The U.S. Congress and the Institutional Design of Agencies

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Abstract

Theories of agency design explain that lawmakers impose requirements on how bureaucratic agencies make policy decisions, preventing agencies from undermining lawmakers’ political and policy goals. Empirical support for these theories, however, is limited by the difficulty of measuring critical variables hypothesized to influence the use of this tool of political control. In this study, I employ a methodology particularly well-suited, but not previously employed, to study variance in the use of agency design provisions: interviews with congressional committee staff. Staffers’ responses support several theories, cast doubt on one explanation and point to nuances in other explanations of agency design.

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“One of the ironies of Washington is that you get agencies who believe that Congress has, or should have, no role in what they’re doing.”

—Anonymous congressional committee staff member

The staffer left implicit why it is ironic that some agencies view Congress as superfluous. Members of Congress require no elaboration. Since the U.S. Constitution grants Congress authority to make laws, Congress—not the bureaucracy—possesses legitimacy to shape public policy. As such, Congress’s right to influence agencies’ policy choices is unassailable and bureaucrats should revere and heed, rather than bemoan and dismiss, this democratic mandate.

Nevertheless, in delegating authority to agencies to make policy decisions, members of Congress risk that agencies will make decisions harmful to their political and policy goals. One reason that lawmakers can be harmed by delegation is the potential for “bureaucratic drift” (Horn and Shepsle 1989). In the language of principal-agent theory, members incur “agency losses” when bureaucrats’ decisions create different policy outcomes than what the legislative coalition that delegated authority intended. Despite this problem, delegation occurs routinely. Agency losses aside, delegation is sometimes more efficient than using the lawmaking process to craft policy. Additionally, for very complex policies, outcomes engineered by agencies serve coalitions better than those that they can write themselves—even if such outcomes engender agency losses (Epstein and O’Halloran 1999).

Given the need to delegate, lawmakers try to limit agency losses. One mechanism employed for this purpose is the use of “structure and procedure.” When delegating, lawmakers can locate agencies within the government so that they are more likely to respond to some political forces and less likely to respond to others. For example, in placing the Office of the U.S.
Trade Representative in the Executive Office of the President, Congress ensured that the Office would be responsive to the President. However, in making the Federal Reserve Board (FRB) an independent commission, Congress limited the FRB’s responsiveness to any political actor. Thus, “structure” influences policy outcomes. Additionally, lawmakers often require agencies to follow procedures that make it more likely that they will please some constituencies and less likely that they will please others. For example, Moe (1989) recounts how the Occupational Health and Safety Agency (OSHA) was required to rely on research conducted by a separate agency located within a separate cabinet department, when making regulations. As a result, the degree to which OSHA could pursue aggressive regulation was limited. Hence, “process” also influences policy outcomes. Throughout, I refer to the imposition of provisions that impose structural and procedural mandates on agencies’ policy decisions as “agency design.”

Importantly, political influence, or lack thereof, due to agency design occurs before agencies make decisions. As such, agency design allows lawmaking coalitions to construct agencies so that future policy decisions are consistent with present coalitions’ priorities (McCubbins, Noll, and Weingast 1987, 1989). In summary, by varying how much authority is delegated to agencies, and varying the degree agency design is employed to constrain authority, lawmakers seek to protect their political and policy priorities (Epstein and O’Halloran 1999; Huber and Shipan 2002).

Even if agency design is an imperfect mechanism of control (Balla 1998; Hamilton and Schroeder 1994; Spence 1999), that lawmaking coalitions in the U.S. Congress (Epstein and O’Halloran 1999), U.S. state legislatures (Huber, Shipan and Phahler 2001; Huber and Shipan 2002) and many parliaments (Huber and Shipan 2002) employ it regularly emphasizes its importance as a policy-making tool for modern legislatures. Therefore, scholars have followed
Huber and Shipan’s (2000) advice to “examine the factors underlying variation in institutional choices for political control.” Yet, there is a need to examine the findings of this research from a different perspective due to the necessity faced by researchers to use proxy variables to measure factors hypothesized to influence agency design choices. As discussed below, scholars employ variables that are the best available measures. However, the variables are such that one should expect slippage between concept and measurement, resulting in uncertainty regarding the empirical support for theories of design.

As argued below, interviewing congressional committee staffers promises to compensate for measurement slippage in recent studies. Insights from interviews reinforce several explanations of why lawmaking coalitions vary the freedom agencies receive to make policy decisions delegated to them, increasing the confidence that scholars should have in these explanations. However, this study also casts doubt on one explanation. Additionally, the interview data suggest that several factors affect how much agency authority is limited in a conditional manner unappreciated by prior scholarship.

**Theory and Measurement in the Study of Agency Design**

Explanations for why lawmakers employ design when delegating center on several features of lawmaking in republican democracies. First, many actors want to influence agencies’ policy decisions to further their political and policy goals. Second, laws must pass for delegation to occur, requiring that laws delegating authority garner the minimum support necessary to secure enactment within the lawmaking systems under which they are considered.

Epstein and O’Halloran (1999) and Huber and Shipan (2002) employ transaction cost approaches, based on the consideration that agencies themselves have preferences for the substance of policy, to explain why agencies receive discretion. Given this consideration, and
given the difficulty of supervision (Brehm and Gates 1997), it is clear that when agencies make
decisions, they can make different decisions than lawmakers intended when delegating
authority. Employing game theoretic models, Epstein and O’Halloran (1999) and Huber and
Shipan (2002) demonstrate that lawmakers provide agencies with less discretion as policy
disagreement between the coalition and the agency increases. After all, as agencies become less
faithful agents of the coalition, agencies may render policy outcomes imposing greater agency
losses on the coalition. Therefore, the transaction costs of delegating policy authority to agencies
rise and lawmakers should cede less discretion.

In both studies, the authors find support for this prediction. In measuring legislative-
agency policy conflict, however, both studies employ independent variables measuring policy
conflict between legislatures and the relevant chief executive. For example, to measure policy
disagreement between Congress and agencies, Epstein and O’Halloran (1999) employ a dummy
variable indicating the presence of divided government, finding that divided government leads to
less discretion. Divided government, though, describes a situation in which there is partisan
policy disagreement between Congress and the President. Therefore, this measurement strategy
assumes that the President imposes his policy priorities perfectly on all agencies. Additionally,
disagreement between Congress and all agencies is assumed to be constant across congressional
sessions during which divided/unified government is constant.

Although chief executives no doubt possess leverage over agencies, they still confront
supervision problems (Brehm and Gates 1997). What is more, several factors, such as how
readily bureaucratic tasks can be observed, makes some agencies more difficult to supervise than
others (Wilson 1989, Ch. 9). Additionally, sometimes agencies become autonomous from elected
institutions (Carpenter 2001). These realities ensure that chief executives do not always impose
their priorities on agencies perfectly. Indeed, Aberbach and Rockman (2000, 168) report that
career bureaucrats flaunted the priorities of Republican presidents during the 1970’s and 1980’s,
a period encompassed by Epstein and O’Halloran’s (1999) data. These realities also ensure that
executive-agency policy disagreement varies across agencies during the same legislative session.
In summary, these considerations suggest uncertainty about the empirical foundation for the
theory that legislative coalitions cede less discretion to agencies as disagreement between
coalitions and agencies increases.

Similar to these theories, Lewis (2003) and Wood and Bohte (2004) argue that
lawmaking coalitions raise the transaction costs that presidents must pay to influence agencies as
congressional-presidential policy disagreement increases. Lewis (2003) finds support for this
perspective in studying the creation of agencies from 1946 to 1997. This study employs a
dummy variable for divided government to measure congressional-presidential conflict,
capturing only part—though an important part—of such conflict. This variable, however, cannot
measure conflict under unified government and cannot measure greater or lesser conflict across
different periods of divided government. Also in studying agency creation, Wood and Bohte
(2004) measure conflict by examining the number of vetoes issued by a President during a given
year, which does allow for policy conflict during unified government. Nevertheless, the variable
cannot measure differences in congressional-presidential conflict across different policy areas
during a given year. In summary, these studies employ creative indicators of inter-branch
conflict but these indicators cannot measure important aspects of such disagreement.

Relying on divided government as a measure of policy conflict is problematic since it is
used to measure two distinct phenomena (albeit by different scholars): congressional-agency and
congressional-presidential conflict. Divided government is no doubt related to both. Since it is
related to both, though, one cannot use it to distinguish whether congressional-presidential or congressional conflict (or both) prompts congressional coalitions to employ agency design. To do so, one must account for these phenomena using separate variables.

A third perspective explains that lawmaking coalitions limit discretion due to the difficulty of passing legislation. Often, coalitions lack the votes, or cannot overcome an executive veto, to pass laws that delegate authority to accomplish policy goals. To pass laws, they must compromise with their opponents. Therefore, “[p]olitical compromise ushers the fox into the chicken coop” of agency design (Moe 1989, 276), expanding lawmaking coalitions to include former opponents who remain hostile to the initial purposes of laws. As a price for necessary support, these new “allies” require the addition of provisions that impose structures and procedures on agencies that hamper the ability of agencies to accomplish the purposes of laws.

Creative studies of agency design find support for this theory (Lewis 2003; Wood and Bohte 2004). Yet Wood and Bohte (2004, 192) refer to their measure of coalitional conflict, a dummy variable indicating the presence of conflict if the number of votes against a bill exceeded 11% of all votes cast, as “very coarse.” The variable’s coarseness is in part due to its reliance on legislators’ final positions. Conflict is assumed to be present if the 11% threshold was exceeded. However, compromise brings opponents of a law into the coalition voting in favor of it. Therefore, it could be the case—and the theory expects it to be the case—that opponents vote for bills authorizing their existence only after they get what they want, i.e., the inclusion of structures and procedures that debilitate the agency’s ability to make policy effectively. In such instances, there was clearly conflict resulting in compromise. However, if this compromise produced a roll call vote with fewer than 11% of “nay” votes, the measure would indicate that
there was no conflict. Similarly, Lewis (2003) employs a partisan indicator—the size of the minority party—to measure the need for compromise. Partisan conflict is an important part of coalition building. However, this variable cannot account for the importance of bipartisan coalitions, e.g., the conservative coalition of Republicans and Southern Democrats, to the passage of legislation during much of the 1946-1997 period Lewis examines (Schickler 2001). Additionally, neither measure can account for the important role that Moe (1989) attributes to interest group mobilization in necessitating compromise.

A fourth explanation for why lawmaking coalitions limit discretion is tied to post-legislative efforts to influence agencies. To further their future political and policy goals, lawmaking coalitions would like to influence agencies. Consequently, coalitions may be tempted to provide agencies with substantial discretion. Such discretion cedes agencies wide leeway to make future decisions, thereby “freeing” them to choose whatever policies the coalition forces on them. Unfortunately, coalitions cannot adopt such arrangements because of the “dangers of democracy” (Moe 1989, 275). Coalitions understand that elections allow their political opponents to win control over the lawmaking process—and by extension future access to agencies. Hence, if a coalition designs accessible agencies, it risks helping its opponents to obtain future policies that it would find abhorrent. In summary, “political uncertainty” leads even coalitions in firm control of the legislative process to employ agency design to limit agency authority (Moe 1989).

As with empirical investigation of the other theories, scholars assessing this perspective have employed the best available data and found support for the theory. Wood and Bohte (2004) measure uncertainty by accounting for turnover in Congress’s membership. With higher turnover, there may be greater uncertainty regarding what political forces will control access to
agencies in the near future. On the other hand, periods of high electoral turnover, such as Democratic gains in the 1930’s and 1960’s and Republican gains in the 1990’s, are often followed by prolonged stability. Why would coalitions automatically view high turnover as signaling uncertainty, then? Additionally, congressional turnover often occurs because of “midterm loss,” in which the President’s party loses seats. High turnover, then, may result in a situation in which a congressional coalition is forced to compromise with a hostile president. Certainly, this scenario held in the 104th Congress (1995-1996) after the Republican landslide in the 1994 midterm elections ushered control of Congress into Republican hands. As such, turnover may also measure the presence of compromise. Lewis (2003) also assesses the influence of uncertainty on agency design, finding that congressional majorities of the President’s party are more likely to protect agencies structurally from presidential influence when they face greater uncertainty. Lewis (2003) employs presidential approval as a measure of the certainty that coalitions have regarding their control over access to agencies. The measure does not account for calculations that congressional coalitions make about their own, rather than the President’s, durability, though. Finally, both Wood and Bohte’s (2004) and Lewis’s (2003) measures are premised on the assumption that the degree to which uncertainty leads coalitions to insulate agencies from, or expose them to, future influence is based on projections about the near future. However, Moe (1989) emphasizes that uncertainty plagues even coalitions with strangleholds over decision making that are virtually assured of retaining control in the near future. Neither measures of uncertainty, then, can account for this aspect of uncertainty and its influence on agency design.

In summary, theoretical and empirical scholarship on agency design has advanced the understanding of how lawmakers confront concerns about political control when faced with the
necessity of delegation, consistently showing that policy conflict between the legislative and executive branches leads to less discretion (Epstein and O’Halloran 1999; Huber and Shipan 2002; Potoski 1999; Lewis 2003; Wood and Bohte 2004). Additionally, research provides some evidence that political compromise and uncertainty about political control in the future leads to less discretion (Lewis 2003; Wood and Bohte 2004), although other research finds no association (Potoski 1999). In particular, scholars have developed creative measures of difficult to observe phenomena. These variables capture significant components of these phenomena. Yet, the measures are incomplete. To complement these studies, I study agency design from a perspective not previously employed to understand it: interviewing congressional committee staffers. Staffers observe lawmakers’ considerations about whether to write agency design provisions into law. Therefore, as argued below, staffers are well-situated to provide insight into why congressional coalitions use this policy tool. In tandem with prior research, information from interviews has the potential to strengthen the empirical foundation for existing theories.

**Congressional Committee Staffers and Agency Design**

Committees are the repositories of congressional expertise across policy jurisdictions and staffers “are among the top policy specialists in their fields” (Deering and Smith 1997, 162). With reference to the bureaucracy, staffers play a vital role in what Aberbach (1990, Ch. 6) terms the “Committee Intelligence System,” in which they maintain formal and informal contact with political appointees and bureaucrats within the civil service to monitor agencies. Staffers work on legislation daily and regularly interact with the interest groups (Fox and Hammond 1977) that Moe (1989) emphasizes are the source of much demand for agency design. Staffers are especially important to the development of legislation on complex policy matters (DeGregorio 1994) for which delegation is more likely (Epstein and O’Halloran 1999).
In sum, staffers are in excellent positions to assess why agency design is employed.\textsuperscript{2} For example, previous studies employ measures of policy disagreement between Congress and agencies that treat disagreement within a legislative session between Congress and all agencies as being identical. In contrast, a House/Senate Agriculture Committee staffer interacts with members of Congress and observes the coalition building process on behalf of legislation that delegates authority to, for example, the Department of Agriculture to set levels for crop subsidies and to the EPA to regulate pesticides.\textsuperscript{3} If the coalition delegating authority to the EPA disagrees more with it than the coalition delegating authority to the Department of Agriculture, the staffer can observe this fact and consider it when responding. To calibrate congressional-agency disagreement, prior studies use a variable indicating the presence of conflict between the legislature and the chief executive that assumes disagreement between Congress and each agency is identical. Staffers, though, can observe variance in disagreement between Congress and individual agencies. Therefore, interviewing staffers constitutes an effective way to assess the face validity of transaction cost theories predicting that legislative coalition-agency policy disagreement diminishes the volume of discretion agencies receive to make policy.

In this way, I also employ staffers’ responses to assess the face validity of the other theories discussed above. If this study arrives at similar conclusions about the influence of policy conflict, political compromise and political uncertainty on agency design as previous studies, then scholars should have increased confidence in the empirical bases for theories of design. Additionally, staffers’ access to decisions to employ agency design makes it possible that they will convey insights that prior research has not identified regarding why design is used as a political and policy tool.
In seeking interviews, to account for the possibility of different perspectives between House and Senate and majority (Republican) and minority (Democratic) staffers, I stratified the sample of staffers from whom I requested interviews. A broad range of House and Senate committees was identified to ensure that staffers’ responses were not the product of unusual conditions limited to a handful of jurisdictions. Potential respondents were identified using the Congressional Yellow Book, which contained information about the committees for which staffers worked and provided phone numbers. Democratic and Republican professional staff members from each committee were sent letters expressing interest in interviewing them on the general matter of why Congress limits the authority of agencies. These letters also explained that they would receive a phone call inquiring about scheduling an interview within a week of the letter’s date. Seven respondents were obtained from forty-two inquiries made in this way. A second round of contacts was initiated by sending a letter to the majority and minority staff directors of each committee, requesting an interview with them or an experienced member of their professional staff, and noting that they would receive a phone call within a week of the letter’s date to arrange an interview. Ten respondents were obtained in this manner. Finally, interviews were concluded by asking respondents whether they knew of anyone who would be able to provide insight on the questions they were asked. Using contact information from respondents, four additional respondents were obtained. The contacts were made and interviews conducted between Dec. 2000 and June 2001.

Table 1 provides information on the committees, chambers and parties with which staffers were affiliated. The sample over-represents the House moderately and is composed of roughly equal numbers of Republican and Democratic staffers. The appendix presents the statement with which each interview began, describing the idea of agency design as a policy tool.
available to lawmakers. This statement emphasized that I was interested in how Congress limited agency authority by imposing structural requirements and mandating procedures that agencies must follow. Therefore, staffers’ responses can be understood to refer to agency design rather than other means of control, such as oversight. The appendix also presents the questions posed to staffers. With the wording of each question, I encouraged staffers to elaborate, rather than provide “yes” or “no” answers, regarding why agency design is employed as a policy tool. Staffers’ were guaranteed anonymity and their responses were recorded by taking notes during the interviews and by elaborating on these notes immediately following the interviews.

(Insert Table 1)

In querying staffers, I asked general questions to investigate whether lawmaking coalitions impose structures and procedures on agencies in the ways predicted by theories of agency design. In doing so, I recognize that scholars with expertise on interviewing congressional elites emphasize that such respondents are best equipped to answer concrete questions about specific decisions or events and that such respondents may misunderstand, or not take seriously, general questions (Hall 1996, 261; Kingdon 1989, 13). However, staffers’ understanding of the questions, and whether they took them seriously, should be assessed based on the substance of their comments. As emphasized below, in response to the questions they were asked for this study, staffers’ responses involved rich context from their experiences that was narrowly tailored to the questions. These responses demonstrate that staffers understood the questions, took them seriously, and answered them with respect to their experiences.

The questions described circumstances in which congressional coalitions are thought to limit agency authority by employing agency design. To avoid biasing responses, I did not ask about the direction of relationships. Rather, I asked whether relationships existed. I also avoided
asking about the magnitude of relationships on the premise that it would be easier for staffers to assess whether a consideration influences decisions to impose design requirements on agencies than to evaluate how great of an effect exists. Therefore, staffers’ responses cannot pinpoint the magnitude of any relationship. Rather, the responses are assessments—by individuals well situated to make such assessments—about the relationships between variables that have been measured incompletely in prior empirical research. In this way, the staffers’ responses assess the face validity of the theories described above, complementing prior research.

Committee Staffers’ Views on Why Agency Design Is Employed

In describing why lawmakers to resort to agency design, no staffer asserted that any one factor always leads lawmakers to author provisions limiting agency discretion. Therefore, when a staffer indicated that a factor led lawmakers to employ such provisions, I coded his/her response as indicating that it was “sometimes” important. As shown in the appendix, to begin each interview, staffers were asked a general question about why agency design is employed. This question referenced no potential cause of design. Therefore, when staffers indicated that, for example, congressional-agency disagreement leads lawmaking coalitions to limit agency authority through design, they did so without having first been asked to think about the variable as a causal factor. If staffers did not highlight variables as important in response to the general question, they were asked the direct question about whether the variable influences the degree to which lawmaking coalitions limit agency authority through design. The first column of Table 2 displays the percentage of staffers indicating that each variable was “sometimes important” in response to the general question; the second column lists the percentage of staffers expressing this sentiment in response to the direct question; the third column sums these figures, indicating
the percentage of committee aides whose responses supported predictions about how these variables affect the level of agency design employed by lawmakers.

(Insert Table 2)

Overall, the staffers’ responses support transaction costs theories of discretion that expect lawmakers to limit agency authority as coalition-agency policy disagreement increases (Epstein and O’Halloran 1999; Huber and Shipan 2002). The third column of Table 2 shows that over three-quarters of the staffers indicated that such disagreement sometimes leads lawmakers to employ agency design provisions. Additionally, the comments of the staffers echo the logic of these theories.

Some respondents made general statements about why congressional-agency disagreement prompts lawmakers to resort to agency design, indicating that controls are employed when “we want something specific done and are not confident that the agency will do it,” as a Senate Banking, Housing and Urban Affairs staffer commented. This staffer explained that both the FRB and the Department of Treasury possess regulatory authority regarding what kind of activities financial holding companies can perform. However, the FRB is given more discretion, because the FRB is more trusted by Congress than Treasury. A Senate Commerce, Science, and Transportation Committee staffer made a similar comment, explaining, “The International Trade Administration probably has half of the restrictions that [OSHA] does because members of Congress disagree with OSHA more.” Likewise, a House Agriculture committee staffer stressed how difficult it is for Congress to compel agencies that have different policy priorities from Congress to pursue congressional priorities: “if the bureaucrats want to beat you, they’re going to beat you. They’re a hundred thousand or so of them and hundred of us.” Given this reality, s/he explained “[the Department of] Agriculture gets more freedom than
the Department of Education because [Congress] trusts Agriculture more than Education is trusted.” Hence, congressional coalitions saddle agencies with which they disagree with more provisions limiting their discretion. Also along these lines, a House Transportation and Infrastructure staffer noted that the level of discretion enjoyed within agencies can vary because congressional coalitions delegating authority trust one office within an agency more than another: “The Army Corp of Engineers—the level of comfort varies within it. Water Resources is given untethered [ability] to do legislative intent. Environmental, the regulatory part of the Clean Water Act—less generous.”

Other respondents provided detailed analysis of specific instances in which congressional coalitions circumscribed bureaucratic discretion over policy through agency design, citing congressional-agency disagreement as the reason. Consistent with the argument by Weingast and Moran (1983), a House Banking Committee staffer, remembering the battle over the Federal Trade Commission’s (FTC) regulatory actions in the late 1970’s, noted, “the FTC . . . became so despised that it’s been hamstrung to death.” Noting that “theoretically [the FTC] still has a lot of authority to regulate interstate commerce,” he explained that the “Moss-Magnuson Act subjected the FTC to the trial procedures of the [Administrative Procedures Act].” Before passage of this act, the FTC merely had to respond to stakeholders’ comments on its proposed regulations in written form in its final regulations; however, subsequently, it was required to hold public hearings. The staffer noted the change “ended the FTC’s ability to regulate at its will.”

A former House Banking staffer made a similar comment about the FTC: “At some point the staff at the FTC became all powerful. They acquired the reputation of being able to get the agenda that the staff wanted embraced independent of the commissioners. So Congress cracked down on it. Some folks think the same thing might happen with the [Securities and Exchange
Commission]. Over time problems with agencies build up and members eventually try to do something about it.” A Senate Health, Education, and Labor Committee staff member cited a similar example concerning the Food and Drug Administration’s (FDA) ability to control the approval process for new drugs. The staffer emphasized how the Food and Drug Modernization Act of 1997 circumscribed the authority given to the FDA by the Kefauver-Harris Drug Amendments of 1962. The 1962 amendments mandated for the first time that drug manufacturers had to prove that their products were effective to the FDA. Explaining that the 1962 statute mandated that “substantial scientific evidence” was needed, the Health, Education, and Labor staffer asserted that the statute gave the FDA “very broad” authority because it gave the agency the ability to claim that the high bar of evidence had not been reached and thereby hold up entry of new drugs into the marketplace. The staffer explained that a majority of both chambers eventually became dissatisfied by the delayed entry of such drugs into the marketplace, leading to the 1997 reform bill that made changes to the process of drug approval. The staffer concluded by noting that “changes were made to the process that limited the FDA’s authority—it depends on how much Congress trusted the agency. In this case, Congress felt that the FDA, if left to its own devices, would be too conservative in its administration of drug approval.” The first column of Table 2 provides particularly telling evidence regarding the importance of congressional coalition-agency policy disagreement for agency design provisions. Nearly half of the staffers indicated that such disagreement prompts design without even being prompted about it as a potential cause.

The general tenor of staffers’ responses also indicates support for theories stressing that coalitions employ design to make it harder for hostile presidents to influence agencies (Lewis 2003; Wood and Bohte 2004). Some staffers indicated that their experience advised against
finding such a relationship, a sentiment best stated by a Democratic Ways and Means Committee staffer who explained, “We didn’t sit around [when Reagan was in office as compared to Clinton] and say how we’ve got enemies down there and we better tie their shoe laces together.” However, 57.18% of the respondents noted that disagreement with the President leads coalitions to limit agency authority by adding agency design provisions to policy delegations. Slightly less than a fifth of the staffers broached this factor before they were asked about it directly, further reinforcing the theory that congressional-presidential disagreement prompts agency design.

Similarly, a House Energy and Commerce Committee staffer stated, “If you have confidence that they’re not going to [undermine] you, then you’ll be less specific. [The Democratic majority was] a lot more prescriptive in legislation under Reagan—[Representative Waxman [the Democratic Subcommittee Chair of the Energy and Commerce Committee’s Subcommittee on Health and the Environment] in healthcare was distrustful of how the administration would pursue implementation.” A House Agriculture Committee aide echoed his/her Energy and Commerce colleague: “During the 80’s Congress wrote very specific legislation on the food stamp program because the Reagan Agriculture Department was going out of its way to limit the program. In this circumstance, Congress wrote specific legislation and limited the agency through using all sorts of restrictive provisions to ensure that a hostile administration would not wreck a program that it supported.”

To be sure, that just over half of the respondents indicated that, in their experience, congressional-presidential conflict led to more provisions limiting agency authority is not overwhelming. Why some staffers indicated that such conflict was important while others did not was suggested by several aides, who emphasized that the salience of the policy under consideration to the President conditioned its effect. For example, a House Government Reform
aide observed that the President’s “position, if it is a high priority, certainly is a factor in how Congress may treat certain programs in terms of specificity,” explaining that “higher parameters limit the ability of the president to achieve his policy goals.” Therefore, agency design is employed “to deny the president the ability for a policy victory” in an area that he is actively engaging. This sentiment resonates in the response of a Senate Banking, Housing, and Urban Affairs staffer who explained, “Congress is less specific when there is a congruence in partisanship and when there’s a congruence in policy positions. Yes. There’s no standard rule—it depends on how important the issue is to the President, how important it is to Congress.”

One lesson emerging clearly from Table 2 regarding congressional-presidential policy disagreement is that divided government in and of itself does not foster the use of agency design. Of course, scholars do not argue that it does—merely that it is a proxy for a major, partisan, element of such conflict. These interviews suggest, though, that prior studies may underestimate the influence of inter-branch conflict on the use of agency design, since these studies cannot observe instances in which congressional-presidential conflict leads to design during unified government. As a House Education and the Workforce staffer explained, “... Bush has taken more of an activist role with respect to the federal government in education than Republicans would like—some of that will require legislation. Give authority to the Secretary of Education to decertify, to take away money, etc.? Some Republicans will not like that.” This perspective implies that conflict occurs during unified government and diminishes the freedom agencies receive, something that studies measuring conflict using divided government cannot observe.

The theory of political compromise also receives support from staffers. Table 2 demonstrates that over half of the staffers indicate that compromise sometimes leads coalitions to increase the burden of design provisions on agencies. However, compared to congressional-
agency and congressional-presidential disagreement, relatively few aides offered compromise as an explanation for such provisions in response to the general question.

The only factor that one House Energy and Commerce staffer identified as prompting agency design was compromise. S/he explained that provisions restricting agency discretion are added to placate members of Congress who are sympathetic to interest groups opposed to a law’s purpose. S/he explained that these provisions are employed to “limit the effectiveness of the policy.” Likewise, a House Banking and Financial Services staffer explained, “if an issue is very hot and there are different interests that are entrenched, then jurisdiction can be split between agencies and more generally constraints on legislation are likely to be imposed.” Similarly, a Senate Environment and Public Works Committee staffer recounted the details of negotiations during the creation of the “Brownfields Bill” considered during the 106th Congress (1999-2000). Explaining that the bill contained a provision disallowing the EPA from reopening a site unless new information about the presence of toxins became available, the staffer noted that some Republicans were worried that the EPA would have too much authority to reopen a site. Therefore, provisions were inserted into the legislation specifying that a new project manager examining existing data did not constitute new evidence. As a result, it was more difficult than it otherwise would have been for the EPA to reopen “Brownfields” sites.

Also telling, a Ways and Means Committee aide explained how the absence of compromise led to delegation free from agency design: “the [United States] Code is only 6 lines long with respect to psychiatric hospitals compared to 10 pages long for regular hospitals. Then Congress tells the agency it’s doing things wrong if it’s dissatisfied. So this occurred because a well funded [Political Action Committee (PAC)] won when no one was looking. Presumably, the agency is being responsive to the PAC. So this is an example of the PAC getting what it wants
through vague legislation.” Here, there was no need for compromise; therefore, no agency design provisions were attached to the delegation of authority.11

The short and vague statute governing psychiatric hospitals also has implications for understanding the influence of uncertainty about control over political institutions in the future on the use of agency design by lawmakers. Clearly, the group lobbying for vague statutory language governing psychiatric hospitals was unconcerned about enabling its opponents in the future. The absence of this consideration is largely supported by staffers’ assessments of the question asking about political uncertainty. As seen in Table 2, only 15.79% of respondents indicated that such considerations are sometimes important in prompting the use of design and, as is seen in first column of the table, no staffer thought of political uncertainty in response to the general question.

What is more, many staffers were contemptuous of the notion. For example, a Ways and Means Committee staffer, after expressing confusion at the question, and pressing for clarification of what exactly the connection might be, exclaimed, “You’re playing chess and most of these guys are playing checkers. Most of these guys just want to get through the next four years!” He went on to note, “The idea makes sense but I’ve never heard that type of thinking in closed caucuses.” A House Banking and Financial Services Committee staff member agreed. Again, after pressing for and receiving clarification, s/he stated that the idea made sense and was clever but that “I can’t think that it does.”12 A Senate Banking, Housing, and Urban Affairs Committee staff member also agreed that the idea makes sense but said, “I can’t think of an instance of this occurring.” The House Agriculture Committee staffer responded, “People don’t think about things changing. We live in the here and now. Members focus on the present and it’s difficult to foresee what’s going to happen. More of what people are going to take into
account is what they can do now.” The Senate Environment and Public Works Committee staffer reinforced the point, stating, “When we do bills, regulations have to come out within the next twelve to twenty-four months, so this is guided more by what will be done than by who is doing it.”

Yet, several staffers noted that uncertainty about the political control of governing institutions plays a role in shaping the volume of discretion agencies receive. A House Banking and Financial Services staffer stressed that lawmakers sometimes are concerned about the composition of a future governing coalition as the next election nears. S/he noted: “Some of that goes on. That kind of thing, you’ll find that people don’t worry much for the first year of a Congress—but then they start worrying about it. . . There’s not a continuing ongoing effort to do so.” Although the staffer did not convey that lawmakers are concerned with the composition of governing coalitions well into the future (Moe 1989), his/her comment is consistent with the findings of Lewis (2003) and Wood and Bohte (2004) that the danger of electoral turnover in the short-term leads to diminished executive branch discretion. Additionally, a Senate Commerce, Science, and Transportation staffer explained, “this can be seen when Congress does things like use sunset provisions—it does not want to give the presidency power since the President may be different in the future.”

In summary, the comments discussed above recount staffers’ responses indicating that either no relationship exists between the independent variables and agency design or revealing that, consistent with the one-tailed hypotheses described above, there is a positive association between these variables and the volume of design. However, an unexpected finding emerges from these interviews. A full quarter of the staffers who answered the question asking about the relationship between compromise and agency design responded that there is a negative
relationship between compromise and design. That is, higher levels of conflict during consideration of legislation, necessitating compromise, can lead to more agency freedom.

A Ways and Means Committee staffer noted such an instance in describing congressional deliberation on the terms under which Medicare would reimburse physicians for colon cancer tests during consideration of the Balanced Budget Act of 1987:

. . . someone decided it would be a good idea. . . Get Medicare to pay for tests for colon cancer because this . . . would do good. But what type of tests to reimburse for? Specialists wanted reimbursement for a complicated procedure—colonscopic enema. . . but not for an easier less invasive type of test, the barium enema, that could be done by anyone and the generalists wanted reimbursement for the safer, easier, less invasive test that could be done by any doctor. Fortunately this one has slipped a little but I still remember the horror of the lobbying. There was a fundraiser where both sides were in the room—very uncomfortable. It was one $600 an hour K Street lobbying firm against another, both of whom the Democrats liked. So they just punted it to the Secretary . . . and said help us Madame Secretary, passed a very vague statute and let [the agency] sort it out.

A Senate Health, Education, and Labor Committee staffer made the identical point with a different example, the Nutrition Labeling and Education Act of 1990, and used the same word as the Ways and Means Committee staff member did to describe the phenomenon, “punted.”

Discussing food labeling, the staffer explained, “[The bill] . . . provided for regulations on health claims made by producers of dietary supplements. . . But what requirements was the question. Hatch wanted . . . the process for health claims on dietary supplements to be relatively easy for
producers to meet. Whereas folks like Kennedy, Meteznbaum, and Waxman wanted tougher standards. So they just punted . . . they let the FDA figure it out."

Conclusions and Discussion

Empirically, staffers’ responses provide leverage on a question that previous studies could not fully answer: Does legislative-agency conflict, legislative-executive conflict or both lead lawmaking coalitions to resort to agency design to protect their political and policy priorities? After all, there exists no precise measure of policy disagreement between legislatures and agencies. Often though, when precise measures of a phenomenon are not available, a proxy variable that is available, and is correlated with the phenomenon, is used as a substitute. Given this correlation, researchers can use the proxy variable to assess whether a relationship exists between the phenomenon and some dependent variable of interest. Researchers have followed this strategy in assessing the effects of legislative-chief executive and legislative-agency disagreement on the degree to which legislative coalitions impose design provisions on agencies. In this case, though, all of the available proxies are correlated with both legislative-chief executive and legislative-agency disagreement. Some scholars use proxy variables, e.g., divided government, to measure legislative-chief executive disagreement; other scholars use the same proxy variables to measure legislative-agency disagreement. Therefore, prior research can not sort out whether disagreement with agencies or chief executives or both leads legislative coalitions to employ agency design.

At present, then, only by talking with people well-positioned to observe the difference between the two types of disagreement, and know whether or not each influences agency design, can one assess these explanations independently. Along these lines, staffers’ responses to the questions itemized in the appendix allow for the assessment of both explanations simultaneously
with respect to policy-making by legislative coalitions in the U.S. Congress. The responses provide support for the face validity of both perspectives, enhancing the empirical foundation for transaction costs theories stressing that legislative-agency (Epstein and O’Halloran 1999; Huber and Shipan 2002) and legislative-chief executive (Lewis 2003; Wood and Bohte 2004) diminish discretion provided in laws. However, a higher percentage of staffers indicated that congressional-agency conflict sometimes leads to the application of agency design provisions than congressional-presidential conflict, suggesting that the former variable leads congressional coalitions to resort to design more frequently than the latter.

Staffers’ responses also yield new empirical leverage on other theories. In particular, the responses cast doubt on the theory that lawmakers employ agency design due to long term concerns about losing control of the policy-making process. The variables measuring uncertainty employed by prior studies (Lewis 2003; Wood and Bohte 2004) measure the prospects for near-term electoral change, whereas Moe (1989) emphasizes that lawmaking majorities consider the possibility of losing control of the policy process not merely in the next election but over the long haul. No variables measuring political uncertainty in prior studies can account for such long-term calculations. Therefore, staffers’ responses amount to an assessment of this theory outside the grasp of prior research. Consistent with Lewis (2003) and Wood and Bohte (2004), a few staffers noted that concern among lawmakers that they may lose majority status in the near future affected thinking about how much to constrain agencies. Yet, no staffer indicated that lawmakers look beyond the immediate electoral horizon.

From the standpoint of Congress’s capacity to make effective policies, this finding is promising. It is no shock that, when opponents of a law force its proponents to compromise, the changes to the law hinder the ability of agencies to make policy effectively. After all, the
opponents opposed the policy. Of course they wanted to undermine it. However, if advocates of policy goals consistently sabotage the capacity of agencies to achieve those goals out of a fear that their opponents will come to power in the future, then the prospects for effective policy-making in era when delegation is often necessary are truly dismal. That, on the whole, staffers did not express that such friendly sabotage occurs, and many staffers were contemptuous of the notion, is a hopeful finding concerning the prospects for effective policy-making.

Staffers’ responses also have implications for understanding how political compromise should be measured by scholars. Recent studies measure the need to compromise using variables that indicate whether the size of the minority party (Lewis 2003) and whether the percentage of votes against a bill in the legislature reached a threshold (Wood and Bohte 2004). These measures assume that compromise stems from opposition by legislative coalitions. Yet, staffers’ comments also emphasize that interest groups are catalysts for compromise leading to greater use of agency design. These comments are consistent with Moe’s (1989) emphasis on interest groups as the impetus for design. To be sure, interest groups will find it easier to undermine a policy using design when there is strong legislative opposition, e.g., in the form of a sizable minority party or a sizeable coalition opposed to a policy. Nevertheless, without interest group opposition to provisions, a sizeable minority party may have no reason to demand the attachment of provisions that limit agency discretion. Therefore, staffers’ comments suggest that models seeking to account for the role of compromise in prompting agency design would do well to measure the presence of interest group opposition to policies embodied in legislation.

Notwithstanding support for perspectives on why compromise leads to the limitation of agency discretion through design, staffers also indicated that strong opposition can result in agencies receiving greater leeway than they otherwise would to make policy. Why does
compromise sometimes diminish the use of design, allowing agencies to make policy free from constraints? One explanation suggested by the staffers involves lawmakers’ desire to claim credit for legislative accomplishments (Mayhew 1974). In the cases cited, members were on the verge of passing legislation that would have allowed them to claim credit for improving public health. Yet, disputes threatened enactment, and cast doubt on whether members’ would be able to advertise this accomplishment to constituents. Assuming that members’ priorities lay with communicating the perception of effectiveness to constituents, “punting” the specific details to the bureaucracy offered members a solution. Members were able to pass a bill—and hence claim credit for pursuing a popular outcome—and avoid making a difficult choice that would have alienated supporters. In such circumstances—when opposition based on policy details threatens the ability to pass legislation that is a credit claiming vehicle—compromise may lead to delegation free from agency design. However, when members, and the constituencies they represent, care about policy, the presence of substantial political opposition may lead to additional agency design provisions as a condition for enactment. Of course, this explanation—stemming from staffers’ insights—for why compromise sometimes leads to delegation free from design provisions is preliminary. A goal of future research should be to flesh out the reasons for this conditional relationship.

Similarly, staffers’ comments suggest one reason why congressional-presidential policy disagreement sometimes leads to agency design and in other cases does not: the influence of this variable is conditional on the salience that the President attaches to the issue under consideration. When the President’s attention is not fixed on an issue, congressional coalitions have no reason to hedge against presidential interference by designing provisions that constrain the bureaucracy. However, when a policy area is an important part of the President’s agenda, the coalition should
expect presidential participation in agencies’ decisions. To the degree that the coalition disagrees with the President, then, it has incentive to design the structure of agencies, and the procedures that agencies must follow, in a way that forestalls presidential influence.

These insights about the conditional influence of compromise and congressional-presidential policy conflict on agency design are in keeping with recent formal research on delegation. In particular, Volden (2002) theorizes that the ability of coalitions to limit agency discretion is conditional on the presence of an executive veto; when the executive possesses a veto, s/he is well-situated to negotiate with the legislature to reduce the volume of constraints on agencies. Likewise, Huber and Shipan (2002) theorize and show that policy conflict between the legislature and the executive affects the level of discretion agencies receive conditionally: only when the legislature possesses sufficient expertise to make policies can it reduce bureaucratic discretion given a distrust of the executive; when it does not possess technical knowledge necessary to write policy, it must delegate substantial authority to the bureaucracy even when it disagrees with the executive. Along these lines, Gailmard (2002) theorizes that legislative-executive policy conflict leads legislatures to develop policy expertise; once legislatures possess expertise, they provide less discretion to agencies. Yet, the conditional effects identified in this study were not uncovered by prior research. As such, in addition to allowing for empirical assessments outside of the measurement reach of prior studies, staffers’ provided new insights on the understanding of the political and policy tool of agency design.
As such, interviews fulfill a role similar to the case studies of Moe (1989) and Lewis (2003). Interviews, though, provide insight into the motivations of members that cannot come from tracing events of a case using documents and journalistic accounts and noting that they are consistent with a theory.

Staffers’ are not only well-positioned to observe the considerations made about whether to employ agency design, they also possess expertise concerning how to write legislation to achieve specific policy ends and win enactment. Leaving committee chairpersons and other particularly experienced members aside, staffers possess greater expertise in this area than most members of Congress. This combination of access and expertise makes staffers an excellent source of insight about why agency design is employed.

One committee staff member interviewed for this study emphasized that, over the same time period, the EPA was distrusted much more than Agriculture.

Eight House and eight Senate committees were identified. In the House, staff members from the “Agriculture,” “Appropriations,” “Banking and Financial Services,” “Education and the Workforce,” “Judiciary,” “Resources,” “Transportation and Infrastructure,” and “Ways and Means” committees were contacted. In the Senate, staff members from the “Agriculture, Nutrition and Forestry,” “Appropriations,” “Banking, Housing and Urban Affairs,” “Commerce, Science and Transportation,” “Energy and Natural Resources,” “Environment and Public Works,” “Finance,” and “Health, Education, Labor and Pensions” committees were contacted. Three of the respondents interviewed for the study were former staffers.
Although obtaining respondents in such a “snowball-like” fashion can potentially bias results, only less than a fifth of respondents were obtained in this way. Given that these respondents possessed particular expertise on issues of institutional design, according to the respondents who recommended them, this trade off seemed justified.

Initially, I asked 22 (52.38%) Republican and 20 (47.62%) Democratic staffers for interviews; in total, I obtained interviews with 10 (47.62%) Republicans and 11 (52.38%) Democrats. I asked 25 House (59.52%) and 17 (40.48%) Senate staffers for interviews; in total, I obtained interviews with 14 House (66.7%) and 7 Senate (33.3%) aides.

The preliminary statement explains that provisions imposing structures and procedures are assumed to have a policy role. The purpose of the statement is to encourage staffers to think about provisions as policy tools—as opposed to tools that ensure procedural fairness. In doing so, the statement does not contain language that should predispose staffers to answer questions in one way or another.

In the case of the questions asking about political compromise and uncertainty about who will control political institutions in the future, the questions required slightly more elaboration. Again, though, the questions merely detailed the circumstances that the theories identify as prompting agency design without suggesting what the nature of the relationship might be.

This comment, better than any other, demonstrates the utility of interviews. If a divided government variable, or a count of the number of vetoes, cannot measure differences in congressional-agency conflict within a legislative session, then these variables certainly cannot measure differences in this variable across offices within agencies within a legislative session.

The APA does not require that all agencies hold public hearings. Rather, 5 U.S.C. 553, the section of the APA mandating agencies’ rulemaking procedures, stipulates that only when a
statute requires that an agency hold a hearing must one occur. In such cases, 5 U.S.C 556 and 5 U.S.C 557 govern the rulemaking process. These sections specify that the proponent of a rule, e.g., the FTC, has “the burden of proof” (5 U.S.C. 556d). Parties that oppose the agency’s position are empowered to cross-examine witnesses (5 U.S.C. 556d), submit proposed findings, dispute agency findings, and propose exceptions to agency decisions—the agency must consider and respond to (5 U.S.C. 557c) parties. Thus, in requiring public hearings, Congress forced the FTC to undergo substantially higher procedural hurdles before promulgating a rule.

11 This comment also supports the face validity of using the length of statutes to measure the volume of discretion provided to agencies, a strategy employed by Huber and Shipan 2002.

12 Although some staffers did not immediately understand this question, the conversational nature of the interviews allowed me to elaborate on the concept, clarifying it for staffers. This was the only question for which elaboration was necessary and the elaboration was effective in that staffers were able to respond to the question in light of their experiences.

13 I argue that staffers’ ability to relate their experiences to the questions demonstrates that they understood the questions. With respect to divided government and political uncertainty, though, the staffers generally did not communicate that experiences were consistent with the hypotheses that these factors influence the use of agency design. One reason for these findings is that staffers’ experiences are not consistent with these hypotheses. Another perspective might be that staffers’ experiences are consistent with the hypotheses—but that they could not relate these two questions (about divided government and political uncertainty) to their experiences. Therefore, readers may wish to interpret the divided government and political uncertainty findings more warily than the other findings.
REFERENCES


Table 1. Characteristics of Committee Staff Members

<table>
<thead>
<tr>
<th>Senate Committee Staff</th>
<th>Democrats</th>
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<tbody>
<tr>
<td>Republicans</td>
<td>Democrats</td>
</tr>
<tr>
<td>Appropriations</td>
<td>Banking, Housing and Urban Affairs</td>
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<tr>
<td>Banking, Housing and Urban Affairs</td>
<td>Health, Education and Labor</td>
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<tr>
<td>Commerce, Science, and Transportation Finance</td>
<td>Environment and Public Works</td>
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<tr>
<td>House of Representatives Committee Staff</td>
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</tr>
<tr>
<td>Republicans</td>
<td>Democrats</td>
</tr>
<tr>
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<td>Transportation and Infrastructure</td>
<td>Government Reform (2)</td>
</tr>
<tr>
<td></td>
<td>Ways and Means</td>
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</tbody>
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**NOTE**: “(2)” indicates that two staffers from the relevant party were interviewed from the committee.
Table 2. Staffers’ Responding that Variables Are “Sometimes Important” in Prompting the Use of Agency Design in Response to the General and Direct Questions

<table>
<thead>
<tr>
<th>Variable</th>
<th>General Question</th>
<th>Direct Question</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Inter-Institutional Disagreement</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Disagreement with Agencies</td>
<td>47.62%</td>
<td>28.57%</td>
<td>76.19%</td>
</tr>
<tr>
<td>Disagreement with President</td>
<td>19.05</td>
<td>38.13</td>
<td>57.18</td>
</tr>
<tr>
<td>Divided Government</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td><strong>Coalition Dynamics</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Political Compromise</td>
<td>9.52</td>
<td>45.48</td>
<td>55.00</td>
</tr>
<tr>
<td>Political Uncertainty</td>
<td>0</td>
<td>15.79</td>
<td>15.79</td>
</tr>
</tbody>
</table>

**NOTE**: Staffers were asked the direct question about the importance of a variable to the use of agency design only when they did not discuss the variable in response to the general question. Due to time limitations, 20 and 19 staffers (rather than all 21) were asked the direct question about the importance of political compromise and political uncertainty respectively.
Appendix: Interviewing Congressional Committee Staff Members

_Preliminary Statement:_

First, let me talk briefly about what I’m interested in learning about. One observation that political scientists who study Congress make is that Congress includes provisions in legislation that constrain the way executive agencies make policy. For example, in 1990, Congress ordered halon removed from airplanes and told the EPA to see to it but instead of giving the EPA sole authority over the job ordered the FAA to sign off on the solution. In 1996, Congress gave the FCC authority to determine the prices for certain services but required congressional notification first.

So there’s this pattern of Congress recognizing that it needs agencies to perform certain tasks but then, in the legislation that authorizes agencies to perform these tasks, pulling back and limiting what the agencies can do. Political scientists have referred to this practice as oversight that occurs before agencies can make decisions.

So, sometimes Congress includes provisions in legislation that delegates authority to agencies that then limits the latitude of the agencies to make policy. And sometimes Congress just lets agencies do what they want. It’s my assumption, and please tell me if I’m wrong, that the legislative coalition that passes legislation uses such provisions to make sure that policy decisions are not made in a way that differs from what the coalition wants. And what I’m interested in knowing is the following:

_Questions:_

(1) What circumstances lead Congress to use these provisions in some cases but not in others?
(2) Do considerations about the agency’s position relative to Congress’s on legislation affect the use of these provisions? How so?

(3) Do considerations about the president’s position relative to Congress’s on legislation affect the use of these provisions? How so?

(4) Do you feel that the presence of divided government itself affects the use of these provisions? How so?

(5) One feature of democratic government is that the party, or the governing coalition, in control of government at one point in time may lose control after the next election. Is it your perception that this uncertainty plays a role in the use of such provisions? How?

(6) One distinctive characteristic of the legislative process in the United States is that it is often difficult to pass legislation; more difficult, at least, than in most other Western democracies. Do you feel that the amount of political opposition that a bill faces affects the use of such provisions? How so?

(7) Is there anything that I did not mention, or that has not come up, that you consider particularly important to this issue?
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