

**THE PRESIDENCY AND THE BUREAUCRACY: THE LEVERS OF PRESIDENTIAL CONTROL**

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*“Chief executive” is not a presidential title that appears in the Constitution. Indeed, the constitutional separation of powers grants considerable authority over the executive branch, or bureaucracy, to Congress as well as to the president. Nonetheless, modern presidents work hard to maximize their control of the bureaucracy and to shift the balance of political power in their own favor. David E. Lewis and Terry M. Moe explain why presidents seek to make themselves “chief executives”; and, after reviewing the constitutional and historical aspects of the relationship between the presidency and the bureaucracy, they offer case studies in the areas of personnel, budgets, and regulatory review to illuminate how presidents do it—and why they usually succeed.*

On January 3, 2013 President Barack Obama signed the 2013 National Defense Authorization Act into law. The law was 680 pages long and among its many titles were provisions that purported to limit the president’s ability to transfer detainees out of military prisons in Guantanamo Bay and Afghanistan. Notably, accompanying the President’s signature was a 10 paragraph “signing statement.”<sup>1</sup> The document included language applauding passage of the law but also expressing dissatisfaction with many provisions, including those relating to detainees. The president’ statement read, “Even though I support the vast majority of the provisions contained in this Act, which is comprised of hundreds of sections spanning more than

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<sup>1</sup> Barack Obama, “Statement by the President on H.R. 4310,” January 3, 2013.

680 pages of text, I do not agree with them all.” In some cases the document declared the president’s controversial interpretation of provisions of the law or his explicit intention not comply with parts of the law he was signing. With regard to the purported limits on his ability to transfer detainees, the statement read, “In the event that these statutory restrictions operate in a manner that violates constitutional separation of powers principles, my Administration will implement them in a manner that avoids the constitutional conflict.” In other words, the president would only comply with these provisions only if *he* felt doing so would not interfere with his constitutional authority.

What makes President Obama’s use of this tool so surprising is that Obama criticized them when he was a candidate for the presidency in 2007 and 2008.<sup>2</sup> In 2007 Obama told the *Boston Globe* it was a “problem” that President Bush “has attached signing statements to legislation in an effort to change the meaning of the legislation, to avoid enforcing certain provisions of the legislation that the President does not like, and to raise implausible or dubious constitutional objections to the legislation.”<sup>3</sup> Yet, during his first term President Obama attached signing statements to at least 20 different pieces of legislation, challenging multiple provisions in each law.

What is President Obama trying to do? Just what President Bush was trying to do. By telling the bureaucratic agencies charged to implement the new law what he considered its language to mean, and thus how he expected it to be carried out, Obama was attempting to exercise control over the bureaucracy—and in so doing, to shape the content and outcomes of

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<sup>2</sup> Laura Meckler, “Obama Shifts View of Executive Power,” *Wall Street Journal*, March 30, 2012 (<http://online.wsj.com/article/SB10001424052702303812904577292273665694712.html>, accessed January 27, 2013).

<sup>3</sup> Devin Dwyer, “President Obama Issues ‘Signing Statement’ Indicating He Won’t Abide by Provision in the Budget Bill,” *ABC News*, April 15, 2011 (<http://abcnews.go.com/blogs/politics/2011/04/president-obama-issues-signing-statement-indicating-he-wont-abide-by-provision-in-budget-bill/>, accessed January 27, 2013).

public policy. Writ large, this is what all modern presidents do. Sometimes they use signing statements, but far more often they rely upon other levers of presidential power, such as appointments, budgets, and regulatory review, that are better known. Whatever the mechanisms, all presidents routinely and systematically take actions throughout their terms of office that are designed to bring the bureaucracy more fully under their control. Indeed, they have little choice but to do so. Almost all important policies are carried out by public agencies of one kind or another—and precisely because this is unavoidably true, the bureaucracy makes up virtually the entire corpus of government. Any president who hopes to be a strong leader and put his stamp on the nation’s public policy must control the bureaucracy. Or at least gain as much control as possible.

Throughout our nation’s history, presidents have made a good deal of progress on this front. During the nineteenth century, there was very little bureaucracy because the departments and agencies of the executive branch were few in number and small in size and scope. Presidents tended to be weak and Congress strong. But as the federal government began actively addressing the burgeoning problems of industrial society during the early decades of the twentieth century, particularly during the New Deal of the 1930s, American bureaucracy grew enormously. And as the bureaucracy grew, so did the presidency, which evolved into a complex institution whose specialized components—the Office of Management and Budget (OMB), the National Security Council, the White House domestic policy staff, the White House appointments unit, and many others—are devoted largely to providing the president with the capacity to impose centralized control on the bureaucracy.<sup>4</sup> These developments are among the defining features of modern American government: a government that is bureaucratic and presidentially led.

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<sup>4</sup> Terry M. Moe, “The Politicized Presidency,” in *The New Direction in American Politics*, ed. John E. Chubb and Paul E. Peterson (Washington, D.C.: Brookings Institution, 1985); and John P. Burke, *The Institutional Presidency* (Baltimore: Johns Hopkins University Press, 1992).

Yet presidential control is far from complete. Precisely because bureaucracy is so central to public policy, Congress cares about the bureaucracy too. Indeed, this is putting it mildly. Congress knows that, unless it can shape the substance of bureaucratic action, the laws its legislators write and the benefits they attempt to bring home to constituents and powerful interest groups are worth little more than the paper on which they are written. Congress has formidable weapons to employ, moreover, in bringing its preferences to bear: it authorizes bureaucratic agencies' programs, supplies the money for agencies to operate, and oversees their behavior.

The stage is set, then, for an ongoing struggle between the president and Congress over which branch controls the bureaucracy—a struggle that is guaranteed, even encouraged, by a Constitution that puts no single branch in charge, and indeed barely deals with the bureaucracy at all. Any effort to understand presidential leadership must understand the nature of this perpetual battle over the bureaucracy, how presidents have responded to it, and how well they have done—and can be expected to do—in gaining the upper hand.

The challenge facing presidents is a daunting one. But despite the obstacles that the American system of checks and balances purposely puts in their way, and despite the awesome powers of a turf-conscious Congress, presidents have inherent advantages in the struggle to control the federal bureaucracy—advantages that have allowed them, slowly but surely, to outmuscle Congress (much of the time) and play the predominant role in harnessing the bureaucracy toward their own ends. We are not saying that presidents reign supreme. We are saying instead that, although the separation of powers is naturally brutal to presidents, they have made it less so through strategic and aggressive action.

In the first part of the chapter, we show that a distinctive logic governs this struggle for control. Along the way, we explain how decisions about the bureaucracy are made in the

political process, the relative roles that the president and Congress play, and the forces that give rise to key presidential advantages. In the second part, we detail how presidents have used their inherent advantages through various levers of power. Specifically, they have increased their strategic use of presidential appointees across the government, they have extended their control over the federal budget, and they have centralized the review of agency rulemaking in their own hands. Through these actions they have gained more control over the nation's bureaucracy, and over its policies and governance, than the constitutional fragmentation of power would otherwise provide.

### **The President, the Congress, and the Dynamics of Control**

To understand the dynamics of control, we need to start at the beginning with how the bureaucracy is organized. Although this topic may seem sterile and far removed from politics, it is anything but. Organization matters. Everyone in the political process knows that the specifics of agency organization—mandates, structures, personnel systems, locations in the hierarchy of government, and more—have profound consequences for how policies are interpreted and carried out, as well as for which politicians and groups are in a position to exercise control. Because decisions about organization are matters of strategy and struggle, they are intensely political.<sup>5</sup>

Within Congress, the legislative designers of public agencies tend to view the bureaucracy in parochial terms. As individual actors in a fragmented system, legislators and interest groups are not held responsible for the performance of the bureaucracy as a whole, as presidents are. They have little concern for broad issues of management, efficiency, and

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<sup>5</sup> For a more fully developed discussion of the logic and substance of the issues we cover in this section, see Terry M. Moe, "The Politics of Bureaucratic Structure," in *Can the Government Govern?* ed. John E. Chubb and Paul E. Peterson (Washington, D.C.: Brookings Institution, 1989); and David E. Lewis, *Presidents and the Politics of Agency Design* (Stanford: Stanford University Press, 2003).

coordination, as presidents do. Interest groups have their eyes on their own interests and not much else. Legislators have their eyes on their own electoral fortunes, and thus on the special (often local) interests that can bring them security and popularity in office. For both interest groups and legislators, politics is not about the system. It is about the pieces of the system, and about ensuring the flow of benefits to constituents and special interests. As we see in the following sections, political parties modify these tendencies somewhat. But the tendencies remain fundamental.

What are the implications for how the bureaucracy gets organized? In any particular case, of course, a winning legislative coalition wants an agency that will carry out its favored policies effectively. But this is not simply a matter of designing organizations to be effective. For what an agency actually does will depend on who controls it and what they want it to do. If control of the agency falls into the “wrong” hands, the most effective organization in the world will not help. The key challenge a legislative coalition faces is to ensure its own control, and to insulate against the control of others.

The way to accomplish such control most directly is to specify the agency’s organization in great detail by establishing decision procedures, standards, timetables, personnel rules, and other structural features. A strategically designed compendium of such rules serves to tell the agency precisely what to do and how to do it. In this way, the legislative coalition that passes the law is able to exercise control *ex ante*, embedding its interests in formal restrictions that, by giving the “right” direction to agency behavior, also insulate it from future influence by opponents. The benefits of insulation do not come cheap, because restrictive rules can easily undermine the agency’s effectiveness by denying it the discretion it needs to do a “good” job. But in a world of political uncertainty, where enemies abound, this is a price worth paying if the

agency is to be protected.

Presidents are prime targets of this strategy, even when legislative coalitions regard the current incumbent as friendly. The reason is that all presidents, for institutional reasons, use their power in ways that are threatening to legislators and groups. As national leaders with a broad, heterogeneous constituency, presidents think in grander terms than members of Congress about social problems and the public interest, and they tend to resist specialized appeals. Moreover, because presidents are held uniquely responsible by the public for virtually every aspect of national performance, and because their leadership turns on effective governance, they have strong incentives to seek centralized control of the bureaucracy, both for themselves and for their policy agendas.

Legislative coalitions often have reason, then, to try to insulate agencies from presidential influence. All the formal restrictions mentioned here help to do that: by specifying the features of agencies' organization—and thus the rules that ultimately guide their behavior—in excruciating detail, they help to insulate agencies from external control, including presidential control. Other restrictions are aimed directly at presidents themselves. The independent commission, for example, is a popular structural form that restricts presidents' appointment and removal powers, as well as their budgetary and managerial reach. Similarly, legislation is sometimes crafted to limit the number of presidential appointees in an agency, and to use civil service hiring procedures and professional credential requirements as protections against presidential control.

So although presidents are nominally in charge of the entire executive branch, the American political system makes it very difficult for them to exercise genuine control. This is a built-in problem, ultimately traceable to the constitutional separation of powers and its far-reaching consequences for politics. The bureaucracy is a product of this politics. It is heavily

influenced by the fragmented, decentralized forces that animate congressional decision making, and it is slowly pieced together over time—agency by agency, program by program, unit by unit, procedure by procedure—with little overarching concern for the whole, and with conscious, strategic effort to insulate its components from possible opponents. The bureaucracy is not designed to be centrally controlled by presidents, or by anyone else. Yet controlling it is essential to presidential leadership.

What can presidents do?

### **Presidential Discretion and Unilateral Power**

There is actually quite a lot that presidents can do to control the bureaucracy. In the fractious, often chaotic politics that separation of powers tends to generate, presidents enjoy important advantages over Congress in the ongoing struggle for control. Over time, these advantages have allowed presidents to move the structure of the bureaucratic system, however haltingly and episodically, along a presidential trajectory—shifting the balance of power in their favor, and giving them greater (if still very imperfect) control.

Presidents are greatly advantaged by their position as chief executive, which gives them many opportunities to make unilateral decisions about structure and policy. If they want to develop their own institutional capacity (by beefing up the apparatus of the institutional presidency), review or revise agency decisions, coordinate agency actions, make changes in agency leadership, or otherwise impose their views on the bureaucracy, they can simply act—claiming the legal right to do so—and leave it to Congress and the courts to react. For reasons discussed later, Congress often finds this difficult or impossible to do, and the president wins by default. The ability to win by default is a cornerstone of the presidential advantage.



Why do presidents have powers of unilateral action?<sup>6</sup> Part of the answer is constitutional. The Constitution, rather than spelling out their authority as chief executive in detail through specific enumerated powers—a strategy favored by those among the Framers who were most concerned with limiting the executive—is largely silent on the nature and extent of presidential authority, especially in domestic affairs. It broadly endows presidents with the “executive power” and charges them to “faithfully execute the laws,” but says little else. This very ambiguity, as Richard Pious notes, “provided the opportunity for the exercise of a residuum of unenumerated power.”<sup>7</sup> The proponents of a strong executive at the Constitutional Convention were well aware of that.

The question of what the president’s formal powers really are, or ought to be, will always be controversial among legal scholars. But two things seem reasonably clear. One is that if presidents are to perform their duties effectively, they must be (and in practice are) regarded as having certain legal prerogatives that allow them to do what executives do: manage, coordinate, staff, collect information, plan, reconcile conflicting values, and so on. This is what it means, in practice, to have the executive power.<sup>8</sup> The other is that, although the content of these prerogative powers is often unclear, presidents have been aggressive in pushing an expansive interpretation: rushing to claim the gray areas of the law, asserting their rights of control, and exercising them—whether or not other actors, particularly in Congress, happen to agree.<sup>9</sup> Many of the same arguments can be made for the president’s role as commander in chief, but the

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<sup>6</sup> For a detailed review, see Terry M. Moe and William G. Howell, “A Theory of Unilateral Action,” *Presidential Studies Quarterly* 29(4): 850–871; and William G. Howell, *Power without Persuasion: the Politics of Direct Presidential Action* (Princeton: Princeton University Press, 2003).

<sup>7</sup> Richard Pious, *The American Presidency* (New York: Basic Books, 1979), 38.

<sup>8</sup> Harold H. Bruff, “Presidential Power and Administrative Rulemaking,” *Yale Law Journal* 88 (1979): 451–508; Bruff, “Presidential Management of Agency Rulemaking,” *George Washington Law Review* 57 (1989): 533–595; Lloyd N. Cutler, “The Case for Presidential Intervention in Regulatory Rulemaking by the Executive Branch,” *Tulane Law Review* 56 (1982): 830–848; and Peter Strauss, “The Place of Agencies in Government: Separation of Powers and the Fourth Branch,” *Columbia Law Review* 84 (1984): 573–669.

<sup>9</sup> Pious, *American Presidency*.

presidential advantages are stronger and more obvious when it comes to war and foreign policy—so we continue to highlight the grounds for unilateral presidential action in the domestic realm, and in governance generally.<sup>10</sup>

The courts, which have the authority to resolve ambiguities about the president's proper constitutional role, generally have not chosen to do so. Certain contours of presidential power have been clarified by major court decisions—on the removal power, for instance, and executive privilege—and justices have sometimes offered their views on the president's implied or inherent powers as chief executive. But the political and historical reality is that presidents have largely defined their own constitutional role by pushing out the boundaries of their prerogatives.<sup>11</sup>

Congress can do nothing to eliminate presidents' executive power. Presidents are not Congress's agents. They have their own constitutional role to play and their own constitutional powers to exercise, powers that are not delegated to them by Congress and thus cannot be taken away. Any notion that Congress makes the laws and that the president's job is simply to execute them—to follow orders, in effect—overlooks what separation of powers is all about: presidents have authority in their own right, coequal to Congress and not subordinate to it.

Precisely because presidents are chief executives, however, what they can and cannot do is also shaped by the goals and requirements of the laws they are charged to execute. And Congress has the right to be as specific as it wants in writing these laws, as well as in designing the agencies that administer them. If Congress likes, it can specify policy and structure in enough detail to narrow agency discretion considerably, and with it the scope of presidential control. It

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<sup>10</sup> See, for example, Andrew Rudalevige, *The New Imperial Presidency* (Ann Arbor: University of Michigan Press, 2006); and Gordon Silverstein, *Imbalance of Powers: Constitutional Interpretation and the Making of American Foreign Policy* (New York: Oxford University Press, 1997).

<sup>11</sup> On how the courts have approached presidential power, and particularly presidential powers of unilateral action, see, for example, Joel L. Fleishman and Arthur H. Aufses, "Law and Orders: The Problem of Presidential Legislation," *Law and Contemporary Problems* 40(3): 1–45; Thomas Cronin and Michael Genovese, *The Paradoxes of the American Presidency* (New York: Oxford University Press, 1998); and Silverstein, *Imbalance of Powers*.

can also impose requirements that explicitly qualify and limit how presidents may use their prerogative powers—as it has done, for example, in protecting members of independent commissions from removal and in mandating civil service protections.<sup>12</sup>

Yet these sorts of restrictions ultimately cannot contain presidential power. To begin with, presidents are powerful players in the legislative process, and because discretion is the foundation of their power and ultimate success in controlling the bureaucracy, they will fight for statutes that give them as much discretion as possible, and they can veto those that don't. All legislation, as a result, is inevitably shaped to some degree by the presidential drive to increase administrative discretion.<sup>13</sup> In addition, legislators have their own incentive to craft bills that delegate considerable discretion to agencies and presidents in order to pursue their own goals. Legislators' main concern, politics aside, is for the effective provision of benefits to their constituents. For problems of even moderate complexity, especially in an ever-changing and increasingly interdependent and complicated world, this requires putting most aspects of policy and organization in the hands of agency professionals and allowing them to use their expert judgment to flesh out the details. It requires, in other words, the delegation of discretion. And once this is done—as it regularly is, year in and year out—presidents and agencies do the actual governing, not Congress.

Thus, although legislators and groups may try to protect their agencies by burying them in rules and regulations, a good deal of agency discretion will remain, and presidents cannot readily be prevented from turning it to their own advantage. They are centrally and supremely positioned in the executive, they have great flexibility to act, they have a vast array of powers

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<sup>12</sup> Louis Fisher, *The Politics of Shared Power* (Washington, D.C.: CQ Press, 1993); and Strauss, "The Place of Agencies in Government."

<sup>13</sup> Craig Volden, "A Formal Model of the Politics of Delegation in a Separation of Powers System," *American Journal of Political Science* 46(2002): 111–133.

and mechanisms at their disposal, they have informal means of persuasion and influence—and they, not Congress, are the ones who are ultimately responsible for day-to-day governance. Even when Congress directly limits a presidential prerogative, such as the removal power, presidents have the flexibility simply to shift to other avenues of discretionary action.

In part, Congress's problem is analogous to the classic problem a board of directors faces in trying to control management in a private firm.<sup>14</sup> The board, representing owners, tries to impose rules and procedures to ensure that management will behave in the owners' best interests. But managers have their own interests at heart, and their expertise and day-to-day control of operations allow them to strike out on their own. Congress faces the same problem with presidents. However much it tries to structure things, presidents can use their own institution's—and through it, the bureaucracy's—informational and operational advantages to promote the presidential agenda.

Yet Congress's situation is even worse than the corporate analogy would suggest. In business settings, the owners may well have control problems, but they also have supreme authority over their managers, whom they have the right to hire and fire—and thus they have major levers for gaining the upper hand. In American politics, Congress has no such authority. Its executive officers—presidents—have all the resources for noncompliance that corporate managers do, and in addition they are not Congress's agents in the scheme of government. Presidents have formal authority in their own right. Congress does not hire them, it cannot fire them short of impeachment, and it cannot structure their powers and incentives in any way it might like. Yet Congress is forced to entrust them with the execution of the laws. From a control standpoint, this is your basic nightmare.

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<sup>14</sup> Eugene Fama and Michael Jensen, "Separation of Ownership and Control," *Journal of Law and Economics* 26 (1983): 301–325.

It is also important to recognize that, although Congress can try to limit presidential prerogatives by enacting statutes, presidents are greatly empowered through statutory law whether Congress intends it or not. Some legislative grants of power to the presidency are explicit, such as the negotiation of tariffs and the oversight of mergers in the foreign trade field. But the most far-reaching additions to presidential power are implicit. When new statutes are passed, almost regardless of what they are, they increase presidents' total responsibilities and give them a formal basis for extending their authoritative reach into new realms. At the same time, the new statutes add to the total discretion available for presidential control, as well as to the resources contained within the executive.

It may seem that the proliferation of statutes would tie presidents in knots as they pursue the execution of each one. But the opposite is true: the aggregate effect of all these statutes on presidents is liberating and empowering. Presidents, as chief executives, are responsible for *all* the laws—and, inevitably, those laws turn out to be interdependent and conflicting in ways that the individual statutes themselves do not recognize. As would be true of any executive, the president's proper role is to rise above a myopic focus on each statute in isolation, to coordinate policies by taking account of their interdependence, and to resolve statutory conflicts by balancing their competing requirements. All of this affords presidents substantial discretion, which they can use to impose their own priorities on government.<sup>15</sup>

### **Congress's Collective Action Problems**

Another major source of presidential advantage deserves equal emphasis. Presidents are unitary actors who sit alone atop their own institution, the Executive Office of the President.

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<sup>15</sup> Pious, *American Presidency*; Bruff, "Presidential Power and Administrative Rulemaking"; Bruff, "Presidential Management of Agency Rulemaking"; Strauss, "The Place of Agencies in Government"; and Cutler, "The Case for Presidential Intervention in Regulatory Rulemaking by the Executive Branch."

Within that institution, what they say goes. In contrast, Congress is a collective body that can make decisions only through the laborious aggregation of member preferences. As such, it suffers from serious collective action problems that presidents not only avoid, but can exploit.

This crucial fact of political life is too often overlooked. Scholars and journalists tend to reify Congress, treating it as an institutional actor like the president and analyzing their interbranch conflicts accordingly. The president and Congress are portrayed as fighting it out, head to head, over matters of institutional power and prerogative. Each is seen as defending and promoting its own institutional interests. The president wants power, Congress wants power, and they struggle for advantage.

This portrayal misconstrues things. Congress is made up of hundreds of members, each a political entrepreneur, each dedicated to reelection, each serving a district or state. Although they have a common stake in upholding the institutional power of Congress, this is a collective good, not an individual one, and as such can only weakly motivate their behavior.<sup>16</sup> Members of Congress are trapped in a classic prisoner's dilemma: all of them might benefit if they could cooperate in defending or advancing Congress's power, but each has a strong incentive to free ride if supporting the collective good is politically costly to them as individuals. Just as most citizens, absent taxation, would not voluntarily pay for their share of the national defense, so most legislators will not flout the interests of their constituents or key interest groups if that is the price of protecting congressional power. If a legislator is offered a dam or a veterans' hospital or a new highway in exchange for supporting a bill that, among other things, happens to reduce Congress's power relative to the president's, there is little mystery as to where the stronger incentives would lie.

The internal organization of Congress, especially its party leadership, imposes a

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<sup>16</sup> Mancur Olson, *The Logic of Collective Action*, 2nd ed. (Cambridge: Harvard University Press, 1971).

modicum of order and gives it a certain capacity to guard its power.<sup>17</sup> Indeed, in recent decades, with the parties ever more ideologically polarized and party-line votes increasingly common, it may appear that party leaders have been strong enough to stifle the fractious inclinations of their members, coordinate and direct behavior, and get Congress to defend itself by acting coherently as an institution. But there is less institutional strength here than meets the eye.

What has happened in recent decades, more fundamentally, is that the constituencies within each party have become more homogeneous, mainly because the conservative South has become more Republican and the liberal Northeast has become more Democratic. Party leaders—who are elected by their members and highly sensitive to their needs—have been better able to mobilize them to vote together because there are many more issues on which they already agree. Not so, however, when they don't agree. Constituency is still in the driver's seat, and much of what looks like the power of leaders is really a reflection of shared constituency concerns and ideology. Leaders have no license to force members to do what they don't want to do, or don't really care about—such as taking costly action to protect Congress's institutional power relative to the president's—in the face of competing inducements to behave otherwise.<sup>18</sup>

The party that doesn't occupy the presidency, of course, does have an electoral reason—although it is not directly related to protecting Congress as an institution—for challenging the president on some occasions. If its members can make him look bad, and if they are able to tarnish his party's label, then they are more likely to win the next election. In addition to the forces of constituency, then—which can easily be centrifugal, and thus can be played upon by

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<sup>17</sup> Gary Cox and Mathew McCubbins, *Legislative Leviathan* (Berkeley: University of California Press, 1993). See also Gary Cox and Mathew McCubbins, *Setting the Agenda* (New York: Cambridge University Press, 2005).

<sup>18</sup> On the relative roles of constituency and party, see, for example, David W. Rohde, *Parties and Leaders in the Postreform House* (Chicago: University of Chicago Press, 1991); J. H. Aldrich, "Political Parties In and Out of Legislatures," in *The Oxford Handbook of Political Institutions*, ed. R. A. W. Rhodes, Sarah A. Binder, and Bert A. Rockman (New York: Oxford University Press, 2006); and Keith Krehbiel, "Where's the Party?" *British Journal of Political Science* 23 (2): 235–266.

presidents—legislators have a “shared electoral fate” that shapes at least part of their political calculus and may induce them to stand up to the president when he tries to enhance his power. There is a flip side to this phenomenon, however, that works in the opposite direction and undercuts its efficacy: legislators in the president’s own party have a shared electoral fate in seeing that he wins—and they have an incentive to undermine any effort by Congress to strike back at him or foil his plans. This is just another example of how complex the congressional decision process is, and how many collective action problems stand in the way of strong, coherent legislative action.

Presidents are not hobbled by collective action problems. Supreme within their own institution, they can simply make authoritative decisions about what to do—and then do it. On occasion, their interests as individuals may conflict with those of the presidency as an institution. The short-term pressures on them to enhance the loyalty of an agency like OMB, for example, could cause them to overly politicize it, and this could undercut the institutional presidency’s long-term capacity for expertise and competence.<sup>19</sup> But most of the time, presidents’ personal drive for leadership almost always motivates them to do things that actively promote and nurture the power of their institution—because it is through their institutional power that they are able to get things done, and to succeed. Thus not only is the presidency a unitary institution, but there is also substantial congruence between the president’s individual interests and the interests of the institution.

In sum, presidents have both the will and the capacity to promote the power of their own institution, but individual legislators have neither and cannot be expected to promote the power of Congress in a coherent and forceful way. This basic imbalance means that presidents will

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<sup>19</sup> Hugh Heclo, “The OMB and the Presidency: The Problem of Neutral Competence,” *Public Interest* 38 (Winter 1975): 80–98.



behave imperialistically and opportunistically, but that Congress will not do the same by formulating an offensive of its own, and indeed will not even be able to mount a consistently effective defense of its authority against presidential encroachment.

Congress's situation is all the worse because its collective action problems do more than weaken its will and disable its capacity for action. They also allow presidents to manipulate legislative behavior to their own advantage by getting members to support or at least acquiesce in the growth of presidential power. One reason for this has already been established by political scientists: in any majority-rule institution with a diverse membership, so many different majority coalitions are possible that, with the right manipulation of the agenda, outcomes can be engineered to allow virtually any alternative to win against any other.<sup>20</sup> Put more simply, agenda setters can take advantage of the collective action problems inherent in majority-rule institutions to get their own way.

Presidents have at least two important kinds of agenda-setting power. First, because Congress is so fragmented, presidentially initiated legislation is the most coherent force in setting the legislative agenda. The issues Congress deals with each year are fundamentally shaped by the issues presidents decide are salient.<sup>21</sup> Second, presidents set Congress's agenda when they or their appointees in the bureaucracy act unilaterally to alter the status quo—by making the Environmental Protection Agency less aggressive in enforcing the Clean Air Act, for example, or by having the Occupational Safety and Health Administration conduct fewer on-site inspections of worker safety. This sort of thing happens all the time, and Congress is forced to react or acquiesce. In either case, presidents can choose their positions strategically, with an eye to the

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<sup>20</sup> Richard D. McKelvey, "Intransitivities in Multidimensional Voting: Models and Some Implications for Agenda Control," *Journal of Economic Theory* 12 (June 1976): 472–482.

<sup>21</sup> See John Kingdon, *Agendas, Alternatives, and Public Policies* (Boston: Little, Brown, 1984); Paul Light, *The President's Agenda* (Baltimore: Johns Hopkins University Press, 1982).

various majorities in Congress, and engineer outcomes more beneficial to the presidency than they could if dealing with a unified opponent.<sup>22</sup>

Presidential leverage is greatly enhanced by the maze of obstacles that stand in the way of each congressional decision. A bill must pass through subcommittees, committees, and floor votes in both the House of Representatives and the Senate; it eventually must be passed in identical form by both houses; and it is threatened along the way by rules committees, filibusters, holds, and other procedural roadblocks. Every one of these veto points must be overcome if Congress is to act. Presidents, in contrast, need to succeed with only one to ensure that their newly determined status quo will prevail.

More generally, the transaction costs of congressional action are enormous. Not only must coalitions somehow be formed among hundreds of legislators across two houses and a variety of committees—a challenge that requires intricate coordination, persuasion, trades, promises, and all the rest—but owing to scarce time and resources, members must also be convinced that the issue at hand is more deserving than the hundreds of other issues competing for their attention. Party leaders and committee chairs can help, but the obstacle-strewn process of generating legislation remains incredibly difficult and costly. And because it is, the best prediction for most issues most of the time is that Congress will take no positive action at all. Whatever members' positions on an issue, the great likelihood is that *nothing will happen*.

When presidents use unilateral powers and discretion to shift the status quo, what they want most from Congress is no formal response at all—which is exactly what they are likely to get. This would be so in any event, given the multiple veto points and high transaction costs that plague congressional choice. But it is especially likely when presidents and their agents enter the

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<sup>22</sup> Thomas H. Hammond, Jeffrey S. Hill, and Gary J. Miller, "Presidents, Congress, and the 'Congressional Control of Administration' Hypothesis" (paper presented at the annual meeting of the American Political Science Association, Washington, D.C., 1986).

legislative process on their own behalf—dangling rewards, threatening sanctions, offering side payments, and perhaps most important, mobilizing the legislators in their own party to come to their support.<sup>23</sup> Presidents are especially well-situated and endowed with political resources to do this. And again, blocking congressional action is fairly easy—especially given that, should all else fail, presidents can use their veto.

Whether presidents are trying to block or to push for legislation, the motivational asymmetry between them and Congress adds mightily to their cause. Presidents are strongly motivated to develop an institutional capacity for controlling the bureaucracy as a whole, and, when structural issues are in question, they take the larger view. How do these structures contribute to or detract from the creation of a presidential system of control? Legislators are driven by localism and special interests, and they are little motivated by these sorts of systemic concerns. This basic motivational asymmetry has a great deal to do with what presidents are able to accomplish when they attempt to block or steer congressional outcomes.

On issues affecting the institutional balance of power, then, presidents care intensely about securing changes that promote their institutional power, whereas legislators typically do not. Members of Congress are unlikely to oppose incremental increases in the relative power of presidents unless the issue in question directly harms the special interests of their constituents—which, if presidents play their cards right, can often be avoided. On the other hand, legislators are generally unwilling to do what is necessary to develop Congress's own capacity for strong institutional action. Not only would doing so often require that they put constituency concerns aside for the sake of the common good, which they have strong incentives not to do, but it also would tend to call for more centralized control by party leaders and less individual member

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<sup>23</sup> George C. Edwards III, *Presidential Influence in Congress* (San Francisco: W. H. Freeman, 1980); and Stephen J. Wayne, *The Legislative Presidency* (New York: Harper and Row, 1978).

autonomy, which they find distinctly unattractive.

When institutional issues are at stake in legislative voting, then, presidents have a motivational advantage: they care more about their institution than legislators do about theirs. This asymmetry means that they will invest more of their political clout in getting what they want. It also means that the situation is ripe for trading. Legislators may fill the airwaves with rhetoric about the dangers of presidential power, but their weak individual stakes in overcoming these dangers allow them to be bought off with the kinds of particularistic benefits (and sanctions) that they really do care about. This does not mean that presidents can perform magic. If what they want requires affirmative congressional action, the obstacles are many and the probability of success is low. But their chances are still much better than they otherwise would be, absent the motivational asymmetry between them and legislators. And if all presidents want to do is block congressional action, which often is all they need to preserve their control over the bureaucracy, then the asymmetry can work wonders in cementing presidential *faits accomplis*.

### **The Levers of Presidential Control: Three Cases**

Presidents have used their institutional advantages to enhance their control over the bureaucracy. In this section, we describe three important examples of how they have done this—in the areas of personnel, budgets, and regulatory review. In each case, Congress has been either unwilling or unable to protect its own power, and the net result has been a shift in the balance of power toward presidents.

#### **Personnel**

During the middle and late 1800s, members of Congress were actively involved in the spoils system, which, in doling out government jobs to the party faithful, was the foundation of the American party system. Control of spoils gave them control over appointments to the

bureaucracy, and thus substantial control over the bureaucracy itself. American society, however, was undergoing disruptive changes—industrialization, immigration, urbanization—and these changes gave rise to massive social problems, as well as to new political groups demanding governmental action to solve them. A government that traditionally had done very little, and could get away with being staffed by appointees who lacked expertise and experience, was now expected to perform at a much higher level.

As a result, Congress was under pressure to adopt a merit system for government personnel. The first step came with the Pendleton Act in 1883, which created the Civil Service Commission and brought 10.5 percent of federal jobs under the umbrella of merit appointment. The proportion of merit-protected civil servants then grew, decade by decade, as did the protections afforded federal employees under the system. Presidents had the authority to add jobs to the merit system and, at the end of their terms, often “blanketed in” their political appointees, ensuring that the latter couldn’t be fired en masse by the next president. Meanwhile, business and civic groups continued the drumbeat for civil service expansion, as did the emerging federal employee unions, and Congress responded by adding new classes of employees to the system. By the 1930s, more than 80 percent of federal jobs had become part of civil service.<sup>24</sup>

During the Great Depression, Franklin Roosevelt led the federal government into new areas of economic and regulatory activity. Scores of new agencies were created to counter the depression and, later, to mobilize for World War II. The bureaucracy grew by leaps and bounds. Federal employment soared.<sup>25</sup> Most of the new jobs were originally filled with appointees

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<sup>24</sup> Sean M. Theriault, “Patronage, the Pendleton Act, and the Power of the People,” *Journal of Politics* 65(1): 50–68; Ronald N. Johnson and Gary D. Libecap, *The Federal Civil Service System and the Problem of Bureaucracy* (Chicago: University of Chicago Press, 1994); and Martin West, “Bargaining with Authority: The Political Origins of Public-Sector Collective Bargaining,” manuscript, Brown University (2006).

<sup>25</sup> It increased from 603,587 employees to 3,332,356 between 1933 and 1944. Susan B. Carter, Scott Sigmund Gartner, Michael R. Haines, Alan L. Olmstead, Richard Sutch, and Gavin Wright, eds., *Historical Statistics of the United States: Earliest Times to Present, Millennial Edition*, vol. 5 (New York: Cambridge University Press, 2006),

recommended by Democratic Party officials; but these positions were then blanketed in as the New Deal drew to a close, thus protecting them from future dismissal.<sup>26</sup>

The expansion of bureaucracy presented all subsequent presidents with a fundamental challenge. If they wanted to be strong leaders, they needed to control the tangle of departments, agencies, boards, and commissions that populated the government and carried out policy. This was especially true for Dwight Eisenhower, the first Republican to become president in twenty years—because upon assuming office in 1953, he faced a bureaucracy filled with Democrats.

Supported by a Republican Congress hungry for jobs, President Eisenhower acted through executive order to create 800–1,000 new appointed positions, hoping to rein in the sprawling New Deal bureaucracy.<sup>27</sup> Subsequent presidents have continued to add appointees to the federal personnel system. And more fundamentally, they have worked to develop the president’s institutional capacity to find, recruit, and select loyal appointees. The number of political appointees has nearly doubled from 1,778 at the end of the Eisenhower administration to about 2,846 in 2012, a number that will surely increase as President Obama fills out his second term team. These increases have come under both Democratic and Republican presidents, with the largest increase occurring during the presidency of Jimmy Carter—for reasons we soon discuss.

Why wouldn’t Congress simply forbid modern presidents to expand the numbers of appointees? One reason is evident in the Eisenhower experience. He entered office with Republican majorities in Congress. They wanted him to be successful and, with Republicans in high-level executive positions, to move policy in a more conservative direction. They also knew

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<sup>26</sup> By the end of the Truman administration, close to 90 percent of all federal civilian employees were governed by the civil service system. David E. Lewis, *The Politics of Presidential Appointments* (Princeton: Princeton University Press, 2008), 20.

<sup>27</sup> Lewis, *Politics of Presidential Appointments*, 70.

that, as members of the president's party, they could recommend candidates for appointment and, when successful, win the appreciation of the appointees and their group supporters—along with their endorsements and campaign support.

When the president is from the opposing party, needless to say, Congress often resists presidential efforts to increase the number of appointees. It is common for them to communicate their displeasure to the White House informally—but they can also go public. For example, in 1987 several Democratic members of Congress, backed by a General Accounting Office (now the Government Accountability Office) report, complained that President Ronald Reagan was “packing” the bureaucracy with appointees, particularly in the agencies that manage the government, such as the Office of Personnel Management (personnel), the General Services Administration (facilities), and OMB (finances).<sup>28</sup> During Bill Clinton's administration, Republicans publicly complained about an increase in appointees in the Commerce Department, and Commerce Secretary William Daley agreed to cut the number.<sup>29</sup>

Not surprisingly, the data show that during periods of unified government—when the presidency and Congress are controlled by the same party—significantly larger increases in the number of political appointees occur than during periods of divided government.<sup>30</sup> Yet even when Congress is controlled by the opposition party, serious efforts to reduce the number of appointees have gained little traction. This is true despite repeated claims by think tanks, academics, and former government officials that there are too many political appointees in the bureaucracy, threatening its expertise and “neutral competence.”<sup>31</sup> Congress's problem is that,

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<sup>28</sup> Judith Havemann, “Top Federal Jobs ‘Politicized,’” *Washington Post*, August 6, 1987, A1.

<sup>29</sup> Paul Blustein, “Commerce Nominee Promises Reforms,” *Washington Post*, January 23, 1997, E1.

<sup>30</sup> Lewis, *Politics of Presidential Appointments*, chaps. 4–5.

<sup>31</sup> National Commission on the Public Service, *Leadership for America: Rebuilding the Public Service*, Washington, D.C. (1989); and National Commission on the Public Service, *Urgent Business for America: Revitalizing the Federal Government for the 21st Century* (Washington, DC: Brookings Institution Press, 2003).

because the president can veto any legislation he doesn't want, a fair portion of his own party would have to go along if the number of appointees were to be cut—and they are unlikely to do that. In addition, the majority party's willingness to cut the number of appointees is inhibited by the hope that its own candidate will win the presidency in the next election.

The dynamic at work here, therefore, favors the president. Congress is not a unified institution intent on maximizing its power relative to the president's. It is a factionalized institution rife with collective action problems, and it is vulnerable to presidential imperialism. Historically, Congress has occasionally resisted presidential efforts to increase the number of political appointees, and it has occasionally succeeded in pressuring presidents to reduce the numbers in specific agencies. But overall, presidents have increased the penetration of appointees in the bureaucracy quite dramatically.

*Targeting Management Agencies.* The career civil service, whose members are neither hired nor fired by presidents, is obviously a major impediment to presidential leadership of the bureaucracy. Presidents took strategic action *within* the existing federal personnel system to affect the numbers and placement of political appointees. But until Jimmy Carter, no modern president had seriously tried to change the system itself. Civil service reform had been contemplated in broad reorganization packages, notably under Roosevelt (via the Brownlow Committee) and Eisenhower (via the second Hoover Commission), but such reform had never been a high priority on its own.<sup>32</sup> This isn't so surprising: genuine reform requires controversial new legislation, which is extraordinarily difficult and politically costly to achieve. With so many other ways to enhance their power over the bureaucracy through unilateral action, presidents have had little incentive to pursue it.

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<sup>32</sup> Richard Polenberg, *Reorganizing Roosevelt's Government 1936–1939* (Cambridge: Harvard University Press, 1966); and Peri E. Arnold, *Making the Managerial Presidency* (Princeton: Princeton University Press, 1986).



Carter's situation was different from that of his predecessors. With the massive growth of government in the 1960s under Lyndon Johnson's Great Society, followed in the early 1970s by the dramatic expansion of federal regulation—with the creation of the Environmental Protection Agency and the Occupational Safety and Health Administration, for example—Carter oversaw a bureaucracy much bigger, more complex, and more expensive than they had. And by the mid-1970s, in a worsening atmosphere of stagflation and energy shortages, Americans were fed up. Strong antigovernment, antitax sentiments swelled within the electorate, and politicians—including Carter—responded with pledges of reform.<sup>33</sup>

It was easy to portray civil service reform as part of this broad movement for better, more effective government. But for Carter it was much more than that: it was a way to make the civil service system more responsive to the presidency, and thus to enhance the president's capacity to control the bureaucracy. The kind of reform he had in mind amounted to nothing less than a clear shift in the balance of institutional power.

In the early spring of 1978, barely a year after assuming office, Carter placed a comprehensive proposal for civil service reform before Congress.<sup>34</sup> Among other things, he aimed to divide the Civil Service Commission into two parts. One, the Office of Personnel Management (OPM), would be headed by a single presidential appointee and given substantial discretion in crafting personnel policies for federal employees. The other, the Merit Systems Protection Board, would be an adjudicatory agency for handling employee appeals and grievances. In addition, Carter pushed for the creation of the Senior Executive Service (SES), a

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<sup>33</sup> Felix A. Nigro, "The Politics of Civil Service Reform," *Southern Review of Public Administration* 20 (1979): 196–239.

<sup>34</sup> Patricia W. Ingraham, "The Civil Service Reform Act of 1978: The Design and Legislative History," in *Legislating Bureaucratic Change: The Civil Service Reform Act of 1978*, ed. Patricia W. Ingraham and Carolyn Ban (Albany: State University of New York Press, 1984); and Harlan Lebo, "The Administration's All-Out Effort on Civil Service Reform," *National Journal*, May 27, 1978, 837–838.

flexible corps of about 8,000 high-level administrators who could be moved from job to job at the discretion of the president and his subordinates and whose ranks would include some 800 political appointees.<sup>35</sup>

Nothing about this proposal could have fooled legislators into seeing civil service reform as a simple attempt to achieve “good government.” It was also—and obviously—a bold attempt to expand presidential power over personnel and thus over the entire bureaucracy. Congress responded just as we would expect. Legislators simply did not care much about the balance-of-power issue and, with a few exceptions, did not oppose this clear shift in authority and discretion to the president. Virtually all the political controversy was stimulated by other aspects of the bill that were tangential to the power issue but affected veterans’ organizations and public sector unions—constituency interests that, unlike the collective good of institutional power, motivate members of Congress to take action.<sup>36</sup>

The dynamics of control favored the president. Carter had a Democratic majority in Congress and so was in a strong position to begin with. Plus, most of the political conflicts between the president and Congress, and within Congress itself, centered on special-interest concerns—which excited negative votes even among many Democrats at points along the way—but not on whether Congress was yielding too much authority to the president in an institutional power struggle. In the end, Carter compromised on the veterans’ and labor issues and won on what he really cared about. The Civil Service Reform Act transferred governance of the federal personnel system from an independent commission to a presidential agency (OPM) headed by a

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<sup>35</sup> Nigro, “The Politics of Civil Service Reform.” The original design allowed for a little over 9,000 SES employees, but the number has varied somewhat over time and has generally been in the neighborhood of 8,000. Also, of the 800 political appointees, 350 were in newly created positions and 450 were moved into the SES from the old system.

<sup>36</sup> Arnold, *Making the Managerial Presidency*; and Ann Cooper, “Carter Plan to Streamline Civil Service Moves Slowly toward Senate, House Votes,” *Congressional Quarterly Weekly Report*, July 15, 1978, 1777–1784.

political appointee and endowed with greater discretion; it increased the number of appointees in OPM from six to twelve; it embedded them more deeply into the structure of the agency; and it created the SES—a hugely important innovation that allowed presidents to move thousands of high-level careerists from job to job, and gave them hundreds of additional appointees to work with as well. All in all, the act resulted in a tremendous boost for presidential power.

*Strengthening the White House Personnel Operation.* Along with the increase in the number of political appointees, the White House personnel operation has grown more sophisticated in how it fills these positions.<sup>37</sup> Truman was the first president to have a White House aide designated specifically to handle personnel issues. And up through the Eisenhower administration, it was common for the national party to have an office close to the White House to handle appointments. With the advent of John Kennedy’s administration, however, a dedicated White House staff emerged both to recruit appointees and to manage the patronage pressures on the new administration.

Since that time, presidents have increasingly professionalized and institutionalized the personnel process.<sup>38</sup> President Kennedy employed three personnel officials. President Nixon employed twenty-five to thirty. Today the number is higher still, and can exceed one hundred when new presidents are transitioning into office. Starting with Nixon, presidents began employing professional recruiters to help identify qualified persons for top executive posts. Recent presidents have also regularized a process for handling patronage requests from campaign staff, the party, interest groups, and influential members of Congress through an ever more formal division between policy and patronage efforts.

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<sup>37</sup> For a good review, see Bradley H. Patterson Jr. and James P. Pfiffner, “The Office of Presidential Personnel,” in *The White House World*, ed. M. J. Kumar and T. Sullivan (College Station: Texas A&M University Press, 2003); and Thomas J. Weko, *The Politicizing Presidency: The White House Personnel Office, 1948–1994* (Lawrence: University Press of Kansas, 1995).

<sup>38</sup> Lewis, *Politics of Presidential Appointments*, 27–30.

The growing sophistication of the personnel operation has allowed presidents to take more and more control of the appointments process—leaving less to their party and their department and agency heads. Throughout much of the twentieth century, presidents were involved directly in filling only the top executive positions. In recent decades, they have increasingly sought to assert their influence over all appointed positions.

Congress hasn't done anything to slow the development of the White House personnel operation. In part, legislators recognize that presidents need to make appointments and thus need to get organized for that purpose. But of course, bigger issues are at stake. The president's institutional capacity is related directly to his ability to shift the balance of power with Congress in his favor. Congress could have tried to keep the president's institutional capacity to a minimum—for example, by restricting the amount of money appropriated for presidential operations, or by restricting his discretion (much of it grounded in OPM and the SES) in allocating appointees across the bureaucracy. But it hasn't done these things. In the final analysis, presidents hold most of the cards: they can veto anything Congress enacts, members of their own party support them anyway, and power issues just don't mobilize legislators to rise up and defend their institution.

*Congressional Response Through Inaction?* One area where recent Congresses have attempted to limit presidents is by refusing to use their power to confirm presidential nominees to executive and judicial posts with the goal of gaining leverage in negotiations with the president. Congressional efforts have met with mixed success, subject to the same limitations that influence their ability to check the president in other areas. According to data from the *Washington Post*, for example, President Obama had filled only 75% of the key policymaking

positions in executive branch by the 18 month mark in his first term.<sup>39</sup> His record with regard to judges was even worse.

Some of the reluctance to confirm Obama nominees was partisan but individual members also used the threat nomination delay as a way to seek policy concessions from the president on issues of concern to their states. There was a determined minority in the Senate that was not inclined to support administration appointees, particularly if opposing those appointees might give Republicans an election issue. Both Republicans *and* Democrats also placed “holds” on nominations in the Senate in the hope of stopping the president’s agenda or securing concessions from the White House on issues of concern to individual senators. These holds are requests by senators to keep nominations from coming to the floor with an implied threat to hold up Senate business with dilatory actions such as filibusters. For example, Senator Richard Shelby (R-AL) held up dozens of nominees because of concerns about a tanker contract and funding for a proposed counterterrorism center in his home state.<sup>40</sup> Democratic Senator Robert Menendez (D-NJ) placed holds on Obama’s nominees to head the White House Office of Science and Technology Policy and National Oceanic and Atmospheric Administration over a policy disagreement about U.S. foreign policy in Cuba.<sup>41</sup>

Difficulties with confirmation have led recent presidents to increasingly use recess appointments to circumvent the requirement of Senate confirmation. The Constitution provides the president the ability to fill administration positions during a recess of the Senate. Presidents

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<sup>39</sup> David E. Lewis, "Presidential Appointments in the Obama Administration: An Early Evaluation." In Andrew Dowdle, Dirk van Raemdonck, Robert Maranto , eds., *The Obama Presidency: Change and Continuity*. New York: Routledge (2011).

<sup>40</sup> Murray, Shailagh, “Sen. Shelby Releases Hold on Nominees,” *Washington Post*, February 9, 2010 (<http://www.washingtonpost.com/wp-dyn/content/article/2010/02/08/AR2010020804199.html>, last accessed October 24, 2010)

<sup>41</sup> Eilperin, Juliet, “Nominations on Hold for Two Top Science Posts,” *Washington Post*, March 3, 2009 (<http://www.washingtonpost.com/wp-dyn/content/article/2009/03/02/AR2009030202425.html>, last accessed October 26, 2010).

have waited for the Senate to go into recess and filled key posts during this time. President Obama used this authority 32 times and used it to name some of his most controversial appointees to administration posts.<sup>42</sup>

The use of the president's recess appointment power led to a significant constitutional confrontation between the president and Congress. During President Obama's first term, for example, Congress purposefully stayed in session in order to prevent the president from filling key administration posts. These posts included empty seats on the National Labor Relations Board and the directorship of the new Consumer Financial Protection Bureau. Rather than recess, the Senate stayed in *pro forma* sessions. In these sessions, a senator would come to Washington, DC every 3 days to gavel the Senate into and out of order and thereby stay in session. In January, 2012, however, the president 'recess appointed' persons to these agencies' vacant positions, arguing that the Senate was actually in recess despite their efforts to gavel the Senate into session every three days. Congressional Republicans were outraged, suggesting that Obama had acted beyond his constitutional authority and "arrogantly circumvented the American people."<sup>43</sup> Yet, President Obama's picks began their jobs shortly thereafter and worked through 2012. Court cases involving the constitutionality of the president's actions were working their way through the courts in 2013 but were unlikely to be resolved before the terms of the recess appointees expired.<sup>44</sup>

Congress and the president also agreed in the summer of 2012 to reduce the number of appointees requiring Senate confirmation from about 1,200 to around 1,030. The Presidential

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<sup>42</sup> David E. Lewis, "Presidential Appointments in the Obama Administration: An Early Evaluation." In Andrew Dowdle, Dirk van Raemdonck, Robert Maranto, eds., *The Obama Presidency: Change and Continuity*. New York: Routledge (2011).

<sup>43</sup> Stephen Dinan and Susan Crabtree, "Obama Defies Congress with 'recess' Picks," *Washington Times*, January 4, 2012 (<http://www.washingtontimes.com/news/2012/jan/4/obama-unprecedented-recess-appointment/?page=all>, accessed January 27, 2013).

<sup>44</sup> Under the Constitution recess appointees may only serve until the end of the next congressional session.

Appointment Efficiency and Streamlining Act of 2011 (enacted in 2012) reduced the number of Senate confirmed positions in order to ease the confirmation burden on the Senate and reduce the number of vacant positions in the Executive Branch. The bill primarily targeted appointments to minor boards and commissions and officials in the executive departments responsible for management and legislative affairs. From the president's perspective, the law makes it easier for the president to fill lesser administration positions. From the Senate's perspective, the Senate is now better able to focus on the remaining (more important) policy making positions. If anything, this move has strengthened the president's ability to place administration appointees in the executive branch.

## **Budgets**

In the late 1800s and early 1900s, as government became bigger, more bureaucratic, and more complex in the course of responding to the nation's growing social problems, Congress began to have serious difficulties dealing with the national budget.<sup>45</sup> Its own fragmented organization was part of the problem. Congress was divided into policy-based committees, and bureaucratic agencies each submitted their budgetary requests to these committees directly, without coordination. This diffusion of control made it difficult for Congress to establish priorities in its spending, or even to reconcile expenditures with revenues—leading to frequent deficits.

These problems came into sharp relief in the aftermath of World War I, precipitating a fiscal crisis that pushed the nation's debt from \$1 billion to \$25 billion. Congress responded by

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<sup>45</sup> Presidents had much earlier earned a reputation as guardians of the Treasury against extensive spending by Congress. As early as 1909, Congress asked the secretary of the Treasury to estimate revenue for the coming year, determine whether there was likely to be a deficit, and make recommendations for cuts or other sources of revenue to cover the deficits. Fisher, *Politics of Shared Power*, 220–221.

enacting the Budget and Accounting Act of 1921, which created the Bureau of the Budget (BOB) within the Treasury Department, authorized it to pull together the budget estimates of every agency into a single federal budget, and made presidents responsible for improving the economy and efficiency of administration. The intention was to compensate for Congress's collective action problems by creating a more coherent, coordinated structure for the budget.<sup>46</sup>

The BOB, however, soon became a foundation for the expansion of presidential power. With authority not only to collect agency budget estimates but also to revise them—and thus to bring them into line with his own priorities and policy goals—the president now had a far stronger institutional capacity for directing national policy. Presidents gradually began to use the budget as a policy tool by adjusting budget estimates to promote their own legislative goals. The budget evolved into a document that described presidential aspirations for what government should do and how it should do it. By the end of the New Deal and World War II, after two decades of Democratic presidents and Democratic congressional majorities, a general expectation had emerged that presidents would take the lead on the budget, and that Congress would use the president's budget as a starting point for its own deliberations. This deference to the president was bolstered by the fact that the BOB had far-reaching expertise and detailed inside knowledge about what the bureaucracy was (and was not) doing, and how much its programs actually cost—which gave the president's team an information advantage over Congress.

Presidential control of the budgetary process—and through it, public policy—received another boost in 1939. Franklin Roosevelt, worried that the inability to manage the fast-growing New Deal bureaucracy might threaten his reelection, as well as the New Deal itself, asked Congress to help him create an institutional apparatus for housing agencies that would be truly

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<sup>46</sup> Fisher, *Politics of Shared Power*, 222–223.



presidential—and not really part of the larger bureaucracy, where they would be vulnerable to more congressional intervention. Large Democratic majorities agreed to empower their president by authorizing the creation of the Executive Office of the President and placing the BOB under its rubric. The Budget Bureau was now, in every sense, an arm of the presidency.

When Republicans finally regained control of both branches in 1953, they could have acted to roll back the BOB and the power of the presidency. But they didn't, because the power was now theirs. Over time, the BOB grew in size, and its career staff gained greater and greater influence in matters ranging from the details of administration and spending to the broader contours of public policy. The bureau also became an important source of institutional memory for the president, as well as for Congress. It provided vital transition advice to new presidents, monitored the management performance of different bureaucratic agencies, and helped presidents use the budget to accomplish their larger political goals. The BOB viewed its mission as serving the presidency as an institution, rather than any one individual president.

But presidents, characteristically, wanted more. In particular, they wanted the BOB to be responsive to their individual needs and political agendas; they also wanted it to be a more powerful control mechanism overall. The vehicle for change was Richard Nixon's Reorganization Plan no. 2, which, under "reorganization authority" granted to the president by Congress, would become law unless disapproved by either the House or the Senate. Nixon proposed that political appointees replace career civil servants as heads of the bureau's operating divisions; that its functions in program management, coordination, and information be expanded; and that all functions vested by law in the BOB—now to be renamed the Office of Management and Budget—be transferred to the president. The point of this plan, clearly, was to give OMB greater control of the bureaucracy, to make OMB more responsive to the president, and to

expand presidential power.<sup>47</sup> Legislators saw Nixon’s proposal for what it was. But the institutional issues, even with Congress in the hands of the Democratic Party, were not sufficient to galvanize opposition—especially because Congress actually had to act in order to block the plan. The Senate never even voted on a resolution of disapproval. The House did, but the Nixon forces put together a coalition of Republicans and southern Democrats that prevailed.<sup>48</sup>

If Congress had a budgetary moment in the sun, it came in the midst of the Watergate crisis—an episode of presidential excess that, needless to say, raised the specter of the imperial presidency and gave presidential power a very bad name. At least for a while. In the budgetary realm, the symbol of Nixon’s imperial misbehavior was that he had “impounded” (refused to spend) certain funds appropriated by Congress, arguing that legislators’ spending was profligate and a cause of inflation.<sup>49</sup> Congress responded by passing the Congressional Budget and Impoundment Control Act of 1974, which made it more difficult for presidents to impound money—and, more generally, created a new and more centralized congressional budgetary process for countering presidential power.

In passing the 1974 budget act, Congress was not only recognizing that excessive presidential power was a problem. It was also recognizing its own collective action problems—and the new law was fully intended as a remedy. The act included three main provisions. First, it created new budget committees in each chamber that would set an overall annual budget ceiling, as well as ceilings for each policy area, in order to limit what the appropriations committees could spend. Second, it established a series of deadlines and procedures to usher each year’s budget legislation through Congress. Finally, it created the Congressional Budget Office to

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<sup>47</sup> Hugh Heclo, “The OMB and the Presidency”; Moe, “The Politicized Presidency”; and Arnold, *Making the Managerial Presidency*.

<sup>48</sup> “Congress Accepts Four Executive Reorganization Plans,” *Congressional Quarterly Almanac, 1970* (Washington, D.C.: Congressional Quarterly, 1971), 462–467.

<sup>49</sup> Whether Nixon was correct is contestable. See Fisher, *Politics of Shared Power*, 226–227.

provide Congress with its own source of fiscal expertise as a counterbalance to the power of OMB.<sup>50</sup>

This reform has been a colossal failure. Members of Congress still wanted to bring home the bacon to their constituents, and the act provided no mechanism to force them or their committees to stick to the targets set by the budget committees. The budget committees themselves, moreover, could and did change (meaning: increase) the targets throughout the legislative year. Nor did Congress abide by the procedures and deadlines designed to promote speedy, coherent decision making.

These problems became sorely apparent in the 1980s. President Reagan pushed for lower taxes and higher defense spending; Congress sought to protect entitlements and social programs. Deficits ballooned. With its reforms not working, Congress added still other mechanisms to get control over the budget.<sup>51</sup> One device involved automatic spending cuts: if deficits hit certain prespecified levels, cuts would go into effect on all programs not specifically exempted from the process. Another device involved hard spending caps, augmented by “pay as you go” requirements stipulating that all new spending proposals must identify a new source of revenue (or cuts in other programs) to compensate for the new spending. Ultimately, both devices failed. Members of Congress used accounting tricks, program exemptions, and clever scoring to maneuver around their own rules. Having designed these reforms because they knew they couldn’t trust themselves, they proved they were right. Even during periods of fiscal surplus, such as the late 1990s, the budget caps were exceeded by close to \$60 billion per year.

Congress’s most overt capitulation came in 1996. Controlled by Republicans for the first time in forty years, and thus by conservatives who had long railed against the Democrats’

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<sup>50</sup> Ibid., 129–130.

<sup>51</sup> Ibid., 141–152.

“irresponsibility” in overspending, it passed the Line Item Veto Act. This was, to be sure, at least partly an act of ideology. But it was also rooted in a simple recognition that Congress’s collective action problems made it inherently incapable of controlling the budget. What the act did was to give presidents—in this case, a Democratic president, Bill Clinton—the power to single out specific spending or revenue items within a larger bill, and to veto only those items. These vetoes would then prevail unless Congress passed another bill to reinstate the spending. In June 1998, however, the Supreme Court struck down the act as unconstitutional.

In recent years, economic adversity and political polarization have combined to bring the budget—and the deficit—to center stage, accompanied by political fireworks that illuminate once again just how debilitating Congress’s collective action problems can be. Anti-tax-anti-spend Republicans took control of the House in 2011 and refused to increase the nation’s debt ceiling—which was necessary by August 3, 2011, if the nation were to avoid defaulting on its obligations—unless Democrats agreed to drastic cuts in spending without any increases in taxes. The Democrats, in control of the Senate and led by President Barack Obama, insisted on softer spending cuts and higher taxes on the wealthy. As August 3 loomed, every attempt at compromise failed, bringing the national economy, and indeed the world economy, to the brink of disaster.

Finally, at the last hour, Congress kicked the can down the road by passing the Budget Control Act of 2011, which itself did little to reduce the long term deficit. Instead, it temporarily raised the debt ceiling and set up a “super committee” to come up with a legislative solution by the end of the year. If the committee failed, massive spending cuts onerous to Republicans and Democrats alike would go into effect automatically on January 2 of 2013. At that same time, the Bush tax cuts were set (by an earlier law) to expire, raising everyone’s taxes if nothing were

done. The result: a “fiscal cliff” so dangerous to the national economy that, optimists hoped, members of all stripes would have incentives to agree on a solution—and act.

But this was expecting too much. The super committee failed miserably, and most of 2012 was then wasted as legislators looked toward the November elections and refused to bite the bullet on the deficit issue. After the election, a victorious Obama demanded a comprehensive legislative fix. But Congress remained deadlocked. Just hours before the nation was set to fall off the fiscal cliff, it managed to produce legislation that did increase taxes on the wealthy, but also avoided dealing with spending issues, delayed the “automatic” spending cuts—and thus, once again, kicked the can down the road to set up yet another fiscal cliff. At this writing, the crisis continues without resolution. Almost surely, it will “end” not with a genuine, long-term solution to the nation’s deficit problem, but with some sort of cobbled-together patchwork that avoids disaster while only partially dealing with the fundamentals.<sup>52</sup>

The nation’s recent budgetary wars are an especially vivid demonstration of Congress’s incapacities as an institution—and of the reasons why, over more than a century of modern history, budgetary power has been shifted incrementally but relentlessly toward the president. In the last few years, President Obama’s leadership has been frustrated by House (and Senate) Republicans. But the bigger picture is that, just as presidents before him did, President Obama is the one forcing the budgetary action, setting the budgetary agenda, controlling most of the pivotal expertise—and operating the levers of power. He can’t have everything he wants. But his budgetary levers do allow him to exercise leadership in a system that is heavily stacked against it.

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<sup>52</sup> See, for example, “The Plans for Reducing the Deficit,” *New York Times*, November 21, 2011; “Budget Control Act of 2011,” *Wikipedia*, on the web at [http://en.wikipedia.org/wiki/Budget\\_Control\\_Act\\_of\\_2011](http://en.wikipedia.org/wiki/Budget_Control_Act_of_2011); “American Taxpayer Relief Act of 2012,” *Wikipedia*, on the web at [http://en.wikipedia.org/wiki/American\\_Taxpayer\\_Relief\\_Act\\_of\\_2012](http://en.wikipedia.org/wiki/American_Taxpayer_Relief_Act_of_2012).

## Regulation

Appointments and budgets have long been fundamental levers of presidential power. Another is regulatory review, which in recent decades has become a mainstay of the modern presidency and a telling barometer of how much the institutional balance of power has shifted in the president's favor.<sup>53</sup>

The first traces of regulatory review emerged in the early 1970s, when President Nixon—acting unilaterally—instituted the Quality of Life Review program under OMB. His real target was the Environmental Protection Agency (EPA), newly created in 1970, which had been devising antipollution rules that stood to cost industry billions of dollars a year at a time when the national economy—Nixon's main concern—was headed for trouble. The administration required EPA to submit its rules to OMB for prepublication review so that other agencies could comment, economic costs could be analyzed, and pressure could be applied to bring EPA's rules more in line with the president's program. EPA wasn't Nixon's only target. In the early 1970s, six other regulatory agencies had been created, and twenty-nine new regulatory statutes had been enacted.<sup>54</sup> Nixon wanted to gain control of all this because it affected his entire economic agenda.

Environmental, labor, and other liberal interest groups were not pleased with the president's moves, nor was Congress. The new agencies had been created to engage in aggressive regulation, and Nixon—without any clear statutory authority—was trying to replace

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<sup>53</sup> The basic history of regulatory review is well known. The following account relies largely on William F. West and Joseph Cooper, "The Rise of Administrative Clearance," in *The Presidency and Public Policy Making*, ed. George C. Edwards III, Steven A. Shull, and Norman C. Thomas (Pittsburgh: University of Pittsburgh Press, 1985); Elizabeth Sanders, "The Presidency and the Bureaucratic State," in *The Presidency and the Political System*, 3rd ed., ed. Michael Nelson (Washington, D.C.: CQ Press, 1990), 409–442; Thomas O. McGarity, *Reinventing Rationality: The Role of Regulatory Analysis in the Federal Bureaucracy* (Cambridge: Cambridge University Press, 1991); and Robert V. Percival, "Checks without Balance: Executive Office Oversight of the Environmental Protection Agency," *Law and Contemporary Problems* 54 (Autumn 1991): 127–204.

<sup>54</sup> Percival, "Checks without Balance," 139.

their priorities with his. Still, it wasn't clear at this point whether regulatory review was simply a Nixon power grab, which would soon be over, or something bigger.

It turned out to be something bigger, although its ultimate proportions could hardly have been anticipated at the outset. When Gerald Ford became president in 1974, he too faced serious economic problems and expanded Nixon's early system of regulatory review as a means of attacking them. Jimmy Carter's election in 1976 gave Congress and Democratic constituencies hope that EPA and other regulatory agencies would be unleashed, but this was not to be. Carter took even more aggressive action on regulatory review than his Republican predecessors had. In his Executive Order 12044, agencies were told to prepare—for all rules having major economic consequences—"regulatory analyses" that rigorously evaluate their cost-effectiveness. Carter also created a new organizational arrangement, led by OMB and other presidential agencies, for carrying out the reviews. With these developments, it became clear that regulatory review was not merely a Nixon or a Republican device to frustrate liberal ideals. It was a *presidential* device—one that would serve presidential interests regardless of party.

When Ronald Reagan took office in 1981, he pushed regulatory review to unprecedented heights. He began quickly, appointing a Task Force on Regulatory Relief that promptly suspended some two hundred pending regulations and prepared a hit list of existing regulations for review. He followed up with the groundbreaking Executive Order 12291, which brought regulatory agencies under presidential control as never before.<sup>55</sup> The executive order required agencies to submit all proposed rules to OMB's Office of Information and Regulatory Affairs (OIRA) for prepublication review, accompanied by rigorous cost-benefit analyses and evaluations of alternative approaches. In a departure from past practice, OMB now allowed

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<sup>55</sup> To this already stringent set of procedures, Reagan later added Executive Order 12498, which required agencies to submit annually a program outlining all significant regulatory actions planned for the coming year so that OMB would have plenty of time to review them without the pressure of statutory deadlines.

agencies to issue rules only when the benefits exceeded the costs; it also required them to choose among possible rules so as to maximize the net benefits to society as a whole. Moreover, OMB now asserted the right to delay proposed rules indefinitely while review was pending.<sup>56</sup>

Environmental groups, especially, were furious and launched all-out attempts to persuade Congress to break the president's hold on regulatory review. Pressure to do so had been building for more than ten years, as frustration with past presidents escalated demands for a congressional counterattack. But now, with the Reagan agenda so aggressive, these groups were pulling out the stops.

How did Congress respond? It did not take on the president directly—say, through major legislation declaring that Executive Order 12291 was null and void. Instead, its approach was piecemeal, fragmented, and altogether predictable from a constituency-dominated institution: special interest legislation—such as the 1982 amendments to the Endangered Species Act, the 1984 amendments to the Hazardous and Solid Waste Act, and the 1986 Superfund amendments—that, through countless new restrictions, narrowed the EPA's discretion, hobbled it with cumbersome administrative burdens, and, on very specific items, directed the president and the OMB not to interfere. For the most part, legislators and groups attacked the president by burying EPA in more bureaucracy and trying to insulate its decisions from presidential interference.<sup>57</sup>

At the same time, another drama was unfolding over OIRA. This agency was created during the Carter years for other purposes, and only later did Reagan, acting unilaterally, vest it

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<sup>56</sup> Peter M. Benda and Charles H. Levine, "Reagan and the Bureaucracy: The Bequest, the Promise, and the Legacy," in *The Reagan Legacy: Promise and Performance*, ed. Charles O. Jones (Chatham, N.J.: Chatham House, 1988).

<sup>57</sup> Percival, "Checks without Balance," 175.



with authority for regulatory review.<sup>58</sup> The problem was, it had to weather the congressional budgetary process every year to get funding and, to make matters worse, its authorization was set to expire in 1983. In principle, then, OIRA was very vulnerable to congressional attack.

What happened? OIRA's opponents were able to block its reauthorization for a few years. But Congress continued to fund OIRA, which continued to carry out its regulatory review activities. Eventually, a compromise was struck. OIRA was reauthorized, but Reagan agreed that its head would henceforth be subject to Senate confirmation and its processes made more public.<sup>59</sup> These were not serious concessions, considering that Congress could have put OIRA out of business. The president held the upper hand. And regulatory review churned on, shaping and delaying regulations and infuriating its opponents.

The Bush years witnessed more of the same. Although the more moderate George H. W. Bush was not as zealous about regulatory review as Reagan, he left the basic structure of Executive Order 12291 in place, and OIRA continued to do its presidential job. Interest groups, meanwhile, continued to nibble away at OIRA through piecemeal congressional action. Environmental groups scored an indirect success (with Bush's assistance) when Congress passed and Bush signed the Clean Air Act of 1990, which buried EPA in more bureaucratic constraints and timetables intended to guide its future behavior.<sup>60</sup> Environmentalists also took direct shots at OIRA, whose authorization was set to run out again. In 1990 legislative opponents agreed to reauthorize OIRA if Bush would accept certain restrictions on its activities, but wrangling within Congress caused the effort to collapse. By default, OIRA wasn't reauthorized.<sup>61</sup> Nonetheless,

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<sup>58</sup> Benda and Levine, "Reagan and the Bureaucracy."

<sup>59</sup> Ann Cooper, "OMB Regulatory Review," *Congressional Quarterly Almanac*, 1986 (Washington, D.C.: Congressional Quarterly, 1987), 325.

<sup>60</sup> Jonathan Rauch, "The Regulatory President," *National Journal*, November 30, 1991, 2902-2906.

<sup>61</sup> Kitty Dumas, "Administration Deal Pushes Paperwork Reduction Act," *Congressional Quarterly Weekly Report*, October 27, 1990, 3602; and Janet Hook, "101st Congress Leaves Behind Plenty of Laws, Criticism," *Congressional Quarterly Weekly Report*, November 3, 1990, 3699.

Bush (and later, Bill Clinton) succeeded in getting it funded.

Legislative opponents did score a big (but temporary) victory: the Senate never confirmed a nominee to head OIRA during George H. W. Bush's administration. But the president simply acted unilaterally, shifting regulatory review from OIRA to the Competitiveness Council, a purely presidential unit headed by Vice President Dan Quayle.<sup>62</sup> The Competitiveness Council, which earlier had been assigned issues ranging from legal reform to job training, dove quickly into regulatory review—with staff assistance from OIRA. For the remainder of the Bush presidency, opponents trained their ire on the council, going after it in the usual ways.<sup>63</sup> But they were never able to deny it funding, they had no influence over its personnel or appointments, and they never passed legislation to challenge its activities.<sup>64</sup>

Bill Clinton retook the White House for the Democrats in 1993 and immediately got rid of the Competitiveness Council, evoking a joyous response from many legislators and interest groups. But Clinton's action was largely symbolic, because he surely did not get rid of regulatory review. Indeed, he fully embraced it as essential to his leadership. During his first year in office, Clinton issued Executive Order 12866, which, in the course of repealing Reagan's Executive Order 12291, imposed a review structure that was very similar to Reagan's, even retaining cost-benefit requirements. The difference was that the new structure was better suited to Clinton's agenda, which was more proregulation than Reagan's. Accordingly, regulatory review was returned to OIRA; environmental, labor, and other such groups were granted greater access to the process; and only the most costly rules were targeted for review.<sup>65</sup>

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<sup>62</sup> Rauch, "The Regulatory President."

<sup>63</sup> Kirk Victor, "Quayle's Quiet Coup," *National Journal*, July 6, 1991, 1676–1680.

<sup>64</sup> On the failed attempt to deny the council funding, see Susan Kellam, "Social Security Riders Thrown from Senate Treasury Bill," *Congressional Quarterly Weekly Report*, September 12, 1992, 2712–2713; and Kellam, "Conferees Cut \$200 Million, Pave Way to Approval," *Congressional Quarterly Weekly Report*, September 26, 1992, 2936.

<sup>65</sup> Executive Order 12866, 58 *Federal Register* 51735 (1993). This order also repeated Reagan's Executive Order 12498.

What made the Clinton years unusual is that, after Congress shifted from Democratic to Republican control in 1995, the president came under pressure from Congress to use his powers of regulatory review more forcefully than he wanted to. With Clinton insisting on using regulatory review as he saw fit, Republicans pushed ahead with bills to impose heavy new restrictions on the regulatory agencies.<sup>66</sup> These failed to become law—because Congress, as usual, was unable to take bold action—and the president ultimately prevailed: another reflection of the presidential advantage.

Republicans in Congress did succeed in enacting the Congressional Review Act of 1996, which made it easier—by streamlining its own procedures—for Congress to overturn proposed regulations, and thus to participate in regulatory review. Yet the review act hasn't worked. The streamlined procedures have been used successfully just once, in 2001, to overturn controversial ergonomics regulations promulgated by the Clinton Labor Department. Even in this case, legislative action was successful only because the newly elected president, George W. Bush, supported the repeal. Congress's problems are always the same: the obstacles to collective action are huge, and the president can veto.

By the election of 2000, the device of presidential review of regulation was firmly in place. Both President Bush and President Obama have made minor changes to the process, attempting to lengthen its reach. President Bush strengthened his regulatory powers in 2007 by issuing Executive Order 13422.<sup>67</sup> The new order required that every regulatory agency have a regulatory policy review office headed by a presidential appointee. These offices were directed to supervise the development of new rules, as well as to impose new criteria (such as proof of market failure) that increased the threshold for issuing any new rules. Their most significant role,

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<sup>66</sup> See, for example, John H. Cushman Jr., "Republicans Plan Sweeping Barriers to New U.S. Rules," *New York Times*, December 25, 1994, A1.

<sup>67</sup> Robert Pear, "Bush Directive Increases Sway on Regulation," *New York Times*, January 30, 2007.

however, was to oversee how agencies use “guidance” documents: that is, informal statements that instruct businesses as to how agency rules will be interpreted and enforced. White House officials and business groups were concerned that agency careerists were using these guidance documents to work around the presidential restrictions they didn’t like, and the new regulatory offices were designed to extend presidential control to these informal practices. Congressional critics hit the roof, and in the summer of 2007 the Democratic House voted to prohibit OIRA from using any federal money to enforce Bush’s executive order. No action was forthcoming from the Senate, however, and the order remained in effect. So did the new regulatory offices, and the extension of presidential power.<sup>68</sup>

Barack Obama assumed the presidency in January 2009. By this time, the president’s Democratic allies had no illusions that he would relegate this tool of presidential power to the dustbin. He would keep it—and like his predecessors, Republican and Democratic alike, use it aggressively toward his own policy ends. One of his first steps was to issue an executive order reversing Bush’s Executive Order 13422 and its intrusion into agency decision making. But his biggest early move was his high-profile pick to head OIRA: Cass Sunstein, a stellar legal scholar from the University of Chicago (and more recently, Harvard) widely admired for his creativity, his brilliance, and his innovative approaches to public policy (rooted in the new behavioral economics). Sunstein went on to become “one of the Obama administration’s most provocative figures,” as the *New York Times* would put it—enraging liberals with his aggressive use of cost-benefit analysis and his alleged weakening of agency rules, enraging conservatives by endorsing significant rules (e.g., on Obama’s new health care law) that they claimed would hamper business and economic growth, and seeking to rationalize the nation’s entire regulatory system through a “retrospective review” of all past agency rules. He wasn’t acting alone. He was

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<sup>68</sup> Jim Abrams, “House Balks at Bush Order for New Powers,” *Washington Post*, July 3, 2007.

Obama's choice, Obama's agent. And OIRA, once again, was serving as a major means of leverage in forwarding the president's agenda.<sup>69</sup>

Regulatory review has been an arena of ongoing struggle between the presidency and Congress. But it is a struggle sparked continually by the imperialistic initiatives of presidents, and one that presidents have dominated time and again. Regulatory review is now a routine part of government. Presidents began it, built it up, and have used it regularly to pursue their agendas in the face of interest group and legislative hostility. Congress did not rise up and pass major legislation to stop them, although it had the power to do so. It did not refuse to fund the review agencies, although it had the power to do that, too. Instead, it succeeded only in imposing minor restrictions—while presidents expanded their power relentlessly.

### **Conclusion**

The story of the president, Congress, and the bureaucracy is not entirely a story of presidential triumph. Separation of powers creates a system of government that is distinctly unfriendly to presidents. It fragments authority, multiplies sources of opposition, creates a bureaucracy resistant to central control, and in a host of other ways produces a political setting hostile to any kind of forceful, coherent leadership.

But presidents are strongly motivated to lead and are reluctant to accept a system that is stacked against them. Their strategy has been to modify the architecture of the system to make it more presidential—and it is through this effort that the story becomes brighter for them. For whatever separation of powers does to frustrate their leadership, it also gives them critical advantages over Congress in the politics of institution building and bureaucratic control.

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<sup>69</sup> Sunstein returned to Harvard in August of 2012. For perspectives on his years at OIRA, see, e.g., John M. Broder, "Powerful Shaper of U.S. Rules Quits, with Critics in Wake," *New York Times* (August 3, 2012)—from which the quote in the text is taken; James L. Gattuso and Diane Katz, "Red Tape Rising: Obama-Era Regulation at the Three-Year Mark," *Backgrounder* No. 2663, The Heritage Foundation (March 13, 2012).

Presidents derive important advantages from their capacity for unilateral action. These involve powers that Congress cannot readily stop them from exercising, and that allow them to shift the status quo on their own, winning by default when Congress fails to react effectively. They also benefit because they are unitary decision makers motivated to protect and promote their own institution, whereas Congress is vulnerable to serious collective action problems and unable to take coherent, forceful action on its own behalf. The combination produces a built-in asymmetry in the president's favor when the two branches struggle for power.

The three case studies in this chapter illustrate how these presidential advantages play out in American politics. In matters of personnel, the budget, and regulatory review, presidents have clearly been aggressive in building their own institutions for controlling the vast government bureaucracy. In contrast, Congress has typically been disorganized, ineffective, and even passive in response. Presidents did not always get their way in these cases, and Congress did not always fail to act. But changes in the institutional balance of power came about because presidents were pushing and shoving to occupy new institutional terrain, and Congress did not have what it took to stop them.

The future promises more of the same. The dynamic is built-in, an unavoidable outgrowth of the institutional system itself and the way it structures incentives. All future presidents, whether Republican or Democrat, liberal or conservative, will find that their presidencies are defined and their legacies ultimately determined by how successfully they deal with the formidable economic and social challenges that face our nation—and they will have no choice but to push for as much discretion and institutional capacity as they can get. They will need these things if they are to exercise forceful, coherent leadership. And they need them if they are to overcome the impediments that the separation of powers system places in their way.

There will be no backing down, no going back. They will need power. And they will pursue it.