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Divided Agencies

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ANTONIN SCALIA
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DIVIDED AGENCIES

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Clashes between presidential appointees and civil servants are front-page news. Whether styled as a “deep state” hostile to its democratically selected political principals or as bold “resisters” countering those principals’ ultra vires proposals, accounts of civil-servant opposition are legion. Move beyond headlines, however, and little is known about the impact of political divisions within agencies on their workaday functioning.

This Article presents the first comprehensive, empirical examination of the effects of intra-agency political dynamics on policymaking. Leveraging data on political preferences based on campaign donations, we identify “ideological scores” for both appointees and civil servants in 47 agencies over 34 years—the first measure of the political gap between these two groups across agencies and time. We use these new scores to examine how ideological divergence between appointees and civil servants affects regulatory activity.

We find that agencies with greater distance between these two groups—which we term divided agencies—adopt a more cautious posture. They tend to extend the rulemaking process and allow consideration of late-filed comments. These features provide appointees with extra time to gather and digest comments from politically aligned outside experts. Divided agencies’ caution extends to the content of final rules, which tend to be shorter and less numerous. Remarkably, divided agencies are no less successful than unified ones in seeing their proposed rules through to finalization. That finding casts doubt on the claim that the longer rulemaking timeframes in these

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agencies are attributable to civil servants' attempts to derail oppositional appointees' initiatives. Instead, it suggests that divided agencies' caution pays off.

These findings enrich our understanding of the policy dynamics of polarized agencies. With agency heads oscillating between left and right based on the party in power, civil servants—whom we find tend to be more politically moderate—can serve as a ballast. Specifically, faced with appointees that may be responsive only to a bare electoral majority, the presence of oppositional civil servants may encourage regulatory caution and push decision-making away from the extremes—thus, paradoxically, moving policy toward the median voter.

Our findings also spotlight the critical role that the notice-and-comment process plays in divided agencies. Generalist appointees face a principal-agent problem when crafting rules; their key source of necessary in-house expertise, civil servants, may be misaligned. In this circumstance, outside comments can provide appointees with an ideologically-aligned check on civil servants' work. Often maligned as merely pretextual, notice-and-comment actually may enable divided agencies to function. Further, the finding that civil servants can play a pro-majoritarian, moderating role in divided agencies highlights the importance of preserving civil-service protections—especially in today's polarized political climate.

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INTRODUCTION

Secretary of the Interior Ryan Zinke, who served during the Trump administration, and John Morton, who helmed Immigration & Customs Enforcement (ICE) under President Obama, may not have much in common politically, but they do share one experience: they managed agencies in which approximately one-third of their workforce was estranged. A proponent of increasing industry access to public lands, Zinke believed he had “thirty percent of the crew that’s not loyal to the flag” concerning that goal.¹ He compared his situation to capturing “a prized ship at sea and only the captain”—that would be Zinke, incidentally, a former Navy SEAL—“and the first mate row over” to manage the captured crew.² In response, some Interior Department civil servants styled themselves “the disloyals,” printing t-shirts with that epithet.³

Morton faced a similar mutiny. After issuing a directive prioritizing deportations of people convicted of crimes and urging prosecutorial discretion in other cases,⁴ the union representing 39 percent of ICE employees passed a no-confidence vote against Morton’s leadership.⁵ That move was unprecedented.⁶

That other apostates can be found across the executive branch is unsurprising;⁷ the conditions are ripe for such conflicts. Civil servants often hold differing views from appointees.⁸ With only four thousand appointees atop a federal workforce of over

¹ Evan Osnos, *Trump vs. The Deep State*, NEW YORKER, May 14, 2018, <https://www.newyorker.com/magazine/2018/05/21/trump-vs-the-deep-state>.

² Matthew Daly, *Interior chief’s loyalty comments draw widespread criticism*, ASSOCIATED PRESS, Sept. 26, 2017, <https://apnews.com/article/8c3ae77664f44159823903b3add31e65>.

³ Osnos, *supra* note 1.

⁴ John Morton, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs*, U.S. Immigration & Customs Enforcement Memorandum, June 17, 2011, <https://www.ice.gov/doclib/foia/prosecutorial-discretion/certain-victims-witnesses-plaintiffs.pdf>.

⁵ Ted Hesson, *7 Numbers That Tell the Story of an Immigration Boss’s Tenure*, ABC NEWS, June 7, 2013, https://abcnews.go.com/ABC_Univision/Politics/ice-director-john-mortons-tenure-numbers/story?id=19422159 *see also* Julia Preston, *Single-Minded Mission to Block an Immigration Bill*, N.Y. TIMES, June 1, 2013, <https://www.nytimes.com/2013/06/02/us/for-chris-crane-a-quest-to-block-an-immigration-bill.html> (providing figures used to calculate the union’s share of ICE’s workforce).

⁶ *Id.*

⁷ *See* Osnos, *supra* note 1 (providing other examples).

⁸ *See supra* Part III.

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two million—many of whom hold job protections—the former group’s ability to supervise the latter will, by practical necessity, be incomplete.⁹ As political polarization grows and hardball tactics typically associated with electoral politics enter into administrative agencies,¹⁰ we expect that conflicts between appointees and civil servants will only increase.

In recent years, legal scholars have turned their attention to examining these inner workings of administrative agencies. For instance, some scholars posit that competing centers of power within agencies—civil servants and appointees, along with public participants—serve a checking function on each other’s power, and thus mimic the more familiar constitutional separation-of-powers.¹¹ Others theorize about the policy outcomes produced by agencies that contain competing powers, some of which pull in majoritarian and others in counter-majoritarian directions.¹²

Yet while the legislative consequences of political divisions among the branches of government are well-studied,¹³ relatively little empirical work analyzes the impact on policy of political divisions *within* agencies.¹⁴ Empirically, political dynamics inside administrative agencies remain terra incognita in some important respects. How do agencies in which key subgroups are at loggerheads differ from

⁹ See Fiona Hill, *Public service and the federal government*, BROOKINGS, May 27, 2020, <https://www.brookings.edu/policy2020/votervital/public-service-and-the-federal-government/> (reporting the size of the federal non-military, non-postal workforce and political appointees).

¹⁰ See Brian D. Feinstein & M. Todd Henderson, *Congress’s Commissioners*, 38 YALE J. REG. 175 (2021) (documenting these developments).

¹¹ Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227, 239 (2016); Gillian E. Metzger, *The Interdependent Relationship between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 425 (2009); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006).

¹² See Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 72 (2008).

¹³ See, e.g., Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006); GARY W. COX & MATHEW D. MCCUBBINS, *SETTING THE AGENDA: RESPONSIBLE PARTY GOVERNMENT IN THE U.S. HOUSE OF REPRESENTATIVES* (2005); John Coleman, *Unified Government, Divided Government, and Party Responsiveness*, 93 AM. POL. SCI. REV. 821 (1999); DAVID MAYHEW, *DIVIDED WE GOVERN* (1991).

¹⁴ *But see, e.g.* RACHEL AUGUSTINE POTTER, *BENDING THE RULES: PROCEDURAL POLITICKING IN THE BUREAUCRACY* (2019); Rachel Augustine Potter, *Slow-Rolling, Fast-Tracking, and the Pace of Bureaucratic Decisions in Rulemaking*, 79 J. POL. 841 (2017); Anne Joseph O’Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889 (2008); GEORGE A. KRAUSE, *A TWO-WAY STREET: THE INSTITUTIONAL DYNAMICS OF THE MODERN ADMINISTRATIVE STATE* (1999).

agencies that are more politically cohesive? Do deeply divided agencies take longer to regulate, perhaps because of distrust or civil servant foot-dragging? Is White House review more exacting for these agencies, on the theory that White House officials are less likely to trust proposed rules emanating from ideologically divided entities? And do these agencies ultimately produce fewer or less substantial rules?

This article seeks answers to these questions. It examines how ideological differences between political appointees and civil servants affect the rulemaking process. These two groups share power within agencies, with generalist appointees relying on expert civil servants to implement the former group's preferred policies. That division gives rise to a well-studied principal-agent problem: appointees must rely on civil servants who may have very different policy preferences and over whom appointees have limited ability to monitor or control.¹⁵

Faced with potentially unreliable agents, appointees may seek out, and spend more time considering, informed "second opinions" from other sources. These alternative sources of information include comments received during the notice-and-comment process, informal feedback from allies in Congress, and recommendations from advisory committees of outside experts occupying a privileged position within agencies. Indeed, public-choice theorists posit that administrative structures and processes can serve just this purpose.¹⁶

We put this theory to the test, examining how appointees respond when their agents in the civil service hold differing views. To do so, we must first develop an appropriate measure of ideological distance over time and within agencies, so that we can identify divided agencies.

Existing measures are inadequate for that purpose,¹⁷ so we create our own. We leverage a dataset on ideological preferences based on campaign donations to do so. We use that data to generate dynamic ideological "ideal point" estimates for agency heads and civil servants in 47 agencies over 34 years—and thus, a new measure of the

¹⁵ See Mathew D. McCubbins, Roger G. Noll, & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 243-44 (1987) (outlining this principal-agent problem) [hereinafter McNollgast, *Administrative Procedures*].

¹⁶ See, e.g., McNollgast, *Administrative Procedures*, *supra* note, at 255 ("[P]olitical principals in both branches of government suffer an informational disadvantage with respect to the bureaucracy. . . . [M]any of the provisions of the Administrative Procedure Act solve this asymmetric information problem.")

¹⁷ For instance, measures based solely on the ideology of the appointing president fail to capture ideological differences in consecutive agency heads appointed by the same president. In other words, they do not capture enough variation over time. Other measures only occur sporadically in time.

ideological gap between these two groups across agencies and time. We then connect this measure to data concerning the rulemaking process.

Our results show that divided agencies—i.e., those with ideologically opposed agency heads and civil servants—adopt a more circumspect rulemaking posture than agencies that are more unified. We observe this greater caution in several ways. First, the rulemaking process is longer in these divided agencies. Once civil servants generate a proposed rule, appointees take their time. Perhaps they extend the comment period to hear from a greater number of ideologically aligned outside groups as a check on civil servants' work. Or perhaps they spend additional time assessing those comments. In either case, the greater delay at divided agencies suggests that appointees may be utilizing rulemaking procedures to blunt civil servants' informational advantages.

Second, these agencies tend to issue fewer rules. And the rules that they do issue tend to be shorter. Given that rule length is closely correlated the rule's economic significance,¹⁸ that brevity suggests that divided agencies—where civil servants and appointees may not fully trust each other—display greater caution.

This cautious approach means that, whatever policy changes one desires in a first-best world, the reality of policymaking in divided agencies likely will leave one disappointed. Indeed, divided agencies are likely status quo-preserving. Whether this feature is normatively desirable turns, in part, on one's risk aversion and the extent to which one values policy certainty.

Given that partisan polarization—and thus divided agencies—likely will persist into the foreseeable future, our findings provide a set of best practices for agencies to function as well as possible under these conditions. For one, officials must preserve the independence of the civil service. At a time when that independence is challenged, we show that civil servants comprise a moderating counterweight against more ideologically extreme appointees; thus, they serve as a bulwark against wild changes in regulatory policy. With agency leadership swinging between liberal and conservative poles, as we find, civil servants—who tend to be more moderate, albeit left-of-center—can pull agency policies toward the median voter. Whereas employment-protected civil servants are conventionally seen as a counter-majoritarian force, we show that they can serve a democratizing function in divided agencies.¹⁹

¹⁸ See *infra* note 69.

¹⁹ See Stephenson, *supra* note 12, at 72 (presenting a positive theory of this dynamic).

Further, to prevent divided agencies from descending into gridlock and paralysis that plague other polarized institutions, appointees must have access to sources of high-quality information from ideological allies. As our findings suggest, the notice-and-comment process serves this function well. Notice-and-comment also may discourage civil servants, aware that their work will be “checked” by outsiders, from straying too far from their principals’ goals. Additional measures to inject diverse outside sources of information into agency decision-making would further enhance agencies’ ability to function even in a challenging partisan climate within their walls.

This Article proceeds in four parts. Part I situates our study in twin literatures: empirical scholarship examining extra-agency influences on regulatory dynamics, and descriptive and positive work concerning intra-agency dynamics. Part II presents our theory and expectations concerning the effects of appointee-civil servant preference divergence on regulatory processes and outputs. In Part III, we describe our research design, including our creation of an original dataset identifying appointees and civil servants’ political ideologies across agencies and time, and we present our analysis. Part IV discusses normative implications and offers policy prescriptions.

I. EXTRA- & INTRA-AGENCY DYNAMICS

This Article is grounded in two differing visions of the place of administrative agencies in governance. The first vision emphasizes mechanisms to inject a measure of external control into administrative policymaking.²⁰ Focused alternatively on interest groups, presidents, Congress, and the public at-large, it is no exaggeration to say that this project has been a central focus of administrative law for generations.

The second vision emphasizes checks on agency actors from *inside* the administrative state. This vision, which emerged in legal scholarship largely in the twenty-first century, rejects the conception of “the agency” as a monolith. Instead, this second approach focuses on internal checks on agency actors.²¹ We consider each of these visions in turn.

²⁰ See Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 UCLA L. REV. 1300, 1302 n.1 (2016) (collecting citations for this proposition).

²¹ See, e.g., Michaels, *supra* note 11; Katyal, *supra* note 11.

A. View from the Outside

The project of identifying and strengthening external checks on agencies emerged on the heels of the Brownlow Commission of 1937, which decried the administrative state as a “headless ‘fourth branch’ of government.”²² To increase agencies’ responsiveness to supervision, policymakers and scholars focused on enhancing citizens and political actors’ influence in administration.

Foremost among these measures, agencies implement policy pursuant to their statutory missions by using tightly controlled procedures aimed, in part, at enhancing public participation in the regulatory process. For instance, the Administrative Procedure Act (APA) of 1946 mandates a sequence of rulemaking steps designed to enable the public to weigh in on proposed rules.²³ Agencies considering a rule must, with limited exception, publish a written Notice of Proposed Rulemaking (NPRM) in the Federal Register to announce their plans.²⁴ They then must provide interested parties with “an opportunity to participate in ... rulemaking through submission of written data, views, or arguments.”²⁵ The agency may only issue a final rule “[a]fter consideration of the relevant matter presented” during this notice-and-comment process.²⁶

Beginning in the 1980s, policymakers turned to a different means of external control over agencies: buttressing the president’s role.²⁷ In perhaps the most prominent example, President Ronald Reagan issued an executive order in 1981 requiring executive agencies to submit economically significant proposed rules for centralized review by the Office of Information and Regulatory Affairs (OIRA), which is situated within the White House Office of Management and Budget.²⁸ Every subsequent president has either endorsed or expanded this requirement.²⁹ Congress gets in on the

²² PRESIDENT’S COMMITTEE ON ADMINISTRATIVE MANAGEMENT 36 (1937).

²³ 5 U.S.C. § 553.

²⁴ *Id.* at § 553(b).

²⁵ *Id.*

²⁶ *Id.*

²⁷ See Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 991 (1997) (summarizing these efforts).

²⁸ Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1982).

²⁹ See, e.g., Exec. Order No. 13,771, 82 Fed. Reg. 9339-41 (Feb. 3, 2017); Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

act as well, redesigning its committee system and installing various “fire alarms” within agencies to facilitate oversight.³⁰

Large and varied scholarly literatures examine these external influences on agency behavior. Particularly relevant to our project, a set of studies examines how agencies respond to external actors in the rulemaking context specifically. These studies note that political disagreement between an agency and other government actors can affect the agency’s rulemaking productivity. For instance, agencies can strategically alter their productivity when faced with changing political and institutional circumstances. Anne Joseph O’Connell finds that cabinet departments are particularly likely to finish regulations immediately preceding presidential transitions.³¹ Rachel Potter and Charles Shipan determine that agencies that are ideologically opposed to the President issue fewer proposed rules than do ideologically aligned agencies.³² Conditions in the legislature also may affect agency rulemaking activity; Graeme Boushey and Robert McGrath show at the state level that where legislative professionalization is low, bureaucratic productivity increases to fill the gap.³³

Manipulating the timing of rules sometimes is enough to affect an agency’s rulemaking productivity. Agencies can “slow roll” or “fast track” rulemakings in order to undermine or avoid political oversight and thus increase the likelihood of finalization.³⁴ This phenomenon also occurs around White House transitions.³⁵

After proposed rules that are deemed economically significant leave the agency, a subsequent level of review awaits at OIRA. Once again, scholars have found that political dynamics between the agency and extra-agency actors—here, the White

³⁰ See Brian D. Feinstein, *Congress in the Administrative State*, 95 WASH. U. L. REV. 1189, 1202 (detailing these efforts); *id.* at 1234-38 (providing evidence that congressional oversight alters agency behavior).

³¹ See O’Connell, *supra* note 14.

³² Rachel Augustine Potter & Charles Shipan, *Agency Rulemaking in a Separation of Powers System*, 39 J. PUB. POL’Y 89, 104 (2017). They find null results concerning final rules. *Id.* Potter & Shipan use a dichotomous measure of ideological alignment based on the president’s partisanship and a 2007 survey of bureaucracy experts regarding the perceived ideological orientation of executive agencies, a static measure that does not disentangle appointees and civil servants. *Id.* at 101.

³³ Graeme T. Boushey & Robert J. McGrath, *Experts, Amateurs, and Bureaucratic Influence in the American States*, 27 J. PUB. ADMIN. TH’Y 85 (2017).

³⁴ See Potter, *supra* note 14.

³⁵ See Anne Joseph O’Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471 (2011); *see also* O’Connell, *supra* note 14.

House—can influence the fate of proposed rules. OIRA is more likely to review proposed rules when the agency and president diverge.³⁶ Further, this review takes longer when OIRA and the agency disagree substantively, such as about the way the agency has interpreted a statute.³⁷

Empirical work in this strand tends to identify one ideal point representing “the agency’s” (singular) ideology.³⁸ These measures assume that an agency holds a singular view, which is alternatively theorized to be the agency head’s preferred policy, the president’s preferred policy, survey respondents’ assignment of a single ideological score to the agency, or an average of all agency employees’ political contributions. These simplifications assist us in understanding how administrative procedures help mitigate Congress’s informational disadvantages vis-à-vis agencies;³⁹ the role of various veto players in a separation-of-powers system;⁴⁰ and how the causes and effects of agency personnel unionization,⁴¹ among other insights.

B. View from the Inside

Even as the role of the President and other extra-agency actors in checking agency behavior continues to expand,⁴² cracks have appeared in the theoretical

³⁶ Alex Acs & Charles Cameron, *Does White House Regulatory Review Produce a Chilling Effect and “OIRA Avoidance” in the Agencies?*, 43 PRES. REV. Q. 443 (2013).

³⁷ Lisa Heinzerling, *Inside EPA: A Former Insider’s Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENV. L. REV. 325, 349 (2014).

³⁸ See, e.g., Jowei Chen and Tim T. Johnson, *Federal employee unionization and presidential control of the bureaucracy: Estimating and explaining ideological change in executive agencies*, 27 J. THEORETICAL POL. 151-174 (2015); Joshua D. Clinton & David E. Lewis, *Expert Opinion, Agency Characteristics, and Agency Preferences*, 16 POL. ANALYSIS 3, 17-19 (2008); John Ferejohn & Charles Shipan, *Congressional Influence on Bureaucracy*, 6 J.L. ECON. & ORG 1 (1989); DAVID EPSTEIN & SHARYN O’HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* (1999).

³⁹ Mathew D. McCubbins and Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984).

⁴⁰ Epstein & O’Halloran, *supra* note 38.

⁴¹ Chen & Johnson, *supra* note 38.

⁴² See, e.g., *Seila Law v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020) (holding that a for-cause restriction on the President’s ability to remove the CFPB director is unconstitutional); Kristin E. Hickman & Aaron L. Nielson, *Narrowing Chevron’s Domain*, 70 DUKE L.J. 931 (2021) (describing the narrowing of judicial deference doctrines concerning agencies’ statutory interpretations).

foundations of the project. Some scholars consider the view that agencies can or should be controlled primarily through artfully designed checks from external actors as incomplete at best.⁴³ Instead, they argue that agencies are comprised of competing powers, and that competition among intra-agency groups can serve a function inside agencies that is akin to the inter-branch separation-of-powers.⁴⁴

This recognition of the importance of intra-agency dynamics is the basis for the second vision of administrative agencies. Some political advocates focused on inter-agency dynamics point to the civil service as a force that must be checked or managed. Otherwise, those in this camp warn, civil servants would unduly wrest control over agency policymaking from political appointees, who, via their electoral connection, enjoy a greater claim to being democratically legitimate policymakers.⁴⁵

The notion that civil servants may pursue goals that are not aligned with appointees—i.e., that slack exists in the relationship between agent and principal—is an old idea. As Max Weber observed, bureaucrats are “forged to the common interest ... in the perpetuation of the apparatus,” irrespective of the preferences of their ostensible bosses.⁴⁶ Civil servants’ statutorily mandated job protections may worsen the slack.⁴⁷ In recent years, this claim has had new life breathed into it. Some commentators, often associated with or sympathetic to the Trump administration, decry a shadowy “deep state” working to subvert an elected president’s policy agenda. Others, including some of the former commentators’ ideological opponents, basically accept the charge, but argue that this bureaucratic resistance is a “benevolent constraint” on misguided political appointees.⁴⁸

⁴³ See, e.g., Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421, 423 (2015).

⁴⁴ See Michaels, *supra* note 11; Katyal, *supra* note 11; but see Bijal Shah, *Response: Toward an Intra-Agency Separation of Powers*, 92 N.Y.U. L. REV. 101 (2017) (providing a critical take on this concept).

⁴⁵ See Sidney Shapiro, Elizabeth Fisher, & Wendy Wagner, *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463, 476 (2012) (noting that the White House “has sought to strengthen overhead democracy by increasing the number of political appointees in agencies”).

⁴⁶ Max Weber, *Bureaucracy*, in CLASSICAL SOCIOLOGICAL THEORY 328, 337 (Craig Calhoun, et al., eds., 3d ed. 2012).

⁴⁷ See, e.g., 5 U.S.C. § 7513.

⁴⁸ For an overview of these two camps, see Rebecca Ingber, *Bureaucratic Resistance and the National Security State*, 104 IOWA L. REV. 139, 142-44 (2018).

Although this debate can be overheated at times,⁴⁹ the basic premise that civil servants and appointees occupy competing centers of power and jockey for influence is grounded in a growing scholarly literature excavating intra-agency dynamics. These mostly positive and descriptive accounts analyze how various actors within a given agency check and compete against each other to gain an edge for their favored policies. Rather than viewing an agency as an indivisible whole, this literature recognizes that agencies are comprised of appointees, civil servants, and varied others, all of whom possess their own views—which they act strategically to advance and “check” competing intra-agency actors.⁵⁰

From this account, we see that when it comes to appointees’ ability to actually carry out their preferred policies, differences between the preferences of appointees and civil servants matter.⁵¹ Appointees’ position at the helm and responsiveness to the president’s preferences, which arguably legitimates their views, matter for agency outcomes.⁵² But appointees are often generalists. As such, they rely on civil servants for specialized tasks like policy drafting and implementation.⁵³ That reliance empowers civil servants with a set of tools to delay or deny appointees’ objectives.⁵⁴

This Article, focused as it is on intra-agency dynamics, is planted firmly in this second vision. We assume that two key intra-agency actors—appointees and civil servants—may hold divergent views and theorize that their divergence has

⁴⁹ See, e.g., JASON CHAFFETZ, *THE DEEP STATE: HOW AN ARMY OF BUREAUCRATS PROTECTED BARACK OBAMA AND IS WORKING TO DESTROY THE TRUMP AGENDA* (2018).

⁵⁰ See Michaels, *supra* note 11, at 229 n.2; id. at 233 n.9; Bijal Shah, *Response: Toward an Intra-Agency Separation of Powers*, 92 N.Y.U. L. REV. 101 (2017) Cf. Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”*: Legislative Intent as Oxymoron, 12 INT’L REV. L. & ECON. 239, 254 (1992).

⁵¹ See ROBERT MARANTO, *BEYOND A GOVERNMENT OF STRANGERS* (2005)

⁵² DAVID E. LEWIS, *PRESIDENTS AND THE POLITICS OF AGENCY DESIGN: POLITICAL INSULATION IN THE UNITED STATES GOVERNMENT BUREAUCRACY, 1946-1997* (2003); it matters also to agency outcomes on non-mission tasks. Abby K. Wood and David E. Lewis, *Agency Performance Challenges and Agency Politicization*, 27 J.Pub. Admin. Res. & Theory 581–595 (2017).

⁵³ HUGH HECLLO, *A GOVERNMENT OF STRANGERS: EXECUTIVE POLITICS IN WASHINGTON* (1977)

⁵⁴ See Jennifer Nou, *Bureaucratic Resistance from Below*, YALE J. REG NOTICE & COMMENT, Nov. 16, 2016 (<https://www.yalejreg.com/nc/bureaucratic-resistance-from-below-by-jennifer-nou/>) (enumerating these tools, e.g., work slow-downs, building a record, enlisting internal “offices of goodness,” and leaking to the press). See also Sharece Thrower, *Policy Disruption Through Regulatory Delay in the Trump Administration*, 48 PRES. STUD. Q. 517 (2018); Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 36, 53 (2014); ROSEMARY O’LEARY, *THE ETHICS OF DISSIDENT: MANAGING GUERRILLA GOVERNMENT* (2019); MARISSA MARTINO GOLDEN, *WHAT MOTIVATES BUREAUCRATS? POLITICS AND ADMINISTRATION DURING THE REAGAN YEARS* (2000); JOHN BREHM AND SCOTT GATES, *WORKING, SHIRKING, AND SABOTAGE: BUREAUCRATIC RESPONSE TO A DEMOCRATIC PUBLIC* (1999).

consequences for how policy is formulated within the agency. We advance intra-agency scholarship by importing an empirical device from the extra-agency literature: ideal point estimates for the key players in these strategic interactions.

Quantifying the degree of preference divergence between agency heads and civil servants, over time and across agencies, enables us to answer questions concerning the consequences of this divergence on agency behavior. We predict that the effects of intra-agency preference divergence on policy outcomes flow from principal-agent theory. The next section introduces our theoretical framework.

II. RULEMAKING IN DIVIDED AGENCIES: A THEORY

Civil servants are in the driver's seat in the rulemaking process.⁵⁵ True, appointees are tasked with transforming the White House's lofty objectives into concrete, often highly technical policies. Yet agency heads—who typically are generalists and occupy their positions for relatively short periods—must rely on subject-matter experts in the civil service to accomplish this goal.⁵⁶

Appointees' reliance on civil servants generates the possibility of shirking, i.e., an agent's undertaking action (or inaction) that is at odds with the principal's goals or desired effort level.⁵⁷ That civil servants enjoy legal protections limiting appointees' ability to terminate unfaithful agents presumably generates some baseline risk of

⁵⁵ See Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1554 (1992) (“Although ... appointees generate the agency's policy agenda, they depend on the bureaucrats below to evaluate the various alternatives for implementing broad policies. ... [Their] expertise allows bureaucrats to exert significant influence on public policy even when their role is merely advisory.”). See also Christopher J. Walker, *Chevron Inside the Regulatory State: An Empirical Assessment*, 83 FORDHAM L. REV. 703, 713 (2014) (noting that all respondents to the author's survey of agency rule-drafters were civil servants)

⁵⁶ See Jennifer Nou, *Subdelegating Powers*, 117 COLUM. L. REV. 473, 484 (2017); Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STANFORD L. REV. 999, 1018 (2015) (reporting that all respondents to a survey on agency statutory interpretation and rulemaking were civil servants).

⁵⁷ See Pauline T. Kim, *Beyond Principal-Agent Theories: Law and the Judicial Hierarchy*, 105 NW. U. L. REV. 535, 546 (2011) (defining shirking as). Other scholarship refers to this concept as “bureaucratic drift,” with some authors instead reserving the term slack as a synonym for shirking, i.e., agents' substituting leisure time for effort. See *See* Ethan Bueno de Mesquita & Matthew C. Stephenson, *Regulatory Quality Under Imperfect Oversight*, 101 AM. POL. SCI. REV. 605, 605 n. 1 (2007) (noting a lack of uniform definitions of these terms); Sean Gailmard and John W. Patty, *Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise*, 51 AMER. J. POL. SCI. 873 (2007).

shirking throughout the federal government.⁵⁸ That possibility is particularly pronounced, however, where the principal and agent are on opposite sides of the political spectrum.⁵⁹

Where appointees know that the civil servants on whom they rely generally oppose their political objectives, what are they to do? We theorize that agencies where appointees and civil servants' preferences diverge will adopt a more cautious posture in their rulemaking activity. We contend that this circumspection will elongate the rulemaking process, as appointees seek out and consider information and opinions from allied interest groups, sympathetic lawmakers and advisory committee members, and others outside the civil service. We further theorize that this greater caution will manifest in characteristics of final rules.

A. The Rulemaking Process

A generalist appointee reliant on ideologically misaligned civil servants cannot merely cast aside civil servants' views. To survive arbitrary-and-capricious review, appointees must ground new regulations in expertise—which they, as generalists, likely do not possess. Accordingly, we expect that appointees in divided agencies will extend the notice and comment period to provide greater time to solicit and consider feedback from aligned outside groups.

⁵⁸ See, e.g., 5 U.S.C. § 2301(b)(8)(A) (2012) (“Employees should be protected against arbitrary action, personal favoritism, or coercion for partisan political purposes . . .”). Further, outgoing presidents may exploit these legal protections by “burrowing” appointees into civil service positions, thus lodging their political allies into protected positions—where they can work to subvert the incoming administration’s goals. See Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 606-16 (2003).

⁵⁹ For instance, the conventional wisdom that most civil servants are left-of-center raises the prospect of greater shirking during Republican administrations. See Ralph R. Smith, *Which Party Receives the Most in Political Contributions from Federal Employees?*, FEDSMITH.COM (May 19, 2016), <https://www.fedsmith.com/2016/05/19/whichparty-receives-the-most-in-political-contributions-from-federal-employees> (“The general view of government employees is that they prefer Democrats over Republicans as they benefit economically by having more money allocated for government spending.”). Further, a survey of senior officials across government reveals that the civil-service workforces in several departments—i.e., Defense, Homeland Security, Veterans Affairs, Agriculture, Justice, Energy, and Transportation—are right-of-center, which raises analogous concerns in these departments. 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*, 56 AM. J. POL. SCI. 341, 348 fig.3 (2012).

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Aligned interest groups may require substantial time to spring into action. Appointees also need time to review the positions taken and claims made during the notice-and-comment process, along with reports generated by aligned advisory committees and the like. Because courts require agencies to disclose data, research procedures, and results that they used to craft the rule,⁶⁰ agency heads must ensure that all of the items on which they rely are sufficiently strong to survive judicial scrutiny.⁶¹ Moreover, whereas generalist appointees may trust civil servants to do this work in unified agencies, appointees may insist on doing it themselves in divided agencies, which will take longer, as they lack expertise.

All of these steps take time, thus elongating the rulemaking process. With sufficient time, outside groups can have an impact, in some cases demonstrably changing the content of proposed rules.⁶² Thus, a longer comment period and more extensive review after the comment period closes, enable the agency head to better assess whether a civil servant-generated proposed rule furthers the agency head's objectives, or those of the ideologically misaligned civil servants. Our first expectation captures this rationale.

Expectation 1: As preferences between agency heads and civil servants diverge, the time between issuance of a notice of proposed rulemaking and a final rule (or other disposition) increases.

By a similar logic, we posit that agencies are more likely to allow late comments to be considered when agency heads and civil servants' preferences diverge. Agencies ordinarily possess discretion to permit or disallow consideration of comments submitted after the close of the comment period.⁶³ Because agency heads

⁶⁰ See *Lloyd Norland Hosp. v. Heckler*, 762 F.2d 1561, 1565 (11th Cir. 1985); *Petry v. Block*, 737 F.2d 1193, 1198 (D.C. Cir. 1984); *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 392 (D.C. Cir. 1973). That is not to say that the agency *must* base its decisions on its own studies. See *FCC v. Prometheus Radio Project*, No. 19-1231, Slip Op. at *12. Instead, to the extent a decision is based on a study, that study must be disclosed.

⁶¹ See *Lloyd Norland Hosp. v. Heckler*, 762 F.2d 1561, 1565 (11th Cir. 1985); *Petry v. Block*, 737 F.2d 1193, 1198 (D.C. Cir. 1984); *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 392 (D.C. Cir. 1973). That is not to say that the agency *must* base its decisions on its own studies. See *FCC v. Prometheus Radio Project*, No. 19-1231, Slip Op. at *12. Instead, to the extent a decision is based on a study, that study must be disclosed.

⁶² Susan Webb Yackee, *Sweet-Talking the Fourth Branch: The Influence of Interest Group Comments on Federal Agency Rulemaking*, 16 J. PUB. ADMIN. RES. & THEORY 103, 103 (2005).

⁶³ Office of the Federal Register, *A Guide to the Rulemaking Process*, https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf. Legal standards

facing a misaligned civil-service workforce presumably have a greater demand for comments from outside experts, we expect that:

Expectation 2: As preferences between agency heads and civil servants diverge, an agency's propensity to allow consideration of late-filed comments regarding a proposed rulemaking increases.

We also expect regulatory delays stemming from the White House when agency heads and civil servants ideologically diverge. The same pressures that encourage deliberateness among appointees counsel in favor of caution at OIRA. Presidents since Ronald Reagan have empowered OIRA to review proposed regulations from executive agencies that are likely to have a significant economic effect.⁶⁴ The office may reject those proposals for which it determines that costs exceed benefits.⁶⁵ In effect, OIRA review enhances presidential control over rulemakings.⁶⁶

Because administration officials recognize a heightened possibility of shirking, or bureaucratic drift, by civil servants in divided agencies, we hypothesize that OIRA will devote greater attention to reviewing proposed rules from these agencies. Our third expectation conveys this reasoning.

Expectation 3: As preferences between agency heads and civil servants diverge, the period during which a proposed rule is under OIRA review increases.

B. Final Rules

Divided agencies' greater caution may manifest not only in the rulemaking process, but also in the characteristics of the rules that this process generates. To start,

typically do not constrain agencies' use of this discretion. *See, e.g.*, 84 Fed. Reg. 65044 (Nov. 26, 2019) (example of an announced reopening of the comment period without citation to legal authorities).

⁶⁴ *See, e.g.*, Exec. Order No. 13,985, 89 Fed. Reg. 7009 (Jan. 20, 2021); Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1982). *See also* Exec. Order 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993) (establishing \$100 million threshold for economic significance).

⁶⁵ *Id.*

⁶⁶ *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2278 (2001).

perhaps the most obvious way to exhibit a more cautious posture is to issue fewer final rules.⁶⁷ Accordingly,

Expectation 4: As preferences between agency heads and civil servants diverge, agencies issue fewer final rules.

Further, divided agencies may exhibit greater caution by issuing weaker or lower-impact rules. Once an agency head has decided to issue a rule, she nonetheless may still harbor suspicions that the rule's eventual impact may be closer to civil servants' preferences than her own views. After all, these civil servants will be charged with implementing the rule, and they enjoy considerable discretion in their enforcement decisions.⁶⁸ Faced with uncertainty over implementation decisions by an oppositional workforce, a risk-averse agency head may issue lower-impact, less consequential rules in these circumstances. Because the length of a proposed rule is highly correlated with the determination that the proposed rule is economically significant,⁶⁹ we use rule length as a proxy for a rule's significance.⁷⁰ We posit:

Expectation 5: As preferences between agency heads and civil servants diverge, an agency tends to issue shorter final rules.

This more searching consideration may pay off. If the other expectations are correct—i.e., if divided agencies issue fewer rules, which tend to be shorter and issued after a longer review period—then one might expect this more careful, risk-averse

⁶⁷ Using 2007 ideology estimates from survey data, Potter and Shipan found that agencies whose ideology is different from the president issue fewer proposed rules, but their final rule analysis was inconclusive. Potter & Shipan, *supra* note 32, at 104.

⁶⁸ See Rory Van Loo, *Regulatory Monitors: Policing Firms in the Compliance Era*, 119 COLUM. L. REV. 369, 381-96 (2019).

⁶⁹ This statement is based on logistic regressions of (i) whether proposed rules and (ii) final rules are deemed economically significant for purposes of OIRA cost-benefit analysis (dependent variables) on the document's length in pages (explanatory variables), plus agency-level fixed effects. These models produce coefficient estimates of 0.026 for proposed rules (SE=0.003, p<0.001) and 0.045 for rules (SE=0.004, p<0.001). The corresponding log-odds indicate that a one-page increase in the length of a proposed rule is associated with a 2.6 percent increase, and the length of a final rule with a 4.5 percent increase, in the likelihood of the proposed rule being deemed economically significant. For perspective, proposed rules have a median length of 3 pages, a mean length of 8, and an interquartile range of 1-629. We obtained data for this analysis from Patrick A. McLaughlin & Oliver Sherouse, RegPulse U.S. 3.0, QuantGov, Mercatus Center at George Mason University, quantgov.org (data source).

⁷⁰ Prior research also uses rule length as a proxy for importance. See Jennifer Nou & Edward H. Stiglitz, *Strategic Rulemaking Disclosure*, 89. S. CAL. L. REV. 733, 769 (2016).

orientation toward rulemaking to yield a greater proportion of proposed rules that make it to final rules. In other words,

Expectation 6: As preferences between agency heads and civil servants diverge, the likelihood that a given proposed rule is finalized increases

Testing Expectation 6 serves an additional purpose. Complicating matters, Expectation 2—essentially, that rulemaking takes longer in divided agencies—is consistent with two distinct theories. A longer comment period could enable appointees to “check the work” of oppositional civil servants, as we posit *supra*. Alternatively, it could evince civil servants’ strategically “slow rolling” proposed rules with which they disagree, in the hopes that a fortuitous change in political circumstances will enable them to drop the rulemaking.⁷¹ A finding that divided agencies are less likely to finalize rules in their set of proposed rules would provide support for the “slow rolling” alternative view and against our preferred theory.

These six expectations all are grounded in a theory that agencies in which appointees and civil servants hold divergent views will experience greater friction in the principal-agent relationship between these two actors, and that friction will encourage a more cautious approach to rulemaking. In the next section, we describe our approach to assessing these expectations.

III. EMPIRICAL ANALYSIS

To test these expectations, we gathered data and chose models to help us evaluate them. We describe that process and those models here.

A. Research Design

i. Data

Because existing measures of agency preferences failed to capture the intra-agency dynamics of interest,⁷² we constructed our own measure. We identify the

⁷¹ See Potter, *supra* note 14; O’Connell, *Agency Rulemaking and Political Transitions*, *supra* note 35.

⁷² As discussed *supra* Part I, measures that assign one ideal point for “the agency” cannot inform us of preference divergence among key actors *within* that agency. See *supra* note 38 (collecting citations). One set of studies measure ideology at one point in time, using agency-wide surveys or aggregates of agency employees’ donations to political candidates. See, e.g., Robert Maranto, *Still Clashing after All These Years: Ideological Conflict in the Reagan Executive*, 37 AM. J. POL. SCI. 681, 685-87 (1993); Joel D. Aberbach & Bert A. Rockman, *Clashing Beliefs Within the Executive Branch: The Nixon Administration Bureaucracy*, 70 AM. POL. SCI. REV. 456, 457-58 (1976). This cross-sectional measure

ideological gap between agency heads and civil servants across agencies and across time. That exercise begins with the Database on Ideology, Money in Politics (DIME).⁷³ Created by political scientist Adam Bonica, DIME leverages over 130 million political contributions made by 14.7 million donors over a 36-year span to generate ideological scores for all donors and recipients during this period.⁷⁴ These scores, termed “CF scores,” are normally distributed, with a mean score of zero and a standard deviation of one. Lower scores denote more liberal donors and recipients; higher scores indicate more conservative ones.⁷⁵ DIME reports separate scores for

assumes that an agency’s ideology does not change over time, even with changes in presidential administration and turnover in the civil service.

Other studies derive ideal point estimates using measures of the politics of the coalition in Congress that created the agency. Again, these measures paint agencies with broad, time-invariant brushes. The same is true for surveys of agency employees or experts. *See* Joshua Clinton, David E. Lewis, and Jennifer Selin, *Influencing the Bureaucracy: The Irony of Congressional Oversight*, 58 AM. J. POL. SCI. 387, 390-91 (2014).

Still other measures import an ideal point estimate for the President as a measure of agency appointees’ views. *See, e.g.*, Potter & Shipan, *supra* note 32, at 104. That measure is defensible as a first cut at intra-agency ideological disagreement but it assumes away presidents that have not identified an ideological clone, let alone persuaded the Senate to confirm that individual.

By contrast, this Article uses ideology estimates derived from campaign contributions to generate a dynamic measure. Administrative personnel, including agency heads, change within election cycle. This phenomenon generates more variation in the ideology divergence measures than prior research has captured. In terms of our models, the differences within election cycle allow us to incorporate an agency fixed effect into our analysis, helping to isolate the effect of the changing levels of preference divergence in agencies over time.

⁷³ Adam Bonica, Codebook for the Database on Ideology, Money in Politics, and Elections (DIME) (Version 2.0) (2016) [hereinafter Bonica, Codebook for DIME], <http://dataverse.harvard.edu/file.xhtml?fileId=2865308&version=2.2>

⁷⁴ Adam Bonica, Mapping the Ideological Marketplace, 58 Am. J. Pol. Sci. 367, 368 (2014).

⁷⁵ The use of CF scores as well as other spatial scores that measure the ideologies of political actors, is increasingly common in legal scholarship. *See, e.g.*, Adam Bonica, Adam S. Chilton & Maya Sen, *The Political Ideologies of American Lawyers*, 8 J. LEGAL ANALYSIS 277, 279 (2016); Abby K. Wood & Douglas M. Spencer, *In the Shadows of Sunlight: The Effects of Transparency on State Political Campaigns*, 15 ELECTION L.J. 302, 307-08 (2016); Adam S. Chilton & Eric A. Posner, *An Empirical Study of Political Bias in Legal Scholarship*, 44 J. LEGAL STUD. 277, 282 (2015). Ideological scores based on campaign contributions hold several advantages. They are closely correlated with ideal point estimates based on legislators’ roll-call voting records, *see* Bonica, *supra* note 74, at 5-6, and with survey respondents’ views on a host of political issues. Adam Bonica, *Are Donation-Based Measures of Ideology Valid Predictors of Individual-Level Policy Preferences?*, 81 J. POL. 327, 329-31 (2019) (correlation with survey responses). Nonetheless, donation-based measures improve on vote-based and survey-based ideal points in that donors’ choice set is essentially unrestricted; there is no agenda-setter structuring the available options.

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each biennial election cycle from 1979-1980 to 2013-2014,⁷⁶ which we use to create our measure.⁷⁷

To locate CF scores for agency heads, we first identify the head of each included agency who served for at least six months in that position.⁷⁸ We then search DIME for that individual, using secondary indicia—namely, location, occupation, and employer—to ensure that we identify the correct person.

Generating mean CF scores for each agency’s civil-servant workforce in each year is a three-step process. First, we identify every individual in DIME for whom the agency or any bureau thereof is listed in the employer or occupation field.⁷⁹ Second, we omit all individuals’ names that appear in our agency head list or in the most recently published Plum Book, a directory of political appointees.⁸⁰ Third, we generate the median CF score for the remaining individuals, which serves as a proxy for the ideological orientation of civil servants at that agency. Fourth, to generate our measure of ideological divergence between agency heads and civil servants, we calculate the absolute value of the difference in CF scores between these two groups.

This dynamic measure of the ideological gap between civil servants and appointees constitutes a significant advance over past measures of agency ideology,

⁷⁶ See Bonica, *supra* note 73. Note that we used DIME’s biennial files, labeled *contribDB_[year]* rather than the better-known “main” DIME database for this analysis. The main database reports static scores; each included individual has a single score based on their political giving for the entire 1979-2014 period.

⁷⁷ We are able to create a year-level measure using CF scores that are reported biennially because some agency-head transitions occur in off-years. These differences in the identities of agency head within election cycles enables us to generate annual, rather than biennial, scores.

⁷⁸ We obtain this information from datasets created by David Nixon and, separately, George Krause & Anne Joseph O’Connell, which we supplement with original data collection. See George A. Krause & Anne Joseph O’Connell, *Replication Data for: Experiential Learning and Presidential Management of the U.S. Federal Bureaucracy: Logic and Evidence from Agency Leadership Appointments (2015)* [hereinafter Krause & O’Connell, *Replication Data*], <http://dataverse.harvard.edu/file.xhtml?fileId=2681304&version=RELEASED&version=.2>; David C. Nixon, *The Independent Regulatory Commissioner Data Base*, <http://www2.hawaii.edu/~dnixon/IRC/index.htm> (last updated Mar. 10, 2005). For agencies with more than one head during a single year, we identified the individual with the longer tenure during that year. For multi-member commissions, we use the chair.

⁷⁹ For example, for the Department of Agriculture we search for the Agricultural Marketing Service, Forest Service, etc., as well as alternative names for the department, e.g., USDA and Agriculture Department.

⁸⁰ The “most recent” Plum Book refers to the edition published most recently prior to that election cycle. We recognize that, because turnover among political appointees does not pause between printings of the Plum Book, this measure under-counts political appointees.

which do not distinguish between appointees and civil servants' views or account for the possibility that agencies' ideological postures may change over time.⁸¹

With our key explanatory variable—agency head-civil servant preference divergence—in place, we turn to constructing outcome variables. Testing Expectations 1 and 6 require measures of the numbers of proposed and final rules. We obtain these data from the Mercatus Center's QuantGov database.⁸²

We obtain information for whether agencies allowed untimely submission of comments concerning proposed rules, to test Expectation 2, from a repository assembled by political scientists Brian Libgober, Steven Rashin, and Devin Judge-Lord.⁸³

To measure rule length (Expectation 3), we use data from QuantGov on each rule's length to create a measure of the average number of pages for rules issued in each agency-year.⁸⁴

Testing Expectation 4 requires that we measure the time elapsed between the issuance of a notice of proposed rulemaking and the proposed rule's final disposition.⁸⁵ We obtained these data from Professor Rachel Potter, who reports this information

⁸¹ See, e.g., Potter & Shipan, *supra* note 32, at 96. Nonetheless, no measure is perfect. One potential source of measurement error here comes from the donors themselves. Namely, some donors may not accurately report their employer to the recipient, who then reports to the FEC. The FEC only requires best efforts be used to ascertain the donor's employer, and the FEC does very little enforcement these days about issues large or small. Donor risk for misreporting is low, and therefore the incidence of reporting is probably higher than it would be in a world with enforcement. Another potential flaw in our measure relates to missing non-donors within a given agency, whose preferences may differ from those who donate to political campaigns.

⁸² Patrick A. McLaughlin, RegData U.S. 3.2 Annual (metadata), QuantGov, Mercatus Center at George Mason University (recording all proposed rules announced and final rules promulgated, 1996-2018).

⁸³ They obtain this information via automated collection of metadata from regulations.gov. Devin Judge Lord, *Public Pressure Campaigns and Bureaucratic Policymaking*, University of Wisconsin-Madison, 2021 (dissertation); Daniel Carpenter and Devin Judge-Lord and Brian Libgober and Steven Rashin,

"Data and methods for analyzing special interest influence in rulemaking", 9 Interest Groups & Advocacy 425-435 (2020) doi = 10.1057/s41309-020-00094-w.

⁸⁴ Patrick A. McLaughlin & Oliver Sherouse, RegPulse U.S. 3.0 (dataset), QuantGov, Mercatus Center at George Mason University, quantgov.org.

⁸⁵ Final dispositions include the issuance of a final rule or the withdrawal of the proposed rule.

from the Unified Agenda for the 1995-2019 period.⁸⁶ Potter's dataset also supplies our measure for whether each proposed rule resulted in a final rule (Expectation 5).⁸⁷

ii. Summary Statistics

Table 1 provides a first-look at our key variables. The table includes the average of each measure, its standard deviation (a measure of noise in the data), and its minimum and maximum values.

Our measure of preference divergence is of particular interest. On average, agency heads and civil servants are situated 0.785 points from each other along a 2.5-point scale. With a 0.540-point standard deviation, there is considerable variation around that mean. Differences range from miniscule (0.0001 at the EPA during 2011 and 2012) to cavernous (2.061 at the Agency for International Development in 2007).

⁸⁶ Rachel Augustine Potter, Replication Data for: Slow-Rolling, Fast-Tracking, and the Pace of Bureaucratic Decisions in Rulemaking, 79 J. POL. 841 (2017), <https://doi.org/10.7910/DVN/1O8LCD>.

Because agencies do not report all of these proposed rules on the Unified Agenda, this measure is incomplete. See Nou & Stiglitz, *supra* note 70, at 741.

⁸⁷ Specifically, our measure of time elapsed used the *monthstofinal* variable and excluded all observations for that did not result in completed rules. Our measure of OIRA review time is a month-level transformation of Potter's *oirareviewtime* variable.

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Table 1: Summary Statistics

Variable	Mean	Std. Dev.	Min.	Max.
Agency Head-Civil Servant Divergence	0.785	0.540	0.0001	2.061
Months from NPRM to Disposition	19.243	23.152	1	244
Months from NPRM to Disposition (final rules only)	15.868	15.875	1	205
Untimely Comments Considered? (1=yes)	0.152	0.360	0	1
Months of OIRA Review	0.583	1.522	0	31.837
Number of New Rules per Year	2.90	7.920	0	62
Avg Page Length of New Rules	1.601	4.49	0	94.17
Was Proposed Rule Finalized? (1=yes)	0.842	0.365	0	1

The two components of this measure, agency head and mean civil servant CF scores by agency and year, have markedly different distributions. Figure 1 displays the distribution of agency heads' scores; the dashed lines display the median scores during Democratic and Republican administrations (-0.972 and 0.868, respectively). The figure shows a bimodal distribution, with most agency heads concentrated approximately one standard deviation to the left or right of the median donor in the agency.

Figure 1: Distribution of Agency Heads' CF Scores

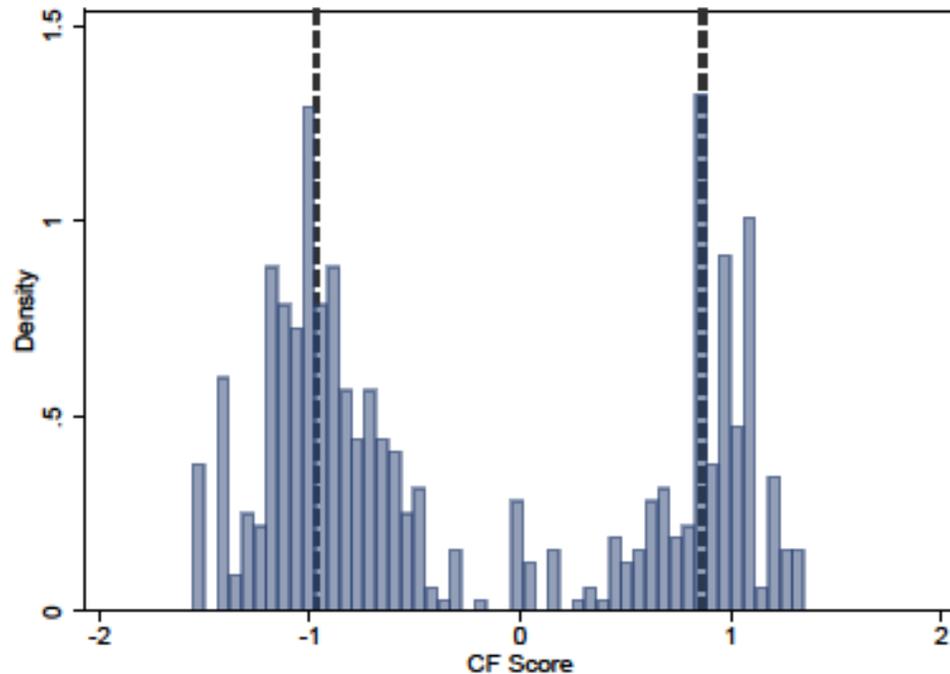


Figure 1: Ideology of agency heads, as measured by their CF Scores. These data are measured at the agency-year level.

Figure 2 provides an analogous histogram for civil servants. Here, each data point is the mean CF score for a given agency and year.

As a first-cut, the figure shows that civil servants cluster left-of-center. The information in this figure, however, is far more nuanced than simply that civil servants lean liberal. For one, they tend to be not nearly as liberal as Democratic agency medians. their median of 0.560 is not nearly as far left as the median Democratic agency head (0.560 versus 0.972). There are even some agency-years where the median civil servant in the agencies we study is right-of-center. Further, there is considerable variation in the median civil servant ideology, as compared to either side of the appointee distribution. Consider the kurtosis of the two distributions.⁸⁸ Figure 1

⁸⁸ Kurtosis measures the degree to which a distribution clusters in the peak or the tail of a distribution. It is a measure of how far from a “normal” distribution any given distribution is. We use it here to encourage readers to consider the different shapes of the distributions. Within each side of the bimodal distribution in Figure 1, the spread is very tight. This suggests that within the president’s political party, political appointees do not vary as much on ideology as the civil servants they try to

has a sharp peak and wide spread in the tails. By contrast, the distribution of civil servant ideologies in Figure 2 appears flatter, with a roughly even concentration of scores from -1 into the (small) positive values.

Figure 2: Distribution of Civil Servants' CF Scores

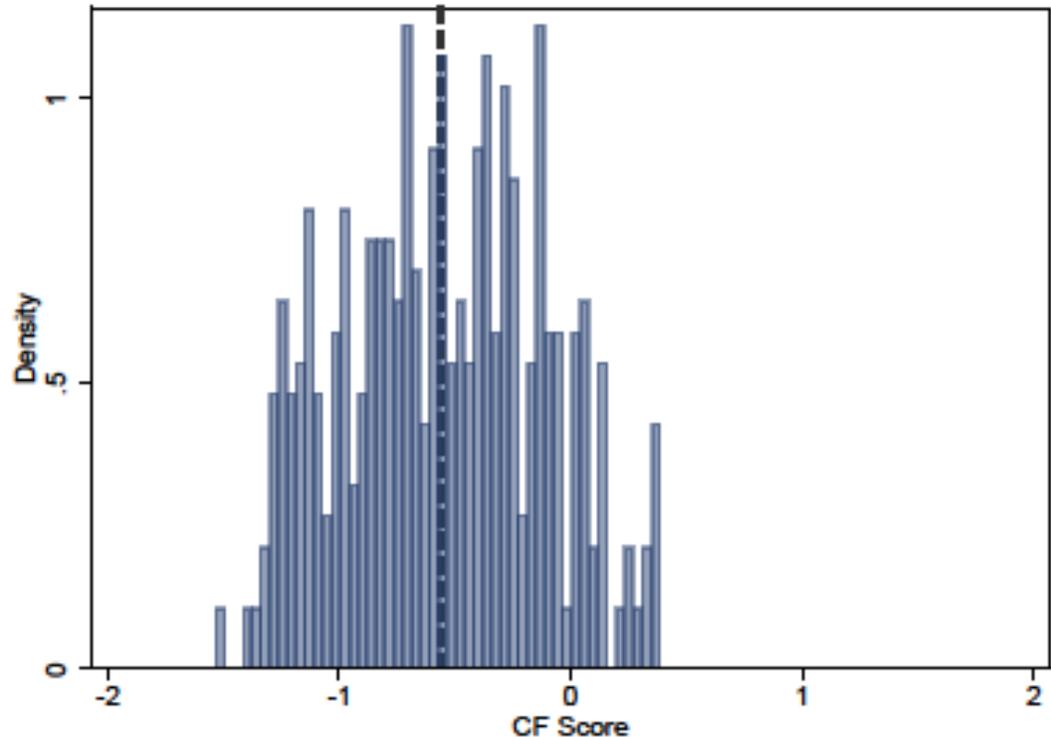


Figure 2: Ideology of civil servants, as measured by their CF Scores. Data measured at the agency-year level.

To further illustrate how agency heads and civil servants' ideologies differ—and change over time—we display agency ideological distance for a few of the agencies in our dataset. Figure 3 displays the median CF scores for the Attorney General (the circles in the figure) and Justice Department civil servants (the diamonds). Attorneys General serving during Republican administrations are conservative—usually approximately one standard deviation more conservative than the median donor—whereas Democratic secretaries tack liberal. Civil servants' views

control. However, these data are built across agencies. See Figure 3-Figure 5 for within-agency examinations of ideological dispersion.

also display movement throughout the period; they lean right during the 1980s and gradually move left in the donor data we use.⁸⁹ Notably though, civil servants do not stray nearly as far from the median as agency heads.

Figure 3: Attorney General & DOJ Civil Servant CF Scores

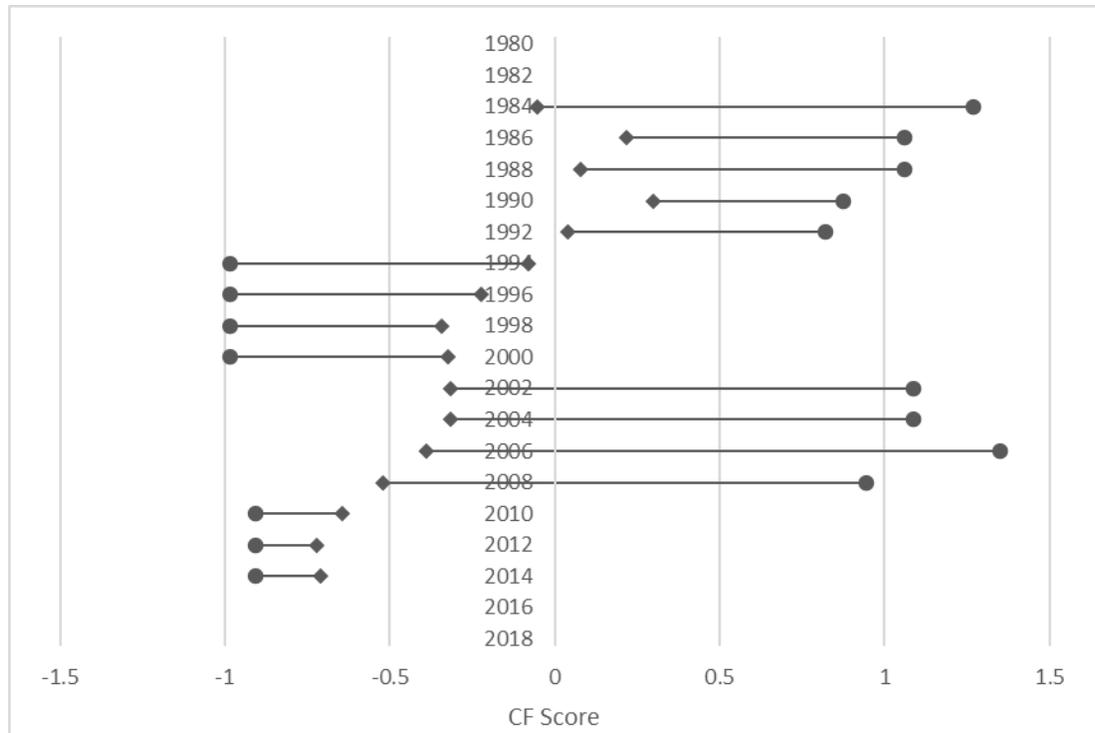


Figure 3: Ideological distance between agency heads (circles) and the median civil servant (diamonds), in the Department of Justice, as measured by their CF Scores. Years are measured on the vertical axis, with more recent years appearing at the bottom. The horizontal axis captures CF Scores.

⁸⁹ These gradual changes could result from several mechanisms, e.g., civil servants changing their views; more conservative civil servant cohorts being replaced by more liberal cohorts over time; or different groups of civil servants choosing to donate over time while cohorts and ideologies remain static. We are agnostic concerning these and other possible explanations, and will save the question of mechanism for future research. We further note that any discussion of a change in ideology over time using this data is based on an assumption that the standard deviation of the donor data – which is what the CF Score is based on – is invariant over the years that we study, such that a 1 or -1 at time T means the same thing as a 1 or -1 at time T+1.

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The Justice Department is illustrative of a larger pattern: civil servants positioned close to the median, with agency heads ping-ponging between the ideological extremes based on the party in power. Although civil servants tend to lean left, they typically do not stray far from center relative to appointees.

The Environmental Protection Agency—an agency that some commentators charge is stacked with liberal civil servants—exhibits similar themes.⁹⁰ As Figure 4 shows, its civil-service workforce is consistently left-of-center. Nonetheless, the median EPA civil servant is substantially to the right of that agency’s administrator during Democratic presidencies. It may be, therefore, that even left-of-center civil servants can pull agency policies to the political right, having a moderating effect on liberal-helmed agencies.

Figure 4: EPA Administrator & Civil Servant CF Scores

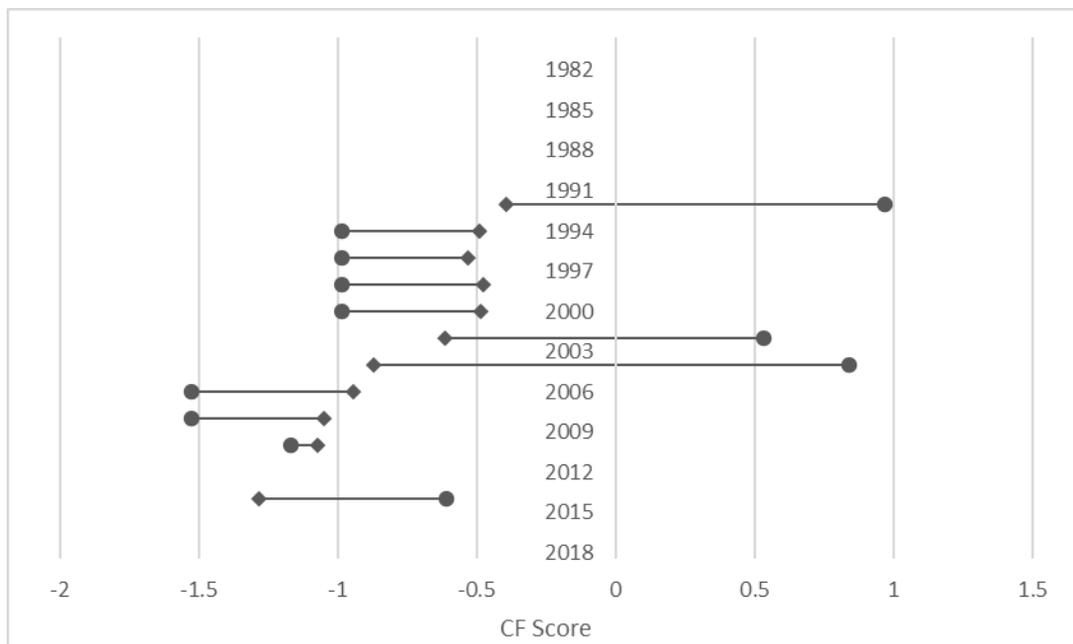


Figure 4: Ideological distance between agency heads (circles) and the median civil servant (diamonds), in the Environmental Protection Agency, as measured by their CF Scores. Years are measured on the vertical axis, with more recent years appearing at the bottom. The horizontal axis captures CF Scores.

⁹⁰ See, e.g., Andrew McGill, *The Coming Exodus of Career Civil Servants*, THE ATLANTIC, Dec. 28, 2016, <https://www.theatlantic.com/politics/archive/2016/12/the-coming-exodus-of-career-civil-servants/511562/> .

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Defying stereotype, civil servants in some agencies exhibit a conservative streak. As Figure 5 shows, civil servants in the Department of Health & Human Services—a large agency with a diverse and highly consequential portfolio—lean right-of-center in most years of the donor data during our study period.⁹¹

Figure 5: HHS Secretary & Civil Servant CF Scores

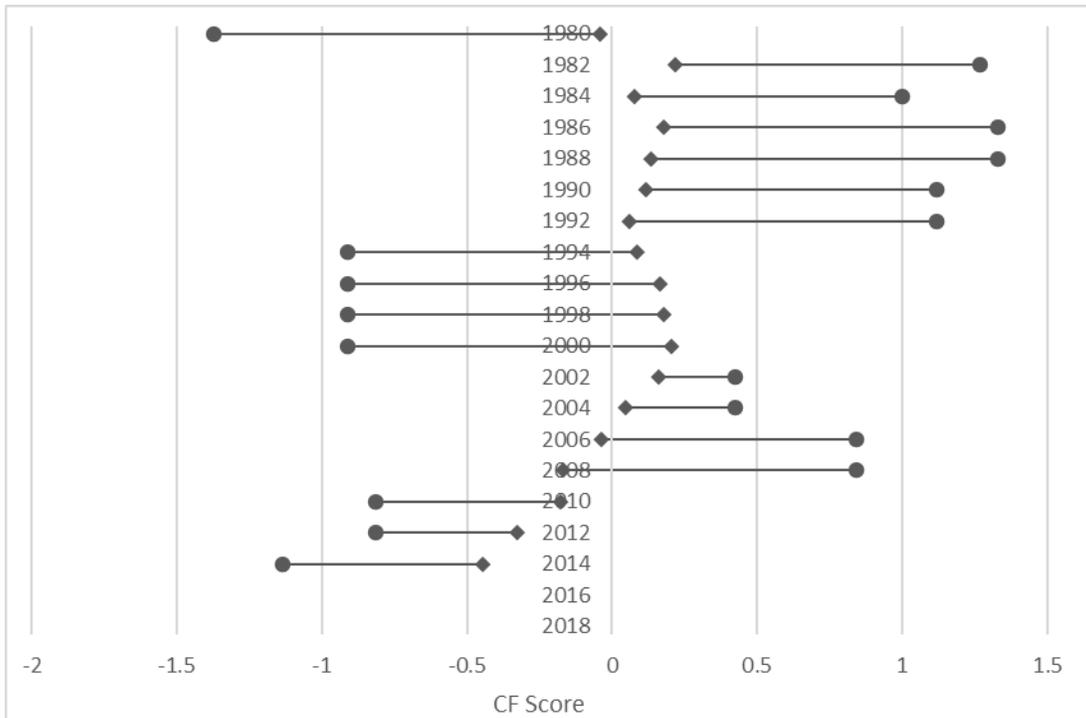


Figure 5: Ideological distance between agency heads (circles) and the median civil servant (diamonds), in the Department of Health and Human Services, as measured by their CF Scores. Years are measured on the vertical axis, with more recent years appearing at the bottom. The horizontal axis captures CF Scores.

In short, although the median civil servant in most agencies and in most years is left-of-center, that tendency does not hold across the administrative state. Further,

⁹¹ A similar story holds for the Department of Homeland Security. For the National Transportation Safety Board, civil servants are right-of-center throughout the entire 1979-2014 period. Incredibly, their preferences lie to the right of the Reagan-appointed NTSB chair for some years in the 1980s.

during Democratic administrations, even left-leaning civil-service workforces typically lie well to the right of agency heads.

iii. Model

Regression models testing Expectations 1-3, and 6 have the same basic format:

$$Y \sim \beta * D + \gamma_{\text{agency}} + \gamma_{\text{year}} + \varepsilon,$$

where Y is the outcome variable, D is the divergence measure, and γ_{agency} and γ_{year} denote agency and year fixed effects. Agency fixed effects account for the fact that agencies have different regulatory turf and thus, capture agencies' differing tendencies to issues rules.⁹² Year fixed effects capture a wide variety of features of the political system during the relevant two-year period—e.g., the composition of Congress and the current President's identity—that presumably affect agency activity.

When we test Expectations 1-3 and 6, our observations are measured at the rule level, so we use the agency and year fixed effects above. Our models for Expectations 4 and 5 are similar to the model above, but the key difference is the lack of fixed effects, since our observations are measured at the agency-year level.

With the basic model and data structure explained, we now turn to our choice of statistical model and outcome measures to test each expectation. We test Expectation 1 and 3-5 using ordinary least squares (OLS) regression (Model 1) and negative binomial regression (Model 2) to examine the relationship between ideological divergence and various outcome measures. They are as follows: *logged number of months of review* and *number of months of review* (Expectation 1, models 1 and 2, respectively); *months during which the proposed rule is subject to OIRA review* (Expectation 3); *number of new rules* (Expectation 4), *pages of new rules*, and *average number of pages per new rule* (Expectation 5, models 1 and 2 respectively).⁹³

⁹² For instance, one would not expect the relatively obscure Federal Maritime Commission to issue more rules than the EPA, regardless of the extent of preference divergence at those two agencies.

⁹³ Negative binomial regression is appropriate for event-count models where, as here, the numbers of events is substantially over-dispersed.

We also run zero-inflated negative binomial models. These models can correct for bias in our estimates due to the fact that most observations (measured at the agency-year level) are zeros. That the modal agency in our dataset does not promulgate any rules in the typical year may bias our estimates, and these models correct for that possibility. Zero-inflated negative binomial models assume that an inflation variable influences whether an observation value is zero or non-zero. Once a value is determined to be zero, the regular negative binomial model is run. Here, we use “regulatory restrictions imposed by the agency currently in effect” as the inflation variable, on the theory that agencies that

We estimate logit models to test Expectations 2 and 6. Of course, our outcome variables differ; they are *late comments accepted* (Expectation 2), and *proposed rule finalized* (Expectation 6).

B. Results

This section presents our findings. To preview the results: most of our expectations were met. We observe that divided agencies have longer rulemaking processes and are more likely to allow late comments. We do not find evidence that OIRA causes delays. Divided agencies issue fewer and shorter rules, but conditional on issuing a notice of proposed rulemaking, the rules are more likely to become finalized.

i. The Rulemaking Process

We begin with our expectation that divided agencies will expend greater time between NPRM and final disposition. Tables 2(a) and (b) report the association between preference divergence and time elapsed between NPRM publication and issuance of a final rule or other disposition. All models across the two tables show a positive, statistically significant relationship between ideological divergence and time elapsed in the regulatory process.

Table 2(a), model 1, suggests that as agency divergence increases by one unit, the number of months between NPRM and disposition of proposed rule increases by 1.19 months, or roughly 36 days.⁹⁴ Simulated first differences reveal that moving from an agency at the 25th percentile in terms of agency head-civil servant divergence to one at the 75th percentile is associated with an expected 37.5-day increase in time to

have fewer regulatory restrictions on the books will tend to issue fewer edicts in the typical year. We obtained these data from QuantGov. McLaughlin, *supra* note 82. We ran similar models to test the other hypotheses. Because Hypotheses 3-5 are tested with observations at the proposed-rule level, rather than aggregates at the agency-year level, there is no need for zero-inflated or other rare-events models.

Finally, we employ survival analysis in an alternative set of models to test Expectations 1 & 3. Violations of the proportionality assumption, however, call into question the suitability of these models. *See infra* note **Error! Bookmark not defined.** The results of these models—which are substantially similar to the reported OLS and negative binomial regression models—are available upon request.

⁹⁴ $\exp(0.171) = 1.19$.

disposition.⁹⁵ Table 2(a), model 2 runs the same analysis in a negative binomial framework, yielding similar results.⁹⁶

Table 2(a): Months from NPRM to Disposition of Proposed Rule

	(1)	(2)
Agency Head-Civil Servant Divergence	0.171 *** (0.029)	0.155 *** (0.031)
Agency Fixed Effects	Y	Y
Year Fixed Effects	Y	Y
Model	OLS	Neg. Bin.
Observations	9,777	9,777
R ²	0.19	0.03
Robust SEs clustered at the agency-year level. Observations are individual final rules. DV: natural log of months from NPRM to disposition (Model 1); months from NPRM to disposition (Model 2). NPRMs that do not yield final rules are excluded. R ² refers to Pseudo R ² in negative binomial model.		

A similar story holds concerning those NPRMs that yield final rules. Table 2(b), which is limited to this subset of NPRMs, reports properly signed coefficient estimates that achieve conventionally accepted levels of statistical significance. An alternative set of Cox proportional hazard models, with the same predictor and outcome variables as in models 1 & 2, yields similar results.⁹⁷

⁹⁵ For readers perplexed as to how a coefficient estimate of 0.171 in model 1 could be associated with an over one-month increase in the simulated first differences analysis, note that the dependent variable in model 1 is the *natural log* of months from NPRM to disposition. The same is true for other dependent variables throughout this Article.

⁹⁶ Although the magnitude of coefficient estimates in this framework are unintuitive, calculating the incidence rate ratio for the coefficient estimate in model 2 shows that a one-unit increase in agency divergence—i.e., roughly two standard deviations, *see* Table 1, *supra*—is associated with a 17 percentage-point increase in time to disposition. (The incidence rate ratio provides the percentage change in the dependent variable associated with a one-unit increase in the independent variable.)

⁹⁷ In these models, we classify proposed rules that fail to be finalized as right-censored. We do not report these results, however, because the proportionality assumption is not satisfied for these models.

To test this assumption, we first included time-dependent covariates (essentially, interactions between our key predictor and logged time). For most tests, $p < 0.01$ for most of these covariates, counseling in favor of rejecting the null hypothesis that the hazards are proportional. For another

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Simulated first differences for model 1 in the table show that moving from an agency at the 25th percentile in terms of divergence to one at the 75th percentile is associated with an expected 37.5-day increase in time to final rule—identical (to one decimal place) to the simulated first differences generated from the first model in Table 2(a). Thus, failed or abandoned rulemakings are not driving our results. Instead, many proposed rules that ultimately succeed, resulting in new regulations, experience greater delay in divided agencies.

Table 2(b): Months from NPRM to Final Rule

	(1)	(2)
Agency Head-Civil Servant Divergence	0.185 *** (0.028)	0.182*** (0.028)
Agency Fixed Effects	Y	Y
Year Fixed Effects	Y	Y
Model	OLS	Neg Bin
Observations	8,542	8,542
R ²	0.22	0.03
Robust SEs clustered at the agency-year level. Observations are individual final rules. DV: natural log of months from NPRM to final rule (Model 1); months from NPRM to final rule (Model 2). NPRMs that do not yield final rules are excluded. R ² refers to Pseudo R ² in negative binomial model.		

Further, divided agencies differ considerably concerning rulemaking delays. In unreported models, we find that rulemaking delays are concentrated in one type of divided agency: those where the political leadership is more conservative than the civil service rank-and-file.⁹⁸

Next, we test Expectation 2, i.e., that divergence is associated with a higher likelihood that an agency decides to consider untimely comments. Table 3 reports

window into the extent to which the proportionality assumption, we conducted similar tests of statistical significance for the Schoenfeld and scaled Schoenfeld residuals, which yielded similar results.

⁹⁸ These unreported models interact the *Agency Head-Civil Servant Divergence* variable with a dichotomous variable denoting whether the agency head is more conservative than the agency's civil servant workforce or vice-versa.

For agencies where the agency head is more liberal than the workforce, the coefficient estimates for *Agency Head-Civil Servant Divergence* are still properly signed, but fall short of conventionally accepted levels of statistical significance.

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correlations between preference divergence and whether the agency accepts public comments submitted after the close of the notice-and-comment period.⁹⁹

Table 3: Late Comments Accepted?

	(1)	(2)	(3)
Agency Head-Civil Servant Divergence	2.304 *** (0.519)	5.202 ** (1.89)	5.397 * (2.549)
Agency Fixed Effects	Y	N	N
Year Fixed Effects	N	Y	N
Model	Logit	Logit	Logit
Observations	265	772	932
R ²	0.73	0.56	0.45
Table reports logit coefficients (not odds ratios). Robust SEs clustered at the agency-year level. Observations are individual proposed rules. DV: Whether late comments were accepted on a proposed rule.			

Once again, the table reports a positive and statistically significant correlation.¹⁰⁰ In model 1, simulated first differences revealing that moving from the 25th to the 75th percentile in terms of divergence is associated with an expected 26.8 percent increase in the likelihood of the agency accepting late comments. In unreported models,¹⁰¹ we find that the effect is greater where the agency head is more conservative than the agency’s civil servants.¹⁰²

Our results concerning Expectation 3—i.e., that OIRA will expend greater time reviewing proposed significant rules from divided agencies—are less informative. In contrast to the previous findings, Table 4 reports null results; we see no evidence of a

⁹⁹ Running a model with both year and agency fixed effects, and dropping variables that are perfectly correlated with other independent variables, also yields positive and statistically significant coefficient estimate for *Preference Divergence*.

¹⁰⁰ Presumably, if a comment period was extended, then any comments received after the extension would not be considered “late.” Data concerning whether the comment period for each given rule was extended has proven elusive. Therefore, we view the analysis presented above both as based on the best available data, and also potentially missing an aspect of the comment period.

Cox proportional hazard models produce similar results. As before, we do not report these results because the proportionality assumption is not satisfied.

¹⁰¹ These unreported models interact *Agency Head-Civil Servant Divergence* and a binary variable denoting whether the agency head is more conservative than the civil service or vice versa.

¹⁰² Nonetheless, the coefficient estimates in all models are positive and statistically significant (in most cases at $p < 0.05$ and in all cases at $p < 0.10$) for situations where the agency head is more liberal than the workforce as well. These unreported results are available upon request.

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connection between preference divergence and length of OIRA review. The coefficients on the estimates are positive, as we expected, but the data are too noisy to rule out the possibility that they could also be negative.

Table 4: Months of OIRA Review

	(1)	(2)
Agency Head-Civil Servant Divergence	0.043 (0.061)	0.087 (0.059)
Agency Fixed Effects	Y	Y
Year Fixed Effects	Y	Y
Model	OLS	Neg. Bin.
Observations	2,662	9,777
R ²	0.13	0.09
Robust SEs clustered at the agency-year level. Observations measured at the agency-year level. Observations are individual proposed rules that are subject to OIRA review. DV: natural log of months of OIRA review (Model 1); months of OIRA review (Model 2). R ² refers to Pseudo R ² in negative binomial models.		

ii. Final Rules

This subpart assesses the association between agency head-civil servant preference divergence and the promulgation of final rules. We begin with Expectation 4, which posits that as preferences between agency heads and civil servants diverge, agencies issue fewer final rules. Table 5 reports the results from our this claim.

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Table 5: Number of New Rules

	(1)	(2)	(3)
Agency Head-Civil Servant Divergence	-0.137 * (0.066)	0.073 (0.96)	-0.145 * (0.072)
Agency Fixed Effects	Y	Y	Y
Model	OLS	Neg. Bin.	Zero-Inflated Neg Bin
Observations	372	1,298	1,298
R ²	0.66	0.11	—
Robust SEs clustered at the agency-year level. Observations measured at the agency-year level. DV: natural log of count of new rules (Model 1); count of new rules (Models 2-3). R ² refers to Pseudo R ² in negative binomial models.			

Two out of three models in Table 5 show a negative, statistically significant relationship between agency head-civil servant divergence and that the number of new rules that an agency issues in a year. The now-familiar simulated first differences based on model 1 show that, when one shifts from an agency at the 25th percentile for divergence to the 75th percentile, the expected number of rules issued annually decreases by 0.83. With the mean agency in our dataset issuing only 2.90 rules per year,¹⁰³ this reduction is substantial.

Next, we test the expectation that divided agencies exhibit greater rulemaking caution, and thus issue shorter rules.

reports the average number of pages per rule issued by a given agency in a given year.

¹⁰³ See Table 1, *supra*.

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Table 6: Average Page Length of New Rules

	(1)	(2)	(3)
Agency Head-Civil Servant Divergence	-0.274 ** (0.095)	-0.337 *** (0.088)	-0.348 *** (0.083)
Agency Fixed Effects	Y	Y	Y
Model	OLS	Neg. Bin.	Zero-Inflated Neg Bin
Observations	372	563	563
R ²	0.54	0.24	
Robust SEs clustered at the agency-year level. Observations measured at the agency-year level. DV: natural log of total pages of significant rules (Model 1); average page length of significant rules (Models 2-3). R ² refers to Pseudo R ² in negative binomial models.			

Once again, the coefficient estimates in all models are negatively signed and achieve conventionally accepted levels of statistical significance. Simulated first differences show that moving from an agency at the 25th percentile in terms of preference divergence to one at the 75th percentile is associated with rules that are 0.49 pages shorter in expectation. By comparison, the average rule in our dataset is 1.60 pages long.¹⁰⁴

Finally, Table 6 reports positive—but not statistically significant—results concerning the relationship between agency head-civil servant divergence and likelihood of the agency’s proposed rules being finalized.¹⁰⁵

¹⁰⁴ See Table 1, *supra*.

¹⁰⁵ For completeness, we also report simulated first differences. Moving from an agency at the 25th percentile for divergence to one at the 75th percentile, the likelihood that a proposed rule will be finalized increases by 2.5 percent. Because the coefficient estimate on *Agency Head-Civil Servant Divergence* in Table 6 does not approach conventionally accepted levels of statistical significance, we place little weight on this simulation.

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Table 6: Likelihood of Proposed Rule Being Finalized

	(1)
Agency Head-Civil Servant Divergence	0.122 (0.099)
Agency Fixed Effects	Y
Year Fixed Effects	Y
Model	Logit
Observations	9,758
R ²	0.07
<small>Table reports logit coefficients (not odd ratios). Robust SEs clustered at the agency-year level. Observations are individual final rules. DV: Whether the proposed rule was later promulgated as a final rule.</small>	

To summarize, as the distance between agency heads and civil servants diverge, we observe several outcomes that are important to understanding the effects of agency division on policy outputs. *First*, the rulemaking process takes longer, a phenomenon we observe regardless of whether the final rule is adopted. However, we cannot pin the delay in the rulemaking process on OIRA review. Rather, it seems that agencies may be lengthening the time in which they receive and process comments, as divided agencies are more likely to accept late comments as a part of their rulemaking process.

Second, as agency heads and civil servants diverge, the number of new rules issued per year decreases. Further, the rules that diverging agencies do issue tend to be shorter. Given that a rule's length is closely correlated with whether the rule is classified as economically significant,¹⁰⁶ we raise the prospect that divided agencies issue tend to issue less consequential rules.

Table 7 presents each of our six expectations alongside the extent to which our empirical analysis provides support.

¹⁰⁶ See *supra* note 69.

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Table 7: Summary of Empirical Results

<u>Expectation</u>		<u>Evidence</u>
<i>The Rulemaking Process Characteristics</i>		
1	Greater agency head-civil servant divergence → more time between NPRM and final rule (or other disposition)	Consistent w/ expectation
2	Greater divergence → higher likelihood to allow late comments	Consistent
3	Greater divergence → longer OIRA review	Null results
<i>Final Rule Characteristics</i>		
4	Greater divergence → fewer rules issued	Consistent in 2 of 3 models; null in 1 model
5	Greater divergence → shorter rules issued	Consistent
6	Greater divergence → higher likelihood that a proposed rule is finalized	Null results

These results suggest that divided agencies move slowly and carefully, bringing many voices into their deliberations, and trimming the number and scope of the rules they issue.

Several of these results also are consistent with the alternative theory presented *supra*: that civil servants in divided agencies, opposed to rulemakings that oppositional agency heads push on them, strategically delay these rulemakings.¹⁰⁷ Namely, the findings that divided agencies are associated with longer periods between NPRM and final disposition (Expectation 1) and with fewer rules issued (Expectation 4) are both consistent with our regulatory-caution theory and this strategic civil-servant delay theory.

Three results, however, counsel in favor of our theory over this alternative. First, recall that an agency at the 75th percentile in terms of appointee-civil servant divergence only sees an additional 37.5 days in time to final rule, compared to an agency at the 25th percentile. Approximately five weeks is typically far too short of a time span to expect a material change in political circumstances (except, of course, in relatively rare partisan transitions in the White House or Congress). That length of

¹⁰⁷ See Potter, *supra* note 14; O’Connell, *Agency Rulemaking and Political Transitions*, *supra* note 35.

time, however, seems sufficient to gather and process additional outside perspectives on a proposed rule. Second, divided agencies' greater likelihood of allowing late comments (Expectation 2) is difficult to square with the strategic-delay theory, but fits well with our regulatory-caution theory. Third, the lack of a statistically significant association between divided agencies and likelihood that a proposed rule is finalized—along with a *positive* coefficient estimate—suggests that, if civil servants are attempting to strategically slow-roll proposed rules in divided agencies, they are doing a remarkably poor job of it. Accordingly, although firm conclusions remain elusive, the weight of the evidence favors our regulatory-caution account over this alternative.

This agency caution has several implications for policymaking writ large, to which we turn next.

IV. IMPLICATIONS

The above results should cause scholars to update their views in several respects. For one, these findings sharpen our understanding of the dynamics between agency heads and civil servants. In place of an irredeemably antagonistic relationship—as critics of the supposed “deep state” and admirers of heroic “bureaucratic resisters” both suggest—we see nuance. Divided agencies act more slowly and deliberatively. Their orientation can be status quo-preserving. These characteristics have both positive and negative implications, with one's ultimate assessment likely depending on one's priors concerning each specific policy area.

These results also complicate our picture of civil servants. Although unelected, civil servants help further democratic values. As our measure of agency head and civil servant preferences shows, civil servants often serve as a counterweight to outlier agency heads.¹⁰⁸ In this way, civil servants can pull policy away from relatively extreme appointees and toward the median voter.¹⁰⁹

In addition, even small-c conservative skeptics of large bureaucracies should find something to like here. Namely, that divided agencies tend to adopt a more circumspect posture, moving laboriously and favoring more incremental changes.

¹⁰⁸ See Figures Figure 3-Figure 5, *supra*.

¹⁰⁹ See Stephenson, *supra* note 12, at 55.

Further, our findings show that the notice-and-comment process—sometimes maligned as merely symbolic¹¹⁰—serves an important function. That divided agencies engage in longer comment periods and are more likely to permit late-filed comments suggests that they find informed “second opinions” from outside the agency particularly useful. In other words, extra-agency comments can mitigate agency heads’ information problem when their internal source of expertise, civil servants, part ways with them on policy objectives.

Finally, the results counsel in favor of several legal reforms. Given the high degree of political polarization in Washington, divided agencies are unavoidable.¹¹¹ In light of this reality, officials should implement institutional design reforms to improve the functioning of divided agencies. We suggest several prescriptions to improve agency heads’ access to high-value second opinions to complement civil servants’ views.

A. The Pros & Cons of Caution

In the main, civil servants serving politically opposed appointees are neither heroes, valiantly blocking their nominal principals’ disastrous views from becoming law, or villains subverting the will of democratically selected policymakers. Instead, a dominant characteristic of divided agencies is regulatory caution. When agency heads and civil servants prefer different policies, rulemakings are slower and final rules are shorter. Further, although divided agencies promulgate fewer rules, it does not seem that proposed rules perish during the rulemaking process.¹¹² Taken together, a clear picture emerges; divided agencies are cautious, incrementalist, and status quo-preserving.

Accordingly, whether divided agencies are normatively desirable hinges in part on one’s view of the status quo. Beneficiaries of the existing order should see much to celebrate—and those shut out of public benefits and regulatory protection should have much to criticize—concerning divided agencies.

¹¹⁰ See, e.g., E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (1992).

¹¹¹ See Brian D. Feinstein & Daniel J. Hemel, *Partisan Balance With Bite*, 118 COLUM. L. REV. 9, 25-29 (2018) (detailing elite polarization among the political class); *id.* at 39-56 (reporting the effects of polarization on the composition of government decision-makers).

¹¹² If anything, the coefficient estimate in Table 6 suggests that divided agencies see *more* of their proposed rules finalized—evinced that their caution pays off—although this estimate does not rise to conventionally accepted levels of statistical significance.)

Going deeper, groups across the ideological spectrum may have an independent interest in policy certainty, i.e., an interest in stability distinct from their first-order interest in the merits of any particular regulation. Those valuing policy certainty presumably also appreciate the stability that divided agencies bring. Political and regulatory uncertainty depress economic activity, as firms delay investment decisions until after closely contested elections are resolved and major policy decisions are made.¹¹³ Thus, even firms that disfavor the status quo may desire avoiding large swings in policy following presidential inaugurations. That trans-ideological interest in policy stability counsels in favor of divided agencies.

Naturally, we recognize that stability is far from an unmitigated good. To the extent that people can disentangle their second-order interest in certainty from their first-order views on the merits of a policy, we presume that the interest in stability will be substantially smaller. Members of disadvantaged or ignored groups are particularly unlikely to care about policy stability as an independent value. Indeed, individuals that are shut out or systemically discounted in regulatory decisions or government benefits determinations may be risk-loving (in the economic sense of the term).¹¹⁴ That is, they may prefer unified agencies because they offer the prospect of vigorous action in the individual's favored direction if the agency head and civil servants are properly aligned. That unified agencies also engender the possibility of similarly strong action *against* that individual's position if the alignment is in the "wrong" direction may be less important. After all, utility functions are zero-bounded; if the status quo policy ignores a group in the distribution of benefits, it may be difficult to contemplate a worse outcome emerging from a more engaged, unified agency that opposes the group's interests—and relatively easier to imagine a substantially improved policy from an engaged, unified agency aligned with the group's interests.

B. Two Cheers for Civil Servants

¹¹³ See Scott R. Baker, Nicholas Bloom, & Steven J. Davis, *Measuring Economic Policy Uncertainty*, 131 Q.J. ECON. 1593 (2016); Michael D. Bordo, John Duca, & Christoffer Koch, *Economic Policy Uncertainty and the Credit Channel: Aggregate and Bank Level U.S. Evidence over Several Decades*, 26 J. FIN. STABILITY 90 (2016); Brandon Julio & Youngsuk Yook, *Political Uncertainty and Corporate Investment Cycles*, 67 J. FIN. 45 (2012).

¹¹⁴ For examples of groups systematically denied benefits or facing de jure or de facto discrimination by regulators, see generally RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 64–65 (2017); CHLOE N. THURSTON, *AT THE BOUNDARIES OF HOMEOWNERSHIP: CREDIT, DISCRIMINATION, AND THE AMERICAN STATE* (2018); Cassandra Jones Havard, *African-American Farmers and Fair Lending: Racializing Rural Economic Space*, 12 STAN. L. & POL'Y REV. 333 (2001); Robert A. Margo, *Race Differences in Public School Expenditures*, 6 SOC. SCI. HIST. 9 (1982).

Our identification of the ideological preferences of appointee and civil servants, across agencies and over time, produces a surprising revelation; in many agencies, civil servants hug the middle of the ideological spectrum. Even in agencies in which they are left-leaning—as in the EPA, for instance¹¹⁵—they serve a moderating function; not only do EPA civil servants pull Republican administrators’ policy outputs to the left, they also pull Democratic appointees’ to the right by proposing shorter and presumably less ambitious regulations. Further, as Figure 3-Figure 5 show, civil servants’ preferences are relatively stable. By contrast, agency heads oscillate between liberal and conservative positions based on the party in power.

In these circumstances, civil servants may serve as a pro-majoritarian force. As Professor Matthew Stephenson shows, this function is possible where the president is only partially responsive to majority preferences—e.g., with Democratic (Republican) presidents placed to the left (right) of the median voter—and civil servants occupying a stable position near—but not exactly at—the median voter.¹¹⁶ Professor Stephenson posits that, under these conditions,

Forcing the politically responsive president to share power with a partially insulated, politically unresponsive bureaucracy tends to reduce the variance in policy outcomes, because bureaucratic insulation creates a kind of compensatory inertia that mutes the significance of variance in the president’s policy preferences.¹¹⁷

As detailed *supra* Part III, the ideological posture in many agencies fits Stephenson’s assumptions perfectly: relatively moderate (even if not quite centrist) civil servants, with agency heads that alternate between liberal and conservative based on the party in power. Accordingly, civil servants in some divided agencies can serve as a counterweight to more extreme agency heads, thus pulling policy toward the median voter. Paradoxically, politically insulated, generally left-of-center civil servants can enhance agencies’ popular responsiveness.

Our findings also raise implications for civil service reform. Civil servants have long enjoyed a host of merit-based protections concerning their hiring, promotion, and removal.¹¹⁸ Skeptics of these protections, who tend to be politically

¹¹⁵ See Figure 4, *supra*.

¹¹⁶ Stephenson, *supra* note 12, at 55.

¹¹⁷ *Id.*

¹¹⁸ See Civil Service Reform Act of 1978, 5 U.S.C. §§ 1101 et seq. (consolidating and updating legal protections for civil servants and establishing an adjudicatory review procedure for them to challenge adverse employment actions); see also See Pendleton Act of 1883, 22 Stat. 404 (establishing merit-based hiring).

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conservative, argue that the measures unduly insulate civil servants from accountability, encourage shirking, and discourage fealty to the objectives of their nominal principals.¹¹⁹

These skeptics had a friend in President Donald Trump. In October 2020, President Trump signed an executive order establishing a new category of civil servants.¹²⁰ Federal employees in this new category, labeled Schedule F, were to be exempt from some of the merit-based job protections available to most civil servants.¹²¹ If implemented, Schedule F would have removed job protections from tens of thousands of civil servants.¹²² Presumably, those employees would have faced strong incentives to either align their views with those of political appointees or risk being fired and replaced by loyalists.¹²³ President Biden rescinded the executive order on his third day in office.¹²⁴ Yet Schedule F remains a live political issues with some Republicans supporting its revival and Democrats opposed.¹²⁵

Conservative proponents of Schedule F may want to reevaluate how well that position serves their political interests. To be sure, exposing a greater share of the federal workforce to political control would benefit whichever party is in power. But its effects would not stop there. Our results suggest that disempowering career civil servants would lead to more regulatory activity: more rules and longer rules, under consideration as proposals for less time before promulgation. That is hardly conservative. Neither is it necessarily in the interest of regulated firms, which place weight on regulatory certainty—as opposed to drastic pendulum swings with each change in administration. In deciding whether to support reducing civil servants’ job

¹¹⁹ See, e.g., John W. York, *Bring Everyone Who Works for the Federal Government Under the Microscope*, WASH. TIMES, July 15, 2019, <https://www.washingtontimes.com/news/2019/jul/15/bring-everyone-who-works-for-the-federal-governmen/>; Inez Feltscher Stepman & Jarrett Stepman, *Civil Service Reform for the 21st Century: Restoring Democratic Accountability to the Administrative State*, AM. LEGIS. EXCHANGE COUNCIL, Mar. 2017, https://www.alec.org/app/uploads/2017/03/2017-Center-Point_-21st-Century-Civil-Service_Final.pdf; see also VA Accountability First Act of 2017, H.R. 1259, 115th Cong. (2017) (House-passed bill to empower Department of Veterans Affairs appointees to punish civil servants for infractions or poor performance).

¹²⁰ Exec. Order No. 13,957, 85 Fed. Reg. 67631 (October 21, 2020).

¹²¹ *Id.*

¹²² See Lisa Rein & Eric Yoder, *Trump issues sweeping order for tens of thousands of career federal employees to lose civil service protections*, WASH. POST, Oct. 22, 2020.

¹²³ See Erich Wagner, *As White House Steps Up Schedule F Implementation, ‘Lawmakers Don’t Get It’*, GOV. EXEC., Dec. 14, 2020.

¹²⁴ Exec. Order No. 14,003, 86 Fed. Reg. 7231 (Jan. 27, 2021) (order issued Jan. 22, 2021).

¹²⁵ See Nicole Ogrysko, *Schedule F is gone, but the debate continues in Congress*, FED. NEWS NETWORK, Feb. 24, 2021, <https://federalnewsnetwork.com/workforce/2021/02/schedule-f-is-gone-but-the-debate-continues-in-congress/>.

protections, conservatives should recognize these these countervailing features of divided agencies.

C. Notice-and-Comment Reconsidered

Our findings also provide a response to the charge that the notice-and-comment stage of agency rulemaking is merely performative, with most important decisions occurring in the pre-notice stage. According to Professor Donald Elliott, notice and comment is a “highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues.”¹²⁶ Although the empirical evidence is mixed, some studies have found few textual changes following the comment period, suggesting that the content of final rules is sometimes settled long before the agency opens its mailbox to the public.¹²⁷ Further, the changes that are enacted following the comment period may not justify the expense, effort, and delay associated with the notice-and-comment process.¹²⁸

It is tough to reconcile the claim that notice-and-comment is purely performative with the reality that divided agencies have longer rulemaking processes and are more likely to accept late-filed comments. Both findings at least raise the possibility that agency heads utilize comments submitted by ideologically aligned outside groups to, in effect, provide a second-opinion on civil servants’ work-product. Because that second opinion is particularly valuable when agency heads and civil servants’ preferences diverge, divided agencies are more solicitous of outsiders’

¹²⁶ E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (1992); accord Wendy Wagner, Katherine Barnes, & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA’s Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 123 (2011) (empirical confirmation of Elliott’s observation); Richard Murphy, *Enhancing the Role of Public Interest Organizations in Rulemaking via Pre-Notice Transparency*, 47 WAKE FOREST L. REV. 681, 682 (2012) (“Rather than serve as a vehicle for policymaking, the notice-and-comment process is instead, to a rounding error, a means for establishing a record for judicial review of rules.”).

Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1775 (1975) (“[R]ulemaking decisions [are] often largely determined in advance through a process of informal consultation in which organized interests may enjoy a preponderant influence.”).

¹²⁷ Compare William F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Analysis*, 64 PUB. ADMIN. REV. 66, 68 (2004); with Susan Webb Yackee, *Sweet-Talking the Fourth Branch: Assessing the Influence of Interest Group Comments on Federal Agency Rulemaking*, 16 J. PUB. ADMIN. RES. & THEORY 103, 103-124 (2006). For a discussion of this debate, see Nou & Stiglitz, *supra* note 70, at 743-44.

¹²⁸ See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 227 (2006).

comments. Thus, they extend the period during which proposed rules are considered and accept untimely comments.

Essentially, notice-and-comment can serve as a “fire alarm” for agency heads at the helm of divided agencies. That term, coined by political scientists Mathew McCubbins and Thomas Schwartz, refers to mechanisms that automatically alert a principal of disfavored action by her agent, without the principal needing to undertake costly monitoring to discover the action on her own.¹²⁹ The term is typically applied in the inter-branch context.¹³⁰

We import this concept to the internal workings of agencies. Just as Congress uses administrative structures and processes to ameliorate its information deficit vis-à-vis agencies, so to do generalist agency heads utilize procedures to address their own information problem with respect to civil servants.¹³¹

That is not to say that comment periods-as-fire alarms are an unmitigated good. Just as nuisance calls, false alarms, and the like can tax a fire department, so too can low-quality or duplicative comments strain agency resources.¹³² Nonetheless, notice-and-comment can be particularly impactful in divided agencies via several pathways.

For one, civil servants—aware that outside experts will check their work during the comment period—may alter their behavior *ex ante*. Specifically, they may write proposed rules that anticipate and preemptively respond to comments from extra-agency actors aligned with the agency head. In this way, the notice-and-comment

¹²⁹ McCubbins & Schwartz, *supra* note 38, at 166; *see also* Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 442 (1989); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 244 (1987) [hereinafter McNollgast, *Procedures as Instruments*].

¹³⁰ *See* McCubbins & Schwartz, *supra* note, at 166 (“Congress establishes a system of rules, procedures, and informal practices that enable individual citizens and organized interest groups to examine administrative decisions, ... to charge executive agencies with violating congressional goals, and to seek remedies from agencies, courts, and Congress itself.”).

¹³¹ *See* McNollgast, *Procedures as Instruments*, *supra* note 129, at 258 (“[T]he entire sequence of decisionmaking—notice, comment, ... [etc.]—affords numerous opportunities for political principals to respond when an agency seeks to move in a direction that officials do not like.”).

¹³² *See* Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 394 (2019).

process could be highly consequential despite some studies finding few changes between proposed and final rules.¹³³

Alternatively, if a civil servant involved in rulemaking believes that preemptorily accommodating outside experts would generate a rule that strays too far from her preferences, she may take a different tack. For instance, cognizant that interest groups might object but also of the need for regulation, she may write a less impactful proposed rule, i.e., one that is shorter, less onerous on the affected parties, and thus less likely to raise objection. Alternatively, she may look down the game tree, realize that she would prefer the status quo to the eventual final rule once her proposal is inevitably revised following comments from outside experts aligned with the agency head, and decide to slow-walk or even not submit the proposed rule in the first instance.

Notably, these strategies are consistent with our findings. That we see longer periods between NPRM and final disposition and greater receptivity to late-filed comments in divided agencies suggests that appointees in these agencies have greater need for outside experts to check their civil servants' work. That we see both fewer rules and shorter rules (and thus, likely less economically significant rules)¹³⁴ evinces that civil servants may be aware of this dynamic and thus adopt a more conservative rule-writing posture.

We do not mean to be Pollyannaish about the role that outside comments play in divided agencies. For instance, divided agencies' strategic allowance of late comments is normatively difficult. Accepting late comments may privilege experienced repeat players and insiders who know that deadlines are soft at a particular agency at a particular time. That feature would call into question the agency's commitment to two bedrock values of administrative law: an open process and public transparency.¹³⁵ Accordingly, to give members of the public an equal chance to

¹³³ Cf. Peter Bachrach & Morton S. Baratz, *Two Faces of Power*, 56 AM. POL. SCI. REV. 947 (1962) (describing how power exercised ex ante by actors with the ability to set the agenda may be missed by studies focused on latter stages of political processes)

¹³⁴ See *supra* note 69 (reporting correlation between rule length and economic significance for OIRA purposes).

¹³⁵ See, e.g., *Office of Comm'n of United Church of Christ v. FCC*, 465 F.2d 519, 527 (D.C. Cir. 1972) ("Public participation in decisions which involve the public interest is ... indispensable."); Administrative Procedure Act of 1946, 5 U.S.C. § 553 (requiring agencies to "give interested persons an opportunity to participate in ... rulemaking through submission of written data, views, or arguments"); Government in the Sunshine Act of 1976, 5 U.S.C. § 552b ("meetings of an agency" must be open to the public); Freedom of Information Act of 1967, 5 U.S.C. § 552 (agencies must provide information to requesting members of the public unless a statutory exception applies).

participate in the process, agencies tempted to receive and entertain late comments should instead should publicly extend the comment period.

D. Policy Prescriptions

Divided agencies are here to stay. Elite polarization in Washington continues to build,¹³⁶ increasing the opportunities for serious intra-agency mismatches between appointees and civil servants. Supposed solutions, like stripping a subclass of civil servants of merit-protections, are misguided;¹³⁷ attempting to monitor the ideological orientations of the many thousands of civil servants in policy analysis or adjacent roles would be a fool's errand. What steps, then, can institutional designers take to ensure that divided agencies function as well as possible in these politically charged times?

They should build on what works. As explained above, our empirical results suggest that appointees in divided agencies may utilize comments from ideologically aligned outside experts to “check the work” of their agencies’ civil servants. In a similar spirit, institutional designers can take steps to expand the pool of high-quality information that agencies receive when writing rules. Targeted use of field hearings, advisory committees, and the like can subsidize participation by knowledgeable parties that may provide different—but ideally no less informed—perspectives than civil servants.¹³⁸ Coordinating with other agencies across the federal government also can improve the quality and diversity of information from ideologically aligned sources that an agency has when making decisions.¹³⁹

In a similar vein, the Federal Energy Regulatory Commission’s nascent Office of Public Participation intends on funding the participation of intervenors in

¹³⁶ See Feinstein & Hemel, *supra* note 111, at 25-29.

¹³⁷ See Part IV.B, *supra*.

¹³⁸ See Brian D. Feinstein & Daniel J. Hemel, *Outside Advisers Inside Agencies*, 108 GEO. L.J. 1139 (2020).

¹³⁹ See Bijal Shah, *Congress’s Agency Coordination*, 103 MINN. L. REV. 1961, 2007 (2019) (“[E]xecutive agencies coordinating ... may exhibit greater adaptability and a better use of information in decisionmaking than agencies acting alone.”). McCann and Shipan observe that the number of agencies receiving statutory delegations in a single statute has increased over time – in other words, inter-agency coordination has become more important as an information-sharing mechanism. Pamela J. Clouser McCann and Charles R. Shipan, *How many major US laws delegate to federal agencies? (almost) all of them*, Pol. Sci. Res. & Methods 1-7, doi:10.1017/psrm.2021.32.

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Commission proceedings,¹⁴⁰ where the intervenor “substantially contributed to the approval, in whole or in part, of a position advocated by such person”¹⁴¹ and the intervention “constitutes a significant financial hardship.”¹⁴² A similar mechanism in the rulemaking context would compensate under-resourced parties that provide high-quality information that the agency utilizes in formulating the rule.¹⁴³

We are not suggesting that divided agencies adopt an all-of-the-above approach to acquiring informed second-opinions. Agencies are resource-constrained, and, as anyone who has read through public comments on a rulemaking docket can attest, diminishing marginal returns soon set in. Rather, agency heads should consider these measures as a menu of options, with the optimal selections likely differing by agency.

CONCLUSION

This project is the first to document ideological divisions across time and agencies within the administrative state. Descriptively, these data reveal that civil servants—though left-of-center in the donor data—tend toward relative political moderation, whereas agency heads tend to occupy the extremes. That finding suggests that civil servants serving under *either* liberal or conservative appointees can encourage policy moderation. Where appointees may oscillate between left and right poles based on which presidential candidate captured a bare majority of electors in today’s polarized, evenly split national elections, civil servants can play a pro-majoritarian role.

Examining rulemaking in divided agencies—i.e., entities in which agency heads and civil servants’ views diverge—reveals several noteworthy findings. Divided agencies consider proposed rules for longer periods of time. They also are more likely to accept late-filed comments. They ultimately produce fewer rules, and the rules that they produce are both more modest in length and slower to be finalized. Suggestive

¹⁴⁰ FERC, Report on the Office of Public Participation, June 24, 2021, at 24-26, <https://www.ferc.gov/media/ferc-report-office-public-participation>.

¹⁴¹ 16 U.S.C. §§ 825q-1(b)(2).

¹⁴² *Id.* at § 825q-1(b)(2)(A)-(B).

¹⁴³ See Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1416 (2010) (proposing to “subsidize participation on specific rulemakings in which certain sets of interests, such as those representing the diffuse public, will be otherwise underrepresented”).

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evidence, though not reaching conventional levels of statistical significance, hints that, conditional on a proposed rule being introduced, that proposed rule is more likely to be finalized in a divided agency.

All of this suggests that divided agencies exercise greater caution in the regulatory process. They use notice-and-comment to gather feedback from a wide variety of stakeholders, so that appointees can hear from ideologically aligned experts and others. For their part, civil servants—aware that grand proposals likely will come under fire from these extra-agency actors during the comments stage—may propose more modest rules *ex ante*.

Together, these findings affirm the importance of an independent civil service and the notice-and-comment process—two mainstays of administrative law that have come under popular and scholarly critique in recent years. Yet changes in our political climate make these features even more valuable than in the past. As partisan polarization deepens and the prospect of extremist appointees grows, relatively moderate civil servants can play an even larger role in pulling agencies toward the median voter. Likewise, as these same phenomena cause greater divergence between agency heads and civil servants, the notice-and-comment process—along with the reforms we propose to insert informed “second opinions” into agency deliberations—will become even more vital in ensuring that divided agencies are able to function.