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### Congress's Commissioners: Former Hill Staffers at the S.E.C. and Other Independent Regulatory Commissions

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# Congress's Commissioners: Former Hill Staffers at the S.E.C. and Other Independent Regulatory Commissions

Brian D. Feinstein<sup>†</sup> & M. Todd Henderson<sup>††</sup>

*The expression “personnel is policy” has become a truism in Washington. Yet our understanding of how the political branches use appointments to project influence into the administrative state is incomplete. This Article leverages data on almost one-thousand commissioners serving on eleven major independent regulatory commissions to chart, for the first time, Congress’s growing practice of placing former legislative-branch personnel onto these entities. We then theorize that this phenomenon is rooted in fundamental changes in American politics in recent decades—and, in turn, that it has deeply affected administrative law and separation-of-powers dynamics.*

*Over the past several decades, the number of commissioners with prior service as a lawmaker or congressional staffer increased almost four-fold. Paradoxically, this sea change occurred during a period in which, according to conventional wisdom, Congress’s influence over administration declined. We contend that, faced with a set of worsening pathologies in Congress, lawmakers turned to appointments to influence policymaking. At the same time, congressional atrophy and an increasingly rocky confirmation process combined to make executive posts more attractive to Hill staffers than to others.*

*This influx of staffers-turned-commissioners has, we argue, substantially altered the functioning of these commissions and their place in the separation-of-powers system. Congress’s ability to “embed” loyal former staffers on commissions can benefit both institutions. From their new positions, former staffers can both enhance congressional influence over administration and provide commissions with valuable insights into the views*

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*and priorities of the branch that writes their statutes, sets their budgets, and oversees their activities.*

*Staffers-turned-commissioners also bring with them political savvy, familiarity with the legislative process, and other skills developed on Capitol Hill. Further, as former staffers—steeped in the norms of an increasingly dysfunctional Congress—fill more seats on commissions, these bodies may undergo a degree of acculturation, encouraging more overtly political behavior among commissioners.*

*Our descriptive and theoretical accounts generate two prescriptions. First, in evaluating potential appointees, presidents and senators should be attuned not only to those individuals' preferences and expertise, but also to their institutional allegiances and potential impact on organizational culture. Second, increased congressional influence over independent commissions justifies a degree of presidential oversight. If commissioners are political actors—grounded in the politics of their congressional principal and carriers of Congress's culture—they should be subject to controls from both political branches.*

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## Introduction

Richard Roberts wasn't your typical Securities and Exchange Commissioner. At the time of his appointment in 1990, he was not known to the Washington securities bar.<sup>1</sup> He arrived at the Securities and Exchange Commission (SEC) by way of the Washington office of a Mobile, Alabama-based law firm.<sup>2</sup> The key fact on his resume was his prior service as chief of staff to Senator Richard Shelby, then a first-term senator from Alabama and member of the Senate Banking Committee and, before that, a backbencher in the House.<sup>3</sup> The President nominated Roberts to the SEC at Senator Shelby's urging.<sup>4</sup> As Roberts acknowledges, he was "a long-shot."<sup>5</sup>

Roberts's status as a congressional staffer-turned-commissioner was novel in 1990. Prior to his appointment, only 10 of the 112 then-current and former SEC commissioners had Hill experience.<sup>6</sup> Today, however, Roberts's résumé is typical; roughly half of the current members of the most consequential independent boards and commissions hail from the halls of Congress.<sup>7</sup> Since 1980, the number of former staffers serving on independent commissions has increased more than fourfold; it has nearly tripled in the last twenty years alone.<sup>8</sup> That rapid increase is remarkable—and it may not just impact the functioning of these bodies but also suggest changes in our underlying politics that implicate broader policy issues.

But the story of Commissioner Roberts gives us another reason to be interested in the rise of the staffer-to-commissioner pipeline. Roberts did not just owe his job on the SEC to Senator Shelby; he tracked his patron's

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1. See Gregory A. Robb, *Democrat for S.E.C. Seat*, N.Y. TIMES (Aug. 4, 1990), <https://www.nytimes.com/1990/08/04/business/democrat-for-sec-seat.html> [<https://perma.cc/6BPX-TNGS>].

2. *Id.*

3. See *id.*; see also Jeanne Meserve, *CNN Access: Former Democrat Explains His Party Switch*, CNN (May 24, 2001, 6:32 PM), <http://edition.cnn.com/2001/ALLPOLITICS/05/24/shelby.switch.cnn/index.html> [<https://perma.cc/F5XJ-DK87>] (quoting Senator Shelby, "I was not a committee chairman. I had not flourished in the [Democratic] party [prior to 1994] . . . I had no position of power.")

4. See Stephen Labaton, *Wall Street's Ambitious Top Cop*, N.Y. TIMES (Mar. 24, 1991), <https://www.nytimes.com/1991/03/24/magazine/wall-street-s-ambitious-top-cop.html> [<https://perma.cc/CKM7-ASKT>].

5. Interview by William Thomas with Richard Roberts, Former SEC Comm'r, in Washington, D.C., SEC. & EXCHANGE COMMISSION HIST. SOC'Y 11 (May 15, 2014), [http://3197d6d14b5f19f2f440-5e13d29e4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/oral-histories/20140515\\_Roberts\\_Richard\\_T.pdf](http://3197d6d14b5f19f2f440-5e13d29e4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/oral-histories/20140515_Roberts_Richard_T.pdf) [<https://perma.cc/JF57-KDLL>].

6. See *infra* Section I.B (describing data sources for this figure).

7. See *infra* Section I.B.

8. See *infra* Figure 1.

politics. Appointed to fill a Democratic seat on the Commission, Roberts—like Senator Shelby at the time—was a Democrat.<sup>9</sup> Then, the day after the 1994 election, Senator Shelby announced that he was joining the Republican Party.<sup>10</sup> Shortly thereafter, Roberts announced that *he too was switching teams*<sup>11</sup>—making him the first and, to this day, only Commissioner to do so.<sup>12</sup> There was no strategic reason for Roberts to make this switch.<sup>13</sup> Instead, Roberts considered it as an expression of loyalty to Senator Shelby. “When Senator Shelby changed parties, I changed,” he explained.<sup>14</sup> “At heart, I’d worked for Senator Shelby for most of my life and so I just felt like that was the place for me to be.”<sup>15</sup> If today’s staffers-turned-commissioners display a similar degree of loyalty to their political patrons on Capitol Hill, then this development may pull these independent agencies towards Congress.

Another development makes the picture we are starting to paint even more interesting. Over the past few decades, both chambers of Congress have become increasingly polarized, adversarial, and dysfunctional.<sup>16</sup> This Article advances the idea that these dual phenomena—growing partisan dysfunction in Congress and more Hill alumni running independent agencies—may be linked. With Congress’s lawmaking function diminished, senators turn to the appointment of like-minded, loyal staffers, like Roberts, as an alternative means of influencing policy. At the same time, Congress’s pathologies have altered the pool of potential appointees, making a position off the Hill more attractive for congressional staffers and less attractive for those employed outside of politics or the Beltway.

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9. Robb, *supra* note 1.

10. See *Senators Who Changed Parties During Senate Service (Since 1890)*, U.S. SENATE <https://www.senate.gov/senators/SenatorsWhoChangedPartiesDuringSenateService.htm> [<https://perma.cc/ZTZ6-DV2F>].

11. Thomas, *supra* note 5, at 30.

12. See *SEC Historical Summary of Chairmen and Commissioners*, U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/about/sechistoricalsummary.htm> [<https://perma.cc/7TPP-LHY2>].

13. Because there was already one vacant seat and Roberts’s term would expire in nine months, his switch did not force President Clinton to appoint an additional Democrat to the Commission to adhere to the Commission’s partisan balance requirement. See 15 U.S.C. § 78d(a) (2018) (“Not more than three [of five] . . . commissioners shall be members of the same political party.”). Neither did his switch appear to be opportunistic; he did not work in politics or government again after his term ended nine months later. See *Richard Y. Roberts: Biography*, ROBERTS RAHEB & GRADLER LLC, <https://www.rrg-llc.com/images/RickLongBio.pdf> [<https://perma.cc/UK3H-WNBS>].

14. Thomas, *supra* note 5.

15. *Id.*

16. See Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273, 276-81 (2011); see also *id.* at 323-24 (summarizing research showing that these pathologies are almost as severe in the Senate as in the House).

The increasing partisanship of Capitol Hill may not just make congressional staffers more attractive appointees, but may also alter the functioning of the agencies they now help run. Staffers-turned-commissioners likely bring to agencies the very pathologies of the Hill that made them leave in the first place. For instance, whereas the SEC was once seen mostly as a model of nonpartisan efficiency, contemporary observers, including recent chairs Arthur Levitt and Mary Schapiro, view it as divided by faction and increasingly dysfunctional.<sup>17</sup> These developments may be traceable in part to the rise of staffers-turned-commissioners transmitting Congress's partisan culture to independent agencies.

The staffers-turned-commissioners phenomenon also may yield several important benefits to both Congress and the affected commissions. Congress may profit from the presence of its former staffers on independent commissions, since they can transmit information to Congress at lower cost. Relatedly, staffers-turned-commissioners may leverage their preexisting relationships with legislators to their agencies' benefit—in essence, engaging in relationship-based lobbying. To the extent that staffers-turned-commissioners were exposed to mass politics from their time on Capitol Hill, their presence may inject a measure of democratic responsiveness into agency decision making. Finally, staffers-turned-commissioners may import to the agencies valuable skills learned on the Hill. For instance, their greater understanding of the lawmaking process and legislative intent may improve the rulemaking capacity of their agencies, and their political instincts may enable their agencies to achieve their objectives in an increasingly partisan climate.

This Article proceeds in three parts. Part I describes the legal landscape concerning experiential or credential requirements for appointees and documents, for the first time, the growing prevalence of staffers-turned-commissioners. Part II posits two causes of this trend: first, that Congress, mindful of the maxim that personnel is policy, has turned to appointing its loyalists to agencies as its direct influence on policymaking has waned; and second, that congressional dysfunction has skewed the pool of potential appointees towards Hill staffers. Part III considers potential consequences of the rise of staffers-turned-commissioners. Part IV draws out prescriptive implications of our findings.

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17. See, e.g., Stephen Labaton, *S.E.C. Chief Pursues Tougher Enforcement*, N.Y. TIMES (Feb. 22, 2009), <https://www.nytimes.com/2009/02/23/business/23schapiro.html> [https://perma.cc/HCT7-K8PG] (quoting former SEC Chair Arthur Levitt Jr.'s observation that the SEC "since it was formed, was always known as nonpartisan and free of interference from the White House," but that "[i]n recent years that changed"); *id.* (characterizing incoming chair Mary Schapiro as desiring to eliminate "partisan politics" from the SEC to restore its credibility").

## I. Law and Practice

## A. Legal Framework

There are few constitutional constraints on the identities or characteristics of individuals whom the President and Senate may appoint to principal offices.<sup>18</sup> Among the few restrictions are that members of Congress cannot serve in executive positions.<sup>19</sup> Laws that entrust Congress or particular legislators with the power to name individuals to executive positions are also unconstitutional.<sup>20</sup> Statutory mechanisms that overly constrain the President's choice set—such as by requiring that the President select nominees from a list curated by Congress—are also impermissible.<sup>21</sup>

Within these broad parameters—and over the objections of some presidents<sup>22</sup> and scholars,<sup>23</sup> courts grant Congress wide latitude to impose character-and-credential requirements on appointees to certain offices.<sup>24</sup> Congress has taken advantage of the relative lack of judicial constraints in this area, inserting experiential requirements in many agencies' organic

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18. By contrast, the Supreme Court takes a more active role in other aspects of the law of appointments. *See, e.g.*, *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018) (elucidating the line between “Officers of the United States,” who must be installed pursuant to the Appointments Clause, and employees); *Nat'l Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2550 (2014) (determining when recess appointments are permitted); *Edmond v. United States*, 520 U.S. 651, 659-660 (1997) (expounding on the distinction between principal officers, whom only the President may appoint, with the advice and consent of the Senate, and inferior officers).

19. *See* *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 274 (1991).

20. *See id.*; *Buckley v. Valeo*, 424 U.S. 1, 126-40 (1976); *Springer v. Gov't of Philippine Islands*, 277 U.S. 189, 202 (1928).

21. *See* *Bowsher v. Synar*, 478 U.S. 714, 727 (1986); *Hechinger v. Metro. Wash. Airports Auth.*, 36 F.3d 97, 100-01, 105 (D.C. Cir. 1994).

22. *See, e.g.*, Statement on Signing the Department of Homeland Security Appropriations Act, 2007, 42 WEEKLY COMP. PRES. DOC. 1742, 1742-43 (Oct. 4, 2006) (asserting that the Act “purports to limit the qualifications of the pool of persons from whom the President may select the [FEMA Administrator] in a manner that rules out a large portion of those persons best qualified,” and, thus, “[t]he executive branch shall construe [it] in a manner consistent with the Appointments Clause”); Statement on Signing the Lobbying Disclosure Act of 1995, 2 PUB. PAPERS 1907, 1907 (Dec. 19, 1995) (“Congress may not . . . impose broad restrictions on the President's constitutional prerogative to nominate persons of his choosing to the highest executive branch positions.”).

23. *See* Michael J. Gerhardt, *Toward a Comprehensive Understanding of the Federal Appointments Process*, 21 HARV. J.L. & PUB. POL'Y 467, 534-35 (1998); Donald J. Kochan, *The Unconstitutionality of Class-Based Statutory Limitations on Presidential Nominations: Can a Man Head the Women's Bureau at the Department of Labor?*, 37 LOY. U. CHI. L.J. 43, 46 (2005); Hannah Metchis Volokh, *The Two Appointments Clauses: Statutory Qualifications for Federal Officers*, 10 U. PA. J. CONST. L. 745 (2008).

24. *See* *Myers v. United States*, 272 U.S. 52, 128-31 (1926) (noting, in dictum, that statutory qualifications requirements are permitted, provided that they “do not so limit selection and so trench upon executive choice as to be in effect legislative designation”); *id.* at 264-65 (Brandeis, J., dissenting) (similar point); *Fed. Election Comm'n v. NRA Political Victory Fund*, 6 F.3d 821, 825 (D.C. Cir. 1993).

statutes. These requirements fall into two conceptually distinct categories: mandates that appointees possess *expertise* in the relevant subject matter—with professional credentials usually serving as a proxy for expertise—and requirements aimed at promoting certain *perspectives* among appointees.

Expertise-promoting requirements are the more familiar category. They date to the Judiciary Act of 1789, passed by the First Congress, which required the Attorney General and U.S. attorneys to be “learned in the law.”<sup>25</sup> Congress imposed similar requirements for professional qualifications or experiences across executive branch offices throughout the nineteenth century.<sup>26</sup>

During the Progressive and New Deal eras, these requirements proliferated within the executive branch. A central tenet of public administration theory during this period was scientific management, the notion that the administrative state could and should be managed by neutral technocrats divorced from politics.<sup>27</sup> To that end, reformers added credential requirements to offices across the administrative state.<sup>28</sup> Moreover, fixed terms for independent regulatory commissioners were justified as enabling appointees to gain expertise through experience on the commission.<sup>29</sup>

Today, expertise requirements are present throughout administration. Members of the Defense Nuclear Facilities Safety Board must be “respected experts in . . . nuclear safety with a demonstrated competence and knowledge relevant to [the Board’s work].”<sup>30</sup> At least one member of the Federal Deposit Insurance Corporation must have previously served as a state banking supervisor.<sup>31</sup> The Director of the Federal Housing Finance Agency must “have a demonstrated understanding of financial management or oversight, and . . . of capital markets, including the mortgage securities markets and housing finance.”<sup>32</sup> Similar requirements concerning “professional standing and demonstrated knowledge in the field[]” requirements exist for positions within the Surface Transportation Board,<sup>33</sup>

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25. Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93 (1789). Today, the Solicitor General is subject to a similar requirement. See 28 U.S.C. § 505 (2018).

26. See Myers, 272 U.S. at 265-74 (Brandeis, J., dissenting) (collecting statutes).

27. See Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1133-34 (2000).

28. See *id.*

29. See *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 624-25 (1935); see also Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 29 (2010).

30. 42 U.S.C. § 2286(b)(1) (2018).

31. 12 U.S.C. § 1812(a)(1)(C) (2018).

32. 12 U.S.C. § 4512(b)(1) (2018).

33. 49 U.S.C. § 1301(b)(2)(A) (2018).



Federal Emergency Management Agency (FEMA),<sup>34</sup> Postal Regulatory Commission,<sup>35</sup> Occupational Safety and Health Review Commission,<sup>36</sup> and Office of Special Counsel,<sup>37</sup> among other offices.<sup>38</sup>

The second category of requirements promotes the representation of specific perspectives on administrative bodies. Most notably, twenty-three multimember commissions require partisan balance among their members; in most cases, only a bare majority may hail from the same political party.<sup>39</sup> Partisan-balance requirements have yielded real ideological diversity on commissions, with Republican presidents generally appointing bona fide liberals for Democratic seats, and Democratic presidents appointing true conservatives to Republican seats.<sup>40</sup> Accordingly, these requirements ensure that certain political views are represented on commission daises regardless of the party controlling the White House.<sup>41</sup>

Other membership requirements promote viewpoint representation in more subtle ways. The composition of the Federal Reserve Board of Governors (the Fed) must include “fair representation of . . . financial, agriculture, industrial, and commercial interests . . . .”<sup>42</sup> At least two out of

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34. See 6 U.S.C. § 313(c)(2)(A) (2018). Following Hurricane Katrina, Congress added a requirement that FEMA’s administrator possess at least five years of “executive leadership and management experience.” *Id.* § 313(c)(2)(B), *as added by* Pub. L. No. 109-295, Title VI, § 611(11), 120 Stat. 1355, 1397 (2006); *see also* LOUIS FISHER, *THE LAW OF THE EXECUTIVE BRANCH: PRESIDENTIAL POWER* 132 (2014) (noting that Congress amended the statute in response to FEMA’s emergency-response performance following that disaster).

35. See 39 U.S.C. § 502(a) (2018).

36. See 29 U.S.C. § 661(a) (2018).

37. See 5 U.S.C. § 1211(b) (2018).

38. Oddly, some statutes merely require that the President “consider” appointing individuals with relevant experiences or credentials. *See, e.g.*, 12 U.S.C. § 1752a(b)(2)(A) (2018) (providing that, in selecting National Credit Union Administration board members, “the President shall give consideration to individuals who, by virtue of their education, training, or experience relating to a broad range of financial services . . . are especially qualified to serve on the Board”); 15 U.S.C. § 2053(a) (2018) (requiring the President to “consider” for the Consumer Product Safety Commission individuals with “background and expertise in areas related to consumer products and protection of the public from risks to safety”).

39. See Brian D. Feinstein & Daniel J. Hemel, *Partisan Balance with Bite*, 118 COLUM. L. REV. 9, 31, 41 (2018) (identifying the Commodity Futures Trading Commission, Federal Communications Commission, and twenty-one other boards and commissions with partisan-balance requirements).

40. See *id.* at 14.

41. See Daniel E. Ho, *Congressional Agency Control: The Impact of Statutory Partisan Requirements on Regulation 1-3* (Feb. 12, 2007) (unpublished manuscript), <https://law.bepress.com/cgi/viewcontent.cgi?article=2219&context=alea> [<https://perma.cc/4V3J-NPGA>] (“[T]he effect of [FCC] [C]ommissioner ideology on voting is profound. Commissioner partisan affiliation exhibits robust and large predictive power over votes, even holding constant the party of the appointing president.”).

42. 12 U.S.C. § 241 (2018). The Board also must be geographically balanced and include at least one member with “demonstrated primary experience working in or supervising [small] community banks . . . .” *Id.*

the five members of the Surface Transportation Board must possess private-sector experience.<sup>43</sup> By contrast, Congress actively discourages private-sector views on the National Credit Union Administration, where “[n]ot more than one” out of the three board members may hail from a credit union.<sup>44</sup>

At first glance, these industry-representation requirements may appear as merely another way to ensure that various forms of expertise are present on commissions. But they go beyond that purpose. For instance, an individual can possess expertise concerning the financial sector without being a “representat[ive] of . . . financial . . . interests,”<sup>45</sup> as the Fed’s statute requires. By mandating appointments *from* industry—rather than from the broader category of experts concerning that industry, such as academics and civil servants, these provisions ensure that certain industry or interest-group perspectives are included on commissions. Accordingly, the drafters of these provisions presumably understood that a commissioner’s employment history can influence her current policy outlook.<sup>46</sup>

Some representational requirements are even more specific. The Secretary of Defense cannot have served in the military during the preceding seven years;<sup>47</sup> the Federal Reserve Board<sup>48</sup> and the central bank’s Federal Open Market Committee (FOMC) both must be geographically balanced;<sup>49</sup> two seats on the three-person National Indian Gaming Commission are reserved for enrolled members of a Native American tribe;<sup>50</sup> and the Director of the Women’s Bureau of the Department of Labor must be a woman.<sup>51</sup>

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43. See 49 U.S.C. § 1301(b)(2)(B) (2018).

44. 12 U.S.C. § 1752a(b)(2)(B) (2018).

45. Federal Reserve Act, 12 U.S.C. § 241 (2018).

46. Cf. Rufus E. Miles, Jr., *The Origin and Meaning of Miles’ Law*, 38 PUB. ADMIN. REV. 399 (1978) (discussing the origins of the aphorism “[w]here you stand depends on where you sit”).

47. See 10 U.S.C. § 113(a) (“A person may not be appointed as Secretary of Defense within seven years after relief from active duty as a commissioned officer of a regular component of an armed force.”); see also 42 U.S.C. § 2286(b)(1) (requiring that Defense Nuclear Facilities Safety Board members be “from civilian life”). The Senate has waived the civilian Defense Secretary requirement in the recent past, see, e.g., Act of Jan. 20, 2017, Pub. L. No. 115-2, 131 Stat. 6 (waiving the provision as applied to General James Mattis), and could waive requirements concerning other offices as well. Alternatively, perhaps the Senate could simply ignore these requirements if it so chose, because judicial challenges to confirmation decisions arguably are nonjusticiable.

48. See 12 U.S.C. § 241 (2018) (mandating that no more than one Board member be appointed from any one Federal Reserve District and that the President consider “fair representation of . . . geographical divisions of the country”).

49. See 12 U.S.C. § 263(a) (2018) (providing that the directors of the Federal Reserve Bank of New York select one of the twelve members of the FOMC, and the directors of the other eleven regional Reserve Banks select four additional FOMC members).

50. 25 U.S.C. § 2704 (2018).

51. See 29 U.S.C. § 12 (2018).

By imposing these unambiguous representational requirements, Congress acknowledges the importance of identity and past experiences in shaping one's perspective. There are without a doubt many talented and knowledgeable candidates who could fill these roles but do not meet the above requirements. By imposing these restrictions, Congress is signaling that there is something about having certain experiences or traits—as a civilian in a defense position, as a central banker outside of the Acela corridor, as a Native American, or as a woman—that provides an individual with a different expected perspective, from a similarly credentialed person without that experience or trait.

So too, we contend, does Congress have a similar perspective on the experience of serving as a congressional staffer.<sup>52</sup> In Part II, we argue that Congress has shown an increasing propensity to place its former staffers on independent regulatory commissions, based in part on legislators' belief that these staffers' service to Congress, and ties that they maintain with their former colleagues on the Hill, will engender loyalty to that institution. In Part III, we describe how staffers-turned-commissioners' acculturation in Congress has in fact changed the working culture of their agencies. But first, we detail the growing prominence of former congressional staffers on independent regulatory commissions.

### *B. The Congress-to-Commission Phenomenon*

Today, the presence of former congressional staffers on the daises of multimember commissions and boards is common. Two out of the five current commissioners of the SEC are former senior staffers on the Senate Committee on Banking, Housing, and Urban Affairs (Senate Banking Committee).<sup>53</sup> Two of the four current members of the National Labor Re-

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52. Could Congress pass a law requiring, for example, that the President fill certain seats “from among former legislators or legislative staff”? Almost certainly—provided that Congress did not attempt to fill the seats with *current* lawmakers. See *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 267 (1991) (invalidating this practice on separation-of-powers grounds). The illustrative language tracks other existing experiential requirements. See 12 U.S.C. § 635a(c)(8)(B) (2018) (requiring that at least one board member of the Export-Import Bank “be selected from among the small business community and . . . represent the interests of small business”). But, considering that former staffers are appointed to these positions in growing numbers *without* such statutory requirements, why call attention to the practice by enshrining it in statute?

53. Hester Peirce served as senior counsel to the Senate Banking Committee under Chairman Richard Shelby (R-AL). *Commissioner Hester M. Peirce*, U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/biography/commissioner-hester-m-peirce> [https://perma.cc/XF72-P7Q6]. Kara Stein served as senior policy advisor for securities and banking policy to Senator Jack Reed (D-RI) and staff director of the Securities, Insurance and Investment Subcommittee of the Senate Banking Committee. *Commissioner Kara M. Stein*, U.S. SEC.

lations Board (NLRB) are former senior congressional staffers with experience on labor committees.<sup>54</sup> As Table 1 shows, Capitol Hill alumni are well-represented on most of the other major independent boards and commissions. (For simplicity, we adopt the term “commission” to refer to any multimember agency and “commissioner” to refer to any member of one of these agencies.)

Table 1: Composition of Independent Regulatory Commissions<sup>55</sup>

Agency	Members with Hill Experience	Total Current Members
Consumer Products Safety Commission (CPSC)	2	4
Equal Employment Opportunity Comm'n (EEOC)	2	3
Federal Communications Commission (FCC)	3	4
Federal Election Commission (FEC)	2	4
Federal Energy Regulatory Commission (FERC)	3	5
Federal Reserve Board of Governors (Fed)	0	3
Federal Trade Commission (FTC)	2	5

& EXCHANGE COMMISSION, <https://www.sec.gov/biography/stein-kara-m> [<https://perma.cc/Y7KW-8C2Z>].

54. Lauren McFerran served as chief labor counsel and deputy staff director of the Senate Committee on Health, Education, Labor, and Pensions (HELP), and senior labor counsel to Senator Tom Harkin (D-IA) and Senator Edward Kennedy (D-MA). *Lauren McFerran*, NAT'L LAB. REL. BOARD, <https://www.nlr.gov/bio/lauren-mcferran> [<https://perma.cc/2YL9-G75V>]. Marvin Kaplan served as counsel to the House Committee on Oversight and Reform and as policy counsel to the House Committee on Education and Labor. *Marvin E. Kaplan*, NAT'L LAB. REL. BOARD, <https://www.nlr.gov/who-we-are/board/marvin-e-kaplan> [<https://perma.cc/LQY9-25Q9>].

55. Data obtained via agency websites and other online biographies, and is current as of July 31, 2020.

National Labor Relations Board (NLRB)	2	4
National Transportation Safety Board (NTSB)	0	3
Nuclear Regulatory Commission (NRC)	3	5
Securities & Exchange Commission (SEC)	2	5
TOTAL	21	44

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Among the multimember independent agencies included in Table 1, twenty-one out of forty-four commissioners and board members (forty-eight percent) had previous experience working for Congress. Typically, this experience involved a senior policy role on a House or Senate committee with authorization and oversight jurisdiction over the relevant agency.

How does the present level of representation of former Hill staffers on commissions compare to historical practice? To answer this question, we leverage data on the biographies of commissioners and board members on the eleven major commissions and boards included in Table 1.

We start with Professor David Nixon's Independent Regulatory Commission Database. Nixon identifies every former member of Congress or congressional staffer who later served on one of the eleven commissions listed in Table 1 through 2000.<sup>56</sup> The Federal Trade Commission and Federal Reserve Board were the first of these eleven commissions to be established, both in 1914.<sup>57</sup> Accordingly, our analysis begins in that year. We

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56. David C. Nixon, *Independent Regulatory Commissioner Database, 1887-2000*, INTER-UNIVERSITY CONSORTIUM FOR POL. & SOC. RES. (Sept. 25, 2007), <https://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/4221> [<https://perma.cc/EB4G-NLWW>]. Specifically, Nixon codes for whether each commissioner served as a congressional staffer or held a "federal elective office" in one of the individual's four previous positions. See David C. Nixon, Codebook for *Independent Regulatory Commissioner Data Base*, INDEPENDENT REGULATORY COMMISSIONER DATA BASE 7 (Mar. 10, 2005), [http://www2.hawaii.edu/~dnixon/IRC/irc\\_codebook\\_110.pdf](http://www2.hawaii.edu/~dnixon/IRC/irc_codebook_110.pdf) [<https://perma.cc/V5FV-FJD3>]. In practice, the only former federal elected officials to later serve as commissioners are former members of Congress.

57. See Federal Trade Commission Act of 1914, Pub. L. No. 63-203, 52 Stat. 111; Federal Reserve Act of 1913, Pub. L. No. 63-43, 38 Stat. 251. The Banking Act of 1935 altered the entity's

then scoured agency and professional websites, LinkedIn profiles, and other online sources to extend Nixon's classifications from 2001 to 2018. In all, we obtained data on 977 commissioners serving on these eleven commissions.<sup>58</sup>

Figure 1 displays the results of this effort: the first look at the growth of the Congress-to-commission pipeline. Each dot indicates the proportion of commissioners with Hill experience that were appointed in a given year.<sup>59</sup> The figure displays a loess curve in blue, along with associated ninety-five percent confidence intervals in gray.<sup>60</sup> Figure 1 reveals an overall slight decrease in the proportion of new commissioners with Hill experience from the New Deal era to the 1980s, followed by an increase that accelerates into the 2000s.

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governance structure and functions and changed its name to the "Board of Governors of the Federal Reserve System." See Banking Act of 1935, Pub. L. No. 74-305, § 203, 49 Stat. 684, 704-05. For purposes of this analysis, we consider the latter entity to be a continuation of the former.

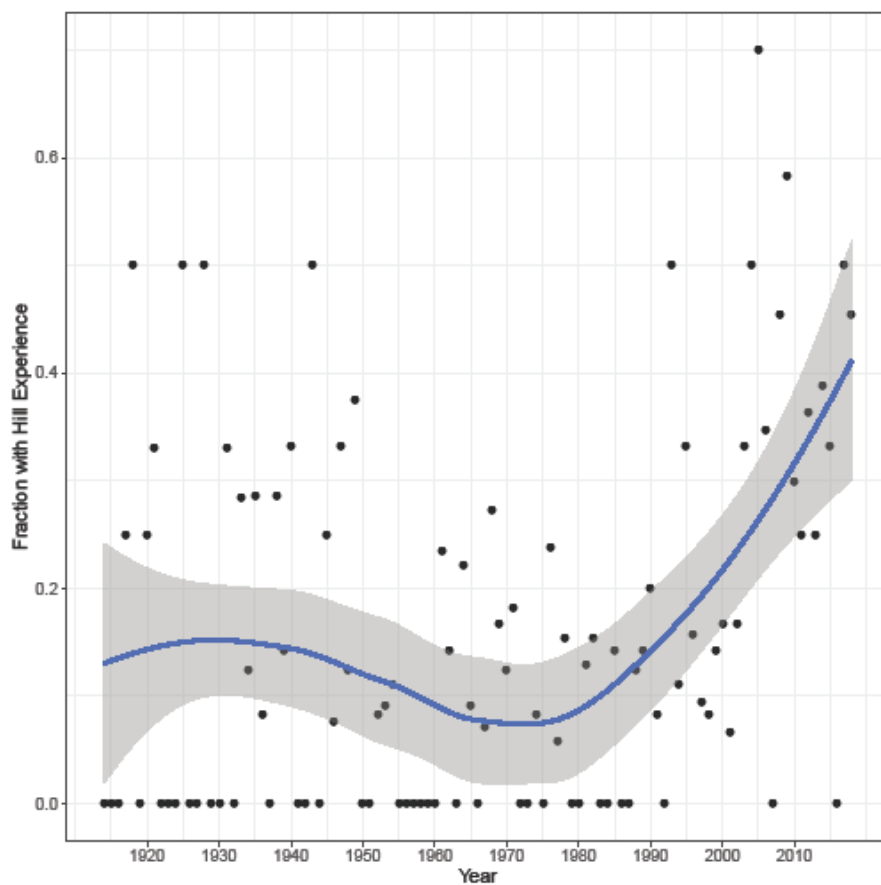
58. The included members and years for each of the eleven commissions are: CPSC (thirty-nine members, 1972-2018); EEOC (fifty-seven members, 1965-2018); FCC (123 members, 1934-2018); FEC (fifty members, 1975-2018); Federal Reserve (119 members, 1914-2018); FERC (fifty-six members, 1977-2018); FTC (114 members, 1914-2018); NLRB (110 members 1935-2018); NRC (108 members, 1974-2018); NTSB (sixty members, 1967-2018); SEC (141 members, 1935-2018).

59. By focusing exclusively on new appointees, Figure 1 eliminates a key source of autocorrelation present in the loess curve in Figure 2, which shows the proportion of commissioners with Hill experience serving in a given year. Consider the career of Michael O'Rielly, a longtime advisor to several members of Congress and congressional committees who began serving as an FCC Commissioner in 2013. See *Michael O'Rielly*, FED. COMM. COMMISSION, <https://www.fcc.gov/about/leadership/mike-orielly#bio> [<https://perma.cc/A9KN-U89T>]. Commissioners serve fixed terms and rarely resign in their second year, so O'Rielly's presence in our dataset in 2013 essentially perfectly predicts his presence in 2014. More generally, his presence or absence in any given year in our dataset is highly correlated with his presence or absence in the previous year. Thus, the observations in our dataset are not independent. Instead, whether the individual holding commission seat  $c$  at time  $t$  has prior Hill experience is serially correlated with whether the individual holding seat  $c$  at  $t-1$  has prior Hill experience.

After eliminating an important source of non-independence among commissioner-year observations, the loess curve in Figure 1 exhibits markedly less autocorrelation than that in Figure 2; the value of the function for a one-year lag in Figure 2 is 0.882 versus 0.125 in Figure 1.

60. A loess curve is a locally weighted, non-parametric regression line; essentially, a trend line.

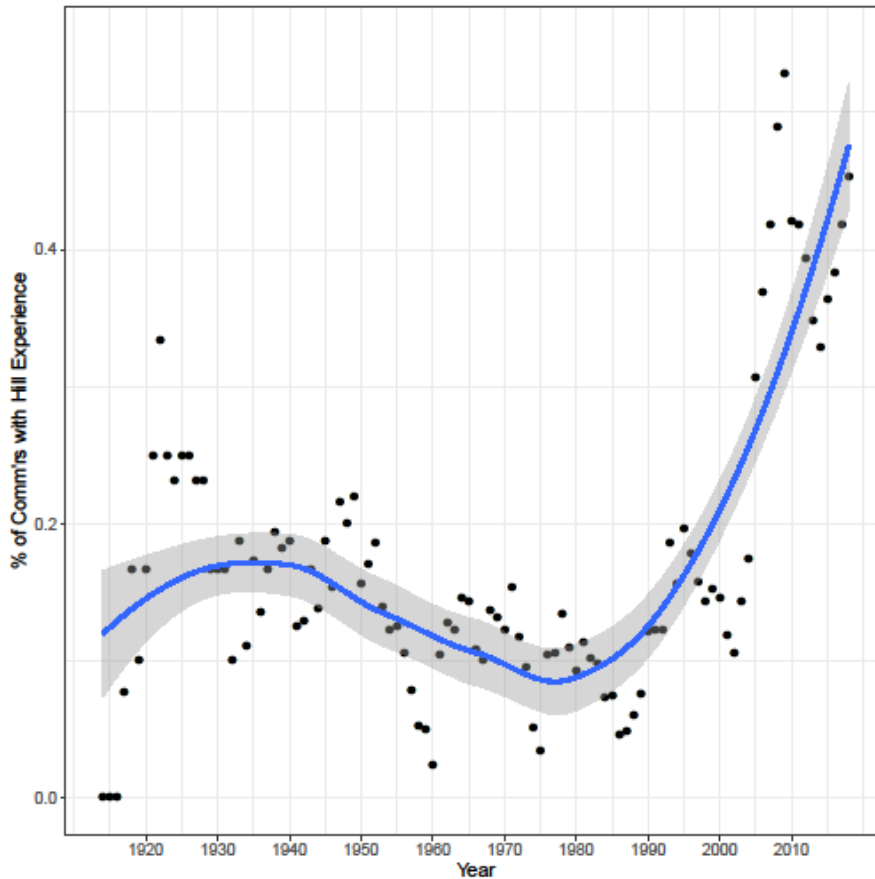
Figure 1: Proportion of New Commissioners with Hill Experience



Given the significant year-to-year variation in the proportion of newly appointed commissioners with Hill experience, Figure 1 is somewhat lumpy.

Figure 2 provides another perspective on these data. Whereas Figure 1 illustrates the proportion of commissioners with Hill experience *appointed* in a given year, Figure 2 shows the proportion of *currently serving* commissioners with Hill experience in each year.

Figure 2: Proportion of Commissioners with Hill Experience



As the figure shows, this proportion remained relatively steady throughout most of the twentieth century, exhibiting a slight, gradual decline from around 1940 to 1980. Although the figure fluctuated considerably during the 1980s through the early 2000s, the general trend was positive. Around 2005, however, the proportion of commissioners with Hill experience changed dramatically. In that year, the figure jumped from 17%—around where it had hovered for the previous decade—to 31%. By 2009, the figure reached its global maximum: 53%. For the next ten years, the figure fluctuated between 33% and 45%.

Figures 1 and 2 reveal a clear time trend in the proportion of commissioners with previous Hill experience: an overall slight decrease in this proportion from the New Deal era to the 1980s, followed by an increase that accelerates into the 2000s. Both figures illustrate that



there has been a marked and sustained influx from Capitol Hill onto multimember independent agencies in the past fifteen years or so.<sup>61</sup>

Still, there are two plausible alternative explanations to a time trend. First, a handful of outlier agencies could be driving these results, with most agencies not exhibiting this trend. Second, divided government—which has become a more frequent occurrence in recent decades<sup>62</sup>—could explain the phenomenon. When different parties control the Senate and White House, Senate leadership lacks partisan or electoral incentives to acquiesce to presidential demands and instead adopts a more assertive posture.<sup>63</sup> If Senate leadership has always favored appointing legislative branch staffers to executive agencies, and Senate leadership is more assertive during divided government,<sup>64</sup> then we would expect to see a higher proportion of Hill staffers appointed to executive agencies during periods of divided government. That divided government has become more common over time raises the possibility that what we interpret as a time trend in the proportion of commissioners with previous Hill experience may instead be reflecting an omitted variable: the presence of divided government.<sup>65</sup>

To examine the relative roles that (1) a time trend, (2) outlier agencies, and (3) the presence or absence of divided government play in the growth of the Hill-to-agency pipeline, we regress whether a given commissioner has Hill experience on (1) the year in which the individual was appointed; (2) the agency to which he or she was appointed; and (3) whether different parties controlled the presidency and Senate at the time of appointment.

Because there is no clear-cut way to model the nonlinear trend line in Figures 1 and 2, we take three approaches. Model 1 estimates a linear

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61. This trend is consistent with Professor Daniel Ho's observation that, whereas no FCC commissioners had previous experience as congressional staffers between 1965 and 1979, fourteen percent of FCC commissioners had such experience between 1980 and 2006. See Ho, *supra* note 41, at 29.

Examining individual figures for each of the eleven included agencies shows that the general trend observed in Figures 1 and 2 is clearly present for the CPSC, EEOC, FCC, Fed, NTSB, NRC, and SEC. The trend is also present for the FEC, FTC, and NLRB in recent decades only, with the proportion of commissioners with Hill experience increasing at the FEC and FTC since the mid-1990s and at the NLRB since the early 1970s. The trend is not present for the NLRB.

62. The Pearson correlation coefficient for the *Year* and *Divided Government* variables introduced *infra*, Table 2, is 0.190.

63. See DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE* 60-66 (2008) (reporting that the proportion of new agencies with limitations on appointments is higher under divided government); DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* 77-78 (1999) (finding that Congress places greater constraints on executive agencies' discretion under divided government).

64. See *supra* note 63.

65. See *supra* note 62 (reporting the correlation between divided government and time).

regression model for appointments between 1980 and 2018. This section of the loess curve in Figure 1 approximates a linear function, making linear regression more appropriate. Models 2 and 3, by contrast, use nonparametric forms to model the entire 1914-2018 period. Model 2 transforms the *Year* variable into a cubic polynomial ( $Year$ ,  $Year^2$ ,  $Year^3$ ); this transformation provides the closest approximation to the nonparametric plot in Figure 1.<sup>66</sup> Finally, Model 3 employs a spline regression model, in which each segment of a polynomial function is estimated separately.<sup>67</sup> Internal breakpoints at the years 1930 and 1972—the approximate internal local maximum and local minimum, respectively, of the curve in Figure 1—establish the three segments of the spline.

Finally, Model 4, which is unreported, presents an alternative spline regression model with an additional breakpoint at 2004. Because Figure 2 exhibits a substantial discontinuity around 2004, this model tests whether the post-2004 period completely drives any observed time trend.<sup>68</sup>

These models also include a *Divided Govt* covariate, which denotes whether different political parties controlled the Senate and presidency in a given year, as well as agency fixed effects. Table 2 reports the results.

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66. Per convention, this function also includes linear and quadratic terms (i.e.  $Year$  and  $Year^2$ , as well as  $Year^3$ ). As a check, we computed Akaike information criterion (AIC) and adjusted R-squared values for first-, second-, third-, and fourth-degree polynomial transformations of *Year*. We found that the third-degree polynomial produced the largest R-squared value and was trivially larger than the lowest AIC value. Accordingly, using the third-degree polynomial is most appropriate. See John H. McDonald, *Handbook of Biological Statistics*, SPARKY HOUSE PUB. 217 (2014), <http://www.biostathandbook.com/HandbookBioStatThird.pdf> [<https://perma.cc/TVX5-X58H>].

67. See Jeffrey S. Racine, *A Primer on Regression Splines*, COMPREHENSIVE R ARCHIVE NETWORK, [https://cran.r-project.org/web/packages/crs/vignettes/spline\\_primer.pdf](https://cran.r-project.org/web/packages/crs/vignettes/spline_primer.pdf) [<https://perma.cc/GZK2-Y7XW>].

68. This fourth model reports positive, substantially large, and statistically significant coefficient estimates for both the 1973-2004 and 2005-2018 periods, which indicates that the discontinuity around 2004 observed in Figure 2 is not driving the results.

To further assess whether any system-wide feature caused the jump around 2004 in Figure 2, we produced separate versions of that figure for each commission. As the figures show, all commissions except one exhibit a general increase in the proportion of staffers-turned-commissioners in the last several decades. Given the small number of observations for individual commissions, we do not make much of these single-commission results. But, at the very least, they do not suggest that any system-wide phenomenon is present around 2004.

Table 2: Staffers-Turned-Commissioners Over Time

	Model 1	Model 2	Model 3
Year	0.065** (0.012)		
Year Cubed		0.0001* (0.00005)	
1914-1930			1.436 (0.904)
1931-1972			0.166 (0.827)
1973-2018			2.494** (0.843)
Divided Govt	-0.433 (0.272)	-0.275 (0.218)	-0.352 (0.212)
Agency Fixed Effects	Y	Y	Y

Unit of analysis: appointments and reappointments to eleven boards and commissions. Dependent variable: whether the appointment is filled by an individual who previously worked for or served in Congress. Model: logistic regression (all models); Model 2 contains a third-degree polynomial transformation of *Year* (*Year* & *Year*<sup>2</sup> terms included in model, but unreported in table); Model 3 employs regression splines at 1914-1930, 1931-1972, and 1973-2018. Agency covariates modeled as fixed effects. Period: 1980-2018 (Model 1); 1914-2018 (Model 2); 1914-2018 (Model 3). Observations: 459 (Model 1); 977 (Model 2); 977 (Model 3). Pseudo-R<sup>2</sup>: 0.142 (Model 1); 0.118 (Model 2); 0.111 (Model 3). \*\*\* signifies  $p < 0.001$ , \*\*  $p < 0.01$ , \*  $p < 0.05$ , †  $p < 0.10$ .

That the coefficient estimates for *Divided Govt* are negative and do not reach conventionally accepted levels of statistical significance is not consistent with an argument that more frequent divided government is driving the trend of former Hill staffers serving as commissioners. We cannot, however, reject the null hypothesis that the presence of divided government has no bearing on the placement of Hill staffers on these agencies.

The potential lack of association between divided government and the strength of the staffers-to-commissioners phenomenon bears on the

debate over the extent to which lawmakers are loyal to Congress as their home institution or to their political party, and thus less willing to engage in Madisonian interbranch competition with a same-party President.<sup>69</sup> That the staffers-to-commissioners trend increases year after year, during periods of unified as well as divided government—and, we posit, in response to growing presidential power in other areas—suggests that legislators' institutional loyalty to Congress can trump their partisan or ideological affiliations.

More notably for our purposes, the positive and mostly statistically significant coefficient estimates for the time-related variables suggest the presence of a time trend. Controlling for any agency-specific effects or the presence of divided or unified government, the proportion of commissioners with prior Hill experience tends to increase over time.<sup>70</sup>

The use of a logit model precludes straightforward interpretation of the magnitude of this trend. Accordingly, we transform several key coefficient estimates into predicted probabilities.<sup>71</sup> The following figure charts

69. Compare David Fontana & Aziz Z. Huq, *Institutional Loyalties in Constitutional Law*, 85 CHI. L. REV. 1, 5 (2018) (arguing that institutional loyalties persist and may still influence the behavior of federal officials), with Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2329 (2006) (contending that party loyalty drives interbranch dynamics and concluding that interbranch competition is apparent when government is divided but is suppressed when government is unified).

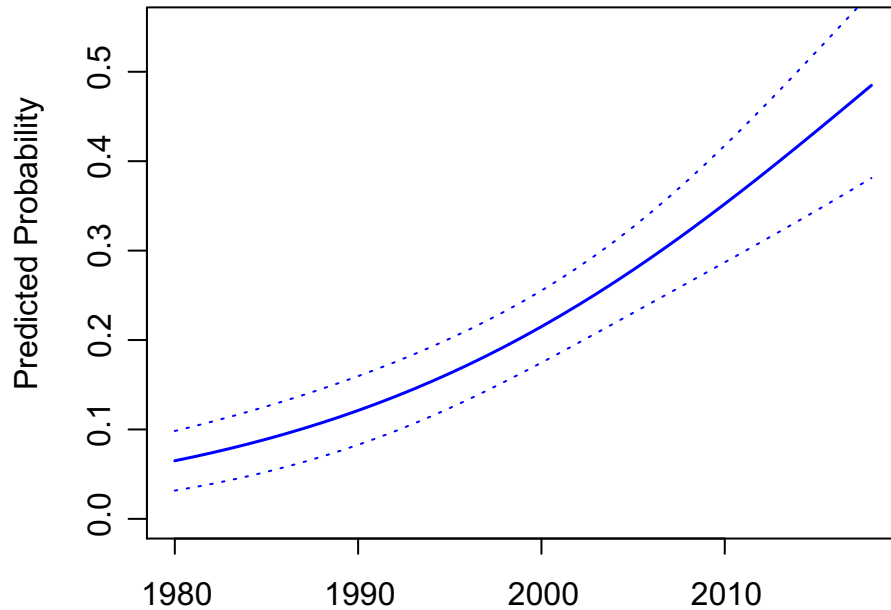
70. To account for the possibility that features of the political environment apart from the presence of divided or unified government drive these results, we estimated several alternative model specifications. First, we re-ran Model 1 in Table 2 with fixed effects for each President and Senate Majority Leader pair during the period. (This model omitted the *Divided Govt* covariate to avoid perfect multicollinearity. In addition, because Senator Trent Lott and Senator Harry Reid split majority-leader duties in 2001, we ran the analysis twice, coding 2001 for Senator Lott in the first specification and for Senator Reid in the second.) Only the estimate for the George W. Bush-Bill Frist fixed effect (2003-2006), which was positive, approached conventionally accepted levels of statistical significance ( $p = 0.089$ ). Second, we re-ran the model with fixed effects for each pair of the President and the Senate leader of the other party than the President's. Here, only the George W. Bush-Harry Reid estimate (2005-2008), which also was positive, approached statistical significance at conventional levels ( $p = 0.067$ ). Third, we re-ran the model with dummy variables for a Republican President, GOP Senate majority, and the interaction of the two. (This model also omitted *Divided Govt* for the same reason as above.) Here, only the interaction term, which once again was positive, approached conventionally accepted levels of statistical significance ( $p = 0.086$ ). In sum, virtually every coefficient estimate in these three models suggests a null result. In all three models, the only estimates that approach conventionally accepted levels of statistical significance correspond to the mid-2000s. That the mid-2000s is late in the study period is consistent with our claim that a time trend best explains these data.

Neither is it the case that congressional staffing levels have risen, thereby creating a deeper pool of qualified candidates for executive positions. In fact, congressional employment figures have dropped precipitously over the past several decades. See *Vital Statistics on Congress*, BROOKINGS INST. 1 tbl. 5-1 (2017) [https://www.brookings.edu/wp-content/uploads/2017/01/vital-stats\\_ch5\\_full.pdf](https://www.brookings.edu/wp-content/uploads/2017/01/vital-stats_ch5_full.pdf) [<https://perma.cc/XRS5-XRFT>] (reporting a secular decline in policy-focused committee positions, from 3,437 in 1979 to 2,262 in 2012).

71. See TIM FUTING LIAO, INTERPRETING PROBABILITY MODELS: LOGIT, PROBIT, AND OTHER GENERALIZED LINEAR MODELS 11-21 (1994). In Model 1, for instance, the predicted probability of a new appointee in 1980 having prior Hill experience is 6.5% (with a 95%

the growth over the past several decades in the predicted probability that a new appointee will have prior Hill experience.

Figure 3: Predicted Probability that a New Appointee Has Hill Experience



Generating individual predicted probability figures for each of the eleven agencies yields broadly similar results.<sup>72</sup> The conclusion from these analyses is clear: the past several decades have witnessed a significant and sustained increase in the appointment of former congressional staffers to these agencies. Where once it was rare to find Hill staffers on the daises of independent commissions and boards, today they figure prominently.

## II. Causes

What is the cause of the rise of the former Hill staffer serving on independent commissions? We propose that it is not coincidental that this trend occurred in the midst of a period in which Congress's relative role in

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confidence interval of 3.2% to 9.8%). By 2018, that figure is 48.0% (with a 95% confidence interval of 38.1% to 58.8%).

72. For the EEOC and FEC figures, however, the lower bounds of the confidence intervals hover around zero for the full 1980-2018 period.

governance otherwise has been in retreat.<sup>73</sup> Reacting to their declining power to achieve their desired ends through traditional legislative processes,<sup>74</sup> lawmakers sought out other means of influence. Placing Hill staffers on commissions constitutes a relatively low-cost pathway to exercising power in our current milieu.

Counterintuitively, Congress's own pathologies may have led it to focus on appointments. Congressional dysfunction could make the Congress-to-agency pathway more attractive for two reasons.<sup>75</sup> First, with a waning role in direct governance, Congress may place greater emphasis on ensuring that individuals who actually set policy have substantial ties to the legislative branch. Second, with the material and psychic rewards for working on the Hill declining, high-level congressional staffers may feel the pull of multimember agencies more today than in the past. In the following two subsections, we consider these two potential pathways in turn.

### *A. Demand-Side*

In this section, we outline several reasons why Congress's demand for former Hill staffers to serve as commissioners on independent agencies may have increased in the past few decades. We then test these theories against available data.

#### 1. Interbranch Dynamics

With Congress's exercise of its traditional lawmaking and oversight functions diminished, lawmakers may view appointing allies onto independent agencies as an alternative means of exercising influence. In recent

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73. See, e.g., BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010); THOMAS MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* 97 (2006); Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 *YALE L.J.* 1920, 1938 (2014); Richard L. Hasen, *Essay: Political Dysfunction and Constitutional Change*, 61 *DRAKE L. REV.* 989, 993 (2013).

The development also transpired in the years immediately following a series of Supreme Court decisions striking down statutes designed to give Congress a formal role in the appointment or removal of executive branch officials. See *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252 (1991), *Bowsher v. Synar*, 478 U.S. 714 (1986); *Buckley v. Valeo*, 424 U.S. 1 (1976). Congress also cannot draft statutory requirements that overly constrain the President's choice set for appointments. See *Hechinger v. Metro. Wash. Airports Auth.*, 36 F.3d 97 (D.C. Cir. 1994); *supra* Section I.A.

74. See Josh Chafetz, *The Phenomenology of Gridlock*, 88 *NOTRE DAME L. REV.* 2065, 2067 (2013) (labeling as conventional wisdom the view that "Congress is hopelessly gridlocked").

75. For a recent treatment of congressional dysfunction, see THOMAS MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* (2012).

years, Congress has passed far fewer laws than a generation ago.<sup>76</sup> Existing laws often delegate significant authority to the executive branch,<sup>77</sup> and congressional committees sometimes overlook their oversight function.<sup>78</sup> Today, Congress even struggles with more routine tasks, like passing budgets prior to the start of a new fiscal year and approving increases in the debt ceiling.<sup>79</sup> Facing a reduced role in policymaking, legislators naturally seek alternative means of influence.

At the same time, presidential innovations such as regulatory review by the Office of Information and Regulatory Affairs (OIRA) and the use of White House policy “czars” or councils to coordinate policy among agencies have strengthened the President’s hand in administration.<sup>80</sup> With the door closing on Congress’s more direct levers of power and White House power over agencies on the ascent, legislators may be turning to appointments to indirectly influence policy outcomes.<sup>81</sup>

Lawmakers’ increasingly turned their attention to appointments in the late 1970s. The Senate strengthened its financial disclosure requirements for nominees, increased the amount of time its committees spent holding hearings on nominees, and demonstrated a greater willingness to place holds on nominees to gain concessions elsewhere from the White House.<sup>82</sup> By the mid-1990s, Senate Majority Leader Bob Dole (R-KS) reg-

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76. See Michael J. Teter, *Gridlock, Legislative Supremacy, and the Problem of Arbitrary Inaction*, 88 NOTRE DAME L. REV. 2065, 2220-21 (2013).

77. See Kathryn A. Watts, *Rulemaking as Legislating*, 103 GEO. L.J. 1003, 1013-15 (2015) (describing Congress’s delegation of legislative power to agencies).

78. See Brian D. Feinstein, *Congress in the Administrative State*, 95 WASH. U. L. REV. 1189, 1216-20 (2018) (showing that where committee, chamber and agency preferences are misaligned, oversight hearings are less likely to be held); Brian D. Feinstein, *Avoiding Oversight: Legislator Preferences and Congressional Monitoring of the Administrative State*, 8 J.L. ECON. & POL’Y 23 (2011) (demonstrating that legislators tend to disfavor assignments to oversight-focused committees); Terry M. Moe, *The Presidency and the Bureaucracy: The Presidential Advantage*, in *THE PRESIDENCY AND THE POLITICAL SYSTEM* 425, 442 (Michael Nelson ed., 2003) (arguing that reelection-oriented legislators have scant incentive to participate in oversight activities).

79. See Jack M. Balkin, *The Last Days of Disco: Why the American Political System is Dysfunctional*, 94 B.U. L. REV. 1159, 1193 (2014).

80. See Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1176-78 (2012) (discussing White House policy councils); Elana Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2277-81, 2285-90 (2001) (describing the bolstering of OIRA’s influence in regulatory review during the 1980s).

81. See Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 487 (2008) (observing that “[p]olitical polarization has shifted the focus of government policymaking away from Congress and to government agencies,” thus raising the stakes for executive appointments). As we discuss in this Section, we think other factors have influenced the increasing emphasis that legislators place on appointments.

82. See Ho, *supra* note 41, at 28 (citing Senate studies on the appointments process from 1976 and 1977).

ularly sent to President Bill Clinton the names of recommended appointees to Republican-designated seats on commissions with partisan-balance requirements, thus capturing first-mover advantage for this subset of appointments.<sup>83</sup>

The Senate's heightened attention to nominees expanded the timeframe for appointments. Whereas the Senate took an average of 59 days to confirm judicial and executive branch nominees during the Reagan Administration, that figure rose to 127 days during the Obama Administration.<sup>84</sup> Evidence from the Trump Administration suggests the problem is getting worse—reports of unusually long delays in confirmations abound.<sup>85</sup> Although seemingly in tension with lawmakers' tendency to place their own people in the some of these roles, these staffing delays also support the inference that senators are scrutinizing appointments more, which is consistent with a desire to play a greater role in this realm.

As one would expect given the stakes, lawmakers' turn towards appointments did not occur in a vacuum. The White House may have been aware of the implications of Congress's growing focus on appointments, but any measures to counteract it would be costly in several ways.

While we cannot definitively say whether the White House or Senate has greater power over appointments in general—empirical research on this question does not yield a firm conclusion<sup>86</sup>—the Senate has a veto power on administrative appointments as a practical matter.<sup>87</sup> Should the

83. See Feinstein & Hemel, *supra* note 39, at 63-64 (2018). The historical record is unclear as to whether this practice began with Senator Dole.

84. 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, 1669 (2015). Figures refer to the time to confirmation for confirmed nominees only. *Id.* The Obama Administration figure is calculated through 2014. *Id.* Rates of failed nominations were also higher during the George W. Bush and Obama Administrations than during presidencies earlier in the observed period. *Id.* at 1652.

85. See Anne Joseph O'Connell, *After One Year in Office, Trump's Behind on Staffing but Making Steady Progress*, BROOKINGS INST. (Jan. 23, 2018) <https://www.brookings.edu/research/after-one-year-in-office-trumps-behind-on-staffing-but-making-steady-progress/> [<https://perma.cc/D6NK-GTBZ>].

86. See Kelly H. Chang, *The President Versus the Senate: Appointments in the American System of Separated Powers and the Federal Reserve*, 17 J.L. ECON. & ORG. 319, 343 (2001) (finding that "sometimes the [P]resident, sometimes the Senate, and sometimes neither" influences appointments to the Federal Reserve); David C. Nixon, *Separation of Powers and Appointee Ideology*, 20 J.L. ECON. & ORG. 438, 439 (2004) (finding that "[a]ppointee ideology is systematically related to the policy preferences and bargaining positions of [both] presidents and senators").

87. See U.S. CONST. art. II, § 2, cl. 2; see also Ronald J. Krotoszynski, Jr., *Transcending Formalism and Functionalism in Separation-of-Powers Analysis: Reframing the Appointments Power After Noel Canning*, 64 DUKE L.J. 1513, 1524 (2015) (arguing that given the "lack of any temporal limits on the Senate's consideration of presidential nominations that require the Senate's approval . . . the Framers intended to give the Senate an unreviewable veto power over presidential nominations through the expedient of simply not voting on a pending nomination").



Senate reject or fail to act on a presidential nominee, the White House's options are limited. The Recess Appointments Clause authorizes the President to unilaterally appoint officials "during the Recess of the Senate," but these appointments expire at the conclusion of the Senate's next session.<sup>88</sup> Thus, by not going into recess and instead holding *pro forma* sessions, the Senate may prevent the President from exercising this power.<sup>89</sup> Further, the Federal Vacancies Reform Act of 1998, which provides a framework for the unilateral appointment of "acting" officials to serve on a temporary basis, does not apply to multimember commissions.<sup>90</sup> Indeed, nominations to independent commissions are substantially more likely to run aground in the Senate than are nominations to other executive positions, which suggests that the Senate exerts greater power over independent commissions than other executive offices.<sup>91</sup>

While the House plays no constitutional role in appointments,<sup>92</sup> its role in lawmaking, budgeting, and oversight may provide its members with leverage over appointments. Should House majorities favor a particular individual for an executive position, they have chits they can call in. The bottom line is that if the President wants agencies staffed to implement his or her policies, legislators have several sources of power that they can exert.

Indeed, the political branches' appointments machinations over the past several decades sometimes resemble a "Spy Versus Spy" panel: individual senators, with the tacit approval of Senate leadership, use holds to delay or block consideration of nominees;<sup>93</sup> the President then turns to recess appointments to bypass the Senate;<sup>94</sup> and the Senate responds by not adjourning, technically avoiding a recess by holding one-minute sessions every three business days.<sup>95</sup>

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88. U.S. CONST. art. II, § 2, cl. 3.

89. See *Nat'l Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2550, 2574 (2014) (stating that Article II "gives the Senate wide latitude to determine whether and when to have a session"). Krotoszynski, *supra* note 87, at 1537-38.

90. 5 U.S.C. § 3349c(1); see O'Connell, *supra* note 84, at 1699 n.171.

91. See O'Connell, *supra* note 84, at 1661-62.

92. *But see* U.S. CONST. Art. I, § 5, cl. 4 (requiring House consent to any Senate recess longer than three days, which under certain circumstances could compel the Senate to act on a presidential nominee rather than punt to the President to make a recess appointment).

93. See Nicholas O. Howard & Jason M. Roberts, *The Politics of Obstruction: Republican Holds in the U.S. Senate*, 40 LEGIS. STUD. Q. 273, 278-81 (2015).

94. See Ryan C. Black et al., *Assessing Congressional Responses to Growing Presidential Powers: The Case of Recess Appointments*, 41 PRESIDENTIAL STUD. Q. 570, 582-83 (2011) (reporting that Sen. John Cornyn offered this rationale for President George W. Bush's increased use of recess appointments).

95. See Jordain Carney, *Senate Blocks Trump from Making Recess Appointments over Break*, THE HILL (Aug. 3, 2017, 7:40 PM), <https://thehill.com/homenews/senate/345261-senate-blocks-trump-from-making-recess-appointments-over-break> [<https://perma.cc/3GHS-8M5Z>].

But even with both branches engaged in an arms' race regarding appointments,<sup>96</sup> lawmakers in some respects have come out ahead, denying the President the ability to fill key positions in high-profile confirmation fights.<sup>97</sup> Legislators are winning more of these battles today than in the past, with Presidents George W. Bush and Barack Obama experiencing higher rates of failed nominations than did Presidents Ronald Reagan, George H.W. Bush, or Bill Clinton.<sup>98</sup> In sum, as the balance of power between Congress and the President shifted towards the latter in some areas, lawmakers responded by asserting their power in appointments, an area less amenable to a presidential counterpunch.

## 2. The Advantages of Staffers

If members of Congress have tried to counter the rise of presidential power in administration by putting favored personnel at the helm of independent commissions, another question presents itself: Why would they focus on Hill staffers specifically? After all, if legislators wanted to increase their power over policy, they could choose other members of the political class with similar ideological commitments.<sup>99</sup>

Staffers offer three advantages for members of Congress above what other potential appointees outside the Hill, including political allies, can deliver. First, lawmakers can gauge their ideological commitments through frequent, in-person interaction.<sup>100</sup> Second, staffers-turned-commissioners may be more pliable to congressional demands because they believe that they "owe" their patron in Congress for both their commission seat and their previous position on the Hill, whereas for other commissioners, legislators hold only one favor in the bank. Third, staffers operate in an institution where loyalty to one's political principal and party is emphasized.<sup>101</sup>

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96. See Devins & Lewis, *supra* note 81, at 488 (discussing the "transform[ation of] the nomination and confirmation of independent-agency heads," with "White House vetting . . . and the Senate's corresponding power to confirm . . . becom[ing] especially consequential"). Cf. Cynthia R. Farina, *Undoing the New Deal Through the New Presidentialism*, 22 HARV. J.L. & PUB. POL'Y 227, 235 (1998) (asserting that greater presidential involvement in administration, "[b]y raising the stakes for other actors in the system . . . may trigger an oversight arms race").

97. See, e.g., Ho, *supra* note 41, at 28.

98. See O'Connell, *supra* note 84, at 1660-61.

99. See Feinstein & Hemel, *supra* note 39, at 26 (discussing partisan polarization among the elite circles from which appointees to independent agencies are drawn).

100. See Sara L. Hagedorn, *Taking the Lead: Congressional Staffers and Their Role in the Policy Process* 144 (2015) (unpublished Ph.D. dissertation, University of Colorado), [https://scholar.colorado.edu/concern/graduate\\_thesis\\_or\\_dissertations/4t64gn319](https://scholar.colorado.edu/concern/graduate_thesis_or_dissertations/4t64gn319) [<https://perma.cc/HT7Z-8SRZ>] (showing that staffers tend to hold the same ideological outlooks as their bosses).

101. See Jacob M. Montgomery & Brendan Nyhan, *The Effects of Congressional Staff Networks in the U.S. House of Representatives*, 79 J. POL. 745, 745 (2017) (asserting that staffers are "increasingly loyal to parties rather than members"); Robert Salisbury & Kenneth Shepsle,

Placing these individuals—loyal to their legislative principals and inculcated in the folkways of Congress—in high-ranking executive offices may constitute a significant means of influencing administration. Further, as we explain in Section III.B, the growth of this Congress-to-agency channel has in fact changed the culture of these agencies—and perhaps ultimately affected their policy outcomes.

In light of Congress's growing dysfunction concerning lawmaking and other core tasks, how could its members find increasing success in placing Hill staffers onto commissions?<sup>102</sup> For one, shepherding a nominee through Congress may attract less attention and require fewer resources than passing a law: no turf wars among committees for jurisdiction, no omnibus bundles, no amendment tree gamesmanship on the floor, no prospect of convoluted conference committee negotiations with the House, and so on. Instead, the relevant Senate committee and the floor ultimately are faced with a simple question: "Will the Senate advise and consent to this nomination?"<sup>103</sup> Further, in contrast to the time and resource costs necessary to place a new issue on Congress's agenda—for example, lobbying one's colleagues and holding hearings to gin up interest—the Constitution places the agenda-setting function for appointments squarely with the President;<sup>104</sup> no congressional effort is required.<sup>105</sup> Given these advantages, it makes sense that members of a resource-constrained and increasingly dysfunctional institution would focus on appointments.

The rise of Hill staffers may also be an elegant solution to another problem: the need for potential appointees to credibly signal their ideological bona fides. We turn to this next.

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*Congressional Staff Turnover and the Ties-That-Bind*, 75 AM. POL. SCI. REV. 381, 394 (1981) (asserting that staffers are loyal to the legislator who hired them and supervises them).

102. We do not intend to suggest that the Senate's role in appointments is unsusceptible to the dysfunction pervading other congressional functions. Indeed, delays in staffing appointed positions across the executive branch have increased in recent decades. See Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 953-54 (2009).

103. STANDING RULES OF THE SENATE r. XXXI(1), S. DOC. NO. 113-18 (2013), <https://www.rules.senate.gov/imo/media/doc/CDOC-113sdoc18.pdf> [<https://perma.cc/JHZ3-VWKL>].

104. U.S. CONST. art. II, § 2, cl. 2 (providing that the President "by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States," except for certain proscribed positions).

105. Indeed, Congress does not even need to incur search costs to determine whether a vacancy exists, as the Vacancies Act requires the heads of agencies to report this information to Congress. See 5 U.S.C. § 3349(a) (2018).

### 3. The Rise of Programmatic Parties

The ascent of “programmatic” political parties also encourages the appointment of staffers-turned-commissioners.<sup>106</sup> A generation or two ago, congressional elections were mostly local affairs, emphasizing patronage, pork-barrel projects, and the individual candidate’s “home style,” or reputation and persona in the district.<sup>107</sup> Today, by contrast, national political issues—on which the two parties typically take clear, unified, and distinct positions—dominate both campaigns and governance.<sup>108</sup> In Professor James Q. Wilson’s formulation, party membership has moved from a focus on solidary and material incentives to an emphasis on purposive ones, namely, advancing an ideological vision and associated programmatic goals.<sup>109</sup>

It is easy to see how these changes could lead the political branches to emphasize ideological purity when considering potential appointees. Professor Nancy Scherer describes how this transformation played out in the context of the appointment of lower federal judges:

Under both the old and modern party systems, party activists closely monitored the selection of lower court judges. But while local party activists under the old party system viewed lower court judgeships as jobs to be distributed to friends and campaign contributors, in the modern political era, party and issue activists view judicial appointments as crucial policy matters.<sup>110</sup>

Replace “lower court judges” with “commissioners of independent agencies,” and the argument resembles the one we are making. The rise of party and issue activists, the donor class, and party-affiliated media alters the incentives of political actors in making appointments, encouraging the elevation of individuals who have demonstrated fidelity to shared objectives. Former congressional staffers’ tenures on the Hill—spending long hours advancing their principal’s policy goals for relatively low pay<sup>111</sup>—

106. See MARTIN SHEFTER, *POLITICAL PARTIES AND THE STATE: THE AMERICAN HISTORICAL EXPERIENCE* 3 (1993).

107. See RICHARD FENNO, *HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS* (1973).

108. See generally RICHARD FENNO, *CONGRESS AT THE GRASSROOTS* (1998) (contrasting the old and new emphases in congressional campaigns).

109. See JAMES Q. WILSON, *POLITICAL ORGANIZATIONS* (1995). While the reasons for these changes lie beyond this Article’s scope, they include a gradual partisan realignment that sorted activists and politicians into two internally cohesive, polarized parties; donors’ and primary voters’ growing importance in elections; and news media with a more national scope. See Paul Frymer, *Debating the Causes of Party Polarization in America*, 99 CAL. L. REV. 335 (2011).

110. NANCY SCHERER, *SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS* 13 (2005).

111. See *infra* Part II.B.

send a costly signal that they will remain committed to these goals once installed for a fixed term on a commission. That signal is particularly important when—as now—the parties and their affiliated activists, donors, and media place great value on advancing policy goals.

Recent battles about net neutrality are illustrative. In 2015, the FCC, headed by Obama appointee Tom Wheeler, commanding a 3-2 majority for Democrats, promulgated “net neutrality” rules reclassifying internet services as telecommunications services, thus bringing them under Title II of the Communications Act of 1934.<sup>112</sup> Three years later, FCC Chair Ajit Pai issued new rules undoing the old ones.<sup>113</sup> Pai’s nomination to be Chair, a position with unusual authority among independent commissions, was in effect a referendum on whether to keep net neutrality. As a consequence, Pai found himself at the center of something that could only be described as a high-profile, mass political campaign. During the rulemaking, the FCC received millions of comments on its website, many of which were duplicative and thus highly suggestive of an organized effort.<sup>114</sup> Democrats made reinstatement of the Obama-era rules a campaign issue,<sup>115</sup> and Pai witnessed protests at his home and even death threats.<sup>116</sup> Pai, a former Hill staffer, ultimately delivered for the Trump Administration, which wanted to roll back these rules.<sup>117</sup>

Several features of this anecdote are noteworthy. First, that federal policy regarding regulation of the internet was being made by the FCC through the interpretation of a nearly century-old statute, rather than by Congress, captures the decline in Congress’s direct role in policymaking, as discussed in Section II.A.1. Second, the policy issue garnered widespread public attention, with a clear partisan split between supporters and opponents. Third, the instrument for delivering a policy change for the Trump Administration was a former Hill staffer, who is viewed by both sides as an ideological purist. Finally, the example illustrates how Congress can install its personnel onto commissions without necessarily triggering

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112. See Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601 (2015).

113. See Restoring Internet Freedom, 33 FCC Rcd. 311 (2018).

114. See Paul Hitlin, Kenneth Olmstead & Skye Toor, *Public Comments to the Federal Communications Commission About Net Neutrality Contain Many Inaccuracies and Duplicates*, PEW RES. CTR. (Nov. 29, 2017), <https://www.pewresearch.org/internet/2017/11/29/public-comments-to-the-federal-communications-commission-about-net-neutrality-contain-many-inaccuracies-and-duplicates/> [<https://perma.cc/XK5S-8AK3>].

115. See Harper Neidig, *Can Net Neutrality Be a Potent Political Issue for Democrats?*, THE HILL (Dec. 24, 2017), <https://thehill.com/policy/technology/366177-can-net-neutrality-be-a-potent-political-issue-for-democrats> [<https://perma.cc/WQW2-HDAM>].

116. See Cecilia Kang, *Man Charged with Threatening To Kill Ajit Pai’s Family*, N.Y. TIMES (June 29, 2018), <https://www.nytimes.com/2018/06/29/technology/ajit-pai-death-threat.html> [<https://perma.cc/8P3K-WFCU>].

117. See Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 7, 2019, 7:51 AM), <https://twitter.com/realDonaldTrump/status/1181175266409889793>.

pushback from the White House. Where the same party controls the White House and Senate, as was the case at the time of Pai's appointment, partisans in both branches benefit from the appointment of former Hill staffers who are able to credibly signal their ideological bona fides.

#### 4. Inter-Agency Variation

The story we have told so far is incomplete; Congress's demand for staffers-turned-commissioners is not uniform across agencies. Table 3, below, reproduces the same three regression models reported in Table 2. Whereas Table 2 did not report the agency-level fixed effects, Table 3 does.

Table 3: Staffers-Turned-Commissioners Over Time & Across Agencies

	Model 1	Model 2	Model 3
Year	0.065** (0.012)		
Year Cubed		0.0001* (0.00005)	
1914-1930			1.436 (0.904)
1931-1972			0.166 (0.827)
1973-2018			2.494** (0.843)
CPSC	2.096** (0.753)	1.717** (0.587)	1.725** (0.586)
EEOC	0.359 (0.877)	0.330 (0.689)	0.380 (0.688)
FCC	1.768* (0.703)	0.112* (0.508)	1.122* (0.505)

FEC	1.254 (1.254)	1.622** (0.562)	1.604** (0.559)
Fed	—	—	—
FERC	2.144** (0.694)	1.998*** (0.536)	1.933*** (0.531)
FTC	0.929 (0.777)	2.230*** (0.476)	2.292*** (0.478)
NLRB	1.153 (0.709)	1.170* (0.511)	1.172* (0.508)
NRC	1.519* (0.706)	1.201* (0.514)	1.276* (0.512)
NTSB	1.280 (0.755)	1.096 (0.588)	1.094 (0.588)
SEC	0.911 (0.750)	0.969 (0.511)	0.989 (0.507)
Divided Govt	-0.433 (0.272)	-0.275 (0.218)	-0.352 (0.212)

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Unit of analysis: appointments and reappointments to eleven boards and commissions. Dependent variable: whether appointee previously worked for or served in Congress. Model: logistic regression (all models); Model 2 contains a third-degree polynomial transformation of *Year* (*Year* & *Year*<sup>2</sup> terms included in model, but unreported in table); Model 3 employs regression splines at 1914-1930, 1931-1972, and 1973-2018. Agency covariates modeled as fixed effects; baseline category: the Federal Reserve. Period: 1980-2018 (Model 1); 1914-2018 (Model 2); 1914-2018 (Model 3). Observations: 459 (Model 1); 977 (Model 2); 977 (Model 3). Pseudo-R<sup>2</sup>: 0.142 (Model 1); 0.118 (Model 2); 0.111 (Model 3). \*\*\* signifies  $p < 0.001$ , \*\*  $p < 0.01$ , \*  $p < 0.05$ , †  $p < 0.10$ .

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The various agency fixed effects reported in Table 3 complicate the narrative. Compared to the Federal Reserve—which is the baseline category and the included agency with historically the smallest proportion of former Hill staffers among its leaders—several agencies have a significantly greater likelihood of including former Hill staffers among their leadership, controlling for time and the presence of divided government. Namely, the positive coefficient estimates achieve conventionally accepted levels of statistical significance in at least one model for the CPSC, FCC, FEC, FERC, FTC, NLRB, and NRC. Controlling for the time trend and effect of divided government, the Hill-to-agency current is particularly strong for these agencies.

What accounts for these differences across agencies? One possibility is that the observed variation in appointments is the result of a self-reinforcing process. Imagine the following scenario. For idiosyncratic reasons, a Hill staffer is appointed to a commission for the first time. Adaptive expectations then set in;<sup>118</sup> the next time a seat on that commission is open, political actors fail to agree on a candidate, decide that the first staffer-turned-commissioner is working out well enough, and so appoint a second one. The process then repeats. At the same time, with each subsequent appointment, staffers-turned-commissioners' patrons in Congress gain knowledge of how to successfully elevate someone to a commissionership. These learning effects give them an advantage in placing their favored candidates on commissions in the future.<sup>119</sup> The result: a positive feedback loop develops, with the boost in staffers-turned-commissioners attributable to path-dependent development rather than conscious choice to elevate Hill staffers.

Although this path-dependence theory cannot be empirically evaluated, there is much to recommend it. Not only can it explain the variation in staffers-turned-commissioners across agencies, but it also offers a rationale for why the other theories yield null results. It very well may be efficient for political actors to take into account, for example, the commission's ideology or the political climate at the time, when deciding whether to appoint a congressional staffer. But positive feedback processes are rarely path-efficient and often lead to one of multiple possible equilibria.<sup>120</sup>

Alternative explanations for these differences across agencies focus on idiosyncratic characteristics of each particular commission, or of the overall political climate at the time of particular appointments. Empirical tests of four of these alternative explanations yield null results.

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118. See PAUL PIERSON, *POLITICS IN TIME* 24 (2004) (defining adaptive expectations).

119. See *id.* (“Projections about future aggregate use patterns lead individuals to adapt their actions in ways that help to make those expectations come true.”).

120. See *id.* at 18, 44.



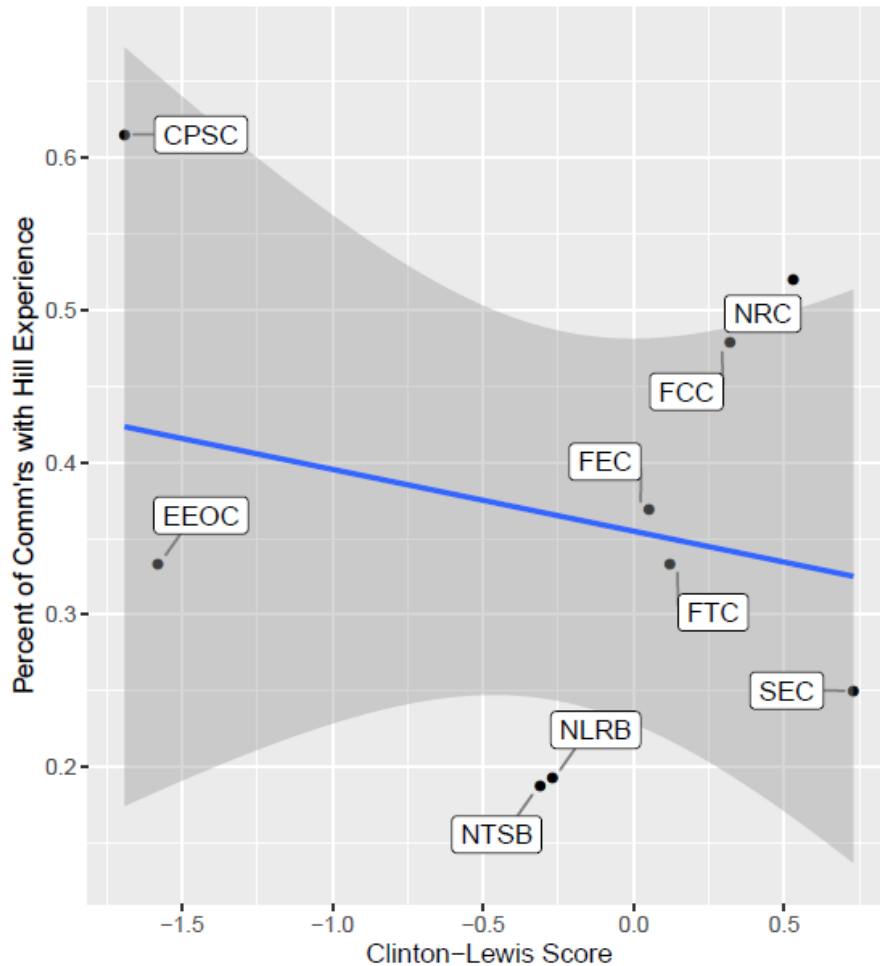
First, we examine whether agencies' political orientations offer an explanation. We operationalize political orientation using liberal-to-conservative ideological scores developed by Professors Joshua Clinton and David Lewis.<sup>121</sup> As a first cut, we regress the proportion of each agency's commissioners during the 2005-2018 period that were former Hill staffers on the agency's ideological score.<sup>122</sup> Figure 4 displays the results. Although the regression line in Figure 4 shows a slight negative relationship between an agency's conservatism and the proportion of its commissioners that hail from Capitol Hill, the associated confidence intervals are far too wide to support a clear connection.

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121. Clinton and Lewis's measure is based on a survey of journalists, think-tankers, and bureaucracy experts conducted in 2006. See Joshua D. Clinton & David E. Lewis, *Expert Opinion, Agency Characteristics, and Agency Preferences*, 16 POL. ANALYSIS 3, 5 (2008). Because Clinton and Lewis's survey does not include the Fed or FERC, these agencies are excluded from this analysis.

122. We use a logit model with standard errors clustered by agency. As an alternative specification, we also use a two-limit tobit model censored at 0 and 1. Both models yield substantially similar results. We start at 2005 based on the dramatic increase in staffers-turned-commissioners around that year. The results reported in Figure 4 are robust to different start years.

Figure 4: Agency Ideology & Presence of Staffers-Turned-Commissioners



Second, we examine whether staffers-turned-commissioners are more common on lower-profile commissions. If lawmakers view appointments as patronage plums to reward longtime staffers, one might expect the phenomenon to be concentrated in lower-salience, less consequential agencies. After all, getting one's employee a sinecure on an obscure commission may incur fewer political costs than installing that individual on a commission such as the FCC.

Third, in another variation of the patronage story, we consider whether staffers-turned-commissions are concentrated on agencies that address relatively less-sophisticated subjects. By analogy, consider the

practice of presidents appointing their campaign supporters to cushy ambassadorships in European capitals, while reserving positions in countries with more complex relationships with the U.S. to expert career diplomats.<sup>123</sup> If a similar dynamic is at play in the administrative state, we would expect the presence of staffers-turned-commissioners to be negatively correlated with the complexity of an agency's subject matter.

Finally, we examine whether a possible association between an agency's ideology and the presence of former Hill staffers depends on period-specific political dynamics.

Regression models testing all of these hypotheses yield null results.<sup>124</sup> We cannot reject the null hypotheses that any of these alternative explanations—major features of the overall political climate at the time of appointment, whether the commission is high- or low-profile, or whether it addresses complex subject matter—have no connection to the likelihood that a former Hill staffer is appointed to a given commission.

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123. See Dav Seminara, *In U.S., Selling Ambassadorships To Highest Bidder Has Long History*, WASH. DIPLOMAT (Feb. 28, 2013), [https://washdiplomat.com/index.php?option=com\\_content&id=8985:in-us-selling-ambassadorships-to-highest-bidder-has-long-history&Itemid=428](https://washdiplomat.com/index.php?option=com_content&id=8985:in-us-selling-ambassadorships-to-highest-bidder-has-long-history&Itemid=428) [<https://perma.cc/3WXH-WC6A>].

124. To test the *political-climate account*, we regress whether each individual hails from Capitol Hill on various features of the political climate at the time of the appointment. To capture any period-specific political influences on appointments, we include year-level fixed effects. Alternative specifications replace these year-level fixed effects with (i) fixed effects for each President-Senate Majority Leader pair; (ii) fixed effects for each pair of the President and Senate leader of the other party than the President; and (iii) dummy variables for a Republican President, GOP Senate majority, and the interaction of the two. Each model employs logistic regression with agency-clustered standard errors. All models also include the relevant agency's Clinton-Lewis ideological score as an independent variable. The analysis encompasses the period 2005 to 2018.

To test the *lower-profile-commissions account*, for each commissioner appointed after 2004, we regress whether that commissioner formerly worked for Congress on a measure capturing the relevant agency's public profile. We operationalize "public profile" as the number of times the agency was mentioned in the *New York Times* in the year of the appointment. As above, we estimate several alternative specifications with different variables capturing period-specific political dynamics. The model is a logistic regression with agency-clustered standard errors.

To test the *less-sophisticated-commissions account*, for each commissioner appointed during the period of study, we regress whether that individual previously worked in Congress on two measures of regulatory complexity: the number of regulatory restrictions issued by the agency in the previous year and, in an alternative model, the total word length of those regulations. The data for these two measures were obtained from Patrick A. McLaughlin & Oliver Sherouse, *RegData U.S. 3.2 Agency Summary Dataset*, QUANTGOV, <https://www.quantgov.org/bulk-download>. We estimate similar alternative specifications as before to capture period-specific fixed-effects. All models employ logistic regression with agency-clustered standard errors. Because the data source used here ends in 2017, this analysis covers 2005-2017 rather than 2005-2018 in the previous models. Contra our prediction, the coefficient estimates are positive in all eight of the models that we estimate. All eight, however, fall short of statistical significance. ( $p=0.13$  in one model,  $p=0.14$  in another, and the standard errors dwarf the coefficient estimates in the other six models.)

In this section, we examined the demand-side of the market for commissioners, focusing on lawmakers' incentives to place former congressional staffers in these positions. We argued that the demand for staffers as commissioners has recently increased because of the relative fall in congressional power over policy. As one pathway of power has been weakened, legislators naturally have resorted to alternative, lower-cost means of influencing policy. On the other side of the equation, although the White House decides whom to nominate for these positions, it may have less relative power than is apparent, since the Senate can act as a veto gate over the White House's ability to execute its policy choices through appointees. At the same time, increasingly cohesive and ideologically oriented parties arguably favor appointing ideological true believers to commissions; in this climate, Hill staffers' demonstrated commitment to their party's policy goals makes them particularly well-suited as appointees.

### *B. Supply-Side*

Continuing with our market metaphor, we next consider whether a demand-focused account may be only half of the story. Changing workplace dynamics on Capitol Hill also may have influenced the supply of individuals seeking to work as commissioners on independent agencies. Namely, it is possible that growing congressional dysfunction may have induced senior staffers to head to the exits in increasing numbers. A 1995 Congressional Management Foundation report described employment in Congress in dismal terms: "Staff typically work exceedingly long, unpredictable hours that leave little time for outside activities; receive lower pay than both private sector and federal executive branch staff; work in cramped quarters with no privacy; exercise minimal control over their work schedules; and have virtually no job security."<sup>125</sup>

The situation has only worsened since then. Between 2009 and 2013, inflation-adjusted salaries declined by twenty percent for House counsels and thirteen percent for House legislative directors.<sup>126</sup> In the Senate, counsel and legislative directors saw similar decreases in salary.<sup>127</sup> Further, staffing levels for policy positions have been in decline for decades; whereas in 1979 committees in both chambers employed a total of 3,437 staffers, by

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125. Nicole Cooper, *Working in Congress: Introduction*, CONG. MGMT. FOUND. (Feb. 3, 2007), [https://www.congressfoundation.org/index.php?option=com\\_content&task=view&id=117&Itemid=50](https://www.congressfoundation.org/index.php?option=com_content&task=view&id=117&Itemid=50) [https://perma.cc/55LJ-A9K6].

126. See Lee Drutman et. al, *Congress Must Invest in Its Own Capacity Again*, R STREET INST. (Mar. 9, 2016), <https://www.rstreet.org/2016/03/09/congress-must-invest-in-its-own-capacity-again/> [https://perma.cc/P4B7-WD3E].

127. See *id.* (reporting that salaries for individuals holding these positions in the Senate declined fourteen percent and eleven percent, respectively, over this period).

2012, that figure had fallen to 2,262 individuals<sup>128</sup>—presumably limiting opportunities for advancement in a shrinking workforce. And while staffing levels and salaries declined, the work may have become more difficult; the size and scope of the executive branch that these committee staffers are charged with overseeing more than doubled in real terms between 1979 and 2012.<sup>129</sup> These developments may make working for Congress a less-attractive career option—and increase the attractiveness of exit.

To be clear, we do not claim that the typical high-level Hill staffer would prefer to be an SEC Commissioner because of a growing pay or work-quality gap between Congress and the SEC. Plainly, a seat on a high-profile commission is likely to be a more attractive career option than serving as a top aide to a powerful senator or committee in any era. But what about a position on a less consequential commission? When Congress was well-functioning and the employment structure facilitated spending one's career on Capitol Hill,<sup>130</sup> a star staffer for an influential lawmaker conceivably might prefer to stay put rather than accept a fixed-term appointment to a minority-party seat on a backwater commission. If exit decisions are made at the margins, then we would expect to see more departures among policy-motivated staffers as Congress's policymaking capacity and its attractiveness as a workplace both have waned.

Compounding matters, service on a commission simultaneously has become less financially attractive for high-fliers in the private sector. Over the past generation, the income gains for the most highly paid individuals, virtually all of whom presumably work outside of government, have far outpaced those of other workers.<sup>131</sup> Members of one common group from

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128. *Vital Statistics on Congress*, *supra* note 70, at 1 tbl. 5-1.

129. See *Historical Tables*, OFF. MGMT. & BUDGET 28, tbl. 1.3, <https://www.whitehouse.gov/omb/historical-tables/> [<https://perma.cc/F5KH-9ZEN>].

130. See Sarah Binder, *The Dysfunctional Congress*, 18 ANN. REV. POL. SCI. 85, 91-92 (2015) (identifying the mid-1960s through 1970s as the post-war period in which Congress's agenda was most expansive); Kenneth A. Shepsle, *The Changing Textbook Congress*, in CAN THE GOVERNMENT GOVERN? 239 (John E. Chubb & Paul E. Peterson eds., 1989) (describing “an institutional bargain that gave prominence to committees and the jurisdictional imperative” of the Congresses of the mid-twentieth century).

131. See Chad Stone et al., *A Guide to Statistics on Historical Trends in Income Inequality*, CTR. ON BUDGET & POL'Y PRIORITIES 9-10 (Jan. 13, 2020), [https://www.cbpp.org/sites/default/files/atoms/files/11-28-11pov\\_0.pdf](https://www.cbpp.org/sites/default/files/atoms/files/11-28-11pov_0.pdf) [<https://perma.cc/JP76-BCPT>]. The pay gap between private- and public-sector workers also has grown. See *Comparing the Compensation of Federal and Private-Sector Employees, 2011 to 2015*, CONG. BUDGET OFF. 10, 15 (Apr. 2017), <https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/52637-federalprivatepay.pdf> [<https://perma.cc/ZH44-NM6K>] (finding that the total compensation was lower for federal employees with a professional or doctorate degree than for private-sector employees with similar attributes).

which commissioners are selected, law firm partners, have seen their incomes rise precipitously.<sup>132</sup> Almost twenty years ago, Chief Justice William Rehnquist recognized that the increase in opportunity costs for public service could discourage “many of the very best lawyers” from judicial service.<sup>133</sup>

A similar dynamic may be playing out among the pool of potential executive appointees. Consider the pre-appointment professional lives of two FTC commissioners: Chair Joseph Simons and Rebecca Slaughter. Slaughter arrived at the FTC after serving as chief counsel to Senator Charles Schumer,<sup>134</sup> a position that would have paid no more than \$111,000 in 2013.<sup>135</sup> Simons, by contrast, came to the FTC from the partnership of Paul, Weiss, Rifkind, Wharton & Garrison, where his most recent partnership share was \$1.9 million.<sup>136</sup> While income gaps between big-firm partners and federal officials are nothing new, the size of Simons’s pay cut may make others in a similar position think twice about the opportunity cost of government service. Taken together, the decline in pay for high-level staffers and the massive increase in pay for high-level attorneys could shift the supply of potential commissioners away from the private sector and to the halls of Congress.

Digging deeper, we ask whether a concomitant decline in appointments from the private sector has accompanied the rise of staffers-turned-commissioners. To answer this question, we examine changes over the 1934-2018 period in the proportion of newly appointed SEC commissioners’ with certain pre-appointment employment. Specifically, we examine whether each new commissioner arrived at the SEC immediately from one of the following positions: (a) congressional staff or member; (b) SEC staff; (c) other executive branch position; and (d) securities-related private-sec-

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132. See Albert Yoon, *Love’s Labor Lost? Judicial Tenure Among Federal Court Judges: 1945-2000*, 91 CAL. L. REV. 1029, 1038 (2003) (finding greater increases in the salaries of law firm partners than those of most professions, including federal judges).

133. William H. Rehnquist, Chief Justice, U.S. Supreme Court, Statement Before the National Commission on the Public Service (July 15, 2002), [https://www.supremecourt.gov/publicinfo/speeches/viewsspeech/sp\\_07-15-02](https://www.supremecourt.gov/publicinfo/speeches/viewsspeech/sp_07-15-02) [<https://perma.cc/E945-A3AH>].

134. See Cecilia Kang, *‘I Don’t Feel Superhuman. I Feel Like a Mom Who Has a Career.’*, N.Y. TIMES (May 31, 2018), <https://www.nytimes.com/2018/05/31/technology/government-mom.html> [<https://perma.cc/2NWL-85CT>].

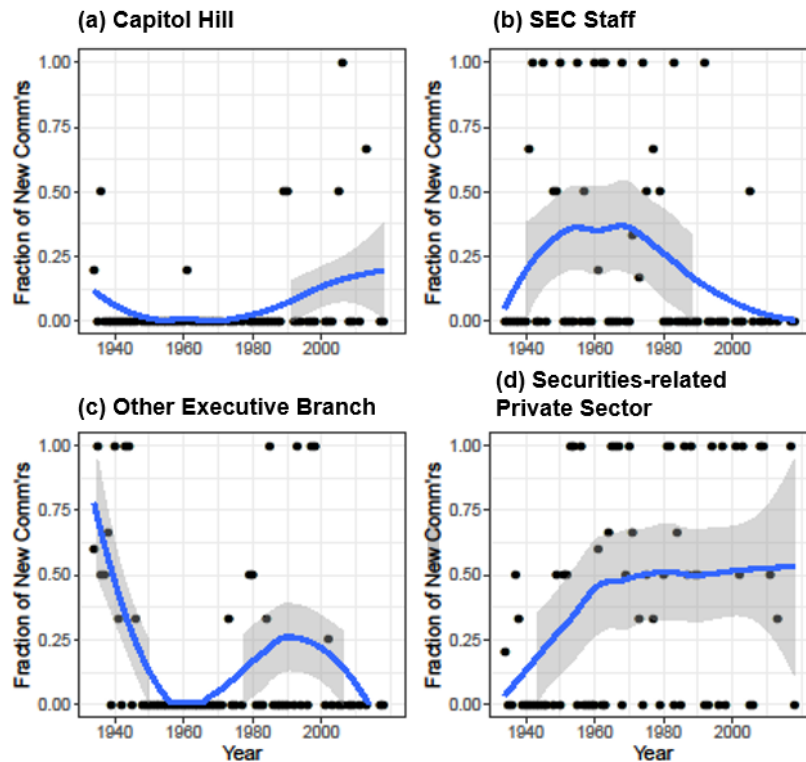
135. See R. ERIC PETERSEN, LARA E. CHAUSOW & AMBER HOPE WILHELM, CONG. RES. SERV., R43774, STAFF PAY LEVELS FOR SELECTED POSITIONS IN SENATORS’ OFFICES, FY2009-FY2013 10, tbl. 6 (2014), <https://fas.org/sgp/crs/misc/R43774.pdf> [<https://perma.cc/2NBK-BGCG>].

136. See Mike Scarcella & C. Ryan Barber, *Joseph Simons of Paul Weiss, Trump’s FTC Chair Pick, Reports \$1.9M in Partner Share*, NAT. L.J. (Feb. 2, 2018, 9:50 AM), <https://www.law.com/nationallawjournal/sites/nationallawjournal/2018/02/02/joseph-simons-of-paul-weiss-trumps-ftc-chair-pick-reports-1-9m-in-partner-share> [<https://perma.cc/BKM6-W56P>].

tor work (in practice, securities lawyers). As before, we use Professor David Nixon's biographical dataset for 1934-2000 and collect our own data from internet sources for 2001-2018.

Figure 5 displays our findings.<sup>137</sup>

Figure 5: Proportion of New SEC Commissioners by Most Recent Work Experience



Our claim that increased opportunity costs for individuals in the private sector to serve in government has shifted the SEC's compositional balance in favor of former Hill staffers does not find support in Figure 5. Instead, Figure 5(d) shows that the proportion of commissions hailing from

137. Panel C aggregates the following codes from Nixon's dataset: other federal agency staff, unrelated public sector, appointive federal commissioner/agency head, related military service, related public sector, and ambassadorial and international commission. Panel D aggregates direct and indirect employment by regulated industry, with indirect employment including legal services and consulting. See Nixon, *supra* note 56, at 7.

the private sector has remained steady for almost sixty years.<sup>138</sup> Still, the trend towards appointing staffers-turned-commissioners appears to have come at the expense of SEC staffers and other executive branch employees, not private-sector workers. Even though the data concerning the SEC does not support the public-private sector pay gap hypothesis, because the figure examines a single agency—and an unusually high-profile one at that—we are not ready to reject this possible explanation for agencies writ large. Whether other commissions exhibit a similar pattern is a promising area for future research.

In addition to the above pay-related dynamics, congressional dysfunction may make executive appointments less attractive to job candidates who are not currently working on the Hill. Consider that the average time from nomination to confirmation for all executive and judicial appointees has more than doubled from the Reagan to the Obama Administrations.<sup>139</sup> Failed nominations also have crept upward, from eighteen percent of all nominations under Reagan to twenty-eight percent under Obama,<sup>140</sup> with even higher failure rates for appointees to independent commissions.<sup>141</sup> Remaining in limbo for a prolonged period may be particularly disruptive to nominees with existing careers outside of politics and those contemplating a long-distance move to Washington to accept a position. Observing the growing proportion of nominees hailing from the District of Columbia or an adjacent state, Professor Anne Joseph O'Connell raises the possibility that the length and unpredictability of the confirmation process “may be narrowing the pool of top officials.”<sup>142</sup>

But whereas an individual living outside of Washington or working outside of politics might view the confirmation process as disruptive to her life, congressional staffers do not face these concerns to nearly the same degree. Perversely, the delay and uncertainty that Congress has injected into the confirmation process may advantage Hill staffers at the expense of other potential nominees.

In summary, several related trends may jointly contribute to an increase in the supply of staffers-turned-commissioners: increasingly long hours, low job security, and reduced pay push Hill staffers towards the exits, while simultaneously, the greater share of national income received by high-earners encourages law partners and other potential commissioners from the private sector to stay put. That public-sector employees and those

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138. Since our data cannot distinguish between job functions within the private sector, however, one must take these findings with a grain of salt. For instance, there still may be a substitution of higher-prestige law partners in favor of lower-prestige ones.

139. O'Connell, *supra* note 84, at 1669. The Obama figure refers to the 2009-2014 period.

140. *Id.* at 1660-61.

141. *Id.* at 1652.

142. *Id.* at 1653.



living in the Washington metropolitan area may be better able to bear the challenges of increasingly lengthy confirmation processes may also tip the balance towards staffers-turned-commissioners.

An alternative supply-side story also exists. Whereas, in past generations, an ambitious young policy wonk aiming for a commissionership might have begun her career at an agency, law firm, or any number of other places, today she may observe the growing staffer-to-commissioner pipeline and instead decide to work for Congress. In this telling, the early glimmerings of a staffer-to-commissioner trend becomes self-reinforcing, with path-dependent, herd behavior among prospective commissioners fueling the trend. If that is the case, then agencies may be populated with individuals with the same qualities as commissioners prior to the rise of the staffer-to-commissioner pipeline, with the only difference being the particular lines on those individuals' résumés.

If one believes this alternative story, then why would one care if members of Washington's striver class punch their tickets by working in Congress or somewhere else? If the same sorts of people are seated at commission daises in either case, then why does it matter whether they previously worked for Congress? Part III addresses this question. As that part shows, the experience of working for Congress may have profound consequences for one's professional enculturation. To the extent that staffers-turned-commissioners import Congress's norms of behavior onto independent commissions, that dynamic may impact the functioning of these commissions.

### III. Consequences

In this Part, we address the consequences of the increased likelihood of commissions being run, in whole or part, by former Hill staffers on the functioning and effectiveness of these bodies. The following Section discusses possible effects of the Congress-to-commission pipeline on commissions' relationships with other actors. Namely, we suggest that this phenomenon may enable Congress to exert greater influence on independent regulatory commissions, bolster congressional support for commissions' activities, and perhaps even enhance commissions' democratic accountability.

Next, we address how the phenomenon may influence agencies' internal functioning. Here, we are less sanguine. On one hand, a career on Capitol Hill may provide an education in political tactics and congressional culture, which—for better or worse—may be imported to independent regulatory commissions. On the other hand, greater knowledge of legislative intent and legislative history of the laws that their agencies administer may enable staffers-turned-commissioners to better implement their statutory mandates.

A. *Extra-Agency*

## 1. Strengthening Congress's Role

The staffers-turned-commissioners phenomenon offers distinct benefits to Congress. As explained in Part II, the timing of this trend suggests that Congress intended to place former staffers on commissions as a reaction to other developments that weakened Congress's relative role in administration.<sup>143</sup> It is easy to see how Congress's turn towards appointing its former staffers to commissioners could strengthen Congress's hand.

Beginning with the Reagan Administration, presidents have known that appointing loyalists to administrative agencies can be an effective strategy for influencing agency decision-making.<sup>144</sup> Whereas, according to an American Bar Association (ABA) report, prior presidents "ha[d] been loath to let it appear that they were influencing regulatory agencies,"<sup>145</sup> President Reagan emphasized personal loyalty and ideological congruence in making appointments.<sup>146</sup> This practice has increased in subsequent administrations, with presidents aggressively using appointments to encourage agencies to march in lockstep with White House priorities.<sup>147</sup>

That Congress would subsequently embrace this strategy is unsurprising. Conventional wisdom holds that independent agencies lie within Congress's sphere of influence more than the President's.<sup>148</sup> Writing for the Court in *FCC v. Fox Television Stations*, Justice Antonin Scalia asserted that "independent agencies are sheltered not from politics but from the President, and . . . their freedom from [p]residential oversight (and protection) has simply been replaced by increased subservience to congressional

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143. See *supra* Section II.A.

144. See Kagan, *supra* note 80, at 2277.

145. COMM'N ON LAW & THE ECON., AM. BAR ASS'N, *FEDERAL REGULATION: ROADS TO REFORM* 70 (1979).

146. See Kagan, *supra* note 80, at 2277.

147. See David J. Barron, *Foreword: From Takeover to Merger: Reforming Administrative Law in an Age of Agency Polarization*, 76 GEO. WASH. L. REV. 1095, 1096 (2008).

148. See Lawrence Lessig & Cass R. Sunstein, *The Presidential Administration*, 94 COLUM. L. REV. 1, 115 (1994) ("[Agency] independence can be understood as a form of [congressional] aggrandizement."); Randolph J. May, *Defining Deference Down: Independent Agencies and Chevron Deference*, 58 ADMIN. L. REV. 429, 449 (2006) ("Congress is quite jealous of its hegemony over the independent agencies, and can be expected to reach strongly to any executive poaching. . . . Congress's prerogatives [are] usually not completely lost on agency commissioners." (quoting Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 350 (1991))); Antonin Scalia, *Historical Anomalies in Administrative Law*, SUPREME COURT HISTORY YEARBOOK 110 (1985) ("*Humphrey's Executor* continues to induce the Executive to leave the policy control of the independent agencies to congressional committees, and fastidiously to avoid any appearance of influence in those entities.").

direction.”<sup>149</sup> Indeed, appointees and civil servants at independent commissions report significantly more congressional influence than do employees working in executive departments.<sup>150</sup> If Congress endeavors to use appointments to influence administration, independent agencies are a natural place to start.

For an individual member of Congress, placing one’s staffer on an independent commission has obvious advantages.<sup>151</sup> But the staffers-turned-commissioners phenomenon also benefits Congress as an institution in two respects.

First, a survey of congressional staff reveals that most staffers hold a “sense of loyalty to the body within which they work,” meaning the Senate or House, and a subset develop “a sense of loyalty and commitment to the institution of Congress more broadly.”<sup>152</sup> Russell Mills and Jennifer Selin’s study of detailees—agency personnel temporarily assigned to work for a congressional committee—offers insights. Mills and Selin find that detailees “can represent the interests and perspectives of the agency, and give the agency a conduit to [congressional] committee decision making.”<sup>153</sup> Perhaps a similar dynamic exists concerning staffers-turned-commissioners, who take the opposite path as agency detailees to Congress.

The degree to which staffers-turned-commissioners exhibit loyalty to Congress as an institution may differ by staff function and title. Former committee staffers may feel the institution’s pull more than former personal staffers. Former congressional counsels’ professional training may lead them to value adherence to general legal norms, whereas former chiefs of staff may harbor a different role-morality. Evaluation of the various types of congressional staffers that are appointed to commissions is a promising area for future research.

Second, the Congress-centric social network that a staffer-turned-commissioner developed while working on Capitol Hill may influence her behavior as a commissioner. Consider that after the confirmation vote, the Senate has limited leverage over appointees—and a host of other actors compete for the appointee’s loyalties. The President exerts some degree of

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149. 556 U.S. 502, 523 (2009).

150. See Joshua D. Clinton, David E. Lewis, & Jennifer L. Selin, *Influencing the Bureaucracy: The Irony of Congressional Oversight*, 58 AM. J. POL. SCI. 387, 394 (2014) (reporting survey results).

151. See *infra* Section II.A.2 (arguing that staffers retain a degree of loyalty and connection to their former principals on the Hill).

152. See Barbara S. Romzek & Jennifer A. Utter, *Congressional Legislative Staff: Political Professionals or Clerks?*, 41 AM. J. POL. SCI. 1251, 1266 (1997).

153. Russell W. Mills & Jennifer L. Selin, *Don’t Sweat the Details! Enhancing Congressional Committee Expertise Through the Use of Detailees*, 41 LEGIS. STUD. Q. 611, 618 (2017).

control over independent agencies.<sup>154</sup> Narrow, well-organized interest groups subject to, or benefitting from, the agency's regulations may "capture" appointees' attention.<sup>155</sup> Moreover, after sustained interactions with their careerist subordinates, appointees may "go native," that is acculturate to their agencies, adopting the norms and perspectives of the agency's civil service.<sup>156</sup>

An appointee with a deep social or professional network on Capitol Hill may be better able to resist these sirens. Observers have noted in other contexts how officials' extracurricular networks influence their professional activities. For instance, Professor Daniel Carpenter charts how bureaucrats' outside-the-Beltway professional networks provide them with an alternative power base, thereby reducing their reliance on elected officials.<sup>157</sup> Similarly, Supreme Court watchers have identified a so-called "Greenhouse effect," in which Republican-appointed Justices tack left following their immersion in a liberal Washington legal establishment.<sup>158</sup>

Like Carpenter's bureaucrats, staffers-turned-commissioners' ties with current legislators and staffers may provide them with a basis of support outside of the executive branch, thereby enabling them to act in ways in which a commissioner without extra-branch ties could not.<sup>159</sup> And to the extent that staffers-turned-commissioners maintain ties with their former colleagues on the Hill, these social connections may encourage them to

154. See Cary Coglianese, *Presidential Control of Administrative Agencies: A Debate over Law or Politics?* 12 J. CONST. L. 637, 639 (2010). Presidential control is often indirect, however, through the use of "requests" and permissive language. See *id.*

155. See Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1080 (1986); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 5 (1971).

156. See Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1302 (2006). The experience of former Energy Secretary Rick Perry is illustrative. When running for President in 2011, Perry favored abolishing the Department of Energy. See Katie Reilly, *Rick Perry Infamously Forgot About the Department of Energy. Now He Might Lead It*, TIME (Dec. 13, 2016, 7:57 AM), <http://time.com/4598910/rick-perry-department-energy-oops-gaffe/> [https://perma.cc/9TTU-6DL7]. Yet as Secretary of Energy, Perry was a public booster of the Department. See Dan Farber, *Rick Perry at the Helm of the Department of . . . What Was That One Again*, LEGALPLANET BLOG (Aug. 3, 2017), <http://legalplanet.org/2017/08/03/rick-perry-hasnt-been-terrible/> [https://perma.cc/E8F7-MZA2].

157. DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862-1928, at 15 (2001).

158. See Fontana & Huq, *supra* note 69, at 63; accord NEAL DEVINS & LAWRENCE BAUM, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT 88 (2019).

159. By contrast, most OIRA administrators have a generalist and/or academic background. See Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1373-77 (2013). Given these individuals' academic bend, their "relationships to particular interest groups have . . . been relatively attenuated, reducing the risks of capture." *Id.* at 1377.

support Congress-favored measures in a similar manner as the Greenhouse effect influences conservative justices.

Prior Hill experience may be particularly important as a bulwark against going native. According to Professor Bruce Ackerman, when even appointees with differing views from their civil servants engage in sustained interactions with these mission-focused civil servants, there is a “great danger” that appointees will “succumb to the pressures of the entrenched ideologues to sustain the preexisting mission of the agency.”<sup>160</sup> Civil servants do, in fact, frequently have differing views than agency heads.<sup>161</sup> Further, civil servants may sort into employment based on their level of commitment to the agency’s mission.<sup>162</sup> The result may be, for example, an NLRB staff stocked with labor advocates or a NRC with proponents of nuclear power.<sup>163</sup> Accordingly, the political branches may worry about the prospect of commissioner assimilation into agency culture through sustained interactions with expert civil servants.

For appointees with deep ties to the White House, sustained interactions with White House officials could provide a *partial* corrective; while administration officials are likely to hold the “correct” ideological outlook, they are unlikely to be experts in the agency’s subject matter. Accordingly, they are of limited use as a counterweight to the influence of expert civil servants in the fight for an appointee’s attention.

Appointees from Congress face different circumstances. A Republican Hill staffer-turned-NLRB Board Member may maintain ties with expert Republican staffers on the House Committee on Education and Labor. A liberal staffer-turned-NRC Commissioner may stay connected to expert Democrats on the Senate Committee on Environment and Public Works. In this way, staffers-turned-commissioners may be embedded in professional networks that are both ideologically consistent *and* expert. These networks enable them to seek out informed second opinions from their ideological allies when they do not fully trust the views of expert-but-ideologically dissimilar civil servants.<sup>164</sup>

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160. Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 700-01 (2000).

161. See Joshua D. Clinton et al., *Separated Powers in the United States: The Ideology of Agencies, Presidents, and Congress*, 56 AM. J. POL. SCI. 341, 347 (2012).

162. See Bagley & Revesz, *supra* note 156, at 1300.

163. See *id.*; see also Clinton et al., *supra* note 161, at 348 (reporting that the NLRB has the most liberal civil servants of any independent agency, while the NRC has among the most conservative civil servants).

164. Cf. Brian D. Feinstein & Daniel J. Hemel, *Outside Advisers Inside Agencies*, 108 GEO. L.J. 1139, 1203-04 (2020) (positing that advisory committees mitigate the expertise-representativeness tradeoff facing appointees seeking to acquire information).

In summary, staffers-turned-commissioners' earlier socialization in Congress may engender loyalty to that institution, with their social and professional ties to lawmakers and staff reinforcing that sense of loyalty. Placing former staffers onto commissions may be particularly effective as a defense against appointees "going native," because these appointees are likely to be connected to lawmakers and staff who are both expert and ideologically similar—a rare combination. By pulling independent commissions closer into Congress's orbit and guarding against bureaucratic drift, the presence of staffers-turned-commissioners helps effectuate congressional intent underlying the creation of at least some independent commissions: to project congressional power into the administrative state.<sup>165</sup>

## 2. Shoring Up Congressional Support

Staffers-turned-commissioners also may be able to leverage their ties to Congress to advance their agencies' interests. Just as lobbying firms and trade associations hire former lawmakers and staffers to capitalize on these individuals' goodwill toward and connections with current legislators,<sup>166</sup> so too could staffers-turned-commissioners' social and professional ties to members of Congress benefit their new employers. We consider four mechanisms by which staffers-turned-commissioners could strengthen the ties between their agency and Congress—to their agency's benefit.

First, staffers-turned-commissioners are particularly well-positioned to advocate before Congress on behalf of their agencies. Commissioners routinely testify before congressional committees, making the case for their agency's budget requests.<sup>167</sup> Commissioners also urge Congress to grant their agencies greater powers or to defend their existing turf.<sup>168</sup> For

165. See Barkow, *supra* note 29, at 25. We do not take a position on whether this objective is a normative good and acknowledge that some readers will find it troubling. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 582-83 (1994); cf. *Bowsher v. Synar*, 478 U.S. 714, 722 (1986) ("The Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts.").

166. See Jordi Blanes i Vidal, Mirko Draca, & Christian Fons-Rosen, *Revolving Door Lobbyists*, 102 AM. ECON. REV. 3731, 3746 (2012) (finding that lobbyists are in part valued for their connections to lawmakers).

167. See, e.g., *Review of the FY2019 Budget Request for the U.S. Commodity Futures Trading Commission & the SEC: Hearing Before the Financial Servs. & Gen. Gov't Subcomm. of the S. Comm. on Appropriations*, 115th Cong. (2018) (statement of Jay Clayton, Chairman, U.S. Securities & Exchange Commission), <https://www.sec.gov/news/testimony/testimony-financial-services-and-general-government-subcommittee-senate-committee> [<https://perma.cc/Z3M5-SQCR>].

168. See, e.g., *Hearing Before the Financial Servs. & Gen. Gov't Subcomm. Of the H. Comm. on Appropriations*, 111st Cong. (2010) (statement of Nancy Nord, Comm'r, U.S. Consumer Products Safety Commission), [https://www.cpsc.gov/s3fs-public/nord03042010\\_0.pdf](https://www.cpsc.gov/s3fs-public/nord03042010_0.pdf)

instance, lawmaker-turned-SEC Chair Christopher Cox performed this function when he urged his former House colleagues not to substantially weaken the Sarbanes-Oxley Act.<sup>169</sup> When performing these functions, commissioners essentially serve as lobbyists for their commissions.<sup>170</sup> Just as former Hill staffers are able to leverage their connections in Congress on behalf of their private-sector clients, staffers-turned-commissioners may be able to do the same on behalf of their commissions.<sup>171</sup>

Second, staffers-turned-commissioners could use their knowledge of Congress's internal dynamics to reduce conflicts between the branches. A former congressional staffer is well-positioned to advise her agency on what potential actions would invoke Congress's ire and thus should be avoided. Once again, Mills and Selin's work on agency detailees to Congress offers insights. Mills and Selin describe how detailees can assist Congress in predicting how their home agency would interpret a new statute.<sup>172</sup> Similarly, staffers-turned-commissioners can assist agencies in predicting how Congress might respond to a potential new rule or enforcement action. Further, once an agency finds itself in hot water with lawmakers, staffers-turned-commissioners may be able to use their connections in and understanding of Congress to cool the temperature and thus avoid embarrassing public hearings.<sup>173</sup>

Third, due to their connections to Congress, staffers-turned-commissioners may be particularly well-situated to assist their agencies' lawyers and policy experts in providing drafting assistance to lawmakers. The prac-

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[<https://perma.cc/BD7U-X6VH>] (urging Congress to amend the Consumer Product Safety Improvement Act of 2008).

169. See *Sarbanes-Oxley at Four: Protecting Investors and Strengthening the Markets: Hearing Before the H. Comm. on Financial Servs.*, 109th Cong. (2006) (statement of Christopher Cox, Chairman, U.S. Securities & Exchange Commission), <https://www.sec.gov/news/testimony/2006/ts091906cc.htm> [<https://perma.cc/GU3Z-8R3N>].

170. See Lobbying Disclosure Act of 1995, 2 U.S.C. § 1602 (2018) (defining "lobbying contact" as, *inter alia*, "communication . . . to a covered . . . official that is made on behalf of a client with regard to the formulation, modification, or adoption of Federal legislation").

171. See Blanes i Vidal et al., *supra* note 166, at 3732 (finding that lobbyists who previously worked for a senator find their income drop by twenty-four percent on average when that senator retires, which suggests that staffers-turned-lobbyists exploit their connections to their Hill employer to benefit their clients); *id.* (noting that staffers-turned-lobbyists comprise the largest category of former government officials working as lobbyists).

172. See Mills & Selin, *supra* note 153, at 620.

173. See *id.* at 628 (noting a negative correlation between the number of detailees on a congressional committee and committee oversight levels, and speculating that committees with a high number of detailees are able to resolve issues with the agency through a less adversarial forum); *cf.* THOMAS SCHELLING, *THE STRATEGY OF CONFLICT* 134-35 (1960) ("Trust is often achieved simply by the continuity of the relation between parties . . .").

tice of agencies assisting Congress with legislative drafting is commonplace.<sup>174</sup> To the extent that staffers-turned-commissioners have deeper knowledge of the drafting process and stronger ties to current lawmakers than do other commissioners, they are better positioned to assist with this task—to the potential benefit of their agency.<sup>175</sup>

Fourth, the presence of former congressional staffers on the daises of independent commissions may encourage future delegations from Congress. Preference divergence between a principal and agent discourages the principal from delegating authority to that agent,<sup>176</sup> as does the principal's uncertainty regarding the agent's preferences.<sup>177</sup> In other words, even when Congress believes that the commission's preferences are aligned with its own, Congress's uncertainty regarding this belief leads to suboptimal delegation.<sup>178</sup> When the President nominates and the Senate confirms a former Hill staffer to an independent commission, however, Congress may be more confident in its knowledge of the staffer's preferences based on her longstanding professional relationships with members of Congress. Accordingly, Congress may be more comfortable delegating authority to that commission in the future.

### 3. Increasing Democracy Accountability

The rise of staffers-turned-commissioners also may mitigate the administrative state's democratic deficit.<sup>179</sup> The Senate could channel its newfound energy concerning appointments into pushing for ideologically aligned Beltway lawyers or technocratic internal candidates at the commissions to fill these roles. By choosing instead to select former Hill staffers, the Senate may strengthen—albeit imperfectly—-independent agencies' democratic accountability and responsiveness.<sup>180</sup>

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174. See Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377, 1401-02 (2017).

175. See *id.* at 1411-12 (raising the prospect of self-dealing where an agency is involved in drafting a statute that the agency administers).

176. See Jonathan Bendor, Amihai Glazer & Thomas Hammond, *Theories of Delegation*, 4 ANN. REV. POL. SCI. 235, 243-44 (2001).

177. See *id.* at 244 (“Suppose the boss can make an educated guess about subordinates’ ideal points but does not know them precisely . . . [T]his reduces the value of delegating, if the boss is risk-averse.”).

178. See *id.*

179. See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 480 (2003) (discussing the origins of the “majoritarian critique of agency decisionmaking”).

180. To be clear, we are not suggesting that the Senate's increased role in appointments alone has a remedial effect on accountability. Any increase in that chamber's role necessarily implies a reduction in the President's power, and we take no position on whether democratic accountability is better served by strengthening one of these institutions over the other. Instead, we



To be clear, we are not suggesting that any loyalty that staffers-turned-commissioners feel to their congressional principal renders commissions completely democratically accountable. By way of example, let's return to Richard Roberts, the former staffer to Senator Richard Shelby who was later appointed to the SEC. To claim that Roberts's appointment makes the SEC more democratically accountable in this manner requires the following herculean assumptions: (1) the public has views on securities law; (2) the median senator reflects the public's views; (3) Senator Shelby reflects the median senator's views; and (4) Roberts reflects Senator Shelby's views. All of these assumptions are open to challenge.<sup>181</sup> To the extent that commissioners are democratically responsive at all, that is mostly because they are nominated by an elected President and confirmed by an elected Senate.

Nonetheless, we wonder whether staffers-turned-commissioners' experience in Congress makes them more attuned to—or even more solicitous of—the average citizen's views than a Washington lawyer-turned-commissioner would be. Lawmakers spend much of their time interacting with constituents and evaluating how their actions will be perceived in their district.<sup>182</sup> High-level staffers, in turn, engage in deep and sustained interactions with these lawmakers.<sup>183</sup> Lawmakers' attention to constituent or mass public views might therefore rub off on staffers.

Recall, for instance, that Roberts previously served as Senator Shelby's chief of staff, both when Shelby was a first-term House member and later when he became a senator.<sup>184</sup> Serving as a high-level staffer to a rising politician presumably provided Roberts with exposure to a lawmaker's re-election imperative—and thus to constituent opinion. The same cannot be said for an SEC lifer, a white-shoe lawyer, or any number of other professions from which commissioners are selected.

We do not wish to hang too much on this hook. After all, the inevitable time lag between service as a Hill staffer and service as a commissioner

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focus on the ways in which the Senate chooses to use its role in appointments—namely by appointing former employees to independent commissions—and how that enhances commissions' democratic responsiveness.

181. See, e.g., Frank H. Easterbrook, *Unitary Executive Interpretation: A Comment*, 15 *CARDOZO L. REV.* 313, 318-19 (1993) (positing that congressional committee chairs tend to be “farther from the median of national opinion than are presidents”).

182. See ROGER H. DAVIDSON ET AL., *CONGRESS AND ITS MEMBERS* 113 (14th ed. 2013).

183. For instance, a large majority of legislative counsel responding to a survey claimed that whether legislative history was drafted by a staffer versus a lawmaker is irrelevant because, in the words of one respondent, “[e]verything staff does members approve, and everything members say is written by staff.” Abbe Gluck & Lisa Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation and the Canons: Part I*, 65 *STAN. L. REV.* 901, 983 (2013).

184. See Thomas, *supra* note 5, at 1-2.

means that any osmosis of public views that occurred while a staffer is no longer current. Still, the possibility that staffers-turned-commissioners insert an added dose of democratic accountability to independent commissions is worth raising.

### *B. Intra-Agency*

#### 1. Playing Political Hardball

Staffers-turned-commissioners also may bring with them deep knowledge of “political hardball”—that is, practices that are within the bounds of the law, but are in tension with previously longstanding norms of behavior—acquired through their prior employment in Congress.<sup>185</sup> Congressional leaders often are viewed as savvy tacticians, able to see several moves ahead and use—or, better yet, bend—the rules of the game to their advantage.<sup>186</sup> If staffers-turned-commissioners learn at the knee of these lawmakers, then we might expect them to import several strategies to independent commissions. The following three areas are illustrative.

First, experience on Capitol Hill may provide staffers-turned-commissions with greater knowledge of how to advance favored changes and delay disfavored ones. Staffers-turned-commissioners’ exposure to the legislative process gives them a front-row seat for the stagecraft involved in introducing a proposed new policy, strategic considerations inherent in coalition-building, and the use of cheap talk and leverage in negotiations. These skills presumably are applicable to policymaking in other multi-member settings, such as independent commissions.

Similarly, they may have learned from their time on the Hill tactics to delay disfavored policies. Commissioners generally have some ability to delay rulemakings, and one might expect a former Hill staffer to be more strategic in the use of this tactic.<sup>187</sup> One former commissioner we spoke

185. We adopt this definition from Mark Tushnet’s definition of constitutional hardball. See Mark V. Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523 (2004); see also William Galston, *Toughness as a Political Virtue*, 17 SOC. THEORY & PRAC. 175, 190 (1991) (providing an early definition of the term *political hardball*: “hardball means sliding into the second baseman to break up a double play; softball means sliding around [him] . . . to avoid potentially injuring him; dirtyball means sliding into him spikes up with the intention of knocking him out of the game.”).

186. See, e.g., Amber Phillips, *Another Big Mitch McConnell Supreme Court Gamble Looks Set To Pay Off*, WASH. POST (Oct. 4, 2018, 1:27 PM), [https://www.washingtonpost.com/politics/2018/10/04/another-big-mitch-mcconnell-supreme-court-gamble-looks-set-pay-off/?noredirect=on&utm\\_term=.8fa68f3561fc](https://www.washingtonpost.com/politics/2018/10/04/another-big-mitch-mcconnell-supreme-court-gamble-looks-set-pay-off/?noredirect=on&utm_term=.8fa68f3561fc) [<https://perma.cc/D8XW-M8V4>].

187. See Janet M. Box-Steffensmeier, *Advising, Consenting, Delaying, and Expediting: Senator Influences on Presidential Appointments*, 30 STUD. AM. POL. DEV. 19, 22 (2016) (explaining senators’ strategic use of “blue slip objection[s] . . . to delay, not defeat, a [judicial] nomination”).

with noted, “a commissioner can easily push hearings off a week or two, and given travel schedules and other priorities, sometimes a few-week delay could force a months-long delay in consideration of a rule.”<sup>188</sup>

Second, staffers-turned-commissioners—accustomed to switches in partisan control that have occurred periodically in both chambers of Congress for the past twenty-five years—may be particularly adept at managing political transitions. Minority commissioners know “where the bodies are buried,” according to another former commissioner we interviewed, which enables policy reversals following a switch in partisan control of the White House to happen more effectively.<sup>189</sup> Their presence enables agencies to “unravel the bad policy more quickly, if the [new] majority is interested in doing so.”<sup>190</sup> If Hill staffers are more ideologically committed and politically savvy, their presence would increase the whipsaw nature of agency regulation.

Third, practitioners of Hill-style political hardball may be more adept at strategic obfuscation—that is, diverting attention concerning unpopular decisions—than are appointees without experience in politics. For instance, strategic sub-delegations to civil servants may play a blame-avoidance function. Relatedly, a savvy commissioner can encourage the use of guidance documents—which often alter regulated entities’ behavior and thus can be considered a form of “soft law”<sup>191</sup>—in areas in which a formal rule could trigger judicial review or political blowback. Finally, politically sophisticated commissioners seeking to reduce their agency’s involvement in a given area may push to reduce enforcement actions, which may attract less attention than would acting through rulemaking or adjudication.<sup>192</sup>

## 2. Degrading Agency Culture

Recent years have witnessed not just the swelling ranks of former Hill staffers on independent commissions and boards, but also marked changes in the culture of several important independent agencies, with overtly partisan behavior encroaching on longstanding norms.<sup>193</sup> In this Section, we

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188. E-mail from former commissioner of an independent agency to authors (Dec. 1, 2018).

189. E-mail from former commissioner of an independent agency to authors (Dec. 4, 2018).

190. *Id.*

191. See Jacob Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 576 (2008).

192. See Rory Van Loo, *Regulatory Monitors*, 119 COLUM. L. REV. 369, 418 (2018).

193. The SEC is illustrative. See, e.g., Floyd Norris, *Independent Agencies, Sometimes in Name Only*, N.Y. TIMES (Aug. 9, 2013), <https://www.nytimes.com/2013/08/09/business/independent-agencies-sometimes-in-name-only.html> [<https://perma.cc/3DZ5-B2FP>] (“The S.E.C. has in recent years splintered into factions far more than ever before . . . Now, [in contrast to the recent

describe the sharp-elbowed approach to politics that has defined Congress in recent decades. A similar style is beginning to manifest itself in several agencies, which we suggest the migration of Hill staffers to agencies has encouraged.

We are cautious in making this causal claim. For one, many venues have become politicized in recent decades,<sup>194</sup> making it difficult to isolate the independent effects of Congress's culture on changes in agency culture—let alone to label Congress as a “patient zero” for this phenomenon. In addition, the evidence that one could marshal in support of or in opposition to this claim is necessarily impressionistic, further tempering our conclusions. Nonetheless, there is a real and important dynamic at play: congressional staffers-turned-commissioners have imported aspects of Congress's hard-edged culture to their agencies, and this development merits further study.

#### a. Congress's Culture

Four key themes characterize Congress's organizational culture<sup>195</sup>: it is partisan; it values bellicosity; it tolerates dysfunction; and it rewards loyalty.<sup>196</sup> Before describing how congressional staffers-turned-commissioners have imported these interrelated features into agencies, we provide a brief overview of the four features.

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past,] there is some evidence that the [P]resident generally gets to choose the chairmen of independent commissions, but the other majority members are picked on Capitol Hill. The result has been that chairmen of commissions can find it difficult to accomplish anything.”); Labaton, *supra* note 17 (“The once-proud agency was so dysfunctional that it had no way of distinguishing the meritless from the significant among the more than 700,000 whistle-blower and investor complaints it receives each year.”).

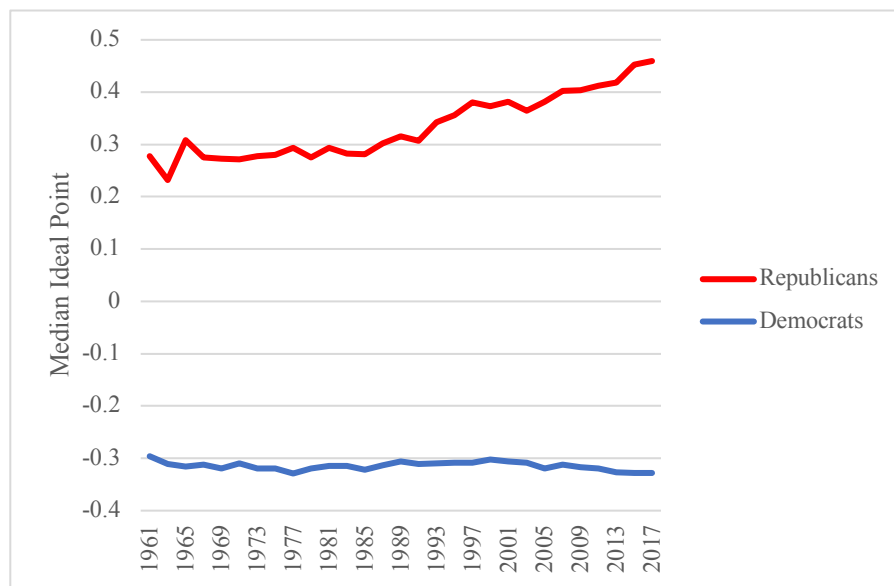
194. See, e.g., Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205, 242-44 (2013) (increased polarization on the Supreme Court); Markus Prior, *Media and Political Polarization*, 16 ANN. REV. POL. SCI. 101 (2013) (among media outlets); Boris Shor & Nolan McCarty, *The Ideological Mapping of American Legislatures*, 105 AM. POL. SCI. REV. 530 (2011) (in most state legislatures).

195. We adopt the term “organizational culture” from management and business scholarship, where it refers to “a complex set of values, beliefs, assumptions, and symbols that define the way in which a firm conducts its business.” Jay B. Barney, *Organizational Culture: Can It Be a Source of Sustained Competitive Advantage?* 11 ACAD. MGMT. REV. 656, 657 (1986). Shared organizational culture fosters communication within the organization. See Alan Morrison & William J. Wilhelm, Jr., Culture, *Competence, and the Corporation* 2 (Oct. 2004) (unpublished manuscript), <https://gates.comm.virginia.edu/wjw9a/Papers/culturecompetence2.pdf> [https://perma.cc/9DRA-29UA].

196. For brevity, we consider Congress as a monolith in discussing its culture. In so doing, we gloss over cultural differences between the House and Senate. See Tara Leigh Grove & Neal Devins, *Congress's (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571, 605 (2014) (noting that “the two chambers of Congress maintain distinct institutional cultures”). Cultural differences also abound at the committee level. See, e.g., Richard F. Fenno, Jr., *The Appropriations Committee as a Political System*, 56 AM. POL. SCI. REV. 310 (1962) (describing local norms on one committee); cf. Kenneth Shepsle, *Congress Is a “They,” Not an “It”: Legislative*

First, Congress's increasingly partisan atmosphere has been well documented. On more and more votes, an overwhelming majority of legislators sort by party.<sup>197</sup> To illustrate this growing partisan divide, Figure 6 reports the median Democratic and Republican senator's first-dimension DW-NOMINATE ideal point estimate from 1963 to 2017.<sup>198</sup> Legislators placed near -1 are considered very liberal; those near +1 are very conservative.<sup>199</sup> As the figure shows, Senate Republicans have marched steadily to the right during this period, while Democrats have moved slightly to the left.

**Figure 6: Partisan Polarization in the Senate**



*Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 248-49 (1992) (distinguishing between the preferences of individual legislators and Congress as a whole and arguing that it is fruitless to attribute legislative intent to the product of legislators' collective effort).

197. See Frances Lee, *How Party Polarization Affects Governance*, 18 ANN. REV. POL. SCI. 261, 263 (2015).

198. DW-NOMINATE sorts legislators in a multi-dimensional space based on the similarity of their roll call voting records. Figure derived from Party Medians from DW-NOMINATE. Jeffrey B. Lewis et al., *Voteview: Congressional Roll-Call Votes Database*, VOTEVIEW, <https://voteview.com/data> [<https://perma.cc/XUX8-L7TB>]; see KEITH T. POOLE & HOWARD ROSENTHAL, *CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING* 23-24 (2000).

199. See Poole & Rosenthal, *supra* note 198.

A similar figure for the House evinces even greater divergence in voting behavior by party<sup>200</sup> The developers of the DW-NOMINATE metric conclude that “Congress is now more polarized than at any time since the end of Reconstruction.”<sup>201</sup>

Second, Congress’s culture is adversarial.<sup>202</sup> As longtime Senate staffer Ira Shapiro observed, “senators work in an acrimonious political culture that seems to offer little reward for substance and sees moderation and compromise as weaknesses.”<sup>203</sup> Indeed, legislators arguably are incented towards antagonism. According to Professor Frances Lee, parties win congressional elections by highlighting differences with the other party.<sup>204</sup> Merely placing issues on Congress’s agenda that are popular with one’s constituents is not sufficient; legislators who want to see their party in the majority must push bills that “provoke . . . resistance” from the other party.<sup>205</sup> That may mean scheduling message votes, meaning votes on bills and amendments that have no chance of passage but will compel one’s opponents to make politically difficult choices.<sup>206</sup> More generally, because “a party benefits from harming the opposing party’s image,” Lee writes, it must “look[] for ways to make its opposition appear weak and incompetent, as well as ideologically extreme and out of touch with mainstream public opinion.”<sup>207</sup>

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200. Figure and data on file with the authors.

201. Christopher Hare, Keith T. Poole & Howard Rosenthal, *Polarization in Congress Has Risen Sharply. Where Is It Going Next?*, WASH. POST: MONKEY CAGE (Feb. 13, 2014, 9:15 AM), [https://www.washingtonpost.com/news/monkey-cage/wp/2014/02/13/polarization-in-congress-has-risen-sharply-where-is-it-going-next/?noredirect=on&utm\\_term=.b1864de5ffe5](https://www.washingtonpost.com/news/monkey-cage/wp/2014/02/13/polarization-in-congress-has-risen-sharply-where-is-it-going-next/?noredirect=on&utm_term=.b1864de5ffe5) [<https://perma.cc/5ART-8YU8>].

202. See Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 COLUM. L. REV. 1689, 1724 (2015) (describing a “toxic party culture” in Congress). At first glance, adversary and polarization may seem like two sides of the same coin. But it is possible to disagree without being disagreeable. Cf. Ruth Bader Ginsburg, *In Memoriam: Justice Antonin Scalia*, 130 HARV. L. REV. 1, 2 (2016) (reminiscing on the author’s friendship with Justice Scalia).

203. IRA SHAPIRO, *BROKEN: CAN THE SENATE SAVE ITSELF AND THE COUNTRY?* 248 (2018).

204. FRANCES LEE, *INSECURE MAJORITIES: CONGRESS AND THE PERPETUAL CAMPAIGN 2* (2016).

205. *Id.* at 45.

206. *Id.* at 142–43.

207. *Id.* at 2; accord Farina, *supra* note 202 at 1727 (“[M]embers of both parties are motivated to engage in scorched-earth tactics intended not merely to stymie the other side, even on noncontroversial issues, but also to brand the opposition as incompetent, corrupt, or evil.”).

Third, Congress's culture abides dysfunction.<sup>208</sup> While one ought not to equate legislative inaction with dysfunction,<sup>209</sup> the signs point to Congress performing its lawmaking function poorly.<sup>210</sup> Using the subjects of Congress-focused *New York Times* editorials as a measure of the size of the legislative agenda each year, Professor Sarah Binder charts the proportion of those agenda items on which Congress fails to act in that year.<sup>211</sup> She finds a secular increase in the frequency of deadlock on these issues between 1947 and 2012.<sup>212</sup> Congress's record is no better for once-ordinary tasks, such as budgeting and appropriations.<sup>213</sup> Although whether a given action or lack thereof evidences "dysfunction" is ultimately a subjective determination, most observers would agree that chronic budget brinkmanship leading to government shutdowns, an inability to marshal public resources to assist Americans after debilitating hurricanes, and an unwillingness to act against a foreign country's attempts to subvert U.S. elections all point to a malfunctioning legislature.<sup>214</sup>

Rather than decry these developments and take corrective actions, Congress arguably encourages these machinations—and sometimes may even reward them.<sup>215</sup> Congressional leaders devote a growing proportion of scarce calendar time to superficial message votes, which leaves less time

208. Some political observers employ the term "dysfunction" as an all-purpose epithet in arguing that Congress is overly partisan or adversarial. *See, e.g.*, James P. Pfiffner, *Dysfunctional Politics in the United States: Origins and Consequences*, 60 PAPERS ON PARLIAMENT 17, 17 (2014) (noting that polarization and gridlock have caused American politics to become dysfunctional). We, however, use this term in a narrower sense. After all, a legislature could be completely polarized into two warring factions and still perform its basic functions as a lawmaking body (as long as one faction holds a majority and majoritarian procedures govern the consideration of bills). Nevertheless, that does not describe the contemporary Congress.

209. *See* Josh Chafetz, *The Phenomenology of Gridlock*, 88 NOTRE DAME L. REV. 2065, 2075 (2013) (distinguishing between inaction due to a lack of sufficient public consensus and inaction due to legislative gridlock).

210. *See* Binder, *supra* note 130, at 93.

211. *Id.* at 91.

212. *Id.* at 93.

213. *See* Balkin, *supra* note 79, at 1193; Lee, *supra* note 197, at 270.

214. *See* Jennifer Hochschild, *What's New? What's Next? Threats to the American Constitutional Order*, in CONSTITUTIONAL DEMOCRACY IN CRISIS? 100 (Mark A. Graber et al. eds., 2018).

215. For instance, Representatives Eric Cantor (R-VA), Kevin McCarthy (R-CA), and Paul Ryan (R-WI) orchestrated a confrontation over a 2011 debt-ceiling vote that, if successful, would have caused the government to default on its debt. *see* MANN & ORNSTEIN, *supra* note 75, at 8-9, raising the cost of future government borrowing and possibly causing the U.S. economy and global capital markets to tank. *See* Terry Belton et al., *The Domino Effect of a U.S. Treasury Technical Default*, J.P. MORGAN (Apr. 19, 2011) <https://valkayec.files.wordpress.com/2011/04/morgan.pdf> [<https://perma.cc/9RKZ-CKYZ>]. After 2011, Representatives McCarthy and Ryan rose higher in the House leadership ranks, and Representative Cantor suffered no internal sanction for his role. VALERIE HEITSHUSEN, CRS REP. FOR CONGRESS, RL30567, PARTY LEADERS IN THE UNITED STATES CONGRESS, 1789-2019, at 6-7 (2019).

for substantive issues.<sup>216</sup> Leadership also has cut legislative support agencies and staff resources, shortened the legislative workweek, and pushed rank-and-file members to spend less time in Washington, thereby reducing Congress's institutional capacity.<sup>217</sup>

Finally, Congress prizes loyalty from its staffers.<sup>218</sup> That emphasis on loyalty—"an essential, paramount norm of congressional staff work," according to Professors Barbara Romzek and Jennifer Utter<sup>219</sup>—begins on the day a staffer is hired. As Professors Robert Salisbury and Kenneth Shepsle observe, since "staffers are hired by specific members and work under their direction, they soon come to accept a norm structure that emphasizes loyalty, of a very personal and specific kind, to be given to that member."<sup>220</sup> Accordingly, the central object of staffers' loyalty is to the legislator for whom they work.<sup>221</sup> Most staffers also report a sense of loyalty to their chamber, and a smaller subset report a sense of loyalty to Congress overall.<sup>222</sup>

That staffers serve as at-will employees further encourages deference and loyalty to legislators.<sup>223</sup> Staffers do not benefit from the employment protections granted to most of the federal workforce.<sup>224</sup> This lack of job security enables lawmakers to hire loyalists and fire renegades and ensures that current staffers will remain mindful of the importance of loyalty.<sup>225</sup> Given the need for staffers to respond to every whim of their principals, Senator John Glenn referred to Congress's employment culture as "the last plantation."<sup>226</sup>

Staffers who are willing to accept these loyalty norms tend to advance in the institution.<sup>227</sup> A survey of congressional staffers found that legislators, including committee chairs, tend to delegate greater responsibility to

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216. See Lee, *supra* note 197, at 271.

217. See Farina, *supra* note 202, at 1726.

218. See Christine DeGregorio, *Staff Utilization in the U.S. Congress*, 238 POLITY 261, 262 n.3 (1995) (collecting citations of "[s]cholarly reports of the loyalty and deference staffers show toward their legislative bosses").

219. Romzek & Utter, *supra* note 152, at 1265.

220. Salisbury & Shepsle, *supra* note 101, at 394.

221. See Romzek & Utter, *supra* note 152, at 1266.

222. See *id.*

223. See Barbara S. Romzek, *Accountability of Congressional Staff*, 10 J. OF PUB. ADMIN. RES. 413, 422 (2000).

224. See, e.g., 5 U.S.C. §§ 4303, 7513 (2018). While the Congressional Accountability Act of 1995 applies some federal anti-discrimination and workplace safety laws to congressional employees, it does not interfere with legislators' ability to hire and fire legislative staff at will. See Romzek, *supra* note 223, at 422.

225. See Romzek, *supra* note 223, at 422-23.

226. *Id.*

227. See DeGregorio, *supra* note 218, at 273-75.



staffers who demonstrate loyalty.<sup>228</sup> By contrast, staffers who are motivated by other goals, such as their own ideological or policy agenda, tend not to last long on Capitol Hill.<sup>229</sup>

### b. Exporting Culture

Congressional staffers may similarly absorb norms of behavior from their institution—and carry these lessons with them later in their careers. Congressional dysfunction, such as it is, gets absorbed into the ethical and practical behavior of staffers, traveling with them when they leave the Hill for other government work.

Organizational theorist Edgar Schein asserts that organizational culture is a “pattern of shared basic assumptions” that—importantly—is “taught to new members [of the organization] as the correct way to perceive, think, and feel in relations to those problems” that the organization and its members face.<sup>230</sup> The notion that social connections influence behavior is familiar to social scientists.<sup>231</sup> In the government context, Professors David Fontana and Aziz Huq posit that officials are situated in an “epistemic community,” shaping the set of arguments and behaviors to which they are exposed—and establishing reputational costs for officials who deviate from their institution’s position.<sup>232</sup> The result: a government official’s peer group affects her ultimate decisions.<sup>233</sup> For instance, Professors Michael Frakes and Melissa Wasserman find marked peer effects in the rate at which patent examiners grant applications.<sup>234</sup> Further, whether an examiner was hired during a period in which the Patent Office exhibited a “permissive granting culture” influenced that examiner’s grant rate throughout her career.<sup>235</sup>

Several characteristics of congressional staffers render them particularly susceptible to internalizing Congress’s culture. First, staffers tend to

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228. *See id.*

229. *See* Salisbury & Shepsle, *supra* note 101, at 394.

230. EDGAR H. SCHEIN, ORGANIZATIONAL CULTURE AND LEADERSHIP: A DYNAMIC VIEW 9 (2d ed. 1992).

231. *See* David A. Siegel, *Social Networks and Collective Action*, 52 AM. J. POL. SCI. 122, 122 (2009) (“Across social science, a wealth of empirical evidence illustrates the ways in which social interactions can alter choice.”).

232. Fontana & Huq, *supra* note 69, at 59-60.

233. *Id.* at 37-39.

234. Michael D. Frakes & Melissa F. Wasserman, *Knowledge Spillovers and Learning in the Workplace: Evidence from the U.S. Patent Office* 5, (Duke Law Sch. Pub. Law & Legal Theory, Working Paper No. 2018-11), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3099029](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3099029) [<https://perma.cc/D84B-GDH8>].

235. *See* Michael D. Frakes & Melissa F. Wasserman, *Patent Office Cohorts*, 65 DUKE L.J. 1601, 1631-34 (2016).

join the institution when they are relatively young,<sup>236</sup> at an age at which psychologists have found that beliefs and values are malleable.<sup>237</sup> Second, they are situated in small, insular networks,<sup>238</sup> which facilitate both the development of uniform cultural practices and the administration of sanctions for deviations from these norms.<sup>239</sup> Third, working for Congress can be all-encompassing, with long hours and little time for family or outside pursuits that could expose staffers to countervailing influences.<sup>240</sup> Finally, the combination of low pay, long hours, and lack of job security<sup>241</sup> may discourage all but the most ideologically motivated individuals from working for Congress<sup>242</sup>—and this group may be more willing than the average person to adapt to Congress's culture.

We argue that staffers, after internalizing Congress's norms of behavior, carry these norms with them to their subsequent employment. In the private sector, managers' early professional experiences earlier can influence their management styles decades later. For instance, CEOs with law degrees are associated with better performance for firms with above-average litigation risk.<sup>243</sup> In another article in the same field, one of us has provided evidence that family environments strongly influence CEO decision making, with CEOs raised in poorer homes and those exposed to moderate family trauma outperforming CEOs raised in wealthier homes and those

236. See Hagedorn, *supra* note 100, at 82.

237. See Jeffrey Jensen Arnett, *Emerging Adulthood*, 55 AM. PSYCHOLOGIST 469, 474 (2000); Brent W. Roberts, Ayshalom Caspi, & Terrie E. Moffitt, *Work Experiences and Personality Development in Young Adulthood*, 84 J. PERSONALITY & SOC. PSYCHOL. 582, 583 (2003).

238. See Barbara S. Romzek & Jennifer A. Utter, *Career Dynamics of Congressional Legislative Staff: Preliminary Profile and Research Questions*, 6 J. PUB. ADMIN. RES. & THEORY 415, 417 ("Congress is a relatively small-scale work setting where individuals develop networks, working relationships, and opinions about staffers and members of Congress . . . Legislative staffs are relatively small working groups . . . Full committees, which range from twenty to over one hundred members in either body, constitute small work units.").

239. See Harry C. Triandis, *The Self and Social Behavior in Differing Cultural Contexts*, 96 PSYCHOL. REV. 506, 513 (1989).

240. See Hagedorn, *supra* note 100, at 84; Cong. Mgmt. Found. & Soc'y for Human Res. Mgmt., *Life in Congress: Job Satisfaction and Engagement of House and Senate Staff*, CONG. MGMT. FOUND. 74 (2013), [http://www.congressfoundation.org/storage/documents/CMF\\_Pubs/life-in-congress-job-satisfaction-engagement.pdf](http://www.congressfoundation.org/storage/documents/CMF_Pubs/life-in-congress-job-satisfaction-engagement.pdf) [<https://perma.cc/F6KP-MLYK>].

241. See *Working in Congress: The Staff Perspective*, CONG. MGMT. FOUND. 1 (1995), [http://www.congressfoundation.org/storage/documents/CMF\\_Pubs/CMF-Working-in-Congress.pdf](http://www.congressfoundation.org/storage/documents/CMF_Pubs/CMF-Working-in-Congress.pdf) [<https://perma.cc/Q4A2-9GNN>] ("Staff typically work exceedingly long, unpredictable hours that leave little time for outside activities; receive lower pay than both private sector and federal executive branch staff . . . and have virtually no job security.").

242. See Montgomery & Nyhan, *supra* note 101, at 5 (asserting that "working conditions [in Congress] have become increasingly unattractive for staff, making staff positions less appealing to those who lack strong partisan views").

243. See M. Todd Henderson et al., *Lawyer CEOs 23-24* (Feb. 21, 2018) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2923136](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2923136) [<https://perma.cc/9JHW-84CB>].

who experienced no or severe trauma in their youth.<sup>244</sup> In a related vein, CEOs with military backgrounds are more effective managers during times of crisis than are CEOs without military experience.<sup>245</sup> Further, combat veterans tend to make riskier, more highly leveraged capital structure choices as CEOs.<sup>246</sup>

Naturally, these early-stage experiences may affect an individual's internalization of norms of behavior. For instance, the aforementioned findings concerning CEOs' background suggest that lawyers-turned-CEOs absorb cautious, legalistic norms, whereas veterans-turned-CEOs are inculcated in a culture that values steadiness under pressure. Earlier professional experiences also may foster the development of a particularized set of skills. While it is difficult to disentangle the specific mix of cultural norms, skills, and other aspects of a previous experience that contribute to CEO behavior, presumably culture is part of the mix.

In the context of government, federal employees who transition from one branch of government to another bring with them the perspectives that they socialized into during their service in their previous branch. Professor Robert Robinson has found that Supreme Court Justices with prior executive-branch experience are more deferential to the executive branch.<sup>247</sup> The extent to which they defer is positively correlated with the length of their executive branch service, suggesting that executive-branch socialization—and not the Justices' preexisting attitudes—is driving this result.<sup>248</sup> Similarly, Professors Fontana and Huq posit that an Office of Legal Counsel attorney with even just a few months of prior work for the Senate Judiciary Committee will bring “a different sense of presidential power than the OLC lawyer who never left the executive branch.”<sup>249</sup>

The experience of Republican senators who previously served in the House contemporaneously with former Speaker of the House Newt Gingrich offers another clue regarding the impact of institutional culture on subsequent behavior in another institution. Professor Sean Theriault charts these individuals' Senate tenures, concluding that they “almost single-handedly at first, propelled party polarization and escalated partisan

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244. M. Todd Henderson & Irena Hutton, *CEO Traits and Firm Outcomes: Do Early Childhood Experiences Matter?* 24 (Jan. 8, 2018) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3374389](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3374389) [<https://perma.cc/U3RU-5GR9>].

245. See Effi Benmelech & Carola Frydman, *Military CEOs*, 117 J. FIN. ECON. 43, 44 (2015).

246. See Ulrike Malmendier et al., *Overconfidence and Early-Life Experiences: The Effect of Managerial Traits on Corporate Financial Policies*, 66 J. FIN. 1687, 1690 (2011).

247. Robert R. Robinson, *Executive Branch Socialization and Deference on the U.S. Supreme Court*, 46 LAW & SOC'Y REV. 889, 891 (2012).

248. *Id.*

249. Fontana & Huq, *supra* note 69, at 71.

warfare in the Senate.”<sup>250</sup> Not only did these so-called “Gingrich senators” amass a more extreme voting record than other Republicans,<sup>251</sup> they also displayed a more aggressive, slash-and-burn posture.<sup>252</sup> As Senator Alan Simpson (R-WY), who did not have a background in the Gingrich-era House, observed: “The rancor, the dissension, the disgusting harsh level came from those House members who came to the Senate. They brought it with ‘em. That’s where it began.”<sup>253</sup> Governor-turned-Senator George Voinovich (R-OH) also drew a distinction between these former House members—of whom he thought there were “too many” in the Senate—and “other people.”<sup>254</sup> In response, senators in the “other people” category created an informal caucus as a counterweight to the aggressive, partisan strategies that former House members pushed.<sup>255</sup>

What accounts for the cultural divide between Gingrich-era House members and other senators? Differences in their constituencies explain only about one-quarter of the variation in the two groups of senators’ voting behavior.<sup>256</sup> Their personal characteristics—including age, religion, occupation, and other affiliations—offer little or no explanatory power.<sup>257</sup> Instead, Theriault’s empirical analysis demonstrates that their service in the House during Speaker Gingrich’s rise in the 1980s explains much of their behavior.<sup>258</sup>

These senators picked up several lessons in the Gingrich-era House. During this period, Gingrich and his lieutenants pushed the House Republican Conference towards a more aggressive posture, eschewing cooperation with the Democratic majority to influence legislation in favor of drawing clear contrasts with them.<sup>259</sup> In drawing these contrasts, Gingrich and his allies favored short floor speeches which, according to Lee, “used harsh rhetoric and relentlessly charged majority Democrats with corruption, arrogance, and mismanagement.”<sup>260</sup> Gingrich himself saw his objective as changing the nation’s political culture, declaring that, whereas previous Democratic speakers “had been essentially legislative leaders . . . I, on the

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250. SEAN M. THERIAULT, *THE GINGRICH SENATORS: THE ROOTS OF PARTISAN WARFARE IN CONGRESS* 16 (2013).

251. *Id.* at 40-43.

252. *Id.* at 35.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.* at 17.

257. *Id.* at 72.

258. *Id.* at 17.

259. See Steven V. Roberts, *One Conservative Faults Two Parties*, N.Y. TIMES, Aug. 11, 1983, at A18 (reporting that, “to Gingrich and his compatriots,” the notion of “tak[ing] on the responsibilities of actually running the government . . . is heresy”).

260. LEE, *supra* note 204, at 95.

other hand, was essentially . . . seeking to do nothing less than reshape the federal government *along with the political culture of the nation*.<sup>261</sup> Representatives-turned-senators adopted the House's culture, internalized it, and exported it to the Senate.

We argue that an analogous dynamic to the one Theriault identifies—that one chamber's culture can be exported to the other chamber—is at play concerning congressional staffers-turned-commissioners. Having described how organizational culture can be inculcated, we turn to examining how norms of behavior in several key independent agencies have grown closer to congressional norms, just as these agencies have experienced an influx of new commissioners from the Hill.

### c. Absorption of Hill Culture?

Assessing the ways in which congressional staffers-turned-commissioners have altered their agencies' cultures requires, first, describing the extent to which agencies' cultures have changed in recent years and, second, evaluating the extent to which these changes are attributable to an influx of former congressional staffers. Challenges abound at both steps. Culture does not lend itself to quantifiable metrics. Neither are there obvious tests for cultural change. Given these hurdles, our discussion is necessarily impressionistic—and our conclusions are merely suggestive.

We begin by clarifying what we are *not* arguing. We do not assign complete responsibility for the increasingly polarized voting behavior within some multimember agencies directly to staffers-turned-commissioners.<sup>262</sup> To measure the ideological outlooks of staffers-turned-commissioners versus other commissioners, we employ Professor Adam Bonica's Database on Ideology, Money in Politics, and Elections (DIME), which considers individuals' history of political contributions as revealed preferences of their political ideologies.<sup>263</sup> We identify the absolute values of the ideological scores for members of ten agencies from 2000 to 2018, which is

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261. NEWT GINGRICH, LESSONS LEARNED THE HARD WAY: A PERSONAL REPORT 37 (1998).

262. See, e.g., Lee, *supra* note 197, at (noting polarization on the NLRB and FEC); Roberta Karmel, *Threats to the SEC's Independence*, AM. BAR ASS'N (Dec. 2016), [https://www.americanbar.org/groups/business\\_law/publications/blt/2016/12/09\\_karmel/](https://www.americanbar.org/groups/business_law/publications/blt/2016/12/09_karmel/) [<https://perma.cc/8VDC-4XRU>] (on the SEC).

263. Adam Bonica, *Codebook for the Database on Ideology, Money in Politics, and Elections (DIME) (Version 2.0)*, HARV. DATAVERSE (Aug. 16, 2016), <http://dataverse.harvard.edu/file.xhtml?fileId=2865308&version=2.2> [<https://perma.cc/Q37V-DZVP>]. Viewing decisions to donate to candidates as expressions of donors' revealed preferences, DIME uses information concerning the dollar amount of each included donation and its recipient to estimate each donor's ideology. See Adam Bonica, *Mapping the Ideological Marketplace*, 58 AM. J. POL. SCI. 367, 367 (2014). These scores are centered at zero with a standard deviation of one; positive (negative) values indicate a conservative (liberal) outlook. *Id.* at 369.

the period when former Hill staffers reached a critical mass at agencies.<sup>264</sup> The mean value is 0.996 for former Hill staffers and 0.909 for other commissioners during this period. Although these values suggest that the ideological views of former congressional staffers may be slightly more extreme than other commissioners, the difference in means is trivial and, importantly, does not approach conventionally accepted levels of statistical significance.<sup>265</sup> Essentially, staffers-turned-commissioners likely are indistinguishable from other commissioners in terms of ideological extremism, at least based on observable metrics.

The finding that staffers-turned commissioners are just as ideologically extreme as other commissioners is unsurprising. Congress, multi-member agencies, and the political class from which members of both Congress and agencies often are drawn have all become increasingly polarized in recent decades.<sup>266</sup> That partisan polarization is multicausal and is occurring across multiple institutions simultaneously makes it difficult to tease out the independent effects, if any, of congressional polarization on agency polarization.<sup>267</sup>

Instead, our claim is that the presence of staffers-turned-commissioners changed the *culture* of independent agencies. Specifically, the increased prevalence of commissioners from Capitol Hill may have an independent effect on the functioning of these agencies, apart from the effect of increased polarization in politics writ large. That claim—like most claims regarding the influence of culture on decision-makers—eludes definitive tests.<sup>268</sup> Yet clues exist.

Consider the SEC. In 2002, reporters on that agency's beat took notice of its dysfunctional climate. According to the *New York Times*, the SEC's decision process that year for selecting a chair for the nascent Public

264. The ten agencies are: the CPSC, FCC, FEC, FERC, FTC, EEOC, NLRB, NRC, NTSB, and SEC.

265. Welch's two-sample *t*-test produces  $t = 0.917$  and  $p$ -value = 0.361.

266. See Feinstein & Hemel, *supra* note 39, at 26 (polarization on multimember agencies with partisan-balance requirements); Morris P. Fiorina, Samuel A. Abrams & Jeremy C. Pope, *Polarization in the American Public: Misconceptions and Misreadings*, 70 J. POL. 556, 557-58 (2008) (polarization among political elites); Christopher Hare & Keith T. Poole, *The Polarization of Contemporary American Politics*, 46 POLITY 411, 415 (2014) (polarization in Congress)

267. See Feinstein & Hemel, *supra* note 39, at 26-27 (discussing potential causes of polarization); *supra* note 264 (citing research on polarization in other institutions).

268. Consider, for instance, Chief Justice John Roberts's vote to uphold the Affordable Care Act. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2016). That vote is in tension with Chief Justice Roberts's reputation as a generally conservative jurist, and is typically explained as an act of institutional loyalty to the Supreme Court. See Fontana & Huq, *supra* note 69, at 63. Chief Justice Roberts and other justices, according to theories on culture and institutional loyalty, are embedded in a social network comprised of legal journalists, appellate practitioners, and academics, and this network influences justices towards institution-affirming behavior. *Id.* Professors Fontana and Huq are adherents of this theory, yet they acknowledge that "it is not possible to say with certainty what motivated Roberts." *Id.*

Company Accounting Oversight Board “dissolved into partisan bickering,” leaving the position vacant and resulting in “squabbling and lack of cooperation spilling over to other commission matters.”<sup>269</sup> These developments “threatened to undermine the credibility of both the [C]ommission and the new accounting board.”<sup>270</sup> The handling of that selection process led to the resignation of SEC Chair Harvey Pitt, who remarked that “[i]n a partisan environment, criticism often devolves into attack,” which is “counterproductive.”<sup>271</sup>

News accounts indicate that the SEC’s pathologies have persisted since then. In 2013, the *New York Times* reported that the SEC “has in recent years splintered into factions far more than ever before.”<sup>272</sup> That article laid the blame squarely on staffers-turned-commissioners, noting that the two newest commissioners were former Hill staffers and quoting former SEC Chair Arthur Levitt’s observation that these commissioners “tend to embrace the philosophy of their mentors.”<sup>273</sup>

Off-the-record conversations with senior officials at the SEC conducted as part of our research support this claim. The consensus view is that the SEC’s culture has changed appreciably in the past few decades because of the rise of the former staffer as commissioner. As one SEC official described, “There are things that we could be doing today—easy wins on policies that reasonable people on both sides would agree to—but we aren’t doing them because commissioners are not here to compromise but are just doing the bidding of their congressional masters.”<sup>274</sup> Another senior official put it this way: “In the past, academics or lawyers were commissioners, and they were used to bargaining and seeing the nuances of both sides. This made deal making possible. Today, things have gotten way too political around here. It is sad to see the lost opportunities.”<sup>275</sup> The view is

269. Floyd Norris, *Help Wanted at the S.E.C.*, N.Y. TIMES (Nov. 13, 2002), <https://www.nytimes.com/2002/11/13/business/help-wanted-at-the-sec-help-needed-for-reforms.html> [https://perma.cc/4TJB-C2ZK]; see also David S. Hilzenrath, *SEC Likely to Split on Accounting Panel Chief*, WASH. POST (Oct. 25, 2002), [https://www.washingtonpost.com/archive/business/2002/10/25/sec-likely-to-split-on-accounting-panel-chief/1215236e-957c-4d17-9d01-951d87ef07fa/?utm\\_term=.1c4be5525707](https://www.washingtonpost.com/archive/business/2002/10/25/sec-likely-to-split-on-accounting-panel-chief/1215236e-957c-4d17-9d01-951d87ef07fa/?utm_term=.1c4be5525707) [https://perma.cc/8BH5-UBLS].

270. Stephen Labaton, *Ex-F.B.I. Chief Seen as Choice for Accounting Post*, N.Y. TIMES (Oct. 25, 2002), <https://www.nytimes.com/2002/10/25/business/ex-fbi-chief-seen-as-choice-for-accounting-post.html> [https://perma.cc/W2BM-8PAE].

271. Patrick McGeehan, *Defiant S.E.C. Chief Exhorts Wall Street and Assails Critics*, N.Y. TIMES (Nov. 9, 2002), <https://www.nytimes.com/2002/11/09/business/defiant-sec-chief-exhorts-wall-street-and-assails-critics.html> [https://perma.cc/L3VW-DXTW].

272. Floyd Norris, *Independent Agencies, Sometimes in Name Only*, N.Y. TIMES (Aug. 8, 2013), <https://www.nytimes.com/2013/08/09/business/independent-agencies-sometimes-in-name-only.html> [https://perma.cc/R8S6-Z678].

273. *Id.*

274. Interview with SEC official (Mar. 27, 2018).

275. *Id.*

shared by officials within the professional ranks of the SEC as well: “Yeah, I’ve seen a change in how things happen [on the policy making floor]. I’d say the pipeline from Capitol Hill has really changed this place for the worse.”<sup>276</sup>

Or consider the NRC. In June 2011, an inspector general report charged that NRC Chair Gregory Jaczko engaged in hardball tactics with his fellow commissioners—for instance, failing to inform them of budgetary changes—in an effort to conceal his endeavors to cease work on the Yucca Mountain, Nevada, nuclear storage facility.<sup>277</sup> One month later, journalists reported that a partisan cleavage developed at the Commission concerning measures to reduce meltdown risks at nuclear reactors.<sup>278</sup> By the fall, other commissioners sent a letter to the White House expressing “grave concerns” with Jaczko’s leadership.<sup>279</sup> The letter averred that Jaczko “intimidated and bullied senior career staff to the degree that he has created a high level of fear and anxiety resulting in a chilled work environment.”<sup>280</sup>

And what was Jaczko’s background? In brief, he was a congressional staffer to Senate Majority Leader Harry Reid (D-NV), who opposed nuclear waste storage in Nevada.<sup>281</sup> Given Jaczko’s biography, his aggressive pursuit of the objectives of his political patron is unsurprising. President Obama reportedly appointed Jaczko to the NRC at Senator Reid’s urging.<sup>282</sup>

In addition to this anecdotal evidence of a more dysfunctional decision-making process at several commissions, a growing partisan split on

276. Telephone interview with SEC official (Dec. 12, 2018).

277. See John M. Broder & Matthew L. Wald, *Report Blasts Management Style of Nuclear Regulatory Commission Chairman*, N.Y. TIMES (June 10, 2011), <https://www.nytimes.com/2011/06/11/science/earth/11nuclear.html?scp=1&sq=jaczko%20inspector%20general&st=cse> [<https://perma.cc/835C-KFUZ>].

278. See Matthew L. Wald, *Split Within Nuclear Regulatory Agency*, N.Y. TIMES (July 20, 2011), <https://www.nytimes.com/2011/07/21/science/earth/21nuke.html> [<https://perma.cc/YE53-BBA7>].

279. Letter from Kristine L. Svinicki, Comm’r, Nuclear Regulatory Comm’n, et al., to William L. Daley, Chief of Staff, White House (Oct. 13, 2011), <http://www.documentcloud.org/documents/272333-daley-letter.html> [<https://perma.cc/4FLU-GF9L>].

280. *Id.*

281. See Broder & Wald, *supra* note 277. Jaczko started his career as a congressional science fellow for then-Representative Ed Markey (D-MA), then moved to a post as appropriations director and science advisor to Senate Majority Leader Harry Reid (D-NV). NRC, *Gregory B. Jaczko, Chairman*, U.S. NUCLEAR REGULATORY COMMISSION, <https://www.nrc.gov/about-nrc/organization/commission/former-commissioners/jaczko.html> [<https://perma.cc/3NRE-C47Y>].

282. See Broder & Wald, *supra* note 277.



votes in several commissions also suggests that commissions may be following Congress's lead regarding partisan polarization.<sup>283</sup> Journalists describe partisan divisions on both high-profile commissions like the FCC (“bitter and partisan”)<sup>284</sup> and on lesser known ones like the CPSC (“deepening a partisan rift”).<sup>285</sup> Indeed, the proportion of FCC decisions that were strictly on party lines has been creeping upwards since the 1990s.<sup>286</sup>

Importantly, partisan votes may not fully capture the extent to which partisan fissures exist on commissions and boards. Voting records for the FCC, for instance, do not reflect that commission's adversarial culture, in part because the FCC Chair can utilize his powers over personnel and budgeting to, as Professor Daniel Ho described, “dominate[] and bull[y] other commissioners into compliance.”<sup>287</sup>

Finally, even when commissioners agree with an outcome, they are increasingly willing to write separately rather than sign onto their colleagues' opinions. Again, the FCC provides an example; the proportion of FCC cases with a concurrence increased from a low of approximately five percent in the mid-1980s to almost forty percent in the mid-2000s.<sup>288</sup> And when FCC commissioners decide not only to vote against the majority but also to issue a dissenting opinion critiquing the majority's reasoning, those dissents tend to take an aggressive tone.<sup>289</sup>

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283. See Gillian E. Metzger, *Agencies, Polarization, and the States*, 115 COLUM. L. REV. 1739, 1762 & n.112 (2015) (collecting citations regarding partisan splits on independent commissions).

284. Stephen Labaton, *F.C.C. Faces a New Set of Challenges After Powell*, N.Y. TIMES (Jan. 24, 2005), <https://www.nytimes.com/2005/01/24/business/media/fcc-faces-a-new-set-of-challenges-after-powell.html> [<https://perma.cc/PN9J-L5MD>].

285. Andrew Martin, *After Long Battle, Safer Cribs*, N.Y. TIMES (July 15, 2011), <https://www.nytimes.com/2011/07/16/business/with-new-safety-rules-for-cribs-makers-scramble-and-retailers-fume.html> [<https://perma.cc/8WXG-Z5CX>].

286. See Keith S. Brown & Adam Candeub, *Independent Agencies and the Unitary Executive Debate: An Empirical Critique*, Mich. St. U. Legal Stud. Res. Paper No. 06-04 (Mar. 4, 2008), available online at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1100125](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1100125) (last accessed Nov. 1, 2020), at \*5. Likewise, while non-unanimous decisions on the FERC are relatively rare, recent years have seen an increase in the number of 3-2 decisions where the split is on party lines. Email from Sharon Jacobs, Associate Professor of Law, Univ. of Colo. Sch. of Law to Brian Feinstein (Aug. 24, 2018) (on file with the authors). The bottom line is that there is great variability in the extent to which these agencies are polarized. See Sharon Jacobs, *Administrative Dissents*, 59 WM. & MARY L. REV., 541, 570-71 (2017); see also *id.* at 561, 567-68 (reporting that consensus norms continue to govern NRC rulemaking decisions).

287. Daniel E. Ho, *Measuring Agency Preferences: Experts, Voting, and the Power of Chairs*, 59 DEPAUL L. REV. 333, 360 (2010).

288. See Ho, *supra* note 41, at 14.

289. See Jacobs, *supra* note 286, at 563.

Once again, examining observable behavior—namely, the frequency with which commissioners write separately—may underestimate the phenomenon.<sup>290</sup> For one, because the chair sets the agenda at many agencies,<sup>291</sup> a strategic chair may block agency consideration of issues on which the chair is in the minority.<sup>292</sup> In this situation, a commission's dissent rate would underestimate the degree to which the commission is fractured, because those issues on which the chair is on the losing side of a divided commission would not come up for a vote. Further, differences in norms regarding the utility of pre-vote bargaining—which may have nothing to do with number of former Hill staffers in the agency—also stymie cross-agency comparisons of dissent rates.<sup>293</sup>

### 3. Improving Rulemaking Capacity

Hill staffers may import not only Congress's culture, but also knowledge of the legislative intent and substance of the statutes that their agencies administer. This expertise—which is certainly different, and in some ways deeper, than the statutory expertise that a private-sector regulatory lawyer would bring—may benefit their agencies in two respects.

First, staffers-turned-commissioners who were involved in drafting a statute that their agency administers may be better equipped to exercise delegated authority. For instance, the Sarbanes-Oxley Act delegated policymaking authority to federal agencies concerning fifty-seven discrete policy areas.<sup>294</sup> The SEC promulgated forty-six rules pursuant to these delegations, including nine rules during the tenure of legislator-turned-SEC chair Christopher Cox.<sup>295</sup> Given Cox's prior involvement in drafting the Act—as a member of Congress, he served on the House Financial Services Committee and on the House-Senate conference committee on the Sarbanes-Oxley Act<sup>296</sup>—Cox presumably was intimately familiar with the

290. See *id.* at 572-73 (noting that while NRC commissioners rarely release separate statements, “allegations of Commission partisanship have been rampant in recent years”).

291. See Marshall J. Breger & Gary J. Edles, *Established by Practice, The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1174, 1177-78 (2000).

292. See Ho, *supra* note 287, at 337-38.

293. *Id.* at 354; accord Breger & Edles, *supra* note 291, at 1246-47 (noting that the EEOC does not permit its commissioners to issue separate opinions).

294. See Pamela J. Clouser McCann, Replication Data File for *The Strategic Use of Congressional Intergovernmental Delegation*, HARV. DATAVERSE (2015), <https://dataverse.harvard.edu/file.xhtml?persistentId=doi:10.7910/DVN/29108/HXYBPG&version=1.0> [<https://perma.cc/BKG6-YW8K>] (data file used to calcite this figure).

295. Figures calculated using ProQuest Regulatory Insight Database. *Regulatory Insight*, PROQUEST, <https://regulatoryinsight.proquest.com/regulatoryinsight/search/basicsearch> [<https://perma.cc/AR4Y-F6DX>].

296. See *Sarbanes-Oxley at Four: Protecting Investors and Strengthening the Markets: Hearing Before the H. Comm. on Fin.*: 109th Cong. (2006) (statement of Christopher Cox, Chairman, U.S. Securities & Exchange Commission), <https://www.sec.gov/news/testimony/2006/ts091906cc.htm> [<https://perma.cc/GU3Z-8R3N>].

scope of activities that the law authorized the SEC to undertake. Thus he could hit the ground running at the SEC.

Second, to the extent that staffers-turned-commissioners have greater knowledge of the legislative history of their agencies' organic statutes based on their time on Capitol Hill, they could use that expertise to construct rules that are more likely to withstand judicial review. We do not presume that staffers-turned-commissioners have greater subject-matter expertise in general and thus are better able to craft rules that survive arbitrary-and-capricious review. There is no reason to suspect, for instance, that a telecommunications law firm partner-turned-FCC Commissioner, or an FCC careerist-turned-FCC Commissioner, would be more or less knowledgeable of telecommunications law than, for example, the chief communications counsel of the House Energy & Commerce Committee would be.

But we do think that the House counsel may possess greater expertise in one key area: the bill-drafting process and grasping legislative intent.<sup>297</sup> That greater expertise may benefit the agency when crafting regulations that later provoke litigation challenging the agency's interpretation of the relevant statute.

Agencies pay careful attention to legislative history and strive to ensure that their regulations adhere to the statute's purpose—or, at least, do not stray far enough such that a court strikes down the regulations.<sup>298</sup> This attention is justified, because under the *Chevron* framework, a court reviewing a regulation first evaluates whether the governing statute is ambiguous and, if so, whether the agency's interpretation of the ambiguous statute is “based on a permissible construction of the statute.”<sup>299</sup> Some commentators observe that the D.C. Circuit has added an intermediate step to *Chevron*: whether the agency recognized that the statute is ambiguous.<sup>300</sup> Others whittle the doctrine down to one step: whether the agency's position is permitted as a matter of statutory interpretation.<sup>301</sup>

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297. SEC Chair Cox's prior experience as a lawmaker during the drafting of Sarbanes-Oxley again is illustrative. Cox “well remember[s] the significant work that preceded the drafting of [Sarbanes-Oxley], including extensive hearings.” *Id.*

298. See Peter L. Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 329 (1990) (“Legislative history has a centrality and importance for agency lawyers that might not readily be conceived by persons who are outside government and are accustomed to considering its relevance only to actual or prospective judicial resolution of discrete disputes.”); Walker, *supra* note 174, at 1398-1400 (describing agencies' use of legislative history in and purposivist approach to statutory interpretation).

299. *Chevron U.S.A. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

300. See Daniel J. Hemel & Aaron L. Nielson, *Chevron Step One-and-a-Half*, 84 U. CHI. L. REV. 757, 757 (2017).

301. See Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597, 599 (2009).

Under any of the views of *Chevron*, agencies that are skilled at statutory interpretation will come out ahead. If an agency correctly recognizes that a statutory provision is ambiguous and demonstrates an awareness of the range of permissible constructions, we should expect that agency to enjoy greater success in statutory interpretation cases than a less adept agency would. Accordingly, staffers-turned-commissioners who drafted legislation while working in Congress presumably will be more successful rule-writers at independent agencies.

#### IV. Implications

The previous section of this Article argued that the placement of former Hill staffers onto commissions provides Congress with an important—albeit indirect and subtle—power over regulatory policy. In this section, we draw out several implications of this assertion and offer suggestions regarding how each of the two political branches ought to respond to the staffers-to-commissioners pipeline.

##### *A. Enculturation as a Source of Congressional Power*

The most fundamental implication of our analysis is that Congress matters in more ways than one might think. Congress's levers of influence over administrative agencies extend beyond its conventional functions of lawmaking, budget, and oversight.

That conclusion should be cause for at least partial reconsideration of the conventional notion that Congress is a moribund body. Growing concerns that Congress is no longer a player in policymaking have generated a slew of reform proposals.<sup>302</sup> Recognizing the severity of this supposed institutional lassitude, the House voted overwhelmingly in January 2019 to establish a Select Committee on the Modernization of Congress to address, *inter alia*, staff retention problems and bill-scheduling procedures that promote gridlock.<sup>303</sup> These discussions understandably focus on how Congress's perceived pathologies affect that institution.

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302. See, e.g., Michelle Cottle, *Mike Lee's New Crusade*, ATLANTIC (Feb. 21, 2016), <https://www.theatlantic.com/politics/archive/2016/02/mike-lee-article-one-project/462564> [<https://perma.cc/HA23-TJ9G>]; Lee Drutman, *To Fix Congress, Make It Bigger. Much Bigger*, WASH. MONTHLY (Nov./Dec. 2018), <https://washingtonmonthly.com/magazine/november-december-2018/to-fix-congress-make-it-bigger-much-bigger> [<https://perma.cc/J7YA-8MQS>]; Thomas Spulak & George Crawford, *How to Fix Congress in One Step*, POLITICO (Sept. 19, 2018), <https://www.politico.com/agenda/story/2018/09/19/house-rules-committee-congress-000699> [<https://perma.cc/6KN3-DDJY>].

303. H. R. Res. 6, 116th Cong. § 201 (2019) (enacted); see also *Final Vote Results for Roll Call 12*, U.S. HOUSE OF REPRESENTATIVES (Jan. 4, 2019), <http://clerk.house.gov/evs/2019/roll012.xml> [<https://perma.cc/SNP4-B3MP>] (reporting the floor vote).

But with the growing placement of former congressional personnel into high-level positions in the administrative state, the legislative branch's operations and culture may influence the functioning of institutions far from Capitol Hill in ways that members of Congress may not have anticipated. Like Johnny Appleseeds, staffers-turned-commissioners bring Congress's ways with them into the administrative state.

If lawmakers desire to amplify their role in administration even further, it would behoove them to pay closer attention to the organizational cultures of potential appointees' past professional homes to a similar extent as lawmakers examine other aspects of their résumés. For instance, a communications lawyer who has served as legislative counsel earlier in her career may bring with her a different cultural outlook to the FCC than an otherwise identical lawyer possessing the same credentials and political views, but-for her lack of congressional experience. This difference, in turn, could have consequences not only for the functioning of the FCC, but also for Congress's ability to indirectly influence that commission.

While the idea that early-career enculturation will affect individuals' later behavior is not novel, dating back at least to Plato,<sup>304</sup> this insight deserves greater attention from those seeking to alter the relative influence of the political branches in administration.

### *B. White House Countermeasures?*

Our last point is more controversial, but nonetheless follows directly from the evidence and argument presented above. Under current law and practice, independent commissions are, as their name implies, largely free from ongoing, operational White House control. While the Supreme Court has held that independent commissions are part of the executive branch,<sup>305</sup> and presidents of both parties have feinted in the direction of executive-branch supervision,<sup>306</sup> the President's ability to control independent com-

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304. See PLATO, *Laws XII*, in THE COLLECTED DIALOGUES OF PLATO 1495 (Edith Hamilton & Huntington Cairns, eds., 1969) (advising that foreign travel be restricted to those over age forty because immersion in foreign cultures by younger people can cause social disorder at home).

305. See, e.g., *Free Enter. Fund v. PCAOB*, 561 U.S. 477 (2010).

306. See Exec. Order No. 13,579, § 1, 3 C.F.R. §§ 256, 257 (2012) (encouraging independent agencies to engage in cost-benefit analysis); Exec. Order No. 12,866, 3 C.F.R. § 638 (1994) (requiring independent agencies to prepare a Regulatory Plan and contribute to the Unified Regulatory Agenda); Bridget C.E. Dooling, *OIRA Sends a Smoke Signal on Independent Agencies*, 36 YALE J. ON REG.: NOTICE & COMMENT (Aug. 23, 2018), <http://yalejreg.com/nc/oira-sends-a-smoke-signal-on-independent-agencies> [<https://perma.cc/82W3-QZ6V>] (interpreting language in President Trump's Executive Order 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017), as "sending signals" regarding the Administration's designs on independent agencies).

missions is limited. For instance, these commissions are not generally subject to White House supervision by the Office of Management and Budget (OMB). Most significantly, unlike executive departments they are not required to assess the economic costs and benefits of important regulations and submit their analyses to OMB's Office of Information and Regulatory Affairs (OIRA) for review.<sup>307</sup>

There are many in the academy, government, and the bar who believe this degree of autonomy should be curtailed. Former OIRA Director and current D.C. Circuit Judge Neomi Rao expanded OIRA review of Internal Revenue Service regulations and "strongly hinted that independent regulatory agencies might be next."<sup>308</sup> Judge Rao argued that OIRA oversight promoted better regulatory practices across "all agencies that regulate the public."<sup>309</sup> President Obama also asked independent agencies to engage in retrospective cost-benefit analysis of existing rules,<sup>310</sup> thereby encouraging them to adhere to similar principles as those that OIRA applies to executive agencies.<sup>311</sup>

The notion that independent agencies ought to be subject to some form of White House review has the endorsement of the ABA's Section of Administrative Law and Regulatory Practice. The Section's 2016 report to the President-elect of the United States "strongly urge[d] [the President-elect] to bring the independent regulatory commissions within the requirements for cost-benefit analysis, OMB review, and retrospective review of rules currently reflected in Executive Order 12,866 and Executive Order 13,563."<sup>312</sup>

Our Article strengthens the case for executive-branch oversight. The rise of Hill staffers as commissioners undermines the claim that independent commissions are run by politically neutral technocrats. Indeed, these commissioners are increasingly political actors and thus should be subject to political controls. After all, in the strong form of our argument, Congress projects its power into commissions through the presence of staffers-turned-commissioners. It follows straightforwardly that the White House should be able to oversee this attempt to influence the administration of law.

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307. Exec. Order No. 12,291, 3 C.F.R. § 127 (1982).

308. See *Will OIRA Extend its Review to Independent Agencies*, FEDERALIST SOC'Y (Apr. 26, 2018), <https://fedsoc.org/commentary/blog-posts/greater-executive-agency-transparency-and-accountability-through-oira> [<https://perma.cc/TH4B-TGAY>].

309. *Id.*

310. See Exec. Order No. 13,579, § 1, 3 C.F.R. §§ 256, 257 (2012).

311. See Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1839 n.3 (2013).

312. See Am. Bar Ass'n, Section of Admin. Law and Regulatory Practice, *Improve the Administrative Process: A Report to the President-Elect of the United States*, AM. BAR ASS'N (2016), [http://www.americanbar.org/content/dam/aba/administrative/administrative\\_law/Final%20POTUS%20Report%2010-26-16.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/administrative_law/Final%20POTUS%20Report%2010-26-16.authcheckdam.pdf) [<https://perma.cc/8ENW-FKN8>].

One potential White House response would be to emphasize a “presidential aide-to-commissioner” pathway that would crowd out the staffers-turned-commissioners one. We counsel against that sort of tit-for-tat approach, based on the concern that it would do little beyond provoking another round of one-upmanship.

Instead, a President who endeavors to provide a counterweight to the power that Congress projects through staffers-turned-commissioners should consider subjecting independent agencies to cost-benefit analysis through OIRA review. That approach facilitates presidential control over agencies, delivering the highest-impact proposed rules from all corners of the administrative state to the White House door.<sup>313</sup> Further, OIRA review arguably improves the quality of regulatory policy, encouraging economically efficient rules,<sup>314</sup> checking cognitive biases facing agency personnel,<sup>315</sup> and serving as a central node to facilitate information aggregation and interagency coordination.<sup>316</sup>

On the other side, OIRA’s critics decry its relative lack of expertise in the substantive subjects that agencies address<sup>317</sup> and claim that its judgments are often ad hoc and politicized,<sup>318</sup> among other infirmities.<sup>319</sup> Although we do not take a position on whether OIRA review is good for society on net, we do assert that it is undoubtedly an effective mechanism for a President endeavoring to check Congress.<sup>320</sup>

## Conclusion

This Article documents a sea change in the composition of independent regulatory commissions. Compared to a generation ago, commissioners are now more than four times more likely to be former congressional staffers. This development is not a fluke. Rather, it represents a fundamental shift in the allocation of power among the branches of government.

We have advanced a theory explaining this phenomenon, noting that it occurred around the same time as Congress’s influence over policy via

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313. See Michael A. Livermore, *Cost-Benefit Analysis and Agency Independence*, 81 U. CHI. L. REV. 609, 616 (2014).

314. See Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1080-82 (1986).

315. See Cass R. Sunstein, *Cognition and Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1059, 1072-73 (2000).

316. See *id.* at 1868.

317. See Lisa Heinzerling, *Statutory Interpretation in the Era of OIRA*, 33 FORDHAM URB. L.J. 1097, 1116 (2006).

318. See Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 832 (2003).

319. See FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (2004).

320. See Susan Rose-Ackerman, *Putting Cost-Benefit Analysis in Its Place: Rethinking Regulatory Review*, 65 U. MIAMI L. REV. 335, 339-40 (2011).

its other powers has eroded, and as the attractiveness of serving as a commissioner has increased for congressional staffers relative to other potential appointees. Placing loyal congressional aides onto independent commissions presents an alternative pathway through which legislators can influence public policy, which is increasingly delivered through the administrative state.

Our story is not merely that as the executive branch asserted its influence in one way, the legislative branch responded by trying to counter it in another way. Instead, the Congress-to-commission pathway likely changes the way in which the administrative state operates. To the extent that former staffers take the culture of, and their connections to, Capitol Hill with them to their new jobs, then some of Congress's pathologies may inhibit agency functioning. On the other hand, linking commissions with the legislative branch may increase democratic accountability, provide meaningful oversight, and improve commissions' understanding of congressional objectives.

Although the net advantages and disadvantages of this development for particular agencies or at particular times is uncertain, on balance, the rise of Hill staffers as commissioners strengthens the case for greater executive branch control over these agencies. Our data lay bare the reality that many of the heads of independent agencies are political actors, not neutral technocrats, calling into question the primary impediment to subjecting these agencies to executive branch oversight.