

# THE INDEPENDENT AGENCY MYTH

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*Republicans and Democrats are fighting the wrong fight over independent agencies. Republicans are wrong to see independent agencies as anathema to hierarchical presidential control of the administrative state. Democrats are likewise wrong to reflexively defend independent agency expertise and influence. Supreme Court Justices also need to break free from this trap; the ongoing struggle over independent agencies should be about facts, not partisan rhetoric.*

*This Article seeks to reframe the fight over independent agencies. By surveying executive branch and independent agency department heads and supervisors during the Obama (2014) and Trump (2020) administrations, we have assembled unique and expansive data for evaluating agency performance. This data is also uniquely reliable: Notwithstanding fundamental differences in the rhetoric and strategies of these two administrations, these surveys of 554 political appointees and 4,776 career executives reinforce each other. The hallmarks of independent agency design (including staggered terms, for cause removal, and partisan balancing) neither facilitate nonpartisan expertise nor shield independent agencies from presidential control.*

*Our findings are striking and disturbing. Contrary to the goals and assumptions of Progressive Era designers, independent agencies are not particularly expert, influential, or independent. Indeed, the very touchstones of today's politics—party polarization and presidential unilateralism—cannot be squared with Progressive Era assumptions about both independent agency decision-making (including that agency decision-making is expert, apolitical, fact-based, and durable) and the willingness of political actors to support independent agency decision-making. Correspondingly, we recommend that Congress no longer turn to the independent agency design when establishing new federal programs. Our data also*

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*calls attention to a critical divide between major and smaller independents. In the maelstrom of party polarization and presidential efforts to gain control of major independent agencies, smaller independents are largely forgotten by a government that has too many agencies to manage and too many Senate-confirmed vacancies to fill. In other words, our government is overburdened and these agencies are its orphans. We recommend that smaller independents be relocated to the executive branch where they would benefit from coordinated executive branch initiatives, Department of Justice representation, and Office of Management and Budget review. For the major independent agencies, we argue that the independent agency design may not work well but ought not to be completely jettisoned. It is not obvious that these agencies will be more successful in the executive branch and there are risks of unintended negative consequences.*

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#### INTRODUCTION

Independent agencies are the “final frontier” in the raging, partisan battle over presidential control of the administrative

state;<sup>1</sup> indeed, the very existence of agencies like the Federal Reserve, the Federal Communications Commission, and the National Labor Relations Board is now on the line. Democrats defend independent agencies, arguing that the “diverse problems of government demand diverse solutions,” that the “institutional design” of government agencies “is one for the political branches” to figure out, and that the courts should not impose “rigid rules” limiting experimentation.<sup>2</sup> Correspondingly, Democrats think it appropriate to constrain an otherwise too powerful executive in order to put in place the Progressive vision of politically insulated fact-based agency decision-making. For Democrats, independent agencies are sacrosanct; the triumph of a dynamic administrative state and the repudiation of formalism wrapped into one. Republicans are just the opposite: embracing hierarchical presidential control as both a bulwark against the deep state and a pathway to making agencies “more accountable to the people,”<sup>3</sup> Republicans envision “a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts.”<sup>4</sup> Invoking the unitary executive as their battle cry, Republicans see independent agencies as an inappropriate restraint on presidential power and anathema to

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<sup>1</sup> STEPHEN SKOWRONEK, JOHN A. DEARBORN & DESMOND KING, PHANTOMS OF A BELEAGUERED REPUBLIC 160 (2021).

<sup>2</sup> That is how Justice Elena Kagan put it in her partial dissent in *Seila Law LLC v. Consumer Financial Protection Bureau*. 140 S. Ct. 2183, 2236–37 (2020) (Kagan, J., dissenting in part) (disapproving of majority opinion declaring unconstitutional single member commissions). Amicus briefs filed by twenty Democratic Senators and the Democrat-controlled House of Representatives backed the independent agency design. Brief of Current and Former Members of Congress as Amici Curiae in Support of Affirmance at 1A–3A, *Seila Law LLC*, 140 S. Ct. 2183 (No. 19–7); Brief of Amici Curiae U.S. Senators Sheldon Whitehouse, Richard Blumenthal, and Mazie Hirono in Support of Court-Appointed Amicus Curiae, *Seila Law LLC*, 140 S. Ct. 2183 (No. 19-7); Brief for Amicus Curiae The United States House of Representatives in Support of the Judgment Below, *Seila Law LLC*, 140 S. Ct. 2183 (No. 19-7). No Democrats signed onto briefs challenging the independent agency design.

<sup>3</sup> *In re Aiken County*, 645 F.3d 428, 440 (D.C. Cir. 2011) (Kavanaugh, J., concurring).

<sup>4</sup> That is how the all-Republican majority, speaking through Chief Justice John Roberts, put it in *Seila Law*. 140 S. Ct. 2183 at 2207. Amicus briefs filed by thirty congressional Republicans (three Senators and twenty-seven Representatives) unanimously called into question the independent agency design. Amicus Brief of U.S. Senators Mike Lee, James Lankford, and M. Michael Rounds Supporting Petitioner, *Seila Law LLC*, 140 S. Ct. 2183 (No. 19-7); Brief Amici Curiae of Twenty-Seven members of the U.S. House of Representatives in Support of Petitioner, *Seila Law LLC*, 140 S. Ct. 2183 (No. 19-7). No Republican lawmaker signed onto briefs backing the independent agency design. The Trump Justice Department likewise challenged the independent agency design. Brief for Respondent Supporting Vacatur, *Seila Law LLC*, 140 S. Ct. 2183 (No. 19-7).

the constitutional design.<sup>5</sup> After all, presidents cannot set independent agency policy; they inherit agencies populated by the prior president and cannot directly intervene in independent agency decision-making.

From its 1935 approval of the independent agency design in *Humphrey's Executor* through the Rehnquist Court,<sup>6</sup> the Supreme Court had largely embraced the agency independence model.<sup>7</sup> Starting with the Roberts Court, however, the Court—splitting along party lines<sup>8</sup>—has backed proponents of the unitary executive and formally limited the *Humphrey's Executor* decision to “multimember expert agencies that do not wield substantial executive power.”<sup>9</sup> The battle lines during the Trump presidency were particularly pitched; Trump campaigned against the bureaucratic deep state and championed judicial appointees who were on record as embracing the unitariness model.<sup>10</sup> These appointees have already played a figural role in leading the charge against independents and seem ready to either further tighten the noose or do away with independents altogether.<sup>11</sup> In its October 2022 term, the Court

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<sup>5</sup> The Republican campaign for unitariness and against independent agencies began in earnest with the Reagan administration and the related rise of the conservative legal network. See CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT 160 (1991); Ganesh Sitaraman, Commentary, *The Political Economy of the Removal Power*, 134 HARV. L. REV. 352, 375–80 (2020); Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CALIF. L. REV. 255, 268 (1994).

<sup>6</sup> *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

<sup>7</sup> For a summary of these decisions, see ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 67–71 (6th ed. 2019).

<sup>8</sup> Starting when Elena Kagan joined the Court in 2010 and filled the seat previously held by Justice John Paul Stevens, the Court's ideological divide also became a partisan divide. See NEAL DEVINS & LAWRENCE BAUM, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT 4 (2019). On the independent agency issue, a liberal-conservative divide (with Justice Stevens siding with the Court's liberal Democrats) became a Democrat-Republican divide.

<sup>9</sup> *Seila Law LLC*, 140 S. Ct. at 2199–2200. In 2021, the Court extended *Seila Law* to the Federal Housing Finance Agency. *Collins v. Yellen*, 141 S. Ct. 1761, 1779 (2021). Through these rulings, the Roberts Court has essentially embraced the unitary executive model by limiting *Humphrey's* to its facts. See Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 SUP. CT. REV. 83, 106 (2021).

<sup>10</sup> For an insightful overview of the Trump era, see generally SKOWRONEK, DEARBORN & KING, *supra* note 1.

<sup>11</sup> It is little accident that Federalist Society events prominently (and regularly) featured panels on the future of independent agencies. For a listing of events see *Independent Agencies*, THE FEDERALIST SOCIETY, <https://fedsoc.org/search?term=independent+agencies> [<https://perma.cc/2HGM-LMUY>] (last visited July 25, 2023). For prescient analyses of the next wave of legal challenges to presidential removal authority, see Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 12 (2021) (assessing whether president should have broad

put the next nail in the independent agency coffin; in *Axon Enterprise v. Federal Trade Commission*, the Court ruled that a claimant need not exhaust all administrative remedies before launching a legal challenge to the independent agency design.<sup>12</sup>

What unites Democrats and Republicans is that they are both relying largely on platitudes and ignoring the reality of independent agencies. In this Article, we make use of extensive new data to show that the independent agency model no longer works; most independent agencies are not particularly expert, not particularly influential, and their policies and policy-making processes are subject to (not insulated from) elected branch oversight and manipulation. In short, Republicans and Democrats largely have it backwards. Republicans need to understand that presidents wield enormous power over independent agencies. Democrats likewise need to see how the independence model invites its own mischief and Democratic policy

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“for-cause” removal authority); Note, *The SEC Is Not an Independent Agency*, 126 HARV. L. REV. 781, 793 (2013) (rejecting implied “for cause” removal). See also Ian Milhiser, *A Wild New Court Decision Would Blow Up Much of the Government’s Ability to Operate*, VOX, (May 19, 2022), <https://www.vox.com/2022/5/19/23130569/jarkesy-fifth-circuit-sec> [<https://perma.cc/NDC9-L84E>] (discussing a May 2022 federal appeals ruling that “for-cause” removal protections cannot extend to employees at independent agencies, most notably, “administrative law judges”); Mohar Chatterjee, *Sean Spicer and Robert Vought Lose Lawsuit Against Biden Administration over Naval Board Dismissal*, POLITICO, (July 12, 2022), <https://www.politico.com/news/2022/07/12/sean-spicer-russell-vought-law-suit-biden-00045335> [<https://perma.cc/TB33-BTLE>] (discussing federal court refusal to recognize implied “for cause” removal).

<sup>12</sup> 143 S. Ct. 890, 897 (2023); see Adam Liptak, *Supreme Court Endorses Streamlined Challenges to Agency Power*, N.Y. TIMES (April 14, 2023), <https://www.nytimes.com/2023/04/14/us/supreme-court-administrative-state.html> [<https://perma.cc/9DA6-T7VK>]. In its October 2023 term, the Court will decide at least two cases regarding the constitutional authority of independent agencies. It will hear oral arguments regarding the constitutionality of agency self-funding mechanisms. See Katy O’Donnell, *Consumer Bureau Future at Stake as Supreme Court Takes up Funding Challenge*, POLITICO (Feb. 27, 2023), <https://www.politico.com/news/2023/02/27/supreme-court-consumer-bureau-funding-case-00084526> [<https://perma.cc/FL6P-3R7D>]. These mechanisms allow agencies to pursue their favored policies without fear of elected branch funding reprisals. Challengers argue that these funding mechanisms unconstitutionally undermine Congress’s role as overseer and appropriator. See *id.* The Court also agreed to hear a constitutional challenge to whether the SEC’s use of administrative law judges comports with the Appointments Clause. See Jan Wolfe, *Supreme Court Agrees to Hear Challenge to SEC’s Power: Case Set for Next Term Will Examine Legality of Agency’s In-House Tribunals*, WALL ST. J. (June 30, 2023), <https://www.wsj.com/articles/supreme-court-agrees-to-hear-challenge-to-secs-power-54b2cae0> [<https://perma.cc/8F5T-9MFN>]. That case too has far-reaching consequences as several agencies make use of in-house enforcement before administrative law judges.

goals may be better achieved through the unitariness model.<sup>13</sup> Donald Trump and a Republican Senate, for example, proved adept at undermining independent agency rulemaking and litigation.<sup>14</sup> By refusing to appoint or confirm Democratic commissioners, several independent agencies were either dominated by ideologically simpatico Republicans or lacked the necessary quorum to either adjudicate or regulate.<sup>15</sup> Likewise, the refusal of Senate Republicans to confirm Obama nominees effectively neutered some independent agencies, most notably the National Labor Relations Board.<sup>16</sup>

By refocusing the debate over independent agencies to the realities of modern-day governance, we highlight the mismatch between the presuppositions of the independent agency design and the realities of the politics of the last forty years. In particular, independent agencies are the creation of long-gone Progressive Era reformers and the workability of the independent agency design hinges on the workability of Progressive Era assumptions, namely, that a multi-member bipartisan group of experts would put aside ideology and work together to put in place fact-based regulations—regulations that would remain in place so long as the facts backed them up. Progressives also assumed that presidents and lawmakers would honor—not subvert—this institutional design; for example, presidents would nominate and the Senate would confirm independent agency heads. The realities of party polarization stand in stark contrast to these assumptions as do the expansionist tendencies of the “living presidency.”<sup>17</sup>

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<sup>13</sup> See Ronald Krotoszynski, *The Conservative Idea That Would Let Biden Seize Control of Washington*, POLITICO (Dec. 10, 2020), <https://www.politico.com/news/magazine/2020/12/10/nathan-simington-christopher-waller-fcc-federal-reserve-appointments-unitary-executive-authority-444136> [https://perma.cc/F9P2-7VVU].

<sup>14</sup> See Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585, 626 (2021); Revolving Door Project, *Dems Must Confront GOP Attacks on Independent Agencies*, CTR. FOR ECON. & POL'Y RSCH. (Nov. 12, 2019) [hereinafter *Revolving Door Project*], <https://cepr.net/dems-must-confront-gop-attacks-on-independent-agencies/> [https://perma.cc/BJ5T-5E5D].

<sup>15</sup> See *Revolving Door Project*, *supra* note 14.

<sup>16</sup> See *infra* notes 215–220. For an overview of how independent agencies increasingly have unfilled Commissioner seats, see Brian D. Feinstein & David T. Zaring, *Disappearing Commissioners*, IOWA L. REV. (forthcoming 2023) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4400583](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4400583) [https://perma.cc/VF8C-7T2F].

<sup>17</sup> See SAIKRISHNA BANGALORE PRAKASH, *THE LIVING PRESIDENCY: AN ORIGINALIST ARGUMENT AGAINST ITS EVER-EXPANDING POWERS* 44 (2020); Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 157 (1999).

The failure of the independent agency design is also the byproduct of another narrative, a narrative about the size and complexity of the modern administrative state. Progressive-era proponents of independent agencies were witness to the industrial revolution, the birth of the administrative state, and the rise of public administration as a field where experts could set public policy.<sup>18</sup> When the Supreme Court approved the independent agency design in 1935, there were 127 million Americans, 123 agencies (thirty of which were independent), and 780,582 federal employees.<sup>19</sup> In 2021, there are 332 million Americans, 434 agencies (fifty-nine of which are independent), and 2.68 million federal employees.<sup>20</sup> Today, Congress and the White House lack the time and resources necessary to attend to smaller independent agencies; the result of such neglect is that these agencies are effectively orphaned by Congress and the White House. Other changes in government also hamper today's independent agencies; for example, agencies are no longer self-contained fiefdoms; instead, an agency's power and reputation are tied to its ability to coordinate with other agencies.<sup>21</sup>

In the pages that follow, we call attention both to the realities of modern administration and to the unworkability of Progressive Era assumptions about governance. The principal contribution of this Article, however, is its original data. Through extensive surveys in 2014 and 2020 of 554 political appointees and 4,776 career executives, we demonstrate that the independent agency design rarely serves its intended purposes. Independent agencies are no more expert than executive agencies, independent agencies are less influential than executive agencies, independent agencies are not particularly insulated, and independent agency policymaking is not especially stable. These findings are buttressed by supplemental research regarding (1) the ability of presidents to gain control of

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<sup>18</sup> See *infra* notes 39–47 and the accompanying text.

<sup>19</sup> 5 SUSAN B. CARTER ET AL., HISTORICAL STATISTICS OF THE UNITED STATES 5-128 tbl.Ea894-903 (2006); Data on number of independent agencies based upon a hand count from the United States Government Manual (1935) and JENNIFER L. SELIN & DAVID E. LEWIS, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 42, tbl.3 (2d ed., 2018).

<sup>20</sup> For a count of the number of federal employees see SELIN & LEWIS, *supra* note 19, at 39. By independent here we mean multi-member bodies with fixed terms that are not part of the Executive Office of the President or an executive department.

<sup>21</sup> See generally MARK H. MOORE, CREATING PUBLIC VALUE: STRATEGIC MANAGEMENT IN GOVERNMENT (1995); Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1133 (2012).

an independent agency through the naming of chairs and the appointment of commissioners from the president's party,<sup>22</sup> (2) the power of both the president and Senate to frustrate quorum requirements and otherwise limit the filling of commissioner seats,<sup>23</sup> and (3) the role of party identity in commission decision-making, most notably, policy shifts by independent agencies when a majority of commissioners are from the president's party and the related efforts of the opposition party to batch presidential detractors with presidential loyalists.<sup>24</sup>

In this Article, we shift the debate regarding independent agencies away from shallow rhetorical platitudes and towards a deeper understanding of the causes and consequences of independent agency failure. More than anything, we demonstrate that the fight now playing out in the Supreme Court is being driven by rhetorical priors, not actual facts. Democratic interests are not well served by the independent agency design and Republicans will not see a restoration of presidential power if the Supreme Court eviscerates independent agencies. Instead, the stakes of this fight are fairly low. During this period of hyper-polarization, the benefits of the independent agency design are largely illusory and, relatedly, independent agency policy is little different than executive branch policy.

Part One explains the Progressive Era's embrace of the independent agency design and the critical assumptions that Progressives made regarding the President, the Congress, and especially independent agency heads. Part Two reports our research findings regarding independent agency expertise and influence, the stability of independent agency policies, and whether independent agencies are politically insulated. Part Two also highlights differences between major and smaller independent agencies. Major independents garner attention from the media and politicians; smaller independents are generally unknown and largely ignored. Part Three examines why the independent agency design rarely works. Party polarization and the president's expansionist tendencies are fundamentally at odds with Progressive Era assumptions; the transformation of government into a difficult-to-manage behemoth results in the orphaning of all but a handful of independent agencies. Part Four details our policy recommendations. We call for a moratorium on new independents. We also call for orphaned independent agencies to be refashioned as executive branch

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<sup>22</sup> See *infra* notes 191–207.

<sup>23</sup> See *infra* notes 182–190, 214–224, and 255–258.

<sup>24</sup> See *infra* notes 171–176.



agencies. There is no cost to legislative or executive priorities nor to Republican or Democratic priorities. On the other hand, these agencies will benefit from more stable leadership, Office of Management and Budget centralization, Department of Justice representation, and the prospect of better coordinating with other agencies. And while we argue that the Supreme Court's limiting and eventual repudiation of the independent agency design is far less consequential than imagined, we do not call for the elimination of politically salient major independents. By highlighting the risks of unintended consequences, we instead call for a more incremental approach to independent agency reform.

## I

### WHY INDEPENDENT AGENCIES?

Since 1887, Congress has created scores of administrative agencies with a degree of autonomy from elected officials.<sup>25</sup> These agencies are dramatically different from one another—their mission, their structure, and their powers run the gamut from small to large, weak to powerful, and barely independent to nearly autonomous.<sup>26</sup> Because Congress makes use of a seemingly infinite number of configurations of a broad array of design tools, there is not a single definition of independence; instead, the broad swath of government agencies enjoy varying degrees of independence. In this part, we will highlight the rise of independent agencies. Our focus will be the Gilded Age (the late 1860s through the 1890s), the Progressive Era (the 1890s to the 1920s), and the New Deal (1933–1939).<sup>27</sup> These are the years when Congress first experimented with the independent agency design, including design innovations such as staggered terms, partisan balancing requirements, and limits on the president's removal power. These are also the years in which Congress established a multitude of independent agencies, including most of today's "major" independent agencies.<sup>28</sup>

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<sup>25</sup> For an excellent overview, see generally MARSHALL J. BREGER & GARY J. EDLES, *INDEPENDENT AGENCIES IN THE UNITED STATES: LAW, STRUCTURE, AND POLITICS* (2015).

<sup>26</sup> See generally *id.*; Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769 (2013); Jennifer L. Selin, *What Makes an Agency Independent?*, 59 Am. J. Pol. Sci. 971 (2015); SELIN & LEWIS, *supra* note 19.

<sup>27</sup> See generally ELIZABETH FISHER & SIDNEY A. SHAPIRO, *ADMINISTRATIVE COMPETENCE: REIMAGINING ADMINISTRATIVE LAW* 128–153 (2020).

<sup>28</sup> For discussion of what constitutes a "major" independent agency as well as a listing of such agencies, see *infra* notes 92–95.

These formative years are important for another reason. Scholars and politicians of the Progressive Era laid the “foundation for the current administrative state,” including the belief that policymaking would both be better and more enduring if made by multimember bipartisan independent agencies.<sup>29</sup> In this way, Progressive and New Deal Era independent agencies were created to advance identifiable, measurable policy goals.<sup>30</sup> By highlighting the critical assumptions underlying independent agency design, we can evaluate whether the insulating of agencies from elected government control serves its intended policy goals.<sup>31</sup>

### A. Historical Foundations of Independent Agency Design

The Progressive Era embrace of independent agencies as a means of formulating and implementing scientifically sound public policy was largely a response to the deep economic and political divide of the Gilded Age (rooted in both the Civil War and in the related schism between agricultural and industrial states).<sup>32</sup> Unlike today’s ideological divide separating Republicans and Democrats, political parties in the Gilded Age “were largely tribal—vast patronage networks competing for spoils.”<sup>33</sup> An examination of congressional votes during this period “reveals that the parties did not take clearly opposing positions on questions involving either federal government regulation of private business or economic redistribution across classes.”<sup>34</sup> Because the parties were not stymied by ideological divisions, it

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<sup>29</sup> Mark Seidenfeld, *The Limits of Deliberation About the Public’s Values*, 119 MICH. L. REV. 1111, 1114 (2021); Daniel A. Crane, *Debunking Humphrey’s Executor*, 83 GEO. WASH. L. REV. 1835, 1844 (2016).

<sup>30</sup> The rise of independent agencies is also tied to the failure of the Gilded Age spoils system and New Deal era fears of too powerful an executive branch. See Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1390 (2010); Neal Devins, *Government Lawyers and the New Deal*, 96 COLUM. L. REV. 237, 257 (1996) (book review).

<sup>31</sup> “From the perspective of institutional design,” as Jacob Gersen noted, “the optimal bureaucratic structure depends on the ends to be achieved.” Jacob E. Gersen, *Designing Agencies*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 333, 334 (Daniel A. Farber & Anne Joseph O’Connell eds., 2010). Separate and apart from the design goals of independent agencies, Congress may act for political reasons when establishing an independent agency; specifically, the independent agency design may be the only way to broker a political logjam between competing factions in Congress. See generally DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN: POLITICAL INSULATION IN THE UNITED STATES GOVERNMENT BUREAUCRACY, 1946–1997 (2003).

<sup>32</sup> See ROBERT D. PUTNAM, THE UPSWING 71 (2020).

<sup>33</sup> *Id.* at 71.

<sup>34</sup> Frances E. Lee, *Patronage, Logrolls, and “Polarization”: Congressional Parties Of The Gilded Age, 1876–1896*, 30 Stud. Am. Pol. Dev. 116, 118 (2016).

was sometimes the case that both parties sought political advantage by backing mutually beneficial government regulation.

Consider, for example, the Pendleton Civil Service Act of 1883 and the Interstate Commerce Act of 1887. Responding to public pressure by creating a merit-based civil service, the Pendleton Act appeared to be a major triumph against the spoils system and a critical first step towards a professionalized administrative state.<sup>35</sup> Congress likewise felt the need to act when approving the Interstate Commerce Act and establishing the first independent agency, the Interstate Commerce Commission (“ICC”).<sup>36</sup> State regulation of railroads had failed, rail companies backed regulation to improve their economic position, and the public demanded action.<sup>37</sup> The multi-member commission model worked well for a Congress concerned with patronage, not ideology. Specifically, by mandating that no more than three members of the commission be from the same political party, lawmakers sought to appease public concerns about the partisan spoils system while simultaneously ensuring that each political party would benefit from the ICC.<sup>38</sup>

The Progressive Era. The cronyism and spoils system associated with the Gilded Age gave way to a new style of politics: progressivism. Big government was now seen as the solution to the problems raised by the Industrial Revolution;<sup>39</sup> rather than a sharp divide between the parties, party polarization abated to a near-historic low.<sup>40</sup> Progressives were troubled by the effect partisan politics had on government policy and attempted to develop a neutral system to avoid replicating the previous era. They believed that “expertise would furnish its own legiti-

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<sup>35</sup> See Jed Handelsman Shugerman, *The Dependent Origins of Independent Agencies: The Interstate Commerce Commission, the Tenure of Office Act, and the Rise of Modern Campaign Finance*, 31 J.L. & POL. 139, 143 (2015).

<sup>36</sup> For a history of the ICC, see BREGER & EDLES, *supra* note 25, at 19–36.

<sup>37</sup> See GABRIEL KOLKO, *RAILROADS AND REGULATION 1877–1916*, at 3, 41 (1965) (noting that railroads were the most important advocate for federal regulation).

<sup>38</sup> See Shugerman, *supra* note 35, at 177 (noting that the bill increased the power of Republicans who controlled the Senate and Democrats who controlled the White House).

<sup>39</sup> During the 1912 presidential campaign, for example, candidates for both parties attempted to appeal to the “widespread sentiment in favor of big government, which transcended established party lines.” John Milton Cooper, *Promoting to Ending Big Government*, in *THE PROGRESSIVES’ CENTURY* 157, 159 (Stephen Skowronek, Stephen M. Engel & Bruce Ackerman eds., 2016).

<sup>40</sup> See Jeff Lewis, *Polarization in Congress*, VOTEVIEW (Jan. 20, 2022) [hereinafter *Voteview*], [https://voteview.com/articles/party\\_polarization](https://voteview.com/articles/party_polarization) [<https://perma.cc/662R-H2WP>] (detailing changes in party polarization from 1879–2015).

macy,”<sup>41</sup> an idea built on Woodrow Wilson’s proposed science of administration. Specifically, “politics sets the tasks for administration”<sup>42</sup> and public administration is “neutral, essentially value-free.”<sup>43</sup>

Independent agencies were integral to this Progressive vision. “This goal of impartial expertise,” as Kirti Datla and Richard Revesz put it, “motivated many of the structural features of the early independent agencies.”<sup>44</sup> To implement efficient and sound policy, early progressives attempted to scientifically separate administration and politics by creating regulatory bodies with “strictly defined jurisdiction, clear lines of authority and impersonal and apolitical decision making.”<sup>45</sup> In particular, it was thought that these “agencies could address rapidly changing social circumstances more expeditiously than could courts and legislatures, and could deploy scientific expertise, rather than mere political preference, in solving the problems produced by social change.”<sup>46</sup> For James Landis: “With the rise of regulation, the need for expertness became dominant; for the art of regulating an industry requires knowledge of the details of its operation.”<sup>47</sup>

The proponents of independent agencies sought to design agencies that would make decisions based on technocratic expertise rather than partisan considerations.<sup>48</sup> In creating the Federal Trade Commission (“FTC”) in 1914,<sup>49</sup> the Senate Committee on Interstate Commerce stated:

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<sup>41</sup> Elizabeth Fisher & Sidney A. Shapiro, *Disagreement About Chevron: Is Administrative Law the “Law of Public Administration”?*, 70 DUKE L.J. ONLINE 111, 126 (2021).

<sup>42</sup> Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 210 (1887).

<sup>43</sup> PATRICIA WALLACE INGRAHAM, *THE FOUNDATION OF MERIT: PUBLIC SERVICE IN AMERICAN DEMOCRACY* 38 (1995).

<sup>44</sup> Datla & Revesz, *supra* note 26, at 777.

<sup>45</sup> Joanna Grisinger, *The (Long) Administrative Century*, in *THE PROGRESSIVES’ CENTURY*, *supra* note 39, at 360, 363.

<sup>46</sup> Mark Tushnet, *Administrative Law in the 1930s: The Supreme Court’s Accommodation of Progressive Legal Theory*, 60 DUKE L.J. 1565, 1566–67 (2011).

<sup>47</sup> JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 23 (1938). Landis also expressed concern of the need for independent agencies to rein in the swelling power of the executive branch. See Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State*, 130 HARV. L. REV. 2463, 2467 (2017).

<sup>48</sup> Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 19–21 (2010).

<sup>49</sup> For a legislative history of the FTC, see Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1 (2003).

It is generally conceded that the peculiar character and importance of [the antitrust] question make it indispensable that some of the administrative functions should be lodged in a body *especially competent* to deal with them, by reason of information, experience, and careful study of the business and economic conditions of the industry affected.<sup>50</sup>

When approving this institutional design in *Humphrey's Executor*, the Supreme Court similarly argued that the FTC was to “act with entire impartiality. . . . [I]ts members are called upon to exercise the trained judgment of a body of experts appointed by law and informed by experience.”<sup>51</sup>

The FTC was hardly alone; this embrace of scientific expertise was the rallying call of early twentieth century progressives who embraced and propelled the independent commission model. During this period, Congress operated on the belief that “the social and economic problems confronting the nation could not be solved . . . by politics” and required “the sort of dispassionate professional judgment that only a cadre of experts could supply.”<sup>52</sup> Progressives thought structural features such as multimember bipartisan boards with “for cause” removal would insulate agencies from the direct influence of the elected branches<sup>53</sup> and facilitate the acquisition and use of expertise.<sup>54</sup> By denying elected officials the power to overrule independent agency heads, agency officials would have incentive both to cultivate expertise and to work hard to apply it.<sup>55</sup> Correspondingly, independent agencies could recruit highly skilled, motivated employees precisely because of their ability to adopt and implement policies free of direct elected government intervention.

Beyond removal limitations, Progressives hoped to foster apolitical expertise through several other features of the independent agency design. In explaining why agency heads should be appointed for staggered terms of several years, Pro-

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<sup>50</sup> S. REP. NO. 63-597, at 8–9 (1914) (emphasis added). The Committee relatedly spoke of the evils of partisan pressure-controlled antitrust enforcement. Bar-kow, *supra* note 48, at 21.

<sup>51</sup> *Humphrey's Ex'r v. United States*, 295 U.S. 602, 624 (1935) (citation omitted). For a thoughtful “debunking” of the applicability of *Humphrey's Executor* to today's FTC, see generally Crane, *supra* note 29.

<sup>52</sup> Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 612 (2010).

<sup>53</sup> BREGER & EDLES, *supra* note 25, at 1132, 1138.

<sup>54</sup> See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2376–77 (2001).

<sup>55</sup> See SEAN GAILMARD & JOHN W. PATTY, *LEARNING WHILE GOVERNING: EXPERTISE AND ACCOUNTABILITY IN THE EXECUTIVE BRANCH* 133 (2013).

gressive Era Congressional Reports emphasized expertise: “[A]gency heads gain wisdom from their experience on the job. The terms must be sufficiently long to allow agency heads to gain the relevant experience. And . . . the terms of the members must be staggered so that institutional expertise can accumulate without gaps.”<sup>56</sup> In addition to expertise, longer terms were seen as a bulwark against partisanship. By cutting across presidential administrations, agency heads could transcend political loyalties to specific administrations.<sup>57</sup> Relatedly, long serving commissioners could transfer knowledge to newly appointed colleagues—facilitating nonpartisan expertise and continuity within independent agencies.<sup>58</sup>

Progressives also saw partisan balancing requirements and multimember quasi-judicial decision-making as ways to facilitate nonpartisan expertise. Unlike a single-headed executive agency, bipartisan multi-member commissions were intended by Progressives to be “consensual, reflective, and pluralistic;”<sup>59</sup> group deliberation was believed to be critical in fostering a higher level of expertise while also promoting continuity within the agencies.<sup>60</sup> By imposing party balancing requirements, moreover, Progressives sought to compel commissioners to work collegially and across party lines. In so doing, balancing requirements would mitigate a commissioner’s loyalty to party and thereby facilitate expertise in multimember decision-making. Correspondingly, since neither party could gain overwhelming control of a multi-member agency, these requirements were seen as a critical roadblock to partisan interventions by either the Congress or White House.<sup>61</sup>

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<sup>56</sup> Barkow, *supra* note 48, at 29 (referencing the Senate Committee on Interstate Commerce reports).

<sup>57</sup> Datla & Revesz, *supra* note 26, at 792. Relatedly, longer terms and multimember bodies would insulate certain fields from partisan presidential turnover. This was particularly important to Congress when creating the Federal Reserve in 1912 and when extending, in 1935, Board of Governor terms from ten to fourteen years. See Barkow, *supra* note 48 at 24.

<sup>58</sup> Datla & Revesz, *supra* note 26, at 792.

<sup>59</sup> Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 260.

<sup>60</sup> Datla & Revesz, *supra* note 26, at 794.

<sup>61</sup> See Brian D. Feinstein & Daniel J. Hemel, *Partisan Balance with Bite*, 118 COLUM. L. REV. 9, 80–81 (2018); Ronald J. Krotozynski, Jr., Johnjerica Hodge & Wesley W. Wintermyer, *Partisan Balance Requirements in the Age of New Formalism*, 90 NOTRE DAME L. REV. 941, 992 (2015). Correspondingly, as Rachel Barkow has argued, nonpartisan requirements might also stave off agency capture by the interest groups that support one or the other political party. See Barkow, *supra* note 48.

By facilitating apolitical expertise and linking expertise to credibility, Progressives believed independent agency decision-making would be seen as legitimate and fair, that independent agencies would promote stability and continuity in policymaking, and that apolitical independent agencies would help prevent the concentration of power in political actors and thereby promote our system of checks and balances. Specifically, for-cause removal, staggered terms, and partisan balancing requirements promoted stability by disallowing presidents to change policy by changing commissioners.

Stability and fairness concerns were also advanced by having multi-member commissions engage in a collegial decision-making process.<sup>62</sup> For example, when proposing a split of three Democrats and three Republicans on the International Trade Commission, Senator Thomas Gore argued in 1916 that balancing requirements are an “assurance of [the agency’s] fitness and efficiency” and that it would be “less affected by the bias and prejudice of partisan controversy.”<sup>63</sup> Stability concerns likewise partially motivated Congress to establish the Federal Reserve in 1913. Members of Congress feared that the short-term incentives of presidents would be to use monetary and banking policies for political benefit to the detriment of long-term economic stability and investment.<sup>64</sup> They relatedly worried about flip-flopping monetary policy depending upon the party in power.<sup>65</sup>

## B. The New Deal Era

The Progressive Era embrace of independent agencies had little to do with the relative powers of Congress or the president. Progressives saw structure as a way to insulate agencies from partisan politics and thereby facilitate expertise, policy

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<sup>62</sup> See Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1113 (2000). Relatedly, Progressives saw bipartisan, multi-member, appellate-style review as promoting due process values of fairness and accuracy. For details on their expansion in the New Deal, see ROBERT E. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 90 (1941); Fisher & Shapiro *supra* note 41, at 127.

<sup>63</sup> Krotozynski, Hodge & Wintermyer, *supra* note 61, at 969 (quoting S. REP. NO. 64-243, at 8, 5 (1916)).

<sup>64</sup> See CUSHMAN, *supra* note 62 at 153–155; ERIC M. PATASHINK, PUTTING TRUST IN THE US BUDGET: FEDERAL TRUST FUNDS AND THE POLITICS OF COMMITMENT 63 (2000); SARAH BINDER & MARK SPINDEL, THE MYTH OF INDEPENDENCE: HOW CONGRESS GOVERNS THE FEDERAL RESERVE (2017). When titling this Article, *The Independent Agency Myth*, we were aware of Binder and Spindel’s splendid book.

<sup>65</sup> Their concern with stability manifested itself not just in the choice of independent agency design but in having fixed terms of fourteen years for members of the Federal Reserve Board of Governors See CUSHMAN, *supra* note 62, at 154–156.

stability, and related legitimacy objectives. Progressives did not see independent agencies as “arm[s] of Congress” nor was there an “assumption that there would be any actual working relation between the President and the commission.”<sup>66</sup> The Progressives’ concern was apolitical expertise, not the balance of powers. For example, when defending for-cause removal in *Humphrey’s Executor*, counsel for Humphrey’s focused on the Progressive playbook and the belief—as expressed in the 1914 Senate Report backing the bill—that “the terms of the commissioners shall be long enough to give them an opportunity to acquire the expertness . . . that comes from experience.”<sup>67</sup>

The New Deal Congress largely embraced this vision, emphasizing, for example, that agency heads be nonpartisan, neutral, and expert.<sup>68</sup> In addition to advancing policy goals, the New Deal Congress also embraced the independent agency design in order to limit presidential control of the administrative state. When responding to “the expanded administrative needs of an industrial society,” lawmakers saw the “[independent] commissions as a way of avoiding giving to the executive branch powers that threatened congressional control of administration.”<sup>69</sup> For President Roosevelt, however, independent agencies were an anathema to the constitutional design. His Court-packing plan was prompted in part by the Supreme Court’s approval of the independent agency design in *Humphrey’s Executor*.<sup>70</sup> Roosevelt also used his self-appointed Brownlow Commission to justify a call to reorganize the government by eviscerating independent agencies.<sup>71</sup> Congress, however, would not bite: “granting the president chief administrator status appeared to many to represent a dangerous concentration of political power threatening the constitutional

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<sup>66</sup> *Id.* at 60.

<sup>67</sup> *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 624 (1935) (quoting S. REP. NO. 63-597, at 10–11 (1914)).

<sup>68</sup> See Ronald Turner, *Ideological Voting on the National Labor Relations Board*, 8 U. PA. J. LAB. & EMP. L. 707, 712–714 (2006).

<sup>69</sup> Barry D. Karl, *Constitution and Central Planning: The Third New Deal Revisited*, 1988 SUP. CT. REV. 163, 192–93. A second constitutional concern that animated Congress was due process. Lawmakers have argued that establishing independent agencies and judicializing their procedures ensures due process protections for regulated interests. See LEWIS, *supra* note 31, at 27–30. For details on the expansion of independent agencies in the New Deal, see CUSHMAN, *supra* note 62, at 372.

<sup>70</sup> See WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 78–80 (1995).

<sup>71</sup> See Christopher S. Yoo, Steven G. Calabresi & Laurence D. Nee, *The Unitary Executive During the Third Half-Century, 1889–1945*, 80 NOTRE DAME L. REV. 1, 94–95 (2004).



foundations of our regime.”<sup>72</sup> “Fears and anxieties produced by European dictatorship”<sup>73</sup> translated into congressional efforts to cabin presidential power. Notwithstanding Roosevelt’s landslide electoral victory, the Democratic New Deal Congress ultimately rejected both Court-packing and reorganization.<sup>74</sup>

When rejecting Roosevelt’s proposed reorganization of independent agencies, there was no partisan divide in Congress. Notably, 108 House Democrats voted against the reorganization plan;<sup>75</sup> party polarization was at a historic low.<sup>76</sup> Furthermore, notwithstanding Roosevelt’s strong opposition to the independent agency design, there was no talk of Roosevelt subverting that design. The presumption, instead, was that the White House and Senate would respect the Progressive Era mantra that—to implement efficient and sound public policy—politics should be separated from administration.<sup>77</sup> Party balancing requirements are once again illustrative: rather than Congress worrying about presidential mischief in appointing on the basis of ideology and not apolitical expertise, “the potential ill-effects of forcing the President to appoint members of the opposition party to principal executive offices appears to have gone completely unconsidered.”<sup>78</sup>

In this Part, we have tracked the rise of independent agencies to the policy and constitutional goals of the Progressive and New Deal eras. Independent agency decision-making was to be unbiased, apolitical, and expert. By limiting presidential control, moreover, it was thought that the independent agency design would promote stability and continuity. Finally (and particularly against the backdrop of the failed spoils system of the Gilded Age), the independent agency design was intended to both instill public confidence and promote agency legitimacy by limiting politically motivated decision-making within the agency.

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<sup>72</sup> See Donald R. Brand, *The President as Chief Administrator: James Landis and the Brownlow Report*, 123 POL. SCI. Q. 69, 70 (2008).

<sup>73</sup> RICHARD POLENBERG, REORGANIZING ROOSEVELT’S GOVERNMENT: THE CONTROVERSY OVER EXECUTIVE REORGANIZATION 1936–1939, at 149 (1966).

<sup>74</sup> See DEVINS, *supra* note 30, at 261–265; Karl, *supra* note 69, at 192–193.

<sup>75</sup> WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL 1932–1940, at 279 (1963).

<sup>76</sup> See Voteview, *supra* note 40.

<sup>77</sup> See Grisinger, *supra* note 45, at 363.

<sup>78</sup> See Krotozynski, Hodge & Wintermyer, *supra* note 61, at 969. Today, of course, those ill effects are on display. See *infra* notes 186–190, 213–220 and accompanying text.

## II

## DO INDEPENDENT AGENCIES LIVE UP TO EXPECTATIONS?

We now turn to evaluating whether independent agencies have lived up to expectations. The answers have important consequences for policy and law. Empirical evidence should inform how elected officials design agencies. Similarly, courts should evaluate legal claims about the appropriateness of specific structures based upon an accurate understanding of how design features operate in practice. Consider, for example, the ongoing debate about whether limitations on presidential removal either promote constructive experimentation or are a constitutional anathema:<sup>79</sup> courts should care about whether the independent agency design actually limits presidential influence while promoting a more expert workforce.

Existing studies evaluate the behavior and outputs of specific independent agencies,<sup>80</sup> particularly the fifteen independent agencies singled out in a prominent National Science Foundation study.<sup>81</sup> But there are no studies that attempt to do what we do here—evaluate whether the entire class of independent agencies is actually more expert and apolitical. One reason for the lack of large-scale empirical evaluation is that it is difficult to assess the performance of independent agencies relative either to other agencies or to how the agency would be doing if it had instead been designed as an executive agency.

Obviously, we cannot re-do history. The best we can do is compare the experience of independent agencies with executive agencies. Are independent agencies more expert than executive agencies? Have they been successfully insulated from politics? Are they producing policies that are more stable? Even these comparisons are daunting. For example, how can we tell if the Securities and Exchange Commission is more expert than the Department of Justice? What data would we use to evaluate the influence of Congress and the president on policy making in the Department of Labor relative to the Na-

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<sup>79</sup> See *supra* notes 1–5.

<sup>80</sup> For several prominent studies, see generally Terry M. Moe, *Control and Feedback in Economic Regulation: The Case of the NLRB*, 79 AM. POL. SCI. REV. 1094 (1985); David C. Nixon & Rosin M. Bentley, *Appointment Delay and the Policy Environment of the National Transportation Safety Board*, 37 ADMIN. & SOC'Y 679 (2006); Joseph Stewart, Jr. & Jane S. Cromartie, *Partisan Presidential Change and Regulatory Policy: The Case of the FTC and Deceptive Practices Enforcement, 1938–1974*, 12 PRESIDENTIAL STUD. Q. 568 (1982); B. Dan Wood, *Does Politics Make a Difference at the EEOC?*, 34 AM. J. POL. SCI. 503 (1990).

<sup>81</sup> See *infra* Table 1 (listing NSF-designated agencies); *Independent Regulatory Commissioner Data Base*, NAT'L SCI. FOUND. (Mar. 10, 2005), <http://www2.hawaii.edu/~dnixon/IRC/index.htm> [<https://perma.cc/XMF8-WDB4>].

tional Labor Relations Board? How can we tell if the policies of the Railroad Retirement Board are more stable than those of the Office of Personnel Management?

The principal contribution of this paper is to use novel survey data designed specifically to measure the expertise, the degree of political influence, and policy stability in government agencies in order to compare the performance of independent to executive agencies. In 2014 and 2020, we partnered with colleagues at Princeton and Georgetown Universities and the Partnership for Public Service and Volcker Alliance to conduct two of the largest ever non-governmental surveys of federal executives—collectively, the *Survey on the Future of Government Service*. We asked appointed and career executives across the executive establishment about their agencies. We probed them about the expertise of their workforces, the policymaking process inside their agencies, and their interactions with public officials and other agencies.<sup>82</sup> Their answers to these questions provide unique and unparalleled insight into whether independent agencies are performing as congressional designers expected. Conducting the survey twice, once in the Obama Administration and once in the Trump Administration, gives us confidence in the reliability of the findings (as the 2020 survey reinforces our 2014 findings).

The Princeton Survey Research Center (“PSRC”) fielded the first survey in the fall of 2014 and executed a second survey in the fall of 2020. The PSRC sent the fifteen- to twenty-minute survey to executives in all federal agencies headed by a Senate-confirmed appointee whose functions were not exclusively advisory.<sup>83</sup> This includes all political appointees,<sup>84</sup> career members of the Senior Executive Service, all senior Foreign Service officers serving domestically, and comparable managers in agencies without these appointment authorities. It also includes other high level career managers that administered programs or agencies (i.e., GS 14–15 with specific titles). The participation rate for the first survey was 24% (3,551 out of

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<sup>82</sup> We have posted both surveys online. See Neal Devins & David E. Lewis, *Analysis Supporting Calculations in The Independent Agency Myth*, VAND. UNIV. [hereinafter *Data Analysis Memo*], <https://my.vanderbilt.edu/davidlewis/data-articles/> [<https://perma.cc/45KZ-W7EG>] (last visited July 31, 2023).

<sup>83</sup> For further details on the surveys, see generally Mark D. Richardson, *Politicization and Expertise: Exit, Effort, and Investment*, 81 J. POL. 878 (2019); David E. Lewis & Mark D. Richardson, *The Very Best People: President Trump and the Management of Executive Personnel*, 51 PRESIDENTIAL STUD. Q. 51 (2021).

<sup>84</sup> This includes all Senate-confirmed appointees (“PAS”), other presidential appointees not requiring Senate confirmation (“PA”), non-career SES (“NA”), and Schedule C (“SC”) appointees.

14,698). The rate of the second survey, fielded during the pandemic, was 11% (1,779 full or partial completes out of 16,232).<sup>85</sup> These rates are comparable to most public opinion surveys (response rates for Gallup telephone surveys average around 7%).<sup>86</sup> All analysis includes survey weights to ensure that the answers provided by the sample of respondents are reliable and mirror those of the target population.<sup>87</sup>

Surveys are a standard measure in empirical research and the type of cross-agency analysis we are conducting could only be pursued through a survey. Nonetheless, we are acutely aware of problems of self-reporting and have taken steps to improve the reliability of our findings. First, agencies have hierarchical structures, and it is important to understand whether a respondent is answering questions about the larger organization (e.g., the Department of Health and Human Services), a particular bureau within that organization (e.g., the Food and Drug Administration), or a subunit of that bureau (e.g., the Center for Tobacco Products). We overcome this difficulty by asking respondents to select their exact workplace from a dropdown menu at the start of the survey.<sup>88</sup> This helps better connect answers to questions about “their agency” to a specific unit.<sup>89</sup> So, for example, rather than asking, “How much influence do the following groups have in policy decisions in your agency?”, we ask “How much influence do the following groups have in policy decisions in the Food and Drug Administration?” This gives us more confidence in the data provided by our respondents since we know whether they are answering with reference to the Food and Drug Administration rather than a part of that agency or the Department of Health and Human Services.

A second common problem in organizational surveys is that respondents may not reliably report what is happening in

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<sup>85</sup> We refer to the participation rate since many respondents started but did not complete the whole survey.

<sup>86</sup> Stephanie Marken, *Still Listening: The State of Telephone Surveys*, GALLUP: METHODOLOGY BLOG (Jan. 11, 2018), <https://news.gallup.com/opinion/methodology/225143/listening-state-telephone-surveys.aspx> [<https://perma.cc/9M58-V7W5>].

<sup>87</sup> For details on survey weights see *About the Survey on the Future of Government Service*, CTR. FOR THE STUDY OF DEMOCRATIC INSTS., <https://www.vanderbilt.edu/csdi/research/MethodsDocument.pdf> [<https://perma.cc/M398-L4P7>] (last visited July 31, 2023).

<sup>88</sup> If the respondent took the survey on paper, they selected their workplace from a list on the survey.

<sup>89</sup> See James R. Thompson & Michael D. Siciliano, *The “Levels” Problem in Assessing Organizational Climate: Evidence from the Federal Employee Viewpoint Survey*, 50 PUB. PERS. MGMT. 133, 143 (2021).

their organization.<sup>90</sup> For example, if we ask executives whether their agency has an expert workforce, their perceptions may be inaccurate or biased. Some of the worst agencies in government may have no sense of how poorly they are performing relative to their peers. Further, some federal managers may not want to admit that their workforce lacks the skills necessary to implement its core mission because the managers are themselves responsible for the health of the workforce. To help remedy this problem we rely on respondents to evaluate their own agencies and the agencies they work with the most. At the beginning, the survey instrument asks that respondents identify the agencies they work with the most (other than their own). The survey subsequently includes questions about these agencies as a partial way of getting around problems inherent in self-reports.<sup>91</sup>

One final note of caution before reporting our findings: When comparing independent agencies to executive agencies, we need to be careful to define what we mean by independent agencies.<sup>92</sup> In Table 1 we list the agencies that we surveyed, that are multimember commissions and operate outside of the existing executive departments. These “independent” agencies have some combination of the following features: multimember structure (rather than a single agency head),<sup>93</sup> party balancing requirements, fixed terms, staggered terms, and for cause removal protections. Other design features include independent litigation authority, self-funding mechanisms, and the power to bypass executive branch review when promulgating regulations.<sup>94</sup> The agencies marked with an asterisk are the “major”

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<sup>90</sup> See generally Stewart I. Donaldson & Elisa J. Grant-Vallone, *Understanding Self-Report Bias in Organizational Behavior Research*, 17 J. BUS. & PSYCH. 245 (2002).

<sup>91</sup> The fact that respondents evaluate five to eight other agencies also helps get around a small-N problem (of too few points of comparison) in government surveys. With hundreds of agencies, it can be difficult to get enough respondents from different agencies to generate reliable agency averages. The Department of Defense and the Department of Veterans Affairs employ more than one half of all civilian employees. This means that a random sample includes a large number of executives in these two departments. Likewise, we would not want to assume that one respondent from a small agency is representative of the whole team of executives. By asking each respondent to evaluate other agencies, we can get more datapoints on each agency.

<sup>92</sup> See generally Datla & Revesz, *supra* note 26; Selin, *supra* note 26, at 972–73; SELIN & LEWIS, *supra* note 19, at 11–15.

<sup>93</sup> See *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020) (holding that a single-head independent agency unconstitutionally limited presidential power).

<sup>94</sup> Other tools include additional limits on the number and kinds of persons that can be named to agency boards, length of terms, rules for selection and

independent regulatory commissions (as identified in the National Science Foundation's Independent Regulatory Commissioner Data Base).<sup>95</sup>

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removal of chairs, rules related to quorums, and rules related to personnel. Congress also sometimes requires agencies either to get approval from other entities prior to acting or provides external review of agency actions. *See generally* Selin, *supra* note 26.

<sup>95</sup> *Independent Regulatory Commissioner Data Base, supra* note 81.

TABLE 1. LIST OF INDEPENDENT COMMISSIONS SURVEYED IN, 2014 AND 2020

1. Board of Governors of the Federal Reserve System*	21. Inter-American Foundation
2. Broadcasting Board of Governors (2014 only)	22. Legal Services Corporation
3. Chemical Safety and Hazard Investigation Board	23. Merit Systems Protection Board
4. Commodity Futures Trading Commission*	24. Millennium Challenge Corporation
5. Consumer Product Safety Commission*	25. National Credit Union Administration
6. Corporation for National and Community Service	26. National Endowment for the Arts
7. Defense Nuclear Facilities Safety Board	27. National Endowment for the Humanities
8. Equal Employment Opportunity Commission*	28. National Labor Relations Board*
9. Export-Import Bank of the U.S.	29. National Mediation Board
10. Farm Credit Administration	30. National Railroad Passenger Corporation (AMTRAK)
11. Federal Communications Commission*	31. National Transportation Safety Board*
12. Federal Deposit Insurance Corporation	32. Nuclear Regulatory Commission*
13. Federal Election Commission*	33. Occupational Safety and Health Review Commission
14. Federal Energy Regulatory Commission*	34. Overseas Private Investment Corporation
15. Federal Home Loan Mortgage Corporation	35. Postal Regulatory Commission
16. Federal Labor Relations Authority	36. Railroad Retirement Board
17. Federal Maritime Commission	37. Securities and Exchange Commission*
18. Federal Mine Safety and Health Review Commission	38. Tennessee Valley Authority
19. Federal Retirement Thrift Investment Board	39. United States African Development Foundation
20. Federal Trade Commission*	40. United States Election Assistance Commission
	41. United States International Trade Commission
	42. United States Postal Service

In what follows we compare independent agencies (i.e., those in Table 1) to executive agencies. We focus on the three principal policy justifications for the independent agency design—expertise, political insulation, and policy stability. After

preparing initial figures and tables, we realized that there was a major fault line separating the ratings of “major” commissions from other independent agencies. That fault line figures prominently in our analysis and we also compare “major” independents to both executive agencies and other independent agencies.

### A. Expertise

Progressives thought the independent agency design would foster expertise and the use of professional criteria in key policy decisions. Unlike executive agencies, it was thought that the policy judgments of independent agencies would not be overruled to accomplish partisan political ends. By shielding independent agencies from the vicissitudes of politics, Progressives hoped to attract the best minds to government service.

To evaluate whether the independent agency design, in fact, contributes to a more expert workforce both surveys asked respondents, “In your view, how skilled are the workforces of the following agencies?” Each respondent rated the skill level of five to eight agencies from 1-“Not at all skilled” to 5-“Very skilled.” The survey asked respondents to evaluate *other* agencies—agencies they worked with most or were likely to know about—rather than their own. In total, there were 15,163 ratings of the expertise of agency workforces from people that should know.

Professor Mark Richardson (Georgetown Government Department) worked with us to aggregate the thousands of ratings into agency workforce skills estimates. These estimates adjust for the fact that raters might use the scale differently.<sup>96</sup> For example, one respondent might require more for an agency to get a 4 out of 5 than another respondent. Reliable estimates for workforce skill require models that account for these differences among raters and these estimates do that.<sup>97</sup> The scale ranges from -2.53 (low skills) to 2.21 (high skills). In 2014, the average agency had a rating of -0.09. In 2020, the average agency had a rating of 0.09.

Figure 1 includes 2014 (top panel) and 2020 (bottom panel) estimates of agency workforce skills based on ratings of individuals who interface with the ranked agency. A higher value

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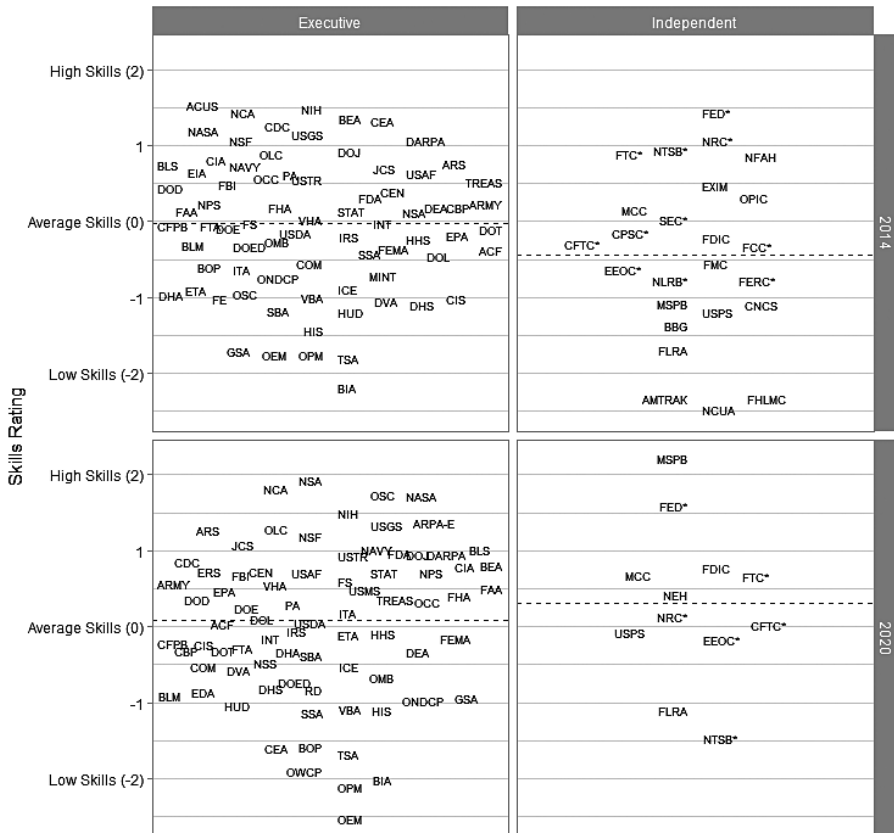
<sup>96</sup> We estimate the 2014 and 2020 ratings together. For details on the estimates and method, see generally Mark D. Richardson, Joshua D. Clinton & David E. Lewis, *Elite Perceptions of Agency Ideology and Workforce Skill*, 80 J. POL. 303 (2017).

<sup>97</sup> The scale is also adjusted so that it is centered around 0.



indicates that federal executives rated the skill of that agency's workforce more highly. The figure labels agencies so we can better see the high and low performers.<sup>98</sup> We identify the "major" independent regulatory commissions by including an asterisk with their name. Because the 2020 survey had fewer respondents than in 2014, there were fewer ranked agencies in 2020.

FIGURE 1. SKILLS RATINGS BY STRUCTURE, 2014 AND 2020



Note: N = 161 [2014], 147 [2020]. Estimates generated using 15,163 ratings in the 2014 and 2020 surveys. Dashed line corresponds to the mean for each subgroup.

The figure shows that independent agencies have a less skilled workforce than executive agencies. In the 2014 panel, executive agencies (Mean: -0.02) have a higher average esti-

<sup>98</sup> The figure does not include every agency estimate in order to declutter the figure. We spread out agency names horizontally so that they are clearly identifiable. The lines representing agency averages are based upon all agency estimates, not just those included in the figure. We have posted the Data Analysis Memo online, which provides support for statistical and other numeric calculations made throughout the paper. *Data Analysis Memo, supra* note 82.

mated workforce skill than independent agencies, and this difference is statistically significant (Mean:  $-0.45$ ;  $p < 0.02$ ). The average estimated workforce skill (i.e., gray dotted line) is lower. The highest rated independent agencies in 2014 tend to be the “major” independent regulatory agencies like the Federal Reserve, Nuclear Regulatory Commission, and Federal Trade Commission. These are the agencies with asterisks. The independent agencies that make up the bottom part of the distribution on the right are all less well-known agencies like the Broadcasting Board of Governors and the Federal Labor Relations Authority. The gap between “major” independents (Mean:  $0.13$ ) and smaller independents (Mean:  $-0.90$ ) is statistically significant ( $p < 0.02$ ). Even if we focus only on these more highly ranked “major” independents, there is no statistically distinguishable difference in skills rankings between independents and executive agencies ( $p < 0.53$ ). Were we to eliminate these “major” independents, moreover, there would be an even larger statistically significant gap between independent and executive agencies ( $p < 0.00$ ). The 2014 data shows the reverse of what agency designers expected to see. Their hope, of course, was that insular designs would facilitate the development of expertise.

When we look at 2020, the pattern is slightly different but still suggests no clear benefit to the independent agency design. In the bottom panel, the distribution of skills estimates for independent agencies (Mean:  $0.30$ ) is slightly higher, although statistically indistinguishable from executive agencies (Mean:  $0.08$ ;  $p < 0.40$ ). This is true even if we focus only on the major independent agencies (Mean:  $0.12$ ;  $p < 0.90$ ). As noted, a key difference between the larger 2014 survey and the smaller 2020 survey is that there are fewer agencies ranked in 2020. If those agencies had been included, executive agencies would appear even more expert: Six of the lowest scoring independent agencies in 2014 drop out of the data in 2020. Indeed, the independent agencies that dropped out in 2020 had average workforce skill ratings of  $-0.75$ . This is significantly lower than the average skill rating of the executive agencies that also dropped out between surveys (Mean:  $-0.09$ ;  $p < 0.07$ ).

Also notable in Figure 1 is that there is quite a bit of variation among both executive and independent agencies. Some independents are ranked as among the most skilled as are some executive agencies; likewise, the cohort of “least skilled” includes some executive and some independent agencies. This highlights how much of each agency’s character has to do with

factors other than its location in or outside the executive. For example, highly skilled lawyers may seek jobs at agencies that allow them to litigate in federal court; these lawyers may care more about that job feature than whether the agency is part of the executive branch.<sup>99</sup>

The data reported in this section is at odds with the expertise justification for the independent agency design. This is true whether we look at all independents or only (the more highly ranked) “major” independents.<sup>100</sup> Of course, we cannot observe what independent agency workforces would look like if the independent agencies were executive agencies instead. What seems clear, however, is that agency structure does not guarantee agencies the ability to attract, develop, and retain an expert workforce.

### B. *Insulated from Politics*

Key to the independent agency design was the belief that political insulation would allow professional expertise to drive policymaking. In evaluating the linkage between structure and agency autonomy, we look to respondents’ answers to questions regarding the relative power of the executive, congressional committees, and the political appointees who head the agency.

We begin by examining responses to the following question: “In general, how much influence do you think the following groups have over policy decisions in [agency]?” Respondents could provide answers of 0-None, 1-Little, 2-Some, 3-A good bit, and 4-A great deal. In Figures 2 and 3 we graph the agency average responses to this question for the White House, congressional committees, and political appointees.<sup>101</sup> As before, the data is broken down by executive agencies (black bars) and independent agencies (gray bars).

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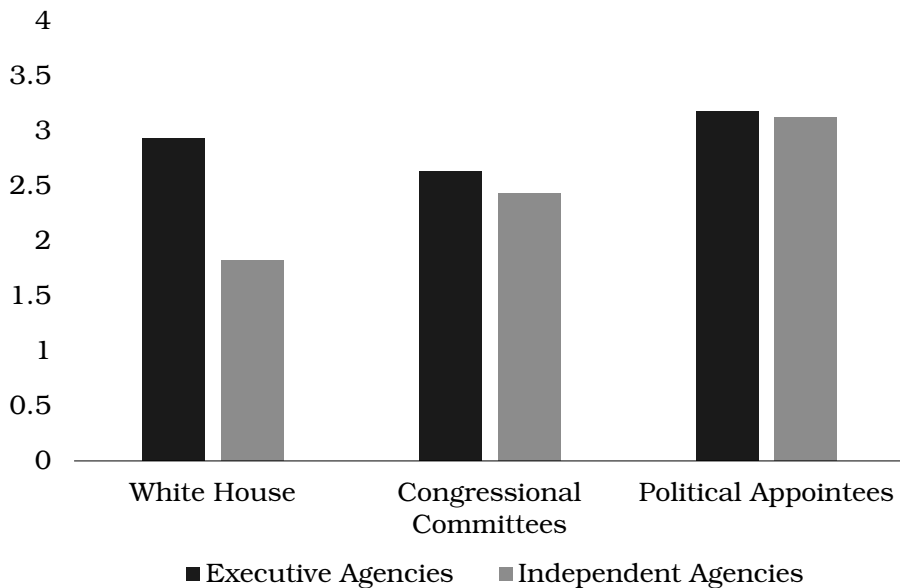
<sup>99</sup> See Sean Gailmard & John W. Patty, *Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise*, 51 AM. J. POL. SCI. 873, 874–875 (2007) (discussing how the development of agency expertise can vary based upon the different labor markets of agencies and the presence or absence of public service motivation in employees).

<sup>100</sup> And it is especially true if we look at smaller independents; their expertise rankings are substantially lower than executive agencies.

<sup>101</sup> We also asked respondents about the influence of the Office of Management and Budget (“OMB”). These results mirror those for the White House except the White House is reported to have slightly more influence than OMB. In both 2014 and 2020 the average executive agency reports that the White House has “a good bit” of influence over policy making (Mean 2.89 [2014], 2.83 [2020]). The average independent agencies, by contrast, report significantly less White House influence, something closer to “some” influence (Mean 2.22 [2014], 2.15 [2020]);

If we look at the bars measuring White House influence, it is clear that executives working in independent agencies perceive less direct White House influence. In both 2014 and 2020 the average executive agency reports that the White House has “a good bit” of influence over policy making (Mean 2.93 [2014], 3.05[2020]). The average independent agency, by contrast, reports significantly less White House influence, something closer to “some” influence on average (Mean 1.82 [2014], 2.19 [2020];  $p < 0.00$ ).

FIGURE 2. “IN GENERAL, HOW MUCH INFLUENCE DO YOU THINK THE FOLLOWING GROUPS HAVE OVER POLICY DECISIONS IN [AGENCY]?” FALL 2014

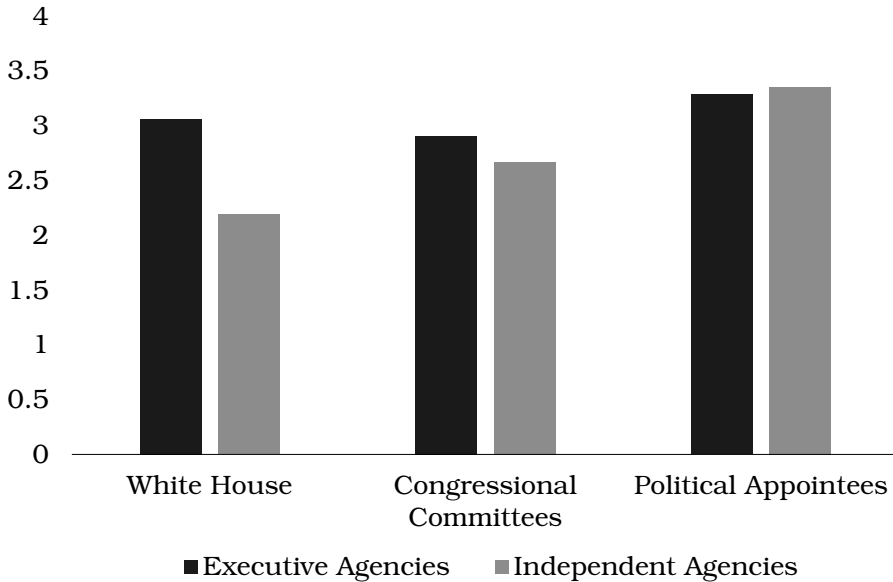


Note: Unit of analysis is an agency. There are 186 executive agencies and 40 independent agencies.

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$p < 0.00$ ). In both years, small independents (Mean 2.33 [2014], 2.43 [2020]) report more OMB influence than big independents (Mean 1.96 [2014], 1.76 [2020]). These differences are close to statistically significant ( $p < 0.15$  and  $p < 0.11$ , respectively). For a more detailed analysis of perceptions of OMB influence see generally David E. Lewis, Mark D. Richardson & Eric Rosenthal, *OMB in Its Management Role: Evidence from Surveys of Federal Executives*, in *EXECUTIVE POLICYMAKING: THE ROLE OF THE OMB IN THE PRESIDENCY* 175 (Meena Bose & Andrew Rudalevige eds., 2020).

FIGURE 3. “IN GENERAL, HOW MUCH INFLUENCE DO YOU THINK THE FOLLOWING GROUPS HAVE OVER POLICY DECISIONS IN [AGENCY]?” FALL 2020



Note: Unit of analysis is an agency. There are 165 executive agencies and 26 independent agencies.

This pattern is replicated for congressional committees. Respondents in executive agencies report more congressional influence than respondents working in independent agencies. In both years, survey responses suggest that Congress exerted more influence over executive agencies (Mean 2.63 [2014], 2.89 [2020]) than independents (Mean 2.43 [2014], 2.66 [2020]).<sup>102</sup> If we compare *between* branches, survey data suggests that Congress has more of say in independent agency policy making than the White House.<sup>103</sup>

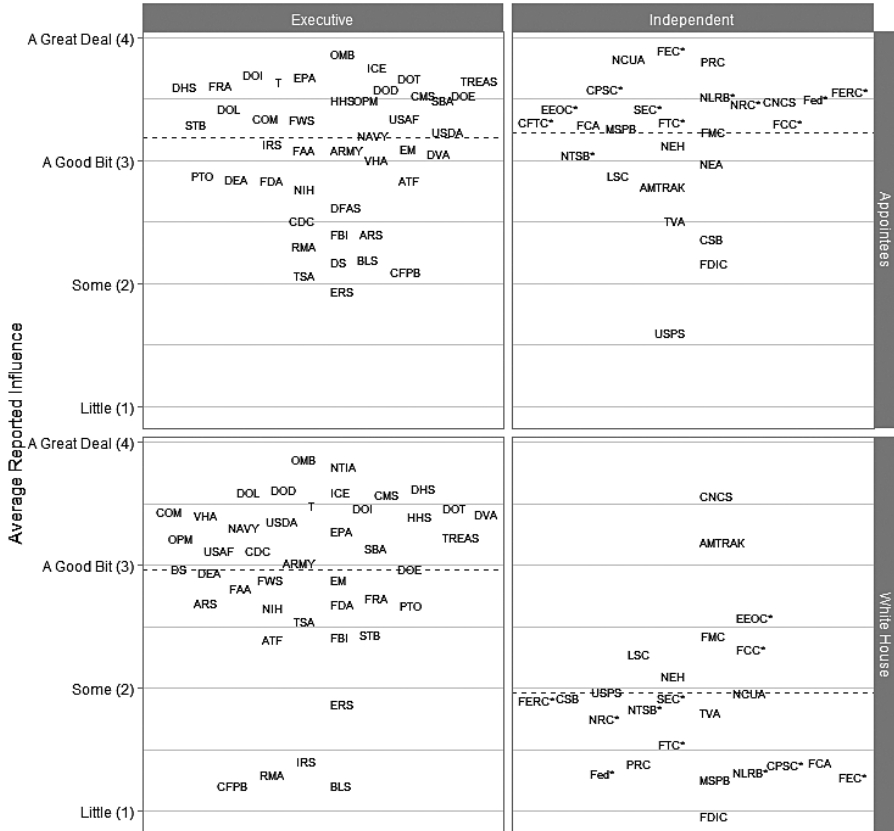
At first glance, these survey results are *prima facie* evidence that the structural features work as expected. White House power is noticeably diminished without making independent agencies “arms of the Congress.” But other survey responses strongly suggest another possibility: White House influence is profound but indirect and/or delayed. Respondents in independent agencies may not perceive White House influence because it is largely indirect—happening through the political appointees picked by the White House. Correspondingly, White House power over an independent agency may be diminished at the start of a presidency; at that time, a majority of Commissioners are likely to be more in sync with the

<sup>102</sup> This effect is seen most clearly for the major independents (Mean 2.37 [2014], 2.36 [2020]). Interestingly, the large independents appear to be somewhat more insulated from direct White House or congressional influence than the smaller independent agencies. The mean level of reported White House influence is 1.72 [2014], 1.92 [2020] for large independents and 1.86 [2014], 2.36 [2020] for small independents.

<sup>103</sup> In 2014 and 2020, the average reported degree of congressional influence over policy making in executive agencies was between 2.63 and 2.89, on a 0 to 4 scale. This is compared to 2.93 and 3.05 for the White House. For the independents, however, the average reported degree of congressional influence was 2.43 and 2.66 on a 0 to 4 scale. This is compared to between 1.82 and 2.18 for the White House.

views of the outgoing president (who probably appointed them) than the new president.<sup>104</sup>

FIGURE 4. WHITE HOUSE & APPOINTEE INFLUENCE OVER EXECUTIVE & INDEPENDENT AGENCIES, 2014



Note: N=155, 161 agencies; N=3,077, 3,123 observations. Top panel includes agency average responses to the question, “How much influence do the following groups have over policy making in your agency? [Political appointees].” Bottom panel includes agency average responses to the question, “How much influence do the following groups have over policy making in your agency? [White House].” Dashed line corresponds to the mean for each subgroup.

Figures 2 and 3 also include average responses to the same question but this time measuring the influence of political appointees. The figures highlight that the political heads of government agencies wield more policy-making power than anyone else. For our purposes, the figures make clear that presidential influence over independent agencies is substantial and principally realized through the appointment of political

<sup>104</sup> This was the key insight of our 2008 study, *Not-So-Independent Agencies*. See Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 462 (2008).

executives. For independent agencies, the question average is 3.12 and 3.14, equal to that for executive agencies. The influence of political appointees is greatest in the big independent agencies, the commissions whose vacancies the president is most likely to fill first at the start of a term (Mean 3.44 [2014], 3.39 [2020]). The primary means by which the president influences agency decisions may be through personnel and appointees; these individuals influence policy decisions the most in the larger (and fully staffed) independent agencies.<sup>105</sup>

In a related analysis, we determined which independent agencies were most influenced by political appointees and which were most influenced by the White House. Our findings—seen in Figure 4—are striking.<sup>106</sup> Presidential appointees are far more influential at “major” independent agencies than smaller independents. Indeed, with the exception of the National Transportation Board, all “major” independents are ranked above the average. On the other hand, the White House has the least direct impact over the “major” independents (as opposed to indirectly through appointments).<sup>107</sup> With the exception of the Equal Employment Opportunity Commission (“EEOC”) and the Federal Communications Commission (“FCC”), no “major” independent ranks above the average of White House influence.<sup>108</sup>

If elected officials are going to influence independent agencies, appointees are key. This may help explain why the Senate and the White House fight so vigorously over commission appointments.<sup>109</sup> In Part Three, we will extend this analysis by examining both presidential efforts to shape independent agen-

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<sup>105</sup> See *infra* notes 152–159.

<sup>106</sup> We focus on the 2014 results since it includes a larger number of small independents than the 2020 survey (twenty-eight vs. fifteen). In the 2020 data, the patterns are the same, but the smaller independents look more like the major independents. This can be seen in the differences between the results in Figure 2 and Figure 3.

<sup>107</sup> In Part III, we will explain how differences between “major” and smaller independents are tied to the fact that the White House is much more invested in staffing “major” independents with simpatico political appointees.

<sup>108</sup> Presidential influence over the EEOC may be tied to the president’s selecting the chair and general counsel of the EEOC, and efforts by the DOJ to override EEOC policy positions on affirmative action and the applicability of Title VII to sexual orientation and transgender discrimination. See *infra* notes 201–212 (discussing the power of the EEOC chair and general counsel); Orion Rummeler, *Trump Administration Argues Civil Rights Law Doesn’t Cover LGBTQ Workers*, AXIOS (Oct. 8, 2019), <https://www.axios.com/trump-administration-federal-law-lgbtq-workers-10c1ee34-41e6-4cd0-bc84-5c10ec392398.html> [<https://perma.cc/5RBL-XE96>].

<sup>109</sup> Burdett Loomis, *The Senate and Executive Branch Appointments: An Obstacle Course on Capitol Hill?*, BROOKINGS (Mar. 1, 2001), <https://>

cies decision-making and the ways that party polarization has transformed independent agency appointments.

### C. Policy Stability

Policy stability is another policy goal of the independent agency design. By limiting presidential influence through for cause removal, party balancing requirements, and fixed and staggered terms, agency policy would not shift from administration to administration.<sup>110</sup> Instead, commissioners would reach across party lines and produce stable fact-based policies. Do independent agencies provide more stable policy by limiting the influence of newly elected officials after elections?

Data from the 2020 survey sheds light this topic.<sup>111</sup> We asked federal executives two related questions. We asked them to report on the degree of agenda change their agency experienced after the election and the strength of Democrat-Republican policy disagreements. By comparing how executives working in executive versus independent agencies respond to the same question about the effect of the election on policy in their agency, we can evaluate something that is very difficult to observe across contexts, namely the stability of policy after an election. Correspondingly, by tracking the strength of partisan policy disagreements, we can assess whether those agencies most impacted by elections regulate on politically divisive subjects.

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[www.brookings.edu/articles/the-senate-and-executive-branch-appointments-an-obstacle-course-on-capitol-hill/](http://www.brookings.edu/articles/the-senate-and-executive-branch-appointments-an-obstacle-course-on-capitol-hill/) [https://perma.cc/3J6D-S7UV].

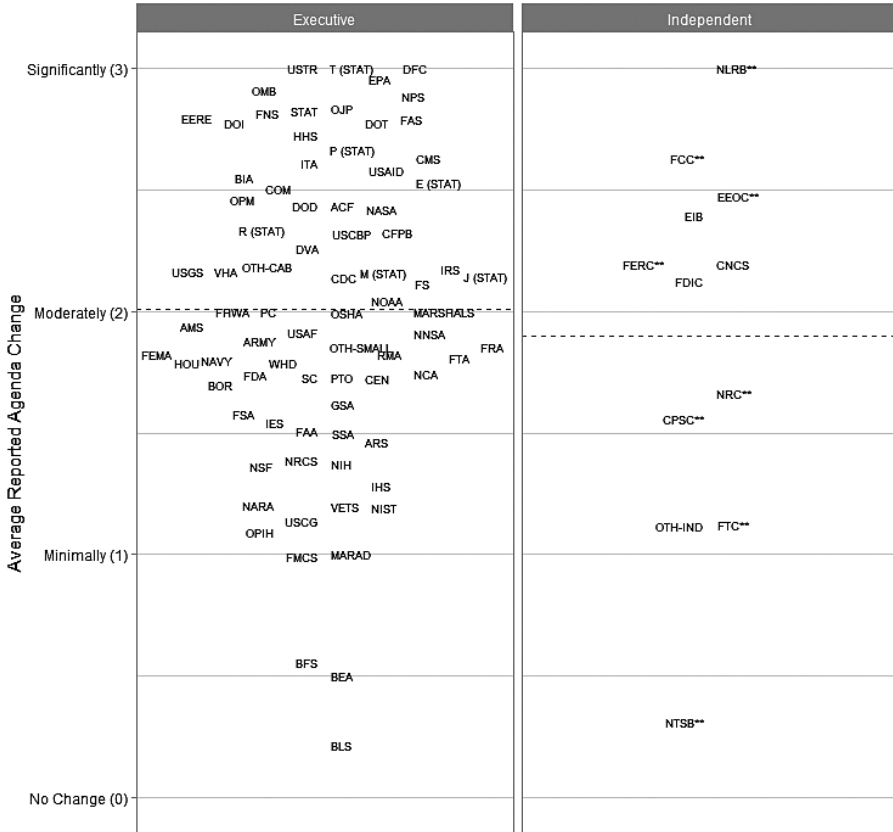
<sup>110</sup> See generally Terry M. Moe, *The Politics of Bureaucratic Structure*, in CAN THE GOVERNMENT GOVERN? 267 (John E. Chubb & Paul E. Peterson eds., 1989); DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN (2003).

<sup>111</sup> We did not ask this question on the 2014 survey.

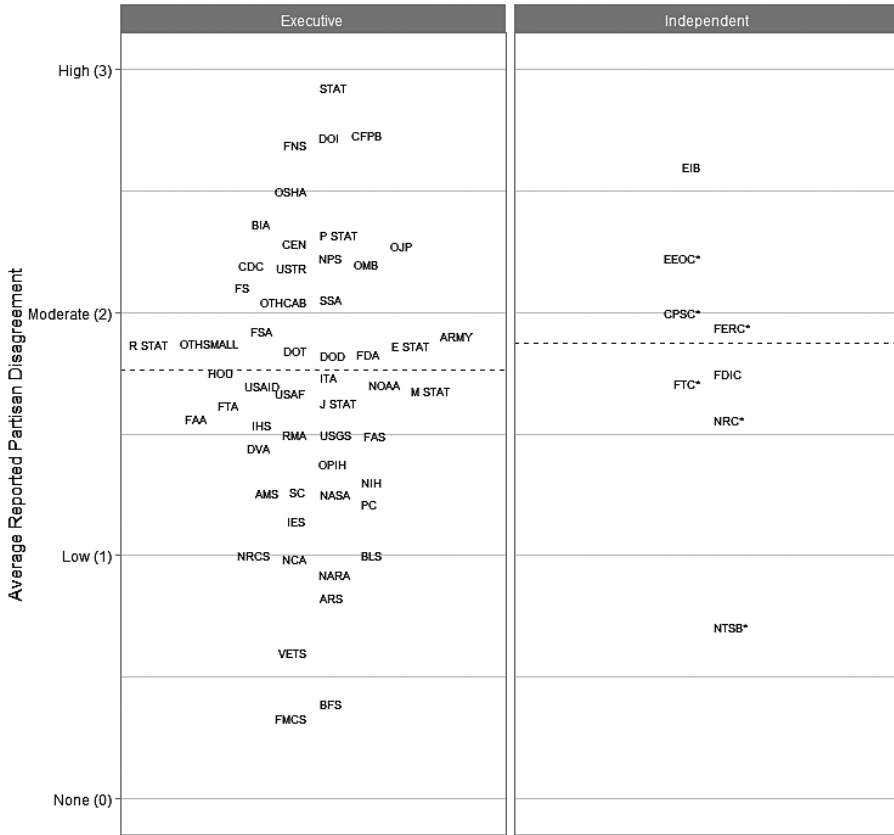


FIGURE 5. AGENDA CHANGE, POLICY DISAGREEMENT IN EXECUTIVE & INDEPENDENT AGENCIES, 2020

*“In your experience, how much did the policy agenda of [your agency] change as result of the transition?” [Fall 2020]*



*“How strongly do Republicans and Democrats in Washington disagree over what [your agency] should do?” [Fall 2020]*



Note: N=92. Dashed gray line corresponds to the mean for each subgroup. Source: 2020 Survey on the Future of Government Service.<sup>112</sup>

We report the basic results in Figure 5. The top part of Figure 5 addresses agenda change, the bottom partisan divisiveness. First, the top image: There is little (statistically indistinguishable) difference in reported agenda change for executive and major independent agencies ( $p < 0.27$ ). Smaller independents, however, experience far less agenda change and the gap between smaller independent agencies and executive agencies is a large and significant ( $p < 0.00$ ).

When comparing agencies with high and low reported agenda change, it is quite clear that issue salience is driving this difference; specifically, agencies with high reported agenda change typically engage in the controversial issues that divide the parties.<sup>113</sup> Executive agencies that report significant change include the Environmental Protection Agency (“EPA”) and Department of Health & Human Services (“HHS”); these agencies implement policies related to climate change, the

<sup>112</sup> We omitted respondents that reported not experiencing the change in administration or refused to answer. The figure only includes agencies for which we have at least 30 potential respondents and 5 actual respondents. There were 1,509 respondents that answered this question and we used 1,255 once agencies were eliminated that had too few respondents. Dashed gray line corresponds to mean for each subgroup for those agencies included in the figure.

<sup>113</sup> Mark D. Richardson, “Presidents, Partisan Disagreement, and Politicization” Paper Presented at the 2022 Annual Meeting of the Southern Political Science Association in San Antonio, Texas (Jan. 13–15, 2022) (copy on file with authors).

environment, stem cell research, and abortion. During the Trump Administration, for example, the EPA sought to repeal Obama-era Clean Power Plan regulations while HHS backed the dismantling of the Affordable Care Act.<sup>114</sup> Independents that report high levels of agenda change include the EEOC and FCC; these agencies too have flip flopping policy preferences on volatile policy issues. As we will discuss in Part Three, the Trump-era FCC and EEOC reversed Obama-era positions on internet net neutrality and discrimination on the basis of race, gender, and sexual orientation.<sup>115</sup>

On the other hand, agencies reporting little agenda change include agencies that are more technical in nature. Executive agencies like the Bureau of Labor Statistics and Bureau of Economic Analysis collect and analyze data; independent agencies like the National Transportation Safety Board (“NTSB”) investigate accidents. As we will discuss in Part Three, there are about 1,100 Senate confirmed positions available for presidential appointment when a new president takes office.<sup>116</sup> Presidents must prioritize among these positions to determine which to fill first. Agenda change may be slower in independent agencies if their policies are less important to incoming presidents.

The bottom panel in Figure 5 reinforces the conclusion that independent agencies are just as subject to partisan policy disagreements as executive agencies. More significant, the independent agencies most likely to be subject to partisan disagreement are the very same agencies that are subject to agenda change, that is, major independents who often engage in controversial issues.<sup>117</sup> Among the independent agencies reporting the strongest partisan disagreement are the NLRB and EEOC. Those reporting the least include the NTSB.

These findings cannot be squared with Progressive Era assumptions about how the political system would operate. They suggest, instead, that variation in responses have less to do with agency structure and more to do with a change in priorities stemming from the presidential transition. In other words, the independent agency structure does not protect policy stability on the very issues where policy stability is most important—controversial issues which divide the parties. Indeed, there is more agenda change in some of the major independent agencies than either executive agencies or smaller independents.<sup>118</sup> In Part Three, we will

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<sup>114</sup> Dan Mangan, *Trump’s Health Chief Pushes ‘Waivers’ for States from Obamacare Rules, as HHS Says Program in ‘Death Spiral’*, CNBC (May 16, 2017), <https://www.cnbc.com/2017/05/16/trumps-health-chief-pushes-waivers-for-states-from-obamacare-rules.html> [<https://perma.cc/6W6S-6Q3M>]; Umair Irfan, *Trump’s EPA Just Replaced Obama’s Signature Climate Policy with a Much Weaker Rule*, VOX (June 19, 2019), <https://www.vox.com/2019/6/19/18684054/climate-change-clean-power-plan-repeal-affordable-emissions> [<https://perma.cc/J73Y-YMTR>].

<sup>115</sup> See *infra* notes 171, 173.

<sup>116</sup> See Lewis & Richardson, *supra* note 83, at 56.

<sup>117</sup> Figure 5 data raises other concerns about the policy stability justification. By comparing agencies where President Trump appointed a majority with those without a Trump majority, we found that those with a Trump majority experienced greater policy change. The average for the independent agencies is 1.97; the average for agencies without a Trump majority is 1.84 on the 0 to 3 scale. This difference, though not statistically distinguishable is at least suggestive that policy change is associated with the speed with which presidents appoint majorities to the commission.

<sup>118</sup> While the average agenda change for large independent is still less than executive agencies overall, the EEOC and FCC are in the top third of all agencies in agenda change. The average reported agenda change in these agencies is higher than agencies such as the Department of Defense, Food and Drug Administration and Veterans Health Administration. The average agenda change reported for the large independent agencies is 1.67, compared to 1.95 for the

extend the analysis in this section by highlighting policy shifts either when the commission chair changes or when there is a shift in the party affiliation of a majority of commissioners.

#### D. Unintended Consequences

The problem with the independent agency design is not simply that expertise, political insulation, and policy stability goals have not been realized. Survey data also highlights unintended negative consequences of the independent agency design, particularly for the smaller independent agencies. For the balance of this section, we will highlight two significant negative consequences. First, Congress and especially the White House are less invested in independents than in executive agencies. This political neglect can be disabling if, for example, the president is slow to nominate or the Senate is slow to confirm commissioners. Second, by removing independent agencies from direct executive branch controls, there is little policy coordination between independent agencies and other parts of the executive. This outsider status can result in a lack of political power.

##### 1. *Independent Agencies and Political Neglect*

The 2020 survey sought to evaluate the effort invested by the White House and congressional committees in managing and supporting the independent agencies. We asked federal executives, “How much effort do the [White House and Congress] spend to ensure that [your agency] has what it needs to carry out its mission?” Their options were 0-None, 1-Little, 2-Some, 3-A good bit, and 4-A great deal. Figure 6 breaks down average agency responses by structure. In comparing independent to executive agencies, there is a clear statistically significant difference ( $p < 0.00$ ) in the levels of support from both branches. The average reported level of White House support is 1.6 out of 4 for executive agencies and 0.83 for independent agencies. To put this in perspective, average White House support for executive agencies is between “Little” and “Some.” It is between “None” and “Little” for independent agencies. While some scholars have suggested that presidents have both incentives and responsibility to make sure the administrative state is effective,<sup>119</sup> these results suggests that the White House

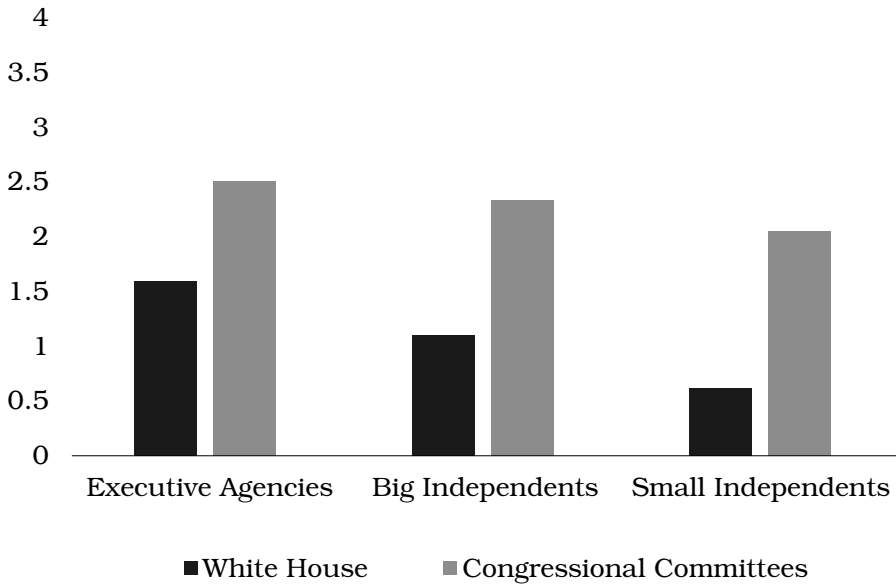
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average executive agency. The large independents also report more agenda change than the small independents (Mean: 1.23,  $p < 0.23$ ).

<sup>119</sup> See, e.g., Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, 6 J.L. ECON. & ORG. 213, 236–37 (1990).

spends little effort building capacity.<sup>120</sup> Among the agencies most likely to be neglected by the White House are the small independents.

FIGURE 6. “HOW MUCH EFFORT DO THE [WHITE HOUSE AND CONGRESS] SPEND TO ENSURE THAT [YOUR AGENCY] HAS WHAT IT NEEDS TO CARRY OUT ITS MISSION?”



Note: Unit of analysis is an agency. There are 156 executive agencies, 11 major independent agencies, and 14 small independents. Source: Survey on the Future of Government Service, 2020.

If we turn our attention to Congress (gray bars), we see a similar pattern. While Congress is more likely across the board to exert effort to make sure agencies have what they need, the pattern of investment is similar. There is a large and statistically significant difference between congressional efforts to support executive agencies compared to independents ( $p < 0.05$ ). Federal executives working in executive agencies report a lot more attention from Congress than independent agencies, particularly smaller independents.<sup>121</sup> The average

<sup>120</sup> 2020 results may speak, in particular, to the Trump White House’s deregulatory agenda and incendiary rhetoric. For a far ranging analysis of Trump’s attacks against the deep state, see SKOWRONEK, DEARBORN & KING, *supra* note 1. For a general discussion of presidential efforts to build capacity in the administrative state see Nick Bednar & David E. Lewis, *Presidential Investment in the Administrative State*, AM. POL. SCI. REV., Mar. 13, 2023, at 1–16.

<sup>121</sup> Persistent vacancies in agency leadership can lead to less investment in agency capacity. If major commissions get more priority in the appointments process, this can be consequential for agency expertise and performance. See

executive agency reports somewhere between “Some” and “A good bit” of congressional effort to make sure the agency has what it needs to carry out its mission. Respondents in large and small independents report closer to “Some.” There is a lengthy scholarly literature exploring whether and when legislators are motivated to conduct legislative oversight.<sup>122</sup>

This literature generally suggests that they do so when such efforts help satisfy reelection incentives. The variation between executive agencies, major independents, and small independents may reflect the fact that smaller independents such as the Railroad Retirement Board or Federal Maritime Commission provide fewer reelection benefits to legislators.

As we will explain in Part III, an unintended consequence of the independent agency design may be less political ownership of the agencies themselves.<sup>123</sup> This is particularly true of smaller independents who seem particularly subject to political neglect. The White House is less inclined to invest effort in making sure that commissioners are named and quorum requirements are satisfied. Congressional committees are more supportive but their efforts are increasingly diluted by an expanding government and smaller staffs.<sup>124</sup> In this way, smaller independents risk becoming administrative orphans, with no elected officials taking responsibility for their health and management unless some misstep forces the agency onto their consciousness.

## 2. *Independent Agencies and Agency Power*

Political neglect is but one cost of an institutional design where independent agencies are not part of the integrated, hierarchical structure of the executive departments. By isolating independent agencies this way, these agencies are also removed from the power centers that provide resources necessary in inter-agency fights. Competition among agencies for

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Anne Joseph O’Connell, *Actings*, 120 COLUM. L. REV. 613, 695–98 (2020); Christopher Piper & David E. Lewis, *Do Vacancies Hurt Federal Agency Performance?*, 33 J. PUB. ADMIN. & THEORY 313, 314 (2023).

<sup>122</sup> See generally MORRIS S. OGUL, CONGRESS OVERSEES THE BUREAUCRACY: STUDIES IN LEGISLATIVE SUPERVISION (1976); JOEL D. ABERBACH, KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT (1990); Seymour Scher, *Conditions for Legislative Control*, 25 J. POL. 526 (1963).

<sup>123</sup> There has been significant work in last decade describing a decline in administrative capacity in the United States and this data—as we will discuss in Section III.C—seems to provide part of an answer why.

<sup>124</sup> See Russell W. Mills & Jennifer Selin, *Don’t Sweat the Details! Enhancing Congressional Committee Capacity Through the Use of Detailees*, 42 LEGIS. STUD. Q. 611, 611–13 (2017) (describing small staffs).

position, turf, and resources extends to all areas of government and in ways not anticipated by Progressive Era progenitors of the independent agency design.<sup>125</sup> To investigate this question, we rely on estimates of influence from the 2014 survey. The survey gave respondents the following text and question:

Government policy making often involves multiple agencies (e.g., commenting on proposed legislation, interagency task forces). When agencies participate in work that involves multiple agencies and diverse opinions, not all agencies operate on equal footing. Some have more influence than others.

In your experience, how influential are the following agencies in interactions involving multiple agencies?

Respondents evaluated five to eight agencies that they knew something about. In Figure 7, we report numerical estimates of agency influence calculated by aggregating all of the responses, adjusting for differences among raters.<sup>126</sup>

The figure reveals some interesting differences between the executive agencies and the independent agencies. First, executive agencies are more influential than independent agencies. Among the most influential agencies are agencies that settle intra-governmental turf wars or otherwise hold power over other agencies. The Office of Management and Budget (“OMB”) reviews agency budgets and apportions spending.<sup>127</sup> It reviews regulations and sets policies for grants and procurement. The Office of Legal Counsel (“OLC”) arbitrates legal disputes among agencies.<sup>128</sup> The other agencies that are most influential appear to be those that are important for society’s survival and ones that hold secret information, including the National Security Staff (“NSS”), Department of Defense (“DOD”), and Central Intelligence Agency (“CIA”).

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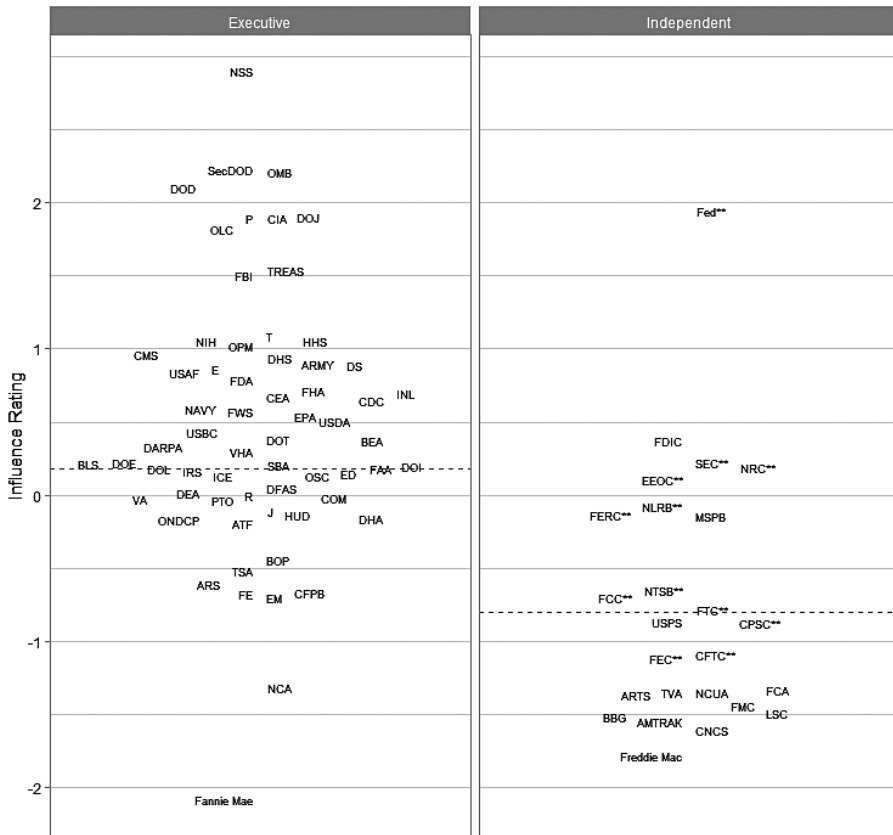
<sup>125</sup> See JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 179-95 (1989) (detailing agency turf fights); see also Amy B. Zegart, *September 11 and the Adaptation Failure of U.S. Intelligence Agencies*, 29 *INT’L SEC.* 78, 86 (2005).

<sup>126</sup> See Lewis, Richardson & Rosenthal, *supra* note 101, at 175 (making use of a similar metric with respect to workforce skills). For a full discussion of these influence estimates, see *id.*

<sup>127</sup> See Eloise Pasachoff, *The President’s Budget as a Source of Agency Policy Control*, 125 *YALE L.J.* 2182, 2196 (2016); Meena Bose, *Understanding OMB’s Role in Presidential Policymaking*, in *EXECUTIVE POLICYMAKING*, *supra* note 101, at 1, 3.

<sup>128</sup> See generally *GOVERNMENT LAWYERS: THE FEDERAL LEGAL BUREAUCRACY AND PRESIDENTIAL POLITICS* (Cornell W. Clayton ed., 1995); William S. Janover, Note, *Indirect Constraints on the Office of Legal Counsel: Examining a Role for the Senate Judiciary Committee*, 73 *STAN. L. REV.* 1601 (2021).

FIGURE 7. FEDERAL EXECUTIVE PERCEPTIONS OF AGENCY INFLUENCE BY AGENCY STRUCTURE, FALL 2014



Note: These numbers do not include judgeships nominations to chair positions on multi-member bodies that are distinct from nominations to these multimember bodies.

The only independent agency among this group is the Board of Governors of the Federal Reserve System. On average, the independent agencies (Mean: -0.80) are significantly less influential than executive agencies in inter-agency matters (Mean: 0.18,  $p < 0.00$ ). With the sole exception of the Fed, no independent agency—not even “major” independent agencies like the FTC, SEC, and FCC—ranks ahead of the average executive branch agency.<sup>129</sup> Indeed, there is a marginally significant difference between executive agencies and “major” independents (Mean: -0.25;  $p < 0.10$ ). And there is an even larger gap between executive agencies and smaller independ-

<sup>129</sup> “Major” independents routinely rank ahead of other independents, suggesting (once again) that elected officials often orphan minor independents. See *Data Analysis Memo*, *supra* note 82 (noting that there is a statistically significant gap between “major” and other independents with respect to agency influence).



ents (Mean: -1.15,  $p < 0.00$ ). The difference in influence between agencies in executive departments and independent agencies can be important for outcomes. As Congress increasingly mandates joint rulemaking and joint enforcement activity in areas as varied as antitrust, financial regulation, environmental protection, and transportation, whether agencies operate on equal footing becomes increasingly important.<sup>130</sup>

There is another reason independent agencies are at a disadvantage in inter-agency disputes. It is sometimes the case that these disputes are either resolved within the executive branch or that the executive branch can outright resist independent agency action. Consider litigation disputes between the executive and independent agencies. The Department of Justice often controls litigation authority and can simply override independent agency legal policy preferences.<sup>131</sup> For example, in litigation involving affirmative action and the applicability of employment discrimination protections to LGBTQ claimants, the Solicitor General (who controls Supreme Court but not lower court litigation) reversed the position of the EEOC.<sup>132</sup> Perhaps more telling, the Department of Justice increasingly sues independent agencies whose policies diverge from executive branch agencies.<sup>133</sup> Independent agencies are at a disadvantage in these lawsuits; courts typically “privilege the statutory interpretations of executive agencies over those of the more technocratic fourth branch.”<sup>134</sup>

If independent agencies are systematically less influential when they disagree with other agencies, this should inform decisions about design. It is hard to name areas of federal policy where multiple agencies are not involved. Jurisdictions almost always overlap in some way and agencies are constantly navigating a complex inter-agency world; agencies must work together in joint rulemaking, cross-agency working groups, and joint task forces. The lack of influence within the executive

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<sup>130</sup> Freeman & Rossi, *supra* note 21. For a recent example of intra-governmental coordination, see Ensuring Responsible Development of Digital Assets, Exec. Order No. 14,067 (Mar. 9, 2022), <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/03/09/executive-order-on-ensuring-responsible-development-of-digital-assets/> [<https://perma.cc/B4BH-9W5S>] (recognizing that independent agencies cannot be mandated to participate in “whole of government” regulation of crypto-currency).

<sup>131</sup> See generally Devins, *supra* note 5.

<sup>132</sup> See Rummeler, *supra* note 108 and *infra* notes 164–165 on affirmative action.

<sup>133</sup> See generally Bijal Shah, *Executive (Agency) Administration*, 72 STAN. L. REV. 641 (2020).

<sup>134</sup> *Id.* at 675.

establishment may also explain delays in the appointment process and difficulties in the ability of recruiting and retaining high quality persons to come work in these agencies.

This story of political neglect and interagency tensions reinforces survey data regarding expertise, political insulation, and policy stability. We see once again that today's administrative state is far bigger and far more interconnected than the fledgling administrative state that was the baseline for Progressive designers of independent agencies. And we see once again that Progressives also did not take modern partisanship into account. Progressives championed the independent agency design at a time when ideological polarization was not a roadblock; instead, it was assumed that the President and Congress would support the independent agency design. Presidents were supposed to nominate and the Senate was supposed to confirm commissioners who were supposed to work in bipartisan ways to make fact-based expert judgments. We will now provide a fuller explanation of how party polarization and the exponential growth of government frustrated the independent agency design.

### III

#### WHY INDEPENDENT AGENCIES FAIL

2014 and 2020 survey data reveal that none of the policy justifications for independent agencies hold up. Major independent agencies do not look so different from executive agencies. They are no more expert; they are susceptible to political influence; their policies change after elections. To make matters worse, smaller independent agencies are administrative orphans. Neither branch claims ownership and independent agencies are at a significant disadvantage in inter-agency negotiations and processes. The Progressive Era vision of fact-based apolitical and technocratic governance has not been realized; if anything, today's independents subvert that vision. The question is why?

In what follows, we explain how three broad changes in American politics have undercut key Progressive Era assumptions regarding independent agencies. *First*, we detail how the growing Democratic-Republican divide undercuts the Progressive vision of apolitical and technocratic decision making. This includes the naming of partisan commissioners determined to advance party priorities at the expense of nonpartisan technocratic policymaking. *Second*, we describe how the rise of the administrative presidency increased presidential pressure in

independent agency policymaking and, in turn, how Senate responses to increasingly aggressive presidential actions have led to regular and persistent independent agency vacancies and, increasingly, the loss of quorums. *Third*, we consider how the dramatic growth in the administrative state has led to an unexpected political neglect of smaller independent agencies.

#### A. Party Polarization and the Demise of Apolitical Expertise

From 1930 to 1980, the ideological divide separating Democrats and Republicans was small.<sup>135</sup> There was virtually no talk of the deep state, the unitary executive, or originalism.<sup>136</sup> Congressional committees often made use of unified staffs.<sup>137</sup> Democrats occupied every ideological niche and liberal “Rockefeller Republicans” were a critical part of the Republican coalition.<sup>138</sup> With little ideological distance between the parties, there was less reason to subvert the independent agency design in pursuit of partisan goals. Instead, presidents and lawmakers largely abided by the independent agency design.

Presidents typically appointed (and the Senate confirmed) commissioners selected as much for expertise or patronage as ideology.<sup>139</sup> Moreover, presidents less commonly overrode agency autonomy.<sup>140</sup> Consider, for example, Supreme Court litigation where the views of the independent agency diverge from those of the White House. Rather than invoke the unitary executive to override the independent agency design, the Department of Justice (in the words of Nixon Solicitor General Erwin Griswold, Eisenhower Solicitor General Robert Stern, and Carter Attorney General Griffin Bell) “tried very hard to be sure that independent agencies had an opportunity to have

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<sup>135</sup> Voteview, *supra* note 40.

<sup>136</sup> See STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 6 (2008).

<sup>137</sup> See Neal Devins, *The Academic Expert Before Congress: Observations and Lessons from Bill Van Alstyne’s Testimony*, 54 *DUKE L.J.* 1525, 1543 (2005).

<sup>138</sup> See Steven S. Smith & Gerald Gunn, *The Dynamics of Party Government in Congress*, in *CONGRESS RECONSIDERED* 167 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 10th ed. 2013).

<sup>139</sup> See E. PENDLETON HERRING, *FEDERAL COMMISSIONERS: A STUDY OF THEIR CAREERS AND QUALIFICATIONS* (1936); CUSHMAN, *supra* note 62, at 748; see also Feinstein & Hemel, *supra* note 61 (noting that cross-party appointments were not particularly ideological before Reagan but have become increasingly ideological).

<sup>140</sup> Before the Reagan administration, the official position of the Department of Justice was that “the Department does not make policy—that is the responsibility and right of the client agencies.” Susan M. Olsen, *Challenges to the Gatekeeper: The Debate over Federal Litigation Authority*, 68 *JUDICATURE* 71, 82 (1984).

their view before the Court,”<sup>141</sup> making sure that “the Court is always appraised of intragovernmental conflict,”<sup>142</sup> and being careful “not to interfere with the policy prerogatives of its agency clients.”<sup>143</sup> A 1994 study on Solicitor General control of independent agency litigation (that one of us authored) found that the Solicitor General gave “higher priority” to independent agency legal policy preference than to executive agency preferences.<sup>144</sup>

Polarization increased, however, driven by a number of factors. Richard Nixon’s southern strategy and the rise of Ronald Reagan and the conservative wing of the Republican Party accelerated a political realignment in both the South (where conservatives left the Democratic party) and North (where the moderate-to-liberal wing of the Republican party dissipated).<sup>145</sup> Computer-driven redistricting accelerated this party split. Specifically, by drawing district lines that essentially guaranteed that each party would win particular seats in the House of Representatives, Democratic and Republican candidates sought to mobilize the more partisan bases that vote in party primaries, pushing moderates out and rewarding candidates who were more ideological.<sup>146</sup> Further exacerbating this partisan split was the advent of both talk radio and the internet, two phenomena that fuel polarization and cut against a shared understanding of facts.<sup>147</sup> Specifically, with conservative and liberal audiences getting their news and opinion programming from stations that reinforce their political beliefs, people are “exposed to louder echoes of their own voices, result-

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<sup>141</sup> *Securities Exchanges Act Amendments of 1973: Hearings before the H. Comm. on Interstate and Foreign Commerce*, 93rd Cong., 1st Sess. 290 (1973) (testimony of Erwin Griswold, Solicitor General of the United States).

<sup>142</sup> Robert L. Stern, *The Solicitor General’s Office and Administrative Agency Litigation*, 46 A.B.A. J. 154, 157 (1960).

<sup>143</sup> 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).

<sup>144</sup> Devins, *supra* note 5, at 288–89 (examining both certiorari filings and merits briefs).

<sup>145</sup> 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); Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 *CALIF. L. REV.* 273, 274 (2011).

<sup>146</sup> See Samuel Issacharoff, *Collateral Damage: The Endangered Center in American Politics*, 46 *WM. & MARY L. REV.* 415, 428–31 (2004).

<sup>147</sup> See generally KATHLEEN HALL JAMIESON & JOSEPH N. CAPPELLA, *ECHO CHAMBER: RUSH LIMBAUGH AND THE CONSERVATIVE MEDIA ESTABLISHMENT* (2008); MARKUS PRIOR, *POST-BROADCAST DEMOCRACY: HOW MEDIA CHOICE INCREASES INEQUALITY IN POLITICAL INVOLVEMENT AND POLARIZES ELECTIONS* (2007).

ing in social fragmentation, enmity, and misunderstanding.”<sup>148</sup> By 1990, the sharp gap between Northern and Southern members had largely disappeared, replaced by a sharp and ever-growing divide between the parties.<sup>149</sup> In 2019, Pew survey data showed that the partisan divide on political values had doubled since 1994.<sup>150</sup> Party leaders were no longer seeking middle ground bipartisan solutions; instead, they embraced competing messages and sought to gain political advantage from the other.<sup>151</sup>

Political choices to emphasize ideology and sharpen the policy divide between Democrats and Republicans have transformed government in ways that cut against the technocratic vision of apolitical fact-based policymaking. The casualties of this struggle have been widespread and include the rules and norms that facilitate bipartisanship and governance. The last two decades have seen breakdowns in the appointment process, the budget process, and even the acceptance of electoral outcomes. The consequences of these changes for the administrative state are dramatic, particularly for independent agencies that are supposed to rise above partisan identity and champion apolitical technocratic expertise.

## B. Rise of the Administrative Presidency

The rise of political polarization has happened in parallel with fundamental changes in the role of the president in relation to the executive establishment.<sup>152</sup> The forces that set political polarization in motion during the Nixon and Reagan administrations were matched by analogous efforts to expand presidential control of the ever-growing administrative state. President Nixon is credited with adopting the so-called “administrative presidency,” that is, a systematic approach to control

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<sup>148</sup> Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 *YALE L.J.* 71, 101–02 (2000).

<sup>149</sup> Roberts & Smith, *supra* note 145, at 306.

<sup>150</sup> See *In a Politically Polarized Era, Sharp Divides in Both Partisan Coalitions*, PEW RSCH. CTR. (Dec. 17, 2019), <https://www.pewresearch.org/politics/2019/12/17/in-a-politically-polarized-era-sharp-divides-in-both-partisan-coalitions/> [<https://perma.cc/3UE9-Q9T2>].

<sup>151</sup> See generally C. Lawrence Evans, *Committees, Leaders, and Message Politics*, in *CONGRESS RECONSIDERED* 217 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 7th ed. 2001) (highlighting ways that Democrats and Republicans alike sought to appeal to their respective bases by embracing competing messages).

<sup>152</sup> For a review of the changes in the presidency related to personnel operations, see generally David E. Lewis, *Presidential Appointments and Personnel*, 14 *ANN. REV. POL. SCI.* 47 (2011).

of the executive.<sup>153</sup> Nixon centralized control of policy decisions in the White House and selected appointees on the basis of loyalty to assert control of agency policy making. Correspondingly, the Executive Office of the President (which included the Presidential Personnel Office) expanded in size and sophistication.<sup>154</sup>

Subsequent presidents have built on Nixon's legacy, most notably, Ronald Reagan. Recognizing that "the president's personnel decisions are strategically important to the realization of his interests as a political leader,"<sup>155</sup> Reagan sought to incorporate independent agencies into larger legal ("unitary executive")<sup>156</sup> and policy goals (deregulation).<sup>157</sup> Recognizing (in the words of OMB head James Miller) that the White House could not "turn around" regulation on its own, the Reagan administration turned to the agencies themselves as the "first line of defense against overregulation" and the "first line of offense in ferreting out ineffective and excessively burdensome regulation."<sup>158</sup> To play this dual role, "the agencies needed to be headed by and staffed with people sympathetic to the president's regulatory relief aims."<sup>159</sup>

In addition to appointments, the Reagan administration took steps to bring independent agencies under the wing of the White House. By invoking the "unitary executive,"<sup>160</sup> the Reagan administration questioned the constitutionality of statutory limits on presidential control of independent agency

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<sup>153</sup> RICHARD P. NATHAN, *THE PLOT THAT FAILED: NIXON AND THE ADMINISTRATIVE PRESIDENCY* 73–80 (1975).

<sup>154</sup> See Hugh Heclo, *OMB and the Presidency—The Problem of "Neutral Competence"*, 38 *PUB. INT.* 80, 84 (1975); HUGH HECLLO, *A GOVERNMENT OF STRANGERS: EXECUTIVE POLITICS IN WASHINGTON* 250 (1977).

<sup>155</sup> Terry Moe, *An Assessment of the Positive Theory of Congressional Dominance*, 12 *LEGIS. STUD. Q.* 475, 489 (1987).

<sup>156</sup> For a general treatment of the unitary executive, see SKOWRONEK, DEARBORN & KING, *supra*, note 1, at 24–38.

<sup>157</sup> Most notably, the Reagan administration imposed OMB cost-benefit review on all proposed agency regulations. See generally *CONG. RSCH. SERV.*, RL32397, *Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs* 2–4 (2011).

<sup>158</sup> GEORGE C. EADS & MICHAEL FIX, *RELIEF OR REFORM?: REAGAN'S REGULATORY DILEMMA* 139 (1984) (quoting Miller).

<sup>159</sup> *Id.* "The common characteristics of the Reagan administration's political appointees [was] their ideological leanings and suspicions of the bureaucracy." *Id.* at 142.

<sup>160</sup> Ronald Reagan, Statement on Signing the Bill Increasing the Public Debt Limit and Enacting the Balanced Budget and Emergency Deficit Control Act of 1985 (Dec. 12, 1985), in *THE AMERICAN PRESIDENCY PROJECT*, <https://www.presidency.ucsb.edu/documents/statement-signing-the-bill-increasing-the-public-debt-limit-and-enacting-the-balanced> [https://perma.cc/SVF2-DEPF] (last visited July 31, 2023).

decision-making. “Under the system of separated powers established by the Constitution,” Reagan argued that “executive functions may only be performed by officers in the executive branch.”<sup>161</sup> Correspondingly, the OLC issued an opinion concluding that “the President had the constitutional power” to subject “independent regulatory agenc[ies]” to OMB review.<sup>162</sup> DOJ filings likewise argued that “executive functions importantly affecting the whole of the executive branch and directing the President himself may only be performed by an officer who serves at the pleasure of the president.”<sup>163</sup> Perhaps more telling, the DOJ broke ranks with the bureaucratic model of agency representation by overriding independent agency legal policy arguments that did not match executive branch priorities. For example, the DOJ successfully forced the EEOC to withdraw its filings in support of affirmative action before a federal appellate court;<sup>164</sup> the DOJ also reversed the EEOC in related litigation before the Supreme Court, appearing before the Court as the EEOC’s advocates while making legal arguments directly contrary to EEOC policy.<sup>165</sup>

Reagan administration efforts to cabin independent agencies set the stage for future presidents to follow suit and further limit the political insulation of independent agencies. Following Reagan, ideological loyalty has become a more consistent

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

<sup>162</sup> Extending Regul. Rev. Under Exec. Order 12866 to Indep. Regul. Agencies, 43 Op. O.L.C. slip op. at 5 (2019) (quoting Memorandum for David Stockman, Director, OMB, from Larry L. Simms, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Proposed Executive Order on Federal Regulation 7* (Feb. 12, 1981)). Ultimately, however, the Reagan administration did not include independent agencies. Likewise, the Biden administration did not include independent agencies as part of its overhaul of the cost-benefit program. Proposed changes extend only to “executive departments and agencies.” Modernizing Regulatory Review, Exec. Order No. 14,094 (Apr. 6, 2023), <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/04/06/executive-order-on-modernizing-regulatory-review/> [<https://perma.cc/TQ9F-F58S>]. The 2024 presidential elections may trigger a new era, however. Former President, Donald Trump is already putting in place a plan to impose greater control over independent agencies should he be elected in 2024. Reporting from the *New York Times* suggests the former president may fire an independent agency commissioner to bring a legal challenge to limits on the president’s ability to fire independent agency commissioners. The former president also plans to require independent agencies to submit proposed regulations to OMB for review. Jonathan Swan, Charlie Savage & Maggie Haberman, *Trump and Allies Forge Plans to Increase Presidential Power in 2025*, N.Y. TIMES (July 17, 2023), <https://www.nytimes.com/2023/07/17/us/politics/trump-plans-2025.html> [<https://perma.cc/CBT9-NVWY>].

<sup>163</sup> Transcript of Oral Argument at 34, in *Bowsher v. Synar*, 478 U.S. 714 (1986) (No. 85-1377).

<sup>164</sup> See Devins, *supra* note 5, at 298–99.

<sup>165</sup> See *id.* at 299–301.

hallmark of presidential appointments.<sup>166</sup> Presidents have sought to expand OMB oversight of independent agencies<sup>167</sup> and have used the DOJ to advance presidential legal policy goals.<sup>168</sup> Indeed, Democratic presidents (who have never formally challenged the independent agency design in court) nonetheless embraced a broad view of the president's power to fill commissioner vacancies through recess appointments and remove agency officials who lack "for cause" removal protections.<sup>169</sup>

In today's hyper-polarized polity, this focus on ideology reinforces Democratic-Republican differences and cuts against bipartisan, apolitical, fact-based expert judgments. By making party identity figural, independent agency decision-making is now tied to which party controls the agency. Independent agency commissioners increasingly file separate statements after a change of administration, so that Democrats and Republicans can establish "their reputations for loyalty."<sup>170</sup>

Far more significant, independent agency policies flip when presidential appointees flip political control of the independent agency. This is particularly true of the "major" independents that garner attention from the president and Congress. During the Trump era, for example, Republican appointees at the

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<sup>166</sup> Lewis, *supra* note 152, at 54–55.

<sup>167</sup> Most notably, the Trump administration—through the OLC—issued an opinion concluding that the president may direct independent regulatory agencies to comply with the centralized regulatory review process. See *Extending Regul. Rev. Under Exec. Order 12866 to Indep. Regul. Agencies*, 43 Op. O.L.C. slip op. at 1–2 (2019). The Biden administration too has leaned on the OLC to assert presidential prerogatives over independent agency staffing. See Mark Joseph Stern, *Biden's Justice Department Is Walking Into a Trap Set by Trump Appointees*, SLATE (May 28, 2021), <https://slate.com/news-and-politics/2021/05/biden-trump-severino-trap.html> [<https://perma.cc/AGK2-34B4>].

<sup>168</sup> See Shah, *supra* note 133.

<sup>169</sup> For a discussion of Obama efforts to fill vacancies through recess appointments, see *infra* notes 213–220. For a discussion of Biden administration efforts to remove Trump-era officials, see Stern, *supra* note 142; Andrew M. Grossman & Sean Dandoloski, *The End of Independent Agencies? Restoring Presidential Control of the Executive Branch*, THE FEDERALIST SOCIETY (July 26, 2021), <https://fed-soc.org/commentary/publications/the-end-of-independent-agencies-restoring-presidential-control-of-the-executive-branch> [<https://perma.cc/2LY3-ZNUD>].

<sup>170</sup> Keith S. Brown & Adam Candeub, *Ideology Versus Partisanship: Regulatory Behavior and Cyclical Political Influence* 10 (Mich. State Univ. Legal Stud. Rsch. Paper Series, Paper No. 04-10, 2006), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=913806](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=913806) [<https://perma.cc/X5C8-6CEX>].



FCC,<sup>171</sup> NLRB,<sup>172</sup> EEOC,<sup>173</sup> and SEC<sup>174</sup> reversed Obama era policies upon gaining majority control. Trump was hardly unique in this regard: Obama appointees reversed earlier independents upon gaining majority control;<sup>175</sup> the Biden administration has likewise set its sights on reversing Trump policies whenever Democrats gain majority control.<sup>176</sup>

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<sup>171</sup> See Tony Romm, *The Trump Administration Just Voted to Repeal the U.S. Government's Net Neutrality Rules*, VOX (Dec. 14, 2017), <https://www.vox.com/2017/12/14/16771910/trump-fcc-ajit-pai-net-neutrality-repeal> [<https://perma.cc/BP36-J6JD>].

<sup>172</sup> See Noam Scheiber, *Trump Takes Steps to Undo Obama Legacy on Labor*, N.Y. TIMES (June 20, 2017), <https://www.nytimes.com/2017/06/20/business/nlr-trump-labor.html> [<https://perma.cc/3P3T-SSZC>].

<sup>173</sup> See Bryce Covert, *The Most Harmful Trump-Era EEOC Rule Faces a Congressional Challenge*, THE NATION (Mar. 23, 2021), <https://www.thenation.com/article/economy/eoc-trump-resolution-murray-scott/> [<https://perma.cc/P9KF-WC2R>].

<sup>174</sup> See Dylan Tokar, *SEC Considers Changes to Trump-Era Rules*, WALL ST. J. (June 14, 2021), <https://www.wsj.com/articles/sec-considers-changes-to-trump-era-rules-11623705091> [<https://perma.cc/BCL4-5QCR>].

<sup>175</sup> Examples include the NLRB and FCC. See Danielle Douglas-Gabriel, *NLRB Reverses Course on Graduate Students' Right to Organize as Employees*, WASH. POST (Sept. 20, 2019), <https://www.washingtonpost.com/education/2019/09/20/nlr-reverses-course-graduate-students-right-organize-employees/> [<https://perma.cc/3LMQ-UXU4>]; Brain Fung, *The FCC Just Voted to Repeal Its Net-Neutrality Rules, in a Sweeping Act of Deregulation*, WASH. POST (Dec. 14, 2017), <https://www.washingtonpost.com/news/the-switch/wp/2017/12/14/the-fcc-is-expected-to-repeal-its-net-neutrality-rules-today-in-a-sweeping-act-of-deregulation/> [<https://perma.cc/X88P-87TT>].

<sup>176</sup> Examples include the SEC and EEOC. See Tokar, *supra* note 174; Katanga Johnson, *Analysis: Biden's Agencies Reverse Trump's Wall Street-Friendly Rules*, REUTERS (Apr. 12, 2021), <https://www.reuters.com/business/finance/with-quick-fixes-bidens-agencies-reverse-trumps-wall-street-friendly-rules-2021-04-12/> [<https://perma.cc/GU45-2NX3>]; Lisa Nagele-Piazza, *EEOC Priorities May Change Under a Biden Administration*, SHRM (Dec. 8, 2020), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/eoc-priorities-may-change-under-a-biden-administration.aspx> [<https://perma.cc/XJ4V-6NRH>]. On the other hand, the Biden administration was slow to gain control of the FCC. In particular, the administration delayed making nominations and, more tellingly, could not secure confirmation of nominee Gigi Sohn (who ultimately withdrew after Democratic Senator Joe Manchin announced he would oppose her nomination). John Hendel, *FCC Nominee Gigi Sohn Withdraws after More than a Year of Fighting for Post*, POLITICO (Mar. 7, 2023), <https://www.politico.com/news/2023/03/07/gigi-sohn-fcc-nominee-withdraws-00085918> [<https://perma.cc/GG2S-X4CS>]. The FCC story, however, is more a story of presidential ambivalence to FCC policies than one of the independent agency design undercutting presidential policy preferences. See Cat Zakrzewski & Cristiano Lima, *Biden's Internet Promises in Limbo amid Long Battle over FCC Nominee*, WASH. POST (Oct. 14, 2022), <https://www.washingtonpost.com/technology/2022/10/14/fcc-deadlock-gigi-sohn/> [<https://perma.cc/4LHG-78AL>]; Ronald J. Krotoszynski, *Do Elections Really Have Consequences?: Presidential Indifference, Attenuated Accountability, and Policy Paralysis within the Administrative State*, GA. L. REV. (forthcoming 2024).

### 1. *Party Polarization and Presidential Appointments*

The concurrent rise of party polarization and the administrative presidency have raised the stakes of independent agency appointments and undermined the ability of independent agency heads to work across party lines in the pursuit of stable, politically insulated, fact-based policymaking. In battling the president and his party, opposition party lawmakers make use of a “highly politicized” confirmation process, a process where “[p]olitical conflict [is] induced by divided government and polarization . . . .”<sup>177</sup> When it comes to independent agencies, opposition party lawmakers have used their confirmation power to delay or block disfavored presidential appointees. In 2008, we found that party polarization contributed to time lags of one to three months between the nomination and confirmation of independent agency heads,<sup>178</sup> a finding consistent with earlier studies that had found that “vacancy duration has grown significantly longer over time.”<sup>179</sup> In 2015, Anne Joseph O’Connell found that nominations to independent regulatory commissions were more likely to fail (30.5%) than any other administrative nomination.<sup>180</sup>

In some cases, the Senate refuses to confirm independent agency nominations unless the president agrees to nominate the preferred candidate of opposition party leadership.<sup>181</sup> These types of deals are most prevalent in independent agencies with partisan balancing requirements.<sup>182</sup> Specifically, when making cross-party appointments, the White House and opposition Senate leaders agree to “batch” nominees from the president’s party (selected by the White House) with nominees from the opposition party (selected by the Senate).<sup>183</sup> 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

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<sup>177</sup> Nolan McCarty & Rose Razaghian, *Advice and Consent: Senate Responses to Executive Branch Nominations, 1885–1996*, 43 AM. J. POL. SCI. 1122, 1141 (1999).

<sup>178</sup> Devins & Lewis, *supra* note 104, at 472 n.60.

<sup>179</sup> David C. Nixon, *Appointment Delays for Vacancies on the Federal Communications Commission*, 61 PUB. ADMIN. REV. 483, 488 (2001).

<sup>180</sup> Anne Joseph O’Connell, *Shortening Agency and Judicial Vacancies Through Filibuster Reform? An Examination of Confirmation Rates and Delays from 1981 to 2014*, 64 DUKE L.J. 1645, 1661 (2015) (listed in Table 1).

<sup>181</sup> See Devins & Lewis, *supra* note 104, at 488–89.

<sup>182</sup> Feinstein & Hemel, *supra* note 61, at 30.

<sup>183</sup> See Devins & Lewis, *supra* note 104, at 489.

versa).<sup>184</sup> Needless to say, with commissioners increasingly likely to back party preferences, the ability of the opposition party to push the President this way is highly consequential; it reinforces party identity and exacerbates the partisan divide on independent agencies.<sup>185</sup>

Batching exacerbates partisanship because it separates commissioners into one of two rival teams and, relatedly, encourages the appointment of ideologically extreme commissioners. Nonetheless, the George W. Bush, Barack Obama, and Donald Trump administrations all made extensive use of batching, especially at independent agencies which dealt with politically charged issues.<sup>186</sup> Our examination of 2001-2020 batching revealed that batching was both extensive and particularly prevalent at the very agencies in which the partisan identity of agency heads was seen as especially salient (based on our survey data).<sup>187</sup> Bush, Obama, and Trump all submitted “batched” nominees to the EEOC, FCC, Federal Elections Commission, Federal Energy Regulatory Commission, and Export-Import Bank;<sup>188</sup> batching was also common at the SEC, NLRB, and the Commodities Future Trading Commission.<sup>189</sup> All of these agencies were ranked above the median of political appointee influence in Figure 4; most were ranked above and none below the Figure 5 median of presidential elections precipitating a shift in agency policy.<sup>190</sup> With the exception of the Export-Import Bank, all of these agencies are “major” independents (a fact we will soon return to in our discussion of political neglect of small independents).

Party allegiance can also bolster presidential power. When party control of the White House changes, a new president can transform agency decision-making. By designating a new agency chair or appointing a new general counsel, a president can wield substantial power over independent agencies from the very start—well before they can gain party control through

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<sup>184</sup> Daniel E. Ho, *Congressional Agency Control: The Impact of Statutory Partisan Requirements on Regulation* 4 (Am. L. & Econ. Ass’n, Working Paper No. 73, 2007).

<sup>185</sup> See *id.*

<sup>186</sup> See *Batching at the Agency Level*, Memorandum from Zachary Hassan to Author (Aug. 11, 2021) (on file with authors).

<sup>187</sup> *Id.*

<sup>188</sup> See *id.*

<sup>189</sup> For these agencies, batching packages were introduced in two of the three administrations. See *id.*

<sup>190</sup> Figure 5 data was limited by the number of agencies with a sufficient number of respondents to be included in our reported data. No agency subject to “batching” was below the reported median.

their appointments power. Presidents can unilaterally name the chair at most independent agencies (including eight of the eleven major independents)<sup>191</sup>; presidents are also authorized to name the General Counsel at several independent agencies (including the National Labor Relations Board and Equal Employment Opportunity Commission).<sup>192</sup> Moreover, notwithstanding staggered terms and for cause removal limitations, it is often the case that presidents have several vacancies to fill at the start of their administration. One commissioner term expires each year, outgoing chairs often resign when a new administration puts in place a new chair, and there may be other vacancies too (due to resignations or the failure of earlier presidents/Senates to nominate/confirm).<sup>193</sup> At the start of the last two presidencies, the average commission had two vacancies.<sup>194</sup> This means that presidents have the ability to get majorities quickly if they prioritize nominations to these vacant positions.<sup>195</sup>

Examples from the FCC, the SEC, and the EEOC highlight the power of the chair<sup>196</sup> and, in so doing, corroborate studies

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<sup>191</sup> See Daniel E. Ho, *Measuring Agency Preferences: Experts, Voting, and the Power of Chairs*, 59 DEPAUL L. REV. 333, 338 (2010). Senate confirmation is required for the chair of the Consumer Product Safety Commission, the Federal Reserve, and the National Transportation Safety Board. See Samuel Rubinstein, *Chairpointment: Rethinking the Appointment of Independent Agency Chairpersons*, HARV. J. LEGIS. (Feb. 25, 2020), <https://harvardjole.com/2020/02/25/chairpointment-rethinking-the-appointment-of-independent-agency-chairpersons/> [<https://perma.cc/AWA4-5GDR>].

<sup>192</sup> See *infra* notes 208–212 and accompanying discussion.

<sup>193</sup> See Feinstein & Zaring, *supra* note 16 (documenting growing propensity of Commissioners to leave early in their tenure and related rise of power in Chair); Ho, *supra* note 191, at 338 (noting the propensity of outgoing chairs to resign when a successor is named).

<sup>194</sup> In a 2008 study, we found that it took presidents thirteen months to appoint a majority of commissioners from their party. See *Data Analysis Memo*, *supra* note 82, at 11. We also found that party identity and ideology were closely linked—so that party control of the agency defined agency positions and policy priorities. See Devins & Lewis, *supra* note 104, at 483. New data from 2008–2021 reinforces the 2008 findings for those agencies described in the 2008 piece. It takes presidents twelve to seventeen months to secure a majority of their party. If we include the smaller independent agencies omitted from the 2008 piece, the average is slightly longer, seventeen to twenty months. See *Data Analysis Memo*, *supra* note 82, at 11.

<sup>195</sup> Of course, the Senate must still confirm and—through arrangements such as batching—the president may need to work with the opposition party to secure a majority.

<sup>196</sup> Other commission chairs have statutory powers at least as expansive as this sampling of three independents. See Michael J. Boyle, *The Federal Reserve Chairman's Responsibilities*, INVESTOPEDIA (June 1, 2022), <https://www.investopedia.com/articles/investing/082415/what-are-federal-reserve-chairmans-responsibilities.asp> [<https://perma.cc/7RTE-HJC7>] (discussing the Federal Reserve); Stavros Gadinis, *From Independence to Politics in Financial Reg-*

suggesting that the naming of a chair substantially bolsters the president's power to shift agency policy upon assuming office.<sup>197</sup> Relatedly, these examples highlight the yo-yo effect of party polarization, that is, independent agency priorities change whenever there is a shift in party control of the White House. The power of the chair is sometimes specified by statute or agency regulations. At the EEOC, the "Chair is responsible for the administration and implementation of policy for and the financial management and organizational development of the Commission"; at the SEC, the chair is responsible "for all executive and administrative functions, including . . . the appointment and supervision of personnel employed under the Commission"<sup>198</sup>; at the FCC "chairs possess relatively limited [formal] powers"<sup>199</sup> but the "chairman and a handful of staff . . . can and usually do exercise nearly total control over [the] agency's basic policy agenda."<sup>200</sup>

Needless to say, the power of the chair is in full view on the salient issues that divide the parties—the very issues that the independent agency design was supposed to protect against policy volatility. Consider, for example, these policy shifts from the Trump to Biden administrations (all on matters where the Trump administration flipped earlier Obama administration policies): At the SEC, Biden chair Allison Lee "wast[ed] no time unraveling Wall Street-friendly measures introduced under former Republican President Donald Trump."<sup>201</sup> Among other initiatives, she "returned power to senior enforcement staff, who had it stripped from them in 2017, to open probes without seeking senior approvals, and . . . reversed a 2019 policy that critics said made it too easy for companies that broke the rules

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ulation, 101 CALIF. L. REV. 327, 368 (2013) (discussing the Financial Stability Oversight Council and the Orderly Liquidation Authority); Rubinstein, *supra* note 191 (discussing the Chemical Safety and Hazard Investigation Board and the National Transportation Safety Board).

<sup>197</sup> See Feinstein & Zaring, *supra* note 16; Terry M. Moe, *Regulatory Performance and Presidential Administration*, 26 AM. J. POL. SCI. 197, 198 (1982); Todd Phillips, *Commission Chairs*, 40 YALE J. ON REGUL. 277, 310–16 (2023).

<sup>198</sup> Brock Romanek, *What's the SEC Chair's Role? Authority for the SEC's Commissioners to Act?*, THECORPORATECOUNSEL.NET (July 16, 2015), <https://www.thecorporatecounsel.net/blog/2015/07/whats-the-sec-chairs-role-authority-for-the-secs-commissioners-to-act.html> [<https://perma.cc/6C9Y-MFB3>] (quoting Reorg. Plan 10).

<sup>199</sup> Ho, *supra* note 191, at 338. Ho, however, argues that chairs "possess power beyond the formal vote." *Id.*

<sup>200</sup> Glen O. Robinson, *Independent Agencies: Form and Substance in Executive Prerogative*, 1988 DUKE L.J. 238, 345 n.24. See also Ho, *supra* note 191, at 358 (demonstrating that the FCC chair "matters" through an empirical study based on expert surveys).

<sup>201</sup> Johnson, *supra* note 176.

to continue with business as usual.”<sup>202</sup> At the EEOC, Biden chair Charlotte Burrows issued fact sheets adopting the position (then in ongoing litigation) that “an employer’s refusal to allow an employee equal access to bathrooms . . . that correspond to the employee’s gender identity would constitute sex discrimination . . . .”<sup>203</sup> This announcement prompted objections by Republican Commissioners over whether the chair may set policy without a Commission vote.<sup>204</sup> At the FCC, however, Biden’s intransigence in naming a chair delayed anticipated policy changes.<sup>205</sup> By way of contrast, Trump named Ajit Pai FCC chair immediately after taking office and Pai wasted no time undoing Obama era policies. Days after taking office, he reversed Obama’s FCC efforts to expand a program to help low-income people pay for the internet.<sup>206</sup> More striking, Pai used his power of agenda control to undo Obama-era net neutrality rules.<sup>207</sup>

Presidential power to name the general counsel at the EEOC and NLRB operates in a nearly identical way. At both agencies, the general counsel has substantial authority to set agency priorities. At the EEOC, the general counsel has the “responsibility for conducting the Commission’s litigation” and the EEOC enforces antidiscrimination mandates in the courts

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<sup>202</sup> *Id.*

<sup>203</sup> John Fox, *Dispute Breaks Out at EEOC*, JDSUPRA (June 21, 2021), <https://www.jdsupra.com/legalnews/dispute-breaks-out-at-eec-between-5032253/> [<https://perma.cc/X6D7-YAX2>].

<sup>204</sup> *Id.* During the Trump administration, EEOC chair Janet Dhillon unilaterally advanced pro-employer policies and, relatedly, sought to limit EEOC judicial enforcement of anti-discrimination laws. See Bryce Covert, *The Trump Administration Guttled the EEOC*, THE NATION (Jan. 28, 2021), <https://www.thenation.com/article/society/janet-dhillon-eec/> [<https://perma.cc/UUA9-4BSB>].

<sup>205</sup> See Jeffrey Hill, *On the Case of President Biden’s Missing FCC Chair Nominee*, VIA SATELLITE (July 23, 2021), <https://www.satellitetoday.com/government-military/2021/07/23/on-the-case-of-president-bidens-missing-fcc-chair-nominee/> [<https://perma.cc/YU8F-N84B>]. Biden likewise undermined his policy agenda by delaying the appointment of a Democratic Commissioner and, in so doing, leaving the FCC deadlocked with two Democratic and two Republican Commissioners. See Margaret Harding McGill, *Deadlocked FCC Could Derail Biden’s Digital Equity Plan*, AXIOS (May 19, 2022), <https://www.axios.com/2022/05/19/deadlocked-fcc-derail-bidens-digital-equity-plans> [<https://perma.cc/8XXF-SPTD>].

<sup>206</sup> Brian Naylor, *New FCC Chairman Moves Quickly to Reverse Obama Policies*, NPR (Feb. 17, 2017), <https://www.npr.org/2017/02/17/515841076/new-fcc-chairman-moves-quickly-to-reverse-obama-policies> [<https://perma.cc/Y4S8-KKU5>].

<sup>207</sup> Seth Fiegerman, *Trump FCC Chair Unveils Plan to Repeal Net Neutrality*, CNN (Nov. 12, 2017), <https://money.cnn.com/2017/11/21/technology/fcc-net-neutrality/index.html> [<https://perma.cc/QA66-3QRD>].

as the agency lacks cease and desist authority<sup>208</sup>; at the NLRB, the general counsel “acts as the agency’s chief prosecutor in the enforcement of federal labor laws, wielding broad power over what cases to bring and legal theories to pursue.”<sup>209</sup> During the Trump era, EEOC general counsel Sharon Gustafson prioritized discrimination claims made by religious claimants<sup>210</sup>; NLRB general counsel Peter Robb sought both to settle high profile complaints and to limit the ability of workers to invoke federal labor law coverage.<sup>211</sup> Needless to say, the Biden administration had different policy priorities and Robb (on Biden’s first day in office, January 20, 2021) and Gustafson (in March 2021) were both fired.<sup>212</sup>

## 2. *Presidential Power and the Quorum Requirement*

Presidential appointment power is contingent on Senate confirmation and the opposition party will make use of all available tools to limit presidential control. We have already discussed how the opposition party makes use of batching arrangements to secure the confirmation of opposition party loyalists.<sup>213</sup> On occasion, the Senate opposition pursues an even more disruptive path—using confirmation intransigence as a mechanism to frustrate quorum requirements and, consequently, undermine the policy goals of the president and his party.<sup>214</sup> Consider, for example, President Obama’s failed ef-

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<sup>208</sup> See U.S. EQUAL EMP. OPPORTUNITY COMM’N, REGIONAL ATTORNEY’S MANUAL: STRUCTURE OF OFFICE OF GENERAL COUNSEL (2005) <https://www.eeoc.gov/structure-office-general-counsel> [<https://perma.cc/P2YG-48QR>].

<sup>209</sup> Robert Iafolla, *Presidents Can Fire NLRB General Counsels*, U.S. JUDGE SAYS, BL (July 14, 2021), <https://news.bloomberglaw.com/daily-labor-report/presidents-can-fire-nlr-general-counsels-federal-judge-says> [<https://perma.cc/7W7W-GKKW>].

<sup>210</sup> See Mark Joseph Stern, *Why Biden Fired Trump’s Appointee to a Key Civil Rights Job*, SLATE (Mar. 9, 2021), <https://slate.com/news-and-politics/2021/03/sharon-gustafson-eeoc-fired-biden-trump-civil-rights.html> [<https://perma.cc/3WJP-DXUK>].

<sup>211</sup> See Noam Scheiber, *The Biden Administration Fired a Trump Labor Appointee*, N.Y. TIMES (Jan. 20, 2021), <https://www.nytimes.com/2021/01/20/us/politics/peter-robb-nlr-fired.html> [<https://perma.cc/5H6R-JYDQ>].

<sup>212</sup> See Ian Kullgren & Josh Eidelson, *Biden Fires NLRB General Counsel After He Refuses to Resign*, BLOOMBERG LAW (Jan. 20, 2021) <https://news.bloomberglaw.com/daily-labor-report/biden-moves-to-oust-top-labor-board-attorney-robb> [<https://perma.cc/CL8X-9N22>]; Andrew Restuccia, *Biden Fires EEOC’s Trump-Appointed General Counsel*, WALL ST. J. (Mar. 5, 2021), <https://www.wsj.com/articles/biden-fires-eeocs-trump-appointed-general-counsel-11614983850> [<https://perma.cc/N6U2-MTEK>].

<sup>213</sup> See *supra* notes 182–190.

<sup>214</sup> It is sometimes the case that the Senate fails to act on a nomination because its calendar is filled with other business and the nomination is to an agency that is not important to the Senate. See *infra* notes 237–247.

fort to appoint commissioners to the NLRB in January 2012. Starting in 2007, there were questions surrounding whether the NLRB was able to exercise its statutory powers because it was without a quorum of three members (as required by statute).<sup>215</sup> President Obama had submitted three nominations but Senate Republicans refused to act—fearing that these nominees would shift the balance of power on the NLRB.<sup>216</sup> After waiting more than one year for the Senate to act, the president invoked his power to appoint officers during Senate recesses.<sup>217</sup> From January 2012 to August 2013 (when Obama advanced a different slate of nominees—one that the Senate was willing to confirm),<sup>218</sup> the NLRB had issued over 400 decisions, including several significant decisions overturning earlier NLRB policy.<sup>219</sup> But in June 2014, the Supreme Court tossed out all of these decisions—claiming that the president could not make such appointments during pro forma sessions of Congress and, consequently, the NLRB lacked the necessary quorum.<sup>220</sup> The upshot: the opposition party has considerable power to use quorum requirements to either neuter disfavored agencies or gain concessions from the White House.

From 2000 to 2022, at least ten different commissions have lost a quorum for a period of at least thirty days, leaving them unable to perform key adjudicatory and regulatory functions.<sup>221</sup> Consider, for example, the Merit Systems Protection Board (“MSPB”), the federal agency responsible for handling federal employee appeals of adverse personnel actions. It lacked a quorum at the start of the Trump administration and it was not until March 2022 (more than one year into the Biden

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<sup>215</sup> The quorum requirement is set out in 29 U.S.C. § 153(b).

<sup>216</sup> See Alec MacGillis, *Nuclear War*, THE NEW REPUBLIC, (July 15, 2013), <https://newrepublic.com/article/113850/senate-republicans-filibuster-nlrp-nominees> [<https://perma.cc/LMG9-S99X>].

<sup>217</sup> See Melanie Trottman, *Obama Makes Recess Appointments to NLRB*, WALL ST. J. (Jan. 4, 2012), <https://www.wsj.com/articles/SB10001424052970203513604577141411919152318> [<https://perma.cc/E3UY-JRMG>].

<sup>218</sup> See Timothy Noah & Brian Mahoney, *Obama Labor Board Flexes Its Muscles*, POLITICO (Sept. 1, 2015), <https://www.politico.com/story/2015/09/unions-barack-obama-labor-board-victories-213204> [<https://perma.cc/42FD-VJRY>].

<sup>219</sup> *Unanimous Supreme Court Invalidates President Obama's NLRB Recess Appointments*, MCGUIREWOODS (June 30, 2014), <https://www.mcguirewoods.com/client-resources/Alerts/2014/6/Unanimous-Supreme-Court-Invalidates-President-Obama-NLRB-Recess-Appointments> [<https://perma.cc/B297-SM4Y>]; see Brad Plumer, *A Court Just Struck Down Obama's Labor Board. Here's Why It Matters*, WASH. POST (Jan. 25, 2013), <https://www.washingtonpost.com/news/work/wp/2013/01/25/obamas-labor-board-has-been-ruled-unconstitutional-heres-why-that-matters/> [<https://perma.cc/Q85U-3QTQ>].

<sup>220</sup> *NLRB v. Noel Canning*, 573 U.S. 513, 519 (2014).

<sup>221</sup> See *Data Analysis Memo*, *supra* note 82.



administration) that it finally got a quorum.<sup>222</sup> The fate of the MSPB is due to both partisan political fights and simple neglect. The MSPB is politically unpopular with Republicans since it plays a key role in enforcing civil service rules, many of which Republicans feel give too much protection to poor performers.<sup>223</sup> It is also a small and relatively obscure agency to all except those that need their appeals heard. It is rarely on the agenda of presidents or the Senate and even a lack of a quorum has not motivated Democrats in the White House or Senate to move.

The MSPB fight (or perhaps more accurately the lack of a fight) highlights a sad but critically important truth about the staffing of independent agencies. Some agencies are so important to both parties that the White House and the Senate will work to overcome their differences and figure out ways to get nominees confirmed. Batching is an example of this phenomenon. For other agencies, however, vacancies will persist; these agencies are not important enough to one party or the other (or both). This can lead to numerous and lengthy vacancies, sometimes leading to a loss of quorum.

All of this is obviously at odds with a statutory design intended to facilitate bipartisan multimember deliberation. In an unexpected way, moreover, the quorum requirement facilitates the neutering of disfavored independent agencies. Presidents not only have vast powers to direct independent agency policy; they have essentially unchecked power to frustrate the ability of independents to act by refusing to meet quorum requirements. Senate opponents of the president too can neutralize disfavored agencies by refusing to confirm and thereby denying the agency a quorum. This is precisely what happened with the NLRB; Senate Republicans sidelined the NLRB until President Obama named Commissioners acceptable to Republican leadership.<sup>224</sup> Republicans could not have accomplished as much

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<sup>222</sup> U.S. MERIT SYS. PROT. BD., FREQUENTLY ASKED QUESTIONS ABOUT THE LACK OF QUORUM PERIOD AND RESTORATION OF THE FULL BOARD 1 (2023), [https://www.mspb.gov/New\\_FAQ\\_Lack\\_of\\_Quorum\\_Period\\_and\\_Restoration\\_of\\_the\\_full\\_board.pdf](https://www.mspb.gov/New_FAQ_Lack_of_Quorum_Period_and_Restoration_of_the_full_board.pdf) [<https://perma.cc/5UZP-Z2NG>].

<sup>223</sup> See Nicole Ogrysko, *House-Passed Oversight Package Would Expand Federal Employee Whistleblower Protections*, FED. NEWS NETWORK (Dec. 10, 2021), <https://federalnewsnetwork.com/agency-oversight/2021/12/house-passed-oversight-package-would-expand-federal-employee-whistleblower-protections/> [<https://perma.cc/2UUB-S877>].

<sup>224</sup> See Noah & Mahoney, *supra* note 218. In September 2015, after the Senate had confirmed Obama NLRB appointees, the now-Democratic NLRB overturned several pro-employer NLRB rulings. See *id.*

had the NLRB been an executive agency. Even if the Senate refused to confirm, the Vacancies Act—as we will explain in Part IV—would have operated in ways that would allow the president to advance her policy agenda.<sup>225</sup> For this very reason, Republican efforts both to seize control of and deconstruct the administrative state may be served by the independent agency design. For their part, Democrats should recognize how the independent agency design can be turned on itself, benefiting Republicans who want to tear down the administrative state.

### C. Growth of Government

In the same way that Progressive Era reformers did not foresee the development of modern political polarization, they could not foresee the way an increasing divide between the parties would interact with the burgeoning administrative state. The federal government expanded massively in scope and size throughout the 20th Century, including the addition of new federal departments and many new independent agencies.<sup>226</sup> Government expansion has placed an increased burden on the elected branches to ensure effective performance. Yet, political polarization has increased the difficulty of providing this type of oversight. The interaction between polarization and growth in government has led to the development of a two-class system among independent agencies, those important enough to attract the regular attention of elected overseers and those that are not. The two-class dynamic regularly manifests itself in the appointments process. The president nominates and the Senate confirms appointees in the first group of “major” independents; the second group of “small” independents is often ignored and agencies regularly operate with persistent and sometimes debilitating vacancies.

We start our analysis by tracking the growth of the administrative state. During the Progressive Era and the New Deal, the federal government assumed vast new powers to protect people from one another (e.g., buyers and sellers, workers and management), prevent systemic disruption of large systems like finance or transportation, and regulate and promote new

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<sup>225</sup> See *infra* notes 255–258.

<sup>226</sup> See, e.g., Anne Joseph O’Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 844–46 (2014) (explaining USPS’ formation during the 20th century to resolve issues with local postal services).

technologies.<sup>227</sup> In so doing, the federal government took on new roles in virtually all areas of modern life, including arts, culture, education, economy, health, security, and transportation. In 1900, the federal government employed 230,775 people.<sup>228</sup> By 1950, the employment swelled to 1,960,708.<sup>229</sup> Today, the federal government consists of more than 2,800,000 million civilian employees and this does not include a burgeoning contractor workforce.<sup>230</sup>

Rather than increase the size and jurisdiction of existing agencies, Congress often delegated authority to new independent agencies for tasks big and small. In addition to well-known major independents, Congress has created new boards and commissions to, among other things, give out Truman scholarships (1975), regulate Indian gaming (1988), manage volunteer service programs (1993), and to facilitate the production of records related to civil rights cold cases (2019).<sup>231</sup> With each new agency comes new appointed positions to fill through nomination and confirmation, new budgets to review, and new policies to coordinate and implement.

At the start of the Biden Administration, there were eleven major independent agencies and thirty-six smaller multimember commissions, well beyond the small number of commissions during the Progressive Era. In total, these forty-seven independent agencies require presidents to nominate and the Senate confirm 292 positions, comprising 22% of all Senate-confirmed positions.<sup>232</sup> At the start of the Biden Administration, 187 of the 292 independent agency positions were vacant or filled by someone in an expired term. This included sixteen positions on the major independents and 170 on smaller in-

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<sup>227</sup> See STEPHEN SKOWRONEK, *BUILDING THE NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES 1877-1920*, at 4-5 (1982).

<sup>228</sup> 5 SUSAN B. CARTER ET AL., *supra* note 19, at 5-128 tbl.Ea894-903.

<sup>229</sup> *Id.* at 5-129.

<sup>230</sup> See, e.g., SELIN & LEWIS, *supra* note 19, at 10 (2.68 million civilian employees in 2017); David E. Lewis, *Deconstructing the Administrative State*, 81 J. POL. 767, 775 (2019).

<sup>231</sup> For Truman Scholarships, see Harry S. Truman Memorial Scholarship Act, 20 U.S.C. § 2004. For regulation of Indian gaming, see Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721. For community service, see National and Community Service Act of 1993, Pub. L. No. 103-82, 107 Stat. 785. For Cold Case investigations, see Civil Rights Cold Case Records Collection Act of 2018, Pub. L. No. 115-426, § 5(a), 132 Stat. 5489, 5494; Bryan Bender, 'The Clock is Ticking': White House Under Pressure to Reopen Civil Rights-Era Cold Cases, POLITICO (July 20, 2020), <https://www.politico.com/news/2020/07/20/white-house-civil-rights-cold-case-372863> [<https://perma.cc/J5WN-2WBR>].

<sup>232</sup> See *Data Analysis Memo*, *supra* note 82.

dependents.<sup>233</sup> There were seventeen vacancies on the board of the Corporation for National and Community Service, ten vacancies on the board of the Inter-American Foundation, and thirteen on the board of the National Association of Registered Agents and Brokers.<sup>234</sup> The question for presidents and members of Congress is whether they have the will and ability to identify and vet candidates for these positions. Congress too has continuing oversight responsibilities.

While the workload associated with independent agencies has expanded, the time horizons and electoral incentives of presidents and members of Congress make it hard for them to keep up. Presidents have time horizons defined by the electoral cycle and the constitutional limit of two terms in office.<sup>235</sup> In allocating their time and effort, presidents must balance the effective functioning of hundreds of different agencies, running for reelection, pursuing a legislative agenda, engaging in foreign negotiations, and managing the other activities the office requires. None of this is to suggest that presidents do not care about the management of the executive establishment. They do. Presidents certainly have a strong incentive to satisfy electoral constituencies by influencing the policies and performance of the departments and agencies of government.<sup>236</sup> But these same election incentives often work against their own attentiveness to less visible parts of the administrative state. Some agencies and programs have a broader impact on key electoral constituencies and the president's own fortunes than others. These naturally take up the limited time and attention of the president and the White House staff. In an era of expanding government, some parts of the administrative state fall by the wayside, neglected by Republican and Democratic presidents. This problem is particularly acute for small independent agencies; they are not connected to an electorally salient department and have little access to the levers of executive power.

Members of Congress, organized into committees, fill in some of the gaps by attending to the care and feeding of many

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<sup>233</sup> We count positions where a term has expired but a commissioner continues to serve as vacant. *See id.*

<sup>234</sup> *See id.*

<sup>235</sup> *See* Brandice Canes-Wrone & Kenneth W. Shotts, *The Conditional Nature of Presidential Responsiveness to Public Opinion*, 48 AM. J. POL. SCI. 690, 691 (2004).

<sup>236</sup> *See* Terry M. Moe, *The Politicized Presidency*, in *THE NEW DIRECTION IN AMERICAN POLITICS* 235, 238-39 (John E. Chubb & Paul E. Peterson eds., 1985); RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN* 7 (1990).

agencies. Their perspectives, however, are also shaped by the electoral cycle, narrower constituencies, and divided parties. In general, voters know very little about the agencies, people, and processes of the executive establishment and this reduces the incentive for members to spend time on it.<sup>237</sup> In particular, lawmakers regularly pursue electorally salient local interests while trading off Congress's larger institutional interest in oversight. This is especially the case when oversight has no direct connection to elections, either district interests or the concerns of key interest groups.<sup>238</sup> Members have a limited amount of time and they plan their schedule in ways that maximize the reelection chances of themselves and their party.<sup>239</sup> When members do focus on the bureaucracy, their focus is electorally-relevant agencies or programs.<sup>240</sup> Members want tangible results that they can take to voters before the next election.<sup>241</sup>

Making matters worse, the legislature has reduced its ability to conduct legislative oversight. Starting with the 1995 Republican takeover of Congress, party leaders have shifted power away from committees and to themselves.<sup>242</sup> In so doing, committee leaders are less invested in the work of the agencies they oversee; they are, instead, increasingly beholden to party leaders and the propagation of electorally salient party-approved messaging.<sup>243</sup> Moreover, since the late 1970s (and especially since 1995), Congress has reduced the size of committee staffs and eliminated congressional support agen-

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<sup>237</sup> See generally CHRISTOPHER H. ACHEN & LARRY M. BARTELS, *DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT* (2016) (discussing the limitations of voter knowledge about the government and their ability to hold it accountable).

<sup>238</sup> OGUL, *supra* note 122, at 19–22; see Scher, *supra* note 122, at 532; but see Diana Evans, *Congressional Oversight and the Diversity of Members' Goals*, 109 POL. SCI. Q. 669, 670–71 (1994) (arguing that lawmakers may act against their electorally-salient interests when those interests conflict with the lawmaker's nonelectoral goals, such as the desire to influence lawmaking peers or to pass good public policy).

<sup>239</sup> ABERBACH, *supra* note 122, at 189.

<sup>240</sup> See R. DOUGLAS ARNOLD, *CONGRESS AND THE BUREAUCRACY: A THEORY OF INFLUENCE* 29–30 (1979).

<sup>241</sup> MORRIS P. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* 44 (1977); see also DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 52–53 (1974) (explaining that lawmakers tend to act in ways that would generate the belief among constituents that the lawmaker has done something desirable while in office).

<sup>242</sup> Neal Devins, *Party Polarization and Congressional Committee Consideration of Constitutional Questions*, 105 NW. U. L. REV. 737, 757 (2011).

<sup>243</sup> See *id.* at 755–56; see also Evans, *supra* note 151, at 217 (explaining how the desire to conform to party messaging constrained Congressman Hastert, the Republican Speaker of the House from 1999–2000, in his legislative activities).

cies.<sup>244</sup> House standing committees employ about half as many professional staff members today as in 1980.<sup>245</sup> The Government Accountability Office and Congressional Research Service have 20% less staff.<sup>246</sup> With fewer professional staff and greater staff allocation to public communication, members of the House and Senate have less ability to make sure that agencies, including the independent agencies, have what they need to be successful. Fewer staff means less overall attention and a greater need for members to prioritize. The ability to act is also limited by political polarization; efforts to improve oversight of the administrative state typically require bipartisan cooperation.<sup>247</sup>

The connected effect of polarization and the growth of government can be seen clearly in appointment politics. Presidents have been taking longer to put nominees forward, partly in anticipation of Senate opposition. Indeed, the Senate has been taking longer to confirm nominees to vacant positions over time. During the Reagan Administration, the president started early with nominees and the Senate took an average of 56.4 days to consider a nomination. During the Trump Administration, the average was 115 days to confirm.<sup>248</sup> Given the large number of vacancies and the short time between Election Day and Inauguration Day, even presidential candidates that start early face an impossible task. They must prioritize the vetting and nomination of candidates. Senate committees must also prioritize; they are tasked with evaluating candidates for as many as 330 positions. If elected officials prioritize the most important positions, many positions and agencies will be neglected. This is particularly the case for minor boards and commissions.

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<sup>244</sup> Mills & Selin, *supra* note 124, at 615; *see also* Lee Drutman & Steven M. Teles, *Why Congress Relies on Lobbyists Instead of Thinking for Itself*, THE ATLANTIC (Mar. 10, 2015), <https://www.theatlantic.com/politics/archive/2015/03/when-congress-cant-think-for-itself-it-turns-to-lobbyists/387295/> [<https://perma.cc/LQS3-2UE2>] (explaining how the decline of congressional staffing has coincided with the rise of political lobbyists).

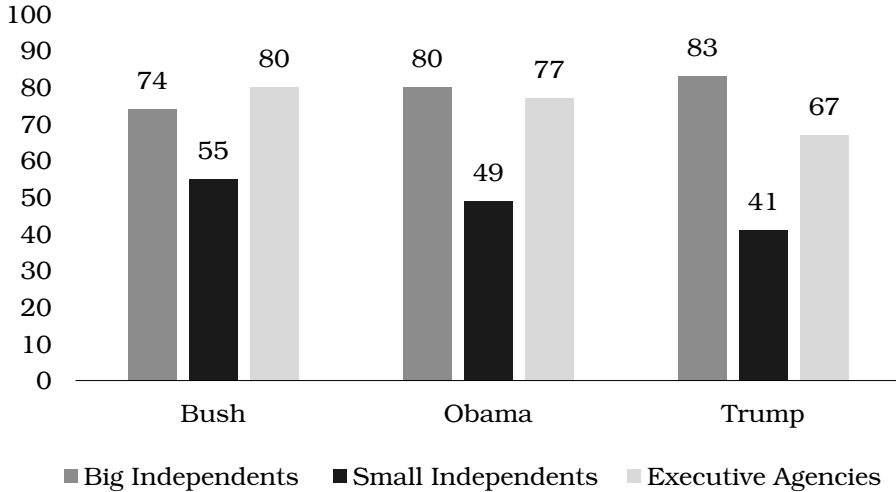
<sup>245</sup> Mills & Selin, *supra* note 124, at 612.

<sup>246</sup> Drutman & Teles, *supra* note 244.

<sup>247</sup> ALEXANDER BOLTON & SHARECE THROWER, CHECKS IN THE BALANCE: LEGISLATIVE CAPACITY AND THE DYNAMICS OF EXECUTIVE POWER 17, 23 (2022).

<sup>248</sup> CTR. FOR PRESIDENTIAL TRANSITION, SENATE CONFIRMATION PROCESS SLOWS TO A CRAWL: CONFIRMATIONS TAKE TWICE AS LONG TODAY AS THEY DID DURING THE REAGAN ADMINISTRATION 1 (2020) <https://presidentialtransition.org/wp-content/uploads/sites/6/2020/01/Senate-Confirmations-Issue-Brief.pdf>, [<https://perma.cc/PM9H-7KLS>].

FIGURE 8. PROPORTION OF VACANT POSITIONS RECEIVING A NOMINEE IN FIRST TWO YEARS OF NEW PRESIDENTS TERM BY AGENCY TYPE, 2001–2018



Note: These numbers do not include judgeships nominations to chair positions on multi-member bodies that are distinct from nominations to these multimember bodies.

In Figure 8, we graph the proportion of vacant positions at the start of a new administration that receive their first *nominee* within two years. We disaggregate the data by president and by type of agency. Notably, the sorry state of the appointments process is evident. Among independent agencies, only 52% of their vacancies received a nominee in the first two years of a new presidency, compared to 75% for executive agencies ( $p < 0.00$ ). The proportion of such vacancies receiving a nominee in the first two years is decreasing. President Bush named candidates for 55% of vacancies in small independents, President Obama for 49%, and President Trump for 41%. This is compared to 74%, 80%, and 83%, respectively, for the large independents, proportions that are comparable to executive agencies. Even if we optimistically assume that all the vacant positions would get nominees at the start of year three, these nominees would still have to get confirmed by the Senate. It is not hard to understand why there are so many vacancies and why commissions, especially small independents, are in danger of losing quorums.

No doubt, the independent agency design is a poor fit with the workings of modern government. Progressive Era progenitors of this design could not have foreseen the exponential growth of government, the rise of the administrative presi-

gency, and party polarization put independent agencies at a disadvantage. The question remains: what to do?

CONCLUSION: SHOULD THERE BE INDEPENDENT AGENCIES?

Our ambition in this Article has been to shift the debate about independent agencies away from stylized and misguided characterizations to a clear-eyed view of the operations and performance of independent agencies. As our survey data and related research make clear, independent agencies are no more expert or apolitical than their executive counterparts and the evidence of their political insularity is decidedly mixed. Contrary to Progressive Era assumptions, presidents seek out party loyalists to advance their party's social and economic priorities; their Senate opponents seek to mitigate this presidential advantage by using their confirmation power to seek the appointment of cross-party loyalists. Correspondingly, independent agency priorities are very much subject to the vicissitudes of politics, sometimes caught up directly in larger party struggles and in other cases completely neglected. Unlike the Progressive vision of apolitical technocratic expertise, independent agency policymaking is often a byproduct of which party has a majority of commissioners or lacks a quorum altogether. On the issues that matter to elected officials, apolitical boards are largely a fiction; on the issues that don't matter, independent agencies often languish, neglected by White Houses and Congresses that are overwhelmed by an expansive administrative state and distracted by a desire to win elections in an era of insecure majorities.<sup>249</sup>

In this final part, we turn our attention to what should be done in the face of this failure. Our approach is intentionally realistic. We do not advocate the elimination of all independent agencies as some Republicans would like. At the same time, the independent agency model is often ineffective or counterproductive; it should be disfavored and Congress ought not to create new independent agencies.<sup>250</sup> Moreover, we propose a

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<sup>249</sup> Lewis, *supra* note 230, at 770; *see generally* FRANCES E. LEE, *INSECURE MAJORITIES: CONGRESS AND THE PERPETUAL CAMPAIGN* 160 (2016) (discussing how insecure majorities create incentives for members of Congress to focus on messaging rather than legislating).

<sup>250</sup> This recommendation will have immediate real-world consequences, for the independent agency design is very much alive and well in Congress. Consider, for example, party balancing requirements. From 1998 to 2015, 950 bills were introduced in Congress that would have created "some new federal administrative body with a mandated split in political party representation." Krotozynski, Hodge & Wintermyer, *supra* note 61, at 979. More recently, lawmakers, in 2021, pro-



radical realtering of the administrative state and a dramatic reduction in the number of independent agencies, something Republicans embrace. Such a change will better fulfill Progressive Era goals of more expert, apolitical, and insular administration of key programs, something Democrats embrace. Our dividing line is hinged to evidence that there is a difference between the “major” independents and “smaller” less visible independent agencies. We recommend eliminating smaller independent agencies; these agencies are victims of political neglect and will certainly fare better if relocated into executive departments. On the other hand, we recommend preserving “major” independents.

*The “Major” Independents.* The dividing line between “major” and smaller independents is hinged much more to political neglect than to agency performance. Although “major” independents tend to be more expert and more influential, there is substantial variation, in expertise, stability, and political support among “major” independents. The Federal Reserve and FTC are expert, effective, and influential; the EEOC and NLRB are regularly objects of targeting and obstruction. What all these majors share in common is that the White House and Congress are engaged in their operations. Presidents make nominations to vacant positions and the Senate ultimately finds a way to confirm agency heads. Congress holds hearings regarding the work of “majors;” the Justice Department monitors their legal arguments. On the other hand, smaller independents are frequently orphaned by political actors who focus on that which is salient and divisive and are otherwise overwhelmed by the sheer number of agency heads to nominate and confirm.

For us, what defines the objects of reform among the independents is the degree to which the agency fulfills the vision of its designers, the degree to which is expert, apolitical, and insular. This is determined in part by the way the commission is treated by the political branches. More to the point, even if “major” independents are not working as Progressive Era designers anticipated, there nonetheless is reason to support their continuation. Their failings are not tied to political neglect and there is no reason to think that expertise and policy

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posed the creation of an independent agency to help promote democracy as part of the Freedom to Vote Act. See Christopher J. Walker, *The Freedom to Vote Act and Congress’s Anti-Removal Power*, YALE J. ON REGUL.: NOTICE & COMMENT (Jan. 28, 2022), <https://www.yalejreg.com/nc/the-freedom-to-vote-act-and-congresss-anti-removal-power/> [https://perma.cc/WD57-7ZCA].

stability measures would improve if they were relocated to the executive branch.<sup>251</sup> It may be, for example, that their rankings have less to do with agency design and more to do with the divisive social issues they tackle and the labor markets from which they hire staff (economists, lawyers who litigate in federal courts, etc.).<sup>252</sup> Moreover, recognizing that unintended negative consequences often accompany reform,<sup>253</sup> we think that the political costs of eliminating these “major” independents may be substantial. As we will now explain, smaller, frequently orphaned, independents are another matter.

*Improving Performance by Moving Small Independents to the Executive.* Eliminating a large number of independent agencies will have a number of benefits, including a reduction in political appointments and, relatedly, a more consistent implementation of policy for smaller independents. Consider, for example, appointments and the ramifications of political neglect. As we explained in Part Three: With 292 independent agency heads requiring Senate confirmation, the White House and Senate frequently leave vacant commissioner openings at smaller independents.<sup>254</sup> One virtue of eliminating smaller commissions is that such a move would substantially lower the workload for both the Presidential Personnel Office and the seventeen Senate committees who need to confirm commissioners. This would allow both branches to spend more time on nominees for the more visible policy-making positions. In addition to facilitating a better appointments process for those nominees, the smaller independents—no longer encumbered by a broken appointments process—will benefit too. They will have more consistent leadership and will reap the benefits of being folded into the more hierarchical executive branch.

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<sup>251</sup> For similar reasons, exogenous factors—not structure—might explain why some independent agencies receive high scores on expertise and other measures. If we find that the Federal Reserve and FTC are more expert, is this because of their structure or simply their visibility (which allows them to recruit better workers)? Do executive agencies with the same level of visibility recruit just as well? If this is the case, it is the visibility and importance of these agencies that matters, not their structure. For a related argument, see George A. Krause, *Federal Reserve Policy Decision Making: Political and Bureaucratic Influences*, 38 AM. J. POL. SCI. 124, 124 (1994) (arguing that institutional expertise plays a strong role in agency decision-making).

<sup>252</sup> Relatedly, sharp Democrat-Republican policy splits are a byproduct of cross-party batching (used to ensure that these agencies satisfy quorum requirements). See *supra* notes 180–187.

<sup>253</sup> For a discussion of unintended consequences of the independent agency design, see *supra* Section II.D.

<sup>254</sup> See *supra* Figure 8 and related discussion.

These benefits are directly tied to a fundamental difference between how executive agencies and independent commissions handle vacant positions. Vacant appointed positions in executive agencies are filled by acting officials in accordance with the Federal Vacancies Reform Act of 1998 (“FVRA”) or agency organic statutes.<sup>255</sup> Persons serving in an acting capacity have tenure limits defined by law but the clock is lengthened during transitions and stops during periods when a nomination is pending.<sup>256</sup> During these periods, career professionals from the agency usually assume leadership roles in an acting capacity, reinforcing professional norms and continuity. By contrast, unfilled positions in independent commissions are simply vacant.<sup>257</sup> As we detailed in Part Three, this can result in the orphaning of small independents; commission positions are left vacant thereby risking a loss of quorum and an agency shutdown.<sup>258</sup> One virtue of transferring responsibility to an executive agency is continuity in leadership. Executive agencies do not suffer from absent commissioners or the related problem of losing quorums.

Agencies with permanent leadership perform better, partly through its effects on the workforce.<sup>259</sup> When the president and Congress do not invest time in vetting and confirming nominees, agency personnel naturally draw conclusions about how much political bosses care about their work. Most federal executives report working in the public sector at least in part because of their belief in an agency’s mission.<sup>260</sup> Drawn out vacancies and lost quorums signal that their work is neither important nor likely to be recognized. It is also unlikely to be accompanied by resources from the political branches. This undercuts the motivation of federal workers to work hard to achieve high performance (e.g., work extra hours, acquire expertise, innovate). It is difficult to build a high-performing

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<sup>255</sup> See O’Connell, *supra* note 121, at 674. The FVRA stipulates the persons that can fill an executive vacancy and for how long. *Id.* at 630 n.84 and accompanying text.

<sup>256</sup> See VALERIE C. BRANNON, CONG. RSCH. SERV., R44997, *THE VACANCIES ACT: A LEGAL OVERVIEW* 13–14 (2021).

<sup>257</sup> Statutes governing commissions provide different rules for whether and how long commissioners can serve if their terms have expired. SELIN & LEWIS, *supra* note 19, at 97 tbl.9.

<sup>258</sup> See *supra* Figure 8 and related discussion.

<sup>259</sup> See Jungyeon Park, *How Leadership Affects Administrative Performance: Evidence from Improper Payment in U.S. Federal Programs* 37 (unpublished manuscript) (on file with author); Piper & Lewis, *supra* note 121, at 313–28.

<sup>260</sup> James L. Perry & Lois Recascino Wise, *The Motivational Bases of Public Service*, PUB. ADMIN. REV., May–June 1990, at 367, 368.

workforce in such an environment. Worker effort is unrewarded, programs suffer, and few important decisions get made or implemented.

Survey data supports these commonsense observations. Small independents are less expert than executive agencies (and major independents); small independents get less support from the political branches than executive agencies (and major independents). These findings are both statistically significant.<sup>261</sup> If federal employees are working in a larger department, however, they have more permanent leadership and career paths that provide advancement inside the agency or department. Political appointees review agency budgets and programs every year and this provides agency officials an opportunity to make their case. In a hierarchical context, there are always political appointees present to direct and advocate for agency programs, even if they are at a higher level (e.g., Assistant Secretary, Under Secretary).

Location inside a larger executive department has other advantages too. Rather than engage in an uphill fight for resources and recognition, the small independent is now part of an executive department that garners attention and resources from Congress and the White House. And while political support varies among executive departments, an otherwise orphaned independent is nonetheless better off competing side-by-side with other department programs. Relatedly, moving such agencies into an executive agency provides benefits in terms of hierarchical coordination and higher-level advocacy for an agency's programs. Surveys and other data suggest that independent agencies are at a disadvantage because they cannot coordinate with executive agencies in pursuing ever-increasing interagency work.<sup>262</sup> Placement in a larger department helps with this problem. In addition, agency leaders in a hierarchical structure feel accountable to both Congress and the White House for the programs under their jurisdiction. Each undersecretary or assistant secretary must answer for the performance of programs under their jurisdiction. This creates the right kinds of incentives to invest in agency capacity and performance.

Finally, a location inside the executive provides smaller independents with important access to the OMB and DOJ. OMB and DOJ both perform important coordinating functions and, at a minimum, ensure that the now-executive program

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<sup>261</sup> See *supra* Figure 1 and related discussion in Section II.A.

<sup>262</sup> See *supra* notes 125–134.

will be both part of the president's budget and will receive high-quality legal representation. OMB is also at the center of executive branch management improvement efforts, setting policies and sharing best practices. This is something that could help the smaller independents. By way of contrast, OMB and DOJ are often in an adversarial posture with independents (at least until the president is able to gain majority control through same-party appointments). DOJ increasingly sues independents over policy disputes and reverses disfavored legal arguments in high-profile Supreme Court litigation.<sup>263</sup> OMB increasingly seeks to check independents through proposed budgets and claims of authority over proposed regulations.<sup>264</sup>

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The primary contribution of this Article has been to bring systematic data to bear on the question of how independent agencies are performing. Survey data and other research underscores the mismatch between independent agency design and the world we live in. Our data also reveals that both Republicans and Democrats have been wrong about independent agencies. Independent agencies are neither the unaccountable and intrusive zealots conservatives fear, nor the expertise-driven high performers liberals praise. In evaluating the Supreme Court's reinvigoration of the unitary executive as a check on the independent agency design, it is critically important for Republicans and Democrats alike to lift ideological blinders. The current fault line between Democrats and Republicans on the Court is based on false premises. As this Article demonstrates, the independent agency design neither frustrates Republican objectives (presidential control, limited government) nor advances Democratic objectives (overcoming Republican intransigence by granting expert administrators the power to regulate). If the design is repudiated, Democrats will not suffer great harm nor will Republicans reap significant benefits.<sup>265</sup> Likewise, neither side will gain or lose all that much if the Court stops pursuing its unitary executive revival.

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<sup>263</sup> See *supra* notes 163–165.

<sup>264</sup> See *supra* notes 166–169.

<sup>265</sup> In its October 2022 term, the Court may well have set in motion the overruling of *Humphrey's Executor* and, with it, the independent agency design. In *Axon Enterprise Inc. v FTC*, the Court ruled that a direct challenge to the constitutionality of independent agencies could be pursued without first exhausting administrative remedies. 143 S. Ct. 890, 897 (2023). The courts may also be asked to tackle such questions as whether Congress must explicitly state that agency officials can only be removed “for cause” and, relatedly, whether presi-

Republicans and Democrats have both been wrong because Progressive Era reformers did not anticipate dramatic changes in American politics and governance, namely political polarization, the rise of the administrative presidency, and the dramatic expansion of the administrative state. The factors together have led to a failure of design and reveal a need for common-sense reforms to the design of the United States executive. Most independent agencies can be safely folded into executive departments, leaving only the visible and high-functioning independents in their current form.

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dents have broad authority to determine what constitutes “cause.” *See supra* note 167 (discussing ongoing litigation between the Biden administration and Trump era officials regarding presidential removal power); *see also* Manners & Menand, *supra* note 11, at 4, 71 (exploring the history and meaning behind the legislative text for the “for cause” removal provision and the standard of “inefficiency, neglect of duty, and malfeasance in office”); Cass R. Sunstein & Adrian Vermeule, *Presidential Review: The President’s Statutory Authority Over Independent Agencies*, 109 *GEO. L.J.* 637, 644–56 (2021) (explaining how presidential review of independent agency decision-making is facilitated by presidential power to remove for “inefficiency, neglect of duty, or malfeasance.”).