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HOW CONGRESSIONAL POLARIZATION IS TRANSFORMING THE SEPARATION OF POWERS

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In recent years, political scientists have made substantial progress in understanding how increased partisanship and ideological polarization have transformed the internal workings of the U.S. Congress. But much less attention has been paid to the downstream effects of these changes for governance and policy making outside the legislative branch. In this chapter, I focus on three legislative activities that have been impacted negatively by partisan polarization: statute enactment, appropriating, and providing advice and consent on appointments. I then discuss the effects of these changes on presidential power and executive branch policy making. Although I concede that these negative effects can be partially offset by the substitution of executive authority for legislative action, I argue that for the most part, executive and legislative governance are complementary and that declining legislative performance is a major hindrance to effective executive policy making and administration.

Like many other features of our constitutional system, the balance of power between the president and Congress has been far from static. Over the course, almost 250 years, we have gone from James Madison's worry that Congress would draw "all power into its impetuous vortex" to lamentations about imperial presidents to fears of incipient authoritarianism. In conventional accounts, presidential power has grown primarily in response to the demands of the expanding administrative functions of the national government and by the imperatives of national security. These developments created governing challenges that could be best met by the centralized authority that only the president could provide. Consequently, Congress routinely delegated and acceded more and more policy-making authority to the executive branch.

In recent decades, however, a somewhat different dynamic is shaping the relationship between Congress and the presidency. Since the 1970s, rising partisanship and polarization has had a major impact on the performance of Congress. Among other things, these trends have impeded the ability of Congress to enact legislation, fulfill its fiscal responsibilities, and effectively supervise executive branch appointments through its powers of advice and consent. These deficiencies have created new opportunities and imperatives for presidents to expand their authority. When Congress fails to act, presidents may be compelled to invoke unilateral powers, such as executive orders and presidential directives. Presidents will not only be motivated to seize opportunities to implement their preferred policies but will find themselves under increasing pressure to act from outside interests who are frustrated with congressional inaction. At the same time, a gridlocked Congress will be unable to reverse presidential policies by passing new statutes reversing such decisions and narrowing presidential authority. Thus, Congress will remain vulnerable to further encroachments on its legislative prerogatives.

Although there are some similarities between previous expansions of executive power and those associated with legislative polarization, there are key differences. Many expansions of presidential power have been associated with governing tasks that legislatures are naturally ill-equipped to manage, such as emergency response and policy making on complex issues.¹ In some cases, Congress has explicitly delegated power to the president to solve the problems related to urgency and complexity. But other times, Congress is forced to acquiesce upon the recognition that legislative policy making is a poor substitute for executive governance. But as I argue below, polarization expands executive power, not because the legislature cannot adapt to new problems but because it has become less able to provide its conventional and traditional inputs to the policy process. As an example of this key distinction, consider one of the pillars of presidential power, the National Emergencies Act. Congress passed this act providing the president broad authority to act in the case of national emergencies. The act even allows the president the ability to define what is and is not a national emergency. The statute's rationale is based on the recognition that legislative bodies are unable to act with the required urgency to deal with time-sensitive challenges to the United States and its citizens.

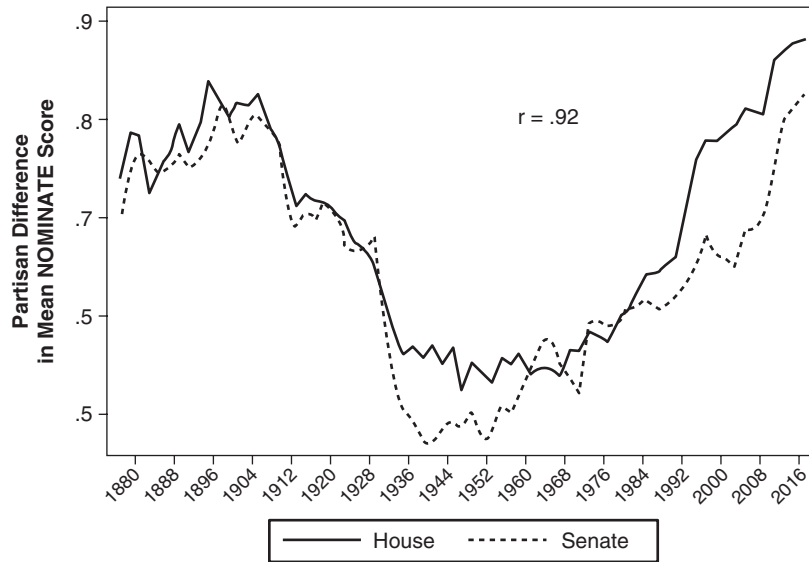
But in 2019, President Trump announced that he would use the act to reprogram monies intended for military construction toward the building of a barrier on the U.S.-Mexico border designed to stop undocumented migration. President Trump was largely successful in asserting this authority, neither because the problems of immigration and border security lie outside the capacity of Congress to address nor because Congress explicitly approved President Trump's orders. Congress has always played a central role in immigration policy, and in this case, it explicitly declined to fund the border wall. Instead, President Trump's encroachment succeeded because the partisan and ideological divisions in Congress prevented it from overriding the order and enforcing its spending prerogatives.

In this chapter, I explore these consequences of congressional polarization for executive power. Of particular focus will be the effects of these changes on the quality of governance. I define quality quite broadly to encompass a wide variety of attributes and values, including but not limited to equity, efficacy, efficiency, fairness, transparency, predictability, and legitimacy. In certain circumstances, polarization allows the president to substitute executive for legislative authority with little consequence for the quality of policy and administration. Indeed, those policy outcomes may improve, just as many scholars have suggested about the benefits of increased presidential control of administration and national security. But I argue that in most situations, legislative and executive authority are complementary. High-quality executive governance requires active legislative engagement. From this perspective, political polarization and legislative dysfunction are impediments to good governance that cannot be solved by expanding of executive power.

POLARIZATION IN CONGRESS

I begin with a review of some of the evidence on the trends in political polarization in Congress. As I argue in later sections, these trends mirror a number of important indicators of congressional performance. Figure 16-1 presents a measure for the United States House and Senate known as DW-NOMINATE.² Underlying DW-NOMINATE is a statistical model that estimates the left/right positions of legislators based on observed roll-call voting behavior. Larger estimated scores represent more conservative positions. The simplest way to understand the statistical model is that it associates a conservative position for legislators who vote often with conservatives and never with liberals. Liberals are those who vote with other liberals and never with conservatives, whereas moderates are those who vote with both liberals and conservatives.³ The DW-NOMINATE scores of individual legislators are aggregated into these measures so that the polarization measure is just the average difference in the scores of Republicans and Democrats.⁴

The first takeaway of Figure 16-1 is that the level of polarization in Congress has varied dramatically over the course of the Democrat–Republican party system since Reconstruction. Not surprisingly, congressional polarization was quite high

FIGURE 16-1 ■ Polarization in the U.S. Congress, 1877–2016

Computed from DW-NOMINATE scores. The polarization measure is the difference in the mean score for Republicans and the mean score for Democrats.

Source: Data from voteview.com

following the Civil War and Reconstruction. But it declined markedly from the 1920s to the 1950s where the greatest declines appear to be associated with the Great Depression and World War II. Partisan differences in Congress remained at fairly low levels from the 1950s to the 1970s. During this period, both the Democrats and Republicans were divided ideologically between liberal and conservative wings.⁵ The current trend toward greater and greater polarization began in the late 1970s and was detectable by academics as early as 1982.⁶ This fact lies uncomfortably against any narrative that pivots on a single event or “great person.” The trend precedes the election of Ronald Reagan, the unsuccessful nomination of Robert Bork, the impeachment of Bill Clinton, and the election of Barack Obama.

The second takeaway point is that the House and the Senate have remarkably similar histories with respect to polarization. The two time series tend to decline together, stabilize together, and increase together. Generally, there is a little less polarization in the Senate, but there are periods in which the Senate was the more polarized body. Although polarization in the Senate leveled off in the early 2000s, it has increased faster than it has in the House over the past half-dozen years.

Figure 16-2 presents a third important historical fact about polarization. Rather than both parties moving toward the extremes, polarization over the past forty

FIGURE 16-2 ■ Party Positions in the U.S. House, 1877–2016

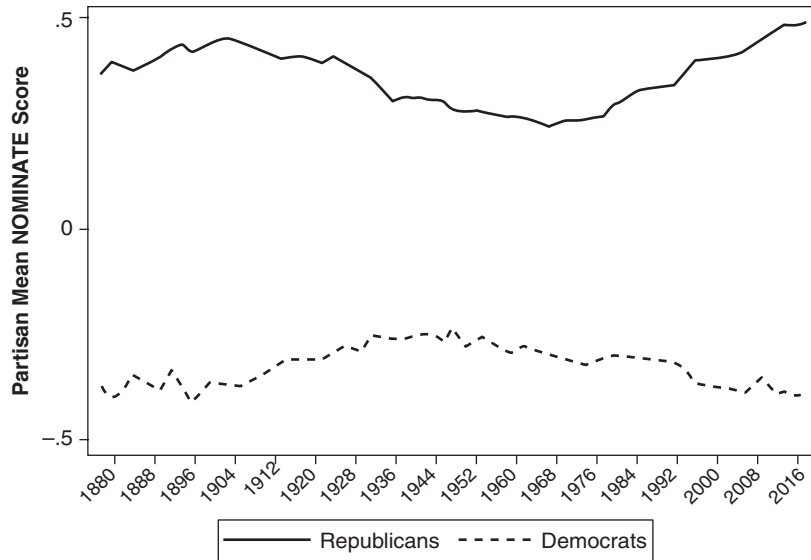


Figure shows average DW-NOMINATE scores by party.

Source: Data from voteview.com

years has been asymmetric. It is overwhelmingly associated with the increased movement of Republican legislators to the right. Each new Republican cohort has compiled a more conservative record than the returning cohort. Importantly, this has been the case since the 1970s. It is not a reflection of the emergence of the “Tea Party” movement or the emergence of Trump-style populism.

The Democratic Party has not followed a similar pattern. Although some new cohorts are more liberal than the caucus on average, many are more moderate. The slight movement of the Democratic Party to the left can be accounted for by the increase of African American and Latino legislators in its caucus. Outside of majority–minority districts, the average position of the Democratic Party has changed very little.⁷

Perhaps the most important take-away from this section is that our current levels of congressional polarization did not emerge overnight. It has been a forty-year process. These deep roots may explain why political scientists have found very little evidence that electoral reforms would do much to reverse these trends. Given the deep-seated nature of polarization and its likely resistance to reform, the focus of the remainder of my chapter will be on the ways that our separation of powers system is likely to evolve given a permanently high level of partisan division.

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POLARIZATION AND LEGISLATIVE PERFORMANCE

How might polarization affect the way Congress fulfills its constitutional functions? A variety of political science theories suggest that polarization reduces the ability of Congress to legislate. At the core of these theories is that Congress is not a purely majoritarian institution. Constitutional structures such as bicameralism and the separation of powers as well as internal rules such as the Senate's cloture procedures make it difficult for a simple legislative majority to act.

If Congress were governed solely by majority rule, legislative outcomes would reflect the preferences of the median legislator—the one whose ideal policies fall exactly in the middle.⁸ If outcomes were governed by the preferences of the median legislator, the increasing number of extreme legislators associated with polarization would have no impact on policy outcomes—the median legislator's position would always prevail. Moreover, there would be no policy gridlock. If the preferences of the median voter were to change, there would be a swift policy response moving policy to the new median-preferred outcome. Indeed, in a more majoritarian setting, the primary problem associated with polarization would be policy instability rather than gridlock.

Moreover, if legislative politics were dominated by the majority party, such as they are in many parliamentary systems, polarization also would not necessarily imply dysfunction and gridlock. In such a system, the winning party enacts its preferences, leaving no gridlock. Polarization should simply lead to wider policy swings upon changes in partisan control of the legislature.

Thus, any connection between polarization and congressional gridlock is the consequence of the combination of the separation of powers, bicameralism, and several non-majoritarian procedures that Congress has adopted over the years. Perhaps the largest deviation from the majoritarian ideal is the institution of cloture in the Senate. Ostensibly to protect its tradition of unfettered and unlimited debate, the Senate requires that three-fifths (i.e., sixty) of its members vote for a cloture resolution before debate can be terminated to allow votes to be taken on the measure in question. Because the opponents of legislation always have the option to keep talking until cloture is successfully invoked, sixty votes has become the *de facto* threshold for passing legislation through the Senate.

Cloture rules are very important for legislative responsiveness.⁹ The Senate is unable to change policy unless there is an alternative to the status quo preferred by sixty senators. Because the majority party in the Senate rarely controls sixty seats, such a coalition almost always requires bipartisanship. Thus, polarization makes such coalitions increasingly rare, so that the likelihood of gridlock increases. Similar arguments hold for the effects of bicameralism in periods of divided government. Polarization reduces the likelihood that a House controlled by one party can agree on legislation with a Senate controlled by the other.

Internal roadblocks such as bicameralism and the filibuster are not the only impediments to legislative policy change. Bills that survive the legislative process face the presidential veto. Certainly, presidents can from time to time use the bully pulpit to force bills through the barriers posed by partisan agenda control and filibusters. But for the most part, the president's legislative powers are negative.¹⁰ Thus, the veto is a tool for blocking change rather than propagating it. A successful bill requires the presidential signature or a two-thirds vote on an override motion. Thus, in the case of the veto override, the levels of required bipartisanship are even more exacting. In the evenly divided legislative chambers of the current era, an override would require a defection of roughly 30 percent of the president's party. This is extremely unlikely given the observed levels of intraparty support of the president observed during our polarized times. Since 1989, the president's veto has been overridden only eight times. Moreover, this statistic underestimates the veto's potency, as it is also a credible deterrent against legislative actions opposed by the president.¹¹

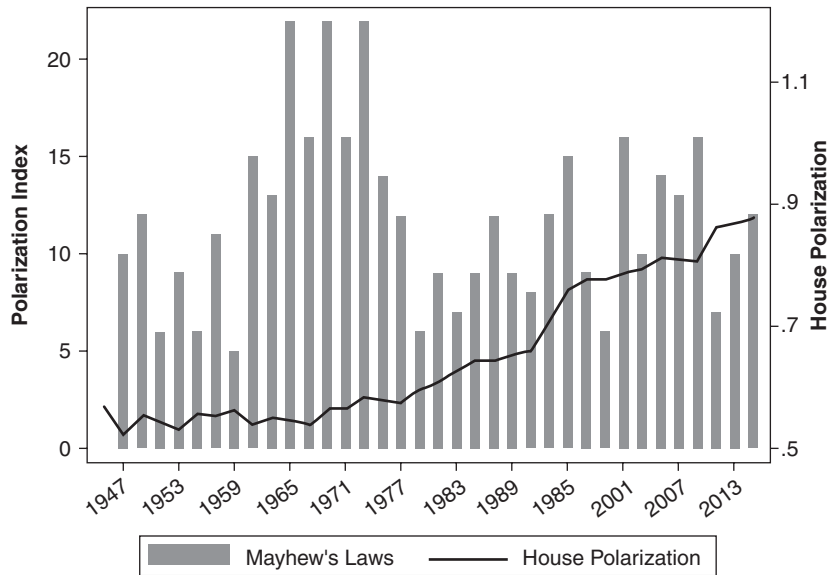
A second mechanism that transforms polarization into legislative paralysis is the increased incentives it provides politicians to engage in *strategic disagreement*. Strategic disagreement occurs when a president, party, or other political actor refuses to compromise with the other side in an attempt to gain an electoral advantage by transferring blame for the stalemate to the other side.¹² Such electoral grandstanding not only lowers legislative capacity by diverting resources into an unproductive endeavor but also because it makes both sides less willing to engage in the compromises required by successful legislation.¹³ There are several reasons to believe that polarization may exacerbate these incentives. As the parties have become more extreme relative to voters, making the other side appear to be the more extreme becomes more valuable.

EVIDENCE ON CONGRESSIONAL PERFORMANCE

In this section, I present and evaluate several pieces of evidence on how polarization has impacted congressional policy-making performance across three domains: the creation of significant statutes, the performance of its role in fiscal policy, and the confirmation of executive appointments by the Senate.¹⁴ As I discuss later, these changes in congressional performance have very important and direct effects on the operation of our separation of powers system.

Legislative Output

As I discussed above, when supermajoritarianism and strategic disagreement are combined with polarization, it becomes much more difficult for Congress to pass new legislation. Data on landmark legislative enactments, collected and updated by David Mayhew, can be used to demonstrate this effect of polarization on the legislative process.¹⁵ Figure 16-3 plots the number of Mayhew's significant

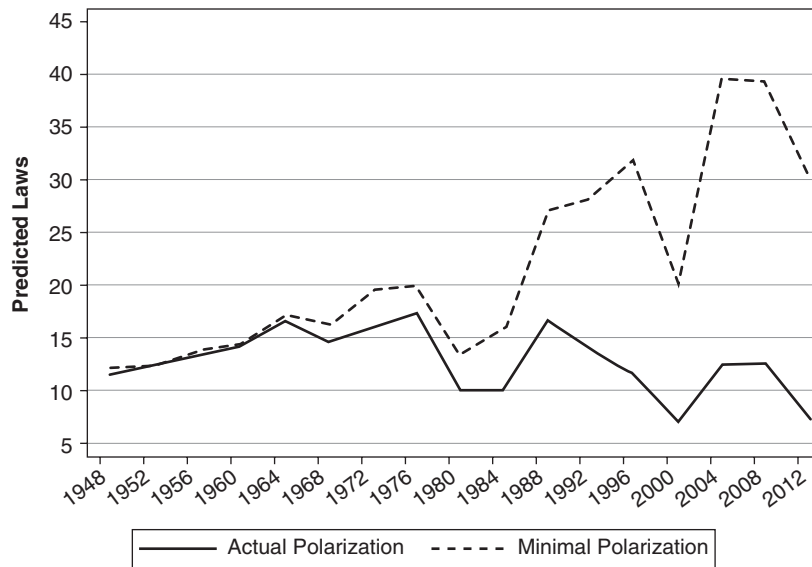
FIGURE 16-3 ■ Polarization and Mayhew's Laws

Source: Data from voteview.com and <http://campuspress.yale.edu/davidmayhew/>

legislative enactments by congressional term against the DW-NOMINATE polarization measure. It reveals a striking pattern. Congress enacted the vast majority of its significant measures during the least polarized period. The ten least polarized congressional terms produced almost sixteen significant enactments per term, whereas the ten most polarized terms produced slightly more than ten.¹⁶

To control for other factors that might explain these differences, I have elsewhere developed a statistical model of legislative output.¹⁷ In this model, I attempt to isolate the effect of polarization by controlling for unified party control of government, split party control of Congress, the election cycle, changes in party control of the presidency and Congress, and secular trends. In the preferred specification, there are substantively large and statistically significant negative effects of polarization. To get at the magnitude of these differences, Figure 16-4 presents a counterfactual analysis of Congress's output if polarization had remained at its 1965 level.

Of course, it is important to stress that Congress's ability to pass significant new legislation has not completely withered. Even the justly maligned recent Congresses have passed legislation reforming the criminal justice system, tackling the opioid crisis, modernizing digital copyright rules, and replacing the North American Free Trade Agreement. A common denominator of these successes, however, is that they were bipartisan. As James Curry and Frances Lee have documented, large bipartisan coalitions are still the way most legislation is enacted.¹⁸ It is just that polarization makes the conditions for successful bipartisanship much

FIGURE 16-4 ■ Counterfactual Legislative Productivity

Source: Data from Mayhew, David R. 1991. *Divided We Govern*. Yale University.

less common. A second feature is that the legislation list above falls well short of comprehensive solutions to these problems. Consider the First Step legislation designed to ameliorate a number of inequities in the criminal justice system. The bill contained a number of important reforms, such as retroactively reducing the sentencing disparities between crack cocaine and powder cocaine at the federal level, easing minimum sentencing guidelines, and increasing the rate at which prison sentences can be reduced for good behavior.¹⁹ Yet the legislation stops short of several reforms popular in the states, such as across-the-board sentencing reductions and the reclassification of certain drug infractions as misdemeanors instead of felonies. Surprisingly, given that the opposition to the First Step bill was from conservative Republicans, much of the successful state-level reform has taken place in GOP-controlled states.²⁰ Nevertheless, despite these legislative successes, polarization-induced gridlock has limited the congressional responses to a set of other high-profile issues, including immigration, climate change, income inequality, pharmaceutical costs, and student debt relief.

It is important to note, however, that gridlock may not always indicate congressional weakness. Blocking unpopular presidential initiatives is often the institution's greatest strength. Congress has flexed these muscles many times in the past few years. Indeed, Donald Trump has had a less successful legislative program than other recent presidents serving under unified party control.²¹ The administration's top legislative priority, the repeal and replacement of Obamacare, failed outright in Congress, despite the use of budget procedures that would have allowed the

legislation to pass with Republican votes alone. In both 2017 and 2018, Congress more or less ignored the administration's budget proposals. The two-year spending deal Congress agreed to in February 2018 bore little resemblance to the president's budget and substantially increased rather than cut domestic discretionary spending. Despite a veto threat, Trump was forced to sign the omnibus spending package that he called "ridiculous."

During the period of unified party control, Congressional Republicans made little effort to enact key elements of Trump's platform, such as increased infrastructure spending and greater restrictions on immigration. The GOP-controlled Congress appropriated additional money for border fencing but declined to fund the construction of Trump's proposed southern border wall.

Generally speaking, the only legislative priorities on which the 115th Congress acted were those where Trump's preferences aligned with traditional Republican Party priorities. The major legislative achievement of the 115th Congress, the Tax Cuts and Jobs Act, delivered a long-standing Republican wish list of tax reductions for corporations and individuals. It is hard to credit Trump with the achievement, however, as similar legislation would almost certainly have passed under any Republican president that might have been elected in 2016.

Fiscal Management

Congress has not only struggled in passing new legislation. It has also struggled to efficiently exercise its constitutional power of the purse. Political scientists often teach an idealized version of the congressional budget and appropriation process known as the "Regular Order." As codified in the Congressional Budget and Impoundment Control Act of 1974, budgeting and appropriating should unfold in a very precise way. The president initiates the process by presenting a budget request for the following fiscal year on or before the first Monday in February. The action then moves to Congress where the House and Senate pass budget resolutions that contain spending allocations, known as 302(a), for each appropriation jurisdiction. According to the textbook, the House and Senate then use a conference committee to iron out any cross-chamber differences. Following the passage of the budget resolution, appropriation committees formulate 302(b) suballocations for each subcommittee that then produces its own appropriation bill. These proposals come to floor as individual bills that contain only appropriations. Any House–Senate differences in their respective appropriation bills are ironed out in conference. After conference reports are passed, the president signs them into law well before the beginning of the fiscal year on October 1.²²

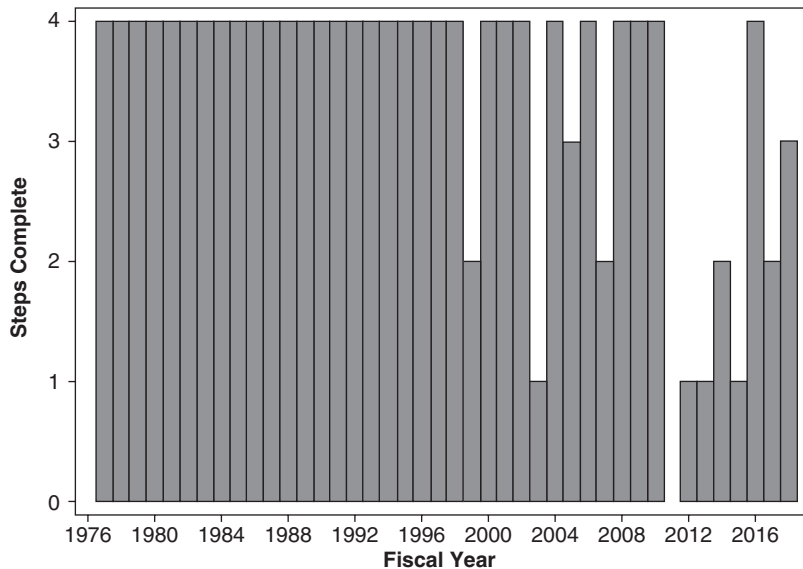
But over the last couple of decades, the process is best described as the "Regular Disorder." The president often misses the early February target for his budget request. With increasing frequency, the House and Senate fail to pass a budget resolution. Even when both chambers pass budget resolutions, conference committees are rarely convened so that the differences between the two resolutions

are never reconciled. Over the past twenty years, very few appropriation bills have passed before the beginning of the fiscal year. More commonly, governmental activities are funded for many months through continuing resolutions (CRs).²³ Occasionally, all federal spending for an entire year is provided under CRs. When appropriation bills do pass, they are often packaged together as “omnibus” bills that are negotiated by party leaders and the president, thus circumventing the role of the appropriation committees. These omnibus bills have increasingly become vehicles for legislative initiatives unrelated to appropriations.

I now provide some evidence of this deterioration in performance. Under “regular” order, both chambers pass budget resolutions and the differences are reconciled by a conference committee. Congressional performance in this stage of the budget process shows clear deterioration over time. Consider the four major budgetary milestones: House passage, Senate passage, House passage of conference report, and Senate passage of conference report. Figure 16-5 plots the number of milestones successfully reached for each annual budget resolution. From 1976 to 1998, Congress successfully cleared all four of these hurdles. Since then, there has been a completed budget resolution in only nine of twenty years. In 2011, neither chamber passed its own budget resolution.

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FIGURE 16-5 ■ Progress on the Annual Budget



The progress of each annual budget resolution is scored from zero to four. Passage of an initial resolution by either chamber scores one point, and the passage of a conference report by either chamber scores one point.

Source: Data from Mayhew, David R. 1991. *Divided We Govern*. Yale University.

Under “regular order,” Congress is also expected to pass each of its appropriation bills prior to the start of the fiscal year (currently October 1). If it fails to do so, Congress and the president must agree to a continuing resolution or face a government shutdown such as the ones that occurred in 1995–1996, 2013, and 2018–2019. Generally, CRs continue the funding levels of the previous fiscal year, but many also include some modifications of spending levels. CRs often contain changes to the authorizing statutes, and because they are often “must” pass legislation, unrelated legislation is often attached. Consequently, delays in the passage of appropriation bills and the resulting “governing by CR” has drawn wide concern. Late appropriation bills are said to create budgetary uncertainty for government agencies and private actors, reduce the ability to adjust to new spending priorities, undermine the role of committee expertise, and weaken fiscal governance.²⁴

To measure the trends in the propensity to begin a fiscal year without completed appropriation bills, I compiled data on each regular appropriation bill for FY1974 to FY2017.²⁵ To measure delay, I simply compare the date of final passage with the start date of the fiscal year. I consider an appropriation bill to have passed if it is signed by the president as a stand-alone appropriation bill or as a separate title of an omnibus appropriation bill. Figures 16-6 and 16-7 present the distribution of appropriation delays in months.²⁷ Figure 16-6 presents the data for the entire sample. Appropriation delays are the norm. Only about 10 percent of all appropriation bills passed prior to the beginning of the fiscal year. The modal month of passage is during the third month of the fiscal year (currently December). But a substantial share of bills pass in months 4, 5 and 6.

Figure 16-7 shows the distribution of delays since 2002. Clearly, delays have become much more common. Very few appropriation bills have been completed on time since 2002, and the frequency of delays exceeding two months has gone up dramatically.

In statistical models of the determinants of appropriation delay, I find that delays correlate directly with polarization and with interbranch and interchamber preference differences, which themselves are functions of partisan polarization.²⁶

The upshot of these patterns is an increased frequency of agencies spending much of the fiscal year without appropriations. Over the past few years, there have been very few months for which more than 40 percent of the appropriation bills were in effect (although the very recent performance is slightly better). Not surprisingly, the prevalence of late appropriation bills has led to greater reliance on CRs to fund government activity. I discuss the ramifications of these outcomes on government performance and the separation of powers below.

Senate Confirmations

Unique among western democracies, the American national government depends on a large cadre of political actors who are neither elected officials nor

FIGURE 16-6 ■ Distribution of Delays in Successful Appropriation Bills, 1974–2014

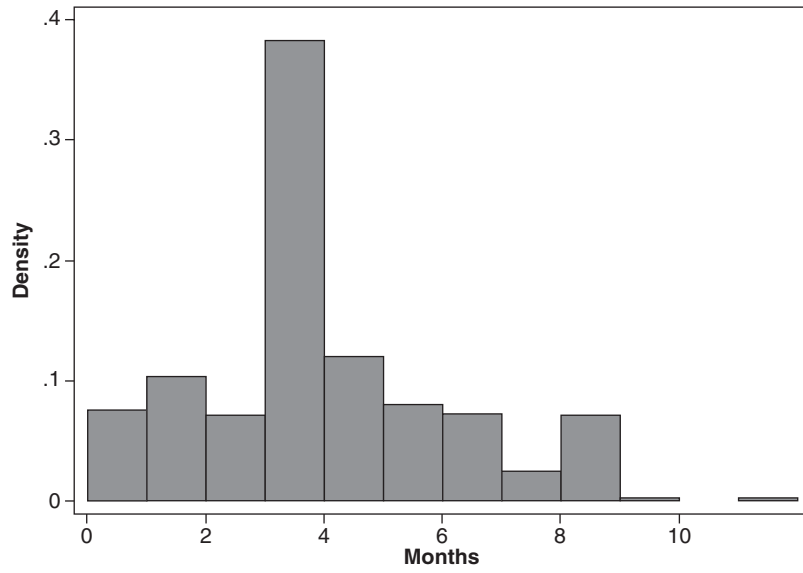
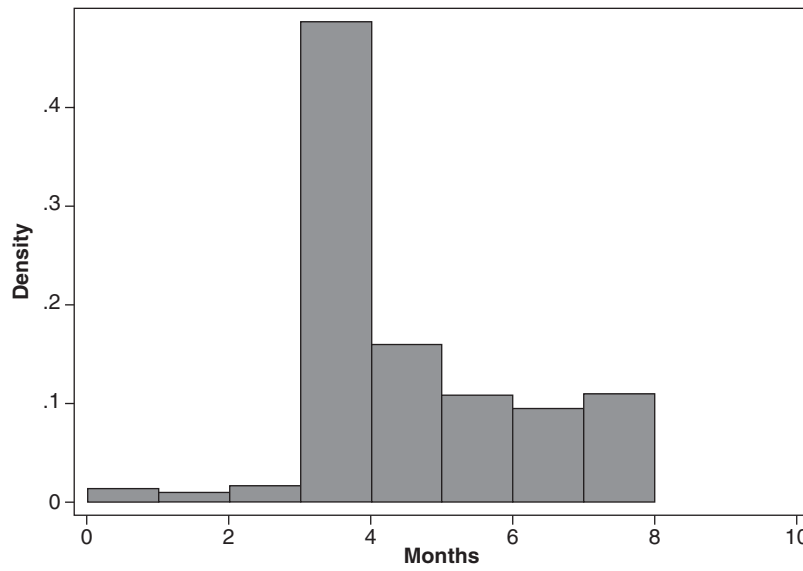


FIGURE 16-7 ■ Distribution of Delays in Successful Appropriation Bills, 2002–2014



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career public servants. The so-called “political appointees” in every government agency are responsible for the tasks of coordination and control necessary to translate the authority of democratic office holders into concrete administrative tasks to be undertaken by the career service.

Scholars of the presidency have argued that political appointees are the crucial actors in the attempts of presidents to “politicize,” “presidentialize,” or “control” the national administrative state.²⁸ Presidents are well aware of the critical link between control of the bureaucracy and the ability to achieve their goals. Although the president is empowered to appoint the officers of the national government, he may also do so with the advice and consent of the Senate. Thus, the deteriorating performance of the Senate in its confirmation role is yet another development with implications for the separation of powers. Battles over the confirmation of Supreme Court nominees and the overt obstruction of other judicial nominees have received much attention, but the scope of the Senate’s problems is often unappreciated. Not only have the confirmations of highly salient appointments succumbed to obstruction and delay, but the Senate is much slower on the hundreds of less important nominations that it must approve each term.

In an earlier study, Rose Razaghian and I collected information about the almost 5,000 nominations to positions in domestic executive branch agencies from the 49th to the 109th Senates (1885–2004). I have updated these data through the end of 2017 to include another approximately 800 confirmations.²⁹ The main focus of our study is the duration of the confirmation process from the date of the president’s official nomination to final action by the Senate.³⁰

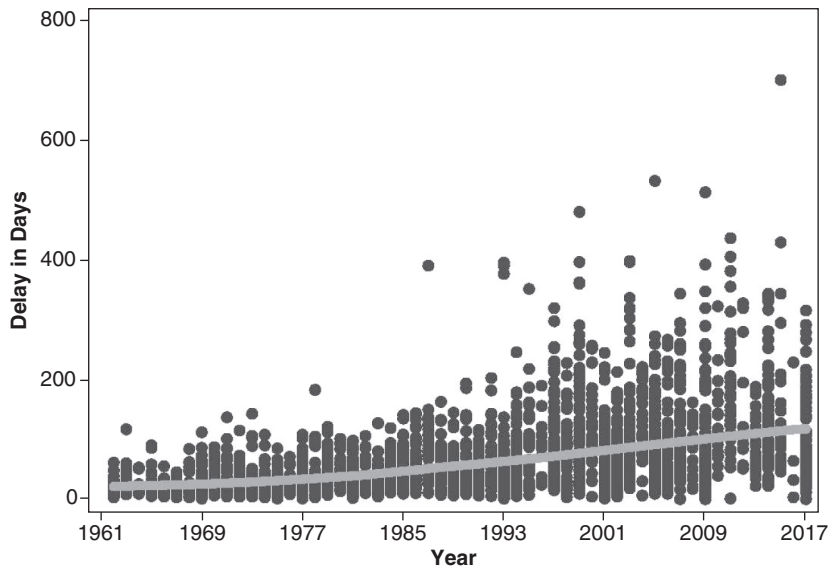
First, the expected delay in confirmations has grown tremendously since the 1960s. In 1961, the average delay was eleven days. In 2017, it had grown to ninety-three days.³¹ Second, the variation in the length of confirmations has grown precipitously. It is now quite common for a nominee to languish hundreds of days without Senate action. Interestingly, the 2013 changes to Senate rules that eliminated the filibuster on nominations appear to have had little effect on the speed of confirmation for these appointees (Figure 16-8).

In our statistical model, Razaghian and I found a strong correlation between the level of polarization and the duration of the confirmation process. Moreover, we found that the association with polarization was strengthened during periods of divided government. So it seems that polarization has not only affected judicial nominations but all the way to the lowest levels of Senate-confirmed positions.³²

THE TRANSFORMATION OF THE SEPARATION OF POWERS

I turn now to the question of how the effects of polarization documented in the last few sections have affected the presidency, the executive branch, and the balance of constitutional power between the branches.

FIGURE 16-8 ■ Confirmation Delay



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There are at least two plausible perspectives for thinking about how changes in congressional performance might transform the presidency and the separation of powers. The first is what I call the *substitutes* perspective. In its simplest form, this perspective suggests that executive and legislative powers are substitutes for one another. If legislative power wanes, executive power can (and probably should) increase to offset any possible declines in governance. The substitutes view sees institutional power as essentially zero sum: A weaker Congress makes for a stronger president and vice versa. Although most scholars of American institutions do not subscribe to the strongest version of this perspective, only slightly more nuanced formulations have been prominent in recent scholarship.³³

The substitutes perspective can be contrasted with an alternative framework where congressional and executive capacity are *complements*. From this perspective, the ability of both branches to achieve their respective policy goals is enhanced when both are performing their designated functions effectively and efficiently. Thus, when one branch performs poorly, the other incurs substantial political and policy costs. The weakness of a single branch can, therefore, impede the ability of the entire policy system to solve important social problems.

Of course, neither perspective is likely to fully account for the changes wrought by polarization. For example, as I discuss below, a gridlocked Congress

may facilitate unilateral presidential actions such as executive orders and presidential memoranda. When such unilateral action occurs, it is often a clear substitution of presidential authority for congressional authority. Similarly, a log-jammed confirmation process may give presidents the incentive and opportunity to appoint “acting” officials who can operate outside the oversight of the Senate confirmation process, another substitution. In general, the extent to which the legislature is a check on executive policy making, the president will respond to a weakened legislature by redoubling his efforts to move policy in his preferred direction. So we should expect to see policy making move away from Congress and become more reflective of the preferences and goals of the administration.

But in many other aspects, the complements perspective provides a better description of the effects of polarization. This is especially true of polarization’s effects on policy quality. A non-exhaustive list of policy qualities that polarization might undermine include robust public deliberation, clear statutory authority, efficient and equitable implementation, clear legal standards, and political accountability for outcomes. In these areas, legislative inputs are generally complements to that of the executive. Well-crafted statutes contribute to high quality policies by facilitating predictable and transparent implementation by bureaucracies and adjudication by the courts. For example, absent renewed statutory authority, policies may drift as old legislation fails to adequately address contemporary problems.³⁴ A classic case of drift is the minimum wage, which is set in nominal dollar terms and not adjusted for inflation. Another example is the fact that much of the Internet and new media is regulated under the authority of the Telecommunications Act of 1934, a statute designed specifically for radio and telephone. Such drift creates substantial uncertainty about how statutes will be applied in agency rulemaking and court decisions as new policy circumstances arise. Executive actions and agency rules in the absence of clear statutory guidance are more vulnerable to revision by future administrations.³⁵ An excellent example of this dynamic is the fate of the Obama Administration’s Clean Power Plan. After Congress failed to pass legislation design to limit carbon emissions, President Obama’s Environmental Protection Agency (EPA) issued new rules requiring states to meet specific targets for the reduction of carbon dioxide emissions. The EPA justified its rules under ambiguous statutory authority granted by the 1990 Clean Air Act. This ambiguity created grounds for legal challenges that continued up until the time the new Trump administration was able to repeal it.³⁶ Legislative politics also provides opportunities for deliberation and consensus building. Consensus policies may have a quality advantage in that broader public acceptance will lead to greater compliance.³⁷ As a result, statutes passed with large majorities may also be more durable and less likely to be repealed. In a study of the most important legislative enactments, Forrest Maltzman and Charles Shipan find that the statutes survive longer before revision if they were passed with large majorities.³⁸

Before I flesh out the implications of congressional polarization on the separation of powers, it is important to acknowledge the ways in which polarization might directly affect the internal workings of the executive branch. It is commonly presumed that the executive branch should be less internally affected by partisan and ideological polarization in that it is headed by a single individual elected by a national constituency. Putting aside the questionable assumption that serving a national constituency places meaningful constraints on the partisan or ideological behavior of presidents, there are many reasons to be skeptical that polarization will not affect the executive branch. First, polarization tends to increase the preference differences between political appointees and career civil servants in ways that would undermine political control and the performance of agencies.³⁹ While political appointees are strongly motivated to implement the president's program, career civil servants may weigh congressional preferences as well as the longer-term interests and goals of the agency. Second, there is considerable ideological heterogeneity across agencies within a single administration.⁴⁰ Some agencies, such as those related to national defense and law enforcement, may lean to the right as others, such as those related to education and social welfare, lean to the left. Finally, legal restrictions on the removal of appointees combined with the sluggish confirmation process dramatically limits the ability of presidents to shift the ideological nature of key agencies.⁴¹ However, once presidents have successfully done so, these same factors work to lock in their policy priorities well into the administrations of future presidents.

LEGISLATIVE GRIDLOCK AND EXECUTIVE POWER

One of the most direct implications of legislative gridlock is that Congress is considerably less able to override the decisions made by presidents and administrative agencies. In the framework discussed above, statutory gridlock creates opportunities for substituting executive action for legislative action.⁴² To clarify how this mechanism works, consider the conventional models of lawmaking, such as pivotal politics⁴³ or majority-party agenda control.⁴⁴ Each predicts a "gridlock interval" of policies that cannot be overturned by a statutory override. As related to the discussion above, these gridlock intervals tend to be larger when congressional parties are more polarized. Therefore, agencies have considerably more leeway to set policy without fear of congressional override when polarization is high.⁴⁵ Moreover, as Congress becomes more gridlocked, interest groups are increasingly likely to turn their lobbying efforts away from Congress and toward the president and the administration.⁴⁶ This dynamic in turn creates even greater expectations that the president will act on those issues on which Congress cannot.

But the substitution effect favoring the executive may pale in comparison to the lost policy impact due to the complementarities between legislative statutes and executive power. Many tools of executive policy making depend in large part on statutory delegation from Congress. A less active Congress thus gives the president much less to work with. Moreover, a more partisan and ideological judiciary may read legislative grants of authority more restrictively. Such constraints are apparent in the judicial responses to President Obama's executive actions on immigration. Consider the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), which provided a three-year work permit and protections from deportation for certain undocumented parents of American citizens and permanent residents. President Obama long claimed that he lacked the authority to act in this area and needed Congress to pass legislation to provide legal status to this group. But when he finally asserted such authority, the administration was sued by the attorneys general of twenty-five states alleging that the orders did in fact lack any statutory authority. The orders were enjoined and legal challenges continued until the Trump administration rescinded them.

A second constraint on executive power is that presidents may be charged with implementing and enforcing poorly drafted laws. When that occurs, sending the bill back to a polarized Congress for technical corrections may not be an option, and the administration may be opened up to even more judicial scrutiny, such as in the recent *King v. Burwell* case over Obamacare subsidies.⁴⁷

Polarization might erode the effectiveness of presidential unilateral action in other ways. First, Dino Christenson and Douglas Kriner present evidence from survey experiments showing that a voter's response to unilateral presidential actions is heavily partisan.⁴⁸ Republican voters react negatively to executive orders by Democratic presidents and vice versa. Second and more importantly, voters in a second study by Christenson and Kriner reacted negatively toward executive actions that are opposed by Congress, even when that opposition is partisan.⁴⁹ These effects clearly raise the costs of any attempts to substitute executive action for legislative authority.

Finally, the outputs of executive policy making, such as orders, memoranda, and rules, are imperfect substitutes for statutes. In particular, they tend to be much more constrained and narrow than statutes because they must be predicated on some existing statutory or constitutional authority. Moreover, they are far less durable than statutes, as they can easily be undone by the next administration.⁵⁰

Another consequence of gridlock, somewhat paradoxically, is that it may increase policy uncertainty. Although gridlock does of course stabilize formal policies, it also precludes policy makers from responding to new circumstances with policy changes. This may generate substantial uncertainty over policy outcomes and effectiveness. For example, consider a program that spends a billion dollars to alleviate poverty. The outcome of this program in terms of the numbers of people in poverty may depend on a whole host of factors, such as demographic shifts, employment opportunities, and so forth. Thus, if the billion dollar allocation were gridlocked, there would be more uncertainty as to its effects on poverty. If, on the other hand, the funding level could be flexibly adjusted to account

for demographic and economic circumstances, we might expect less variation in its impact.⁵¹ A related argument is one developed by Jacob Hacker.⁵² In his account, policy outcomes are not necessarily uncertain under gridlock but may “drift” predictably over long periods of time. One of his primary examples is that of employer provided health insurance. Such insurance became popular during World War II as a way of avoiding wartime wage controls. But despite the rising problems with that system, such as escalating costs, reduced coverage rates, and job market rigidities associated with workers locked into jobs to maintain insurance, “serious efforts [at reform] have been effectively blocked by a formidable constellation of ideologically committed opponents and vested interests.”

APPROPRIATIONS DELAY AND EXECUTIVE POWER

I turn now to the question of the impact of declining legislative performance on appropriations. Given the constitutional injunctions against the expenditure of unappropriated funds, the executive has limited opportunities to substitute its authority for that of Congress. Moreover, the Impoundment Control Act of 1974 restricts the ability of the president to withhold appropriated funds from programs he opposes. A major exception to these rules, however, are the emergency powers that Congress has delegated to the president. The limits of these powers were recently tested when President Trump transferred money appropriated for military construction to fund his proposed “border wall.”⁵³ The National Emergencies Act of 1976 gives presidents broad authority to declare national emergencies. In fact, the act circularly defines a national emergency as any emergency declared by the president.⁵⁴ The formal legislative constraint on this power is a concurrent resolution by Congress terminating the emergency or the revision of the National Security Act itself. Thus, these powers may become entrenched through polarization and gridlock. Few presidents have gone as far as President Trump in using those powers to subvert the congressional power of the purse, but future presidents may be emboldened by his example, enhancing the substitution of presidential authority for that of Congress.

Unless and until presidents more fully exploit opportunities such as the National Security Act, congressional budgetary performance is likely to be complementary to good executive and administrative policy making. Thus, the declining legislative performance should be a drag on executive policy making. I examined these effects in a recent chapter.⁵⁵ Although I do not find clear effects on budgeting outcomes such as deficits or spending, I find some evidence that appropriation delays may have negative economic consequences generated by increased policy uncertainty. I use a measure of policy uncertainty developed by Scott Baker, Nicholas Bloom, and Steven Davis based on media coverage of politics and the economy.⁵⁶ This policy uncertainty index has been shown to correlate

negatively with investment and economic performance, and a connection between it and appropriation delays could indicate the macroeconomic costs of poor procedural budgetary performance. Combining Baker, Bloom, and Davis's findings on the correlation between policy uncertainty and economic growth and my findings on the correlation between unenacted appropriations, I was able to approximate an economically meaningful cost of about .3 percent of GDP (annualized) between a fully funded government and one operating on continuing resolutions.

More recently, Alex Bolton, Sara Kerosky, and I examine the effects of appropriation delay on bureaucratic capacity.⁵⁷ Such delays affect bureaucratic capacity most directly by creating budget uncertainty and limiting agency responsiveness. Under CR, agencies must operate at conservative spending rates until the final appropriations bill is passed, sometimes months into the fiscal year and sometimes not at all. If agencies fail to act conservatively during a delay, they risk overestimating the amount they are actually appropriated, forcing emergency cuts down the line.

CRs limit responsiveness by freezing agency activities in place, inhibiting agencies from adapting to changing circumstances. For instance, agencies are unable to implement new programs, even if they have been authorized by law, during CRs because of the lack of appropriations for those activities and the requirement that agencies not engage in activities that were not part of the previous year's appropriations. This means that long-planned policy changes or grant program distributions face significant delays under CR, raising uncertainty for employees as well as individuals outside of government. Similarly, agencies are legally unable to scale back programs during CRs, even if they (and Congress) have deemed them unnecessary or inefficient, if the programs received explicit appropriations in the previous year.

Continuing resolutions can also have significant impacts on the day-to-day management of agencies and potentially lead to problems related to human capital. For example, appropriation delays and conservative spending during times of budgetary uncertainty may precipitate hiring freezes, leaving some organizations short staffed and unable to recover from natural attrition. When combined with the lengthy process that accompanies federal hiring in general, appropriation delays may further exacerbate human capital problems in the federal government.

Budget uncertainty, lack of resources, and hiring freezes can amplify the impact of appropriation delays on agency capacity by increasing individual workloads and decreasing morale. Public employees receive utility from a number of sources for their labor, including pecuniary utility from their salaries and benefits, as well as non-material benefits arising from policy control or actualizing public service motivations. Budget uncertainty can foster a sense of job instability, which would threaten pecuniary utility. If agencies, forced to spend conservatively for long periods of time under CR, are unable to replace employees who leave the public workforce, the employees who remain may suffer the burden of additional workload, in some cases without additional pay. Furthermore, because CRs prohibit changes in agency programming, employees have limited policy control under CRs. Indeed, a recent news story on the impacts of continuing resolutions on agencies quoted federal officials referring to them as “unacceptable,” “debilitating,” and “sand in

the gears.”⁵⁸ This lack of policy control may contribute to a decreased sense of utility and fulfillment from public service.

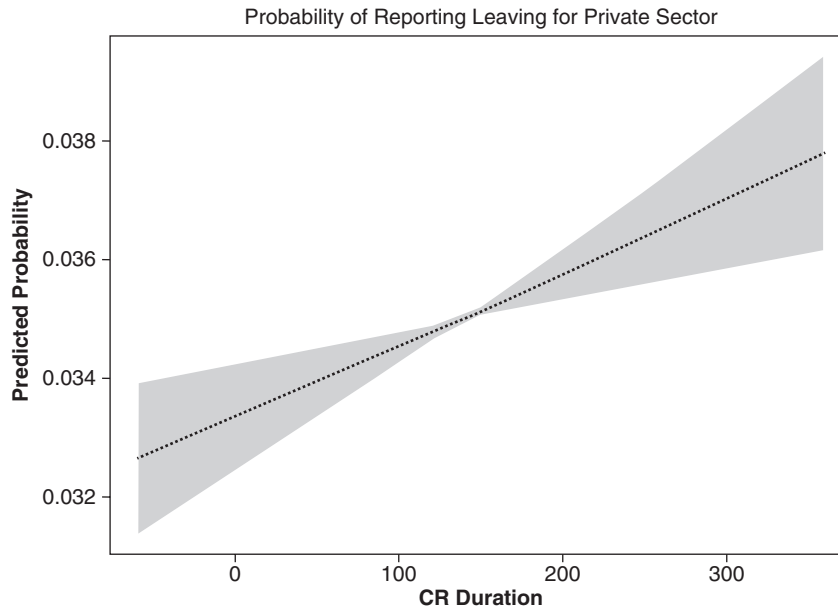
In order to begin to assess whether these effects are perceptible to federal employees and impact their labor market behavior, we examine surveys of federal employees carried out by the Office of Personnel Management (OPM), known as the Federal Employee Viewpoints Survey. We examine responses to two questions in order to measure effects of appropriation delays on bureaucratic capacity and morale. The first question concerns the level of resources that individuals have in their agencies: “I have sufficient resources (for example, people, material, or budget) to get my job done.” The second question that we analyze asks individuals to prospectively consider their career plans. The question reads, “Are you considering leaving your organization within the next year, and if so, why?” The response options include, “No,” “Yes, to take another job within the Federal Government,” “Yes, to take another job outside the Federal Government,” or “Yes, other.” We analyze whether or not delays correlate with a higher likelihood of seeking jobs outside of the federal government.

The key independent variable that we analyze is the duration of the CR for the fiscal year in which the survey occurs. In order to create this variable, we first matched agencies in the survey to the appropriations bill that is responsible for their funding. We then tracked the date on which this bill ultimately became law. The *CR Duration* explanatory variable is a count of the number of days before or after October 1 (i.e., the beginning of the federal fiscal year) that the agency’s appropriations bill was signed into law.

Recall that we predict a negative correlation between the duration of continuing resolutions and responses indicating that the individual’s organization has the necessary financial and human capital resources in order to carry out its mission. Across all of our analyses, we find effects of continuing resolutions on the perception of adequate budget resources. Moving from an agency that is funded all year to one that has endured a year-long CR, the probability of responding “Agree” or “Strongly Agree” to the budget question declines a bit more than three percentage points, from 48.9 percent to 45.6 percent.

Our second hypothesis is that government employees working in agencies prone to operating under a CR would be more likely to indicate an intention to depart government service. This hypothesis is also supported in the data. Figure 16-9 graphs the predicted probability of the respondent indicating that they planned to leave the government within the next year. As can be seen, the baseline probability of reporting leaving for another job is 3.5 percent. This is in line with actual overall federal turnover rates, which, depending on the level of the employee, range from 4 to 8 percent. Moving across the range of the CR duration variable, the probability of reporting an intention to turnover increases from 3.3 percent to 3.8 percent, an increase of 15 percent.

The magnitudes of the effects of governing by CR are not huge, but it is clear that the poor fiscal performance of Congress has been little benefit to a federal bureaucracy already plagued with resource and morale problems. And these problems hardly enhance executive power.

FIGURE 16-9 ■ Predicted Probability of Reported Intention to Leave Federal Government

This graph plots the predicted probability that an individual reports an intention to leave the federal government for another job at different levels of CR duration while holding other variables at their observed levels.

Source: Data from Mayhew, David R. 1991. *Divided We Govern*. Yale University.

THE CONFIRMATION PROCESS AND EXECUTIVE POWER

The transformation of the Senate confirmation process also creates a variety of substitution and complementary effects on executive power. One of the most transparent substitution effects has been the increasing tendency of presidents to appoint “acting” officials rather than submitting nominees to the Senate for confirmation.⁵⁹ Such practices have received a great deal of attention in the Trump years, as novel applications of the relevant statutes have led to the elevation of Trump loyalists Matthew Whitaker to acting attorney general and Ken Cuccinelli to acting director of the Citizenship and Immigration Services (USCIS).⁶⁰ But the practices are much more widespread than these high profile appointments. Legal scholar Anne Joseph O’Connell has compiled data on the use of acting appointments at the cabinet level from the Reagan administration through the third year of the Trump administration. She finds that all presidents have used acting appointments extensively,

especially in the first year of their term where acting officials replace outgoing members of the previous administration. Many of these were for fewer than ten days. But the Trump administration represents a major departure from prior practices. In three years, Trump has utilized twice as many longer-term acting cabinet officials than the previous two presidents did over a sixteen-year period. As of April 2019, only 65 percent of “presidential appointed, Senate confirmed” (PAS) positions in cabinet departments were filled by confirmed officials. Acting officials held 13 percent of the offices, and the rest were vacant.

For example, Joseph O’Connell reports that, due in large part to greater confirmation delays, the initial vacancy period at the start of a new administration for all subcabinet officials increased substantially between the Reagan and Bush II administrations.⁶¹ These vacancies, she argues, foster agency inaction and confusion while undermining agency accountability.

But as in the case of legislative gridlock and appropriation delay, the shortcomings of the Senate confirmation process come with substantial costs to the president and his ability to administer the government. First, agencies might not be able to operate at full capacity when led by an acting official or during periods of leadership vacancies. Studies confirm that performance can be impacted detrimentally when an agency lacks a Senate-confirmed leader. For example, Alexander Bolton, Rachel Potter, and Sharece Thrower find that the Office of Information and Regulatory Affairs takes considerably longer to review new rules when there is an acting administrator.⁶² Importantly, this effect appears to be the largest on regulations that are presidential priorities, suggesting that vacancies can specifically impair the implementation of the president’s regulatory agenda. Second, frequent vacancies and acting appointments can generate substantial uncertainties and morale problems within agencies, similar to the effects of appropriation delays documented above.⁶³ In one study, Paul Light examines forty-one cases between 2001 and 2004 where the government failed to deliver effective public policy.⁶⁴ These range from the failure to prevent the 9/11 terror attacks to consumer product recalls to the Operation Fast and Furious firearms sting that lost track of over one thousand firearms, some of which were used in later crimes. Light’s analysis suggests that vacancies contributed to eight of the failures. In addition to 9/11, recalls, and Fast and Furious, he asserts that the vacancies contributed to the financial crisis and the botched healthcare.gov launch. Third, routine agency operation under vacancies and acting leaders short-circuit the accountability that comes with Senate review and approval of top agency leaders. Many of the controversial acting appointments involved individuals who would be unlikely to be approved by the Senate. Finally, should the courts rule that an appointment has violated the Vacancies Act, certain actions by improperly serving officials should have no “force or effect.”⁶⁵ For example, a federal judge recently ruled that Cuccinelli’s acting appointment at UCIS was unlawful and that all policy memos that he signed should be set aside.⁶⁶ Until that case is settled on appeal, the legal status of the agency’s policies will be in doubt. So the aggressive use of acting officials creates a measure of legal and administrative uncertainty.

CONCLUSIONS

Rising partisanship and ideological polarization in Congress has proven to be especially pernicious in its effects on America's governing institution. This chapter has provided an accounting of its various costs. Congress has proven less able to make significant contributions to addressing major social and economic problems. Its management of its powers of the purse has been poor, leading to unstable financial environments in federal agencies. The Senate's performance on nominations has contributed to numerous vacancies in important policy-making positions.

In light of Congress's problems, expectations that presidential leadership is the solution for good governance have clearly risen. Such expectations were clearly in evidence during the 2020 Democratic presidential nomination debates, as candidates provided exhaustive lists of executive actions they would undertake on "Day 1" of their administrations.⁶⁷ But as I have argued, enhanced executive power may not be a panacea. Certainly there are areas where presidential authority can be substituted for legislative action, but those circumstances are currently quite narrow and the substitutes are imperfect. Putting aside the very real issues of political representation and accountability of a presidentially dominated government, there are quite tangible negative impacts on governance from relying too heavily on the executive branch to compensate for legislative weakness. Presidents can hardly govern well in the absence of clear, transparent, and up-to-date statutory authority. The president cannot effectively oversee an executive branch in which continuing resolutions and leadership vacancies are the norm rather than the exception.

Herbert Stein, President Nixon's chairman of economic advisors, once quipped, "if something cannot go on forever, it will stop."⁶⁸ But is this true of polarization and its impacts on American governance? Over recent decades, scholars, activists, and journalists have focused on a large number of reforms designed to reduce the electoral success of ideological candidates or ameliorate the incentives to engage in excessively partisan behavior. Yet the social science evidence for such reforms in far from encouraging.⁶⁹ This chapter suggests that reforms focused on enhancing executive power are likely to be counterproductive if not corrosive to accountability and other democratic values. Another way the governing slump associated with polarization might end is in the aftermath of a decisive electoral victory that places the presidency and Congress under the clear control of one party. In such a scenario, the copartisans can engage in complementary executive and legislative governance. Perhaps if one party could dominate the government for long enough, polarization might recede, as the out-party is forced to moderate to stay viable.⁷⁰ But in recent decades, such situations have been short lived. Voters have tended to deem that such partisan governments have moved policy too far to the left, as in 1994 and 2010, or too far to the right, as in 2018, resulting in the out-party gaining control of at least one chamber. Thus, voters seem torn between the efficiency of unified government and the checks and balances of divided government.

So absent a plausible institutional reform or political fix for polarization, progress on improved governance seems likely to lie in efforts to improve Congress's capacity to govern alongside the president.

Notes

1. Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877–1920* (Cambridge, UK: Cambridge University Press, 1982); David Epstein and Sharyn O'Halloran, *Delegating Powers: A Transaction Cost Politics Approach to Policy Making under Separate Powers* (New York: Cambridge University Press, 1999); Eric A. Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (New York: Oxford University Press, 2011); Andrew Rudalevige, *The New Imperial Presidency: Renewing Presidential Power After Watergate* (Ann Arbor: University of Michigan Press, 2008); William G. Howell, Saul P. Jackman, and Jon C. Rogowski, *The Wartime President: Executive Influence and the Nationalizing Politics of Threat* (Chicago: University of Chicago Press, 2013).
2. Nolan McCarty, Keith T. Poole, and Howard Rosenthal, *Income Redistribution and the Realignment of American Politics* (Washington, DC: AEI Press, 1997).
3. See Nolan McCarty, Keith T. Poole, and Howard Rosenthal, *Polarized America: The Dance of Ideology and Unequal Riches* (Cambridge: MIT Press, 2016), for a more extensive discussion of the measurement.
4. An important feature of DW-NOMINATE is that we can use overlapping cohorts of legislators to make inter-temporal comparisons about the degree of polarization. For example, we can establish that in relative terms, Ted Cruz is more conservative than John Tower, even though they never served in the Senate together. We can do this by leveraging that John Tower served with Phil Gramm who served with Kay Hutchison who served with John Cornyn who served with Ted Cruz.
5. Indeed, the *intraparty* divisions were so great that the American Political Science Association commissioned a report arguing for *more* partisan polarization. See American Political Science Association, "Toward a More Responsible Two-Party System: A Report of the Committee on Political Parties," *American Political Science Review* 44, no. 3 (1950): part 2, Supplement.
6. Keith T. Poole and Howard Rosenthal, "The Polarization of American Politics," *The Journal of Politics* 46, no. 4 (1984): 1061–79.
7. As of this writing, it is too early to tell whether the strengthening of the Social Democratic wing, embodied by Bernie Sanders and Alexandria Ocasio-Cortez, will move the Democratic Party to the left in a substantial way.
8. See Duncan Black, "The Decisions of a Committee using a Special Majority." *Econometrica: Journal of the Econometric Society* 16, no. 3 (1948): 245–61, on the median voter theorem.
9. For a detailed explication of the underlying theory, see Keith Krehbiel, *Pivotal Politics: A Theory of U.S. Lawmaking* (Chicago: University of Chicago Press, 1998),

and David W. Brady and Craig Volden, *Revolving Gridlock: Politics and Policy From Jimmy Carter to George W. Bush* (Boulder, CO: Westview Press, 2005).

10. Nolan McCarty, "Presidential Reputation and the Veto," *Economics & Politics* 9 no. 1 (1997): 1–26; Charles M. Cameron, *Veto Bargaining: Presidents and the Politics of Negative Power* (New York: Cambridge University Press, 2000); Charles M. Cameron and Nolan McCarty, "Models of Vetoes and Veto Bargaining," *Annual Review Political Science* 7 (2004): 409–35.
11. See Charles M. Cameron, *Veto Bargaining: Presidents and the Politics of Negative Power* (New York: Cambridge University Press, 2000).
12. See John B. Gilmour, *Strategic Disagreement: Stalemate in American Politics* (Pittsburgh, PA: University of Pittsburgh Press, 1995); Tim Groseclose and Nolan McCarty, "The Politics of Blame: Bargaining Before an Audience," *American Journal of Political Science* 45, no. 1 (2001): 100–19; Frances E. Lee, *Beyond Ideology: Politics, Principles, and Partisanship in the US Senate* (Chicago: University of Chicago Press, 2009).
13. See Frances E. Lee, *Insecure Majorities: Congress and the Perpetual Campaign* (Chicago, IL: University of Chicago Press, 2016).
14. I omit one consequential area—congressional oversight of the executive. See Douglas L. Kriner and Eric Schickler, *Investigating the President: Congressional Checks on Presidential Power* (Princeton, NJ: Princeton University Press, 2016) for evidence on how polarization affects the willingness and capacity of Congress to exercise its oversight functions.
15. See David R. Mayhew, *Divided We Govern* (New Haven, CT: Yale University Press, 1991).
16. The gap would be even bigger except for the enormous legislative output following the September 11 terrorist attacks during the polarized 2000s.
17. It is an updated version of that from Nolan McCarty, "The Policy Effects of Political Polarization," in *Transformations of American Politics*, ed. Paul Pierson and Theda Skocpol (Princeton, NJ: Princeton University Press, 2007).
18. See James M. Curry and Frances E. Lee, "Non-party Government: Bipartisan Lawmaking and Party Power in Congress," *Perspectives on Politics* 17, no. 1 (2019): 47–65.
19. See <https://www.vox.com/future-perfect/2018/12/18/18140973/state-of-the-union-trump-first-step-act-criminal-justice-reform>.
20. See https://www.pewtrusts.org//media/assets/2017/08/33_states_reform_criminal_justice_policies_through_justice_reinvestment.pdf.
21. See Frances E. Lee, "The 115th Congress and Questions of Party Unity in a Polarized Era," *The Journal of Politics* 80, no. 4 (2018): 1464–73.

22. The fiscal year began on July 1 until 1977. For a thorough discussion of these procedures, see Jessica Tollestrup, "The Congressional Appropriations Process: An Introduction." Congressional Research Service, 2013, <https://www.senate.gov/CRSPubs/8013e37d-4a09-46f0-b1e2-c14915d498a6.pdf>.
23. A continuing resolution is a joint resolution enacted by Congress, when the new fiscal year is about to begin or has begun, to provide budget authority for federal agencies and programs to continue in operation until the regular appropriations acts are enacted.
24. See Joe White, "The Continuing Resolution: A Crazy Way to Govern?" *The Brookings Review* 6, no. 3 (1988): 28–35; Neal E. Devins, "Appropriations Redux: A Critical Look at the Fiscal Year 1988 Continuing Resolution," *Duke Law Journal*, 1988 (April 1988): 389; and Peter Hanson, *Too Weak to Govern* (New York: Cambridge University Press, 2014).
25. See Nolan McCarty, "The Decline of Regular Order in Appropriations—Does It Matter?" in *Congress and Policy Making in the 21st Century*, ed. Jeffrey Jenkins and Eric Patashnik (New York: Cambridge University Press, 2016), 162, for details.
26. Nolan McCarty, "The Decline of Regular Order."
27. In both figures, a delay of zero is assigned to any bill passed prior to the start of the fiscal year.
28. See Richard P. Nathan, *The Administrative Presidency* (Hoboken, NJ: John Wiley & Sons, 1983); Terry M. Moe, "The Politicized Presidency," in *The New Direction in American Politics*, ed. John E. Chubb and Paul E. Peterson (Washington, DC: Brookings Institution Press, 1985); Hugh Hecl, *A Government of Strangers: Executive Politics in Washington* (Washington, DC: Brookings Institution Press, 1977).
29. Nolan McCarty and Rose Razaghian, "Advice and Consent: Senate Responses to Executive Branch Nominations 1885–1996," *American Journal of Political Science*, 43, no. 4 (1999): 1122–43. To avoid complication related to senatorial courtesy, we did not collect data on nominees to head regional offices, such as United States attorneys or custom officials. Finally, to limit our focus to domestic politics, we did not collect data on the departments of State or Defense.
30. Thus, we ignore the delay between an announced vacancy and the president's nomination. Clearly, the Senate's performance might also affect the duration of the pre-nomination selection and vetting process.
31. This estimate is subject to substantial censoring, as more than forty of Donald Trump's 2017 nominations to these positions were returned to the president unconfirmed at the end of session. This happened to only a couple of Kennedy's nominations in 1961.
32. In a study focused on a broader set of nominees for the period from 1987 to 2012, Ian Ostrander, "The Logic of Collective Inaction: Senatorial Delay in

Executive Nominations," *American Journal of Political Science* 60, no. 4 (2016): 1063–76, also finds that Senate polarization increases the delays associated with confirmation.

33. For examples, see Eric A. Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (New York: Oxford University Press, 2011), and William G. Howell and Terry M. Moe, *Relic: How Our Constitution Undermines Effective Government—and Why We Need a More Powerful Presidency* (New York: Basic Books, 2016).
34. See Jacob S. Hacker, "Privatizing Risk Without Privatizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States," *American Political Science Review* 98, no. 2 (2004): 243–60; Suzanne Mettler and Claire Leavitt, "Public Policy and Political Dysfunction: The Polyscape, Policy Maintenance, and Oversight," in *Can America Govern Itself?*, ed. Frances E. Lee and Nolan McCarty (New York: Cambridge University Press, 2019).
35. See Bethany A. Davis Noll and Richard L. Revesz, "Regulation in Transition," *Minnesota Law Review* 104 (2019): 1, on the increasing susceptibility of agency rules to be overturned by new administrations.
36. See <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/09/supreme-court-puts-the-brakes-on-the-epas-clean-power-plan/> and <https://www.nytimes.com/2017/10/09/climate/clean-power-plan.html>.
37. See Tom R. Tyler, *Why People Obey the Law: Procedural Justice, Legitimacy, and Compliance* (New Haven, CT: Yale University Press, 1990); Tom R. Tyler, "Trust and Democratic Governance," in *Trust and Governance*, ed. Valerie Braithwaite and Margaret Levi. (New York: Russell Sage Foundation, 1998), 269–94.
38. Forrest Maltzman and Charles R. Shipan, "Change, Continuity, and the Evolution of the Law," *American Journal of Political Science* 52, no. 2 (2008): 252–67.
39. See David E. Lewis, *The Politics of Presidential Appointments: Political Control and Bureaucratic Performance* (Princeton, NJ: Princeton University Press, 2010).
40. See Joshua D. Clinton, Anthony Bertelli, Christian R. Grose, David E. Lewis, and David C. Nixon, "Separated Powers in the United States: The Ideology of Agencies, Presidents, and Congress," *American Journal of Political Science* 56, no. 2 (2012): 341–54.
41. See Neal Devins and David E. Lewis, "Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design," *Boston University Law Review* 88 (2008): 459.
42. See for example John Ferejohn and Charles Shipan, "Congressional Influence on Bureaucracy," *Journal of Law, Economics, & Organization* 6 (1990): 1–20; Terry M. Moe and William G. Howell, "The Presidential Power of Unilateral Action," *The*

- Journal of Law, Economics, and Organization* 15, no. 1: 132–79; William G. Howell, *Power Without Persuasion: The Politics of Direct Presidential Action* (Princeton, NJ: Princeton University Press, 2003); Neal Devins, “Presidential Unilateralism and Political Polarization: Why Today’s Congress Lacks the Will and the Way to Stop Presidential Initiatives,” *Willamette Law Review* 45 (2008): 395; Fang-Yi Chiou and Lawrence S. Rothenberg, *The Enigma of Presidential Power: Parties, Policies and Strategic Uses of Unilateral Action* (New York: Cambridge University Press, 2017).
43. See Keith Krehbiel, *Pivotal Politics: A Theory of U.S. Lawmaking* (Chicago: University of Chicago Press, 1998).
 44. See Gary W. Cox and Mathew D. McCubbins, *Setting the Agenda: Responsible Party Government in the US House of Representatives*. (New York: Cambridge University Press, 2005).
 45. See John Ferejohn and Charles Shipan, “Congressional Influence on Bureaucracy,” *Journal of Law, Economics, & Organization* 6 (1990): 1–20; William G. Howell, *Power Without Persuasion: The Politics of Direct Presidential Action* (Princeton, NJ: Princeton University Press, 2003).
 46. For a case study of how interest group politics reoriented away from Congress toward the administration on automobile fuel efficiency standards, see Bruce Oppenheimer, “It’s Hard to Get Mileage Out of Congress,” in *Congress and Policy Making in the 21st Century*, ed. Jeffrey Jenkins and Eric Patashnik (New York: Cambridge University Press, 2016).
 47. *King vs. Burwell*, 576 U.S. 2015.
 48. Dino P. Christenson and Douglas L. Kriner, “Constitutional Qualms or Politics as Usual? The Factors Shaping Public Support for Unilateral Action,” *American Journal of Political Science* 61, no. 2 (2017): 335–49.
 49. Dino P. Christenson and Douglas L. Kriner, “Mobilizing the Public Against the President: Congress and the Political Costs of Unilateral Action,” *American Journal of Political Science* 61, no. 4 (2017): 769–85. These costs are compounded by the fact that the baseline of voter opposition to unilateral action is high. See Andrew Reeves and Jon C. Rogowski, “Unilateral Powers, Public Opinion, and the Presidency,” *The Journal of Politics* 78, no. 1 (2016): 137–51.
 50. Sharece Thrower, “To Revoke or Not Revoke? The Political Determinants of Executive Order Longevity,” *American Journal of Political Science* 61, no. 3 (2017): 642–56, finds that of the 6,158 executive orders issued between 1937 and 2013, 18 percent were amended, 8 percent were superseded, and 25 percent were revoked. See also Davis Noll and Revesz, “Regulation in Transition.”
 51. See Nolan McCarty, “Pivotal Politics, Partisan Polarization, and Policy Predictability,” *The Journal of Politics* 80, no. 3 (2018): 1076–81, for an elaboration of this argument.

52. See Jacob S. Hacker, "Privatizing Risk Without Privatizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States," *American Political Science Review* 98, no. 2 (2004): 243–60.
53. See <https://www.nytimes.com/2020/01/14/us/politics/trump-wall-funding.html>.
54. See Public Law 94-412, Title I Sec.101 3(b).
55. See Nolan McCarty, "The Decline of Regular Order in Appropriations—Does It Matter?" in *Congress and Policy Making in the 21st Century*, ed. Jeffrey Jenkins and Eric Patashnik (New York: Cambridge University Press, 2016), 162.
56. See Scott R. Baker, Nicholas Bloom, and Steven J. Davis, "Measuring Economic Policy Uncertainty," *The Quarterly Journal of Economics* 131, no. 4 (2016): 1593–1636.
57. See Alexander Bolton, Sara Kerosky, and Nolan McCarty, "Congressional Dysfunction and Bureaucratic Capacity" (Paper presented at Political Institutions and Law Conference Emory University, 2017).
58. See <https://www.politico.com/agenda/story/2015/10/congress-federal-budget-continuing-resolution-000270>.
59. See Ann Joseph O'Connell, "Actings," *Columbia Law Review*, forthcoming, and Christina M. Kinane, "Strategic Vacancies: The Presidential Advantage in Agency Appointments," *Yale University typescript*, 2016.
60. A third controversial case involved the use of the installation of OMB director Mick Mulvaney as acting director of the Consumer Financial Protection Bureau (CFPB) despite the CFPB's enacting statute insisting that the deputy director "shall" become acting director in case of a vacancy. See Joseph O'Connell, "Actings," for a discussion of the legal issues involved in these three cases.
61. See Anne Joseph O'Connell, "Vacant Offices: Delays in Staffing Top Agency Positions," *Southern California Law Review* 82 (2009): 913.
62. See Alexander Bolton, Rachel Augustine Potter, and Sharece Thrower, "Organizational Capacity, Regulatory Review, and the Limits of Political Control," *The Journal of Law, Economics, and Organization* 32, no. 2 (2016): 242–71.
63. For examples, see <https://www.washingtonpost.com/news/monkey-cage/wp/2017/08/03/six-months-into-his-presidency-trump-continues-to-be-exceptionally-slow-at-appointing-officials-heres-why-that-matters/>.
64. See Paul C. Light, *A Cascade of Failures: Why Government Fails, and How to Stop It*, Technical report (Washington, DC: Brookings Institute, 2014), https://www.brookings.edu/wp-content/uploads/2016/06/Light_Cascade-of-Failures_Why-Govt-Fails.pdf.
65. See Ann Joseph O'Connell, "Actings."

66. See https://www.washingtonpost.com/national/ken-cuccinellis-appointment-to-top-immigration-job-was-unlawful-court-rules-invalidating-policy-memos-he-signed/2020/03/01/fdc7fda0-5bea-11ea-8baf-519cedb6ccd9_story.html.
67. See https://www.huffpost.com/entry/2020-democratic-candidates-promises-day-one_n_5d3f5727e4b0d24cde042d6c.
68. Herbert Stein, *A Symposium on the 40th Anniversary of the Joint Economic Committee, Hearings Before the Joint Economic Committee, Congress of the United States, Ninety-Ninth Congress, First Session; Panel Discussion: The Macroeconomics of Growth, Full Employment, and Price Stability* (Washington, DC: Joint Economic Committee, Congress of the United States, 1976), 262.
69. See Nolan McCarty, *Polarization: What Everyone Needs to Know* (New York: Oxford University Press, 2019), chapter 6 for an extended review of this evidence.
70. For elaborations of similar arguments, see Frances E. Lee, *Insecure Majorities: Congress and the Perpetual Campaign* (Chicago, IL: University of Chicago Press, 2016).

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