached the opposite conclusion in each case and taken the relatively aggressive regulatory action that was requested by petitioners, those decisions would have been subject to judicial review under the applicable legal doctrines. For example, a developer who lost funding based on the EPA's application of the Endangered Species Act outside of the United States would likely have standing to challenge the validity of that decision.[48] Similarly, users of off-road vehicles in wilderness study areas would almost certainly be entitled to judicial review of a final decision by the

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[43] *Id.* at 831.

[44] *Id.* at 831–32.

[45] *Id.* at 832.

[46] *Id.* at 831–32 (contrasting agency action with agency non-action).

[47] *Id.* at 832 (quoting U.S. CONST. art. II, § 3).

[48] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 572 n.7 (1992) (noting that plaintiffs with a sufficiently concrete injury would not be required to meet the "normal standards for redressability and immediacy" in light of the citizen-suit provision of the Endangered Species Act); Christopher T. Burt, Comment, *Procedural Injury Standing After* Lujan v Defenders of Wildlife, 62 U. CHI. L. REV. 275, 276 (1995) (discussing the potential implications of this statement).

Bureau of Land Management to prohibit their activities.[49] And, of course, judicial review is routinely available to anyone who is found to have violated the statutory provisions or regulations that are implemented by an agency.[50]

Although courts will often defer to an agency's interpretation of ambiguous statutory provisions and other policy determinations, agency action will be invalidated if it is deemed arbitrary and capricious or contrary to law.[51] The arbitrary and capricious standard, in particular, has been described as "hard-look review" because courts demand a reasoned explanation for the agency's final decision, which focuses on whether:

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[52]

To be sure, the doctrinal hurdles the Court has imposed on plaintiffs who seek judicial review of agency inaction are not *always* insurmountable. For example, *SUWA* recognized that plaintiffs with standing can obtain judicial review to "compel agency action unlawfully withheld or unreasonably delayed" when plaintiffs claim that "an agency failed to take a *discrete* agency action that it is *required to take*."[53] Courts have also been willing to entertain

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[49] *See* PETER L. STRAUSS, ADMINISTRATIVE JUSTICE IN THE UNITED STATES 315 (2d ed. 2002) ("[S]tanding is not an issue for those who object to regulation of their own conduct.").

[50] *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894 (1983) ("[W]hen an individual who is the very *object* of a law's requirement or prohibition seeks to challenge it, he always has standing. That is the classic case of the law bearing down upon the individual himself, and the court will not pause to inquire whether the grievance is a 'generalized' one.").

[51] 5 U.S.C. § 706(2)(A) (2006). Similarly, an agency's factual findings in formal adjudication are subject to judicial review under the substantial evidence test. § 706(2)(E); *see also* Arkansas v. Oklahoma, 503 U.S. 91, 112 (1992) (applying the substantial evidence test to uphold agency factual findings).

[52] Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

[53] Norton v. S. Utah Wilderness Alliance (SUWA), 542 U.S. 55, 62, 64 (2004). This situation is most likely to arise when Congress has required an agency to take specific action within a certain period of time. *See id.* at 65 ("For example, 47 U.S.C. § 251(d)(1), which required the Federal Communications Commission 'to establish regulations to implement' interconnection requirements '[w]ithin 6 months' of the date of enactment of the Telecommunications Act of 1996, would have supported a judicial decree under the APA requiring the prompt issuance of regulations . . . ."); Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 951 (2008) ("[D]eadlines provide a rare opportunity for parties to successfully sue for agency inaction under Section 706(1) of the APA.").

challenges to the legality of an agency's denial of a rulemaking petition,[54] even though such decisions could easily be characterized as unreviewable agency inaction.[55] Finally, the presumption against judicial review of non-enforcement decisions can be overcome if a statute explicitly requires enforcement against specified violations or if the statute or an agency's regulations provide concrete guidelines for the agency to follow in exercising its enforcement discretion.[56] Even in these situations, however, courts generally apply exceptionally deferential standards of review,[57] and courts have limited remedial options available to them even when they determine that the applicable standards were violated.[58] As a result, courts rarely order

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[54] The APA provides that "[e]ach agency shall give an interested person the right to petition for issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e) (2006). It also provides that "[p]rompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding," and that "the notice shall be accompanied by a brief statement of the grounds for denial." § 555(e). If the agency grants a petition and initiates a rule-making proceeding, no issue for judicial review arises, but if the agency does not respond to the petition within a reasonable time, or if the agency denies the petition, the petitioner can seek judicial review under the APA. *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497 (2007) (reviewing the denial of a rule-making petition); Am. Horse Prot. Ass'n v. Lyng, 812 F.2d 1, 4 (D.C. Cir. 1987) (distinguishing *Heckler v. Chaney*, 470 U.S. 821 (1985), and concluding that denials of rule-making petitions are subject to judicial review under the APA). *See also* WILLIAM F. FUNK ET AL., ADMINISTRATIVE PROCEDURE AND PRACTICE 62–74 (3d ed. 2006) (describing the relevant APA provisions and case law on petitions for rulemaking).

[55] *See* Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1, 10–13 (2008) (claiming that the distinction between agency inaction and agency action under sections 706(1) and 706(2) of the APA is incoherent and unworkable).

[56] *See, e.g.*, Armstrong v. Bush, 924 F.2d 282, 295–96 (D.C. Cir. 1991) (holding that an agency's decision not to seek enforcement action was not committed to agency discretion by law because the relevant statutory provisions left no discretion to determine which cases to pursue); Doyle v. Brock, 821 F.2d 778 (D.C. Cir. 1987) (explaining that a decision of the Secretary of Labor not to file suit under the Labor-Management Disclosure Act of 1959 is subject to judicial review under the APA because the statute withdraws discretion from the agency and provides guidelines for the exercise of its enforcement power).

[57] *See, e.g.*, Ark. Power & Light Co. v. ICC, 725 F.2d 716, 723 (D.C. Cir. 1984) (explaining that "the scope of review under the [APA] of an agency decision to deny a rulemaking petition is *very narrow*," and that the judiciary's role "is limited to ensuring that the agency has adequately explained the facts and policy concerns it relied on, and that the facts have some basis in the record"). Similarly, in the non-enforcement context, an agency's determination of whether the triggering mechanism for mandatory enforcement action has been activated will generally receive substantial judicial deference. *See* Dunlop v. Bachowski, 421 U.S. 560, 572–73 (1975) (explaining that judicial review of a non-enforcement decision under the arbitrary and capricious standard is limited and "may not extend to cognizance or trial of a complaining member's challenges to the factual bases for the Secretary's conclusion either that no violations occurred or that they did not affect the outcome of the election"); Ellis v. Chao, 336 F.3d 114, 126 (2d Cir. 2003) (explaining that a court may only consider challenges to the factual basis for an agency's decision not to take enforcement action in very limited circumstances).

[58] *See infra* notes 85–87 and accompanying text (describing the remedial limitations of judicial review of agency inaction). For an illustrative discussion of the remedial difficulties associated with enforcing statutory deadlines, see Gersen & O'Connell, *supra* note 53, at 953–55, 964–66.

agencies to promulgate regulations or take enforcement action, and even when they require agencies to fulfill mandatory statutory obligations (such as meeting congressionally-imposed deadlines), courts are not ordinarily empowered to dictate the form that such actions must take.

Commentators have recognized that the foregoing doctrines create an asymmetry between the legal treatment of regulated entities and regulatory beneficiaries.[59] On one hand, regulated entities are routinely granted access to legal relief when they contend that unduly aggressive agency action is arbitrary and capricious or contrary to law. On the other hand, regulatory beneficiaries are frequently denied access to legal relief when they challenge an agency's refusal to implement its statutory mandate in a sufficiently vigorous fashion on the same underlying bases.

B. The Unwarranted Nature of This Asymmetry

Critics of the status quo have recognized that this particular dichotomy makes no sense in the modern administrative state. For example, Cass Sunstein has explained that the disparate legal treatment of regulated entities and regulatory beneficiaries is premised upon the related assumptions that "market ordering within the constraints of the common law" is the natural state of affairs, and the judiciary's proper role is "to safeguard traditional private rights as defined by the common law."[60] From this perspective, governmental intervention in the free market is viewed as exceptional and subject to judicial review. Conversely, the interests of regulatory beneficiaries, which were unprotected at common law, are not entitled to judicial protection. Rather, the appropriate safeguard against unlawful regulatory inaction is through the political process, where the generalized grievances of large numbers of people will presumably be heard. The judiciary should therefore adopt what is "in effect a one-way ratchet, consisting of legally enforceable constraints on regulation but no such constraints on inaction."[61] Sunstein characterizes this perspective as "a *Lochner*-like view of the judicial role," and points out that "[t]he *Lochner* Court, too, saw the judicial role as the vindication of private

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[59] *See supra* notes 5–6. *See also* Michael Herz, *The Rehnquist Court and Administrative Law*, 99 NW. U. L. REV. 297, 348–54 (2004) (discussing a perceived favoritism among parties in the Rehnquist Court's standing decisions and asserting that "[i]n the arena of regulatory policy, this tendency expresses itself in three overlapping tendencies that result in standing for plaintiffs with an anti-regulatory claim and not for those with a pro-regulatory claim").

[60] Sunstein, *Reviewing Agency Inaction*, *supra* note 5, at 666.

[61] *Id.*

rights, defined by reference to market ordering within the common law, against government 'intervention.'"[62]

The implication, of course, is that this understanding of democratic governance and the proper scope of judicial review is both severely flawed and outdated. Students often learn on the first day of administrative law that there is nothing inherently *natural* about free-market ordering under the common law.[63] Rather, this is one of many possible approaches to regulation that societies have sometimes chosen. Students also learn that the implementation of command-and-control regulation by agencies with broad statutory authority is the norm rather than the exception in the modern administrative state.[64] Most federal agencies were explicitly established by Congress to protect interests that were not recognized at common law.[65] Free-market ordering under the common law, in effect, protected one set of beneficiaries (for example, property owners and parties to contracts), whereas modern regulatory statutes tend to protect another set of beneficiaries (for example, workers, consumers, and stewards of the environment). A legal regime that protects the interests of one set of beneficiaries (by reviewing the validity of agency action) and not the other (by declining to review agency inaction) amounts to a judicial rejection of the modern regulatory state established by Congress.[66]

Aside from an ideological opposition to regulation, there is nothing to suggest that judicial review of agency action performs functions that are unnecessary when an agency declines to implement its statutory mandate. An agency can make decisions that are contrary to law by taking action that exceeds its statutory authority, as well as by refusing to take action that is statutorily required. Similarly, an agency can exercise its discretionary authority in an arbitrary and capricious fashion by taking action that is unsupported by a reasoned explanation, as well as by failing to engage in reasoned decision making when the agency declines to take action that is authorized by statute. Because agencies can potentially violate their statutory authority or engage in arbitrary and capricious decision making by

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62 *Id.* at 667.

63 *See, e.g.*, JOHN H. REESE, ADMINISTRATIVE LAW: PRINCIPLES AND PRACTICE 6–9 (1995).

64 *See, e.g.*, BERNARD SCHWARTZ, ADMINISTRATIVE LAW 42 (3d ed. 1991) ("'Broad delegation . . . is the hallmark of the modern administrative state.'" (quoting Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516)).

65 *See* REESE, *supra* note 63, at 9 ("[An agency] is created to achieve legislatively assigned goals. Therefore, it is an active arm of government that does not sit passively and await developments.").

66 *See* Sunstein, *What's Standing?*, *supra* note 5, at 196–97.

implementing their programs in an unduly aggressive fashion *or* in an unduly lenient fashion, the purposes of judicial review would be more fully served if this safeguard were equally available in both contexts.[67]

The most obvious problem with the judiciary's reluctance to review agency inaction is that it allows the Executive Branch to deviate from statutory mandates and render arbitrary and capricious decisions with impunity. At the same time, however, the asymmetry between the legal relief that is available to regulated entities and regulatory beneficiaries creates perverse incentives in the administrative process. Because regulated entities can routinely secure judicial review of regulatory action, whereas regulatory beneficiaries frequently cannot secure judicial review of agency inaction, agencies have incentives to pay more attention to the interests and perspectives of regulated entities—and to ignore the views of regulatory beneficiaries—during the administrative process.[68] When this incentive structure is combined with the collective action problems that regulatory beneficiaries already predictably face based on well-accepted lessons from public choice theory, regulatory capture by narrow special interests is facilitated.[69] This is precisely the result that the structural safeguards of our legal system, including judicial review, are designed to prevent.[70]

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[67] *See* Sunstein, *Reviewing Agency Inaction*, *supra* note 5, at 668–69 (explaining that the purposes of judicial review under the APA "apply with equal force to action and inaction"); *see also* Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Action and Inaction*, 26 VA. ENVTL. L.J. 461, 461–62 (2008) (claiming that "there is no fundamental difference between judicial review of agency inaction or action under the APA," and that "[t]he same underlying principles of administrative law apply in both circumstances"); Bressman, *supra* note 5, at 1691 (explaining that because "[a]gency inaction is subject to the same influences that derail agency action from public purposes to private gains[,] . . . the requirements that tend to fight these influences are equally necessary in both settings").

[68] *See supra* note 5.

[69] *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965) (claiming that interest groups are most likely to form and seek to influence politics when there are a small number of interested members with large stakes in the outcome). *See also* Biber, *supra* note 55, at 40–48 (explaining that public choice theory would suggest that "agency failures to implement regulatory statutes may be the result of asymmetries in the ability of regulatory subjects and regulatory beneficiaries to monitor and influence the political process"); Sunstein, *What's Standing?*, *supra* note 5, at 183–84 (claiming that in light of the possibility of "agency capture" by organized special interests, "it seemed positively perverse to grant standing to objects and not to beneficiaries" of regulation).

[70] *See, e.g.*, Bressman, *supra* note 5, at 1688–89 ("The Framers sought to structure our government to advance public purposes rather than narrow interests."); Pierce, *supra* note 5, at 1195 (explaining how the broad application of the standing decision in *Lujan* would "maximize[] the potential growth of the political pathology the Framers most feared and strived to minimize"). *See generally* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985) (explaining that the Framers designed the American Constitution to counteract the problem of interest group faction).

In sum, the Supreme Court has endorsed a variety of doctrines that create an asymmetry between the legal treatment of regulated entities and regulatory beneficiaries. This situation is deeply problematic because it reflects unwarranted judicial resistance to the modern regulatory state. It also permits agencies to deviate from statutory mandates and engage in arbitrary decision making in selected contexts. Finally, it creates an unjustified incentive for agencies to favor regulated entities over regulatory beneficiaries during the administrative process. The next Part describes the solution that other scholars have proposed to alleviate these concerns, as well as the shortcomings of prior reform proposals.

II. THE STANDARD SOLUTION AND ITS SHORTCOMINGS

Given the problems with the status quo, it is hardly surprising that several scholars have advocated increasing the availability of judicial review of agency inaction.[71] This approach would reduce the incentives for agencies to favor regulated entities over regulatory beneficiaries during the administrative process. It would also reduce arbitrary decision making by agencies and improve their compliance with statutory mandates. By eliminating the asymmetrical legal treatment of regulated entities and regulatory beneficiaries, this course of action would recognize that the interests protected by modern regulatory statutes deserve the same judicial solicitude as legal interests that were traditionally protected at common law. Finally, a judicially-enforced obligation for agencies to provide reasoned explanations for refusing to take action that is authorized by statute would improve the democratic accountability and, hence, legitimacy of administrative decision making.[72] In light of these potential benefits, one might wonder why these reform proposals have not been enthusiastically embraced by the judiciary.

One reason for the Supreme Court's reluctance to make judicial review of agency inaction more readily available stems from its continued adherence to what Keith Werhan has called the "neoclassical model" of administrative law.[73] This model emerged during the 1980s in response to perceived excesses

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[71] *See infra* notes 88–105 and accompanying text (discussing various reform proposals).

[72] *See* Staszewski, *supra* note 8, at 1283 ("Reason-giving can . . . be understood as the enforcement mechanism that holds public officials accountable for making legitimate policy choices in a deliberative democracy.").

[73] *See* Keith Werhan, *The Neoclassical Revival in Administrative Law*, 44 ADMIN. L. REV. 567, 568 (1992); *see also* Herz, *supra* note 59 (identifying similar themes in the Rehnquist Court's administrative law jurisprudence).

of judicial activism during the interest-representation era of the 1960s and 70s.[74] As Werhan perceptively explains:

> The neoclassical model seeks to unite the classical distinction between law and policy with a postmodern skepticism about the competence and integrity of courts to oversee agency decisionmaking. The distinguishing trademark, and bite, of the model is its rigid definition of "law," one which limits the concept to the clearly expressed intent of an authoritative lawmaker, such as Congress, and which thereby denies reviewing courts an active role in the administrative process.[75]

The dominant theme of neoclassical judicial decisions is that "courts are no longer available to protect those whose *interests* are affected by administrative actors unless the action can be said to violate some *right* held by the affected party."[76] Such decisions purport to limit policy making by the judiciary, in turn, "by defining 'right' to include only those interests that are protected by clear provisions of 'law.'"[77]

The Supreme Court's decisions that have limited the availability of judicial review of agency inaction fit squarely within the neoclassical model of administrative law.[78] For example, limiting judicial review of an agency's failure to act under the APA to situations where plaintiffs assert that the agency failed to take a discrete action that it is required to take maintains the judiciary's authority to uphold the "law," while simultaneously ensuring that discretionary policy choices regarding the best manner of implementing a broad statutory mandate are left to the political branches. Similarly, a presumption against judicial review of non-enforcement decisions is premised on the belief that such decisions are policy determinations that should be made by politically accountable officials.[79] Although the promulgation of a statute or regulation establishes the substantive content of the law, enforcement decisions of the Executive are another matter altogether.[80] The meaning of a

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74 *See* Werhan, *supra* note 73, at 620.

75 *Id.* at 568.

76 *Id.* at 620.

77 *Id.*

78 *See id.* at 597–602.

79 *See* Glen Staszewski, *Textualism and the Executive Branch*, 2009 MICH. ST. L. REV. 143, 175.

80 *See* Heckler v. Chaney, 470 U.S. 821, 830 (1985) (explaining that administrative action is "committed to agency discretion by law" under the APA when statutes are drawn in such broad terms that in a given case there is "no law to apply"); Scalia, *supra* note 9, at 105 ("Establishing environmental requirements is one thing; enforcing them is something else.").

statute or regulation is governed by law and is therefore the proper subject of interpretation by courts in an Article III case or controversy. Yet, a decision not to enforce a statute or regulation in the first instance is a policy matter that presumably falls within the absolute discretion of the Executive Branch and is therefore not properly subject to judicial review.[81] A contrary decision would allow politically unaccountable courts to interfere with the Executive's ability to make politically acceptable decisions and potentially displace the policy choices of administrative agencies in favor of the preferred interests of courts. Finally, although *Lujan* arguably conflicts with the neoclassical model because Congress expressly authorized citizen suits under the Endangered Species Act,[82] strict limitations on citizen standing are obviously consistent with an overarching desire to immunize the Executive Branch's "policy decisions" regarding how to implement the law from judicial review. The *Lujan* decision could therefore be understood as an effort by the Court to "constitutionalize" aspects of the neoclassical model of administrative law, irrespective of Congress's preferences regarding the availability of judicial review of administrative decisions.

The neoclassical model of administrative law is vulnerable to criticism on many grounds, including those set forth in the previous section. The point, however, is that from this perspective, non-enforcement decisions and other agency inaction would ordinarily be viewed as a "political" matter that is none of the judiciary's business.[83] As a result, the justices who adhere to this model strongly favor, and if anything might prefer to extend, precisely those doctrines that create the asymmetry between the legal treatment of regulated entities and regulatory beneficiaries. Moreover, because the appropriate legal treatment of agency inaction raises fundamental issues of political, constitutional, and legal theory, it is extremely unlikely that these justices are going to change their minds in the foreseeable future.

Another reason for the Court's reluctance to make judicial review of agency inaction more readily available stems from the practical difficulties associated with any such effort. First, as the Court explained in *Heckler*, the

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[81] *See Heckler*, 470 U.S. at 834 ("The danger that agencies may not carry out their delegated powers with sufficient vigor does not necessarily lead to the conclusion that courts are the most appropriate body to police this aspect of their performance.").

[82] *See* Pierce, *supra* note 5, at 1198–1201 (contending that the decision in *Lujan* "cannot be characterized as part of the Court's agenda to reduce the role of the judiciary in governmental policymaking").

[83] *See* Antonin Scalia, *The Role of the Judiciary in Deregulation*, 55 ANTITRUST L. J. 191, 193–94 (1986).

judiciary is arguably unsuited for the task of reviewing particular non-enforcement decisions because of the balancing of various policy considerations that is necessarily involved:

> [T]he agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.[84]

Consistent with this concern, administrative decisions that decline to take enforcement action are likely to be far more numerous than final agency action, which means that the availability of judicial review in this area could severely drain limited administrative and judicial resources. Finally, judicial review of administrative inaction would, at best, provide a limited remedy for arbitrary governmental action. In most cases, judicial review would be limited to assessing whether an agency provided a reasoned explanation for its decision.[85] In the absence of a reasoned explanation, the agency's decision would be deemed arbitrary and capricious and therefore vacated and remanded for more careful consideration.[86] Except in rare cases where Congress is deemed to have imposed mandatory obligations on agencies, the judiciary would ordinarily decline to order agencies to take the affirmative action that is positively authorized by statute.[87]

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[84] *Heckler*, 470 U.S. at 831–32.

[85] *See* Prof'l Pilots Fed'n v. FAA, 118 F.3d 758, 763 (D.C. Cir. 1997) (explaining that an agency must have provided a reasoned explanation for its chosen course of action, "responded to 'relevant' and 'significant' public comments, . . . and demonstrated that it afforded adequate consideration to every reasonable alternative presented for its consideration").

[86] Massachusetts v. EPA, 549 U.S. 497, 534 (2007) ("In short, EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change. Its action was therefore 'arbitrary, capricious, . . . or otherwise not in accordance with law.'").

[87] *See* Nat'l Wildlife Fed'n v. EPA, 980 F.2d 765, 773 (D.C. Cir. 1992) ("If [Congress] has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion, there is 'law to apply' . . . and courts may require that the agency follow that law; if it has not, then an agency refusal to institute proceedings is a decision 'committed to agency discretion by law' within the meaning of that section.").

Even the sharpest critics of the Court's current approach to agency inaction have recognized the validity of these practical concerns.[88] Commentators have therefore "hedged" or moderated their calls for increased judicial review of agency inaction in a variety of ways. For example, Cass Sunstein claims that standing should be a function of whether Congress has explicitly or implicitly conferred a cause of action on the plaintiff,[89] and that judicial review of agency inaction should frequently be available.[90] He concedes, however, that "[a]n allegation that an agency has acted arbitrarily because it has failed to take action against a particular violation of the governing statute presents the weakest claim for reviewability" because it implicates "all the concerns emphasized by the *Chaney* Court about judicial involvement in the allocation of scarce prosecutorial resources."[91] Lisa Bressman rejects the Court's disparate treatment of agency action and inaction and argues that "courts generally should treat these agency behaviors similarly and subject agency inaction to judicial review."[92] Nonetheless, she contends that "standing may be compared to nondelegation doctrine, inhibiting Congress from effectively delegating policymaking power to private parties through statutory citizen-suit provisions."[93] She also claims that nonreviewability under the APA "can be better understood as an analogue to political question doctrine, preventing courts from examining conduct committed to the unfettered discretion of administrative officials."[94] In any event, she concludes that "both nonreviewability and standing (as well as the [APA] provisions that ground them) can be viewed as links to separation of powers doctrine, barring courts from hearing challenges to the generalized manner in which agencies perform their jobs."[95] Some commentators, including Ashutosh Bhagwat, have

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[88] *See supra* note 10 and accompanying text; *see also* Ashutosh Bhagwat, *Three-Branch Monte*, 72 NOTRE DAME L. REV. 157, 182 (1996) ("[T]here are substantial practical barriers to a regime of pervasive, searching judicial review of agency non-enforcement decisions."); Bressman, *supra* note 5, at 1678 (describing the "administrative concerns" offered by the *Chaney* Court as "the most persuasive—perhaps the only persuasive—rationale" for its decision); Sunstein, *Reviewing Agency Inaction*, *supra* note 5, at 672–73 (acknowledging that certain prudential concerns "do serve to distinguish action from inaction, and they must be taken into account").

[89] *See* Sunstein, *What's Standing?*, *supra* note 5, at 191; *see also* Pierce, *supra* note 5, at 1198–1201 (claiming that standing in statutory cases should be a function of legislative intent).

[90] *See* Sunstein, *Reviewing Agency Inaction*, *supra* note 5, at 676–83 (analyzing the reviewability of various types of agency inaction).

[91] *Id.* at 682.

[92] Bressman, *supra* note 5, at 1661; *see also id.* at 1687–97.

[93] *Id.* at 1662; *see also id.* at 1702–05.

[94] *Id.* at 1662; *see also id.* at 1698–1702.

[95] *Id.* at 1662; *see also id.* at 1705–14.

suggested that the practical barriers to judicial review of agency inaction could be overcome by evaluating those decisions under appropriately deferential standards,[96] while others propose hinging the availability of judicial review on balancing tests that either (1) explicitly weigh the need for judicial deference to agency resource allocation decisions against the judiciary's duty to uphold congressional mandates;[97] or (2) examine whether other forms of judicial review are available, whether a non-enforcement decision is likely to lead to substantial hardship, and whether the non-enforcement decision is consistent with the underlying statute.[98]

There is much to admire in these proposals, and they could well improve upon the status quo. Specifically, each proposal would go a long way toward ensuring that an agency's refusal to take enforcement action is consistent with clear statutory and regulatory mandates. In addition, both Bhagwat and Bressman would facilitate this aspect of judicial review by requiring agencies to adopt and subsequently follow enforcement guidelines that would constrain the scope of agency discretion.[99] Nonetheless, by carving out a range of exceptions, agencies would still be able to engage in arbitrary decision making when judicial review of agency inaction is unavailable under these proposals. For example, Sunstein would apparently give agencies free reign to make "purely arbitrary" decisions by generally excluding from the scope of judicial review of agency inaction freestanding claims that agencies failed to engage in

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[96] *See* Bhagwat, *supra* note 88, at 182–91. Bhagwat claims that non-enforcement decisions should be subject to judicial review for reasoned decision making and that:

> [H]ighly deferential review under the 'arbitrary and capricious' standard of those aspects of an agency's stated policy which involve administrative and discretionary matters, such as the best allocation of limited resources, or the prioritization of socially harmful violations, would permit agencies to retain largely untrammeled authority in those areas where they need it the most, thereby addressing the gravest pragmatic concerns raised by the *Chaney* Court.

Id. at 185. *See also* Heckler v. Chaney, 470 U.S. 821, 840–42, 855 (Marshall, J., concurring) (claiming that non-enforcement decisions should be subject to judicial review under a particularly deferential version of the arbitrary and capricious standard that simultaneously requires agencies to provide reasoned explanations for their decisions and recognizes "an agency's legitimate need to set policy through the allocation of scarce budgetary and enforcement resources").

[97] *See* Biber, *supra* note 55, at 4–5.

[98] *See* Ruth Colker, *Administrative Prosecutorial Indiscretion*, 63 TUL. L. REV. 877, 910–11 (1989).

[99] Bhagwat, *supra* note 88, at 183 ("[A] system of judicial review in this area must rest centrally on a requirement—one new to administrative law and representing an admittedly significant departure from existing practice—that agencies state, and then consistently follow, a rational policy regarding enforcement priorities and disposition of enforcement resources."); Bressman, *supra* note 5, at 1661 ("[A]dministrative nonenforcement decisions should be subject to the important requirement that agencies promulgate and follow standards guiding their affirmative regulatory authority.").

reasoned decision making.[100] Similarly, Bressman would preclude courts from hearing "generalized grievances" regarding the manner in which agencies implement their broad statutory mandates.[101] Yet, agencies can arbitrarily refuse to take action that is within the scope of their statutory authority even when there are no specific legal directives already on the books that affirmatively compel them to do so. The bottom line is that any approach to judicial review of agency inaction that is less than comprehensive will inevitably allow arbitrary decisions to stand. And, in situations where judicial review is unavailable, agencies will continue to have strong incentives to favor regulated entities over regulatory beneficiaries in the administrative process.

A second shortcoming of the existing reform proposals is that they do not adequately address the substantial costs that would be associated with increasing the availability of judicial review of agency inaction. The proposed solutions involve precluding judicial review of non-enforcement decisions and other agency inaction when resource allocation considerations are likely to be predominant or deferring more heavily to agency inaction that is expressly justified on this basis. As explained above, however, the former solution would necessarily allow a potentially substantial number of arbitrary administrative decisions to stand. Moreover, the latter solution would give agencies a tailor-made excuse for nearly any inaction that would be extremely difficult for courts to evaluate because judicial review is typically conducted on a case-by-case basis in a manner that presents specific legal issues in isolation from the broader programmatic responsibilities of agencies.[102] Thus, if courts were regularly authorized to review agency inaction, we might predict that they would either sympathize unduly with plaintiffs and underestimate the resource constraints facing agencies or rubberstamp decisions not to take regulatory action that are allegedly justified by an agency's competing priorities—without a sound basis for evaluating which position is truly warranted.[103]

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[100] *See* Sunstein, *Reviewing Agency Inaction*, *supra* note 5, at 673 ("[A] generalized allegation of arbitrariness will often be an insufficient basis for judicial review.").

[101] *See* Bressman, *supra* note 5, at 1705 (claiming there is a "need for some principle to preclude the adjudication of truly generalized grievances while still permitting the adjudication of legitimate arbitrariness claims").

[102] *Cf.* Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1, 12 (2004) (explaining that "[u]nlike courts, agencies can and do make multi-dimensional decisions, creating packages to surmount political impasses," and claiming that "for judges compelled to consider issues in isolation, there just isn't anything *there* except for the text").

[103] *See* Biber, *supra* note 55, at 26–27 (recognizing the difficulty that courts would have in closely examining the veracity of claims that an agency's decision was based on resource concerns).

A final shortcoming of existing reform proposals is that they do not eliminate the remedial difficulties that would be presented by judicial review of agency inaction.[104] On one hand, allowing citizen standing that is authorized by Congress (as Pierce and Sunstein recommend) and requiring agencies to promulgate and follow enforcement guidelines (as proposed by Bhagwat and Bressman) would increase the likelihood that courts would order agencies to follow unambiguous statutory and regulatory mandates. On the other hand, judicial review would otherwise be limited to assessing whether an agency provided a reasoned explanation for non-enforcement decisions and other inaction. In the absence of a reasoned explanation, the agency's decision would be vacated and remanded for more careful consideration. The judiciary would ordinarily decline to order agencies to take the affirmative action that is positively authorized by statute in these circumstances. To be fair, these remedial limitations appear intractable, and a judicially-enforced requirement that agencies provide a reasoned explanation for their inaction would have significant value for a host of reasons.[105] Nonetheless, as things currently stand, non-enforcement decisions and other forms of regulatory inaction remain a serious problem in search of a workable solution.

III. A NEW PROPOSAL

Instead of seeking to redress the deficiencies in contemporary administrative law through increased judicial review of non-enforcement decisions and other regulatory inaction, this Part proposes the establishment of the "Federal Inaction Commission" (FIC). It begins by describing the powers and responsibilities that would be delegated to this new, independent administrative agency. It also explains that the FIC would provide the same essential benefits that are expected to result from judicial review of non-enforcement decisions and other inaction by administrative agencies, while simultaneously minimizing the theoretical objections and practical disadvantages that have been identified with judicial review of such inaction.

This proposal therefore fits comfortably within the recent movement in administrative law scholarship to encourage the adoption of internal checks

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[104] *See supra* notes 58, 85–87 and accompanying text (describing the remedial limitations of judicial review of agency inaction).

[105] *See infra* notes 130–36 and accompanying text.

and balances within the Executive Branch,[106] which is an explicit focus of the symposium for which this Article was written.[107] However, I also tend to view the FIC as an "external" check on decision making by Executive Branch agencies, which is why I believe that it is important to keep the agency relatively independent.[108] In any event, the combination of lawmaking and enforcement powers within agencies, together with the absence of meaningful external review mechanisms, renders the existing legal treatment of inaction by administrative agencies particularly dangerous from a democratic perspective.[109]

A. The Powers and Responsibilities of the Federal Inaction Commission

Congress should enact a statute that creates a new, independent administrative agency to oversee, monitor, and evaluate decisions by Executive Branch agencies not to implement their existing statutory authority.[110] Under

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[106] For some leading examples, see Barkow, *supra* note 15; Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009); Mariano-Florentino Cuéllar, *Auditing Executive Discretion*, 82 NOTRE DAME L. REV. 227 (2006); and Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006).

[107] The author participated in the panel entitled, "Institutional Design and the Internal Separation of Powers" at the 2009 Randolph W. Thrower Symposium at Emory University School of Law.

[108] *See infra* Part IV (discussing the FIC's ideal structure and evaluating various alternatives in greater detail).

[109] For example, the combination of lawmaking and enforcement functions within agencies potentially allows them simultaneously to promulgate generally applicable regulations and to single out disfavored regulated entities for selective prosecution (or, conversely, to provide preferential treatment to politically favored entities). For a more elaborate example, see BUZBEE, ET AL., *supra* note 13, at 16–18, which describes the lax enforcement of the Clean Water Act under the George W. Bush Administration, reportedly including: (1) the promulgation of a guidance document that instructed field officers who were enforcing the statute consistent with existing regulations to obtain approval from headquarters, while not requiring approval from headquarters for decisions not to enforce those regulations; (2) unsuccessful efforts to amend the regulations to limit their scope consistent with the Administration's preferred interpretation of the statute; and (3) a decision to leave the guidance document in place, despite widespread public opposition to the Administration's narrow interpretation of the statute, which emerged in response to an advance notice of proposed rulemaking.

[110] Of course, Congress may want to choose a more politically correct name for this agency, such as the "Federal Enforcement Commission." In any event, one issue that would need to be considered is whether the FIC's oversight authority should be extended to independent agencies within the Executive Branch or whether it should be limited to pure executive agencies whose leadership is removable at the will of the President. This Article does not thoroughly examine the distinct legal and policy issues that would be raised by extending this proposal to independent agencies. On one hand, some forms of political oversight of independent agencies are widely understood as problematic because they arguably conflict with Congress's intent to shield such agencies from political influence and therefore potentially raise separation of powers concerns. For this reason, the executive orders that authorize presidential review of proposed regulations by executive agencies have never extended to independent agencies. On the other hand, independent agencies are generally subject

this proposal, the FIC would be charged with six primary powers and responsibilities: (1) identifying policy areas in which Executive Branch agencies have declined to exercise their delegated statutory authority; (2) directing Executive Branch agencies to adopt sensible enforcement guidelines for their existing programs; (3) investigating and resolving complaints regarding particular non-enforcement decisions by Executive Branch agencies; (4) securing reasoned explanations from Executive Branch agencies for any perceived deficiencies in the foregoing areas; (5) reporting to elected officials and the public on the nature and scope of the regulatory inaction by Executive Branch agencies; and (6) making recommendations regarding budgetary matters and substantive legislation that could alleviate the perceived deficiencies.

The first significant power and responsibility of the FIC would be to identify policy areas where Executive Branch agencies have declined to exercise their delegated statutory authority. Because this function would require knowledge and expertise regarding specific Executive Branch agencies and their programs, the FIC should be organized into departments that correspond with the jurisdictions of relevant congressional committees and agencies.[111] The FIC departments would each be required to identify specific statutory and regulatory directives that have not been implemented by the Executive Branch agencies within their jurisdictions. The FIC departments would also be authorized to identify new policy initiatives that could arguably be implemented by Executive Branch agencies under their existing statutory

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to congressional oversight, APA procedures, and judicial review to the same extent as other executive agencies. My tentative view is that because the FIC's authority under this proposal would be authorized by statute (as opposed to an executive order), the problems associated with presidential review of rulemaking by independent agencies are likely inapplicable. Rather, the FIC's oversight responsibilities seem more analogous to the external review provided by legislative oversight, the APA, and judicial review. Moreover, while the political dynamics of executive and independent agencies may differ, there is little reason to think that independent agencies will not periodically engage in arbitrary or otherwise unlawful inaction. *See, e.g.*, *supra* text accompanying notes 15–18 (describing the SEC's failure to regulate abuses in the mutual fund industry). Accordingly, it seems both permissible and worthwhile to extend the FIC's oversight authority to independent agencies as well.

[111] Standing congressional committees and executive agencies typically have overlapping jurisdictions. *See* STEVEN S. SMITH ET AL., THE AMERICAN CONGRESS 232 (4th ed. 2006) ("Since the passage of the Legislative Reorganization Act of 1946, standing committees have been assigned the duty of maintaining 'continuous watchfulness' over executive branch activities within their jurisdictions."); *see also* David Epstein & Sharyn O'Halloran, *Legislative Organization Under Separate Powers*, 17 J.L. ECON. & ORG. 373, 390–91 (2001) ("Whereas [congressional] committees have sometimes been portrayed as monopolists in their policy jurisdictions, then our approach makes it clear that they face credible competition from executive bureaus, and vice versa.").

authority. The inaction to be identified by the FIC pursuant to this authority should include any area where Executive Branch agencies have declined to take requested action, as well as areas where such agencies have apparently failed to consider taking action that the FIC considers especially promising or beneficial. Most of this "inactivity" would—predictably and by design—be brought to the FIC's attention initially by regulatory beneficiaries who are disappointed with an agency's failure to implement its statutory authority in a sufficiently vigorous fashion. Indeed, the FIC could establish a complaint process that would provide a triggering mechanism for its oversight of the inactivity of Executive Branch agencies.

The second major power and responsibility of the FIC would be to direct Executive Branch agencies to establish sensible enforcement guidelines for their existing programs. This aspect of the FIC's authority would be similar to what some commentators have advocated in conjunction with increasing the availability of judicial review of agency inaction.[112] While those commentators have not specified the source of the judiciary's authority to compel agencies to adopt enforcement guidelines, the FIC would be given explicit statutory authority to require Executive Branch agencies to adopt reasonable enforcement guidelines under this proposal. The question that would arise, therefore, is whether the enforcement guidelines that were adopted by Executive Branch agencies pursuant to this mandate and their subsequent enforcement decisions would be subject to judicial review under the APA. The answer under the existing case law is apparently in the affirmative,[113] unless Congress explicitly provides otherwise in the FIC's enabling act. Whether an agency's enforcement guidelines and particular non-enforcement decisions should be subject to judicial review would depend largely on one's views of the debate that is described above. For the sake of making this proposal attractive to a wider audience, this Article takes the position that judicial review of an agency's enforcement guidelines and decisions should not be available based on an administrative agency's

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[112] *See supra* note 99 and accompanying text (describing claims by commentators that agencies should be required to promulgate enforcement guidelines).

[113] *See* Ctr. for Auto Safety v. Dole, 846 F.2d 1532, 1534 (D.C. Cir. 1988) ("Just as Congress can provide the basis for judicial review of nonenforcement decisions by spelling out statutory factors to be measured by courts, so an agency can provide such factors by regulation. When an agency chooses to so fetter its discretion, the presumption against reviewability recognized in [*Heckler v.*] *Chaney* must give way.").

compliance with a directive from the FIC to establish reasonable enforcement guidelines.[114]

Nonetheless, the third major power and responsibility of the FIC would be to investigate and resolve complaints regarding particular non-enforcement decisions by Executive Branch agencies. The FIC would therefore be authorized to direct Executive Branch agencies to promulgate enforcement guidelines for their existing programs and to review subsequent non-enforcement decisions by those agencies for reasoned decision making and for compliance with their own guidelines. If the FIC determined in response to a complaint that an Executive Branch agency failed to follow its enforcement guidelines or otherwise to engage in reasoned decision making in reaching a particular non-enforcement decision, the FIC would be empowered to vacate the agency's decision and to remand the matter to the agency for further consideration. Thus, the FIC would, in effect, be able to perform the full range of functions that commentators have previously advocated for the judiciary.[115]

In addition to reviewing complaints about an agency's non-enforcement decisions, the FIC would also be empowered to audit each agency's compliance with its enforcement guidelines. Mariano-Florentino Cuéllar has persuasively argued that such audits would provide a valuable supplement or alternative to judicial review of an agency's discretionary decisions.[116] As he explains, "an audit of executive discretion is a stringent evaluation of a sample of discrete decisions drawn randomly from a larger pool, using an explicit standard fixed in advance, with the results announced to the public."[117] The primary benefit of such audits is that a relatively small sample of decisions can be studied in depth, and the results can reveal substantial information about an agency's overall performance.[118] Moreover, if random audits are done with sufficient frequency, an incentive is created for agency officials to improve

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[114] More broadly, this proposal is not intended to alter the scope of judicial review of agency action that is currently available. Thus, for example, plaintiffs who currently have access to judicial review should not be required to exhaust their administrative remedies with the FIC before proceeding in federal court. Similarly, the decisions of the FIC should not be subject to judicial review under the APA. In this regard, the FIC's decisions would be analogous to the cost–benefit analyses that are currently required (without judicial review) by executive order.

[115] *See supra* notes 88–105 and accompanying text.

[116] *See* Cuéllar, *supra* note 106.

[117] *Id.* at 252.

[118] *See id.* at 257 ("In exchange for reviewing fewer cases, whoever is conducting the audits can demand more evidence from the executive branch, more justification, and more access to information—all at a lower cost than what would be incurred if [every decision were reviewed in a relatively cursory fashion].").

their performance relative to the articulated standard.[119] Because such audits are most useful when even a cursory review of each decision in a particular class is impractical, non-enforcement decisions would provide an ideal context for the use of this technique.

The fourth major power and responsibility of the FIC would be to require Executive Branch agencies to provide reasoned explanations for other regulatory inaction. Specifically, the FIC could require agencies to provide reasoned explanations for their failure to adopt adequate enforcement guidelines pursuant to a valid request from the FIC. Moreover, the FIC would be empowered to compel agencies to provide reasoned explanations for failing to take action that is specifically required by existing statutory and regulatory mandates. Finally, the FIC could compel agencies to provide reasoned explanations for refusing to pursue new policy initiatives, which the FIC has identified as consistent with the agency's existing statutory authority. The FIC would, in turn, be authorized to review the validity of the foregoing agency inaction under this proposal. If it determined that an Executive Branch agency failed to engage in reasoned decision making under the arbitrary and capricious standard, the FIC could invalidate the agency's decision and remand the matter for further consideration.

The fifth major power and responsibility of the FIC would be to report to elected officials and the public on the nature and scope of regulatory inaction by Executive Branch agencies. Administrative law scholars have frequently sought to construct theories to legitimize the exercise of discretionary authority by unelected bureaucrats who perform legislative, executive, and judicial functions.[120] Besides the prospect of judicial review of the legality of their decisions, numerous commentators have emphasized the importance of facilitating greater control of agency action by Congress, the President, or affected interest groups.[121] Other commentators believe that agencies with expertise should be given greater autonomy; these commentators focus on the administrative process's capacity to facilitate reasoned deliberation for the

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[119] *Cf. id.* at 255 ("[R]andom audits (at least when they happen with a sufficiently high probability) make it harder for the people or organizations being overseen to evade detection.").

[120] *See* Cynthia R. Farina, *The Consent of the Governed*: *Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 1007–36 (1997).

[121] *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2253–69, 2331–63 (2001) (describing non-presidential mechanisms of administrative control and making a case for presidential administration).

common good as the basis of the regulatory state's legitimacy.[122] The key to the effective implementation of any of these theories is accurate information about what agencies are doing and the ability of relevant actors to influence and respond to agency decision making.[123] When agencies take action to implement their statutory authority, the first world of administrative law—which is characterized by participatory procedures, presidential review, and a presumption in favor of judicial review—helps to ensure that these conditions are met.[124] In contrast, the vast majority of elected officials and interested members of the public are unlikely to know that Executive Branch agencies have failed to take action to implement their statutory mandates, particularly when the structural safeguards of the first world of administrative law are inapplicable or unavailable.[125] Moreover, agencies could systematically fail to engage in reasoned decision making in precisely these situations, and potentially interested parties would be unable to influence or respond to those decisions.[126] Under this proposal, the FIC would be responsible for alleviating these shortcomings in administrative law by virtue of its obligation to report to elected officials and the general public on what Executive Branch agencies are not doing.[127] This information could, in turn, facilitate a subsequent dialogue on the legality and desirability of an agency's chosen course of (in)action, and perhaps elicit a political response. The FIC's reporting function would thereby improve the legitimacy of the administrative state, as well as providing elected

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[122] *See, e.g.*, Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511 (1992).

[123] *Cf.* Mendelson, *supra* note 6, at 417–20 (explaining that under the leading theories of the administrative state's legitimacy, "the agency must be regularly obligated to disclose and justify its actions, and the agency's authority must be limited by meaningful constraints, whether internal or external").

[124] *See* Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749 (2007).

[125] It is possible, of course, that certain powerful elected officials and interest groups would be aware of, and indirectly responsible for, these decisions. If other elected officials and interested members of the public were not let in on the secret, however, there would be no way to hold the responsible public officials accountable for their actions. As a result, these particular policy decisions would be difficult to square with theories of democratic legitimacy. *See* Staszewski, *supra* note 8, at 1281 ("If citizens are unaware that a particular governmental official has made a specific policy decision, they cannot possibly hold that official accountable in any meaningful way for this action.").

[126] *Cf.* Staszewski, *supra* note 79, at 177–78 (pointing out that public choice theory suggests that an agency's decisions not to take enforcement action may present "the ideal context for governmental officials to favor narrow private interests over the public good to promote their own selfish interests, regardless of the actual merits of a case").

[127] For a discussion of the larger implications of this proposal for theories of legislative oversight, see *infra* Part IV.E.

officials and the public with valuable information about what agencies are (not) doing.

The final major power and responsibility of the FIC would be to make recommendations regarding budgetary matters and substantive legislation that could address serious limitations on the ability of Executive Branch agencies to take action to fulfill their statutory mandates. The most legitimate reasons that agencies can offer for declining to take regulatory action include well-considered decisions to allocate limited resources to more serious or easily resolvable problems and determinations that certain courses of action would exceed their statutory authority. The FIC would not be authorized to vacate or second-guess administrative decisions of this nature that are consistent with the available information under this proposal. Rather, the FIC would be expected to join with conscientious agencies and regulatory beneficiaries to encourage elected officials to provide the financial resources and legal authority needed to solve difficult problems within each agency's programmatic responsibilities.

Public choice theory tells us that members of Congress like to take credit while avoiding blame, which can be accomplished by enacting statutes that create popular programs, while simultaneously depriving agencies of the legal and financial resources that are needed to avoid regulatory capture and to achieve their underlying policy goals.[128] To the extent this story is true, the FIC would be well situated to draw attention to the failure of elected officials to provide the continuing legal and financial support necessary for agencies to successfully implement the public-regarding programs that have been entrusted to their care, which continue to be popular with voters.[129] The FIC should therefore not be viewed as inherently antagonistic to Executive Branch agencies. Instead, its primary mission would be to promote good government in the modern regulatory state.

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[128] *See, e.g.*, Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 496–97 (2003) ("[P]ublic choice theory hypothesizes that Congress often writes statutes with few limitations on administrative discretion intentionally to create room for interest groups to dominate the administrative process—all the while shifting blame to agencies for unpopular outcomes and claiming credit with voters for superficial responses to public problems."). Bressman also points out that "[p]ublic choice theory also posits, though less emphatically, that delegation allows agencies to act in their own self-interest." *Id.* at 497. The FIC would, of course, be expected to help minimize this pathology of agencies.

[129] For a discussion of the political feasibility of this proposal, see *infra* Part IV.D.

B. Why the FIC Provides a Win-Win-Win Solution

This section explains that the FIC would provide the same benefits that are expected to result from judicial review of non-enforcement decisions and other inaction by administrative agencies. At the same time, the FIC would be in a position to minimize the practical disadvantages that have been identified with judicial review of those decisions. Because the establishment of the FIC would also provide a political solution to what the staunchest defenders of the status quo have maintained is solely a political problem, this proposal should be accepted as a viable solution from any perspective in the existing debate.

The benefits that would be provided by judicial review of agency inaction could also be obtained by establishing an FIC with the foregoing powers and responsibilities. First, the FIC would substantially reduce the incentives generated by current legal doctrine for agencies to favor regulated entities over regulatory beneficiaries in the administrative process. Specifically, agencies would know that in contrast to the present situation, their non-enforcement decisions and other inaction would stand a real chance of being discovered, assessed, publicized, and invalidated. This scrutiny could even be initiated by regulatory beneficiaries who would be authorized to file complaints with the FIC about certain types of administrative inaction. The FIC would therefore create incentives for Executive Branch agencies to pay close attention to the interests and perspectives of regulatory beneficiaries throughout the administrative process. These realigned incentives would, in turn, reduce the likelihood that agencies will be captured by regulated entities and increase the chances that regulation will serve the public good.

For related reasons, the FIC would also reduce the prevalence of arbitrary decision making by agencies and improve the extent to which they comply with existing legal mandates. First, the FIC's obligation to identify agency inaction that violates existing legal mandates and to report its conclusions to elected officials and the public would place increased pressure on agencies to take the requisite action. The FIC's authority to identify new policy initiatives that an agency could implement under its existing statutory authority and to highlight these opportunities for elected officials and the public could have a similar effect if Executive Branch agencies declined to pursue those initiatives voluntarily. Second, the FIC's ability to direct Executive Branch agencies to establish enforcement guidelines for their existing programs and to review the validity of subsequent non-enforcement decisions would reduce arbitrary decision making and promote compliance with the rule of law. Indeed, the

FIC's authority to compel agencies to provide explanations for a variety of inaction that would be subject to subsequent review would provide a host of benefits that are associated with reason-giving of this nature. These benefits include limiting the scope of available discretion; ensuring that responsible public officials provide public-regarding justifications for their decisions; facilitating transparency; and enabling interested parties to evaluate, discuss, and criticize governmental action—and potentially to seek legal or political reform.[130] Finally, the FIC's powers and responsibilities would improve the chances that elected officials will enact legislation to redress an agency's unwillingness or inability to take action that would achieve its broader policy objectives and thereby promote the public good.

The preceding benefits could be viewed as largely instrumental, but the FIC would also improve the democratic legitimacy of the modern regulatory state on a more fundamental level. First, by counteracting the asymmetrical legal treatment that is provided to regulated entities and regulatory beneficiaries, the establishment of the FIC would recognize that the interests protected by modern regulatory statutes are entitled to the same solicitude as the legal interests that were protected by the common law and remain favored by courts today.[131] Second, the FIC's ability to require agencies to provide reasoned explanations for declining to take regulatory or enforcement action that could reasonably be accepted by free and equal citizens with fundamentally competing perspectives would help to ensure the democratic legitimacy of those decisions.[132]

This is not to say that Executive Branch agencies must enforce existing legal requirements against every violator or that agencies must implement their statutory authority to the hilt. Nonetheless, several commentators have recently emphasized, first, that fundamental principles of democratic and

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[130] *See* Staszewski, *supra* note 8, at 1279–84 (describing the benefits of reason-giving by public officials).

[131] *Cf.* Sunstein, *Reviewing Agency Inaction*, *supra* note 5, at 667–68 ("Regulatory interests, representing public 'rights,' are created by congressional or administrative action and are entitled to judicial protection under the APA." (footnote omitted)).

[132] For prominent discussions of how reasoned deliberation establishes the democratic legitimacy of governmental authority, see Joshua Cohen, *Deliberation and Democratic Legitimacy*, *in* THE GOOD POLITY 17 (Alan Hamlin & Philip Pettit eds., 1989); Bernard Manin, *On Legitimacy and Political Deliberation*, 15 POL. THEORY 338 (Elly Stein & Jane Mansbridge trans., 1987). *See also* Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. (forthcoming 2010) ("[F]ederal administrative law should seek to promote popular representation in agency rulemaking through 'fiduciary representation, [which] . . . emphasizes agencies' responsibilities to act deliberatively and reasonably in promoting the public welfare."); CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 17 (1993) ("In American constitutional law, government must always have a reason for what it does.").

constitutional theory that underlie the administrative state make it problematic for agencies to exercise broad statutory authority without sufficient constraints and, second, that these principles apply when agencies decline to take action. These commentators have essentially agreed that the key to legitimizing non-enforcement decisions and other regulatory inaction is to require agencies to provide reasoned explanations for their decisions. Thus, Lisa Bressman has explained that reason-giving helps to ensure that the government advances public purposes rather than narrow interests because "[w]hen agencies offer open, public-regarding, and otherwise rational reasons, they reduce opportunities for covert, private-interested, or otherwise arbitrary ones."[133] Moreover, Jerry Mashaw has argued that "in a polity where the individual is the basic unit of social value, the fundamental reason for accepting law, or any official decisionmaking, as legitimate, is that reasons can be given why those subject to the law would affirm its content as serving recognizable collective purposes."[134] Finally, I have claimed that because "individual policy choices are democratically legitimate to the extent that they are supported by public-regarding explanations that could reasonably be accepted by free and equal citizens with fundamentally different interests and perspectives," public officials can be held democratically accountable "by a requirement or expectation that they give reasoned explanations for their decisions that meet those criteria."[135] Significantly for present purposes, Professor Mashaw has recognized that reason-giving can perform its fundamental legitimizing functions even when it is not mandated or reviewed by the courts.[136] This insight suggests that the FIC could substantially improve the democratic legitimacy of the modern regulatory state by requiring Executive Branch

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[133] *See* Bressman, *supra* note 5, at 1687–94.

[134] Jerry L. Mashaw, *Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance*, 76 GEO. WASH. L. REV. 99, 117–18 (2007). Mashaw acknowledges that substantial disagreement will remain over which public policies are preferable and which decisions are justified, but he explains:

> [A] law or decision with which one disagrees can be recognized as acceptable or legitimate only because it is explicable as a plausible instance of rational collective action. Reason giving thus affirms the centrality of the individual in the democratic republic. It treats persons as rational moral agents who are entitled to evaluate and participate in a dialog about official policies on the basis of reasoned discussion. It affirms the individual as subject rather than object of law.

Id. at 118.

[135] Staszewski, *supra* note 8, at 1255. *See also id.* at 1283 ("Reason-giving can therefore be understood as the enforcement mechanism that holds public officials accountable for making legitimate policy choices in a deliberative democracy.").

[136] *See* Mashaw, *supra* note 134, at 122–23. *See also* Cuéllar, *supra* note 106, at 227 (proposing certain forms of auditing as an alternative to judicial review of exercises of executive discretion).

agencies to provide reasoned explanations for their inaction that could be accepted by regulated entities, regulatory beneficiaries, and other interested parties.

The FIC would therefore be in a position to provide the same benefits as judicial review of agency inaction. There are also reasons to believe that the establishment of the FIC would be a major improvement upon previous proposals to make judicial review more readily available. First, the FIC's authority to review agency inaction would be far more comprehensive than the judicial review that most other commentators have endorsed in this context. Second, the FIC would be in an ideal position to minimize the practical disadvantages that have been identified with judicial review of non-enforcement decisions and other administrative inaction. In contrast to federal courts, the FIC would not review the validity of non-enforcement decisions in isolation. Rather, the FIC would be expressly responsible for investigating an Executive Branch agency's resource limitations and evaluating its overall policy choices and priorities along with its particular enforcement decisions in light of that broader context. The FIC would therefore be in a better position than courts to assess the validity of an agency's claim that resource limitations justify refusing to take action. Not only would proceedings before the FIC be less expensive than litigation,[137] but there is a good chance that the FIC's complete understanding of this broader context would provide economies of scale that would significantly streamline the costs associated with reviewing non-enforcement decisions and other inaction. The FIC's potential use of auditing techniques to review other non-enforcement decisions would also be more cost-effective than case-by-case judicial review.[138] When problems are discovered, however, the FIC would be empowered to invalidate and remand agency decisions for further deliberation, which is precisely the remedy that would normally be provided by the judiciary in a successful lawsuit of this nature. Meanwhile, by placing the responsibility to investigate and review the validity of agency inaction on the FIC rather than the courts, the federal judiciary would not be burdened with additional litigation.

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[137] While reliable empirical data is not readily available, it is widely believed that informal proceedings before administrative agencies are less expensive than adjudication in courts.

[138] *See* Cuéllar, *supra* note 106, at 272 (explaining that although the precise costs of an audit system depend on the details of its institutional design, "there is good reason to expect that those costs would be lower than those associated with an expansion in the availability or stringency of traditional judicial review"); *supra* notes 116–19 and accompanying text.

Finally, and perhaps most importantly, the establishment of an agency like the FIC, which is empowered to investigate and review agency inaction, would almost completely avoid the separation of powers objections that are frequently lodged against judicial review of such administrative decisions. As explained in Part I, the Supreme Court has shielded certain types of regulatory inaction from judicial review to prevent the judiciary from interfering with the Executive Branch's obligation to "take Care that the Laws be faithfully executed."[139] The neoclassical model of administrative law, which is exemplified by these decisions, seeks to preclude the judiciary from second-guessing the policy decisions of the political branches. The FIC would be established *by the political branches* based on a policy decision that this agency would perform sufficiently valuable functions. The preceding concerns would be entirely inapposite because the authority established by the FIC's governing statute would neither be mandated nor carried out by the federal judiciary. Rather, the neoclassical model would suggest that a policy decision by the political branches to establish a new form of regulatory oversight of this nature would be none of the judiciary's business. Moreover, as explained in greater detail below, the delegation of this particular authority to the FIC does not raise any serious constitutional difficulties because the FIC's powers and responsibilities could already be carried out by Congress. Simply put, the FIC would provide a political solution to what some judges and scholars have maintained is solely a political problem. This proposal should therefore be viewed as a viable solution to the problems that are presented by regulatory inaction from any perspective in the existing debate.

IV. REMAINING QUESTIONS AND BROADER IMPLICATIONS

Part III of this Article described the most significant powers and responsibilities of the FIC and explained the advantages of this proposal. There are, however, still a few important questions that remain to be considered. This Part examines (1) whether it would be preferable for Congress to establish the FIC as a separate entity or whether its powers and responsibilities should be assigned to existing entities, such as legislative committees or the General Accountability Office (GAO); (2) how the leadership of the FIC should be structured and what provisions should be made for its appointment and removal; (3) whether the FIC's structure or powers and responsibilities would pose any serious constitutional difficulties; (4) the likely

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[139] U.S. CONST. art. II, § 3; *see supra* Part I; notes 73–83 and accompanying text.

costs and political feasibility of establishing and operating the FIC; and (5) the broader implications of this proposal for ongoing debates about the best available strategies for overseeing the bureaucracy.

A. Who Should Carry Out This Work?

Thus far, this Article has assumed that the powers and responsibilities of the FIC would be carried out by a new agency established by newly-enacted legislation. This is, indeed, one way in which the FIC's anticipated work could be authorized and carried out. The same work could, however, potentially be carried out by existing entities, such as congressional committees or the GAO. It is therefore worthwhile to consider which approach is preferable.

Each approach to reviewing agency inaction has advantages and disadvantages. The primary advantages of standing congressional committees performing these functions are that this approach could be implemented without additional statutory authority; it would take advantage of existing expertise; and it would be perceived as relatively legitimate. Congressional committees and their staffs already have the capacity to (1) identify policy areas in which administrative agencies within their jurisdictions have declined to exercise their delegated statutory authority; (2) direct agencies to establish sensible enforcement guidelines for existing programs;[140] (3) investigate and assess complaints regarding particular non-enforcement decisions;[141] (4) secure reasoned explanations from agency officials for any perceived deficiencies in the foregoing areas; and (5) propose budget provisions and substantive legislation that could alleviate any perceived deficiencies. Indeed, congressional committees already perform these tasks periodically.[142] Moreover, the members of such committees already have, or will develop, substantial expertise in the relevant subject areas, as well as extensive

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[140] Congress would, however, need to enact legislation to make such a directive legally binding.

[141] Due process concerns could arise from congressional efforts to pressure agencies to undertake enforcement action against specific regulated entities. Nonetheless, it would likely be permissible for Congress to "vacate" particular non-enforcement decisions and "remand" those matters to agencies for additional consideration, as long as it was clear that Executive Branch agencies retained authority over the final determinations. *See* Harold J. Krent & Lindsay DuVall, *Accommodating ALJ Decision Making Independence with Institutional Interests of the Administrative Judiciary*, 25 J. NAT'L ASS'N ADMIN. L. JUDGES 1 (2005); *cf.* ATX, Inc. v. U.S. Dep't of Transp., 41 F.3d 1522, 1528 (D.C. Cir. 1994) (holding that congressional influence should not shape an agency's adjudication on the merits, but that mere "influence on the decision to hold a hearing is unobjectionable").

[142] *See* LEROY N. RIESELBACH, CONGRESSIONAL POLITICS: THE EVOLVING LEGISLATIVE SYSTEM 363–80 (2d ed. 1995) (describing congressional oversight of the Executive Branch's administration of the laws).

knowledge about what the responsible agencies are (or are not) doing.[143] Finally, this type of legislative oversight of Executive Branch agencies is widely perceived as legitimate—and its potential existence is routinely offered as a rationale for why judicial review of agency inaction should not be available.[144]

The main problem with this solution, however, is that the regular and systematic oversight of agency inaction that is contemplated by this proposal is not a high priority for most members of Congress.[145] Moreover, the legislative oversight that typically occurs under the current system illustrates the disadvantages of relying on congressional committees to carry out the responsibilities of the FIC. First, legislative oversight often consists of informal efforts by knowledgeable and well-placed members of Congress to advance the narrow interests of powerful constituents behind the scenes, rather than public investigations and reports on the merits of a broad range of regulatory inactivity.[146] Given the insights of public choice theory and the realities of congressional campaign financing, it is likely that this form of oversight will often favor regulated entities over regulatory beneficiaries.[147] Second, public hearings and oversight of agency inaction typically focus on high visibility problems that resonate with voters (such as the response to Hurricane Katrina) and will either be haphazard in nature or likely to be unduly

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[143] The Legislative Reorganization Act of 1970 increased the available staffing for congressional committees, which provided them with greater scientific and technical expertise. *See generally* MICHAEL WELCH, AN OVERVIEW OF THE DEVELOPMENT OF U.S. CONGRESSIONAL COMMITTEES (2008), *available at* http://www.llsdc.org/attachments/wysiwyg/544/Cong-Cmte-Overview.pdf (discussing how events over the last two centuries have affected the development of congressional committees).

[144] *See supra* note 9 and accompanying text; *see also* Mark Seidenfeld, *Bending the Rules*: *Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 467 (1999) ("Political influence at some level is imperative to justify the wide substantive latitude . . . needed for a workable administrative state. The politically accountable branches must be able to ensure that the values underlying an agency's policies do not deviate greatly from those generally held by the polity.").

[145] *See, e.g.*, Michael A. Livermore, *Reviving Environmental Protection: Preference-Directed Regulation and Regulatory Ossification*, 25 VA. ENVTL. L.J. 311, 354 (2007) ("[C]ongressmen are busy and have intense demands on their time, including the legislative process, meeting with lobbyists, raising money, and generating press. Agency action is salient . . . [whereas] agency inaction is boring and unlikely to land a member of Congress on the evening news.").

[146] *See* BERNARD ROSEN, HOLDING GOVERNMENT BUREAUCRACIES ACCOUNTABLE 59–85 (2d ed. 1989). *See also* Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 121–44 (2006) (describing the wide range of informal congressional involvement in the execution of the laws).

[147] *See* Bagley & Revesz, *supra* note 20, at 1284–92; *supra* note 69 and accompanying text.

motivated by partisan political considerations.[148] Although political considerations cannot be eliminated altogether from the oversight of Executive Branch agencies, it would be preferable to delegate the power and responsibility to conduct comprehensive evaluations of the validity of agency inaction to a separate and independent body such as the FIC. Finally, since elected officials have incentives to seek credit and to avoid blame, the oversight that is conducted by congressional committees is relatively unlikely to be objective when it comes to assessing the role played by lawmakers in undermining the effective implementation of federal programs by Executive Branch agencies.[149] An independent agency like the FIC would therefore be better situated than a congressional committee to hold elected officials responsible for failing to give administrative agencies sufficient financial resources or legal authority to achieve the underlying goals of their statutory mandates.

The GAO is another institution that could fulfill the role that has been proposed for the FIC. The GAO already performs some of these functions periodically under its existing statutory authority, which includes the ability to seek information from federal agencies about their "duties, powers, activities, organization, and financial transactions," as well as an obligation to evaluate the results of the programs and activities that are carried out by the government under existing law.[150] For example, GAO has evaluated EPA's implementation of the Superfund Program and discovered, among other things, that EPA was failing to hold businesses sufficiently responsible for their environmental cleanup obligations by (1) declining to implement a statutory mandate that requires businesses that handle hazardous substances to make financial assurances regarding their ability to pay for potential environmental cleanups; (2) making little effort to ensure that businesses comply with EPA's existing financial assurance requirements in cleanup agreements and orders; and (3) foregoing opportunities to secure payments for cleanups from financially distressed businesses that are available under EPA's existing statutory authority.[151] The GAO made several recommendations based on

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[148] *See* ROSEN, *supra* note 146, at 67 ("Most committee and subcommittee hearings are not conducted on a regularly scheduled basis . . . . Instead, they are held in response to public criticism of a law or its administration, unexpected problems, [or] alleged improprieties . . . .").

[149] *See* JAMES L. SUNDQUIST, THE DECLINE AND RESURGENCE OF CONGRESS 324–43 (1981) (discussing the history and use of congressional oversight). There is, of course, some partisan squabbling about these matters.

[150] 31 U.S.C. §§ 716–17 (2006).

[151] *See* GAO, *supra* note 13.

these findings, which were either adopted or are still being considered by EPA.[152]

In addition to having broad statutory authority to review and evaluate the programs and activities of Executive Branch agencies and substantial experience in carrying out these functions, GAO is widely regarded as an efficient and effective organization that carries out its work on behalf of Congress in a professional, independent, objective, and nonpartisan fashion.[153] Actions taken by Congress and the Executive Branch in response to GAO's recommendations reportedly resulted in over $22 billion in financial benefits during 2006.[154] Thus, based on the reforms that were implemented at GAO's behest, every dollar that Congress appropriated for the agency's work saved taxpayers $105.[155] Moreover, Congress and the Executive Branch have adopted more than eighty percent of GAO's recommendations in recent years.[156] Based on GAO's existing statutory authority and broader mission,[157] as well as its admirable reputation, it might appear to be an ideal candidate to perform the functions that have been proposed for the FIC.

Nonetheless, there would be several disadvantages to assigning these functions to GAO. First, GAO would probably need additional statutory authority to carry out all of the powers and responsibilities that have been proposed for the FIC. Specifically, GAO does not appear to have the authority to direct agencies to establish enforcement guidelines for their existing programs. Moreover, while most agencies appear responsive to GAO's

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[152] *See id.* at 5–6.

[153] *See, e.g.*, *GAO's Role in Supporting Congressional Oversight*: *An Overview of Past Work and Future Challenges and Opportunities: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs*, 110th Cong. (2007) [hereinafter *GAO's Role*]; Anne Joseph O'Connell, *Auditing Politics or Political Auditing?* (Univ. of Cal. Berkeley Pub. Law & Legal Theory Research Paper Series, Paper No. 964656, 2007), *available at* http://ssrn.com/abstract=964656 (reporting empirical results that support the theory that GAO is a nonpartisan auditor facing some political constraints).

[154] *See GAO's Role*, *supra* note 153, at 35.

[155] *See id.* at 2.

[156] *See* GAO, PERFORMANCE PLAN FOR FISCAL YEAR 2009, at 3 (2008), *available at* http://www.gao.gov/new.items/d08507sp.pdf.

[157] *See id.* at 1 (reporting that GAO's mission is "to support the Congress in meeting its constitutional responsibilities and to help improve the performance and ensure the accountability of the federal government for the benefit of the American people," and claiming that it accomplishes this mission "by providing reliable information and informed analysis to the Congress, to federal agencies, and to the public" and by recommending improvements, when appropriate, on a wide variety of issues); *see also* Cuéllar, *supra* note 106, at 296 ("[A]bout seventy-nine percent of recommendations made [by GAO] between October 6, 1989 and February 3, 2005 were implemented, perhaps in part because of the potential media attention reports generate.").

inquiries,[158] it is not entirely clear that GAO can compel Executive Branch agencies to provide reasoned explanations for declining to take regulatory action. Finally, GAO does not have explicit statutory authority to invalidate agency inaction or to remand those matters to agencies for further deliberation. Accordingly, Congress would need to bolster GAO's existing statutory authority to enable it to perform the full range of functions that have been proposed for the FIC.[159]

Second, GAO might have more difficulty accomplishing the functions of the FIC than a newly established agency because of its competing responsibilities. GAO was initially created to conduct financial audits of Executive Branch agencies, and it still devotes a substantial amount of its resources to this important task.[160] Moreover, GAO is required by statute to conduct oversight of agencies at the request of House and Senate leaders and responsible congressional committees, and GAO gives these requests top priority.[161] The concern is, therefore, that Congress might delegate additional authority to GAO to carry out the powers and responsibilities of the FIC, but GAO might fail to implement this authority in a sufficiently comprehensive fashion based on its own resource constraints and competing responsibilities.[162] The failure to implement the obligations of the Federal Inaction Commission in an appropriate fashion would clearly be the worst form of irony. It might therefore be preferable to give those responsibilities to a separate agency that is created solely for this purpose—or perhaps to create a separate division within GAO that is specifically responsible for carrying out these functions.

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158 The primary exception to this rule is the "intelligence community," which has historically resisted GAO's oversight. *See GAO's Role*, *supra* note 153, at 18–19. *See also* Walker v. Cheney, 230 F. Supp. 2d 51 (D.D.C. 2002) (holding that the Comptroller General lacked standing to initiate litigation to compel Vice President Cheney to disclose documents relating to meetings of a national energy task force over which the Vice President presided).

159 The potential constitutional difficulties that would arise from this course of action are discussed *infra* at notes 170–82 and accompanying text.

160 *See* Cuéllar, *supra* note 106, at 304–05 (explaining that this function is central to the cultural identity of existing auditing institutions, including GAO).

161 *See* 31 U.S.C. § 717(b)(2)–(3) (2006); *GAO's Role*, *supra* note 153, at 12 (describing the increased number of requests from members of Congress for action by GAO and explaining that the agency only has the resources to complete requests from the chair or ranking member of a committee or subcommittee with jurisdiction over a matter).

162 Congress has reduced GAO's budget over the past decade despite its demonstrated cost-effectiveness. *See GAO's Role*, *supra* note 153, at 10–12.

The advantages and disadvantages of establishing a new agency to carry out the powers and responsibilities of the FIC should be readily apparent from the preceding discussion. The need for Congress to enact new legislation to establish the FIC could be viewed as both a blessing and a curse. On one hand, lawmakers would be able to "customize" the FIC's enabling act to provide it with all of the powers and responsibilities that are described above, in addition to an appropriate organizational structure and sensible provisions for the appointment and removal of its leadership. On the other hand, it would be fairly difficult—though, as discussed below, not impossible—to build the political consensus necessary to adopt an enabling act of this nature. As already discussed, however, it would also be advantageous to establish a new, independent federal agency with the sole mission of conducting a comprehensive and nonpartisan evaluation of regulatory inaction by Executive Branch agencies. All things considered, the best course of action would either be to establish a new federal agency to carry out the work of the FIC or to create a new division of GAO (which already has an impressive track record) with this specific mission.

B. How Should the FIC's Leadership Be Structured?

A second question that needs to be considered is the appropriate structure of the leadership of the FIC and the provisions that should be made for its appointment and removal. While there are a variety of possibilities,[163] GAO's enabling act provides a useful model regardless of whether the FIC is incorporated into that agency or established as a separate entity. The GAO is headed by the Comptroller General, who is appointed by the President and confirmed by the Senate for a single fifteen-year term.[164] The President selects the Comptroller General from a list of three or more candidates who are recommended by a commission composed of congressional leaders from both major political parties and the chairs and ranking minority members of the committees in Congress with greatest oversight responsibilities.[165] The Comptroller General may only be removed from office by impeachment or for specified causes by a joint resolution of Congress after notice and an

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[163] *See* Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1137–38 (2000) (identifying several independent agencies and describing their different organizational structures).

[164] *See* 31 U.S.C. § 703(a)(1), (b) (2006).

[165] *See id.* § 703(a)(2)–(3).

opportunity to be heard.[166] The latter method of removal requires presidential approval or an affirmative vote by a two-thirds majority of both legislative chambers to override a presidential veto.[167]

The head of the FIC, let us call her the "Initiator General," could be appointed in the same manner and given similar job security as the Comptroller General. This approach would ensure that the person chosen to head the agency is acceptable to the President, Congress, and leaders of both political parties. Once in office, the Initiator General would have substantial independence to perform her job in an objective and nonpartisan fashion because she could only be removed from office if there was an unusually broad consensus that sufficient cause existed.[168] These features of the legislative scheme have undoubtedly contributed to GAO's professional reputation and ability to hold Executive Branch agencies accountable for their performance,[169] and similar mechanisms for selecting and retaining the FIC's leadership should be adopted.

One potential deviation from this scheme that should be considered would be to make the Initiator General subject to removal by the President for specified causes. In *Bowsher v. Synar*, the Supreme Court held that it was an unconstitutional violation of the separation of powers for the Comptroller General to perform certain executive functions because he was subject to removal by Congress.[170] The Court therefore invalidated the reporting provisions of the Balanced Budget and Emergency Deficit Act of 1985, which authorized the Comptroller General to direct the President to make specified spending reductions in particular circumstances.[171] The Court appeared to define the "executive functions" that the Comptroller General was precluded

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166 *See id.* § 703(e)(1).

167 *See* Bowsher v. Synar, 478 U.S. 714, 728 n.7 (1986).

168 In the more than eighty-year history of GAO, there have only been seven comptrollers general. *See* GAO, GAO: Working for Good Government Since 1921, http://www.gao.gov/about/history/goodgov.html (last visited Sept. 18, 2009). Proceedings have never been initiated to impeach or remove a comptroller general. *See Bowsher*, 478 U.S. at 778 (Blackmun, J., dissenting) (discussing the validity of the removal power, which has never been exercised and had been all but forgotten).

169 *See supra* note 153 and accompanying text.

170 *Bowsher*, 478 U.S. at 726 ("Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment.").

171 *Id.* at 734.

from performing quite broadly,[172] but it simultaneously emphasized that the challenged reporting provisions authorized the Comptroller General to command "the President himself to carry out, without the slightest variation . . . the directive of the Comptroller General as to the budget reductions."[173] Because it was most likely the Comptroller General's ultimate authority to order the President to make specific budget cuts that really bothered a majority of the Court,[174] the powers and responsibilities of the FIC would be distinguishable on the grounds that the Initiator General would not be authorized to order Executive Branch agencies (much less the President) to take any affirmative action.[175] Nonetheless, it would be safer as a constitutional matter if the head of the FIC were subject to removal for good cause by the President, since removal provisions of this nature were explicitly distinguished by the *Bowsher* Court.[176] For the same reason, it may be safer as a constitutional matter for Congress to establish the FIC as a new Article II agency, rather than as a division of an Article I agency such as GAO.

Regardless of whether the FIC is established as a division of GAO or an independent agency, and whether its head is subject to removal for good cause by Congress or the President, there may still be some concerns about the potential politicization of the FIC and where its sympathies would lie. On one hand, these concerns would be minimized by the fact that the FIC would not be empowered to order agencies to "do" anything (other than reconsider their decisions not to take action). On the other hand, the FIC would almost certainly be a thorn in the side of an administration that chose not to implement

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[172] As the Court put it:

> Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of "execution" of the law. Under § 251, the Comptroller General must exercise judgment concerning facts that affect the application of the Act. He must also interpret the provisions of the Act to determine precisely what budgetary calculations are required. Decisions of that kind are typically made by officers charged with executing a statute.

Id. at 733.

[173] *Id.*

[174] *See* Bernard Schwartz, *Administrative Law Cases During 1986*, 39 ADMIN. L. REV. 117, 117–25 (1987) (discussing the limited nature of the *Bowsher* holding, particularly the Court's affirmation of the constitutionality of independent agencies).

[175] *See supra* Part III.A (discussing the six powers and responsibilities of the proposed Federal Inaction Commission).

[176] *See Bowsher*, 478 U.S. at 724–26 (citing *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935) and *Wiener v. United States*, 357 U.S. 349 (1958), to support the proposition that the President may be subject to a good cause requirement in order to remove an executive officer). Similarly, if the new agency is established as a division of GAO, it would likely avoid some potential constitutional difficulties if the final decision-making authority of the FIC were granted to the Initiator General, rather than the Comptroller General.

its statutory mandates for questionable reasons. It is therefore possible that the FIC's role would be as controversial as the regulatory review conducted by the Office of Information and Regulatory Affairs (OIRA). Indeed, I originally envisioned the FIC as an advocate for regulatory beneficiaries who would otherwise be underrepresented in the administrative process, and I therefore anticipated that the agency would serve as a counterweight to the influence of OIRA. The need for a counterweight is likely to diminish to some extent in the current Obama Administration, with Cass Sunstein as the head of OIRA, but the current political leadership would not render the FIC superfluous. Rather, a relatively pro-regulatory administration would presumably appreciate the information provided by the FIC and view this agency as a cooperative partner in its effort to facilitate effective government and reasoned decision making.

Rather than worrying about the FIC conducting oversight in an overly-aggressive manner, a more significant concern would arise if the agency failed to implement its statutory mandate in a sufficiently rigorous fashion. The best way to prevent either of these possibilities from materializing, however, would be to appoint the right people to lead the agency. The ideal candidates would be sophisticated students of the modern administrative state who believe in the capacity of regulation to promote the public good. The likelihood of appointing and confirming those candidates would be facilitated by requiring the President to choose from among a small group of individuals recommended by a bipartisan commission, thereby giving both major political parties a meaningful say in the appointment process.

C. Would the FIC Raise Constitutional Difficulties?

Even if the FIC is headed by an Initiator General who is appointed by the President, confirmed by the Senate, and subject to removal by the President for specified reasons, the constitutional validity of the agency could still potentially be called into question. The basic arguments would be that restrictions on the President's removal authority and the powers and responsibilities of the FIC as a whole interfere with the President's constitutional duty to faithfully execute the laws, in violation of the separation of powers.

Such a case would be similar to *Morrison v. Olson*,[177] and it should be decided in the same way. *Morrison* held that for-cause limitations on the

[177] 487 U.S. 654 (1988).

President's ability to remove independent counsels who were authorized to investigate and prosecute alleged crimes by high-level Executive Branch officials did not unduly trammel on executive authority in violation of the separation of powers.[178] If such limitations can be placed on the President's ability to remove prosecutors who are responsible for sending high-level Executive Branch officials to jail, the same conclusion would presumably follow for administrators who are merely authorized to investigate and review the inaction of Executive Branch agencies. *Morrison* also held that the independent counsel provisions of the Ethics in Government Act did not impermissibly undermine the powers of the Executive Branch or prevent the President from performing his constitutionally assigned functions.[179] Similarly, the oversight responsibilities that have been proposed for the FIC would not unduly interfere with the President's constitutional duty faithfully to execute the laws for several reasons. First, the Court has already recognized that the presumption against judicial review of non-enforcement decisions is defeasible by Congress.[180] If Congress can authorize judicial review of non-enforcement decisions by statute, it should also be allowed to enact a statute that delegates the authority to review non-enforcement decisions to an independent agency that is created for this purpose. Second, Congress is plainly allowed to identify policy areas in which Executive Branch agencies have declined to exercise their statutory authority, require them to adopt enforcement guidelines for their existing programs, and secure reasoned explanations from agency officials for perceived deficiencies in the foregoing areas. There is no reason to believe that it would be impermissible for Congress to enact a statute that delegates these responsibilities to the FIC.

The Court has periodically suggested that judicial review of generalized grievances violates the separation of powers by interfering with the President's constitutional duty to faithfully execute the laws—and that Congress may not

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[178] *Id.* at 691. *See also Humphrey's Ex'r*, 295 U.S. at 602 (finding that the restriction of the President's removal power to a list of causes is constitutional); *Wiener*, 357 U.S. at 349 (finding the President's removal of a War Claims Commission member wrongful where Congress defined the scope of member tenure but made no provision for removal).

[179] *See Morrison*, 487 U.S. at 695–96.

[180] The presumption against judicial review can be overcome by the enactment of a statute that creates "law to apply," which, in turn, could be used to assess the legality of non-enforcement decisions. *See* Heckler v. Chaney, 470 U.S. 821, 834–35 (1985) (discussing Congress's ability to indicate intent to circumscribe agency enforcement discretion through "law to apply"). Because the FIC would be authorized to compel administrative agencies to promulgate reasonable enforcement guidelines for their existing programs, the FIC would routinely have law to apply when it reviews non-enforcement decisions under this proposal.

circumvent these limitations on the judiciary's authority.[181] Nonetheless, the underlying premise of these decisions is that the general manner in which the Executive Branch implements the law is properly subject to review by the political branches. Because the political review that allegedly renders judicial review unnecessary and inappropriate in this context necessarily includes congressional oversight, it is once again difficult to see why the legislature would be prohibited from enacting a statute that delegates its oversight responsibilities to an agency like the FIC.

The functions of the FIC that would be most vulnerable to a constitutional challenge of this nature are its ability to "vacate" an agency's non-enforcement decisions and other inaction and "remand" those decisions to the agency for further deliberations. Yet, this authority would also be permissible based on the same reasoning that is set forth in the preceding paragraph. Congress can typically compel agency officials to testify regarding the manner in which they implement their statutory authority.[182] If Congress is dissatisfied with their explanations, it can ordinarily instruct agency officials to engage in further deliberations on specified policy issues and to consider alternative courses of action. This is, in effect, all that Congress would be authorizing the FIC to do under this proposal. Because the FIC would not be empowered to order Executive Branch agencies to take any affirmative action, it would not be interfering with the President's constitutional duty to faithfully execute the laws in violation of the separation of powers. On the contrary, the whole point of establishing the FIC is to increase the likelihood that this duty will be fulfilled.

D. Is This Proposal Cost-Effective and Politically Feasible?

The FIC's proposed role would not pose overwhelming constitutional difficulties, but one might still object to the potential costs of the proposal or question its political feasibility. Although the precise costs of establishing and operating the FIC are difficult to predict, there is little question that the implementation of this proposal would be a significant undertaking. The requisite costs would include the salaries of the FIC's employees and the agency's operating costs and overhead. For purposes of comparison, it is

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[181] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 573–77 (1992) (holding that Congress may not provide a "procedural right" to standing without a concrete injury).

[182] *See* JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 235–36 (1989) (describing the "awesome arsenal" of weapons that Congress can use to control agencies).

worth noting that GAO had 3,152 employees and a budget of $486 million in 2007.[183] It seems unlikely that the FIC would exceed these figures, but if it turns out that investigating and reviewing the inaction of every Executive Branch agency would be unnecessary or cost-prohibitive, Congress could certainly instruct the FIC to focus on specific agencies with statutory mandates that most directly affect the public health, safety, and welfare. Moreover, the FIC's use of auditing techniques to review non-enforcement decisions would allow the agency to learn a great deal about the Executive Branch's performance in an efficient manner.[184] While an annual budget in the neighborhood of several hundred million dollars is a lot of money, the federal government reportedly paid almost $400 billion in interest on the national debt in fiscal year 2006, and the war in Iraq has reportedly cost American taxpayers over $700 billion since 2001.[185] Considering the returns on those investments, the work of the FIC would be nothing short of a bargain.

The FIC's work under this proposal would also impose additional costs on Executive Branch agencies that would need to be considered. First, administrative agencies would be required to provide the FIC with information about the implementation of their delegated authority. Second, the FIC could direct them to adopt reasonable enforcement guidelines for their existing programs. Third, the FIC would be empowered to require agencies to give reasoned explanations for refusing to take certain action, and it could vacate and remand non-enforcement decisions and other inaction for further deliberations. Finally, Congress might amend an agency's enabling act or increase its budget in response to recommendations from the FIC. Each of the foregoing actions could cost the federal government additional money.

At the same time, the costs that Executive Branch agencies would incur as a result of the FIC should not be overstated. Many of the FIC's functions could already be performed by congressional committees or the GAO, which means that any increase in spending by administrative agencies would be the result of more comprehensive oversight rather than the creation of a new oversight body. Moreover, the costs that would be imposed on Executive Branch agencies by the FIC would be limited by the fact that the FIC would not be empowered to order them to take any affirmative action. There are also

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183 GAO, *supra* note 156, at 4.

184 *See supra* notes 116–19, 138 and accompanying text.

185 *See* Nat'l Priorities Project, Where Do Your Tax Dollars Go? Notes and Sources (2007), http://www.nationalpriorities.org/node/5771 (last visited Jan. 10, 2010).

some circumstances in which the FIC could save the federal government money. First, the FIC could prompt administrative agencies to take action under existing statutory mandates that would provide financial benefits to the federal government. The GAO's study of EPA's failure to implement aspects of the Superfund Program provides a good example of this phenomenon.[186] Second, the FIC could recommend the elimination of existing statutory mandates that are found to be unrealistic, unnecessary, or counterproductive based on its investigation and review of the inaction of the agencies responsible for implementing those provisions. Under those circumstances, the FIC could be viewed as an ally of Executive Branch agencies that are seeking relief from ineffectual or unduly burdensome statutory requirements. Notwithstanding these limitations, however, the establishment and operation of the FIC would admittedly impose some additional costs on Executive Branch agencies.

One's views on whether these additional costs are justified will depend, to a certain extent, on whether one sees a problem with the existing state of affairs. In comparison to the status quo, the proposal to establish and operate the FIC would clearly result in some additional federal spending. As explained above, however, this proposal would be cost-effective in comparison to previous proposals to increase the availability of judicial review of agency inaction.[187] Moreover, the establishment and operation of the FIC would not depend upon deeply contested views of the judiciary's proper role in our constitutional democracy.[188] The adoption of this proposal would, however, be premised upon a general belief that it is problematic as a policy matter for regulated entities to be given preferential treatment over regulatory beneficiaries in the administrative process. The proposal is also more likely to appeal to those who believe that requiring public officials to give reasoned explanations for their decisions provides a crucial mechanism for holding them accountable for the exercise of their authority and for improving the democratic legitimacy of policy choices.[189] Finally, the proposal is premised

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186 *See supra* notes 151–52 and accompanying text.

187 *See supra* notes 137–38 and accompanying text.

188 *See supra* note 139 and accompanying text.

189 *See supra* notes 130–36 and accompanying text. For example, even though elections cost a great deal of money, almost no one questions whether they are warranted on financial grounds because they are viewed as an essential element of democracy. I would contend that reason-giving deserves a similarly fundamental status in a democracy. *See* Staszewski, *supra* note 8, at 1286 (claiming that "a requirement or expectation that public officials will provide a reasoned explanation for their decisions should be understood as a defining

on a fundamental belief that it is possible for administrative agencies to implement federal programs in the modern regulatory state in a thoughtful manner that promotes the public good. If one rejects these premises based on a belief that regulation necessarily reflects rent-seeking by narrow selfish interests,[190] then the best we can do may be to limit the costs (and, hence, the damage) that can be imposed on society by our public institutions.[191] Conversely, if one believes that it is possible for regulation to serve the public interest and that institutional structures can be designed to facilitate (or inhibit) this result,[192] then the adoption of innovative proposals, like the establishment of the FIC, to improve the status quo would definitely be worth a shot.

Because empirical reality generally falls in between these competing views of regulation,[193] the political feasibility of the FIC will likely depend on whether a sufficiently broad coalition of elected representatives can be formed who either believe that the proposed work of the FIC is normatively desirable or that it is in their self-interest to support regulatory reform of this nature. If the obstacles that might be posed by the federal budget deficit and economic recession can be overcome, the current political climate is almost certainly as conducive to the establishment of the FIC as it will ever be. Although Executive Branch officials would ordinarily have rational incentives to oppose increased oversight of this nature,[194] President Obama has expressed a firm commitment to resisting pressure from organized special interests.[195] Not only

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feature of republican democracy, at least as important as periodic elections, because it forces public officials to treat citizens who are bound by their decisions with the proper degree of respect").

190 *See* Cynthia R. Farina, *Faith, Hope, and Rationality: Or Public Choice and the Perils of Occam's Razor*, 28 FLA. ST. U. L. REV. 109, 109–10 (2000) (describing public choice theory as "the most powerful of our contemporary creation myths" in administrative law and explaining that it "posits the innate depravity or corruption in all regulatory programs").

191 *See* Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1044 (1997) (explaining that contemporary trends in administrative law reflect the influence of public choice theory and are "a product of a deeper and more generalized pessimism about the administrative state, and in particular, of a spreading disenchantment with all forms of activist government").

192 *See* Steven P. Croley, *Public Interested Regulation*, 28 FLA. ST. U. L. REV. 7 (2000) (describing the conditions and motives necessary to promote broad-based public interests against the opposition of more concentrated and powerful interests).

193 *See, e.g.*, Glen Staszewski, *Avoiding Absurdity*, 81 IND. L.J. 1001, 1017 n.72 (2006) (discussing the relevant literature and concluding that "the empirical evidence suggests that participants in the legislative process display a combination of self-interested, ideological, and altruistic motivations").

194 *See* Cuéllar, *supra* note 106, at 300 ("[O]ther things being equal, executive authorities and their allies should be expected to seek more discretion, and less review.").

195 *See* Organizing on the Issues, http://www.barackobama.com/issues/ethics/#free-executive (last visited July 30, 2009) (describing President Obama's plan to change Washington by freeing the Executive Branch from special interest influence).

could he demonstrate this commitment by signing the FIC's enabling act into law and thereby ensuring that the voices of regulatory beneficiaries can be heard, but the FIC's oversight responsibilities could ultimately demonstrate his Administration's competence and professionalism.[196] Moreover, the FIC's governing statute would clearly have the best chance of being enacted by a Democratic President and Congress because its *raison d'etre* reflects the endorsement of a relatively active regulatory state. Finally, the minority opposition to this proposal in the Senate would likely be muted by the fact that the country is still emerging from the reign of an extremely unpopular President who was widely perceived to have abused executive power, partly through the inaction of Executive Branch agencies.[197] Thus, while the problems of democratic governance that are addressed by this Article are timeless, this proposal to establish the FIC is also very timely based on the existing political environment.

There are, of course, no guarantees that the FIC would continue to receive the requisite political support in perpetuity once established, but there is a good chance that path-dependence, the norm of divided government, and the benefits that the agency would provide to elected officials and the public would combine to provide the FIC with a reasonably bright future if this proposal turns out to be a success.[198] While its formal independence from the political process would help, the FIC's ability to thrive in the long-run may ultimately depend on its ability to convince elected officials and the public that its autonomy should be protected.[199] This goal would be facilitated by the agency's development of a reputation for technical competence and impartiality.[200]

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[196] *See* Cuéllar, *supra* note 106, at 300 (recognizing that Executive Branch officials could "have reason to limit their flexibility in order to demonstrate their competence"). *Cf.* Bd. of Regents v. Roth, 408 U.S. 564, 591 (1972) (Marshall, J., dissenting) ("As long as the government has a good reason for its actions it need not fear disclosure. It is only where the government acts improperly that [a reason-giving requirement] is truly burdensome.").

[197] *See, e.g.*, BUZBEE ET AL., *supra* note 13; Phillip J. Cooper, *Signing Statements as Declaratory Judgments: The President as Judge*, 16 WM. & MARY BILL RTS. J. 253 (2007).

[198] It is considered a truism of public administration that government agencies, once established and entrenched, become self-perpetuating. *See generally* RANDALL G. HOLCOMBE, AN ECONOMIC ANALYSIS OF DEMOCRACY (1985).

[199] *See* Cuéllar, *supra* note 106, at 306–08. *See generally* DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY (2001).

[200] *See* Cuéllar, *supra* note 106, at 307–08.

E. Broader Implications for Oversight

Not only are the political challenges that would be faced by this proposal potentially surmountable, but the successful enactment and operation of the FIC would change the nature of legislative oversight of administrative agencies in highly desirable ways. Since Mathew McCubbins and Thomas Schwartz published their path-breaking article on the subject,[201] scholars have distinguished between "police patrol oversight" and Congress's use of "fire alarms" to monitor the performance of regulatory agencies. As McCubbins and Schwartz explain, "police-patrol oversight is comparatively centralized, active, and direct: at its own initiative, Congress examines a sample of executive-agency activities, with the aim of detecting and remedying any violation of legislative goals and, by its surveillance, discouraging such activities."[202] In contrast, fire alarm oversight relies on interest groups and the attentive public to use the procedures established by Congress to learn what agencies are doing and to bring politically salient problems to the attention of legislators.[203] McCubbins and Schwartz claim that legislators have powerful incentives to prefer fire alarm oversight because it maximizes the political return on their limited resources.[204] In other words, fire alarm oversight allows members of Congress to earn political credit by helping organized constituents with their problems without wasting time on the review of Executive Branch activities that have not raised sufficient concerns.

The fundamental problem with fire alarm oversight, however, is that it ignores arbitrary decision making by Executive Branch agencies that escapes the attention of well-organized interest groups.[205] Numerous commentators have therefore suggested that an increase in police-patrol oversight would be beneficial.[206] Yet, positive political theory has persuasively suggested that members of Congress generally do not have sufficient incentives to devote

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[201] Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984).

[202] *Id.* at 166.

[203] *See id.*; Cuéllar, *supra* note 106, at 297–98 (describing this model).

[204] McCubbins & Schwartz, *supra* note 201, at 167–68.

[205] *See* Hugo Hopenhayn & Susanne Lohmann, *Fire-Alarm Signals and the Political Oversight of Regulatory Agencies*, 12 J.L. ECON. & ORG. 196, 199 (1996) ("[A]symmetric fire-alarm signals give rise to asymmetric political control rules that introduce a bias into political decision making.").

[206] *See, e.g.*, JOEL D. ABERBACH, KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT 97–104 (1990).

their own limited resources to this endeavor.[207] That does not mean, however, that they would necessarily be unwilling to delegate the authority to perform more comprehensive oversight to an independent agency established for this purpose.[208] The FIC's mission could easily be understood and justified in precisely this fashion. Even if it was normatively desirable for Congress to rely exclusively on fire alarm oversight, this approach does not effectively identify and redress arbitrary agency inaction. First, the collective action problems that have been identified by public choice theory suggest that the beneficiaries of modern social welfare legislation will have greater difficulty monitoring and challenging the decisions of Executive Branch agencies than regulated entities even if they are given similar procedural opportunities.[209] Second, the normal mechanisms for organized groups and interested members of the public to sound an alarm are missing in this context because agency inaction is often exempt from the procedural requirements of the APA and immune from judicial review.[210] One could respond that this state of affairs is what self-interested members of Congress would have intended,[211] but that is precisely what needs to change if oversight of the modern bureaucracy is going to be effective. The enactment and operation of the FIC would ensure that the interests of regulatory beneficiaries are represented in the administrative process and that arbitrary agency inaction is brought to the attention of Congress and interested members of the public in a sufficiently ringing fashion.

CONCLUSION

Administrative agencies can implement their delegated statutory authority too aggressively or not aggressively enough. When regulated entities are adversely affected by final agency action, they can routinely obtain judicial review of the legality of those agency decisions. This important safeguard and

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[207] *See* McNollgast, *The Political Economy of Law: Decision-Making by Judicial, Legislative, Executive and Administrative Agencies*, *in* 2 HANDBOOK OF LAW AND ECONOMICS 1654, 1706 (A. Mitchell Polinsky & Stephen Shavell eds., 2007) ("[P]olitical leaders are likely to prefer the low-risk, high-reward strategy of fire-alarm oversight to the more risky and costly police-patrol system.").

[208] Indeed, the establishment of the GAO in 1921 demonstrates the potential willingness of Congress to provide for relatively comprehensive oversight of federal agencies. *See generally* RICHARD E. BROWN, THE GAO: UNTAPPED SOURCE OF CONGRESSIONAL POWER (1970).

[209] *See supra* note 69 and accompanying text.

[210] *See* Bressman, *supra* note 124, at 1769–70 ("Judicial review is necessary for [fire-alarm oversight] to work because courts force agencies to comply with the procedures that facilitate fire-alarm oversight.").

[211] *See* McCubbins & Schwartz, *supra* note 201.

other procedural protections are often unavailable to regulatory beneficiaries who are adversely affected by agency inaction. As a result, agencies have powerful incentives to favor the views of regulated entities over the views of regulatory beneficiaries during the administrative process. While a number of commentators have suggested that judicial review of non-enforcement decisions and other agency inaction should be more readily available to alleviate this asymmetry and advance other important objectives, such proposals arguably raise separation of powers concerns and other practical difficulties stemming from the limited resources of agencies and courts and questions regarding the judiciary's competence to review decisions of this nature.

This Article has proposed the establishment of the Federal Inaction Commission. This new, independent agency would be charged with investigating and reviewing the inaction of Executive Branch agencies and reporting its findings and recommendations to elected officials and the public. The FIC would provide many of the same benefits that are expected to result from judicial review of non-enforcement decisions and other inaction by administrative agencies. Thus, in addition to compelling Executive Branch agencies to consider new initiatives and adopt enforcement guidelines for their existing programs, the FIC would ensure that those agencies provide reasoned explanations for particular non-enforcement decisions and other inaction. This obligation would, in turn, compel Executive Branch agencies to consider all of the relevant interests and perspectives during their decision-making process, in addition to preventing arbitrary governmental action and securing a meaningful form of democratic accountability. At the same time, the FIC would be in a position to minimize the practical disadvantages that have been identified with judicial review of agency inaction. The establishment of the FIC would therefore provide a workable solution to the problems presented by agency inaction without raising any serious constitutional difficulties. This proposal would vastly improve the oversight of administrative agencies by bringing a broader range of arbitrary or otherwise unlawful decision making to the attention of elected officials and the public.