
**NOT-SO INDEPENDENT AGENCIES:
PARTY POLARIZATION AND THE LIMITS OF
INSTITUTIONAL DESIGN**

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INTRODUCTION

Are independent agencies truly independent of presidential control? By placing limits on the President’s power to appoint and remove independent agency heads as well as mandating limits on the number of the President’s own partisans that can be appointed, Congress made use of an institutional design that sought to limit presidential control of independent agencies.¹ But do these statutory limits, in fact, protect independent agencies from presidential domination? After all, commissioners need not serve out their term, so it may be that a President is able to appoint a majority of commissioners shortly after he takes office. Moreover, partisan rules may be ineffectual, as Presidents may appoint turncoats from the opposition party. For example, a Democratic President may appoint a Republican whose politics are more closely allied with Democrats than with Republicans.

In the pages that follow, we will examine these questions through an empirical analysis of presidential control of independent agencies. Specifically, we will look at turnover rates among commissioners, the impact of party turnover in the White House on these rates, the amount of time that it takes a President to get his nominees through the Senate, and whether commissioners from the party not in the White House (“opposition-party” commissioners) are loyal to their party or to the President who appointed them.

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¹ See discussion *infra* Part I.

By examining these various measures of commissioner partisanship and the President's ability to advance his policy agenda through independent agencies, we will gain a handle on whether congressional efforts to statutorily limit presidential control of independent agencies, in fact, meaningfully limit the President.²

Our initial hypothesis was that commissioner turnover was sufficiently great that statutory limits on presidential powers to appoint and remove independent agency heads did not impose any severe constraints. When we first started talking about writing this paper around 2003, the Federal Communications Commission (FCC) had just relaxed rules governing the cross-ownership of television stations and newspapers.³ This policy change seemed directly tied to commissioner turnover at the FCC and, correspondingly, to President Bush's ability to appoint commissioners who agreed with his policy preferences. Shortly after his 2001 inauguration, President Bush appointed to the FCC two Republican commissioners, Kevin Martin and Kathleen Abernathy, and a Democratic commissioner, Michael J. Copps, who previously worked for a conservative southern Democrat.⁴ We speculated that these three appointments allowed Bush to quickly transform the FCC into an agency that would advance his policy priorities – so much so that the line separating presidential influence over independent agencies from presidential influence over executive agencies became blurred.

The data, as we will soon discuss, do not support our initial thesis about commissioner turnover and the speed at which Presidents can appoint a majority of ideologically-sympatico commissioners.⁵ But the data do support an even more interesting hypothesis – one that suggests greater presidential control of independent agencies, although for reasons quite different than we

² Most of our empirical analysis is original. Others, however, have examined related questions. In particular, Daniel Ho wrote a first-rate study on the impact of statutory partisan requirements on presidential control of independent agencies. See Daniel E. Ho, *Congressional Agency Control: The Impact of Statutory Partisan Requirements on Regulation* 18-31 (Am. Law & Econ. Ass'n, Working Paper No. 73, 2007), available at <http://law.bepress.com/alea/17th/art73/>. Ho's study helped shape our thinking and we will refer to it on several occasions in this Article.

³ See *In re 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 F.C.C.R. 13,620, 13,790-91 (2003); see also *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004) (reviewing the validity of the proposed 2003 rules).

⁴ Press Release, White House, President Bush Nominates Six Individuals To Serve in His Administration (April 6, 2001), available at <http://www.whitehouse.gov/news/releases/2001/04/20010406-7.html>. In 2005, Bush appointed Kevin Martin to be chair of the FCC. Press Release, FCC, Kevin J. Martin Sworn in as Communications Commissioner (July 3, 2001), available at http://www.fcc.gov/Bureaus/Miscellaneous/News_Releases/2001/nrmc0111.html.

⁵ See discussion *infra* Part II.

had initially suspected.⁶ Specifically, contrary to what we had thought, it is taking Presidents longer and longer to appoint a majority of commissioners from their political party.⁷ Furthermore, opposition-party commissioners are not turncoats loyal to the President who appoints them; instead, today's opposition-party commissioners are ideological partisans committed to the agenda of the opposition party.⁸ Thus, statutory limits on the President's appointment and removal powers are effective: opposition-party members do not share the President's priorities and Presidents are unable to quickly appoint a majority of commissioners.

The political polarization of Democrats and Republicans seems to account for these two phenomena. Opposition-party senators agree with each other and disagree with the policy priorities of the President and his party. Consequently, opposition-party senators make use of holds and other delaying strategies to see to it that the President nominates opposition-party Commissioners loyal to the opposition party, not to the President. At the same time, party polarization also explains why today's independent agencies are more likely to agree with presidential preferences *once* the President appoints a majority of his party to the agency. In particular, party polarization between Democrats and Republicans means that party identity is an especially good proxy for commissioner ideology. A majority Republican commission is likely to agree with the policy priorities of a Republican President; a majority Democratic commission is likely to resist those policy priorities.⁹ In demonstrating how party polarization shapes commissioner identity and behavior, we highlight differences between today's independent agencies and pre-1980 independent agencies. Before 1980, modest party polarization was the norm and, correspondingly, opposition-party senators did not use delaying strategies to advance their agenda. Likewise, party identity was a less useful proxy in predicting commissioner behavior. For these and other reasons, we see the Reagan presidency as transformative – separating a period of modest party polarization from a period of ever-increasing polarization.

In examining the profound impact of party polarization on presidential control of independent agencies, our Article proceeds in four Parts. Part I discusses how Congress uses the institutional design of independent agencies to limit presidential control of these agencies. This discussion underscores the primacy of appointment and removal limits to that institutional design. Part II looks at whether Congress's institutional design works – looking at data about commissioner turnover and lag times between presidential nomination and

⁶ See discussion *infra* Part IV.

⁷ See discussion *infra* Part II.

⁸ See discussion *infra* Part III.

⁹ See discussion *infra* Part II. This is especially true on high-salience issues – where Democrats and Republicans are likely to disagree with each other. See discussion *infra* Part II. For this reason, some independent commissions are more likely to be politicized than others.

Senate confirmation. Part III will detail how party polarization contributes to changes in commissioner turnover and time lags between nomination and confirmation, and extends the analysis that takes place in Part II by comparing commissioner turnover and lag times before and after the Reagan presidency. Part III will also discuss how party polarization translates into the appointment of commissioners who are far more likely to be party loyalists. In particular, the opposition party in the Senate will make use of holds and other delaying strategies (often on nominees from the President's own party) to ensure the President appoints opposition-party commissioners who are acceptable to opposition-party leaders. Part IV will serve both as a conclusion and as an opportunity for us to discuss how changes in the appointment and confirmation of commissioners influence presidential control of independent agencies. For reasons already noted, we will argue that Presidents – once there is a majority of commissioners from the President's party – have more influence on independent-agency policymaking than ever before. Party polarization translates into party loyalty, meaning independent-agency heads from the President's party are less likely to disagree with the President.¹⁰

I. THE POLITICS OF INSTITUTIONAL DESIGN

Congress's decision to designate an agency as independent (i.e., not under the control of some cabinet agency or the Executive Office of the President) is intended to limit presidential control.¹¹ After winning the White House, a newly elected President – so the theory goes – cannot control independent-agency decision making.¹² Instead, statutory partisan requirements, fixed statutory terms, and for-cause limits on commissioner removal all work against presidential control.¹³ More to the point, assuming that some opposition-party commissioners serve out their terms, a newly elected President will inherit a commission that is likely to have members (perhaps a majority) that disagree with his policy priorities. That is why the Senate Committee on Government Operations spoke of partisan requirements as “an important restraint on the President.”¹⁴

¹⁰ See discussion *infra* Part III.

¹¹ See Peter L. Strauss, *The Place of Agencies in Government Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 589-91 (1984).

¹² See generally Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a President Arrives*, 78 N.Y.U. L. REV. 557 (2003).

¹³ See DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN 3-4 (2003).

¹⁴ STAFF OF S. COMM. ON GOV'T OPERATIONS, 95TH CONG., STUDY ON FEDERAL REGULATION: THE REGULATORY APPOINTMENTS PROCESS 31 (1977); see also PETER L. STRAUSS, ADMINISTRATIVE JUSTICE IN THE UNITED STATES 95-96 (2d ed. 2002); Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 103 (2000) (opining that partisan membership requirements in independent regulatory commissions may reduce an agency's tendency toward political polarization).

Some combination of concerns about expertise, due process, and the likely administrative actions of Presidents explains Congress's decision to constrain the President this way.¹⁵ Commission expertise is the traditional, "good government" justification for Congress's choice to create independent agencies.¹⁶ Pointing to their inability to deal with the details of complex, sectoral regulation in the legislative process, lawmakers see independent agencies as a particularly good institutional design to offset limitations in the legislative process.¹⁷ As one member said in the debate over the creation of the Interstate Commerce Commission (ICC): "How much better this [the proposal for an independent commission] is than to fix in advance by inflexible law the whole body of rules to govern the most complex business known to our civilization."¹⁸ On this view, members of Congress have neither the expertise nor the time to manage complicated and rapidly changing regulatory issues. Independent agencies are preferred to executive agencies because long commissioner tenure, staggered terms, and political insulation are intended to facilitate a non-political environment where regulatory experts can apply their knowledge to complex policy problems.¹⁹

¹⁵ See LEWIS, *supra* note 13, at 27-29. Due process concerns were particularly salient before Congress's 1946 enactment of the Administrative Procedure Act (APA), a federal statute mandating that government agencies adhere to due process norms. See *infra* note 19 and authorities cited therein.

¹⁶ See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1678 (1975).

¹⁷ See LEWIS, *supra* note 13, at 27-29.

¹⁸ 17 Cong. Rec. 7290 (1886) (statement of Rep. Hitt) (debating the merits of opposing bills to address railway regulation).

¹⁹ See LEWIS, *supra* note 13, at 3-4. Another justification for the creation of independent commissions is that these commissions avoid constitutional problems. See *id.* at 22-23. In particular, some members of Congress argued that the granting of regulatory power comes with great risk to individuals and commercial interests. See McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180, 182-83 (1999). Designing commissions and judicializing their procedures is one way of ensuring due process rights for regulated interests. A related justification for the creation of independent agencies was lawmaker concern about the delegation of quasi-legislative power to executive branch actors. Before the 1946 enactment of the APA, 5 U.S.C. §§ 551-559 (2000), independent – but not executive agencies – made use of quasi-judicial procedures when crafting policy. The Supreme Court favorably cited this practice in its 1935 *Schechter Poultry* decision. See *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541-42 (1935). In explaining why Congress could not delegate power to the executive to determine what is and is not "fair competition," the Court distinguished this impermissibly vague delegation from Congress's granting of analogous power to the Federal Trade Commission (FTC). See *id.* at 552. For the Court, the FTC's determination of "unfair methods of competition" was sensible because the FTC was a "quasi-judicial body" and "[p]rovision was made for formal complaint, for notice and hearing, for appropriate findings of fact supported by adequate evidence, and for [Article III] judicial review to give assurance that the action of the commission is taken within its statutory authority." *Id.* at 533. With the

While expertise may be part of the story, authority in complex regulatory policy areas is also delegated to executive-branch bureaus. For example, the regulation of the environment (Environmental Protection Agency), the regulation of food and drugs (Food and Drug Administration), and the enforcement of antitrust laws (Department of Justice) is delegated to hierarchical executive-branch bureaus. Each of these areas is arguably as, or more, complex than the regulation of the national railroads (ICC), securities (Securities and Exchange Commission), and labor-management relations (National Labor Relations Board). What then explains the creation of independent commissions?

The short answer is “political realities,” for “there is [otherwise] little rhyme or reason as to Congress’ designation of a particular agency as either a cabinet agency or an independent regulatory commission.”²⁰ A burgeoning literature in political science backs up this conclusion,²¹ and while we think that concerns of expertise and due process are not irrelevant, there is little doubt that political calculations figure prominently in Congress’s decision to delegate power to an independent, non-executive, agency.²² Most significantly, members of Congress are more likely to delegate regulatory authority to executive branch actors when they are from the same party or when they share the political preferences of the President.²³ When members of Congress fear the administrative influence of the current President on policies post-enactment, they are more likely to create independent commissions to implement their policies.²⁴

For this very reason, the percentage of new agencies with insulating characteristics correlates with periods of divided government.²⁵ During the Republican Nixon and Ford administrations, for example, a Democratic

enactment of the APA, executive agencies are now bound by due process requirements both when crafting regulatory policy and when adjudicating disputes. *See* 5 U.S.C. §§ 554, 556-557.

²⁰ WILLIAM F. FOX, JR., *UNDERSTANDING ADMINISTRATIVE LAW* 68 (3d ed. 1997).

²¹ *See generally* DAVID EPSTEIN & SHARYN O’HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* (1999); MURRAY J. HORN, *THE POLITICAL ECONOMY OF PUBLIC ADMINISTRATION: INSTITUTIONAL CHOICE IN THE PUBLIC SECTOR* (1995); LEWIS, *supra* note 13; Nolan McCarty, *The Appointments Dilemma*, 48 AM. J. POL. SCI. 413 (2004); Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989); Terry M. Moe, *The Politics of Bureaucratic Structure*, in *CAN THE GOVERNMENT GOVERN?* 267 (John E. Chubb & Paul E. Peterson eds., 1989).

²² *See* FOX, *supra* note 20, at 68.

²³ *See* David Epstein & Sharyn O’Halloran, *Divided Government and the Design of Administrative Procedures: A Formal Model and Empirical Test*, 58 J. POL. 373, 387-92 (1996).

²⁴ *See* LEWIS, *supra* note 13, at 27-28.

²⁵ *See id.* at 49-55.

Congress was especially prone to cabin presidential power through limitations on presidential appointment and removal authority.²⁶ Likewise, Democratic Congresses sought to limit the prerogatives of the Republican Reagan and Bush I administrations by seeking to insulate new agencies from presidential control.²⁷ In sharp contrast, the lowest percentages of insulation were during the Kennedy, Johnson, and Carter administrations, when a Democratic Congress was largely supportive of the political objectives of these Democratic Presidents.²⁸

A particularly good example of this phenomenon is the creation of the Consumer Product Safety Commission (CPSC).²⁹ In the early 1970s, consumer groups had successfully pressured both the President and Congress for a new agency.³⁰ In 1971, President Nixon proposed a new Consumer Safety Administration to be located in the Department of Health, Education, and Welfare.³¹ Proponents in Congress, however, worried about Nixon's ties to business interests, proposed an independent regulatory structure instead.³² The eventual CPSC was placed outside of existing bureaucratic structures and outfitted with a commission structure.³³ To further insulate it from political manipulation, commissioners were granted staggered seven-year terms.³⁴ Democratic members of Congress were worried about the commitment of Richard Nixon to consumer interests, and they worried about what his management would mean for a new consumer agency in one of the cabinet departments.³⁵

Of course, immediate concerns about the impact of the current President are not the only way politics works its way into decisions about creating commissions. Members of Congress worry not only about the current President but also about the impact of future Presidents on agency policy and implementation. If changing presidential administrations will create dramatic policy change with long-term harm to social welfare, Congress will seek to remove regulatory policy from presidential control. The most obvious example of such a decision was the creation of the Federal Reserve in 1913.³⁶ Some members of Congress, and the business interests supporting them, feared that the short-term incentives of Presidents would be to use monetary and

²⁶ *See id.* at 49, 54.

²⁷ *See id.* at 54.

²⁸ *See id.*

²⁹ *See Moe, supra* note 21, at 289-97.

³⁰ *See id.* at 289-90.

³¹ *Id.* at 290.

³² *See id.* at 290-91.

³³ *Id.* at 291.

³⁴ *Id.*

³⁵ *Id.* at 290-91.

³⁶ *See* ROBERT E. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 146-59 (1972).

banking regulation policies for political or electoral benefit to the detriment of long-term economic stability and investment.³⁷ They also worried that electoral turnover in the White House could lead to flip-flopping monetary policy, from loose to tight, depending upon the party in office.³⁸ The solution to this problem was to insulate monetary policy decision making, as well as part of banking regulation, in a Federal Reserve Board of Governors with fixed ten- to fourteen-year terms.³⁹

For their part, Presidents typically see themselves as heads of the regulatory state and fight tooth and nail to resist congressional delegations to independent agencies.⁴⁰ Consider, for example, Franklin Delano Roosevelt. Initially, Roosevelt sought Supreme Court backing for his policy-based dismissal of William Humphrey, a Federal Trade Commission member.⁴¹ Humphrey sued for back pay and won, with the Supreme Court concluding Congress could statutorily limit the President's power to remove "quasi-legislative and quasi-judicial" policymakers who disagree with presidential priorities.⁴² Roosevelt also pushed for a reorganization plan that would do away with independent agencies by statute.⁴³ Through the Brownlow Committee, his Committee on Administrative Management, Roosevelt sought to bring the independent agencies "under the general supervision of Cabinet officers."⁴⁴ Deeming

³⁷ See *id.* at 153-55. This was seen most clearly in their efforts to limit political influence on the Board of Governors and to increase banking influence on the board. See *id.* at 155-58.

³⁸ See *id.* at 154-56.

³⁹ See *id.* at 153-55. The term length originally was ten years but was lengthened to fourteen years in 1935. Compare Federal Reserve Act of 1913, ch. 6, § 10, 38 Stat. 251, 260, with Banking Act of 1935, ch. 614, § 203, 49 Stat. 684, 704.

⁴⁰ Differences between presidential and congressional sensibilities are best illustrated by Harry Truman's conflicting positions on the delegation of authority to regulate the nation's waterways to the Interstate Commerce Commission. In 1938, then-Senator Truman strongly backed the delegation; in 1946 President Truman opposed the delegation, arguing that transportation policy was too fragmented under independent-agency control. See LEWIS, *supra* note 13, at 21-22.

⁴¹ Roosevelt sacked Humphrey, a Coolidge appointee to the Federal Trade Commission who supported big business and opposed the New Deal, because Roosevelt "[did] not feel that [Humphrey's] mind and [his] mind [went] along together." WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 60 (1995). For an insightful discussion of this episode (from which many of the claims in the balance of this paragraph are drawn), see *id.* at 52-81.

⁴² *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935). Enraged by this and other anti-New Deal rulings, Roosevelt launched his failed plan to pack the Court with Justices sympathetic to his policy agenda. On the linkage between *Humphrey's Executor* and court-packing, see LEUCHTENBURG, *supra* note 41, at 79-80.

⁴³ See RICHARD POLENBERG, *REORGANIZING ROOSEVELT'S GOVERNMENT: THE CONTROVERSY OVER EXECUTIVE REORGANIZATION, 1936-1939*, at 187-88 (1966).

⁴⁴ *Id.* at 25.

independent agencies the “headless ‘fourth branch of government,’”⁴⁵ the Brownlow Committee argued that effective presidential management of the administrative state required folding independent agencies into executive departments.⁴⁶

And so it goes. Presidents pursue reorganization plans to expand their power and fight off congressional efforts to insulate government agencies from presidential control.⁴⁷ During periods of divided government, these skirmishes are more intense; Congress is more likely to pursue such limits and the President and Congress are more apt to be at policy loggerheads.⁴⁸ For example, responding to congressional efforts to create an independent agency in charge of environmental enforcement, President Nixon created the Environmental Protection Agency by reorganization plan in 1970.⁴⁹ Presidents Reagan and Bush I made use of their veto power in resisting congressional efforts to create new repositories of independent litigating authority in the Merit Systems Protection Board (during the Reagan years) and the Office of Federal Housing Enterprise Oversight (during the Bush I years).⁵⁰

Needless to say, as the plethora of structural limits on presidential control of the administrative state makes clear, Presidents sometimes agree to statutory limits on their powers to administer government programs. With respect to

⁴⁵ LOUIS FISHER, *THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE* 148 (4th ed. 1998).

⁴⁶ The 1938 Congress, however, had no interest in backing Roosevelt’s plan: “fears and anxieties produced by European dictatorship[s]” translated into congressional efforts to cabin presidential power. POLENBERG, *supra* note 44, at 149. Roosevelt simply could not overcome the specter of a centralized totalitarian regime. See Barry D. Karl, *Constitution and Central Planning: The Third New Deal Revisited*, 1988 SUP. CT. REV. 163, 188; Neal Devins, *Government Lawyers and the New Deal*, 96 COLUM. L. REV. 237, 261-65 (1996) (book review).

⁴⁷ Presidentially appointed commissions established to examine the administration of the executive branch have consistently sought to increase presidential control of the administrative state. For example, in justifying some proposals made in 1971 to decrease the number of independent agencies, the President’s Advisory Council on Executive Organization (the Ash Council) concluded that political insulation limits the accountability of independent agencies to both the President and Congress. THE PRESIDENT’S ADVISORY COUNCIL ON EXECUTIVE ORGANIZATION, *A NEW REGULATORY FRAMEWORK: REPORT ON SELECTED INDEPENDENT REGULATORY AGENCIES* 4, 14-16 (1971). For a general overview of presidentially appointed management commissions, see PERI E. ARNOLD, *MAKING THE MANAGERIAL PRESIDENCY: COMPREHENSIVE REORGANIZATION PLANNING 1905-1996*, at 338-64 (2d ed., rev. 1998) (explaining the recurrent phenomenon of comprehensive executive reorganization planning).

⁴⁸ See discussion *supra* notes 20-28 and accompanying text.

⁴⁹ Reorganization Plans Nos. 3 and 4 of 1970, 35 Fed. Reg. 15,623 (Dec. 2, 1970), reprinted in 84 Stat. 2086 (1970).

⁵⁰ These two episodes are discussed in Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 CARDOZO L. REV. 273, 279-80 (1993).

independent agencies, presidential disdain for inheriting an agency filled with commissioners appointed by the President's predecessor is counterbalanced by the President's desire to advance his policy goals by presiding over the creation of a new commission. In particular, Presidents can have a lasting impact on commission policy by appointing an initial slate of commissioners. Because of fixed and staggered terms, Presidents can lock in a particular set of commission policies into the next presidency more so than in an executive branch bureau. If the current President and a majority in Congress worry about losing power, creating a commission and stacking it with sympathetic appointees is one way of protecting policies well into the future.

Yet the question remains: to what extent does political insulation limit presidential control of independent agencies? Congress sees political insulation as a way to limit presidential power and is especially willing to push for limits on the President's appointment and removal powers during periods of divided government. The President, too, sees political insulation as a way to limit presidential power. With the possible exception of the President's power to advance his policy agenda by presiding over the creation of a new independent agency, Presidents typically seek to centralize power in the White House.⁵¹ This is especially true during periods of divided government, as Part III of this Article will make clear.⁵² During these periods, Presidents are especially concerned with agency heads breaking ranks with presidential priorities.

But what if Presidents can get control of independent agencies relatively quickly through appointments? For example, if opposition-party commissioners regularly retired after a party change in the White House, the incoming President would be able to ensure that a majority of commissioners came from his party, and might even be able to appoint a majority of them. Likewise, if the Senate quickly rubber stamped presidential nominees to independent agencies, Presidents could seek out turncoat commissioners who would echo the President's policy preferences.⁵³ Parts II and III will consider these questions. Part II will empirically evaluate the independence of the independent commissions, focusing primarily on the length of time it takes Presidents to gain control of a commission through appointments. Part III will evaluate those findings, focusing on the role that party polarization plays in shaping the respective actions of Presidents, commissioners, and Congress.

⁵¹ ANDREW RUDALEVIGE, *MANAGING THE PRESIDENT'S PROGRAM: PRESIDENTIAL LEADERSHIP AND LEGISLATIVE POLICY FORMULATION* 18 (2002); Terry M. Moe, *The Politicized Presidency*, in *THE NEW DIRECTION IN AMERICAN POLITICS* 235, 235 (John E. Chubb & Paul E. Peterson eds., 1985).

⁵² See discussion *infra* Part III.

⁵³ As Daniel Ho puts it: "[a]necdotal evidence abounds" that "presidents appoint [cross-party] commissioners differing *formally* in partisanship but who are otherwise identical in viewpoint to the president." Ho, *supra* note 2, at 2. Ho, however, concludes that those studies are in error – and that cross-party appointees are particularly loyal to the party from which they come. See *infra* notes 160-65 and accompanying text.

II. THE DATA

To evaluate the independence of independent commissions we collected data on the length of time it takes Presidents to appoint majorities to commissions. We used publicly available data on commissioner tenure and updated it through the Bush II presidency.⁵⁴ Specifically, we examined the length of time it has taken Presidents from Warren Harding to George W. Bush to appoint majorities to twelve different independent regulatory commissions.⁵⁵ We looked both at the time it takes Presidents to obtain a majority for their party on the commission, and the time it takes them to appoint an *absolute* majority of the commission's members. These two ways of evaluating commission majorities reflect two different views about how commission appointment politics works. If partisanship is the essence of commission voting, then the pivotal moment for Presidents is when they obtain a majority of their partisans on a commission. So, for Republican Presidents, the key moment is when they get a majority of Republicans on a commission, and for Democratic Presidents, a majority of Democrats. If, on the other hand, Republican Presidents appoint Democratic commissioners who vote at least part of the time like Republicans, and Democratic Presidents appoint Republican commissioners who vote like Democrats, then the key moment for the President and the commission is more likely to be when the president has appointed a majority of commissioners. This is a key distinction to which we return below.

During this time period, Presidents were able to obtain a majority on each commission in all cases except one.⁵⁶ On average, Presidents were able to obtain majorities for their party after nine or ten months. They were also able

⁵⁴ This data was collected through an NSF funded research project (SES 00-95962). DAVID C. NIXON, THE INDEPENDENT REGULATORY COMMISSIONER DATA BASE (2005), <http://www2.hawaii.edu/~dnixon/IRC/>. The unit of analysis is the commission within a presidency (first term). There are ninety observations in the data.

⁵⁵ These commissions include the Atomic Energy Commission, Commodity Futures Trading Commission, Consumer Product Safety Commission, Equal Employment Opportunity Commission, Federal Communications Commission, Federal Election Commission, Federal Maritime Commission, Federal Radio Commission, Federal Trade Commission, National Labor Relations Board, Nuclear Regulatory Commission, and the Securities and Exchange Commission.

⁵⁶ We exclude the Federal Election Commission from these calculations since it has an even number of commissioners and by law no more than one half can be from the same political party. See 2 U.S.C. § 437c(a)(1) (2000). We also exclude from these calculations all presidents in office when a commission was created, since they were able to make all of the initial appointments. The case where a President was not able to appoint a majority was the Nuclear Regulatory Commission (NRC) during the Carter administration. For a discussion of the NRC see *Carter Nominating Physicist to Nuclear Agency Vacancy*, WASH. POST, June 30, 1977, at 54. Had we included the Board of Governors of the Federal Reserve, there would have been two more cases, the Kennedy and Nixon administrations. See NIXON, *supra* note 54.

to appoint an absolute majority of commissioners in most cases (ninety percent). Not surprisingly, most of the cases where Presidents did not appoint absolute majorities involved presidencies that did not last a full term (i.e., Harding, Kennedy, and Ford). It took individual Presidents longer on average – twenty-six months – to appoint an absolute majority of the members (i.e., three of five commissioners, or four of seven commissioners). The disparity in the amount of time it takes Presidents to get a party majority versus the time it takes to appoint an absolute majority, again, illustrates the importance of the members' ideology and behavior. If Republicans consistently vote like Republicans and Democrats consistently vote like Democrats, then the structure of independent commissions does not insulate as well from presidential control. If, however, each commissioner votes like the President that appointed him, then the structure insulates against new presidential influence much more effectively and the influence of previous Presidents lasts much longer into new presidential terms.

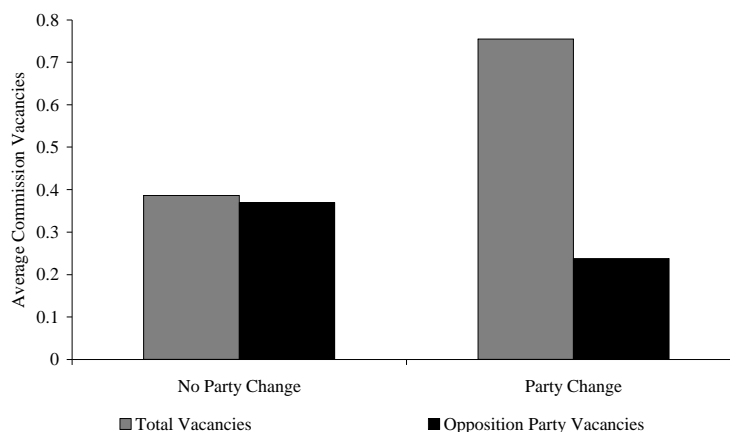
Whether the new President is from a different party than the last President matters significantly for control. New Presidents from the same party as the prior President obtain a party majority in one to two months on average compared to thirteen to fourteen months for a new president from a different party.⁵⁷ Presidents who assume office after a President from their own party have a built-in advantage since they frequently assume office with a majority of their partisans already in place on commissions. Their task is to make adjustments at the margins, perhaps by naming a new chair or slowly bringing in partisans that are more loyal to them personally.

This is strikingly different from the task facing a President after a party change. Presidents who assume office after a party change confront more vacancies, particularly vacancies in positions formerly held by their own party. Figure 1 graphs the average number of commission vacancies by whether or not there has been a party change. The gray bars reflect total vacancies while the black bars reflect vacancies in opposition-party seats on the commission. As the figure suggests, there are more vacancies after a party change than during an intra-party transition: 0.76 vacancies per commission versus 0.39, which amounts to nine vacancies across the twelve commissions versus four or five. On their face, the data would seem to imply that new Presidents after a party change in the White House have the ability to reshape the commission in their own image and get control quickly. Interestingly, however, the additional vacancies exist for seats that were previously filled by commissioners from the President's own party. There are actually *fewer* vacancies in seats formerly held by the other party after a party change, and these are the seats that Presidents must fill to change majorities. Instead, the new President must

⁵⁷ Cases where presidents did not appoint majorities were coded as taking the full tenure of the President's term for these calculations. The overall average of nine to ten months for party majorities reflects the fact that about sixty percent of the cases were ones in which a party change had occurred in the White House.

immediately fill seats left open by his own party simply to ensure the party's influence holds its ground on the commission. The task of filling vacancies in slots filled by the President's own party slows down the process of getting majorities of the President's own partisans on the commissions.

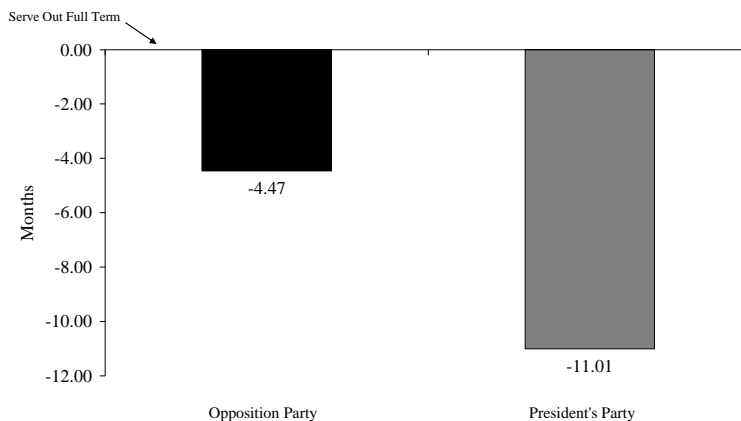
Figure 1: Average Number of Commission Vacancies by Party Change in the White House, 1921 to 2004



One reason why there are more vacancies in Republican seats for Republican Presidents (and vice versa) after a party change in the White House is that Presidents leaving office usually select their own partisans for the appointments that will last longest into the new administration. This means that the staggered terms that expire first after a party change are systematically more likely to be from the new President's own party. A second reason for the surplus of vacancies in the President's own party is that opposition-party commissioners stay on longer. As Figure 2 shows, opposition-party commissioners are much more likely to stay for their full terms. Such commissioners probably stay longer precisely because they know that their departure will open the door for the other party's President to influence commission policies sooner. Many opposition commissioners, in fact, stay after their terms have expired, until a successor has been nominated and confirmed.⁵⁸

⁵⁸ Nowadays, commissioners generally are more likely to stay after their terms expire. For example, during the first term of the George W. Bush administration, one quarter of the commissioners who left had been serving longer than their stipulated terms. During President Eisenhower's first term, the percentage was closer to fifteen percent. From 1930 to 1980, the average commissioner stayed for nine to seventeen months less than his term allowed. From 1970 forward, the average commissioner began staying longer, so that by the George W. Bush administration the average commissioner stayed only two months less than his term allowed and more stayed longer.

Figure 2: Tenure of Commissioners After a Party Change in White House by Party of Commissioner



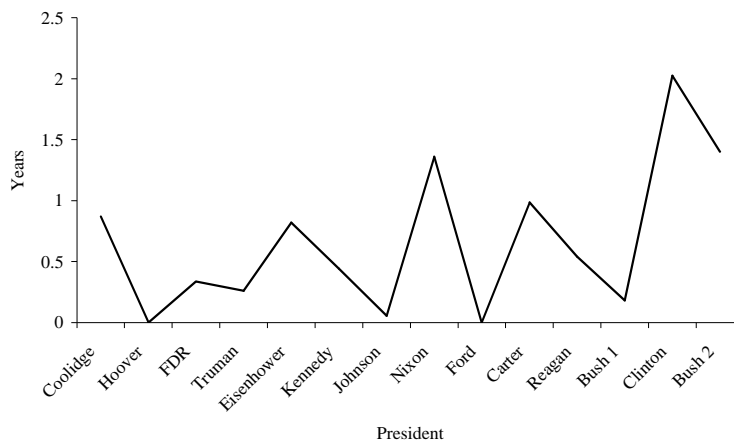
Looking just at averages across this long time period masks consequential changes in presidential commission politics over time. Importantly, it is now taking Presidents longer and longer to appoint majorities.⁵⁹ While there is variation from President to President (largely explained by whether there has been a party change in the White House), there appears to be an increasing trend.⁶⁰ Figure 3 graphs the average time it took Presidents to obtain a majority of their partisans on the commissions in this study. The length of time fluctuates substantially but shows an increase, particularly in recent years. For example, it took an average of twenty months for Presidents Clinton and George W. Bush to obtain Democratic and Republican majorities, respectively, on the independent regulatory commissions (IRC) – which is longer than the average. It also took them slightly longer to appoint absolute majorities (by

⁵⁹ See *infra* p. 473 fig.3.

⁶⁰ One of the puzzling aspects of this picture is the relatively short time it took President Reagan to get party majorities on commissions at the same time that confirmation delays were increasing. The puzzle has two explanations. First, the apparent confirmation delay was driven by slow action on holdover commissioners – that is, the people he was renominating took longer to get confirmed. So, they were already on the commissions, and the confirmation delay did not matter for getting control of the commissions. To illustrate, his first five new nominations were confirmed less than one month after nomination (SEC, FCC, NRC, FCC, NRC). Four of these were Republican nominations, the longest delay for a non-holdover nomination being less than three months. By contrast, the average delay for a holdover was over four months. The Republican Senate was pretty good about moving Reagan's new nominees through. Second, Reagan also made six recess appointments in his first year, five Republicans and one Democrat (NLRB, FEC, EEOC). Confirmation delay is, obviously, not a problem if nominees obtain recess appointments.

approximately one month). Both of these averages are also higher than those of their immediate predecessors.

Figure 3: Average Time to Get a Partisan Majority on IRCs



One reason for the increased delay is that it is taking longer for Presidents to get commissioners confirmed. For example, at the end of 2007, none of the commissioners on the Federal Election Commission had been confirmed for a regular term.⁶¹ Three were serving under recess appointments, two others were serving in expired terms, and a sixth slot was vacant. The difficulty stemmed from partisan disagreements between Republicans and Democrats in the Senate over a package of appointees to be brought up for a vote.⁶² Democratic objections to one of the Republican nominees, Hans von Spakovsky, led to four different holds being placed on the nominee in the Senate.⁶³ Republicans opposed bringing the other nominees to the floor without von Spakovsky, leading to a stalemate.⁶⁴ This squabble threatened to leave the FEC without a quorum when the congressional session ended in December since those

⁶¹ See Matthew Mosk, *Senate Battle Over FEC Nominee May Hamper Agency's Ability to Act*, WASH. POST, October 26, 2007, at A19. The Consumer Product Safety Commission has been hampered by a similar dispute. In May 2007, President George W. Bush's nominee for chair, Michael Baroody, withdrew his nomination when it became apparent he would not receive confirmation. No subsequent nominee was put forward for the position, leaving the position on the three-person board vacant. As a result, the agency has not been able to issue new rules or judgments. See Pete Yost, *Consumer Commission Nominee Withdraws*, WASH. POST, May 23, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/23/AR2007052300897.html>.

⁶² Mosk, *supra* note 61. On the Senate's increasing "batching" of Republican and Democratic nominees, see *infra* notes 140-47 and accompanying text.

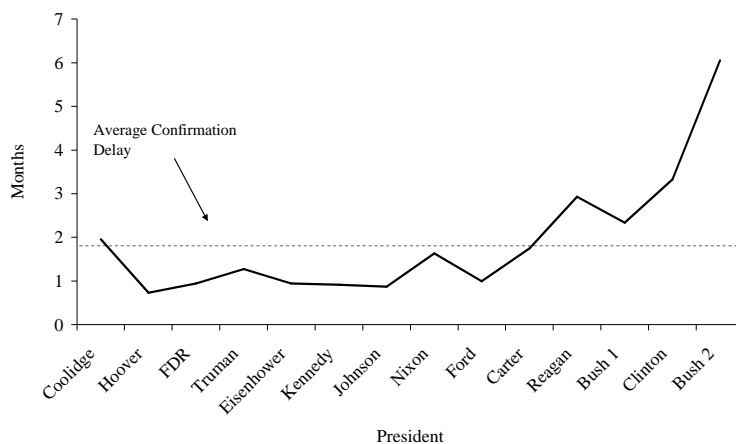
⁶³ Mosk, *supra* note 61.

⁶⁴ *Id.*

commissioners serving under recess appointments would be required to leave at the end of the congressional session.⁶⁵

The FEC case is one example of how increasingly polarized parties have a harder time coming to agreement over nominees.⁶⁶ Figure 4 graphs the average delay between commissioner nomination and confirmation. The data reveal a noticeable increase in confirmation delay over time, particularly recently. Starting in the mid-1970s, there has been a noticeable increase in the time between when a nomination was sent to the Senate and when the nomination was confirmed. This helps explain the increase in time it takes Presidents to appoint majorities.

Figure 4: Average Number of Months Between Nomination and Confirmation



This figure likely *underestimates* the true effect of confirmation delay, since it does not account for delays in making nominations in the first place. If Presidents anticipate difficulties in the Senate, time spent vetting potential nominees increases, as does the amount of legwork and preparation necessary before a nomination is formally made – i.e., an increase in confirmation delay also increases nomination delay.⁶⁷ Indeed, during periods of divided

⁶⁵ *Id.*

⁶⁶ In Part III, we examine how party polarization impacts the appointment and confirmation of commissioners. In so doing, we highlight how opposition-party senators make use of holds to advance their party's agenda. *See infra* text accompanying note 133-34.

⁶⁷ Another reason the figure likely underestimates the true amount of delay is that the data do not include commissioners who were nominated but never confirmed. Nominees that were rejected outright or delayed to the end of a session experience the longest confirmation delays. If rejections or withdrawals are more likely to happen as time goes on, then looking at just those cases where nominees were confirmed underestimates the true effect of confirmation delay.

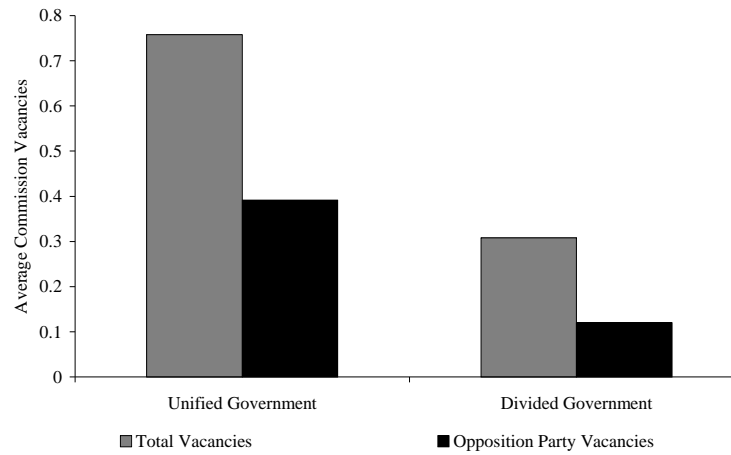
government, Congress has a weaker incentive to act on presidential nominees in a timely manner, particularly if the term-expired commissioner shares the ideology or partisanship of the congressional majority.

As the FEC case suggests, it is also harder for parties within the Senate to come to agreement about proposed commissioners.⁶⁸ As a result, the nomination and confirmation process has gotten longer on both sides as Presidents have taken longer to vet potential nominees and Congress has been slower confirming nominations. As Figure 5 demonstrates, Presidents who take office during periods of divided government confront about half as many vacant commissioner slots.⁶⁹ During periods of divided government, commissioners serve longer, arguably because they are more uncertain about the outcome of future appointments and because more is at stake in disagreements on the commission. The willingness of current FEC commissioners to stay longer than their current terms is likely related to appointment difficulties created by the disagreement between the Senate and White House over von Spakovsky's nomination, and more generally by the disagreements between the parties within the Senate chamber.⁷⁰ The aggregate effect of party polarization is that Presidents have not been able to control commissions as effectively as they have in the past.

⁶⁸ Studies of judicial and executive branch appointments likewise underscore that part of the confirmation delay is due to increasing political polarization. See Sarah A. Binder & Forrest Maltzman, *Senatorial Delay in Confirming Federal Judges, 1947-1998*, 46 AM. J. POL. SCI. 190, 197 (2002); Nolan McCarty & Rose Razaghian, *Advice and Consent: Senate Responses to Executive Branch Nominations 1885-1996*, 43 AM. J. POL. SCI. 1122, 1141 (1999); David C. Nixon & David L. Goss, *Confirmation Delay for Vacancies on the Circuit Courts of Appeals*, 29 AM. POL. RES. 246, 247 (2001).

⁶⁹ See *infra* p. 476 fig.5.

⁷⁰ See Mosk, *supra* note 61.

Figure 5: Commissioner Vacancies by Divided Government, 1921 to 2004

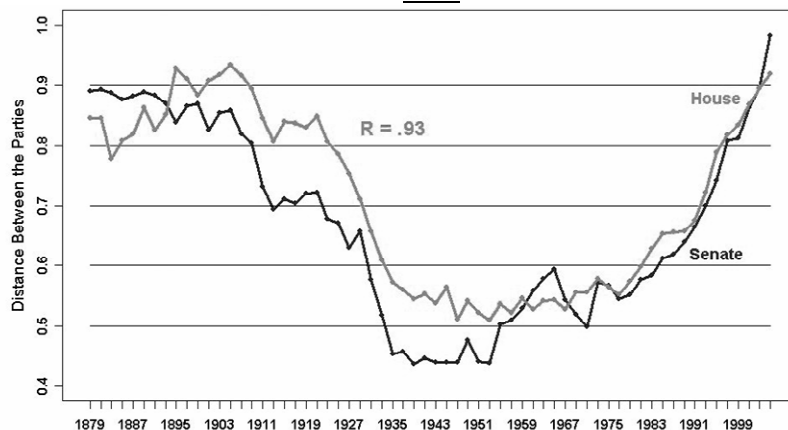
This issue of political polarization is central to our argument; so it is worth reviewing what social scientists know about this phenomenon. In Figure 6, we reproduce a figure from political scientist Keith Poole's website on political polarization.⁷¹ It graphs the ideological similarity of the Democratic and Republican parties using a numerical measure of ideology produced by Poole and his colleague, Howard Rosenthal.⁷² This measure uses legislative voting behavior on different bills by different legislators over time to estimate the liberalism and conservatism of each member numerically.⁷³ The figure graphs the difference between the average liberal or conservative (what they term D-NOMINATE) scores for each party in the House and Senate. Higher values on this graph imply more polarization since the difference in the parties is greater.

⁷¹ NOLAN MCCARTY, KEITH T. POOLE, & HOWARD ROSENTHAL, *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* (2006), available at <http://polarizedamerica.com/>; see also Sean M. Theriault, *Party Polarization in Congress* (April 25, 2006) (unpublished manuscript), available at http://web.austin.utexas.edu/seant/party_polarization.pdf.

⁷² KEITH T. POOLE & HOWARD ROSENTHAL, *CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING* 233 (1997).

⁷³ See *id.*

Figure 6: Party Polarization: Ideological Distance Between Parties, 1879 to 2006



The figure shows that party polarization has fluctuated over time. Notably, there was a large difference between the parties in the late nineteenth century, but this difference narrowed by the middle of the twentieth century. Since that point, however, polarization has been increasing – and most dramatically so since the late 1970s. Not only has the average Republican become more conservative and the average Democrat more liberal, but the divergence of views within the parties has also lessened. The increased polarization of the two parties has dramatic consequences for a number of aspects of American political life, including presidential appointments. As we argue in Part III, party polarization influences not only the politics of selection, nomination, and confirmation of appointees, but also the types of persons selected for commissions and their behavior once at work in these agencies.

III. EXPLAINING THE DATA: PARTY POLARIZATION, COMMISSIONER TURNOVER, AND THE APPOINTMENT OF PARTY LOYALISTS

In making sense of the data we have assembled, the last picture – showing the dramatic rise of political polarization – is most telling. As we will now explain, we think that political polarization has figured prominently both in presidential efforts to gain control of independent agencies and in efforts by the opposition party in Congress to limit presidential control. In particular, polarization contributes to White House efforts to coordinate independent-agency policy making through the appointment of like-minded commissioners; correspondingly, the opposition party in Congress is more likely to use holds and other confirmation-delaying strategies to resist these presidential efforts and to advance its competing policy agenda. Likewise, we think that the increasing propensity of opposition-party commissioners to serve out all or nearly all of their terms is tied to political polarization. Finally, for reasons we will soon detail, we think the so-called Reagan Revolution figures prominently

in this story of presidential appointments, congressional confirmation, and commissioner turnover. Reagan reshaped the presidency by placing greater emphasis on ideology in appointing agency heads, emphasizing the President's power of unilateral action when pursuing policy initiatives, and reshaping the Republican party in ways that increased the ideological gap between Democrats and Republicans.

To start, a few words about political polarization and its impact on presidential administration:⁷⁴ "The polarization between the legislative parties is, perhaps, one of the most obvious and recognizable trends in Congress during the last thirty years."⁷⁵ The political forces that once pushed Democrats and Republicans towards the center have dissipated. In the South, conservative "Southern Democrats" have been displaced – both by Republicans who now occupy conservative seats and by liberal Democrats who occupy the remaining Democratic seats.⁷⁶ Likewise, the liberal "Rockefeller Republican" has been pushed out; the ascendancy of "Ronald Reagan's GOP" in 1980 was linked to the defeat of the moderate-to-liberal wing of the Republican party.⁷⁷

Measures of ideology reveal that the "two parties are perfectly separated": the most liberal Republican in Congress is more conservative than the most conservative Democrat.⁷⁸ With no meaningful ideological range within either the Democratic or Republican Party, longstanding gaps between Northern and Southern lawmakers of the two parties have largely disappeared.⁷⁹ Thus, when legislation is enacted, party cohesion results in a shift in power to party leaders who "see the lawmaking process as a way to stand behind a unified party

⁷⁴ The points made in the following two paragraphs are largely drawn from Neal Devins, Essay, *The Academic Expert Before Congress: Observations and Lessons from Bill Van Alstyne's Testimony*, 54 DUKE L.J. 1525, 1534-39 (2005). That essay looks at the ways that political polarization has transformed congressional hearings into a mechanism for parties to advance their pre-existing political agendas.

⁷⁵ Sean M. Theriault, *The Case of the Vanishing Moderate: Party Polarization in the Modern Congress* 5 (May 2, 2004) (unpublished manuscript), available at <http://www.la.utexas.edu/~seant/vanishing.pdf>.

⁷⁶ See Jason M. Roberts & Steven S. Smith, *Procedural Contexts, Party Strategy, and Conditional Party Voting in the U.S. House of Representatives, 1971-2000*, 47 AM. J. POL. SCI. 305, 306 (2003).

⁷⁷ See, e.g., Kate O'Beirne, *Rockefeller Republicans Take Manhattan*, NAT'L REV. ONLINE, July 7, 2004, <http://article.nationalreview.com/?q=NDJiODgzMWQ5NzBhN2NmYTY1Y2Y4MDUyMDY2NDczZmQ=>.

⁷⁸ 108th House Rank Ordering, <http://voteview.com/hou108.htm> (last visited Feb. 14, 2008); see also 109th House Rank Ordering, <http://voteview.com/hou109.htm> (last visited Feb. 14, 2008).

⁷⁹ Cf. Roberts & Smith, *supra* note 76, at 306. During the Civil Rights era of the 1960s, of course, there was a sharp North-South (as opposed to Democrat-Republican) divide in Congress.

message and, in this way, distinguish their party from the other.”⁸⁰ Rather than allowing decentralized committees to define Congress’s agenda, lawmakers are more apt to see themselves as members of a party, not as independent power brokers.⁸¹ For all these reasons, the separation of powers between Congress and the White House has given way to the “separation of parties.”⁸² Lawmakers advance party interests, not Congress’s institutional interests, such that relations between Congress and the White House are defined by whether there is unified or divided government.⁸³

One of the sources of political polarization in Congress is the so-called Reagan Revolution. Rather than govern from the center, Reagan sought to transform the Republican Party. By lowering taxes, devolving power towards the states, and introducing other initiatives intended to reduce people’s reliance on the federal government, Reagan drove a wedge between moderate and conservative Republicans (and between Republicans and Democrats). As leader of “[t]he most ideological administration in recent history,” Reagan openly embraced social and religious conservatives.⁸⁴ For example, when running for President in 1980 and 1984, Reagan both pledged to appoint judges who “share our commitment to judicial restraint” and reached out to social conservatives by condemning Supreme Court decisions on school prayer, busing, and – especially – abortion.⁸⁵

Equally significant, Reagan sought to revolutionize the presidency. Legal theorists in the Justice Department and elsewhere spoke about the “unitary executive” and, with it, the need for presidential control of all governmental agencies.⁸⁶ Before the Supreme Court, for example, the administration argued (unsuccessfully) that “there must be a unitary, vigorous, and independent Executive who is responsible directly to the people, not to Congress (except by

⁸⁰ Devins, *supra* note 74, at 1538; *see also* C. Lawrence Evans, *Committees, Leaders, and Message*, in CONGRESS RECONSIDERED 217 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 7th ed. 2000).

⁸¹ *See* Devins, *supra* note 74, at 1539.

⁸² For a fuller treatment of this topic, *see generally* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

⁸³ *See id.* at 2315.

⁸⁴ Chester E. Finn, Jr., *Affirmative Action Under Reagan*, COMMENT., Apr. 1982, at 17, 28.

⁸⁵ 1984 REPUBLICAN PARTY PLATFORM, *reprinted in* 40 CONG. Q. ALMANAC 41-B, 55-B to 56-B (1984). In particular, Reagan called for the overruling of *Engel v. Vitale* and *Roe v. Wade* – saying that “God should [never] have been expelled from the classroom,” and that *Roe* was as divisive and wrong as *Dred Scott*. Ronald Reagan Remarks and a Question-and-Answer Session with the Student Body of Providence-St. Mel High School in Chicago, Illinois, 1 PUB. PAPERS 603 (May 10, 1982).

⁸⁶ For insider accounts, *see* CHARLES FRIED, ORDER AND LAW, ARGUING THE REAGAN REVOLUTION – A FIRSTHAND ACCOUNT 132-71 (1991); DOUGLAS W. KMIEC, THE ATTORNEY GENERAL’S LAWYER: INSIDE THE MEESE JUSTICE DEPARTMENT 48-65 (1992).

impeachment)⁸⁷ and that “developments since *Humphrey’s Executor* . . . have cast a shadow over [independent agencies].”⁸⁸

The administration also sought to centralize power in the presidency through initiatives on signing statements and regulatory review.⁸⁹ Signing statements were seen as a way to combat congressional efforts to limit presidential control of the administrative state by leaving it to agencies (and their congressional overseers) to fill in the details of vague statutory language.⁹⁰ Reagan’s regulatory review initiative, expressed in Executive Orders 12,291 and 12,498, were more consequential.⁹¹ Executive Order 12,291 required all executive agencies to submit proposed policies or rules to the Office of Management and Budget.⁹² Executive Order 12,498 required executive agencies to submit their proposed regulatory agenda and to explain how their agenda advanced the President’s objectives on an annual basis.⁹³ Through these orders, “the president and his principal aides [were empowered] to exercise a much greater degree of influence over executive branch regulation than had existed previously.”⁹⁴

⁸⁷ Brief for the United States at 33, *Bowsher v. Synar*, 478 U.S. 714 (1985) (Nos. 85-1377, 85-1378, and 85-1379).

⁸⁸ *Id.* at 81 n.32. On the question of independent agencies, the Supreme Court reaffirmed and expanded *Humphrey’s*. *Bowsher v. Synar*, 478 U.S. 714, 724-27 (1985). In *Bowsher v. Synar*, the Court – while invalidating the Gramm-Rudman statute – self-consciously reaffirmed the legality of independent agencies. *Id.* at 734-36. For an insightful account of internal deliberations in the case, see Bernard Schwartz, *Administrative Law Cases During 1986*, 39 ADMIN. L. REV. 117, 117 (1987). In *Morrison v. Olson*, the Court affirmed the power of Congress to restrict presidential removal of an independent counsel exercising purely executive powers. *Morrison v. Olson*, 487 U.S. 654, 688-93 (1987); see also *id.* at 724-26 (Scalia, J., dissenting) (lamenting that the Court’s decision goes far beyond the limits recognized in *Humphrey’s*).

⁸⁹ See KMIEC, *supra* note 86, at 48-57.

⁹⁰ According to Doug Kmiec, one of the architects of Reagan’s signing statement initiative, the “signing statement was ‘crucial for the administration to give the executive branch direction top-down on inevitable interpretation.’” Christopher S. Kelley & Bryan W. Marshall, *The Last Mover Advantage: Presidential Power and the Role of Signing Statements* 6 (April 20, 2006) (unpublished manuscript, on file with All Academic Research), available at http://www.allacademic.com/meta/p139737_index.html (quoting Interview by Christopher S. Kelley with Douglas W. Kmiec, via E-mail (Apr. 23, 2001)); see also KMIEC, *supra* note 86, at 52-53.

⁹¹ See Christopher S. Kelley, *A Matter of Direction: The Reagan Administration, the Signing Statement, and the 1986 Westlaw Decision*, 16 WM. & MARY BILL RTS. J. 283, 290 (2007).

⁹² Exec. Order No. 12,291 § 3(c), 3 C.F.R. 127 (1981).

⁹³ Exec. Order No. 12,498 § 1(a), (b), 3 C.F.R. 323 (1985).

⁹⁴ GEORGE C. EADS & MICHAEL FIX, RELIEF OR REFORM? REAGAN’S REGULATORY DILEMMA 117 (1984). As one defender of these programs put it: “OMB was to be the President’s eyes and ears in the regulatory field. . . . [Its] job was to ensure that individual actions taken by federal agencies were well reasoned, economically sound and coordinated

A third way Reagan sought to coordinate policymaking was through the appointment of agency heads who shared his deregulatory agenda. Other Presidents, of course, had paid attention to political patronage and ideological compatibility when making appointments.⁹⁵ But prior administrations had less assiduously sought loyalty and ideological compatibility.⁹⁶ Reagan emphasized the need for appointees to see themselves as part of a unitary administration and not as a manager of some discrete agency.⁹⁷ In particular, unlike Carter and Ford, who had made subject-matter expertise the hallmark of their regulatory appointments, Reagan vetted nominees for “ideological consistency and intensity.”⁹⁸ According to Donald Devine, Reagan’s Director of Office of Personnel Management (OPM), “[a] few months after taking office, [Reagan] instructed [OPM] that political and philosophical loyalty should be primary considerations in making appointments.”⁹⁹

with the policies of other agencies.” KMIEC, *supra* note 86, at 48. For similar statements by Reagan administration officials, see Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1080-82 (1986); *see also* TERRY EASTLAND, *ENERGY IN THE EXECUTIVE: THE CASE FOR THE STRONG PRESIDENCY* 163-64 (1992). For critical assessments of the Reagan initiative, see generally Alan B. Morrison, *Commentary, OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059 (1986); Morton Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291*, 80 MICH. L. REV. 193 (1981).

⁹⁵ For example, during the Eisenhower administration, the President was routinely accused of “perverting” federal regulatory agencies and “stacking” regulatory boards with Republican partisans. *See Business Control of Agencies Seen*, N.Y. TIMES, July 26, 1955, at 15; *Ike Seen “Stacking” U.S. Boards*, WASH. POST, Nov. 7, 1955, at 2; *see also* DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE* 11, 32-33, 40-41 (2008). *See generally* Terry M. Moe, *Regulatory Performance and Presidential Administration*, 26 AM. J. POL. SCI. 197 (1982) (demonstrating “gradual, partisan-directed presidential impact” in independent-agency decision making from 1947-1977).

⁹⁶ *See* EADS & FIX, *supra* note 94, at 141-42; *see also* RICHARD P. NATHAN, *THE PLOT THAT FAILED: NIXON AND THE ADMINISTRATIVE PRESIDENCY* 39-40 (1975) (“[Officials] were closeted for long hours in orientation sessions with career program officials, the purpose being for these career officials to explain to them program goals and accomplishments.”).

⁹⁷ *See* EADS & FIX, *supra* note 94, at 140-46; Steven D. Stehr, *Top Bureaucrats and the Distribution of Influence in Reagan’s Executive Branch*, 57 PUB. ADMIN. REV. 75, 78 (1997).

⁹⁸ Dick Kirschten, *Team Players*, NAT’L J., Feb. 19, 1983, at 385 (internal quotation marks omitted); *see also* EADS & FIX, *supra* note 94, at 141 (describing the “unusually uniform probusiness and antiregulation image” of Reagan nominees).

⁹⁹ DONALD J. DEVINE, *REAGAN’S TERRIBLE SWIFT SWORD: REFORMING AND CONTROLLING THE FEDERAL BUREAUCRACY* 8-9 (1991). After determining whether a candidate was “commit[ted] to Reagan’s objectives,” the vetting process took into account “integrity, competence, teamwork, . . . toughness, [and] . . . commitment to change.” EASTLAND, *supra* note 94, at 150 (internal quotation marks omitted). Another commentator

Reagan's pursuit of the "unitary executive" through appointments, judicial filings, and regulatory review was a sea change. Perhaps for this reason, Reagan's regulatory initiatives were resisted by Democrats in Congress.¹⁰⁰ "[A]n all-out assault" was launched in Congress; the law was changed to require Senate confirmation of the OMB director and there were threats to defund OMB review of regulation.¹⁰¹ With respect to OMB review of independent agencies, Reagan avoided a fight with Congress, limiting OMB review to executive agencies.¹⁰² This decision was based on both political and legal considerations. Legally, the Justice Department cautioned the President about "the novelty and complexity of the question."¹⁰³ Politically, the OMB was in the middle of the battle over tax cuts and their related defense of supply-side economics.¹⁰⁴ Rather than spend political capital only to have the courts reaffirm and extend *Humphrey's Executor*, the administration took what they could get from regulatory control: making use of appointments and judicial filings to gain control of independent agencies.¹⁰⁵

In looking back at Reagan's regulatory revolution, the most striking feature of Reagan's OMB and appointments initiatives is their permanence.¹⁰⁶

similarly concluded that the Reagan administration sought to determine whether a candidate was a Reagan supporter, a Republican, a conservative, and a believer in Reagan's view of government. See Chester A. Newland, *A Mid-Term Appraisal – The Reagan Presidency: Limited Government and Political Administration*, 43 PUB. ADMIN. REV. 1, 3 (1983). Correspondingly, because Reagan was more distrustful of the federal bureaucracy than perhaps any previous President, Reagan regularly appointed agency heads "with surprisingly little experience in the technical fields regulated by their agencies or offices." EADS & FIX, *supra* note 94, at 145; see also James P. Pfiffner, *Political Appointees and Career Executives: The Democracy-Bureaucracy Nexus in the Third Century*, 47 PUB. ADMIN. REV. 57, 58 (1987).

¹⁰⁰ See KMIEC, *supra* note 86, at 47-65.

¹⁰¹ *Id.* at 49.

¹⁰² See KMIEC, *supra* note 86, at 58.

¹⁰³ Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 28 (1995) (observing that the Justice Department thought both that the President had legal authority to extend OMB review and that the President might nevertheless lose in court).

¹⁰⁴ In his memoir, OMB director David Stockman makes only one mention of OMB regulatory review, focusing almost exclusively on tax and spending cuts. See DAVID A. STOCKMAN, *THE TRIUMPH OF POLITICS: THE INSIDE STORY OF THE REAGAN REVOLUTION* 112-13 (1987).

¹⁰⁵ See *supra* notes 86-88 and accompanying text (discussing judicial filings). On Reagan's staffing of independent agencies, see EADS & FIX, *supra* note 94, at 140-48 (discussing the role of appointments in the Reagan Revolution); Neal Devins, *Congress, the FCC, and the Search for the Public Trustee*, 56 LAW & CONTEMP. PROBS. 145, 145-50 (1993) (discussing Reagan appointees to the FCC).

¹⁰⁶ After Supreme Court rulings reaffirming independent agencies and upholding the independent-counsel statute, the Justice Department has largely steered clear of legal battles over the legitimacy of independent agencies. See KMIEC, *supra* note 86, at 58-60. The one

Ideological loyalty has become a hallmark of presidential appointments. Consider, for example, Bill Clinton: “[T]he one constant in Clinton’s appointments (including to federal judgeships) was relatively strong confidence in the nominee’s fidelity to the president’s agenda.”¹⁰⁷ Indeed, even Clinton’s campaign pledge to pay greater attention to racial and gender diversity in his appointments was interpreted as an effort to appoint political liberals, with “some senators and interest groups view[ing] ethnicity and

notable exception is a dispute between the Bush I administration and the U.S. Postal Service over the Postal Service’s power to independently litigate postal rate disputes. After Bush I had lost the 1992 election to Bill Clinton, the President – at the urging of White House counsel Boyden Gray – demanded the Postal Service kick such disputes over to the Justice Department. The Postal Service refused, successfully defending their prerogatives in court. For a discussion of this dispute, see generally Neal Devins, *Tempest in an Envelope: Reflections on the Bush White House’s Failed Takeover of the U.S. Postal Service*, 41 UCLA L. REV. 1035 (1994). For additional discussion, see *infra* notes 135-38 and accompanying text

¹⁰⁷ MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 131 (2000). A study by Joan Flynn of presidential appointees to the NLRB, however, argues that Clinton (as well as Bush I) departed from Reagan administration efforts to push an ideological agenda through their independent-agency appointments. See Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935-2000*, 61 OHIO ST. L.J. 1361, 1392-98 (2000). According to this study, Bush and Clinton both nominated “moderates” to the NLRB, individuals who “would have been routinely confirmed under the ‘old rules.’” *Id.* at 1427. But the National Right to Work Committee (backed by Jesse Helms and other senatorial allies) pressured both Clinton and Bush to make more ideological choices. *Id.* at 1425-28. In this and other ways, Flynn concludes the Senate seized control of the NLRB. In our view, Flynn’s study is useful – but we draw somewhat different conclusions from the same data. To start, we agree with Flynn that the confirmation process is more politicized and, as such, the Senate is pushing the President to nominate more ideological nominees. See *supra* notes 93-100 and accompanying text. Unlike Flynn, however, we think that Presidents typically agree with party leaders from their party – so that same-party nominees are likely to reflect presidential preferences. See *infra* notes 112-18 and accompanying text. The fact that a Republican senator put a hold on a Bush I nomination cuts against, but does not undermine, this claim. Helms may have taken a position more extreme than most in his party and, in any event, Bush I was able to appoint commissioners compatible both to his agenda and the agenda of Senate Republicans. *Senate Confirms New Heads of OSHA and MSHA; Late Vote on Two DOL, Four NLRB Posts Possible*, 1989 Daily Lab. Rep. (BNA) No. 194, at A-4 (Oct. 10, 1989). Cross-party nominees, in contrast, are likely to reflect opposition-party preferences. See *infra* notes 160-65 and accompanying text. For this very reason, as Flynn meticulously details, NLRB appointees are likely to be packaged – so that Presidents will name more than one commissioner at a time, some Democrat and some Republican. See Flynn, *supra*, at 1429-32. This practice of “batching” nominations has become more and more common – and it speaks to the ways party polarization has transformed the dance that takes place between the President and Senate over the appointment and confirmation of independent agency heads. See *infra* notes 140-45 and accompanying text.

gender to some extent as rough proxies of nominees' ideology."¹⁰⁸ Clinton's nominees for cabinet posts "were likewise told, 'These positions are Bill Clinton's and he appoints them – the Senate-confirmed positions, the noncareer SES positions, and the Schedule C positions – he selects them.'"¹⁰⁹

The continuing salience of OMB review is even more striking. Jim Blumstein, nominated in 1990 to head the OMB regulatory-review process, put it this way: "After [decades] of political and intellectual Strum und Drang on the issue of centralized presidential regulatory review . . . it appears that we are all (or nearly all) Unitarians now."¹¹⁰ Blumstein, writing at the start of the Bush II administration, was referring to the fact that presidential oversight of the regulatory process had "become a permanent part of the institutional design of American government."¹¹¹ Elena Kagan, a senior member of Clinton's domestic policy staff, boasted that "presidential control of administration, in critical respects, expanded dramatically during the Clinton years, making the regulatory activity of the executive branch agencies more and more an extension of the President's own policy and political agenda."¹¹² Not only did Clinton strengthen Reagan-era executive orders,¹¹³ he also made extensive use of pre-enforcement policy directives to ensure executive agencies followed presidential understandings when enforcing recently enacted statutes.¹¹⁴ For its part, the Bush II administration further extended regulatory review

¹⁰⁸ GERHARDT, *supra* note 107, at 131.

¹⁰⁹ LEWIS, *supra* note 95, at 24 (quoting Telephone Interview by David E. Lewis with Emily Sheketoff, (Sept. 29, 2006)).

¹¹⁰ James F. Blumstein, *Regulatory Review by the Executive Office of the President: An Overview and Policy Analysis of Current Issues*, 51 DUKE L.J. 851, 851-52 (2001).

¹¹¹ Pildes & Sunstein, *supra* note 103, at 15.

¹¹² Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2248 (2001).

¹¹³ Executive Order 12,866 made explicit what had been implicit in Reagan-era executive orders, namely, that "centralized presidential regulatory review is aimed at making agency regulations 'consistent with . . . the President's priorities.'" Blumstein, *supra* note 110, at 853 (quoting Exec. Order No. 12,866, § 2(b), 3 C.F.R. 638, 640 (1994), *reprinted in* 5 U.S.C. § 601 (2000)). With respect to independent agencies, the Clinton order required them to submit "[a] statement of the agency's regulatory objectives and priorities and how they relate to the President's priorities." Exec. Order No. 12,866, § 4(c)(A), 3 C.F.R. 638, 642 (1994), *reprinted in* 5 U.S.C. § 601 (2000). This demand was symbolically significant but, ultimately, without teeth – making it minimal in its scope and representing the least difficult legal path. *See* Pildes & Sunstein, *supra* note 103, at 32-33. That Clinton pushed the envelope further speaks both to the growing acceptance of OMB review in Congress and among the regulated community. It also speaks to the fact that Clinton (at the time of the Executive Order) presided over a unified government and, as such, was not likely to be subject to congressional reprimand. *See* Levinson & Pildes, *supra* note 82, at 2327 (discussing the growing importance of party identity in Congress-White House relations).

¹¹⁴ *See* Kagan, *supra* note 112, at 2293-96.

Executive Orders, and has also sought aggressively to centralize government power in a unitary executive.¹¹⁵

The persistence of Reagan's embrace of centralization, unitariness, and ideological compatibility demonstrates two phenomena. First, Reagan's initiatives strengthened the presidency. "In moving ambitiously down the paths of politicization and centralization, [Reagan] built a set of administrative arrangements that by past standards proved coherent, well integrated, and eminently workable."¹¹⁶ Consequently, future Presidents presumably would "have every reason to learn from and build upon the Reagan example in seeking to enhance their own institutional capacities for leadership."¹¹⁷ Second, for reasons we will now detail, Reagan's regulatory initiatives make more sense today than ever before. When the parties are polarized and the White House and Congress are divided, Presidents have strong incentives to pursue unilateral policymaking through loyal appointees.¹¹⁸

Party polarization and divided government both push the locus of government authority away from Congress and toward government agencies, "such that executive and administrative agency action has displaced lawmaking as the principal source of policymaking."¹¹⁹ Given the increasingly divergent ideological agendas of Democrats and Republicans, it becomes more difficult for Congress and the White House to agree on significant legislation, especially in times of divided government.¹²⁰ Furthermore, even when

¹¹⁵ See, e.g., Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 18, 2007) (amending Exec. Order No. 12,866, 3 C.F.R. 638 (1994)). For a general (and highly critical) treatment of this subject, see generally CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY (2007). For a more positive view of the Bush II administration, see Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power* 32-51 (Univ. Chi. Law Sch. Pub. Law & Legal Theory Research Paper Series, Paper No. 121, 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=922400 (arguing that President George W. Bush's signing statements do not threaten the separation of powers and may be a helpful aid in statutory interpretation).

¹¹⁶ Moe, *supra* note 51, at 271.

¹¹⁷ *Id.* Some scholars also suggest that "[o]nce an area of administration has been politicized it is virtually impossible to reverse the process." Pfiffner, *supra* note 99, at 59.

¹¹⁸ When Reagan assumed office, the parties were not especially polarized. See *supra* notes 74-85 and accompanying text. In other words, Reagan's initiatives foreshadowed today's era of party polarization. For reasons previously detailed, Reagan's efforts to transform the Republican Party anticipated a sharp ideological divide between Democrats and Republicans. See *supra* p. 477 fig.6.

¹¹⁹ Neal Devins, *Signing Statements and Divided Government*, 16 WM. & MARY BILL RTS. J. 63, 71 (2007); see also Kagan, *supra* note 112, at 2248-50.

¹²⁰ Devins, *supra* note 119, at 71. Indeed, the combination of party polarization and supermajority requirements in the Senate limits Congress's ability to enact significant legislation during periods of unified government if the minority party has at least forty members in the Senate. But see DAVID R. MAYHEW, DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946-2002, at 76 (2d ed. 2005).

Congress enacts legislation, “ideological divergence between Democrats and Republicans makes it likely that the President and Congress will have competing spins on legislative meaning.”¹²¹

Divided government, relatively unusual before 1955, has become the norm over the past fifty years.¹²² By the end of the Bush II Administration in 2009, different parties will have controlled the White House and at least one house of Congress for thirty of the last forty years.¹²³ With the dramatic rise of political polarization since the 1980 election of Ronald Reagan, Presidents invariably pursue policy initiatives through executive orders, directives, and other unilateral acts.¹²⁴ Consider, for example, Bill Clinton’s health care reforms and George W. Bush’s faith-based initiatives. In both instances, Congress refused to enact legislation backing the President, and in both instances, Bush and Clinton advanced their policy priorities through unilateral action.¹²⁵

For its part, Congress rarely seeks to overturn unilateral, presidential action.¹²⁶ Congress attempted to overturn only thirty-seven of approximately 1,000 executive orders issued from 1973 to 1998. Of the thirty-seven congressional bills challenging executive action, only three became law.¹²⁷ Rather than confronting unilateral executive actions directly, the opposition party in Congress instead seeks to wield influence by using its confirmation and oversight powers to push agency heads away from presidential priorities and toward competing congressional priorities.¹²⁸ During periods of divided government, the opposition party can use its oversight powers to hold hearings, demand that agency heads turn over information, and otherwise attempt to block executive policy making.¹²⁹ Perhaps more importantly, the opposition

¹²¹ Devins, *supra* note 119, at 72.

¹²² Levinson & Pildes, *supra* note 82, at 2330-31.

¹²³ Before the 2000 presidential election, government was unified for only six of the prior thirty-two years (twenty percent of the time). *Id.* During the Bush II years, Democrats controlled the Senate from 2001-2002 and both houses from 2007-2008.

¹²⁴ See WILLIAM G. HOWELL, *POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION* 6 (2003); Terry M. Moe & William G. Howell, *Unilateral Action and Presidential Power: A Theory*, 29 *PRESIDENTIAL STUD. Q.* 850, 851 (1999).

¹²⁵ See Devins, *supra* note 119, at 67; William G. Howell, *Unilateral Powers: A Brief Overview*, 35 *PRESIDENTIAL STUD. Q.* 417, 418 (2005).

¹²⁶ Devins, *supra* note 120, at 67.

¹²⁷ Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 *J.L. ECON. & ORG.* 132, 165-66 (1999); see HOWELL, *supra* note 124, at 121 (“The president’s powers of unilateral action are greatest when they do not require Congress to take any subsequent action, something not easily done given the vast transaction costs and collective action problems that plague the institution.”).

¹²⁸ Devins, *supra* note 119, at 65.

¹²⁹ During periods of unified government, when the President’s party controls oversight, oversight takes a back seat to party loyalty. Specifically, party polarization typically results in comparatively lax oversight – both because there is a greater commitment to party unity

party can use its confirmation power to push the President to nominate agency heads whom its members find acceptable.¹³⁰ In particular, by placing holds on presidential nominees, the opposition party can block votes on presidential appointments unless sixty senators vote to break the hold.

Increasing political polarization in Congress has complicated the confirmation politics dynamic in three ways. First, the stakes are higher. Political polarization has shifted the focus of government policymaking away from Congress and to government agencies. Second, the ideological gap between Democrats and Republicans makes it harder for the President and his opponents in Congress to agree on a consensus nominee. Third, the President and his Senate opponents use the appointments and confirmation process more strategically to advance their respective agendas. Presidents place greater emphasis on ideological conformity in their nominees; the opposition party in the Senate increasingly uses its confirmation power to stave off presidential unilateralism and otherwise push its agenda.

Against this backdrop, it is little wonder that the dance that takes place between Congress and the White House on confirmation politics has become so intricate and explosive.¹³¹ Once a process of conflict avoidance and resolution, “the confirmation process has become conflict seeking rather than conflict avoiding, conflict magnifying rather than conflict minimizing; and the root of nearly all appointment conflict is public policy.”¹³² The advent of party polarization, something that began immediately before Ronald Reagan assumed office, marked a dramatic shift in Senate procedures. Starting at that time, senators “began to hold longer hearings, increasingly used strategic holds on nominations for political leverage, and increasingly scrutinized nominees.”¹³³ “Nominees,” as an official of both Bush administrations put it, “are now treated like pieces of legislation, facing the full array of

and because the majority in Congress is more likely to agree with the President’s policy priorities. Devins, *supra* note 119, at 74-76; Levinson & Pildes, *supra* note 82, at 2344-46.

¹³⁰ See Devins, *supra* note 119, at 70.

¹³¹ The 2005 fight over Democratic filibusters of Bush II judicial nominees exemplifies this struggle. The Republican-controlled Senate was on the verge of approving the so-called “nuclear option,” a change in Senate rules that would ensure up or down votes on all judicial nominees. Just before the scheduled vote, a group of fourteen Democrats and Republicans came together to craft a deal that averted that vote. Charles Babington & Shailagh Murray, *A Last-Minute Deal on Judicial Nominees*, WASH. POST, May 24, 2005, at A1. For a more complete treatment of this issue, see generally David S. Law & Lawrence B. Solum, *Judicial Selection, Appointments Gridlock, and the Nuclear Option*, 15 J. CONTEMP. LEGAL ISSUES 51 (2006).

¹³² G. Calvin Mackenzie, *The State of the Presidential Appointments Process*, in INNOCENT UNTIL NOMINATED: THE BREAKDOWN OF THE PRESIDENTIAL APPOINTMENTS PROCESS 1, 29 (G. Calvin Mackenzie ed., 2001).

¹³³ Ho, *supra* note 2, at 28.

parliamentary weapons such as delayed hearings or floor votes, filibusters and so-called ‘holds.’”¹³⁴

The increasing politicization of the confirmation process, as we will soon discuss, has fundamentally transformed the nomination and confirmation of independent-agency heads. In particular, White House vetting of independent-agency appointments, and the Senate’s corresponding power to confirm, has become especially consequential. Presidents cannot fire independent-agency heads on policy grounds and, as such, have been constrained in their efforts to direct independent-agency policy making.¹³⁵ In particular, unlike executive agencies, independent agencies need not submit their regulatory proposals to OMB for approval.¹³⁶ They often manage to escape OMB review of budget requests or at least submit their budget requests to Congress directly at the same time.¹³⁷ Likewise, albeit less importantly, most independent agencies have substantial litigation authority. Outside of Supreme Court litigation, which is typically controlled by the Solicitor General, the President cannot use the Justice Department to ensure the legal policymaking of these independent agencies remains consistent with presidential priorities.¹³⁸

The following picture backs up the preceding analysis. In the post-Reagan era, confirmation delays of independent-agency heads have grown markedly, particularly for opposition-party nominations. This change closely correlates with political polarization, especially given that the President’s Senate opponents increasingly see the confirmation process as a way to defend their policymaking prerogatives.¹³⁹ In one critical respect, the opposition party in the Senate has succeeded in its efforts – opposition senators regularly use holds and other delaying strategies to pressure the President to appoint party loyalists to slots held by opposition-party members.

¹³⁴ Gary J. Andres, *Postcards from Sisyphus: What I Saw During the Confirmation Wars*, 35 POL. SCI. & POL. 55, 55 (2002) (providing a firsthand account of confirmation battles from a member of the White House Legislative Affairs Staff).

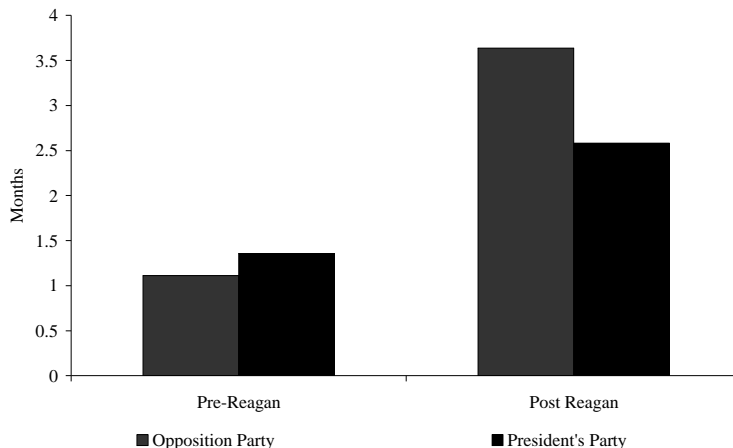
¹³⁵ See *supra* notes 41-42 and accompanying text.

¹³⁶ See *supra* notes 100-05 and accompanying text (discussing the Reagan administration’s rationale for excluding independent agencies from OMB review); *supra* note 113 (discussing the Clinton administration’s decision to ask independent agencies to provide planning documents to OMB).

¹³⁷ See David E. Lewis, *The Adverse Consequences of the Politics of Agency Design for Presidential Management in the United States: The Relative Durability of Insulated Agencies*, 34 BRIT. J. POL. SCI. 377, 389-90 (2004).

¹³⁸ See generally Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CAL. L. REV. 255 (1994) (discussing both pros and cons of this arrangement). On the perils of presidential challenges to independent litigation authority in court, see Devins, *supra* note 106, at 1042-50 (discussing Bush I’s failed effort to seize litigation authority away from the U.S. Postal Service).

¹³⁹ Political polarization and divided government have also resulted in confirmation delays of the President’s nomination of executive-agency heads. See McCarty & Razaghian, *supra* note 68, at 1141.

Figure 7: Confirmation Delay for Vacancies by Party and Pre/Post-Reagan

Opposition-party success stems from the fact that the President often makes multiple nominations to the same commission simultaneously because some commissioners decide not to complete terms at the very time that other commissioners' terms expire. This situation allows for "batching": the opposition party demands that the President nominate a party loyalist to an opposition-party slot in exchange for the opposition party supporting the President's same-party nominations. For better or worse, batching has become a common tactic in the modern appointments process. Daniel Ho has both statistically verified the increase and tied the increase to party polarization (and, coincidentally, the Reagan Revolution): "measuring 'batching' by the number of nominees confirmed two days apart, 24% of nominees were batched prior to 1980, compared to 48% after 1980."¹⁴⁰ Examples of this practice abound, including recent appointments to the FCC,¹⁴¹ the FEC,¹⁴² the Nuclear Regulatory Commission,¹⁴³ and the National Labor Relations Board.¹⁴⁴ In addition to "batching" multiple members to the same independent agency, opposition-party senators pressure the President to appoint opposition-party

¹⁴⁰ Ho, *supra* note 2, at 29.

¹⁴¹ See Mackenzie, *supra* note 132, at 33 (discussing White House-Senate negotiations over the appointment of four FCC commissioners in 1997, which included two Democrats and two Republicans).

¹⁴² See Ben Schneider, *Senators Await Reid Decision on Handling FEC Nominees*, CONGRESS DAILY, Oct. 4, 2007 (discussing 2007 efforts to package the appointment of four FEC nominees, two Democrats and two Republicans).

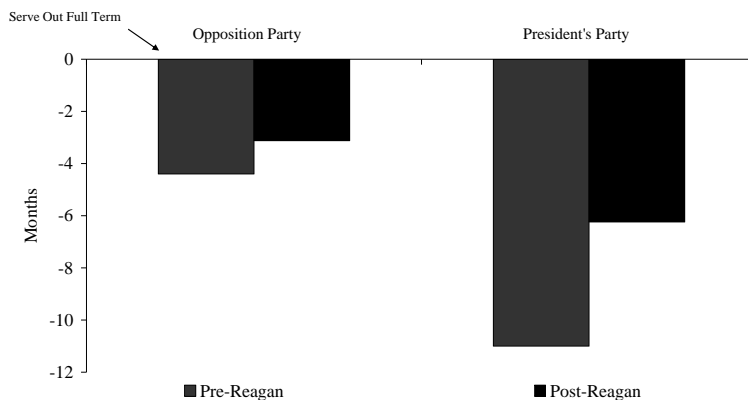
¹⁴³ See Steve Tetreault, *Reid Plans to Block Republican NRC Nominee*, LAS VEGAS REV.-J., July 18, 2007, at 2B (discussing efforts to package a Democratic and Republican nominee to the NRC).

¹⁴⁴ See Flynn, *supra* note 107, at 1393 n.145, 1429-32.

loyalists to vacant seats on an independent agency by placing “holds” on presidential nominees that have nothing to do with an independent-agency appointment. For example, Senate Republicans held up Clinton’s U.N. ambassador pick, Richard Holbrooke, in order to secure the nomination of Republican Brad Smith to the FEC.¹⁴⁵

Batching has profound consequences on appointments politics. Cross-party appointees demonstrate particular loyalty to their parties. In the post-1980 period, according to Daniel Ho, “Republican presidents appear to appoint Democrats [to independent agencies] who are even *more liberal* than Democrats appointed by Democratic presidents (and vice versa).”¹⁴⁶ Given the propensity of commissioners to vote along party lines,¹⁴⁷ the ability of the opposition party in the Senate to push the President this way becomes highly consequential. As the picture below illustrates, party loyalty affects the willingness of opposition-party commissioners to resign before the end of their terms. Consistent with claims we have made about party polarization in the post-Reagan era, this picture strongly suggests opposition-party commissioners more often see themselves as party loyalists, such that opposition-party commissioners more frequently serve out their terms when the President is from another party. Indeed, while all commissioners now remain for longer proportions of their terms, this is particularly the case for opposition-party commissioners.

Figure 8: Commissioner Tenure by Party and Pre/Post-Reagan Administration



¹⁴⁵ Mackenzie, *supra* note 132, at 33. On occasion, majority and minority leaders of the Senate also orchestrate deals. See Karen Foerstel, *Dozens of Clinton Nominees Win Confirmation After Lott Strikes Deal with Democrats*, C.Q. WKLY., Nov. 13, 1999, at 2714.

¹⁴⁶ Ho, *supra* note 2, at 4.

¹⁴⁷ See *infra* notes 153-65 and accompanying text.

The willingness of the opposition party to do battle with the President over the confirmation of independent-agency heads and the willingness of opposition-party commissioners to serve through the end of their terms suggest independent agencies enjoy partial insulation from presidential control. As Part I made clear, the principal reason Congress chooses independent agencies over some other institutional design is to limit presidential prerogatives.¹⁴⁸ Limitations on the President's power to remove commissioners as well as the mandate that the President appoint Democrats as well as Republicans speak to Congress's hope that opposition-party commissioners will stay in office through their terms and that opposition-party commissioners will act independently rather than simply embrace the President's policy agenda. At one level, it therefore appears that political polarization strengthens the institutional design of independent agencies – both with respect to the willingness of opposition-party commissioners to check the President and the willingness of the opposition party in the Senate to use the confirmation power to push for commissioners who will not simply rubberstamp the President's decisions. The question remains: what happens after the President is able to appoint a majority of commissioners from his party? For reasons we will detail in Part IV, it seems political polarization also contributes to greater presidential control of independent agencies *after* the President has appointed a majority of commissioners from his party.

IV. CONCLUSION: HOW PARTY POLARIZATION CONTRIBUTES TO PRESIDENTIAL CONTROL OF INDEPENDENT AGENCIES

We have demonstrated how party polarization affects commissioner ideology, the willingness of commissioners to serve out their terms, and the willingness of the opposition party in the Senate to use delaying strategies to advance its agenda.¹⁴⁹ For reasons we will now detail, the very forces that make opposition-party commissioners and senators fight for opposition-party policy preferences also make it more likely that presidential-party commissioners and senators will fight for presidential preferences. Consequently, independent agencies more often polarize along party lines: they resist presidential preferences when a majority of commissioners are from the opposition party and support presidential preferences once a majority of commissioners are from the President's party. While we have not conducted independent empirical research to buttress our conclusion, so that it should be considered more impressionistic than other parts of this Article, we feel that common sense and existing scholarship point to the increasing identity of interests between the President and independent-agency commissioners from the president's party.¹⁵⁰ Aside from anecdotal stories published in newspapers

¹⁴⁸ See *supra* notes 11-14 and accompanying text.

¹⁴⁹ See discussion *supra* Part III.

¹⁵⁰ For a competing perspective (limited to NLRB appointees during the Bush I and Clinton years), see Flynn, *supra* note 107, at 1413. For reasons previously detailed, we

(discussing policy cohesion between independent agencies and the President as well as the personal commitment of presidential appointees to advance presidential priorities),¹⁵¹ systematic studies of both commissioner voting and the nomination process support our claim that, in this era of party polarization, independent-agency heads are especially likely to support the priorities of the political party they represent. Moreover, the limited empirical research we have conducted on litigation conflicts between independent agencies and the Solicitor General supports our claim.¹⁵²

As Part III makes clear, ideology plays a more pronounced role in both the appointment and confirmation of independent-agency heads. Starting with the Reagan administration, Presidents have placed greater emphasis on a nominee's commitment to the President's agenda.¹⁵³ For its part, the opposition party in the Senate has chosen to fight fire with fire – so while Presidents now vet for ideological conformity, the opposition party in the Senate makes full use of its confirmation power to ensure its nominees are party loyalists.¹⁵⁴ Also, as the figure below demonstrates, party unity has grown markedly since the late 1970s, with both Republicans and Democrats voting as a unified front on roughly ninety percent of roll call votes. This graph illustrates the proportion of legislators voting with their own party on party unity votes over time. These are votes in which a majority of Democrats voted against a majority of Republicans. Whereas the percentages were quite high in the late 1800s, indicating that Democrats and Republicans rarely crossed party lines, the percentages were much lower by the 1950s. Members from one party more regularly voted with a majority of members from the other party on important votes in Congress. While there was slightly more party unity in the Senate than in the House, and some variation in unity around

think that Flynn's analysis is not inconsistent with our claims. *See supra* note 107. Moreover, even if her analysis is inconsistent with ours and even if her data substantiate her claims, Flynn's analysis is limited to the NLRB. *See Flynn, supra* note 107, at 1365. As Flynn states, NLRB politics is unique in that presidents often cut a middle path in order to avoid choosing between business and labor interests. *Id.* at 1364. For that reason, Flynn sees Reagan's appointment of pro-business commissioners as anomalous. *Id.* at 1384; *see infra* note 165 and accompanying text (explaining how Reagan transformed the NLRB through his appointments).

¹⁵¹ For example, there are several journalistic accounts of how Presidents Clinton and Bush II named commission chairs who were party loyalists. *See, e.g.,* David Hatch, *Is the FCC Free From Partisan Politics?*, 2005 NAT'L J. 2935, 2935 (quoting Clinton FCC Chair Reed Hundt as saying that he “naturally . . . preferred the White House to approve of [his] agenda”); Stephen Labaton, *Praise to Scorn: Mercurial Ride of S.E.C. Chief*, N.Y. TIMES, Nov. 10, 2002, at 1-1 (stating that Bush II SEC chair Harvey Pitt “had ultimately become a casualty . . . struggling to remain a loyal Republican without understanding how his partisanship . . . would alienate important Democrats”).

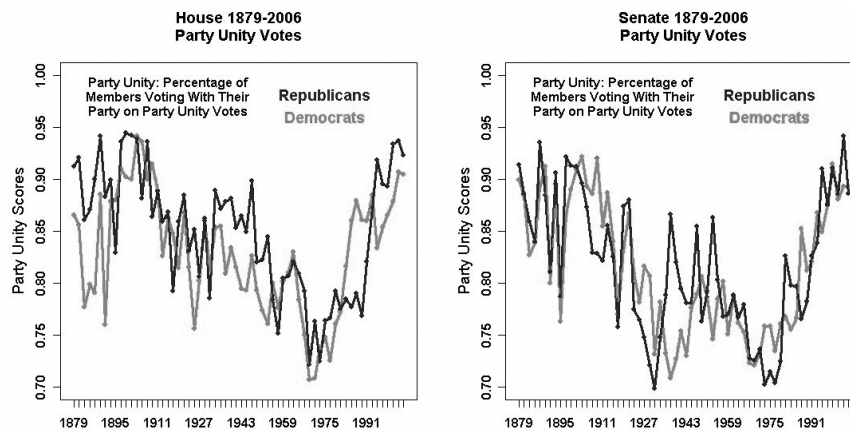
¹⁵² *See infra* p. 497 tbl.1.

¹⁵³ *See supra* note 95 and accompanying text.

¹⁵⁴ *See supra* note 140 and accompanying text.

the middle of the century, the steady increase in this practice after the mid-1970s is striking. Put another way: with members of each party seeing themselves as agents for their party, Democrats in the Senate are apt to agree not just with each other but with other Democrats – whether it is a Democrat in the White House or Democrats who serve on independent agencies. The same is also true of Republicans (even more so, since there is greater intra-party agreement among Republicans).¹⁵⁵

Figure 9: Proportion of Legislators Voting with Their Party on Party Unity Votes, 1879-2006¹⁵⁶



Additional support for this claim can be found in studies of decision making by independent agencies.¹⁵⁷ A study of seven independent and executive agencies during the Carter and Reagan administrations underscores the pivotal role that appointments and confirmation play in agency decision making.¹⁵⁸ In particular, although reorganizations, congressional oversight, and budgeting are important, “[t]he leadership of an agency is the most frequent [and most potent] mechanism for changing agency behavior.”¹⁵⁹ Daniel Ho’s study of FCC voting patterns from 1965-2006 likewise points to the pivotal role of appointees’ party identity. By looking at roughly 100,000 votes by forty-six different commissioners, Ho concludes “[c]ommissioner partisan affiliation exhibits robust and large predictive power over votes, even holding constant

¹⁵⁵ See *infra* p. 493 fig.9.

¹⁵⁶ Nolan McCarty, Keith T. Poole, & Howard Rosenthal, Polarized America Page, <http://polarizedamerica.com> (last visited Feb. 17, 2008).

¹⁵⁷ See, e.g., B. Dan Wood & Richard W. Waterman, *The Dynamics of Political Control of the Bureaucracy*, 85 AM. POL. SCI. REV. 801, 801 (1991).

¹⁵⁸ *Id.* at 801.

¹⁵⁹ *Id.* at 822.

the party of the appointing president. This [finding] . . . rejects the notion that expertise exclusively drives decision making.”¹⁶⁰ Equally telling, FCC commissioners have taken steps to demonstrate party loyalty – so much so that commissioners increasingly file separate statements after a change of administration, so that Democrats and Republicans could establish “their reputations for loyalty.”¹⁶¹ Studies of the National Labor Relations Board reach a similar conclusion – pointing, for example, to the transformative role of Reagan appointees. These nominees were not the usual “establishment-type management representatives” that were acceptable to both labor and business.¹⁶² Instead Reagan pushed for nominees that questioned the Board’s traditional role.¹⁶³ In this way, Reagan’s nominees were a radical departure.¹⁶⁴ More significant, the Reagan Board’s “pattern of decisions changed remarkably from that of its recent predecessors” – ruling against employers approximately half the time as compared to Nixon/Ford/Carter Boards that ruled against employers about eighty percent of the time.¹⁶⁵

One final measure of increasing presidential control over independent-agency decision making is the near absence of litigation conflicts between independent agencies and the Solicitor General’s office.¹⁶⁶ During the Nixon and Carter administrations, these conflicts were common.¹⁶⁷ Even though the Solicitor General spoke the voice of the “United States” before the Supreme Court, the Solicitor General would often accommodate independent agencies’ desires to speak with their own voices.¹⁶⁸ In particular, reflecting the fact that independent-agency decision making did not routinely match executive branch preferences, independent agencies would sometimes file competing briefs or make oral arguments that contradicted the views of the “United States.”¹⁶⁹ These public disagreements had three sources. First, of course, there was a disagreement between independent-agency heads and the executive.¹⁷⁰

¹⁶⁰ Ho, *supra* note 2, at 4. For an anecdotal study of the FCC, focusing on how Reagan transformed agency decision making by appointing commissioners committed to his deregulatory agenda, see generally Devins, *supra* note 105.

¹⁶¹ Keith S. Brown & Adam Candeub, *Ideology Versus Partisanship: Regulatory Behavior and Cyclical Political Influence* 10 (Legal Stud. Research Paper Series, Paper No. 04-10, 2006).

¹⁶² James J. Brudney, *Isolated and Politicized: The NLRB’s Uncertain Future*, 26 COMP. LAB. L. & POL’Y J. 221, 248 (2005).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* For additional discussion of the NLRB, see *supra* notes 140-47 and accompanying text.

¹⁶⁶ See *infra* p. 497 tbl.1.

¹⁶⁷ For a fairly comprehensive detailing of significant litigation disputes between independent agencies and the Solicitor General, see Devins, *supra* note 138, at 258-59.

¹⁶⁸ *Id.* at 258.

¹⁶⁹ See *id.* at 264.

¹⁷⁰ *Id.* at 280.

Second, since several independent agencies have independent litigating authority before the federal courts of appeal, independent agencies had sometimes staked out a position at odds with the Solicitor General's preferences.¹⁷¹ Third, even though the Solicitor General controls nearly all government litigation before the Supreme Court, the Solicitor General thought it appropriate to inform the Court of both its views and competing independent-agency views.¹⁷² Carter Attorney General Griffin Bell, for example, emphasized that Justice Department lawyers "must take care not to interfere with the policy prerogatives of our agency clients."¹⁷³

Over the past twenty-five years, there has been a precipitous decline in the filing of competing Supreme Court briefs by independent agencies and the Solicitor General.¹⁷⁴ Starting with Reagan administration efforts to have the executive speak with a "unitary" voice, Presidents have placed great emphasis on intra-governmental policy cohesion when appointing independent-agency heads.¹⁷⁵ Reflecting the Reagan administration view that "the Attorney General's obligation to represent and advocate the 'client' agency's position must yield to a higher obligation to [follow the President's lead and] take care that the laws be executed faithfully," the executive did everything it could to push its agenda before the courts.¹⁷⁶ Indeed, the Reagan and Bush I administrations pushed unitariness even when independent agencies publicly disagreed with executive branch views.¹⁷⁷ In highly visible cases involving the Equal Employment Opportunity Commission (EEOC) and the U.S. Postal Service, White House officials sought to convince the independent agency either to reverse itself or to allow – in cases before federal courts of appeals – the Justice Department to present a unified government position, notwithstanding the fact that these agencies have independent litigation authority before federal courts of appeal.¹⁷⁸ More recently, the Clinton and Bush II administrations have prevented the Federal Election Commission and Securities and Exchange Commission (SEC) from presenting their independent views to the Supreme Court.¹⁷⁹

¹⁷¹ See *id.* at 274-78 (detailing statutory delegations of independent litigating authority to independent agencies).

¹⁷² *Id.* at 258.

¹⁷³ Griffin B. Bell, *The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?*, 46 *FORDHAM L. REV.* 1049, 1061 (1978). For a fuller discussion of Bell's position, contrasting it to the views of the Reagan administration, see Devins, *supra* note 50, at 281-82.

¹⁷⁴ Devins, *supra* note 138, at 288.

¹⁷⁵ *Id.* at 285-86.

¹⁷⁶ Devins, *supra* note 50, at 281 (internal quotation marks omitted).

¹⁷⁷ *Id.* at 282.

¹⁷⁸ See *id.* at 284-312.

¹⁷⁹ Jonathan Eisenberg, *Beyond the Basics: Seventy-Five Defenses Securities Litigators Need To Know*, 62 *BUS. LAW.* 1281, 1293 (2007); George F. Fraley, III, Note, *Is the Fox*

Far more striking, the Bush II administration disagreement with the SEC stands alone. Today, there are almost no public disagreements between independent agencies and the Solicitor General.¹⁸⁰ As the following table illustrates, there were *no* competing filings of four prominent independent agencies (EEOC, NLRB, FCC, SEC) and the Solicitor General during the 1995-2004 period. Moreover, while there were nine cases out of 157 where the independent agency did not sign onto a Solicitor General brief, a review of these cases reveals *no* merits conflicts between these independent agencies and the Solicitor General. In dramatic contrast, there were numerous conflicts and competing filings with all four of these agencies before 1995, and especially before 1981, when Ronald Reagan became President.¹⁸¹

Watching the Henhouse?: The Administration's Control of FEC Litigation Through the Solicitor General, 9 ADMIN. L.J. AM. U. 1215, 1219 (1996).

¹⁸⁰ See *infra* p 497 tbl.1.

¹⁸¹ See Devins, *supra* note 50, at 282.

Table 1: Filing of Supreme Court Briefs by Independent Commissions, 1970s to 2004

EEOC	1970s	1995-2004
Joint	4/5 (80%)	16/16 (100%)
Agency	0/5	0/16
SG	1/5 (20%)	0/16
Competing	1/5 (20%)	0/16
NLRB	1970s	1995-2004
Joint	49/49 (100%)	67/67 (100%)
Agency	0/49	0/67
SG	0/49	0/67
Competing	0/49	0/67
FCC	1970s	1995-2004
Joint	5/8 (63%)	51/59 (86%)
Agency	1/8 (13%)	0/59
SG	0/8	8/59 (14%)
Competing	2/8 (25%)	0/59
SEC	1970s	1995-2004
Joint	5/6 (83%)	14/15 (93%)
Agency	0/6	0/15
SG	1/6 (17%)	1/15 (7%)
Competing	0/6	0/15
Total	1970s	1995-2004
Joint	63/68 (93%)	148/157 (94%)
Agency	1/68 (1%)	0/157
SG	2/68 (3%)	9/157 (6%)
Competing	2/68 (3%)	0/157

It is time to wrap up. This Article has demonstrated that the independent-agency institutional design is working as well as it can. The very purpose of this design was to limit presidential control of independent agencies in two ways. First, when assuming office, a President would inherit commissioners from both his party and the opposition party. Congress hoped that opposition-party commissioners would stay in office through the ends of their terms – thereby limiting presidential control of independent agencies.¹⁸² As Figures 1 and 2 show, opposition-party commissioners serve out most, if not all, of their terms. For this very reason, as Figure 3 illustrates, it now takes the President longer than ever before to appoint a majority from his party to an independent agency. Second, Congress hoped that opposition-party senators would use

¹⁸² See *supra* note 51 and accompanying text.

their confirmation power to resist presidential efforts to stack independent agencies with appointees who backed presidential preferences.¹⁸³ As Part III demonstrated, opposition-party senators are pressuring the President this way. Through the use of holds and other delaying strategies, which result in the batching of nominees from the President's party and the opposition party, the opposition party has succeeded in forcing the President – when making cross-party appointments – to appoint opposition-party loyalists. Figure 4 backs up this claim, highlighting increased delays in the confirmation process. The subsequent discussion, demonstrating that cross-party appointees are especially ideological, also backs up this claim.

That the institutional design is working as well as it can, however, does not mean Presidents have less actual control of independent agencies. As we have detailed in this Part, there is good reason to think that independent agencies will adhere to presidential preferences *once* a majority of commissioners are from the President's party. In particular, party identity is an especially good proxy for commissioner voting practices. This is tied to two phenomena – both of which can be traced to party polarization (and the Reagan Revolution that contributed to today's polarization). First, as Part III demonstrates, Presidents look to appoint independent-agency heads who are committed to the President's policy agenda. Second, as discussed in Parts III and IV, there is no meaningful ideological gap among Democrats or Republicans. As Figures 6 and 7 show, Democrats are likely to agree with each other and disagree with Republicans (and vice versa). Party cohesion is not limited to senators; it applies to independent-agency heads and the President.

Our bottom line is that party polarization plays a defining role in understanding President-Senate-Commissioner dynamics. Party polarization makes it likely that opposition-party senators and opposition-party commissioners will try to check presidential power; party polarization also contributes to the President's ultimate dominion over independent-agency decision making.

¹⁸³ See *supra* note 128 and accompanying text.