ARTICLES

THE GENESIS OF INDEPENDENT AGENCIES

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This Article sheds light on significant doctrinal and policy issues that are central to the proper understanding of the administrative state. It grapples with a core question of administrative law: When are agencies established with features that insulate them from direct presidential control? Because of its constitutional significance, the legal literature focuses on removal protection for agency heads, and posits that agencies are more likely to be accorded such protection when the presidency and at least one of the chambers of Congress are controlled by different parties. The empirical support for this claim comes from a single political science study, which suffers from significant design flaws and has been widely misinterpreted. In fact, it shows that under almost all plausible scenarios Congress is less likely to vest agencies with indicia of independence under divided government.

To properly study the factors that affect the probability that agencies will be accorded indicia of independence we constructed and analyzed a new dataset. Three principal variables have a statistically significant impact: the approval rating of the President, the size of the Senate majority, and the alignment of the political party of the Senate majority and the President. The latter two variables had never been tested prior to our study. We find that Congress is less likely to establish agencies with indicia of independence when the President is popular. Moreover, when the Senate majority is not aligned with the President, an increase in the majority makes it more likely that Congress will establish an agency with indicia of independence. And, for a given size of Senate majority, alignment with the President makes it more likely that Congress will establish an agency with indicia of independence. Changes in the composition of the House do not produce comparable effects, suggesting that the Senate's filibuster rule or the Senate's role in confirming presidential appointees might play a role in this regard. Noting that the empirical results explain relatively little of the variation observed in the dataset related to when

Congress establishes agencies with indicia of independence, this Article also explores the limitations of the quantitative empirical findings and the benefits of performing detailed case studies.

INTRODUCTION

The status of independent agencies—agencies that are insulated in at least some ways from direct presidential control—is a significant concern of administrative law.[1] Recently, the legal literature has paid sustained attention to the factors leading to the formation of independent agencies, focusing on the circumstances that make it more likely for agencies to have features insulating them from control by the President.[2]

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[1] *See, e.g.*, Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111 (2000) (reviewing the structure and internal operations of independent agencies and describing recurring issues affecting them); Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599 (2010) (discussing distinctions between independent and executive agencies and analyzing related issues of political accountability, presidential control, and constitutional law); Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769 (2013) (surveying agencies for indicia of independence and rejecting a binary independent-executive division in agency classification); Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41 (1986) (describing constitutional issues related to independent agencies); Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257 (1988) (analyzing the structure and purpose of independent agencies and discussing their limits and potential as a vehicle for government decisionmaking).

[2] For discussion of the insulating features analyzed in this article, see *infra* notes 149–57 and accompanying text.

Two leading theories related to the establishment of independent agencies have emerged.[3] The New Deal Hypothesis states that Congress was more likely to establish independent agencies during the New Deal than during other time periods.[4] The most frequently cited motivation attributed to New Deal Congresses with respect to the establishment of independent agencies is the desire to see those agencies run by technocratic experts.[5] Some scholars also attribute the desire of New Deal Congresses to protect the integrity of agency adjudication processes as a reason for why New Deal Congresses chose to establish independent agencies.[6] The legal literature does not adduce any empirical support for the New Deal Hypothesis and we are not aware of any prior empirical studies on this question.

The Divided Government Hypothesis posits that agencies established during periods of divided government are more likely to have

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[3] This Article's analysis is exclusively positive and does not address normative reasons to structure agencies in particular ways.

[4] *See* John William Anderson, Jr., *Regulatory and Supervisory Independence: Is There a Case for Independent Monetary Authorities in Brazil?*, 10 LAW & BUS. REV. AM. 253, 260 n.42 (2004) ("The second wave, contemporaneous to the 'New Deal,' was characterized by the creation of independent agencies in several sectors with legislative, adjudicative, and executive functions."); Bressman & Thompson, *supra* note 1, at 615–16 ("[I]t was during the New Deal that Congress seeded independent agencies across the regulatory spectrum."); Gary J. Edles, *The Almost Accidental Start of a New Federal Agency*, 47 FED. LAW., Jan. 2000, at 32, 34 ("Creation of the traditional, independent multi-member regulatory agency, which combines legislative, executive, and judicial functions in one place, and has bipartisan membership and relative insulation from presidential control, was at its zenith during the New Deal . . . ."); Stavros Gadinis, *From Independence to Politics in Financial Regulation*, 101 CALIF. L. REV. 327, 337 (2013) ("In the United States, independent agencies were a hallmark of the New Deal effort to build an efficient bureaucracy."); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 492 (1987) ("The independent agency . . . is the model of the New Deal institution."); Verkuil, *supra* note 1, at 257 (describing the New Deal as "the golden age of the independent agency"); Christopher S. Yoo et al., *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601, 606 (2005) (stating the New Deal "witnessed the rise of the so-called independent agencies"); Note, *The SEC Is Not an Independent Agency*, 126 HARV. L. REV. 781, 793 (2013) ("[T]he New Deal is widely associated with the proliferation of independent agencies."). *But cf.* F. Scott Boyd, *Florida's ALJs: Maintaining a Different Balance*, 24 J. NAT'L ASS'N ADMIN. L. JUDGES 175, 186 n.43 (2004) ("Roosevelt's New Deal agencies, with which the [Administrative Procedure Act] history is so intertwined, were almost exclusively executive branch agencies.").

[5] *See, e.g.*, Bressman & Thompson, *supra* note 1, at 612 ("Independence was traditionally justified, particularly during the New Deal era, as promoting expertise."); Adam J. Levitin, *The Politics of Financial Regulation and the Regulation of Financial Politics: A Review Essay*, 127 HARV. L. REV. 1991, 2038 (2014) ("New Dealers envisioned technocratic regulatory agencies as the antidote to the power of white-shoed titans of industry.").

[6] *See* Philip J. Harter, *Executive Oversight of Rulemaking: The President Is No Stranger*, 36 AM. U. L. REV. 557, 559–60 (1987) (underscoring the New Deal structural model's interest in protecting "the integrity of adjudication which constituted the main way, if not the only way, that agencies functioned").

indicia of independence.[7] In the legal literature, it is the leading hypothesis for the establishment of independent agencies,[8] and, in particular, of agencies with removal protection provisions for their

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[7] David E. Lewis, Presidents and the Politics of Agency Design: Political Insulation in the United States Government Bureaucracy, 1946–1997, at 49 (2003). "[D]ivided government" is generally defined as any time the President and the majorities in the House and Senate did not all share the same party affiliation. "[U]nified government" is defined as any time the presidency and the majorities in the House and Senate are all controlled by the same party. *See id.* at 55. The theoretical literature related to the Divided Government Hypothesis discusses various ways through which divided government might favor the creation of independent agencies. David Lewis argues that Congress insulates agencies as an accountability mechanism when divergent policy preferences between the President and Congress exist at the time the decision is made or in the anticipated future. *See id.* at 30–31. Matthew McCubbins et al. theorize that members of the winning legislative coalition attempt to cause the decisions of the proposed agency to be more responsive to the constituencies that the policy is intended to favor and to maintain the political compromises negotiated at the time of enactment by, among other things, creating a structure and process for the agency that mirrors the politics at the time of enactment. Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 Va. L. Rev. 431, 443–44 (1989). Terry Moe argues that compromises generated through interest-group politics affect legislators' decisions when establishing the bureaucratic structure of agencies, and that these compromises may result in independent agencies. *See* Terry M. Moe, *The Politics of Bureaucratic Structure, in* Can the Government Govern? 267, 289–323 (John E. Chubb & Paul E. Peterson eds., 1989). *See also* Nolan McCarty, *The Appointments Dilemma*, 48 Am. J. Pol. Sci. 413, 414 n.2 (2004) (discussing the possibility that "mutual beneficial policies may not be enacted unless *ex post* opportunism can be limited").

[8] *See, e.g.*, Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Tex. L. Rev. 15, 28 & n.58 (2010) ("The independent model of for-cause removal is typically selected during divided government when Congress is controlled by a different party than the presidency."); Datla & Revesz, *supra* note 1, at 798 n.157 (noting that "Congress employs insulating characteristics and partisan balance requirements more often in periods of divided government"); Neal Devins, *Signing Statements and Divided Government*, 16 Wm. & Mary Bill Rts. J. 63, 72 n.43 (2007) (stating "that Congress seeks to create politically insulated agencies during periods of divided government"); Neal Devins & David E. Lewis, *Not-So-Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. Rev. 459, 464 & nn.24–25 (2008) (noting that "the percentage of new agencies with insulating characteristics correlates with periods of divided government"); Ronald J. Krotoszynski, Jr., et al., *Partisan Balance Requirements in the Age of New Formalism*, 90 Notre Dame L. Rev. 941, 980–81 & n.257 (2015) ("Some scholars have opined that the greatest push for independence in administrative agencies comes at times when the parties enjoy divided control over Congress (or at least one house) and the White House."). Another theory, not discussed in this Article, posits that agencies regulating matters on which there is significant distrust between lawmakers and voters are more likely to be independent. *See* Edward H. Stiglitz, Democratic Distrust 4–6 (unpublished manuscript), http://www.law.nyu.edu/sites/default/files/upload_documents/Democratic%20Distrust%20And%20Administrative%20Lawmaking_0.pdf (arguing that the administrative state and its procedures develop as devices that address problems of democratic distrust between voters and lawmakers by inserting a feature of credible verification, whereby relatively informed entities probe the nexus between stated objectives and chosen means).

heads.[9] For empirical support, commentators that refer to the Divided Government Hypothesis rely exclusively on a study by Professor David Lewis.[10] The reason adduced for the impact of divided govern-

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[9] *See, e.g.*, Barkow, *supra* note 8, at 16 ("According to the existing legal literature and case law, the defining hallmark of an independent agency is that it is headed by someone who cannot be removed at will by the President but instead can be removed only for good cause."); Krotoszynski, Jr. et al., *supra* note 8, at 942 (noting that "a 'good cause' limitation on involuntary removal from office, constitutes a core element of the standard design that Congress uses when creating a so-called 'independent' federal agency"). *See generally* Datla & Revesz, *supra* note 1, at 772 ("Independent agencies are almost always defined as agencies with a for-cause removal provision, limiting the President's power to remove the agencies' heads . . . .").

[10] *See, e.g.*, Barkow, *supra* note 8, at 28 (citing Lewis for the proposition that "[t]he independent model of for-cause removal is typically selected during divided government when Congress is controlled by a different party than the presidency" (citing LEWIS, *supra* note 7, at 58–60 (2003)); Datla & Revesz, *supra* note 1, at 798 & n.157 (using Lewis's "finding that Congress employs insulating characteristics and partisan balance requirements more often in periods of divided government" to support the idea that "Congress may also use partisan balance requirements to limit the ability of a President to gain control over an agency through the process of attrition and appointment" (citing LEWIS, *supra* note 7, at 46–52)); Devins, *supra* note 8, at 72 n.43 (stating that Lewis demonstrates "that Congress seeks to create politically insulated agencies during periods of divided government" (citing LEWIS, *supra* note 7, at 30–36, 54–55)); Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1140–41 (2012) ("Perhaps Congress sees fragmentation, much like the creation of an independent agency, as a way to 'remove certain policies from presidential political influence' . . . ." (quoting LEWIS, *supra* note 7, at 7)); Krotoszynski, Jr. et al., *supra* note 8, at 981 & n.257 (citing Lewis for the idea that "the greatest push for independence in administrative agencies comes at times when the parties enjoy divided control over Congress (or at least one house) and the White House" (citing Devins & Lewis, *supra* note 8, at 464)); Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 290 & n.124 (2006) ("David Lewis shows that in periods of unified government, the probability that agencies created will be insulated from presidential control decreased with the strength of the congressional majority; in periods of divided government, the probability that agencies created will be insulated from presidential control increased with the size of the congressional majority.").

Two empirical studies test somewhat different propositions. B. Dan Wood & John Bohte test whether "higher executive-legislative conflict," as measured by presidential vetoes and attempts by Congress to override such vetoes, predicts the establishment of agencies with insulating characteristics. *See* B. Dan Wood & John Bohte, *Political Transaction Costs and the Politics of Administrative Design*, 66 J. POL. 176, 177, 189 (2004). Unlike Lewis, their independent variables do not turn on which party controls the relevant institutions. *Id.* at 189.

David Epstein and Sharyn O'Halloran examine the delegations of authority during periods of divided government. They find that divided government results in Congress delegating less discretionary authority in general, but that, when Congress does delegate, it is more likely to do so to independent agencies than to executive ones. *See* DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS 158–59 (1999); David Epstein & Sharyn O'Halloran, *Divided Government and the Design of Administrative Procedures: A Formal Model and Empirical Test*, 58 J. POL. 373, 391 (1996); David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 983–85 (1999). Their work focuses on decisions to

ment on agency structure is that Congress is less willing to give the President fuller control of a new agency when the President is of a different party than at least one of the congressional chambers.[11]

Despite its significant influence on the legal literature, the Lewis study provides no credible support for the hypothesis that Congress is more likely to vest agencies with removal protection during periods of divided government. First, Lewis never tested the determinants of removal protection, which the legal literature has traditionally taken to be the defining characteristic of independence,[12] and which has been the source of most of the Supreme Court disputes concerning independent agencies.[13] None of his empirical work can be seen as providing support for the proposition that Congress is more likely to vest agency heads with removal protection during periods of divided government.[14]

Second, Lewis uses fixed terms as a proxy for removal protection, but there is no support in the Supreme Court case law or in the academic literature for treating these two concepts as equivalent.[15] Third,

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allocate authority to existing agencies rather than on agency design decisions at the time an agency is established.

[11] *See, e.g.*, Barkow, *supra* note 8, at 28 (arguing that Congress enacts "for-cause" removal provisions because it "is interested in making sure that the minority party in the legislature does not exert greater influence over the agency through presidential power"); Devins & Lewis, *supra* note 8, at 464 ("When members of Congress fear the administrative influence of the current President on policies post-enactment, they are more likely to establish independent commissions to implement their policies.").

[12] *See* Breger & Edles, *supra* note 1, at 1138 ("The critical element of independence is the protection . . . against removal except 'for cause.'"); Datla & Revesz, *supra* note 1, at 776 & n.24 ("The consensus view is that the dividing line [between executive and independent agencies] is the presence of a for-cause removal protection clause.").

[13] *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd. (*PCAOB*), 561 U.S. 477, 492, 496–97 (2010) (holding that dual layers of for-cause removal protection were unconstitutional and assuming that Securities and Exchange Commission commissioners enjoy for-cause removal protection, despite a fixed term and statutory silence on removal); Morrison v. Olson, 487 U.S. 654, 691, 693 (1988) (holding that the Independent Counsel's for-cause removal protection was constitutional); Bowsher v. Synar, 478 U.S. 714, 732 (1986) (concluding that the Comptroller General could not be entrusted with executive powers because Congress had retained removal authority); Wiener v. United States, 357 U.S. 349, 356 (1958) (holding that members of the War Claims Commission enjoyed for-cause removal protection despite statutory silence on removal); Humphrey's Ex'r v. United States, 295 U.S. 602, 631–32 (1933) (holding that the statutory for-cause removal protection of Federal Trade Commission commissioners was valid); Myers v. United States, 272 U.S. 52, 176 (1926) (holding that a Postmaster could be removed at will by the President, despite statutory removal protection); Shurtleff v. United States, 189 U.S. 311, 315 (1903) (holding that the President could remove at will a general appraiser of merchandise under a statute that specified the appraiser could be removed for cause but did not fix a term); Parsons v. United States, 167 U.S. 324, 343 (1897) (holding that District Attorneys are removable at will by the President).

[14] *See infra* note 68 and accompanying text.

[15] *See infra* Section I.B.

Lewis seeks to test whether Congress is more likely to grant insulating characteristics under divided government when the congressional majority is strong. But his test, which looks at the strength of the majority party in the House of Representatives, does not distinguish between instances when the House is aligned with the President (though the Senate is not) from those when the House is not aligned with the President.[16] Moreover, his results actually show that, for practically all plausible configurations of majority strength, divided government actually *decreases* the probability that Congress would vest insulating characteristics in administrative agencies—the opposite of the conclusion that the legal literature attributes to it.[17]

Finally, neither Lewis nor the legal literature relying on his study consider that if Congress in fact wants to limit the discretion of a President of the opposite party, it is likely to react differently early in the President's term as compared to late in that term. For example, fixed terms coupled with removal protection constrain the discretion of the sitting President during the agency head or heads' term of office. In the case of an agency established early in a President's term with a specified tenure of five years for its head or heads, the constraining effect of such specified tenure provisions would fall predominantly on the sitting President. But, in contrast, the constraining effect of the specified tenure provisions would fall predominantly on the next President (who well might be of a different party) if the establishment of such an agency occurred late in the President's term, and the sitting President could thereby extend his influence into his successor's term. So, if the explanation for independent agencies is that Congress wants to impose constraints on a President of the opposite party, one would expect that timing would make a significant difference.

In this Article, using a dataset that we constructed and that had not previously been analyzed, we seek to determine what factors make it more likely that agencies will be accorded indicia of independence at the time of their establishment.[18] We find that three principal factors play a statistically significant role in making it more or less

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[16] *See infra* note 107 and accompanying text.

[17] One legal commentator cites Lewis for the correct proposition: that under divided government, "the probability that agencies created will be insulated from presidential control increased with the size of the congressional majority." Stack, *supra* note 10, at 290 & n.124. However, this probability, for most plausible configurations, turns out to be lower than under unified government. *See infra* notes 112–19 and accompanying text.

[18] *See* Datla & Revesz, *supra* note 1, at 784 (identifying the indicia of independence studied in their article as removal protection, specified tenure, multimember structure, partisan balance requirements, litigation authority, budget and congressional communication authority, and adjudication authority); *infra* notes 149–57 and accompanying text.

likely that Congress establishes agencies with certain indicia of independence: the approval rating of the President, the size of the Senate majority, and the alignment of the political party of the Senate majority and of the President. Of these three variables, the latter two had never been tested prior to our study.[19] In general, we find that Congress is less likely to establish agencies with removal protection for its head or heads when the President is popular. Additionally, the size of the Senate majority affects whether Congress establishes agencies with indicia of independence. When the Senate majority party is not aligned with the President, an increase in the size of the majority makes it more likely that Congress will establish an agency with indicia of independence. And, for a given size of Senate majority, alignment with the President makes it less likely that Congress will establish an agency with indicia of independence. Changes in the composition of the House do not produce comparable effects, suggesting that the Senate's filibuster rule or the Senate's role in confirming certain political appointees might play a role in this regard.[20]

However, these variables, though statistically significant, do not have high explanatory power. The Lewis study did not do a comparable analysis but we were able to perform the test on his dataset and found that there, too, the explanatory power of the statistically significant variables was limited.[21] Other unexplained factors, for which we do not control in our models, appear to explain the majority of the variation in the decision to insulate agencies from presidential control.

Some commentators have expressed the view that randomness explains the conferral on agencies of indicia of independence. For example, Neal Devins indicates that "[i]t is not surprising that 'random selection' may explain Congress's choice of an independent over an executive format."[22] Similarly, according to Paul Verkuil, "[n]ew agency structures often appear to be created in a vacuum or almost by random selection."[23]

The relatively low explanatory power of the empirical models could be seen to lend support to this view. For example, the Environmental Protection Agency (EPA), the Occupational Safety and Health Administration (OSHA), and the Consumer Product

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[19] Our approach is superior to the approach in the Lewis study because it allows us to test how the impact of the size of the majority in each of the chambers of Congress varies depending on whether that chamber is aligned with the President. *See infra* Part IV.

[20] *See infra* Section IV.B.

[21] *See infra* Table 14 and accompanying text.

[22] Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CALIF. L. REV. 255, 322 (1994).

[23] Verkuil, *supra* note 1, at 258.

Safety Commission (CPSC) were all established within two years of each other, during President Nixon's first term—the first two as executive agencies and the third as an independent agency with removal protection and other indicia of independence.[24] When the EPA and OSHA were established in December 1970,[25] President Nixon, a Republican, had an approval rating of fifty-two percent,[26] and both chambers of Congress were controlled by Democrats, in the House by a majority of 243–192 and in the Senate by a majority of 57–43.[27] When the CPSC was established less than two years later, President Nixon's approval rating was fifty-six percent,[28] and the Democratic majorities were 255–180 in the House and 54–44–1–1 in the Senate.[29] The traditional determinants were quite similar at the time of the

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[24] *See* Datla & Revesz, *supra* note 1, at 786, 790, 793, 797–98, 800, 804, 809 (describing the presence or absence of seven indicia of independence in statutes related to the EPA, OSHA, and CPSC, among other agencies).

[25] The EPA was established on December 2, 1970 by President Nixon through Reorganization Plan No. 3 of 1970. *See* Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15,623 (Oct. 6, 1970), *reprinted in* 84 Stat. 2086 (1970); *The Origins of EPA*, ENVTL. PROTECTION AGENCY, https://www.epa.gov/history/origins-epa (last visited Jan. 19, 2017). Neither the House nor Senate passed disapproval resolutions objecting to the Plan; as a result, the Plan became effective. *See* S. REP. NO. 91-1250, at 1 (1970) ("Unless a resolution of disapproval is adopted by either House of the Congress by October 2, the plan will become effective on December 2, 1970 . . . ."); *see also* Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 LAW & CONTEMP. PROBS., Fall 1991, at 311, 313 n.3 (detailing the announcement of Reorganization Plan No. 3 of 1970 and the subsequent failure of either chamber of Congress to pass a disapproving resolution within sixty days). There was a House of Representatives disapproval resolution but it was defeated; no such resolution was entered in the Senate. *See Congress Accepts Four Executive Reorganization Plans*, CQ ALMANAC (1971), http://library.cqpress.com/cqalmanac/cqal70-1293675.

The Occupational Safety and Health Act of 1970 established OSHA on December 29, 1970. *See* Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590, 1599. *See* Moe, *supra* note 7, at 297–306.

[26] Presidential approval rating as measured by the Gallup poll, on the most recent polling date before each agency was established. *See Presidential Job Approval Center*, GALLUP, http://www.gallup.com/poll/124922/presidential-job-approval-center.aspx (last visited Mar. 5, 2017) (click on "Richard Nixon").

[27] *See Party Divisions of the House of Representatives*, U.S. HOUSE OF REPRESENTATIVES, http://history.house.gov/Institution/Party-Divisions/Party-Divisions/ (last visited Mar. 5, 2017); *U.S. Senate: Party Division*, U.S. SENATE, https://www.senate.gov/history/partydiv.htm (last visited Mar. 5, 2017).

[28] *See Presidential Job Approval Center*, *supra* note 26 (click on "Richard Nixon"). The CPSC was established on October 27, 1972 when Richard Nixon signed into law the Consumer Product Safety Act, Pub. L. 92-573, 86 Stat. 1207 (1972).

[29] *See Party Divisions of the House of Representatives*, *supra* note 27; *U.S. Senate: Party Division*, *supra* note 27. Senator Harry F. Byrd Jr., a Democrat from Virginia, ran as an independent and continued to caucus with the Democrats, while Senator James L. Buckley, a Republican from New York, ran as a Conservative and caucused with the Republicans. *See Republicans Gain Two Senate Seats in 92nd Congress*, CQ ALMANAC (1971), http://library.cqpress.com/cqalmanac/cqal70-1292445.

establishment of EPA and OSHA on the one hand and the CPSC on the other: divided government, similar Democratic congressional majorities, and presidential approval ratings in both instances. Thus, these factors are unlikely to explain why the EPA and OSHA are under presidential control but the CPSC has significant insulating characteristics.[30]

But randomness in this context is probably best understood as cover for variables for which the randomness explanation has not accounted. In this connection, the role of policy entrepreneurs should not be overlooked. For example, Elizabeth Warren, widely regarded to be the architect of the Consumer Financial Protection Bureau (CFPB),[31] advocated forcefully for giving the CFPB independent budget authority.[32] The resulting arrangement, under which the CFPB receives funds directly from the Federal Reserve System,[33] and its budget is not reviewed by either the Congress or the Office of Management and Budget,[34] is a very unusual one.[35] It is unlikely that

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[30] For one case study of the legislative processes that led to the agency structures of the EPA, OSHA and CPSC that focuses on the actions of various interest groups, see Moe, *supra* note 7, at 289–323 (describing the political factors and actions by interest groups that led to the bureaucratic structures of the EPA, OSHA, and CPSC).

[31] *See* Frank Blechschmidt, *All Alone in Arbitration:* AT&T Mobility v. Concepcion *and the Substantive Impact of Class Action Waivers*, 160 U. Pa. L. Rev. 541, 583 n.265 (2012) (calling Elizabeth Warren the "CFPB chief architect"); Brenden D. Soucy, *The Consumer Financial Protection Bureau: The Solution or the Problem?*, 40 Fla. St. U. L. Rev. 691, 693 (2013) (describing Elizabeth Warren as "[t]he architect of the CFPB"); Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 Harv. L. Rev. 1822, 1841 (2012) (discussing the CFPB as a case study and describing Elizabeth Warren as "the architect of the agency").

[32] *See* Shahien Nasiripour, *Fight for the CFPA Is "A Dispute Between Families and Banks," Says Elizabeth Warren*, Huffington Post (May 25, 2011), http://www.huffingtonpost.com/2010/03/03/fight-for-the-cfpa-is-a-d_n_483707.html (identifying "independent budget authority" as one of four attributes Elizabeth Warren argued that the then proposed consumer protection agency should have).

[33] *See* 12 U.S.C. § 5497(a)(1) (2012) (providing that the Bureau will obtain "from the combined earnings of the Federal Reserve System, the amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau").

[34] *See id.* § 5497(a)(2)(C) (providing that the CFPB budget "shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate"); *id.* § 5497(a)(4)(E) ("This subsection may not be construed as implying any obligation on the part of the Director to consult with or obtain the consent or approval of the Director of the Office of Management and Budget with respect to any report . . . or any jurisdiction or oversight over the affairs or operations of the Bureau.").

[35] *See, e.g.*, Charles Kruly, *Self-Funding and Agency Independence*, 81 Geo. Wash. L. Rev. 1733, 1735 (2013) ("Until the CFPB, and with the longstanding exception of the Federal Reserve Board of Governors . . . , Congress has utilized self-funding in only a limited number of 'narrowly-focused' independent agencies."); Steven A. Ramirez, *Depoliticizing Financial Regulation*, 41 Wm. & Mary L. Rev. 503, 525 (2000) (writing, eleven years before the establishment of the CFPB, that "the Fed is the only regulatory

the CFPB would have achieved this level of budgetary independence without Warren's zealous advocacy.[36]

The statistical significance of important structural variables such as presidential approval, Senate majority, and Senate alignment, coupled with the lack of high explanatory power of these variables suggests that, to best understand the structure of the administrative state, quantitative empirical work should be coupled with case studies,[37] which can provide important context for the study of administrative law.[38] Such case studies would reveal, for example, the strong influence of a successful policy entrepreneur like Warren.

This Article makes possible a more sophisticated understanding of the institutional relationships that affect the characteristics of administrative agencies, thereby shedding important light on a key current debate concerning the status of independent agencies in the U.S. administrative state. In turn, by providing support for one side of the debate, this Article has significant doctrinal and policy payoffs.

As one of us has noted, "the conventional wisdom is that there are two types of agencies: executive and independent."[39] And, "[e]ach type of agency comes with a set of rules that govern how the President can interact with them."[40] In contrast, the "continuum view" rejects

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agency that is totally self-funded and free from the appropriations process"); Note, *supra* note 31, at 1823 ("A complete exemption from appropriations is rare.").

[36] *Cf.* DANIEL P. CARPENTER, REPUTATION AND POWER: ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REGULATION AT THE FDA 125 (2010) ("The post-War vision of drug regulation emerged from a congeries of factors [including] the advocacy of a coterie of new physician-bureaucrats . . . ."); DANIEL J. KEVLES, THE PHYSICISTS: THE HISTORY OF A SCIENTIFIC COMMUNITY IN MODERN AMERICA 361, 363–65 (1971) (describing how Vannevar Bush was responsible for the "politically elitist" structure of the National Science Foundation).

[37] For examples of the use of case studies in administrative law, see Aldon F. Abbott, *Case Studies on the Costs of Federal Statutory and Judicial Deadlines*, 39 ADMIN. L. REV. 467 (1987) (using case studies to examine the costs associated with statutory deadlines for agency action); Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499 (2011) (using case studies to examine their idea of "agency-specific precedents," where courts rely heavily on precedent of the agency under review, even for general administrative law principles); Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362 (2010) (using case studies to examine the development of administrative law in the nineteenth century).

[38] *See* John S. Applegate, *Using Cases as Case Studies for Teaching Administrative Law*, 38 BRANDEIS L.J. 217, 220–21 (2000) (using case studies for a casebook on administrative law because they "convey a better sense of the interaction of facts, policy, and law"); Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1054 (1990) (noting that "detailed case studies can provide far more textured accounts of court-agency relationships than our data permit").

[39] Datla & Revesz, *supra* note 1, at 775–76.

[40] *Id.* at 776.

the two-category formulation and the presence of a clear dividing line.[41]

If the granting of significant indicia of independence followed inexorably from divided government, the binary view would have a clear structural explanation, reflecting the wishes of the opposition party to constrain the power of the President. But if there is only weak support for the Divided Government Hypothesis and if even the alignment of the Senate explains relatively little of the pattern, as this Article's empirical study shows, the structural reason for placing agencies in two airtight categories disappears.

Why does this matter? On the doctrinal front, dictum in *Wiener v. United States*[42] supports the binary view, separating executive agencies from those that "require absolute freedom from Executive interference."[43] This dictum implies that the existence of an insulating characteristic specified by statute can be used to bootstrap other insulating characteristics on which Congress was silent.[44] The dictum has already come under attack,[45] and this Article provides empirical support for that attack.

On the policy front, many current controversies focus on the President's power over agencies with removal protection for their heads. For example, in 2014 and 2015, President Obama was the subject of significant criticism for pushing the Federal Communications Commission to adopt a net neutrality regulation.[46] Similarly, there is

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[41] *See id.* at 825–27 ("Instead of falling into two categories, agencies fall along a continuum . . . rang[ing] from most insulated to least insulated from presidential control.").

[42] 357 U.S. 349 (1958).

[43] *Id.* at 353.

[44] *See* Datla & Revesz, *supra* note 1, at 833.

[45] *See id.* at 832–35 (arguing that *Wiener v. United States* and a line of cases decided by lower courts following *Wiener v. United States* were incorrectly decided because their central premise, that the presence of certain features of independence is evidence of congressional intent to endow an agency with other features of independence, is wrong).

[46] *See, e.g.*, *Of Presidential Importance*, ECONOMIST (Nov. 11, 2014), http://www.economist.com/node/21632020 (discussing institutional issues); Gautham Nagesh, *Obama Calls on FCC to Issue Rules Protecting "Net Neutrality"*, WALL ST. J. (Nov. 10, 2014, 10:06 PM), http://www.wsj.com/articles/obama-calls-on-fcc-to-issue-rules-protecting-net-neutrality-1415633678 (discussing substantive controversy); Edward Wyatt, *Obama Asks F.C.C. to Adopt Tough Net Neutrality Rules*, N.Y. TIMES (Nov. 10, 2014), http://www.nytimes.com/2014/11/11/technology/obama-net-neutrality-fcc.html (stating that leading providers of internet access, some investment groups, and Republican politicians criticized the plan put forth by President Obama and said it "was heavy-handed and would kill online investment and innovation"); Jonathan Weisman, *Shifting Politics of Net Neutrality Debate Ahead of F.C.C. Vote*, N.Y. TIMES (Jan. 19, 2015), http://www.nytimes.com/2015/01/20/technology/shifting-politics-of-net-neutrality-debate-ahead-of-fcc-vote.html (describing efforts by Senate Republicans to introduce legislation that would "prohibit the Federal Communications Commission from issuing regulations to achieve [the] goals" set forth in the Obama administration's net neutrality approach);

currently sustained academic debate on whether the President has the authority to require financial regulatory agencies, including the CFPB, to submit their regulations to the Office of Information and Regulatory Affairs for review under the President's Executive Order requiring significant rules to be justified by reference to cost-benefit analysis.[47] Also, in a future Democratic administration, further efforts to control greenhouse gases are likely to be a priority.[48] At that time, the decision by the Federal Energy Regulatory Commission (FERC), recently upheld by the United States Court of Appeals for the District of Columbia Circuit,[49] not to use the Social Cost of Carbon to evaluate the harm of carbon dioxide emissions, despite an executive branch Interagency Working Group validation of this approach,[50] could well become a flash point. In all of these cases, the statutes are silent on the actions that President Obama took, or that current and future Presidents might take. By providing empirical support for the attack on the binary view, this Article supports a broader assertion of presidential power in these areas.

More broadly, this Article informs salient current issues in constitutional law. For example, last year, in striking down the CFPB Director's removal protection, the United States Court of Appeals for the District of Columbia Circuit emphasized the importance of understanding the history of and tradition related to independent agencies,

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Mario Trujillo, *GOP Report: White House Improperly Influenced Internet Regulations*, THE HILL (Mar. 1, 2016, 10:01 AM), http://thehill.com/policy/technology/271260-senate-report-finds-white-house-inappropriately-influenced-internet (stating that a report from Senate Republicans claimed that "[t]he White House exerted undue influence on the Federal Communications Commission (FCC) in the drafting of net neutrality rules").

[47] *See* Richard L. Revesz, *Cost-Benefit Analysis and the Structure of the Administrative State: The Case of Financial Services Regulation*, 34 YALE J. ON REG. (forthcoming 2017) (manuscript at 37–44) (on file with authors).

[48] The 2016 Democratic Party Platform included a commitment to "reducing greenhouse gas emissions more than 80 percent below 2005 levels by 2050," upholding the Paris Agreement, and promising to "take bold steps to slash carbon pollution." *See* DEMOCRATIC PLATFORM COMM., 2016 DEMOCRATIC PARTY PLATFORM 27 (2016), http://www.presidency.ucsb.edu/papers_pdf/117717.pdf. In addition, the Democratic Party Platform stated that "Democrats believe that carbon dioxide, methane, and other greenhouse gases should be priced to reflect their negative externalities." *Id.*

[49] *See* EarthReports, Inc. v. Fed. Energy Regulatory Comm'n, 828 F.3d 949, 955–56 (D.C. Cir. 2016) (stating that the Federal Energy Regulatory Commission acted reasonably in rejecting the use of the social cost of carbon in its analysis of the environmental impacts of greenhouse gas emissions from the construction and operation of certain facilities).

[50] *See* Richard L. Revesz, *Quantifying Regulatory Benefits*, 102 CALIF. L. REV. 1423, 1439–42 (2014) (discussing the Interagency Working Group on the Social Cost of Carbon and its efforts to create a social cost of carbon concept for use in evaluation of federal regulations).

on which this Article's empirical study casts significant light.[51] And, this issue is likely to become even more salient now that the court has granted rehearing *en banc* and the U.S. Department of Justice has filed a brief attacking the CFPB's constitutionality.[52]

This Article proceeds as follows. In Part I, we analyze the Lewis study and show why it does not support, and to a large extent contradicts, the proposition that the legal literature generally attributes to it. Part II describes the new dataset that we constructed for our empirical analysis.

Part III presents simple bivariate tests of statistical significance for the New Deal Hypothesis. We find that Congress was more likely to establish agencies as multimember commissions with specified tenures during the New Deal than during other time periods.

In Part IV, we evaluate the Divided Government Hypothesis using multivariate analyses. We find only limited support for this hypothesis. Instead, the probability that agencies will have indicia of independence is affected, in a far wider set of circumstances, by the approval rating of the President, the size of the Senate majority, and whether this majority is of the same party as the President. We also show, however, that these variables do not explain much of the pattern of agency formation. Moreover, we also find no support for the proposition that when Congress is in different hands than the presidency, it is more likely to impose indicia of independence like fixed terms and removal protection early in the President's tenure.

I

UNDERSTANDING THE EMPIRICAL LITERATURE

This Part analyzes the empirical design and the results of the Lewis study. We show why it does not provide support for the Divided Government Hypothesis discussed in the legal literature.

A.   *Dependent Variables*

Lewis studies five different structural features of agencies, which he takes to be indicative of insulation from the President: "location," "independence," "commissions," "fixed terms," and "specific qualifi-

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[51] *See* PHH Corp. v. Consumer Fin. Prot. Bureau, No. 15-1177, 839 F.3d 1, 7–8 (D.C. Cir. 2016) (noting that "history and tradition are critical factors in separation of powers cases where the constitutional text does not otherwise resolve the matter"), *vacated and rehearing en banc granted*, No. 15-1177, 2017 WL 631740 (D.C. Cir. Feb. 16, 2017).

[52] Brief for the United States as Amicus Curiae at 4, PHH Corp. v. Consumer Fin. Prot. Bureau, No. 15-1177 (D.C. Cir. argued May 24, 2017).

cations for administrators."[53] With respect to the first feature, "location," Lewis defines five categories, ordered by reference to increasing levels of insulation: the Executive Office of the President, cabinet departments, independent agencies, independent commissions, and government corporations or other entities.[54] According to Lewis, Congress can choose "to place new agencies outside the Executive Office of the President or cabinet as a way of shielding the agencies from presidential influence."[55]

With respect to the first feature, importantly, because it might be part of the source of the confusion in the legal literature, what Lewis calls "independent administrations" are not agencies headed by individuals with removal protection. Instead, he places in this category agencies like the National Aeronautics and Space Administration and the Small Business Administration because they reside outside of cabinet departments,[56] even though their heads can be removed at will by the President.[57] Also, his category of "independent commissions" is not defined by reference to the removal provision. Instead, agencies are placed in this category if they have multiple heads.[58]

The second feature, "independence," is coded affirmatively for agencies that are established with no layers of bureaucratic organization above them.[59] What he calls "independent agencies" under this criterion "are immune to the pressures and larger policy goals of executive departments that threaten administrative agencies."[60] For example, he notes that agencies placed outside of cabinet departments can lobby the Office of Management and Budget and the White House directly.[61] Again, this definition of "independence" is unrelated to the existence of removal protection provisions.

"Commissions," the third feature, refers to agencies that are governed by more than one director or agency head.[62] Lewis notes that "[g]overnance by a board or commission insulates new agencies from presidential control by increasing the number of actors who must be influenced to change the direction of an agency."[63]

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[53] *See* LEWIS, *supra* note 7, at 44–49, 59 (introducing and elaborating on each of these five features).

[54] *See id.* at 45.

[55] *Id.*

[56] *See id.*

[57] *See* Datla & Revesz, *supra* note 1, at 786.

[58] *See* LEWIS, *supra* note 7, at 46–47.

[59] *See id.* at 46.

[60] *See id.*

[61] *See id.*

[62] *See id.*

[63] *Id.*

"Fixed terms" refers to provisions that specify the length of time that an agency head will serve in that role.[64] According to Lewis, "[p]olitical appointees who serve for fixed terms are insulated from presidential control since they cannot be removed without cause."[65] So, Lewis equates "fixed terms" with removal protection. But, as we show in the next section, these characteristics are not coextensive.

Finally, "specific qualifications for administrators," refers to provisions requiring the President to consider only individuals with certain attributes, such as political party affiliation, occupation, or experience.[66] As Lewis notes, provisions of this sort "are a means of limiting presidential discretion."[67]

Notably, as indicated above, Lewis does not directly study the determinants of removal protection, the feature to which the legal literature attaches paramount importance.[68] Additionally, Lewis does not test other features of agency structure that the legal literature recognizes as important. Indeed, of the six indicia of independence recognized as significant in addition to removal protection,[69] Lewis directly tests only three: specified tenure, multimember structure, and partisan balance requirements. He does not test litigation authority, bypass authority, or adjudication authority.

B.   *Relationship Between Fixed Terms and Removal Protection*

Because Lewis did not code removal protection, we did not use his dataset to present the overlap between fixed terms and removal protection and thereby assess his claim that fixed terms imply removal protection.[70] Instead, we examined this overlap in the dataset,

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64 *See id.* at 47.

65 *Id.*

66 *See id.* (defining "specific qualifications for administrators").

67 *Id.*

68 *See supra* notes 12–13 and accompanying text.

69 *See* Datla & Revesz, *supra* note 1, at 784–812. For subsequent literature embracing these indicia, see William Funk, *Recent Articles of Interest*, 39 ADMIN. & REG. L. NEWS, Fall 2013, at 21, 23; Katherine Clark Harris, *Hidden in Plain Sight: The Federal Reserve's Role in U.S. Foreign Policy*, 40 YALE J. INT'L L. 393, 399 (2015); Kathryn Judge, *The Federal Reserve: A Study in Soft Constraints*, 78 LAW & CONTEMP. PROBS. 65, 92 n.129 (2015); Krotoszynski et al., *supra* note 8, at 941, 942 & n.2; Kruly, *supra* note 35, at 1742 & n.33; Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1255 n.204 (2014); Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211, 248 n.187 (2015).

70 After cleaning the Lewis dataset, we independently researched each agency to determine whether it was established with removal protection. Prior to conducting the analysis, we eliminated the following agencies from the dataset because we determined they were judicial in nature: the United States Court of Appeals for the Armed Forces, the Judicial Panel on Multidistrict Litigation, the Temporary Emergency Court of Appeals, the United States Court of Appeals for the Federal Circuit, the United States Court of

described in Part II below, that we constructed for this Article. The relationship between these two indicia of independence is shown in Table 1.

TABLE 1. RELATIONSHIP BETWEEN SPECIFIED TENURE AND REMOVAL PROTECTION

	No Specified Tenure	*Specified Tenure*
No Removal Protection	25	26
Removal Protection	0	17

The table shows that out of forty-three agencies with specified tenure, twenty-six have no removal protection and only seventeen have such provisions. So, in only forty percent of the agencies with specified tenure is there a statutory removal protection provision.

This pattern raises serious questions about Lewis's treatment of removal protection and fixed terms as equivalent. Obviously, Congress regards these two characteristics as different, as evidenced by the fact that, for agencies with specified terms, Congress gives removal protection to some but not to others.

Moreover, the extensive Supreme Court jurisprudence on this issue has not treated these two indicia of independence as coextensive.[71] Back in the nineteenth century, the Court held, in *Parsons v. United States*,[72] that the President could remove a district attorney at will under a statute that specified a four-year term and was silent on removal.[73] The Court interpreted the fixed term as providing an upper limit rather than a mandatory tenure.[74] Thus, while the

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Veterans Appeals, and the Federal Judicial Center. We also eliminated the Congressional Research Service, the Cost Accounting Standards Board, the Office of Technology Assessment, and the Congressional Budget Office as legislative agencies. The following agencies were eliminated because we were unable to make a determination as to whether the agencies had removal protection or not: the Rural Development Administration, the Technology Administration, and the Office of Technology Policy. The relationship between removal protection and specified tenure in Lewis's dataset was similar to the relationship in our dataset that we present *infra* Table 1. A total of 114 agencies had neither removal protection nor specified tenure; forty had specified tenure but not removal protection; thirteen had removal protection and specified tenure; and no agencies had removal protection but not specified tenure. In Lewis's dataset, therefore, only twenty-five percent of the agencies with specified tenure also had removal protection.

[71] For a detailed discussion of the effect of Supreme Court jurisprudence on decisions by Congress to establish agencies with removal protection during the period between 1926 and 1935, see *infra* notes 165–75 and accompanying text.

[72] 167 U.S. 324 (1897).

[73] *See id.* at 343.

[74] *See id.* at 342.

district attorney could not remain in office past the four-year term, this term did not guarantee the individual four years of service.

In *Wiener v. United States*,[75] the Supreme Court did infer the existence of a removal protection provision under a statute that specified a fixed term but was silent on removal. But the holding in that case was very limited. Wiener had been appointed to the War Claims Commission, established after World War II to adjudicate compensation claims brought by "internees, prisoners of war, and religious organizations . . . who suffered personal injury or property damage at the hands of the enemy in connection with World War II."[76] The statute provided that the Commission "was to wind up its affairs not later than three years after the expiration of the time for filing claims," but did not specify a removal provision for the Commissioners.[77]

President Eisenhower removed Wiener before the end of the Commission's term without specifying a "cause" related to Wiener's work. Instead, he took the position that Wiener could be removed at will: "I regard it as in the national interest to complete the administration of the War Claims Act of 1948, as amended, with personnel of my own selection."[78] The Court ruled in favor of Weiner's back pay claim,[79] but did not do so on the basis of a broad rule under which removal protection would be inferred from statutory silence on removal coupled with a fixed term. Instead, according to the Court, "the most reliable factor for drawing an inference" from the statutory silence on removal "is the nature of the function that Congress vested in the . . . Commission."[80] On the basis of this principle, it held that as a result of the "intrinsic judicial character of the task" carried out by the Commission,[81] it must be "inferred that Congress did not-wish [sic] to have hang over the Commission the Damocles' sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing."[82] The holding of *Wiener*, therefore, may not apply to agencies with broader administrative functions such as rulemaking and enforcement functions.

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[75] 357 U.S. 349 (1958).

[76] *Id.* at 350.

[77] *Id.*

[78] *Id.*

[79] *See id.* at 349, 356.

[80] *Id.* at 353.

[81] *Id.* at 355.

[82] *Id.* at 356.

Recently, in *Free Enterprise Fund v. Public Company Accounting Oversight Board* (*PCAOB*),[83] the Supreme Court grappled with the status of the Securities and Exchange Commission (SEC), another agency operating under a statute that grants its heads fixed terms but is silent on their removal.[84] The SEC is like the War Claims Commission in that it has adjudicatory authority,[85] but unlike it in that it also has rulemaking and enforcement authority.[86] At issue in the case was the constitutionality of the removal provision for members of PCAOB, an agency established to regulate the accounting industry. These members are appointed by the SEC for five-year terms and can be removed by the SEC only "for good cause shown."[87] The Court assumed that SEC commissioners had removal protection because neither party argued otherwise,[88] but it did not decide the issue.[89] As a result, it struck down the removal provision for PCAOB members, finding the "double removal protection" scheme to be constitutionally infirm.[90]

Justice Breyer, in a dissent joined by Justices Stevens, Ginsburg, and Sotomayor, questioned why the Court did not rule on whether SEC commissioners enjoyed removal protection, since without it there would have been only one layer of for-cause removal protection and thus no constitutional defect.[91] Justice Breyer also suggested that statutory silence should imply that SEC commissioners are removable at will.[92]

The Supreme Court returned to this issue two years ago in *Department of Transportation v. Association of American Railroads*.[93] Amtrak board members operate pursuant to a statute that gives them five-year terms, but the relevant statute is silent on their removal.[94] In

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[83] 561 U.S. 477 (2010).

[84] Datla & Revesz, *supra* note 1, at 790.

[85] *See* Wiener v. United States, 357 U.S. 349, 354 (1958) ("The Commission was established as an adjudicating body."); Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1211 (2013) (referring to "the strictly adjudicative functions of the War Claims Commission").

[86] *See* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1384 (2004) ("The SEC is thus authorized to take one of four paths to address the transaction with which it is concerned: legislative rule, administrative adjudication, judicial enforcement, or guidance.").

[87] *See PCAOB*, 561 U.S. at 484–86.

[88] *See id.* at 487.

[89] *See id.* at 545 (Breyer, J., dissenting) (questioning the Court's failure to decide the issue).

[90] *See id.* at 495–96.

[91] *See id.* at 545–46 (Breyer, J., dissenting).

[92] *See id.* at 546.

[93] 135 S. Ct. 1225 (2015).

[94] *See* 49 U.S.C. § 24302 (2012).

2008, Congress authorized Amtrak and the Federal Railroad Administration to jointly issue standards on freight activity.[95] The respondent in the case sought to invalidate the resulting standards by arguing that Amtrak was a private entity and, therefore, that it was unconstitutional to allow it to exercise such authority.[96] Rejecting this challenge, the Court decided that Amtrak should be treated as a "governmental entity," in part because, in a memorandum by the Office of Legal Counsel, "the Executive Branch has concluded that all appointed Board members are removable by the President without cause."[97] This memorandum distinguished Amtrak from the War Claims Commission: "[Amtrak] runs a business; it is not an adjudicatory body. Consequently, there is no ground for inferring any tenure protection . . . under the reasoning of *Wiener*."[98]

The academic consensus is that statutory silence on removal protection implies no removal protection except in the very narrow set of cases in which the agency has exclusively adjudicatory functions. Adrian Vermeule best expresses the current state of the law: "Absent either express for-cause tenure protection in the relevant statute . . . or an agency modeled on the Article III judiciary . . . , agency officials are dischargeable at will by the President."[99] Similarly, according to Peter Strauss, "in the absence of a statutory provision limiting removals . . . officers of the executive branch serve at will."[100] Focusing more narrowly on situations where the statute is silent on removal but contains a fixed term, Neomi Rao writes that "[p]roperly understood," statutory terms "do not impose a legal restriction on removal at will by the President."[101] Kirti Datla and Richard Revesz likewise argue that statutory silence should not be interpreted as akin to for-cause removal protection.[102]

In summary, Lewis's decision to treat term limits as equivalent to removal protection is inconsistent with both the Supreme Court's jurisprudence and the academic literature. Some of these authorities came after the publication of the Lewis study. But, nonetheless, it would be highly misleading now to conclude that the empirical results for specified tenure are also relevant to removal protection.

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[95] *See* Dep't of Transp. v. Ass'n of Am. R.R., 135 S. Ct. at 1229.

[96] *See id.* at 1228.

[97] *Id.* at 1231, 1232–33.

[98] Holdover and Removal of Members of Amtrak's Reform Bd., 27 Op. O.L.C. 163, 167 (2003).

[99] Vermeule, *supra* note 85, at 1174.

[100] Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 Geo. Wash. L. Rev. 696, 716 (2007).

[101] Rao, *supra* note 69, at 1252–53.

[102] *See* Datla & Revesz, *supra* note 1, at 832.

C.   *Independent Variables*

Lewis's primary objective was to examine the hypothesis that "[m]embers of Congress are more likely to pursue insulation as their policy preferences diverge from those of the president."[103] Lewis measured divergent policy preferences in his econometric specifications as periods in which the majority party in at least one chamber of Congress was not aligned with the political party of the President. His most important independent variable is, therefore, "divided government," which is coded as 1 if the President and the majorities of the House and Senate are not controlled by the same party, and as 0 otherwise.[104]

Lewis also hypothesizes that "the ability of the majority to insulate a new agency in divided government depends upon the strength of the majority."[105] He means that a majority opposed to the President would be more likely to obtain insulating features for a new agency if it is large rather than small. A corollary is that when the majority is aligned with the President, such insulating features are less likely to result when this majority is large as opposed to small. Indeed, the premise for his analysis is that the party opposed to the President would want to insulate a new agency from presidential control and that its ability to succeed would be a function of both its size and whether it enjoys majority status.

Consistent with this narrative, Lewis uses, as an independent variable, an interaction term of "divided government" and "majority strength" to test whether majority strength has a different effect when government is divided as opposed to unified. As Lewis notes, this interaction term "should be positive, indicating that measures of majority strength increase the probability that a new agency will be insulated during periods of divided government."[106]

Lewis, however, implements this concept in a way that does not permit him to test whether the probability of granting insulating characteristics to a new agency is a function of the strength in Congress of the party opposed to the President. As his proxy for majority strength, he uses the size of the majority in the House of Representatives, but does not control for the size of the majority in the Senate.[107] Yet there

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[103] LEWIS, *supra* note 7, at 30. Lewis also argued that time has an effect on insulation decisions by noting that "[m]embers of Congress assess presidential preferences at the point of decision and likely presidential preferences in the future when deciding about insulating an agency." *Id.* at 31.

[104] *See id.* at 55.

[105] *Id.*

[106] *Id.* at 56.

[107] *Id.*

is no obvious reason why the size of the majority in the Senate would not matter as much as the size of the majority in the House of Representatives.

More importantly, by using the size of the majority of the House of Representatives as his proxy for majority strength, Lewis muddles the variable interacting "divided government" and "majority strength" by lumping together two very distinct forms of government composition: periods when the House majority party and the President are aligned (but the Senate is controlled by a different party) with periods in which the House majority party and the President are not aligned. To the extent that, as Lewis hypothesizes, the party opposed to the President seeks to insulate agencies from presidential control, one would expect that the size of the House majority would have opposite effects in these two situations.

Lewis's choice of interaction term gives rise to two serious problems. The first is that he is not actually testing the hypothesis concerning the impact on insulating characteristics of the size in Congress of the party opposed to the President. And, second, by lumping together two situations in which the results are likely to point in different directions, Lewis runs the risk of neutralizing the effect he seeks to study, whatever that effect might be.

D.   Results

Leaving aside these design issues, Lewis's results are not what the legal academic literature reads them to be. As noted above, in the legal literature, Lewis's work is generally understood as providing empirical support for the proposition that agencies established during periods of divided government are more likely to have attributes of independence. But Lewis's empirical study actually shows the opposite. For each of his estimations, the coefficient on "divided government" is negative and statistically significant.[108] Thus, as Lewis himself acknowledges, this result "appears to indicate that agencies are less likely to be insulated during periods of divided government, contrary to expectations."[109] This result is precisely the opposite of what the legal literature generally attributes to Lewis.

Lewis goes on to say that "[c]are is necessary in interpreting these coefficients in isolation from the interaction effects."[110] The variable interacting "divided government" and "majority strength" is, for most of the dependent variables, positive and statistically significant, indi-

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[108] *See id.* at 59.
[109] *Id.* at 58.
[110] *Id.* at 58–60.

cating, as Lewis notes, "that agencies are more likely to be insulated in divided government when the majority is large."[111] Thus, the proper way to interpret Lewis's result is not that agencies established during divided government are more likely to have insulating characteristics than they are when government is unified. In fact, Lewis's results support the opposite proposition. Instead, what Lewis's results support is the altogether different claim that agencies established during periods of divided government are more likely to have insulating characteristics when the congressional majorities are large rather than small.[112]

To further understand the role of divided government in Lewis's dataset, we ascertained what size of a House majority would be large enough for an agency to be more likely to have insulating characteristics under divided government than under unified government. Three results are noteworthy. First, for Lewis's "commissions" variable, the effect of divided government always decreases the probability that an agency would have insulating characteristics. There is no size of the House majority at which the overall effect of divided government increases the probability that Congress will establish an agency with a commission structure.

Second, for three of Lewis's dependent variables, under a sufficiently large House majority, an agency established under divided government would be more likely to have insulating characteristics than one established under unified government. But we estimated that the majority necessary to produce this effect, under plausible assumptions, is larger than the size of any majority in the past hundred years.[113] For the "location," "fixed terms," and "specific qualifications

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[111] *Id.* at 60.

[112] Lewis's work also supports the proposition that agencies established during periods of unified government are less likely to have insulating characteristics when the congressional majorities are large rather than small. *See id.*

[113] We conducted a marginal effects analysis on the estimations run in the Lewis study to roughly estimate the size of the majority in the House of Representatives that would be necessary to make the "divided government" variable have an overall positive effect in each of the estimations. First, setting the other independent variables at their means, we determined the effect that an increase in the House majority by one percentage unit would have on the likelihood that Congress would establish an agency with each indicia of independence. Since the House majority size variable was entered into the dataset as a percentage of the members of the House of Representatives, a one-unit increase in this variable corresponds to an increase in the majority size of the House of Representatives of one percent of the total members of the House of Representatives at that time. For each estimation, we then compared the two coefficients that are necessary to determine the total effect of divided government on the insulating features tested by Lewis—the negative coefficient on the "divided government" variable and the positive coefficient on the interaction term for majority size times divided government. We applied the marginal effects result we obtained in the first step of the analysis to roughly approximate the size of

for administrators" variables, the majority party in the House would need to have 353,[114] 363,[115] and 382 seats,[116] respectively, for divided government to produce the effect consistent with the Divided Government Hypothesis discussed in the legal literature. In contrast, over the last one hundred years, the majority party in the House has never had more than 334 seats.[117]

Third, it is only for the "independence" variable that a plausible House majority would lead divided government to increase the probability that an agency would receive insulating characteristics. The majority party would need to hold at least 234 seats[118]—a condition that the Republican Party has satisfied in the last three Congresses.[119] But recall that, as explained above, the independence variable is not what the legal literature equates with independent agencies: It does not depend on removal protection but on whether the agency has another bureaucratic organization above it.[120]

II

OUR DATASET

To study the characteristics that lead to the establishment of independent agencies, we created a new dataset containing informa-

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the increase in the House of Representatives required for the overall effect of the "divided government" variable in each estimation to turn from negative to positive. We also calculated the size of the majority in the House of Representatives that would be necessary to make the "divided government" variable have an overall positive effect in each of the estimations using the raw coefficients. The results were almost identical to the marginal effects analysis.

[114] For the "location" estimation, the effect of divided government on whether Congress establishes an agency one category further removed from the President is negative whenever the size of the majority (number of members in the majority party minus number of all other members) is less than 61.9% of the total number of the Representatives in the House of Representatives.

[115] For the "fixed terms" estimation, the effect of divided government on whether Congress establishes an agency with a head that has specified tenure is negative whenever the size of the majority (number of members in the majority party minus number of all other members) is less than 66.7% of the total number of the Representatives in the House of Representatives.

[116] For the "specific qualifications for administrators" estimation, the effect of divided government on whether Congress establishes an agency with limitations on the President's appointment of the agency head is negative whenever the size of the majority (number of members in the majority party minus number of all other members) is less than 75.2% of the total number of the Representatives in the House of Representatives.

[117] *See Party Divisions of the House of Representatives*, *supra* note 27.

[118] For the "independence" estimation, the effect of divided government on whether Congress establishes an agency without any bureaucracy above it is negative whenever the size of the majority is less than 7.4% of the total number of the Representatives in the House of Representatives.

[119] *See Party Divisions of the House of Representatives*, *supra* note 27.

[120] *See supra* notes 59–61 and accompanying text.

tion about agencies in the modern U.S. administrative state. Our source was the U.S. Government Manual, which Lewis also used,[121] and which provides authoritative and comprehensive information on the agencies of the federal government.[122] The Manual is divided into seven categories, but, for reasons discussed below,[123] we focused our attention on only two: "Executive Branch: Departments" and "Executive Branch: Independent Establishments and Government Corporations."[124] Our dataset starts with agencies that were established after 1887, when the creation of the Interstate Commerce Commission gave birth to the administrative state,[125] and ends with agencies established in 2015. To determine the agencies then in existence, we used the 2015 version of the Manual.

We excluded the five agencies established before 1887: the Departments of Treasury, State, Justice, Agriculture, and Interior. Additionally, because we seek to explain features about the current administrative state, we did not include in our dataset agencies that were eliminated prior to 2015 and therefore were not listed in the 2015 U.S. Government Manual, such as the Indian Claims Commission, which was established in 1946 and eliminated in 1976.

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[121] *See* Lewis, *supra* note 7, at 172 (describing the process used to build the dataset).

[122] The U.S. Government Manual is the "official handbook of the Federal Government," prepared by the Presidential and Legislative Publications Unit, Office of the Federal Register. *See* Office of the Fed. Register, Nat'l Archives & Records Admin., The United States Government Manual (2015), https://www.gpo.gov/fdsys/pkg/GOVMAN-2015-07-01/pdf/GOVMAN-2015-07-01-Front-Matter-1.pdf. The Manual "provides comprehensive information on the agencies of the legislative, judicial, and executive branches." *Id*.

[123] *See infra* notes 134–37 and accompanying text (explaining why this Article studies only agencies that carry out rulemaking, adjudicatory, or enforcement functions).

[124] For the full table of contents of the United States Government Manual, including the two categories we focused on, see *United States Government Manual*, U.S. Gov't Publ'g Office, https://www.gpo.gov/fdsys/pkg/GOVMAN-2015-07-01/content-detail.html (last visited Mar. 14, 2017).

[125] *See* Lawrence M. Friedman, A History of American Law 384 (1973) (noting that "[t]he creation of the Interstate Commerce Commission, in 1887, has been taken to be a kind of genesis" of federal administrative law); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387, 1388 (1987) (analyzing the scope of the commerce power during "the rise of the administrative state, from the onset of the Interstate Commerce Commission in 1887 to the height of the New Deal"); Henry P. Monaghan, Marbury *and the Administrative State*, 83 Colum. L. Rev. 1, 17 n.100 (1983) ("While the federal administrative process existed in rudimentary form in 1789, it is 'customary and appropriate to date the present federal [administrative] era from the creation of the Interstate Commerce Commission in 1887.'" (alteration in original) (quoting Louis L. Jaffe, Judicial Control of Administrative Action 9 (1965))); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 Stan. L. Rev. 1189, 1189 (1986) ("A century ago, when Congress established the Interstate Commerce Commission, it initiated a new epoch in responsibilities of the federal government.").

Following the approach taken by Kirti Datla and Richard Revesz, we also excluded from our dataset agencies that are not insulated from bureaucratic organization above them.[126] We considered an agency to be insulated from a bureaucratic organization above it if it had no layers of organization above it or, in the case of subagencies with a layer of organization above it, if Congress granted the heads of those subagencies protection against removal by the President.[127]

We did so for two reasons. First, the independence of agencies with bureaucratic organization above them is influenced both by the hierarchy within their organization and their relationship with the President. Excluding such subagencies yields a dataset that allows for a uniform comparison of agencies whose independence is not affected by the hierarchy within their organization.[128] Second, it is not clear that agencies embedded within a hierarchy are conceptually different from divisions of an agency that lack a separate name. For example, the Assistant Secretary of the Interior for Land and Minerals Management supervises four Interior Department agencies: the Bureau of Land Management; the Bureau of Ocean Energy Management; the Bureau of Safety and Environmental Enforcement; and the Office of Surface Mining, Reclamation and Enforcement.[129] The relationship between this Assistant Secretary and the heads of the agencies that report to her may well be quite similar to that of the Associate Attorney General and the heads of the Antitrust and Civil Rights Divisions of the Department of Justice, which report to him.[130] And the same may well be true with respect to the relationship between the Associate Attorney General and the heads of the Office of Violence Against Women and the Office of Justice Programs, which are subagencies that also report to him.[131]

Our dataset contains a total of sixty-eight agencies. We discuss below the seven indicia of independence that form the basis for our

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[126] *See* Datla & Revesz, *supra* note 1, at 784 n.90 (excluding agencies housed within other agencies from their study).

[127] The only subagency in our dataset that is protected against removal by the President is the Federal Energy Regulatory Commission in the Department of Energy.

[128] Examining questions about the extent to which subagencies are independent from bureaucratic organization above them is outside the scope of this Article.

[129] *See Janice Schneider—Assistant Secretary for Land and Minerals Management*, U.S. Dep't of the Interior, https://www.doi.gov/whoweare/aslm (last visited Mar. 5, 2017).

[130] *Cf. Agencies*, U.S. Dep't of Justice, (June 5, 2015), https://www.justice.gov/agencies/chart (providing a visual depiction of the relationships between Department of Justice subagencies).

[131] *Cf. id.*

empirical work.[132] Only fifteen agencies in our dataset lack any indicia of independence.

Congress sometimes decides to locate new agencies in existing hierarchies, to terminate agencies, and to delegate new authority to existing agencies. These decisions, too, are political decisions. While the legal literature addresses some of these topics,[133] studying them would require a different dataset.

This Article studies agencies that carry out rulemaking, adjudicatory, or enforcement functions because those agencies are the focus of administrative law.[134] In contrast, agencies that provide only advice to one of the branches are engaged in conceptually different work and are outside of the scope of standard administrative law doctrines, particularly doctrines relating to the constitutional status of administrative agencies. For example, in *Buckley v. Valeo*,[135] the Supreme Court noted: "Insofar as the powers confided in the Commission are essentially of an investigative and informative nature, falling in the same general category as those powers which Congress might delegate to one of its own committees, there can be no question that the Commission as presently constituted may exercise them."[136] But it added, in sharp contrast, that when going "beyond this type of authority to the more substantial powers exercised by the Commission, we reach a different result. The Commission's enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress."[137]

As a result, we did not include in our dataset agencies from the five remaining categories of the U.S. Government Manual. Most of the agencies in "Executive Branch: The President," such as the Council of Economic Advisers, the Domestic Policy Council, the National Economic Council, and the Office of Science and Technology Policy, provide advice to the President. "Quasi-Official Agencies" includes cultural institutions such as the Smithsonian Institution and the United States Holocaust Memorial Museum.

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[132] *See infra* notes 149–57 and accompanying text (discussing the seven indicia of independence that are studied in this Article).

[133] *See, e.g.*, Epstein & O'Halloran, *supra* note 10 (examining delegations of authority during periods of divided government).

[134] *See* Adrian Vermeule, *Contra* Nemo Iudex in Sua Causa*: The Limits of Impartiality*, 122 YALE L.J. 384, 399 (2012) ("Although the variety of administrative institutions and procedures is bewildering, many agencies in some way or another combine the powers of rulemaking, investigation, prosecution, and adjudication.").

[135] 424 U.S. 1 (1976).

[136] *Id.* at 137.

[137] *Id.* at 138.

"International Organizations" includes the African Development Bank, the International Monetary Fund, the United Nations, and the World Bank. The agencies in these three categories do not typically have the rulemaking, adjudication, and enforcement functions that are the hallmarks of the administrative state and are therefore excluded from our dataset. Also excluded are "Legislative Branch" and "Judicial Branch" because agencies in those groups primarily advise and support separate branches of government.

It is possible that a few agencies in one of the five excluded categories have rulemaking, adjudication, or enforcement powers. It is also possible that some of the agencies in the two categories used for our database lack any of those responsibilities. But we did not scour the U.S. Code to make case-by-case determinations because such an inquiry would inevitably have involved questions of judgment that might have biased our sample. Instead, our decision rule was to include all agencies in the two categories that closely matched our objective and to exclude the five categories that did not.

Our dataset differs from the dataset in the Lewis study in several important ways. While our dataset contains sixty-eight agencies established between 1887 and 2015 that remained in existence in 2015, the Lewis study includes all agencies established by statute between 1946 and 1999, regardless of whether they remained in existence at the end of this period—a total of 182 agencies. Also, Lewis began by considering agencies in all the U.S. Government Manual categories. Then, he "refined the data set to exclude advisory, quasi-official, multilateral, and educational/research agencies and support offices common to all cabinet departments."[138] Thus, Lewis made on a case-by-case basis an inquiry that we made categorically. The inclusion in his database of judicial bodies, such as the United States Court of Appeals for the Armed Forces, the United States Court of Appeals for the Federal Circuit, and the United States Court of Veterans Appeals, illustrates the perils of case-by-case determinations. Moreover, unlike us, Lewis did not exclude agencies that were housed within another bureaucratic structure. We explain above the reasons for our choices.[139]

For each agency in our sample, we determined the year of agency establishment as the first year that Congress established that agency or its first predecessor agency. Congress frequently establishes agencies that take over the functions and authorities of prior agencies, and

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[138] *See* LEWIS, *supra* note 7, at 171–73.

[139] *See supra* notes 126–31 and accompanying text.

that use personnel, facilities, and other resources of prior agencies.[140] These new agencies may also carry over structural features of their predecessors, thereby making the consideration of predecessor agencies essential to our study of agency design.

An agency is a predecessor agency to an agency in our dataset if the agency in our dataset shared the same name as the predecessor agency, or if the new agency took over the primary regulatory responsibilities of the predecessor agency. To determine whether the agency took over the primary regulatory responsibilities of a predecessor agency, we reviewed the website of the agency in question. If the website of the agency identified a prior agency as a predecessor agency, or as an agency from which that agency took over primary regulatory responsibilities, we treated that agency as a predecessor agency.

Consider the example of the Federal Energy Regulatory Commission (FERC). Congress established the Federal Power Commission (FPC) in 1920 with a multimember structure under the joint administration of the Secretaries of War, Interior, and Agriculture.[141] In 1930, Congress passed a statute creating a new leadership structure for the FPC, consisting of a five-member commission with a partisan balance requirement, and with each commissioner granted a specified tenure.[142] According to the FERC website, the changes in 1930 were designed to eliminate the conflicting mandates created by the prior leadership structure involving secretaries from multiple cabinet agencies.[143] The Federal Power Act of 1935 and the Natural Gas Act of 1938 gave the FPC the authority to regulate the sale and transportation of electricity and natural gas.[144] Amendments to the Natural Gas Act in 1942 also gave the FPC the authority to certify and regulate natural gas facilities.[145] In 1977, following the OPEC oil embargo, Congress decided to reorganize the FPC as FERC, placing it in the Department of Energy.[146] The statute gave

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[140] *See, e.g.*, Department of Energy Organization Act, Pub. L. No. 95-91, § 401, 91 Stat. 565, 571, 582 (1977) (reorganizing the Federal Power Commission as the Federal Energy Regulatory Commission in the Department of Energy).

[141] Act of June 10, 1920, Pub. L. No. 66-280, § 1, 41 Stat. 1063, 1063.

[142] Act of June 23, 1930, Pub. L. No. 71-412, 46 Stat. 797, 797.

[143] *See History of FERC*, Fed. Energy Reg. Comm'n, http://www.ferc.gov/students/ferc/history.asp (last visited Mar. 5, 2017).

[144] Act of Aug. 26, 1935, Pub. L. No. 74-333, § 201, 49 Stat. 803, 847; Act of June 21, 1938, Pub. L. No. 75-688, 52 Stat. 821.

[145] Act of Feb. 7, 1942, Pub. L. No. 77-444, 56 Stat. 83, 83–84.

[146] Department of Energy Organization Act, Pub. L. No. 95-91, § 401, 91 Stat. 565, 582 (1977).

FERC members statutory protection against removal, and granted FERC litigation authority and bypass authority.[147]

Congress continued certain aspects of agency design from the FPC, granting FERC the same indicia of independence that had previously been granted to the FPC, including specified tenure, a multimember structure, partisan balance requirements, and adjudication authority.[148] Applying our definition of "predecessor agency," we treat the FPC as a predecessor agency to FERC because FERC took over the primary regulatory responsibilities of the FPC. Therefore, we set 1920 as the year of establishment of the FERC in our dataset, and we coded FERC as being established with a multimember structure and adjudication authority, but not with the indicia of independence Congress granted it in later years, including removal protection, specified tenure, partisan balance requirements, litigation authority, and bypass authority.

We collected information related to whether Congress granted each agency any of the seven structural features that we have identified as indicia of independence for agencies at the time of agency establishment. We follow Datla and Revesz in identifying the following indicia of independence: removal protection, specified tenure, multimember structure, partisan balance requirements, litigation authority, bypass authority, and adjudication authority.[149] We read statutes from the U.S. Statutes at Large and coded each of these variables as 1 if Congress established the agency with each indicia of independence, and 0 otherwise.[150]

Removal protection provisions come in various forms, but the typical removal protection requirement specifies that an official can be removed only for "inefficiency, neglect of duty, or malfeasance in

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[147] *Id.* § 401(b), 91 Stat. at 582 (statutory removal protection); *id.* § 401(i), 91 Stat. at 583 (litigation authority); *id.* § 401(j), 91 Stat. at 583 (bypass authority).

[148] *See* An Act of June 10, 1920, Pub. L. No. 66-280, §§ 1, 4(d), 4(g), 41 Stat. 1063, 1063, 1065, 1066–67 (establishing the Federal Power Commission with a multimember structure consisting of three members and adjudication authority); Act of June 23, 1930, Pub. L. No. 71-412, 46 Stat. 797, 797 (amending the Federal Water Power Act to provide that the Federal Power Commission shall have a multimember structure consisting of five members with specified tenures and establishing a partisan balance requirement related to the nomination of agency heads); Department of Energy Organization Act, §§ 401(b), 401(g) (establishing within the Department of Energy an independent regulatory commission named the Federal Energy Regulatory Commission with a multimember structure consisting of five members with removal protection and specified tenures and establishing partisan balance requirements related to the nomination of the members).

[149] *See* Datla & Revesz, *supra* note 1, at 784.

[150] *See generally* U.S. Gov't Publ'g Office, United States Statutes at Large, https://www.gpo.gov/fdsys/browse/collection.action?collectionCode=STATUTE (last visited Mar. 5, 2017) (collecting all laws and resolutions enacted during each session of Congress).

office."[151] Specified tenure requirements provide that an agency head shall serve for a specified term of years.[152] Provisions granting agencies multimember structures create a governing body of the agency that consists of more than one member.[153] Partisanship balance provisions require the President to consider the partisan affiliation of agency heads when appointing them, typically providing that no more than a certain number of the members of the governing body may be from the same political party.[154] Litigation authority grants an agency some authority to represent itself in courts of law, rather than to conduct litigation exclusively through the Department of Justice.[155] Bypass authority permits an agency to avoid centralized review of congressional testimony, legislative proposals, or budget submis-

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[151] *See, e.g.*, Act of Feb. 4, 1887, ch. 104, § 11, 24 Stat. 379, 383 (creating the Interstate Commerce Commission); Federal Reserve Act, Pub. L. No. 63-43, § 10, 38 Stat. 251, 260 (1913) (providing that each member of the Board shall serve their specified tenure "unless sooner removed for cause by the President"); Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 7104(b), 92 Stat. 1111, 1196 (providing that members of the Federal Labor Relations Authority may be removed by the President only upon notice and hearing and only for inefficiency, neglect of duty, or malfeasance in office).

[152] *See, e.g.*, Civil Service Reform Act § 7104(c) (providing that the original members shall be appointed for terms of one, three, and five years, respectively, and that each member shall serve for five-year terms thereafter); Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, sec. 101, § 2(a)(2), 88 Stat. 1389, 1389 (providing for a five-year term for each commissioner of the Commodity Futures Trading Commission); Federal Reserve Act § 10 (providing that the initial five members selected by the President shall serve for terms of two, four, six, eight, and ten years, respectively, and thereafter members selected by the President shall serve for terms of ten years).

[153] *See* Civil Service Reform Act § 7104(a) (providing for a Federal Labor Relations Authority composed of three members); Commodity Futures Trading Commission Act § 2(a)(2) (providing for a Commodity Futures Trading Commission consisting of a chairman and four other commissioners); Federal Reserve Act § 10 (creating a Federal Reserve Board consisting of seven members). In recent litigation involving the constitutional status of the agency structure of the Consumer Financial Protection Bureau, the United States Court of Appeals for the District of Columbia Circuit noted that independent agencies have historically been headed by multiple commissioners. PHH Corp. v. Consumer Fin. Prot. Bureau, 839 F.3d 1, 6 (D.C. Cir. 2016), *vacated and rehearing en banc granted*, No. 15-1177, 2017 WL 631740 (D.C. Cir. Feb. 16, 2017).

[154] *See* Civil Service Reform Act § 7104(a) (providing that no more than two of the three members of the Federal Labor Relations Authority may be from the same political party); Commodity Futures Trading Commission Act of 1974 § 2(a)(2) (providing that no more than three members of the commission may be members of the same party).

[155] *See* Civil Service Reform Act § 7105(h) (providing that attorneys designated by the Federal Labor Relations Authority may appear for the Federal Labor Relations Authority and represent it in any civil action brought in connection with any function carried out by the Federal Labor Relations Authority pursuant to the Civil Service Reform Act of 1978 or as otherwise authorized by law); Commodity Futures Trading Commission § 2(a)(4) (providing that the Commodity Futures Trading Commission may have a general counsel who, along with other attorneys appointed by the Commodity Futures Trading Commission, may represent the commission in courts of law whenever appropriate).

sions.[156] Adjudication authority grants an agency some authority to proceed through formal adjudication.[157]

An assumption of the analyses in this Article is that Congress considered the question of agency design at the time of agency establishment and made an intentional decision about whether or not to grant each agency each of the seven indicia of independence. We did not include instances in which Congress granted an agency any indicia of independence in a year after Congress established the agency. While including such postestablishment indicia of independence would add more information to the empirical analyses, it would also create a methodological problem. We are unable to determine the years in which Congress considered granting postestablishment indicia of independence to any agency but intentionally chose not to grant it. Therefore, including postestablishment indicia of independence in our analyses would bias the results of the analyses by introducing affirmative instances of Congress granting indicia of independence with no corresponding negative instances of Congress not granting indicia of independence. Comparing congressional decisions to grant indicia of independence only at the time of agency establishment ensures a uniform comparison.

III
EMPIRICAL EVALUATION OF THE NEW DEAL HYPOTHESIS

In this Part, we begin our empirical analysis by presenting results from a bivariate test of the New Deal Hypothesis. It looks at whether

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[156] *See* Commodity Futures Trading Commission Act § 2(a)(9)(B) (providing that whenever the Commodity Futures Trading Commission submits any budget estimate or request to the President or to the Office of Management and Budget, or any legislative recommendations, legislative testimony, or comments on legislation to the President or the Office of Management and Budget, the Commodity Futures Trading Commission shall concurrently transmit copies to the House Committee on Agriculture and the Senate Committee on Agriculture and Forestry); Act of Oct. 28, 1974, Pub. L. No. 93-495, § 111, 88 Stat. 1500, 1506 (providing that no officer or agency of the United States may require the Federal Reserve System and certain other financial regulatory agencies to submit legislative recommendations, or testimony, or comments on legislation to any officer or agency of the United States for approval, comments, or review prior to the submission of such recommendations, testimony, or comments to the Congress).

[157] *See* Civil Service Reform Act § 7118 (providing that the General Counsel of the Federal Labor Relations Authority may, among other things, provide cease and desist orders for unfair labor practices after notice and hearing); Commodity Futures Trading Commission Act § 14 (providing for a process for the Commodity Futures Trading Commission to investigate and adjudicate complaints of violations under the act); Federal Reserve Act § 9 (permitting the Federal Reserve Board to require member banks to surrender stock in Federal Reserve Banks after notice and hearing if at any time it appears that such member bank has failed to comply with Section 9 of the Federal Reserve Act of 1913 or the regulations of the Federal Reserve Board).

the difference in the percentage of agencies with each of the relevant indicia of independence established during the New Deal and at other times is statistically significant.

The New Deal Hypothesis states that Congress was more likely to establish independent agencies during the New Deal than during other time periods.[158] Congress established the Interstate Commerce Commission, the first agency commonly considered as an independent agency, decades before the New Deal, in 1887.[159] Congress also established the Federal Reserve System and the Federal Trade Commission, two other agencies commonly thought of as independent, before the New Deal.[160] Moreover, Congress established numerous agencies with indicia of independence after the New Deal. Nonetheless, the literature makes the claim that the New Deal period was an especially robust period for the establishment of independent agencies.[161]

We coded every agency in our dataset established in the years 1933–1938 as "New Deal Agencies."[162] Table 2 lists the seven New Deal Agencies in our dataset and the indicia Congress granted to each at the time of their establishment.

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[158] *See supra* note 4 and accompanying text.

[159] Interstate Commerce Act of 1887, Pub. L. No. 49-104, § 11, 24 Stat. 379, 383.

[160] Federal Trade Commission Act, Pub. L. No. 63-203, 38 Stat. 717 (1914); Federal Reserve Act § 2, 38 Stat. 251.

[161] *See supra* note 4 and accompanying text.

[162] Numerous other agencies were established during the New Deal period. One historical study lists over one hundred agencies in a partial list of New Deal agencies, many of which were established by President Roosevelt as government corporations. JOHN T. FLYNN, THE ROOSEVELT MYTH 290–92 (1948). Our dataset only includes New Deal agencies that still existed in 2015 or which are predecessor agencies for agencies that existed in 2015. As stated above, our approach is to study the current landscape of the modern administrative state. Our analysis examines the questions of what are the differences between New Deal agencies that remain a part of the modern administrative state with other agencies that remain a part of the administrative state. To the extent that the New Deal agencies in our dataset are not representative of all New Deal agencies, our analysis would not provide an unbiased comparison of all New Deal agencies relative to other agencies.

TABLE 2. NEW DEAL AGENCIES

Agency	Year Created	Indicia of Independence
Federal Deposit Insurance Corporation	1933	Specified Tenure, Multimember Structure, Partisan Balance Requirements, and Litigation Authority.
Tennessee Valley Authority	1933	Specified Tenure, Multimember Structure, and Litigation Authority.
Federal Communications Commission	1934	Specified Tenure, Multimember Structure, Partisan Balance Requirements, and Adjudication Authority.
National Mediation Board	1934	Removal Protection, Specified Tenure, Multimember Structure, and Partisan Balance Requirements.
Securities and Exchange Commission	1934	Specified Tenure, Multimember Structure, Partisan Balance Requirements, Litigation Authority, and Adjudication Authority.
National Labor Relations Board	1935	Removal Protection, Specified Tenure, Multimember Structure, and Adjudication Authority.
Railroad Retirement Board	1935	Specified Tenure and Multimember Structure.

The rest of this section presents results from a bivariate analysis that evaluates the New Deal Hypothesis. The bivariate analysis involves testing the empirical relationship between one dependent variable and one independent variable. The dependent variable, the variable we are testing to determine the extent to which it depends on the independent variable, is whether Congress granted an agency a specified indicator of independence. The independent variable, the variable we test to determine how much it explains changes in the dependent variable, is whether the agency was established during the New Deal or during another period.

The bivariate analysis tests the differences in the proportion of agencies established with a specified indicator of independence to agencies established without that indicator during the New Deal relative to the proportion of agencies established with that indicator of independence to agencies established without that indicator of independence during other time periods to determine if the difference between the two proportions is statistically significant.[163] We perform

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[163] Because the sample size of New Deal agencies is relatively small, we ran a Fisher's exact test instead of the chi-square test to estimate p-values for statistical differences

a bivariate analysis for each of the seven indicia of independence, except for bypass authority because Congress did not begin granting agencies bypass authority until decades after the New Deal period.[164]

The results provide some support to the New Deal Hypothesis. The association between the time period (New Deal or otherwise) and multimember structure is statistically significant at the one percent level. The association between time period and specified tenure is significant at the five percent level. The associations between time period and removal protection, partisan balance requirements, litigation authority, and adjudication authority are not statistically significant at the ten percent level. These results suggest that the New Deal time period—or some other factor correlated with the New Deal time period—made it more likely for Congress to establish agencies with a multimember structure and specified tenure for its heads relative to other time periods. Tables 3–8 present our full results.

TABLE 3. THE NEW DEAL AND REMOVAL PROTECTION

	Agencies Created with Removal Protection	Agencies Created Without Removal Protection	Percentage of Agencies Created with Removal Protection
New Deal	2	5	29%
Other	15	46	25%

* Two-tailed p-value = 1

The proportion of agencies in our dataset established with removal protection during the New Deal is similar to the proportion of agencies in our dataset established with removal protection during other time periods. The difference between the two proportions is not statistically significant at the ten percent level. Congress granted removal protection to around one out of every four agencies it established in our dataset.

One cautionary note, however, is in order. Justice Breyer, in his dissent in *PCAOB*,[165] wrote that "Congress created the SEC at a time when, under this Court's precedents, it would have been *unconstitutional* to make the Commissioners removable only for cause."[166] Indeed, the SEC was established between two landmark

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between the groups. We compute two-sided p-values with the method of summing small p-values.

[164] *See infra* note 194 and accompanying text.

[165] For further discussion of this case, see *supra* notes 83–92 and accompanying text.

[166] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd. (*PCAOB*), 561 U.S. 477, 547 (2010) (Breyer, J., dissenting).

cases: *Myers v. United States*,[167] decided on October 25, 1926, and *Humphrey's Executor v. United States*,[168] decided on May 27, 1935. According to Justice Breyer, the Supreme Court's decision in *Myers* "cast serious doubt on the constitutionality of all 'for cause' removal provisions," whereas the Court's decision in *Humphrey's Executor*, nine years later, "removed any doubt in respect to the constitutionality of making commissioners of independent agencies removable only for cause."[169]

Justice Breyer suggested that Congress viewed for-cause removal protection as unconstitutional during the period between *Myers* and *Humphrey's Executor*, and therefore would not have intended to provide the SEC with this insulating feature: "Nor is the absence of a 'for cause' provision in the statute that created the [SEC] likely to have been inadvertent."[170] And he noted that, during this period, "Congress created at least three major federal agencies without making *any* of their officers removable for cause."[171]

Justice Breyer's dissent implicitly suggests that Congress consciously avoided for-cause removal provisions during the nine-year period between *Myers* and *Humphrey's Executor* because of constitutional concerns. The extent to which *Myers* influenced decisions to create agencies with or without removal protection affects the interpretation of the results of the bivariate analysis of removal protection and the New Deal time period. However, the evidence as to whether Congress intentionally avoided establishing agencies with removal protection after *Myers* points in conflicting directions. The establishment of the National Labor Relations Board (NLRB) supports this view. As Justice Breyer noted, "only *one month* after *Humphrey's Executor* was decided, [in establishing the NLRB,] Congress returned to its pre-*Myers* practice of including such provisions in statutes creating independent commissions."[172] Justice Breyer's view is further supported by the fact that the original bill establishing the NLRB was introduced before *Humphrey's Executor* and did not include for-cause removal protection,[173] and that the

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[167] In *Myers*, the Supreme Court held that the President could remove a Postmaster at will, despite a statutory removal provision requiring the advice and consent of the Senate. *See* Myers v. United States, 272 U.S. 52, 176 (1926).

[168] In *Humphrey's Executor*, the Supreme Court held that statutory for-cause removal protection of Federal Trade Commission commissioners was valid. *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 631–32 (1935).

[169] *PCAOB*, 561 U.S. at 546–47 (2010) (Breyer, J., dissenting).

[170] *Id.* at 546.

[171] *Id.* at 547.

[172] *Id.*

[173] *See* S. 1958, 74th Cong. § 3a (1935) (as introduced by Sen. Wagner on Feb. 15, 1935).

removal provision was added to the bill after *Humphrey's Executor* was decided.[174] But this view is contradicted by the structure of the National Mediation Board. When Congress established this agency on June 21, 1934, one year before *Humphrey's Executor*, it gave its heads removal protection.[175]

TABLE 4. THE NEW DEAL AND SPECIFIED TENURE

	Agencies Created with Specified Tenure	Agencies Created Without Specified Tenure	Percentage of Agencies Created with Specified Tenure
New Deal	7	0	100%
Other	36	25	59%

* Two-tailed p-value = 0.04. Statistically significant at the five percent level.

Congress granted specified tenure to the heads of agencies in our dataset established during the New Deal more frequently than it granted specified tenure to heads of agencies in our dataset established during periods other than the New Deal. The association between the New Deal and agencies established with specified tenure is statistically significant at the five percent level.

TABLE 5. THE NEW DEAL AND MULTIMEMBER STRUCTURE

	Agencies Created with a Multimember Structure	Agencies Created Without a Multimember Structure	Percentage of Agencies Created with a Multimember Structure
New Deal	7	0	100%
Other	28	33	46%

*Two-tailed p-value = 0.01. Statistically significant at the one percent level.

Congress granted all seven New Deal agencies in our dataset a multimember structure. In periods other than the New Deal, Congress granted agencies a multimember structure only about half of the times it established an agency in our dataset. The difference in the proportions of agencies established with a multimember structure during the New Deal and agencies established with a multimember structure in other time periods is significant at the one percent level.

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[174] The removal protection was added on June 10, 1935. *See* H.R. REP. NO. 74-1147, at 2 (1935) (establishing the National Labor Relations Board with removal protection for its heads).

[175] *See* Act of June 21, 1934, Pub. L. No. 73-442, § 4, 48 Stat. 1185, 1194 (establishing the National Mediation Board with removal protection provisions for its heads).

TABLE 6. THE NEW DEAL AND
PARTISAN BALANCE REQUIREMENTS

	Agencies Created with Partisan Balance Requirements	Agencies Created Without Partisan Balance Requirements	Percentage of Agencies Created with Partisan Balance Requirements
New Deal	4	3	57%
Other	16	12	57%

* Two-tailed p-value = 1.

Table 6 includes only agencies that were established with a multimember structure, because a multimember structure is a necessary condition for partisan balance requirements. The proportion of agencies in our dataset established with partisan balance requirements during the New Deal is identical to the proportion of agencies in our dataset established with partisan balance requirements during other time periods.

TABLE 7. THE NEW DEAL AND LITIGATION AUTHORITY

	Agencies Created with Litigation Authority	Agencies Created Without Litigation Authority	Percentage of Agencies Created with Litigation Authority
New Deal	3	4	43%
Other	11	50	18%

* Two-tailed p-value = 0.15.

Congress granted litigation authority to New Deal agencies in our dataset more frequently than to agencies in our dataset established during other time periods. However, the difference in the proportions of agencies established with litigation authority during the New Deal and agencies established with litigation authority during other periods is not significant at the ten percent level.

TABLE 8. THE NEW DEAL AND ADJUDICATION AUTHORITY

	Agencies Created with Adjudication Authority	Agencies Created Without Adjudication Authority	Percentage of Agencies Created with Adjudication Authority
New Deal	3	4	43%
Other	28	33	46%

* Two-tailed p-value = 1.

The proportion of agencies in our dataset established with adjudication authority during the New Deal is similar to the proportion of agencies in our dataset established with adjudication

authority during other time periods. Congress granted adjudication authority to around three out of every seven agencies it established in our dataset. The difference in the proportions is not statistically significant at the ten percent level.

IV

EMPIRICAL EVALUATION OF
THE DIVIDED GOVERNMENT HYPOTHESIS

This Part presents results from multivariate analyses that test the Divided Government Hypothesis. Section IV.A introduces our main model for testing the Divided Government Hypothesis and presents estimations that control for divided government, the sizes of the majorities in the House of Representatives and in the Senate, and terms that interact each of the majority size variables with variables indicating whether those chambers are aligned with the party of the President. Section IV.B presents similar estimations for a second specification that controls for presidential approval rating in addition to all the variables for which the first specification controls. Section IV.C presents results from tests conducted to determine the goodness of fit of the respective probit models. Finally, Section IV.D analyzes whether the number of years away from a presidential election affects congressional decisions to establish agencies with indicia of independence.

A.   *Multivariate Analysis of the Divided Government Hypothesis*

We estimated probit models for each of the seven indicia that we have identified as features associated with independent agencies: statutory removal protection, specified tenure, multimember structure, partisan balance requirements, litigation authority, bypass authority, and adjudication authority.[176] A probit model is an estimation in which the dependent variable can take only one of two values. In this case, the dependent variable takes on the value of one if Congress established the agency with a designated indicator of independence and zero otherwise. The probit estimations presented below test the extent to which the controls included in the estimations explain when

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[176] *See supra* notes 149–57 and accompanying text. Other researchers have proposed measures of agency independence that could serve as dependent variables, but we focus on the presence of these seven indicia of independence in agency enabling statutes. *See* Jennifer L. Selin, *What Makes an Agency Independent?*, 59 AM. J. POLI. SCI. 971, 973 (2015) (estimating continuous measures of agency independence on the dimensions of limits on the appointments of key agency decision makers and limits on political review of agency policy).

Congress established agencies with indicia of independence.[177] The multivariate analyses presented below allow for an evaluation of the Divided Government Hypothesis. We do not test the New Deal Hypothesis with a multivariate analysis because of the limited number of New Deal agencies in our dataset.[178]

The Divided Government Hypothesis states that the composition of government at the time of an agency's establishment is important in determining whether that agency receives indicia of independence.[179] We control for divided government in the estimations that we present below by including an indicator variable that is equal to one for agencies established during a period of divided government and equal to zero for agencies established during a period of unified government. Following the approach in the Lewis study, we define a period of "unified government" as a period in which both chambers of Congress and the White House were controlled by the same political party, and we define all other periods of time as a period of "divided government."[180] Our dataset includes forty-three agencies that were established during a period of unified government and twenty-five agencies that were established during a period of divided government.

We also control for other variables related to the composition of government that may make it more or less likely that Congress will grant agencies indicia of independence. A larger majority size in either or both of the chambers of Congress may make it easier for one party to impose its goals related to agency design. Therefore, we include controls for the size of the House majority[181] and the size of

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[177] We estimated the estimations using the statistical package R. The R Core Team, R Found. for Statistical Computing, *R: A Language and Environment for Statistical Computing* (2014), http://www.R-project.org/. We used the Stargazer package to present estimation tables. Marek Hlavac, *Stargazer: Well-Formatted Regression and Summary Statistics Tables: R Package Version 5.2* (2015), http://CRAN.R-project.org/package=stargazer.

[178] The sample of seven New Deal agencies is a small number of observations on which to regress our dependent variables. None of these seven observations has presidential approval rating associated with it because our presidential approval rating data only goes back to 1945. Moreover, each of the seven agencies was established during a period of unified government. Because of the small number of observations and the limited variation in the relevant independent variables, a multivariate analysis of the New Deal would produce limited results.

[179] *See supra* notes 7–11 and accompanying text.

[180] *See supra* note 104 and accompanying text.

[181] This variable is an integer that represents the difference between the number of Representatives from the majority party and the number of other Representatives in the House of Representatives as a percentage of all members of the House of Representatives at that time.

the Senate majority.[182] Finally, a popular President may be more able to work with Congress to design agencies that are in line with his or her preferences than a less popular President.[183] Therefore, we control for the approval rating of the President at the time of agency establishment in the second specification, which is discussed in Section IV.B.[184]

Including controls for divided government, the size of the House majority, and the approval rating of the President is consistent with the Lewis study.[185] In our multivariate analyses, we also include a control for the size of the Senate majority, a variable that may plausibly have equal or more significance as the size of the House majority variable.

The interaction term for which we choose to control marks another difference from the Lewis study. The theory behind the Divided Government Hypothesis predicts that the effect of the majority size in each chamber of Congress should depend on whether the majority party in each chamber is from the same political party as the President.[186] While the Lewis study interacts the divided government variable with the variable indicating the size of the House majority (thereby incorrectly treating similarly cases in which the House is aligned with the President and cases in which it is not),[187] we interact the majority size variables for each of the chambers with a variable indicating whether the majority party of that chamber is aligned with the President.

This chamber alignment variable is set at one if the respective majority party is aligned with the President and zero otherwise. The terms interacting the House and Senate majority terms with the chamber alignment terms create a distinction between the effect of an increase in the size of the majority of each chamber of Congress during a period of time when the President's political party is aligned with the political party controlling that chamber and during a period

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[182] This variable is an integer that represents the difference between the number of Senators from the majority party and the number of other Senators in the Senate as a percentage of all members of the Senate at that time.

[183] It is possible that Presidents from one of the two major political parties, the Republican and Democratic parties, have historically been systematically more attracted to the idea of a unitary executive than the other party and therefore attempted to impose more executive control relative to their counterparts in the opposite party. However, this hypothesis is not present in the legal literature and we do not test it in this Article.

[184] We measured presidential approval by the last Gallup poll that asked about the President's approval rating taken before the date the relevant statute passed into law. We only have presidential approval data in our dataset for agencies established after 1945.

[185] *See* LEWIS, *supra* note 7, at 55–57.

[186] *See supra* notes 11, 106–07 and accompanying text.

[187] *See supra* notes 106–07 and accompanying text.

of time when the President's political party is not aligned with the political party controlling that chamber. This distinction, which Lewis had not made,[188] is important because, to the extent that the size of the majority party in each chamber affects decisions to grant indicia of independence, the effects of a change in the majority in each chamber when the President is aligned with that chamber relative to when the President is not aligned with that chamber should move in opposite directions. An interaction term between the size of the majorities in each chamber of Congress and a variable indicating whether the government is unified or divided would not pick up this distinction, but the chamber alignment variables do.

We do not include the indicator variables denoting whether the House and Senate respectively are aligned with the President as stand-alone controls in any of the estimations, and instead include a control for whether the government is unified or divided.[189] The primary reason for this approach is that we want to test the Divided Government Hypothesis, since it has been the predominant hypothesis in the academic literature, and including a control for divided government is the most straightforward way to do so. Periods of Senate alignment with the President or House alignment with the President individually are not coextensive with divided government, so including the divided government variable is essential to testing the Divided Government Hypothesis.

We present results for each indicia of independence for two separate specifications. The first specification uses all agencies in our dataset and includes controls for the composition of government. The second specification uses all agencies in our dataset established in 1945 or later, and includes controls for the composition of government

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[188] *Id.*

[189] While solving for the problem identified in the Lewis study of incorrectly treating similar cases in which the House is aligned with the President and cases in which it is not, the research design in this Article, which uses chamber alignment variables, uses a methodological design that requires a nuanced interpretation. We do not include the alignment of the House of Representatives and of the Senate as independent variables in our specifications as main effects, but only use them as variables interacted with the size of the majority in the House of Representatives and of the Senate, respectively. We instead include the "divided government" variable as an independent variable. Only 1 out of 68 observations in our dataset do not have the same values for chamber alignment of the House of Representatives and divided government. Only 3 out of 68 observations in our dataset do not have the same values for chamber alignment of the Senate and divided government. However, it is important to note that these few conflicting observations make the interaction terms imperfect predictors because the interaction terms may pick up some of the main effects that are due to the effect of chamber alignment on its own (independent of the interaction term) and that are not controlled for through the divided government variable. The interpretation of each other variable is unaffected, and the interaction terms are the only variable whose interpretation is affected by our approach.

and presidential approval. We present both specifications because there is no presidential approval data for agencies in our dataset established before 1945. We present the first specification because we want to present results that include estimations done on a dataset including the New Deal agencies and other agencies established before 1945. We present the second specification because we want to control for presidential approval rating in our analysis of the Divided Government Hypothesis.

Table 9 presents our results for the first specification.[190] The numbers in the dark-shaded rows are coefficient estimates for the independent variable identified in the farthest left column with respect to the dependent variable at the top of each column and the numbers in parentheses represent standard errors for the coefficient estimate immediately above each such standard error.

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[190] Unlike our approach in the bivariate analyses, we do not eliminate agencies without a multimember structure from the dataset before running the partisan balance estimation. We do not eliminate these agencies because the resulting dataset would have few observations remaining, and the statistical power of the estimation on such a limited number of observations would be limited. Since a multimember structure is a necessary condition for partisan balance requirements, the partisan balance estimations presented below should therefore be interpreted as a combination of the two features. The partisan balance estimations compare the likelihood that Congress will establish agencies with a multimember structure and partisan balance requirements relative to all other agencies (including agencies with a single head and agencies with a multimember structure but no partisan balance requirements). This interpretation should be distinguished from the interpretation in the bivariate analyses, which tests the difference in the proportions of agencies with a multimember structure that are established with partisan balance requirements and the proportions of agencies with a multimember structure that are established without partisan balance requirements.

In addition, we do not present an estimation for bypass authority in the first specification because all of the agencies established with bypass authority were established in 1971 or later. Because we have approval rating data for all agencies established with bypass authority, we only present an estimation for bypass authority in the second specification.

TABLE 9. MULTIVARIATE RESULTS FOR THE FIRST SPECIFICATION

	Removal Protection	Specified Tenure	Multi-member	Partisan Balance	Litigation Authority	Adjudication Authority
	(1)	(2)	(3)	(4)	(5)	(6)
Divided	0.05	0.22	0.39	0.53	0.57	0.55
	(1.09)	(0.93)	(0.96)	(1.11)	(1.16)	(0.93)
House Majority	-0.04	0.03	0.03	-0.002	-0.05	-0.07
	(0.07)	(0.05)	(0.05)	(0.06)	(0.08)	(0.06)
Senate Majority	0.09	0.07	**0.10****	**0.11***	**0.12***	0.07
	(0.06)	(0.05)	(0.05)	(0.06)	(0.06)	(0.05)
CA* House Majority	0.07	0.02	0.01	0.02	0.10	0.09
	(0.08)	(0.05)	(0.05)	(0.07)	(0.08)	(0.06)
CA* Senate Majority	**-0.12***	**-0.09***	**-0.12****	**-0.12****	**-0.15****	**-0.11***
	(0.07)	(0.05)	(0.05)	(0.06)	(0.07)	(0.05)
Constant	-1.03*	-0.47	-0.63	-0.89*	-1.63**	-0.12
	(0.56)	(0.51)	(0.50)	(0.53)	(0.68)	(0.49)

*Statistically significant at the ten percent level.
**Statistically significant at the five percent level.

The size of the Senate majority plays an important role in determining whether an agency is granted many of the indicia of independence. The coefficient for Senate Majority in each of the estimations is positive, indicating, as the Divided Government Hypothesis predicts, that when the Senate is not aligned with the President, an increase in the size of the majority party is associated with an increased probability that the agency will have the specified indicator of independence. For the partisan balance requirements and litigation authority estimations, the association is significant at the ten percent level. For the multimember structure estimation, the association is significant at the five percent level. The coefficient for the term interacting the size of the Senate majority with the Senate chamber alignment variable is negative and significant in all six estimations: at the ten percent level for the removal protection, specified tenure, and adjudication authority estimations; and at the five percent level for the multimember structure, partisan balance requirements, and litigation authority estimations.

As noted above, there is conflicting evidence as to whether Congresses avoided creating agencies with removal protection in

between the Supreme Court decisions of *Myers* and *Humphrey's Executor* because these Congresses may have interpreted *Myers* as prohibiting for-cause removal protection for agency heads.[191] As a robustness check, we eliminated the five agencies in our dataset created in between *Myers* and *Humphrey's Executor*[192] and reran the estimation for removal protection. In this estimation, the variable interacting the Senate majority variable and the Senate chamber alignment variable remains the only statistically significant independent variable and it indicates that, for a given level of the Senate majority, alignment with the President makes it less likely that an agency will be established with removal protection. However, under this robustness check, the term interacting the Senate majority variable and the Senate chamber alignment variable is significant at the five percent level instead of the ten percent level.

The raw coefficients presented in Table 9 do not have any meaningful interpretation apart from the direction of the effect and an indication of whether the coefficient is significant or not. To explain these results more fully, we conducted a marginal effects analysis for the variables with significant results to demonstrate what the model indicates is the effect of a one-unit increase in the independent variable of interest on the outcome of whether Congress grants an agency a given indicator of independence when the other independent variables are set at their means.

The marginal effects indicated in Table 10 for the "Increase in Senate Majority (not aligned)" column represent the effect of an increase of one percent in the Senate majority size during a time when the Senate is not aligned with the President on the probability that Congress would establish an agency with the specified indicator of independence when the other independent variables are set at their means. For example, an increase in the size of the Senate majority by one percent during a time when the Senate is not aligned with the President and all other independent variables are set at their means increases the probability that Congress will establish an agency with a multimember structure by 3.6 percent. The significance indicators for the marginal effects in Table 10 are based on the significance of the coefficients in Table 9. Each of the marginal effects reported in Table 10 for when the Senate is not aligned with the President are positive, but the marginal effects are only significant at the ten percent level in

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[191] *See supra* notes 165–75 and accompanying text.

[192] These agencies include the Tennessee Valley Authority, the Federal Deposit Insurance Corporation, the Federal Communications Commission, the National Mediation Board, and the Securities and Exchange Commission.

the case of the multimember, partisan balance, and litigation authority estimations.

The marginal effects indicated for the "Increase in Senate Majority (aligned)" column in Table 10 represent the effect of an increase of one percent in the Senate majority size during a time when the Senate is aligned with the President on the probability that Congress would establish an agency with the specified indicator of independence when the other independent variables are set at their means. For example, an increase in the size of the Senate majority by one percent during a period when the Senate is aligned with the President and the other variables are set at their means decreases the probability that Congress will establish an agency with removal protection by 0.9 percent. Each of the marginal effects of a change in the size of the Senate majority by one percent when the Senate is aligned with the President on the probability that Congress will establish an agency with an indicator of independence are negative and none of the marginal effects are significant at the ten percent level.

TABLE 10. SENATE MAJORITY SIZE MARGINAL EFFECTS ANALYSIS FOR THE FIRST SPECIFICATION

	Increase in Senate Majority (not aligned)	*Increase in Senate Majority (aligned)*
Removal Protection	2.6%	-0.9%
Specified Tenure	2.5%	-0.5%
Multimember	3.6%**	-0.8%
Partisan Balance	3.5%*	-0.3%
Litigation Authority	2.8%*	-0.8%
Adjudication Authority	2.7%	-1.1%

*Statistically significant at the ten percent level.
**Statistically significant at the five percent level.

B. Controlling for Presidential Approval

The second specification contains all of the controls contained in the first specification, but it also adds a control for the approval rating of the President at the time the agency was established. Because we were unable to obtain presidential approval ratings before the year 1945, the estimations run using the second specification include agencies established only in 1945 or later.[193] Relative to the first specifica-

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[193] *See supra* note 184 and accompanying text, and text preceding *supra* note 190. There are a total of fifty-five agencies for which we have approval rating data. Unlike our

tion, the second specification has two major differences. First, the second specification controls for the approval rating of the President at the time of agency establishment. Additionally, the second specification contains a smaller sample size of agencies, starting in 1945, when approval ratings first became available.

   With respect to the bypass authority estimation, we use a partitioned dataset that includes only agencies in our dataset established after 1970, the year prior to which Congress first granted any agency bypass authority.[194] Driving the unique treatment for bypass authority was the observation that Congress did not grant bypass authority to any agency until 1971. While Congress could have theoretically granted agencies bypass authority prior to 1971, we reasoned that Congresses prior to 1971 most likely were not seriously deliberating whether or not to grant bypass authority to agencies. To the extent that Congresses did not debate or even consider bypass authority to be a possibility for earlier agencies in our dataset, including such agencies in the sample would bias the results of the estimation. We chose 1970 as the cutoff year for agencies in our dataset due to its status as the first year prior to which Congress granted such authority. All the agencies that are used as observations in our bypass authority estimation were established after 1970, and we have presidential approval rating associated with each of these agencies. Because the rationale for running the first specification—that we do not have presidential approval rating for agencies established before 1945—does not apply to the bypass authority estimation, we do not present results for a bypass authority estimation under the first specification. We instead present results for a bypass authority estimation only under the second specification. Table 11 presents the results from the second specification for each of the seven indicia of independence.

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approach in the bivariate analyses in Part III, *supra*, we do not eliminate agencies without a multimember structure from the dataset before running the partisan balance estimation. *See supra* note 190.

   [194] There were thirty-six agencies established in 1970 or later in our dataset.

TABLE 11. MULTIVARIATE RESULTS
FOR THE SECOND SPECIFICATION

	Removal Protection	Specified Tenure	Multi-member	Partisan Balance	Litigation Authority	Bypass Authority	Adjudication Authority
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
Divided	1.94*	-0.34	-1.36	-0.76	-0.31	2.59	0.19
	(1.12)	(0.65)	(0.85)	(0.90)	(0.91)	(1.64)	(0.66)
Approval	-0.07**	-0.02	-0.01	0.01	-0.02	-0.05	-0.02
	(0.03)	(0.02)	(0.02)	(0.02)	(0.02)	(0.03)	(0.02)
House Majority	-0.04	0.02	0.04	0.02	-0.04	-0.02	-0.08
	(0.07)	(0.04)	(0.05)	(0.06)	(0.07)	(0.02)	(0.05)
Senate Majority	**0.12***	**0.09***	**0.15****	**0.13****	**0.15****	-0.05	**0.12****
	(0.07)	(0.05)	(0.05)	(0.06)	(0.06)	(0.08)	(0.05)
CA* House Majority	0.14	-0.02	-0.06	-0.04	-0.02	0.01	0.06
	(0.09)	(0.05)	(0.05)	(0.06)	(0.07)	(0.02)	(0.06)
CA* Senate Majority	**-0.14***	-0.07	**-0.12****	**-0.10***	-0.08	0.08	**-0.10***
	(0.08)	(0.05)	(0.06)	(0.06)	(0.07)	(0.11)	(0.06)
Constant	0.34	0.72	-0.05	-1.74	-0.04	0.97	1.18
	(1.39)	(1.07)	(1.11)	(1.41)	(1.34)	(2.07)	(1.07)

*Statistically significant at the ten percent level.
**Statistically significant at the five percent level.
***Statistically significant at the one percent level.

In this specification, which controls for the presidential approval rating, the composition of the Senate remains important. In the multimember estimation, the Senate majority variable is positive and significant for six of the seven estimations: at the one percent level for multimember structure; at the five percent level for partisan balance requirements, litigation authority, and adjudication authority; and at the ten percent level for removal protection and specified tenure. In all six of these cases, a larger Senate majority when the Senate is not aligned with the President increases the probability that Congress will establish an agency with each of the relevant indicia of independence.

The interaction term between the Senate alignment and Senate majority size is significant in four of the seven specifications: at the ten percent level for the removal protection, partisan balance requirements, and adjudication authority estimations, and at the five percent level for the multimember structure estimation, indicating that Congress is less likely to grant these features to agencies when the Senate is aligned with the President relative to when the Senate is

not aligned. These results are consistent with the results from the first specification, and significant to an even greater degree for many of the variables.

Table 12 presents a marginal effects analysis for the Senate majority size variables in the second specification, calculated in the same way as described above for the first specification. The interpretation of Table 12 is similar to the interpretation of Table 10. Therefore, for example, an increase in the size of the Senate majority by one percent during a time when the Senate is not aligned with the President and all other independent variables are set at their means increases the probability that Congress would establish an agency with removal protection by 2.7 percent. An increase in the size of the Senate majority by one percent during a period when the Senate is aligned with the President and all other independent variables are set at their means decreases the probability that Congress would establish an agency with removal protection by 0.4 percent. With the exception of the bypass authority estimation, each of the marginal effects reported in Table 12 for when the Senate is not aligned with the President are positive and significant at least at the ten percent level. With the exception of the removal protection estimation which has a negative and nonsignificant coefficient, each of the marginal effects reported in Table 12 for when the Senate is aligned with the President are slightly positive, but none are significant at the ten percent level.

TABLE 12. SENATE MAJORITY SIZE MARGINAL EFFECTS ANALYSIS
FOR THE SECOND SPECIFICATION

	Increase in Senate Majority (not aligned)	Increase in Senate Majority (aligned)
Removal Protection	2.7%*	-0.4%
Specified Tenure	3.3%*	1.0%
Multimember	4.7%***	0.9%
Partisan Balance	3.5%**	0.8%
Litigation Authority	3.2%**	1.4%
Bypass Authority	-1.3%	0.8%
Adjudication Authority	3.9%**	0.3%

*Statistically significant at the ten percent level.
**Statistically significant at the five percent level.
***Statistically significant at the one percent level.

With respect to other variables, the approval rating of the President is significant for only one of the seven specifications: at the five percent level for the removal protection estimation. As the theory behind the Divided Government Hypothesis predicts, when the

President is more popular, the probability that Congress would establish an agency with removal protection is lower. We conducted a marginal effects analysis for this variable as well, and found that, when the other independent variables are set at their means, an increase in the approval rating of the President by one percent is associated with a 1.5 percent decreased probability that Congress would establish an agency with removal protection.

Out of the thirteen estimations we conducted (six for the first specification and seven for the second), divided government is statistically significant, and then only at the ten percent level, in only one: the removal protection estimation in the second specification. The significance of divided government in the removal protection estimation for the second specification may just be a random result because a random process would be expected to return at least one result that is significant at the ten percent level across thirteen estimations. At a minimum, our results indicate that divided government does not by itself appear to be important in determining when Congress establishes agencies with specified tenure, a multimember structure, partisan balance requirements, litigation authority, bypass authority, and adjudication authority.

While the divided government variable is significant at the ten percent level in the removal protection estimation in the second specification, it is not significant for the removal protection estimation in the first specification. To the extent that the significance of divided government in the removal protection estimation in the second specification is not merely a random result in a series of thirteen estimations, there are two interpretations for the difference between the first and the second specifications, and we have no way to distinguish which is the right interpretation or what combination of the two interpretations best explains the difference. The first interpretation is that divided government is not significant with respect to whether Congress establishes agencies with removal protection when viewed across a longer time frame that includes agencies established before 1945. The second interpretation is that divided government is significant with respect to whether Congress established agencies with removal protection, but the first specification misses this result because it does not control for the approval rating of the President.

In most of our estimations, the term interacting the Senate majority variable and the chamber alignment variable is significant. Since the chamber alignment variable is closely related to the divided government variable, our results provide some support to a subset of the Divided Government Hypothesis. Our results suggest that

Congress is more likely to establish agencies with indicia of independence when the President is from a different party than the party that controls the Senate, a finding that supports the Divided Government Hypothesis with respect to the relationship of the President and the Senate. Importantly, the estimations predict that the alignment of the Senate with the presidency is important regardless of whether the majority party of the House of Representatives is aligned with the majority party in the Senate and the party of the President (unified government), or whether the majority party of the House of Representatives is not the same party as either the President or the Senate or both (divided government). However, our results suggest that the majority size and the alignment of the majority party in the House of Representatives do not have a significant effect on whether an agency is granted any indicia of independence, regardless of whether government is unified or divided, a finding that is at odds with the Divided Government Hypothesis.

We propose three tentative hypotheses for the importance of the size of the Senate majority party relative to the size of the House majority party for the purposes of whether Congress grants agencies indicia of independence at the time of their establishment. The first hypothesis relates to the filibuster rule in the Senate. The filibuster makes it easier for the minority party to block votes on the establishment of agencies entirely, and to increase the political costs associated with those votes that do occur.[195] Because the opposing party (whether it is in the minority or the majority of the Senate) can filibuster with only forty-one members, the President may have to get a super-majority of the Senate to agree on agency design, unlike in the House of Representatives where a simple majority may suffice. The option held by opposing parties to impose a super-majority requirement may make it more important for the President to compromise with the Senate on agency design relative to the House of Representatives.

Second, the importance of the size of the Senate majority party relative to the size of the House majority party may be connected to the Senate's Article II Appointments Clause authority, which requires

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[195] A cloture vote, necessary to end a filibuster, requires a three-fifths majority and does not immediately end debate. Rather it limits further debate to thirty hours. STAFF OF S. COMM. ON RULES AND ADMIN., STANDING RULES OF THE SENATE, r. XXII(2), S. DOC. No. 113-18, at 16 (2013). A Senator can place a hold on a motion, implying the threat to filibuster, and this is often "sufficient to prevent a measure from coming to the Senate floor." *See* RICHARD S. BETH & VALERIE HEITSHUSEN, CONGRESSIONAL RESEARCH SERVICE, FILIBUSTERS AND CLOTURE IN THE SENATE 21–22 (2014). *See generally* GREGORY KOGER, FILIBUSTERING: A POLITICAL HISTORY OF OBSTRUCTION IN THE HOUSE AND SENATE (2010) (providing comprehensive analysis of the practice).

the President to appoint officers of the United States "by and with the advice and consent of the Senate."[196] The Senate's desire to preserve and enhance its Appointments Clause authority may explain in part the use of indicia of independence by, for example, using agency design to create institutional arrangements in which the Senate can exert influence on agency policy for decades through its advise-and-consent role.

Third, the President traditionally delegates the selection of heads of such commissions that must not be from his own party as a result of partisan balance requirements to the leadership of the opposition political party in the Senate, which may further enhance the role of the Senate in agency design decisions relative to the House of Representatives.[197] Further inquiry on these matters could be fruitful.

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[196] U.S. CONST. art. II, § 2, cl. 2.

[197] Even though the Supreme Court struck down the Federal Election Campaign Act's explicit delegation of the agency-head appointment power to party leaders in the House of Representatives and Senate, *see* Buckley v. Valeo, 424 U.S. 1, 126–38 (1976), the President routinely—and unofficially—delegates the selection of minority-party agency heads to the Senate's minority leadership. *See* Daniel E. Ho, Congressional Agency Control: The Impact of Statutory Partisan Requirements on Regulation 29 (Feb. 12, 2007) (unpublished manuscript), http://dho.stanford.edu/research/partisan.pdf (suggesting that, since 1980, presidents have been almost completely deferential to Senate leadership when it comes to cross-party appointments); *see also* Jamin B. Raskin, *"A Complicated and Indirect Encroachment": Is the Federal Election Commission Unconstitutionally Composed?*, 52 ADMIN. L. REV. 609, 615–18 (2000) (discussing how Senate Majority Leader Trent Lott was able to force President Clinton to nominate Bradley Smith to the Federal Election Commission, despite the President's objections, indicating that "the President has no control over his own appointments to the FEC"). While this unofficial practice, known as "batching," Devins & Lewis, *supra* note 8, at 489, may be in tension with the text of Article II, it nevertheless persists. *See* Krotoszynski et al., *supra* note 8, at 985–88. It might be possible, however, for a President to bypass the tradition of deference to the minority party's wishes and nominate candidates of his own choosing, including political independents, who would satisfy statutory partisan balance requirements because they are not from the same party as the majority party. *See* Rick Hasen, Rather Than Continued Stalemate, Federal Election Commission May Now Lead Way to Campaign Finance Deregulation, ELECTION L. BLOG (Feb. 19, 2017, 9:20 AM), https://electionlawblog.org/?p=91191 (suggesting that President Trump could replace Federal Election Commissioner Ann Ravel, a Democrat, with "a libertarian or independent . . . , thereby not violating the rules about having more than three Republican appointees"). *But see* Devins & Lewis, *supra* note 8, at 489–90 (discussing the tactics that opposition-party senators use to ensure that the President nominates opposition-party loyalists); Krotoszynski et al., *supra* note 8, at 995–96 (rejecting the possibility that the President would stop delegating the appointment power because "political independents will not always adhere to the President's policy agenda" and opposition party senators would be likely to "insist that members of their party be appointed to any and all minority party seats on independent federal agencies").

C.   Unexplained Factors

The prior section presented results showing a statistical relationship between certain independent variables and indicia of independence of federal agencies. The size of the Senate majority, the alignment of the Senate, presidential approval rating, and divided government all exhibit associations in our model with respect to whether Congress established agencies with certain indicia of independence that are significant in at least some instances at the ten percent or at the five percent level. However, we have yet to present any information related to the explanatory power of those effects. This section addresses these questions by discussing the goodness of fit of the estimations we present above. The goodness of fit analysis probes how much of the outcome (Congress establishing agencies with indicia of independence) is explained in our model by the independent variables for which we controlled (including presidential approval rating and the size and alignment of the Senate majority), and how much is attributable to other factors for which we did not control.

We note that the results of the goodness of fit analysis do not affect the results we have already presented. Even if the models do not explain all or even most of the difference in the outcomes, it does not mean that the estimation is uninformative. The results still present the statistical relationship between the indicia of independence and the independent variables. An independent variable that has a statistically significant relationship with a dependent variable still exerts an effect on the dependent variable under the model that is unlikely to be explained by randomness alone, even if the effect does not completely explain when Congress establishes independent agencies.

We analyzed two goodness of fit measures for each estimation run using the second specification. The first goodness of fit measure, the McFadden Pseudo R-squared, attempts to approximate for a probit estimation the R-squared measure associated with ordinary least squares estimations.[198] An R-squared value for an ordinary least square estimation is the fraction of the total variance in the outcomes that is explained by the estimation. Visually, R-squared can be thought of as a measure of how close the plotted data are to the fitted estimation line. The McFadden Pseudo R-squared can also be interpreted as a measure of the sample variation in the dependent vari-

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[198] Ordinary least squares estimations are calculated to minimize the variance of the observations. Probit estimations are maximum likelihood estimates arrived at through an iterative process. A consequence of the differences in the construction of ordinary least squares estimations and probit estimations is that the R-squared measure commonly reported with ordinary least squares estimations cannot be precisely replicated for probit estimations.

ables that is explained by the independent variables. The McFadden Pseudo R-squared is constructed by dividing the log likelihood value for the fitted model (the estimation being tested) by the log likelihood value for a null model (a model with no independent variables except for a constant intercept predictor) and subtracting the resulting number from one. A higher McFadden Pseudo R-squared indicates that the model explains more of the variation in the data relative to a lower McFadden Pseudo R-squared. However, the McFadden Pseudo R-squared measures something quite different than the R-squared values for ordinary least squared regressions and produces considerably lower values. A general rule of thumb is that a McFadden Pseudo R-squared of 0.2–0.4 represents an "excellent" fit.[199]

The second measure of goodness of fit compares each estimation model with a null model. A null model is a model with no independent variables and only an intercept line to fit the data. Then, it asks if the difference in the fit of the two models is statistically significant.[200] We present goodness of fit results for the second specification in Table 13. We ran an identical goodness of fit analysis for the first specification and the numbers were similar.

TABLE 13. GOODNESS OF FIT ANALYSIS
FOR THE SECOND SPECIFICATION

Estimation	*McFadden Pseudo R-squared of Estimation*	*Comparison with Null Model: p-value*
Removal Protection	0.25	0.03**
Specified Tenure	0.09	0.33
Multimember	0.17	0.04**
Partisan Balance	0.20	0.14
Litigation Authority	0.18	0.15
Bypass Authority	0.17	0.35
Adjudication Authority	0.12	0.17

**Fits significantly better than the null model at the five percent level.

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[199] Daniel L. McFadden, the academic who developed the McFadden Pseudo R-squared measure, stated that "[t]hose unfamiliar with [McFadden Pseudo R-squared] should be forewarned that its values tend to be considerably lower than those of the [R-squared] index . . . . For example, values of 0.2 to 0.4 for [McFadden Pseudo R-squared] represent excellent fit." Daniel McFadden, *Quantitative Methods for Analysing Travel Behaviour of Individuals: Some Recent Developments*, in BEHAVIOURAL TRAVEL MODELLING 279, 307 (David A. Hensher & Peter R. Stopher eds., 1979).

[200] The chi-square value associated with each of the comparisons between the estimations and the null model has six degrees of freedom.

We interpret these McFadden Pseudo R-squared measures to indicate that each of the estimations explain only a relatively small fraction of the instances in which Congress grants each indicator of independence. For our variables, the McFadden Pseudo R-squared measures range from 0.09 to 0.25, with removal protection having the highest value. Even for the removal protection, partisan balance requirements, litigation authority, and bypass authority estimations in which the McFadden Pseudo R-squared measures are relatively high, the results indicate that the estimations provide only a partial explanation of when Congress grants indicia of independence to agencies.

The goodness of fit is statistically different at the five percent level from a null model for the removal protection and multimember structure estimations. But it is not statistically different from a null model for the remaining variables. We also interpret these goodness of fit measures to suggest that the estimations we present explain only a small part of when Congress establishes agencies with indicia of independence, particularly with respect to the specified tenure, partisan balance requirements, litigation authority, bypass authority, and adjudication authority estimations. Unobserved factors for which we do not control account for the majority of the variation in our dataset related to when Congress grants indicia of independence to some agencies and not to other agencies.

In light of the goodness of fit findings in relation to our own study, we analyzed the goodness of fit of the estimations presented in the Lewis study, the primary empirical support for the Divided Government Hypothesis. The Lewis study did not present information specifying the extent to which the tested independent variables account for the differences in outcomes of when agencies are established with the insulating features tested in that study. Therefore, readers could not determine if the independent variables presented— and most importantly, the divided government variable—explain all the differences in the outcomes of agency establishment with insulating features, or whether other unexplained factors explain some of the difference in outcomes. As noted above, the goodness of fit measures for estimations do not call into question the relationships of statistical significance identified, and therefore do not affect interpretations of statistical significance in the Lewis study. However, by failing to present information about the extent to which other factors might be important in explaining the outcomes about when agencies are established with insulating features, the Lewis study may have unintentionally overstated the importance of the explanatory factors it presented.

We ran the same two goodness of fit tests that we present above on our own results to determine the goodness of fit for each of the estimations run in the Lewis study. Table 14 presents goodness of fit results for the ordinary probit estimations run in the Lewis study.[201]

TABLE 14. GOODNESS OF FIT ANALYSIS FOR SELECT ESTIMATIONS FROM THE LEWIS STUDY

Estimation	McFadden Pseudo R-squared of Estimation	Comparison with Null Model: p-value
Commission	0.05	0.19
Fixed Terms	0.09	0.01***
Independence	0.08	0.01***
Qualifications	0.08	0.01**

**Fits significantly better than the null model at the five percent level.
***Fits significantly better than the null model at the one percent level.

The McFadden Pseudo R-squared measures of less than 0.1 for each of the estimations tested indicate that each estimation only explains a small fraction of the instances in which Congress created agencies with each insulating feature. Other factors for which the Lewis study did not control account for most of the variation in the outcomes of when Congress established agencies with the tested insulating features. The McFadden Pseudo R-squared measures are generally lower for the estimations in the Lewis study relative to the McFadden Pseudo R-squared measures for the estimations we present in this Article. The "fixed terms," "independence," and "specific qualifications for administrators" estimations are each statistically different than the null model, at the one percent level for the first two and at the five percent level for the third. The estimations in the Lewis study generally improve on the null model more significantly than our estimations do, likely due to the larger sample size used in the Lewis study.

D.   Analyzing the Effect of the Distance from a Presidential Election

There is support in the legal literature for the proposition that executive branch actors may engage in "burrowing" near the end of a President's term with the purpose of entrenching and preserving that administration's policies and personnel into the next presidential

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[201] The chi-square value associated with each of the comparisons between the estimations and the null model has seven degrees of freedom.

administration.[202] The focus has been on midnight rulemaking,[203] and on the placement of political appointees into civil service positions with significant policymaking responsibilities,[204] both of which are costly or difficult for future agency leaders to reverse.

No previous study, including the Lewis study, has investigated whether Congress employs a similar burrowing strategy in the construction of independent agencies. Consider, for example, the decision to establish an agency with specified tenure for its head or heads. A Congress contemplating the establishment of an agency during a period of divided government may want to check the power of the President by granting agency heads specified tenure if it establishes the agency at the beginning of the President's term. Specified tenure provisions could insulate agency heads by making it more politically costly for the President to remove the agency heads before the end of their specified tenures and, if the agency heads are also protected by a for-cause removal provision, the President could do so only for cause. In contrast, the President's party may prefer to give the President freer rein early in the President's term by not providing these indicia of independence.

The incentives, however, are different late in the President's term, particularly if the majority party in one of the congressional chambers believes that the party opposed to the President will win the presidency in the upcoming election. A Congress during a period of divided government may not wish to constrain the power of the President by creating an agency whose heads are granted specified tenure. Instead, such a Congress may prefer to establish the agency without specified tenure with the expectation that it will be easier for the incoming President (who may well be from a different political party than the current President) to replace the agency heads with members of their own party upon taking office. Otherwise, the outgoing Presi-

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[202] *See generally* Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. Rev. 557 (2003) (examining agency "burrowing" actions such as midnight rulemaking and late-term hiring and promotion).

[203] *See id.* at 589–92 (describing the practice of an agency entrenching administrative policy by formally and publicly deciding a policy question in the last several weeks of an outgoing President's administration); Edward H. Stiglitz, *Unaccountable Midnight Rulemaking? A Normatively Informative Assessment*, 17 N.Y.U. J. Legis. & Pub. Pol'y 137 (2014) (analyzing agency rulemaking behavior during the period between the election and the inauguration of the next President); Kathryn A. Watts, *Regulatory Moratoria*, 61 Duke L.J. 1883, 1886–87 (2012) (noting that the literature on regulatory moratoria focuses almost exclusively on how such moratoria can enable a review of midnight rulemakings).

[204] *See* Mendelson, *supra* note 202, at 606–10 (discussing how some outgoing administrations reorganize agencies and hire or promote civil servants to entrench their preferences).

dent would have entrenched his or her policies through agency appointees that could not easily be removed during their term. In contrast, late in a President's term, a Congress during unified government may prefer to establish an agency whose heads have specified tenure and removal protection in order to entrench the policies of the outgoing President.

This Section presents results from a simple test investigating whether the distance from a presidential election might affect decisions by Congress to create independent agencies. We coded a variable that is equal to one if the agency was established in an election year or the year before an election year, and zero otherwise.[205] We ran estimations for each of the indicia of independence (other than bypass authority) controlling for the distance from election variable, the divided government variable, and a term interacting these two variables. This model provides minimal support for the conclusion that the year from election affects decisions to create independent agencies. The only significant term at the ten percent level in the six estimations is the interaction term between divided government and the distance from election in the multimember estimation, indicating that when government is divided and it is close to a presidential election, Congress is less likely to establish agencies with a multimember structure. We tested the same model on the Lewis dataset and similarly found minimal support for the proposition that the distance from a presidential election affects decisions by Congress to create independent agencies.[206] Our results may provide support to the theory that

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[205] Estimations with two binary variables—divided government and distance from election—break our dataset into four groups. Because our approval dataset only has fifty-five observations, running the distance from election model on our approval dataset creates groups with too few observations on which to accurately run estimations for the removal protection and bypass authority estimations.

[206] We coded each agency in the Lewis dataset according to the year it was away from a presidential election. The distance from election variable was coded as zero if the agency was established in a presidential election year; one if the agency was established in the year before an election year; two if the agency was established two years before an election year; and three if the agency was established in the year after a presidential election. Because of the larger sample size of the Lewis dataset, we were able to make the distance from election variable an ordered categorical variable taking on four values rather than a binary variable as in the estimation using our dataset. We ran estimations on the Lewis dataset for the removal protection variable that we coded, as well as for the specified tenure and multimember structure variables that were coded in the Lewis dataset. As in the specification run on our dataset, we controlled for divided government, the years from election variable, and a term that interacted these two variables. In addition, we controlled for presidential approval rating in the model run on the Lewis dataset. None of the independent variables are statistically significant at the ten percent level except for the distance from election variable in the specified tenure estimation which has a negative coefficient. This result suggests that during unified government Congress becomes less likely to establish agencies with specified tenures as the President's term advances towards

architects of agency design consider the effects of agency design in future periods.[207] It is also possible that controlling for other factors such as the approval rating of the President would change the results.[208] Further inquiry on this point would be useful.

Table 15 presents the results for our multivariate analysis testing the effect of the distance from an election on the establishment of agencies with indicia of independence.

TABLE 15. DISTANCE FROM ELECTION ANALYSIS

	Removal Protection	Specified Tenure	Multi-member	Partisan Balance	Litigation Authority	Adjudication Authority
	(1)	(2)	(3)	(4)	(5)	(6)
Divided Government	0.00	0.09	0.60	-0.25	0.41	0.59
	(0.43)	(0.41)	(0.41)	(0.54)	(0.42)	(0.40)
Distance from Election	-0.11	0.16	0.46	-0.82	-0.58	0.24
	(0.46)	(0.43)	(0.42)	(0.58)	(0.57)	(0.42)
DFE*DG	-0.11	-0.59	**-1.15***	0.57	0.17	-0.50
	(0.73)	(0.68)	(0.67)	(0.94)	(0.80)	(0.66)
Constant	-0.62**	0.34	-0.17	0.50	-0.84***	-0.34
	(0.25)	(0.23)	(0.23)	(0.36)	(0.26)	(0.23)

*Statistically significant at the ten percent level.
**Statistically significant at the five percent level.
***Statistically significant at the one percent level.

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a presidential election year. This result is consistent with the theory that Congresses aligned with the President would not want to restrict the President's authority to control the agency by creating an agency with heads that have specified tenures.

[207] *See, e.g.*, LEWIS, *supra* note 7, at 31 (stating that "[m]embers of Congress assess presidential preferences at the point of decision and likely presidential preferences in the future when deciding about insulating an agency") and *supra* note 103 and accompanying text.

[208] As a robustness check, we controlled for approval rating with respect to certain indicia of independence—specified tenure, multimember structure, partisan balance, litigation authority, and adjudication authority. Due to limitations of our dataset, we could not test removal protection under this robustness check. The specification that controls for approval rating does not change the significance of any of the variables except in the multimember structure estimation. The negative coefficient on the interaction term between divided government and the distance from election increases in significance from the ten percent to the five percent level. Moreover, the positive coefficient on the divided government variable becomes significant at the ten percent level, indicating that divided government makes it more likely that Congress will create agencies with a multimember structure.

CONCLUSION

Our Article advances the understanding of independent agencies in five significant ways. First, we show that the legal literature's embrace of the Divided Government Hypothesis was based on a misunderstanding of the underlying empirical work, which in fact provided more support for the opposite proposition.

Second, studying the interplay between divided government and the size of the House majority, as the dominant political science study had done, conflates two very different divided government scenarios: the case in which the House is aligned with the President (with the Senate controlled by the other party) and the case in which the House is not aligned with the President. Because the theory predicts that the party not aligned with the President would want to impose insulating conditions on administrative agencies, the effect of a larger House majority should depend on whether that majority is aligned with the President. By conflating these two disparate scenarios, the results are likely to neutralize themselves and their interpretation is therefore likely to be compromised. Also, by focusing on the House and not the Senate, the dominant political science study overlooked the possibility that the impact of the two chambers might be different.

Third, by properly controlling for whether both the Senate and the House majorities are aligned with the President, we find that the most significant factors predicting whether an agency will be vested with indicia of independence are the approval rating of the President and the size and alignment of the Senate majority. In contrast, the size and alignment of the House majority do not have a statistically significant effect. Our results therefore provide some support to a subset of the Divided Government Hypothesis, but they show that only the relationship between the Senate and the President has a statistically significant effect on the establishment of agencies with indicia of independence. In contrast, the relationship between the President and the House of Representatives does not have a similar effect.

Fourth, the identification of statistically significant variables should be the starting point, and not the ending point, of the analysis. It is then important to determine how much of the pattern of agency establishment these variables explain, an inquiry that the dominant political science study had not performed. These statistically significant variables—in both that study and in ours—explain relatively little of this variation. To best understand the full picture, quantitative empirical studies of this sort should be coupled with detailed case studies. The unusual budgetary independence of the CFPB, almost certainly attributable to Elizabeth Warren's zealous advocacy, sug-

gests that the identification of policy entrepreneurs and the tracing of their influence is a promising focus for such studies.

Fifth, the empirical findings support the challenges to the binary view that places agencies in distinct executive and independent categories. In doing so, they have significant doctrinal implications and support a broad assertion of presidential power in areas that have important policy consequences.