THE UNIVERSITY OF CHICAGO

CONTROLLING ADMINISTRATIVE POWER UNDER SYSTEMS OF SEPARATION OF POWERS

A DISSERTATION SUBMITTED TO
THE FACULTY OF THE LAW SCHOOL
IN CANDIDACY FOR THE DEGREE OF
DOCTOR OF JURISPRUDENCE

BY

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CHICAGO, ILLINOIS

JUNE 2025

Acknowledgements

My time at the University of Chicago has been one of the most enriching periods of my life. I came a relatively young common-law academic with thoughts only of legal doctrine, and I leave with a perspective that is perhaps better aligned with the 'Chicago style'. For this I have many to thank. Primarily is Professor Tom Ginsburg. He has been an unrelenting support during my time at the law school – always available to chat about research, career goals and much besides. Professor Susan Stokes played as instrumental a role while I was a student in the Political Science department and this thesis has her to thank as well. Professor William Howell, Professor Michael Albertus, Professor Zhaotian Luo and Professor Monika Nalepa were all of tremendous help, especially in broadening my academic world and encouraging an interloper such as myself to learn the tools of empirical research and formal theory. Professor Jennifer Nou was also a fantastic aid in this project, especially in its early stages. Professor Brian Leiter has also been a tremendous inspiration throughout my time at UChicago and was always accommodating of my curiosity of the Philosophy of Law, ready to suggest readings that would add depth to my understanding of some of the arguments made in this dissertation. Finally, Justin Swinsick has shepherded this project over the line with incredible patience and for that I thank him.

Ultimately, I have a great deal of thanks owed to the people who have ensured I had the opportunity to pursue my academic goals. Obviously there are my parents, Helieh and Martin Konstant. They couldn't have done more for me. My father passed away in 2024 and was not able to see the end of this journey, but he was as responsible as anyone for it. My wife, Shayda Vance, is instrumental in everything I do including raising our beautiful children, Elham and Rohan (both of whom were born while this dissertation was being written).

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Chapter 1: Introduction

The aim of this dissertation is to explain why presidential systems have begun to look similar to parliamentary systems with respect to the relative authority of their political executives. In particular, the study aims to explain how the political executive has assumed greater control over the administrative state. The question is set within the broader debate about the relevance of constitutional regime type in constitutional design. Essentially, is this choice a meaningful one to make or are design outcomes dictated by other factors. Scholarship to this point has almost universally established that the political executive, whether in presidential or parliamentary systems, has expanded in power. Putting aside the question of whether both systems produce political executives of similar levels of power, the fact that they have adopted the same trajectory challenges what we should expect each regime type to produce.

This convergence arguably has occurred because presidents have become more powerful than a system of separated powers with checks and balances would suggest they should. One important way in which presidents have become more powerful is through increased control over the bureaucracy. Here again we should expect control features to look different based on the two regime types. The design of presidential systems means that because legislatures create the administrative state and maintain an interest in its functioning (given the political accountability members of the legislature possess), control over the bureaucracy is not by design completely in the hands of the political executive. The allocation of control is uncertain enough to engender a great deal of contestation between branches of government. The result is that the administrative state was and is treated as the prize in this contest. However, this contest has had the political executive win more often than not and as control over the administrative grows, the presidency gains in power. As a result, the specific question for this study is how the political executive's

control over the bureaucracy has grown. In particular, using the United States as the paradigmatic case of a presidential system characterized by separation of powers, this study aims to explore the reasons for the expansion of presidential authority over the administrative state.

Chapter 2 begins with establishing the expected institutional design that regime types should produce with respect to control over the bureaucracy. Implicit in this question is a challenge to the conventional idea that constitutional regime type matters in dictating the functioning of a governing system. Should administrative control manifest in a manner predicted by regime type, then regime type is a meaningful choice. However, if we see deviation from what we should expect based on the incentives generated by regime type, then the choice between presidential and parliamentary systems carries less meaning. Assuming that the overwhelming consensus that such deviation has occurred is correct, the only conclusion is that more than the incentives generated by regime type are at play in determining which arm of government comes to control the administrative state.

The mechanisms used to control the administrative state in presidential systems are laid out in chapter 3. The chapter employs a rational choice perspective to understand the methods by which the political executive can exercise control over the administrative state. Along with the toolkit of control, the chapter outlines a theoretical model which explores the political executive's incentives for expanding these means of control beyond their legal bounds in an effort to control the bureaucracy. In addition, in order to make the credible claim that what we see is in fact constitutional convergence, the chapter lays out the incentives that exist to maintain successful claims of extra-legal authority. In other words, the reasons for the persistence of expanded authority.

If the mechanisms of control may be thought of as the levers that are used to control the machinery of government. Administrative reform is an opportunity to re-design the machine altogether in a manner more conducive to control by the political executive. Chapter 4 tackles the process of large scale administrative reform. This chapter seeks to explain how this power was obtained by the political executive as opposed to the legislature whose task it was to design the administrative state in the first place. In an effort to do so, the chapter outlines a game theoretic model which illustrates the reasons that a legislature would allow the executive to take the lead in administrative reform.

All the changes that the political executive is permitted to make fundamentally rebalance the separation of powers and the checks and balances with which presidential systems are ordinarily equipped. Essentially, such a change would constitute a fundamental constitutional change – and such language is often used to describe it. The question is then: how does the emergence of extra-constitutional authority take place? Chapter 5 begins to deal with this problem by first characterizing the nature of the actions taken by the political executive when expanding its authority. It then establishes that there exists the scope, and the separation of powers creates the incentive for, a contest of constitutional claims between the political branches of government over expanded authority, especially with respect to control over the administrative state. The chapter then explores the conventional arguments that attempt to describe how these contests are resolved: the judicial model or persuasion. It then establishes that neither is adequate for such a task. In fact, the case of the judiciary, judicial minimalism, being a popular orientation for constitutional courts to adopt, actually encourages more aggressive executive expansion of authority. As a result, we are left in need of a description of the manner in which these contests of constitutional claims are resolved.

Chapter 6 develops such a theoretical model. The model describes the conditions under which the shift in the balance of the Madisonian separation of powers occurs. The theory seeks to understand constitutional change as a bargain between political branches of government occurring in the view of the citizen.

Chapter 7 is the appendix in which I lay out a formal model described in chapter 6 when discussing the doctrinal features of the judiciary that prevent it from acting as a constraint on the political executive's extra-constitutional claims. In fact, a counter intuitive result of the model is that doctrines and norms that judiciaries typically adopt may help in encouraging the political executive to be more aggressive in making extra-constitutional claims.

Chapter 2: Regime Type and the Administrative State

I. Introduction

The argument presented in this dissertation is that despite the different regime types that states may adopt and the theoretical expectations of the constraints that each regime type may place on the executive's control of the bureaucracy, the way in which chief executives exercise control over their administrative states has converged under each regime type and towards a similar goal: grant the head of the executive more control. That control has developed in a remarkably similar fashion based on similar inherent qualities of political leadership in different regime types constitutes the puzzle with which this dissertation is chiefly concerned.

The bedrock assumption upon which this puzzle rests is that regime types, in theory and practice, are expected to produce distinct outcomes for executive power in relation to the administrative state. That despite this difference, the degree of authority that the executive possesses over the administrative state appears similar. If such convergence has actually occurred, there is strong reason to believe that the determinants of executive authority and control may have less to do with regime type and the differences between them, than with lower-level institutional variables. The first leg of this argument, therefore, and the subject of this chapter, is to understand the regime types and their differences with respect to bureaucratic control. What needs to be established are the expected consequences of regime type on the authority and control of the administrative state.

Regime type features heavily as a discreet choice in constitutional design. The belief is that by adopting a regime type, one is importing a package of institutional features that impacts

functioning, and in some cases even longevity, of the democratic system.[1] In justifying this belief, the world is often categorized into two pure forms of democratic regimes, presidential and parliamentary, and a third category of systems that comprise a hybrid of the two or something distinct altogether. Their distinctions are typically based on the electoral rules that determine how parts of government are formed. These distinctions are thought to give rise to differences in incentives across institutions in the different regime types with the result that each regime type should perform differently along different dimensions.

The dimension of immediate importance to this dissertation is the degree of control that the executive may have over the administrative state. It is reasonable to assume that regime-type would create some variance here. In both parliamentary and presidential systems, delegation from an assembly to an expert agency is the modern method of governance. In both systems, an elected assembly is able to *ex-ante* design the administrative state through its delegation of policy implementation to administrative agencies as well as outlining procedural requirements.[2] Likewise, in both systems the executive is thought to be responsible for the implementation of laws, including those which delegate decision-making authority to administrative agencies. The question arises whether in both systems the assembly and/or courts plays any meaningful role *ex post* in direct control of the administrative state.[3]

It may be argued that regime type should result in a difference of outcome as they differ in important respects. In a parliamentary system two ideas are central to their operation:

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[1] Juan Linz, The Perils of Presidentialism, Journal of Democracy (1990) 51; Matthew Shugart and John Carey, *Presidents and Assemblies: Constitutional Design and Electoral Dynamics* (1992).
[2] Paul Craig, Comparative Administrative Law and Political Structure, Oxford Journal of Legal Studies (2017) 946.
[3] The argument in some jurisdictions is defined as whether the constitution commits to unitary structure of the executive or not. Once created, is the bureaucracy under the sole direction of the head of government.

parliamentary supremacy and the notion of unified powers. Conventional understanding of the implication of these two ideas is that the legislature is in ultimate control of the government and the policymaking process. The relationship between branches is not as clear in a presidential system. The legislature cannot as easily remove the independently elected executive. The executive itself possesses a popular legitimacy which may justify a certain level of independent *ex-post* control. Furthermore, some executive control mechanisms come baked into the presidential system. For instance, the ability to name and direct the composition of government could be reasonably interpreted to be the power to appoint members of the executive, at the very least, the cabinet or senior administrators.[4] While the details of the extent of power or oversight of each arm of government are certainly debated within each jurisdiction, it seems clear that the judiciary and legislature play some constitutional role in the *ex-post* oversight or control of the bureaucracy.

Based on these distinctions and with the help of theoretical developments, mostly in political science, this chapter offers the view that regime-types produce different bureaucratic structures or patterns of control. Presidential systems set up a contest between arms of government where compromise is the only possible outcome. This would be no different with respect to the administrative state where each arm of government would have the incentive to micromanage its operation. Parliamentary systems on the other hand allow for the prime minister, along with cabinet ministers, to control, almost exclusively, the administrative state under the direction of the parliament. The result is two different expectations for bureaucratic control. The purpose and plan of this chapter is simply to understand the role of regime types in

[4] However, the notion presidents have the power to direct the 'composition' of government seems somewhat far-fetched. As will be seen, the formal power to change the structure of government does differ somewhat.

theory, their implications for the administrative state and the type of bureaucratic structure that we should expect from each type. The final section will introduce, as the stepping-stone to the rest of the dissertation, the challenge to conventional conceptions of regime types presented by unilateral action taken by prime ministers and presidents.

II. Regime Type Typology

To begin, there is broad consensus that there are two pure forms of government regimes, presidential and parliamentary, as well as the aforementioned third category of governments that possess features of both in some hybrid form that has been labeled either mixed, semipresidential or parliamentary-presidential. Each category is thought to represent a distinct bundle of constitutional rules that produce unique methods of electing, maintaining and changing a government.

The emergence of a third category can be explained by the recent concern that the variation in the bundle of rules across countries, as well as the emergence of novel constitutional designs in more recent constitutions, has made the process of categorization difficult. Some have cured this by expanding the category of mixed systems. For instance, Elgie, following Duverger's pioneering work, has perhaps made the most sustained case for the establishment of a third category, semi-presidential systems, that have become far more common among democracies established after the 90s.[5] Carey and Shugart have likewise worked to create nuanced categories that they believe more accurately captures the variation among presidential systems especially as exceptions to the pure models.[6] The larger this third category becomes and the more stable their definitional features, the more strain it places on the usefulness of the pure

[5] Robert Elgie, *Semi-Presidentialism – Subtypes and Democratic Performance*, OUP (2011).
[6] Carey and Shugart *supra* at note 1.

models of presidential and presidential. Nevertheless, the pure models remain useful analytically as they represent two poles of regime types. They are in theory the two ends of the continuum with mixed systems occupying a place somewhere in between. If one wants to assess the degree of convergence across democratic constitutional systems, the most striking assessment will be gleaned from comparing the most different types.

What follows in the next section are perhaps the least objectionable definitions that one may find in the literature. Broad enough that they should not attract too much criticism for all the countries they may wrongly exclude or include, and specific enough that you can still tell them apart. The purpose of articulating them is simply to set the benchmark of each of these systems against which the hope is to measure the movement towards a uniform model of executive dominance. However, what will become apparent is that these definitions do not include any description of the control structure of the administrative state. Instead, much of the scholarship on regime types focuses on the set of constitutional powers that govern the interaction between arms of government and their electoral origins. The bureaucracy has only relatively recently grown to a size that poses a challenge to now anachronistic understandings of constitutional structure. This has meant that regime types are not normally associated with specific bureaucratic control.

a. Regime Types

The hallmarks of a parliamentary system are that the executive is selected by the assembly or parliament out of its members. Furthermore, the executive remains in office subject to the legislature's confidence. Under parliamentarianism, only the assembly is elected by popular vote, with the chief executive voted or appointed out of the assembly. The requirement of parliamentary confidence means that the executive's survival is similarly tied to the

confidence of a parliamentary majority. In most parliamentary systems, the dependence is mutual, and the executive may dissolve the assembly and call for new elections prior to the expiration of its maximum constitutional period. Thus, parliamentarianism is often distinguished from presidentialism on the grounds that powers are fused rather than separated.

The animating principle of a parliamentary system is the supremacy of parliament and collective responsibility. In brief, ultimate authority is placed in the legislative assembly. They then delegate authority to a cabinet and prime minister who in turn delegate authority to department officials and the civil service. The structure is stitched together with a principle of collective responsibility which requires that all ministers publicly take responsibility for decisions, are responsible collectively to parliament and rightly demand the loyalty of civil servants.

The hallmarks of a presidential system are that the chief executive is popularly elected and the terms of the chief executive and of the assembly are fixed, and not subject to mutual confidence. Furthermore, the elected executive names and directs the composition of government and has a certain degree of constitutionally granted lawmaking authority. Under a presidential system the origins of the two branches of government, the assembly and the presidency, are electorally distinct, with the chief executive elected separately from the assembly, for a fixed term. In principle, the president wields substantial, though not complete, authority over the executive branch and over the lawmaking process.

Presidential systems also come packaged with a system or principle of separation of powers.[7] The original manifestation of the separation of powers as a tripartite administration

[7] Shugart and Carey *supra* at note 1.

separation of branches breaks governing up into an executive, legislative and judicial arm.[8] While mostly normative in content[9], such systems exhibit certain patterns of operation. Perhaps the starkest is that, unlike in a parliamentary system, the executive and legislative powers are separated. Furthermore, the courts' role and power, through judicial review, plays a greater part in the checks and balances system produced in such regimes.

Given the variation of government types/institutional designs and more recent innovations, a third category of regime types has emerged. While it has operated as a catch-all category of hybrid regimes, certain patterns have evolved. The most prominent form, semi-presidentialism, has a disputed definition though the simplest and broadest version is a system in which both branches of government, the president and parliament, are popularly elected, but the head of government (a prime minister) is elected from, and accountable to, the legislature.[10] Semi-presidentialism is characterized by the division of executive power between a prime minister elected out of a parliament, and a popularly elected president.

III. Regime Type in Constitutional Design

Given the assumption that regime type is constructed from a set of defined institutional rules (and each type carries its own set), it is little wonder that it has been the focus of debate in constitutional design. The implication of this assumption is that constitutional design is

[8] Of course, this original depiction of tripartite system is probably no longer accurate. 4th arm of government institutions have become thought of as a co-equal branch of government crucial in the checks and balances dynamic. See Tarunabh Khaitan, Guarantor Institutions, Asian Journal of Comparative Law (2021); Mark Tushnet, *The New Fourth Branch*, CUP (2021).

[9] Also, the principle is often a source of much debate within jurisdictions which perhaps highlights its definitional instability, as well as presents differently across systems such that a single global definition may be impossible. See Peter Strauss, Separation of Powers in Comparative Perspective: How Much Protection for the Rule of Law, Cane, Hofmann, Ip, Lindseth (eds.) *The Oxford Handbook on Comparative Administrative Law* (OUP) 2019.

[10] A Siaroff, Comparative Presidencies: the inadequacy of the presidential, semi-presidential and parliamentary distinction, European Journal of Political Research 42 287-312

important because the choice of institutional arrangements will have some impact on the stability of the state and the quality of its governance. This leads to the persistent belief that constitutional regime type can be tinkered with in order to produce optimal governance. There is an obvious intuitive basis for this belief: the rules of the game matter in that they affect the way in which the game is played. More important for present purposes is the belief that regime types are different in their treatment of executive constraint. In other words, executive design specific to regime type should have a meaningful impact on the nature of executive power. The importance of this understanding is that if we can show that regime type, in fact, has little impact on executive constraints, at least with respect to the administrative state, then we should reconsider the role of regime type in discussions of executive power.

In discussing the benefits of the two regime types, two streams of scholarship have been devoted to the question of which regime type should be adopted by any new democracy. In the first, the objective is ascertaining which regime type is superior and, consequently, which should be adopted by communities designing new constitutions. The second is an effort to challenge the notion that regime type matters for the purposes of constitutional design. In other words, whether it is possible to group countries neatly under the heading of presidential, parliamentary or, in some cases, semi-presidential, or whether the variation between these countries renders such categories underinclusive.

In the first tradition, Bryce was perhaps the first to systematically compare the value of parliamentary and presidential systems.[11] Bryce compared the regime types across three dimensions: which of them best reflects the will of the people; which best guards against the

[11] James Bryce, *Modern Democracies* (1921); James Bryce, *The American Commonwealth*, (1899). See also, Sanford Levinson, *Our Undemocratic Constitutions: Where the Constitution Goes Wrong (and How We the People Can Correct It)* (2006), 82.

errors to which people may succumb (ignorance, haste or passion); which secures the highest efficiency in administration. Unfortunately, Bryce spent little time of the last of these issues. Nevertheless, Bryce concludes that parliamentary systems are superior as they comprise a legislature in absolute control of the executive. The cabinet is effectively a committee of the legislature and this induces the legislature to afford the cabinet a great deal of discretion. Wider discretion leads to an executive able to decide quickly and steer the course of legislation as it needs thus improving efficiency. In addition, accountability is clear. With a powerful executive, the blame for any mistakes can be squarely placed at its feet.

Studies quickly followed and the area has been rife ever since, though, the dimensions across which the regime types were compared have changed. Contemporary scholarship typically looks at regime stability, policy outputs and their fit with citizen preferences, and the process of governance. Linz creates an important marker for this question. For Linz, the fear was that presidential systems concentrate a great deal of power in the hands of the president. This makes the election a high stakes prize which creates the possibility for anti-democratic movements and institutional conflict that could undermine the democratic process. This is contrary to parliamentary systems where the electoral losers will always play some role in governance. This theory and the empirical evidence supplied, largely presidential democracies in Latin America, explains why parliamentary systems typically outlast presidential ones. Cheibub responded that the Latin American democracies on which Linz relied displayed instability as a result of their history in military dictatorships and not because of their unusually powerful presidencies.[12]

[12] Also note Mainwaring's position that presidents were not that strong in Latin America, Scott Mainwaring, Presidentialism in Latin America, Latin American Research Review (1990) 157; and Jose Cheibub, Adam Przewroski and Sebastian Saiegh, Government Coalitions and Legislative Success under Presidentialism and Parliamentarism, British Journal of Political Science, (2004) showing that they traded formal powers in order to transact with the legislature.

Off the back of a substantial amount work done in political science on the relative virtues of each regime type, the debate flowed into the legal scholarship. The most prominent and thus, perhaps, the catalyst in this space was Bruce Ackerman's classic piece on the new separation of powers in which he argued that the American style of separation of powers is flawed and should not be emulated in future constitutions.[13] Ackerman elaborates on the flaws of the American separation of powers system by emphasizing its tendency to shift power to the presidency.[14] Ackerman argues that countries considering their constitutional design should instead opt for a 'constrained parliamentarism' such as that adopted in South Africa or Germany. Richard Albert adds support to this in the context of describing an institutional reason for the prevention of democratic decay in Canada.[15] Albert has brought up regime type and the success of a constrained parliamentary system in Canada in withstanding the general authoritarian slide to which other countries have succumbed.[16]

In the second tradition, a line of scholarship questions whether the definitions of regime-types substantially match the countries that they attempt to describe. Cheibub, Elkins, and Ginsburg have taken aim at the categories by presenting evidence to suggest that they are not particularly useful in describing the constitutional rules and distribution of power one would actually find within jurisdictions.[17] Kent Eaton focuses on the effect of veto players, the visibility

[13] Bruce Ackerman, The New Separation of Powers, Harvard Law Review, 113, (2000)
[14] Ibid, Also, Bruce Ackerman. *The Decline and Fall of the American Republic*, The Tanner Lectures on Human Values, (2013).
[15] Much of the scholarship focuses on institutional design unrelated to regime type. Authors in this sub-genre of constitutional scholarship no longer associate particular institutional traits to chosen regime types and certainly do not associated democratic backsliding to regime type.
[16] Richard Albert and Michael Pal, The Democratic Resilience of the Canadian Constitution, in Graber, Levinson, Tushnet (eds), *Constitutional Democracy in Crisis?* OUP (2018).
[17] Jose Cheibub, Zachary Melkin and Tom Ginsburg, Beyond Presidentialism and parliamentarism, British Journal of Political Science 44 (2014); A Siaroff, Comparative Presidencies: the Inadequacies Presidential, Semi-Presidential and Parliamentary Distinction, European Journal of Political Research, 42 (2003).

of policy negotiations, the system's biases towards collective or particularistic goods, the accountability of individual office holders, interest group strategies, and delegation to bureaucrats.[18] He concludes that although there are systemic differences between presidential and parliamentary systems, these in most cases tend to 'wash out' when variation within each regime is considered.[19]

The reality is that despite the debate over the usefulness and accuracy of regime-types, the classical distinctions remain prominent in the discourse. Further, regime type appears to play a role in the practical state-building activities like constitution drafting.[20] While the most recent scholarship no longer focuses on comparing regime types based on their longevity[21], there remains the project of further refining the categories by investigating the nuanced appearance in various jurisdictions.[22] However, what is apparent is that even in an effort to distinguish between regime types, and importantly, to articulate the differences in executive constraints, regime types are often not described as possessing inherent rules on control of the administrative state. The next section develops an understanding of what each regime type would be expected to produce with respect to bureaucratic control given what is accepted as the definitional elements of system.

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[18] Kent Eaton, Parliamentarism versus Presidentialism in the Policy Arena, *Comparative Politics*, (2000).
[19] Kaare Strom, Wolfgang Muller and Torbjorn Bergman, *Delegation and Accountability in Parliamentary Democracies* (2004). See Eaton *supra* at note 18 at page 371. Richard Albert The Fusion of Presidentialism and Parliamentarism, *American Journal of Comparative Law*, 57, (2009).
[20] Tom Ginsburg (ed), *Comparative Constitutional Design*, (2012).
[21] Although see Zachary Elkins, Tom Ginsberg and James Melton, *The Endurance of National Constitutions*, CUP, (2012)
[22] Susan Rose-Ackerman, Diana Desierto, and Natalia Volsin, Hyper-Presidentialism: Separation of Powers without Checks and Balances in Argentina and the Philippines, 29, *Berkely Journal of International Law* (2011) 246. William Partlett, Crown-Presidentialism, 20 *International Journal of Constitutional Law*, (2022).

IV. Regime type and the administrative state

What we are after is a description of bureaucratic structure in each regime type. There is reason to believe that the differences between the regime types in theory should produce differences in bureaucratic control. In describing how these differences may manifest, however, we encounter two preliminary concerns. The first is that control is not a clearly defined term and too general a definition of control may make it difficult to ascertain whether one arm of government possesses it or not. The second is that much like the fact that regime types have nothing much to say about bureaucratic control, constitutions likewise are unlikely to mention the administrative state. Even if they do, there is little reason to believe that constitutions could define the control relationships between branches of government and the bureaucracy. This leaves us with little to clearly discern a pattern of how each regime may organize its bureaucracy.

With respect to the problem of a definition of 'control', when describing administrative structure, the goal is to describe a pattern of control. However, control can be rather difficult to locate or ascribe to any single actor, even in theory. This is certainly true for presidential systems where, for example, different arms of government simultaneously have notional control over an agency or set of agencies. Similarly, in parliamentary systems, a legislature could be said to control government and yet play little role in directing government decision making. Furthermore, different arms of government will exercise their control in different forms, whether through budgetary processes, vetoes, or legislative hearings. To begin to make sense of control, and thus the structure, of the administrative state, it may be useful to unpack the term.

Control is often described as authority; identifying which institution sits above in the constitutional hierarchy. The identifying features here seem to be the power to dissolve

government, votes of no confidence and impeachment. [23] Then there is issue of actual or operational control, 'telling people what to do'. This more substantive for control can be sub-divided into perhaps four categories. The first is control through agenda control[24] (legislature uses this *ex ante* in administrative design, procedural requirements, and for the executive in presentment powers and executive decrees); and the second is monitoring (*ex post*) and which seems less like control and more like a necessary intermediate step towards control. In order for it to influence action in the way control is perhaps normally understood requires a high probability that the now informed principal will act on the knowledge produced through monitoring. The third is inducement and punishment (done *ex post* perhaps through budget or appointments). Finally, there is instructional control (presidents typically wield this in the form of decrees). By describing exactly what we mean by bureaucratic control, we can understand why some forms of control are less effective than others, and why, even in situations where multiple arms of government wield some form of control, an equilibrium of balanced powers is hard to maintain.

The second issue is that constitutions typically say little about control over the administrative state. One may assume that constitutions would be the vehicle within which to structure the relationship between the executive and the bureaucracy. If this were true, it would be easy enough to assess the correlation between regime type and bureaucratic structure by comparing constitutional provisions. Unfortunately, despite the fact that the administrative state globally has grown in authority and function to constitute a set of institutions comparable to

[23] See Aziz Huq, Binding the Executive (by Law or by Politics), 79 *The University of Chicago Law Review*, (2012) where he argues that the legislature has the institutional power to halt, pause or end executive policies.
[24] See Aziz Huq, The Constitutional Law of Agenda Control, 104 *California Law Review* (2016).

traditional arms of government, it does not make a frequent appearance in constitutions. [25] Without clear indication from the definition of each regime or constitutions from which to discern patterns of bureaucratic structure, the present task is instead to glean how regime-types may be expected to structure control over the bureaucracy given what we do know about these constitutional frameworks. To accomplish this, the next section will extend the work of scholars who have compared or theorized the institutional consequences of regime-type on the control structure of the administrative state.

Our starting point is therefore the institutions that constitutions have created and their interactions. The way to understand how they will behave under stylized conditions is to treat them as rational actors. Their relationship is characterized by the delegation of authority. In such a scenario you have a principal that is able to act on its own or delegate its policymaking authority to an agent. In the context of administrative agencies, the legislature acts as the principal and the agencies as agents with expertise in some policy arena. Any delegation involves a trade-off. For the exploitation of the agency's expertise, the legislature risks the preferences of the agency diverging from its own. Legislatures attempt to combat this bureaucratic drift through various mechanisms of *ex ante* and *ex post* control. Is delegation curtailed by more detailed legislation or through oversight mechanisms, through budget controls or other methods. For the time being, all we are concerned with is whether two regime types produce two different forms or degree of delegation.

[25] In fact, few constitutions make a distinction between executive, government or administration. The counter-examples are art 20 of the French Constitution and Chapter 1, arts 6 and 8 of the Swedish Constitution.

V. Theory of Regime Type and Bureaucratic Structure

Our concern is an understanding of the institutional arrangements that a presidential system with separated powers and a parliamentary system produces in theory with respect to bureaucratic control. As opposed to adopting a principled or normative approach[26] in discussing ideal institutional design, I will instead employ the use of a rational theory based approach in order to describe how regime types will in theory generate bureaucratic control. In the case of a presidential system, there exists a set of institutions that we know interact to produce an outcome of balanced powers through mutual constraints and oversight. The administrative state involves all three arms of government. Simply, the legislature creates and funds agencies through legislation. The functions and breadth of discretion are forms of delegation from the legislature of its policy making powers, to an expert agency. The breadth of discretion is a function of the detail included in the legislation as well as the inevitable uncertainty of law.[27] The executive is responsible for the functioning of the agencies and the judiciary, at the initiation of a litigant, monitors the actions of the agencies in order to insure their lawfulness. This depiction is, however, fraught with ambiguity and much of the debate within jurisdictions revolves around the precise boundaries of the institutions that fulfill these roles.

Parliamentary systems on the other hand are simpler in their basic theoretical structure. These systems have a linear delegation down from a legislature to the executive, and onwards to a bureaucratic state and with conventions in ensure that preferences always align between principal and agent.[28] At the center of bureaucratic control exists the cabinet offices with heads

[26] See Jeremy Waldron, *Political Political Theory*, OUP (2020) for such an approach. He argues that principles and values are all that one can appeal to when making arguments about what should be a constitutional design and, specifically, separation of powers.
[27] H.L.A Hart, *The Concept of Law* (1961).
[28] Government has to resign if it disagrees on major policy with parliament and civil servants have to be loyal to their ministers.

of those offices also holding seats in the legislature. The result is a streamlined interaction between the arms of government. The legislature creates the agency that the government desires and believes will be most effective.[29] The government then delegates to its appointed agents the authority to carry out its mandate.

The question most pertinent here the type of bureaucratic control environment each regime should produce given its institutional features. While parliamentary systems are fairly straightforward, presidential systems with a Madisonian separation of powers are not as easy to predict. Particular features that warrant closer inspection include the link between the differences in the electoral and accountability mechanisms between regime types. These features help explain the differences in bureaucratic structure that emerges under these systems. For example, the fact that a president is separately elected by voters in a presidential system creates the incentives that lead to a differently constructed bureaucratic structure than a parliamentary system where the executive is established out of parliament. Aside from producing a clear depiction of the types of control structure that should emerge under each system, a related benefit is that the structure produced in presidential systems clear illustrates the control 'problem' that presidents relentlessly seek to solve – how to control the administrative state. The purpose then is to establish an expected baseline of structure. Changes in one system, here the presidential system, are as a result of the structural baseline and will make one system look like the other.

Perhaps the earliest attempt that focuses on bureaucratic comparisons of the two pure systems are Moe and Caldwell who divide up the world into 'separation of powers systems' and 'parliamentary' systems as proxies for presidential and parliamentary regimes. They base their

[29] Paul Craig, Comparative Administrative Law and Political Structure, 37 *Oxford Journal of Legal Studies* (2017) at pg 960.

theory on traditional features of these systems and it is a useful description of bureaucratic structural outcomes of regime types based on classical principal-agent theory. They argue that a winning bloc of voters, as principals, primarily want effective government. As such, they would prefer any form of organization of the bureaucracy, along with its control mechanisms, discretion and agenda, that would yield the best policy outcomes for them. This could in theory be a unified bureaucracy under the control of the executive or any other arrangement that would most effectively yield outcomes that they favor. However, these same principals will do all they can to undermine their aims as a result of three circumstances.

The first circumstance under which principals will act to undermine their preference for design that serves their policy interests is political uncertainty. Such uncertainty encourages winning groups that capture authority in one period, to fear that when they lose it, the next majority will undo what they accomplished and shift the administrative state against them. As a result, they try to build in insulating structures *ex ante* that prevent alterations to be made by future democratic majorities. These typically take the form of specifying detail such as agency agendas, timetables, personnel restrictions and other constraints. This of course is not optimal if your goal is effective government. The more obstacles one puts in the way of government action, the natural consequence is a government that does less. The second confounding factor is political compromise to minority political coalitions. In an effort to ensure that the majority cannot rule without constraint, minority political groups are given disproportionate involvement in legislating. The checks and balances system has as its goal the pitting of institutions, parties and groups against one another. Thus, in order for the passage of its legislative agenda, the winning coalition must yield to the loser to some extent in the design of bureaucracy. This forces a compromise with groups that seek to undermine the policy goals of the majority and the

minority will press for structures that undermine performance. The third factor is fear of the state. The principal-agent problem creates a fear amongst principals that they may not be able to control their agents. While this fear is commonly cited for voters and politicians, it is also true (perhaps even more so) for voters and bureaucrats. As a result, when groups press for new laws or agencies, they will try protect themselves through structures that narrow discretion.

Finally, legislators are beholden to parochial interests and groups. They respond more directly to demands of those groups and thus aim to fulfill their wants. Presidents on the other hand possess a national constituency and do not necessarily seek to meet the same ends as legislators. Furthermore, because presidents have their own electoral base they seek to increase their capacity for strong leadership by pushing for unified, coordinated, centrally directed bureaucratic system that they can control exclusively.[30] In response to this, legislators under the sway of their constituencies, seek to take special precautions against presidential domination by adopting insulated independent agency designs, promotion of a civil service to create distance between president and agency decision-making, and reduced roles for political appointees. The result is a fragmented bureaucracy with pockets of independence, duplication and ever growing layers of functionaries and decision-makers.[31]

Parliamentary systems on the other hand, and the Westminster variety in particular, have two or more parties competing with usually one, or a coalition, gaining a majority in parliament. That majority is then tasked with forming a government. Dependent on maintaining control over voting members of the party, the governing majority can then pass policy as it wishes. Crucially, this is true of the subsequent party that is able to gain a majority. As a result, implemented

[30] Terry Moe, The Politicized Presidency in Chubb and Peterson (eds) *The New Direction in American Politics* (1985).
[31] Paul Light, *Thickening Government*, Brookings, (1995).

policies are unstable and easily reversed. The ability of the legislature to manipulate agency design, especially the ability to insulate an agency from political involvement, will be fruitless. The executive, also seeking a strong and effective government, will design an agency structure that is unified, coordinated and effective and also possesses wide discretion. In a parliamentary system, however, the executive faces no obstacle in achieving this goal.[32] Here, the bureaucratic structure is simple and linear. The executive heads a unified administrative state.[33]

Another analytical approach was adopted by Palmer who, again relying on a similar mechanism, generates a model of government as a natural monopoly in comparing parliamentary and executive systems. In explaining the Westminster parliamentary regime, Palmer relies on the franchise bidding solution to the problem of a natural monopoly. Palmer assumes that there is competition *ex ante* between political parties for monopoly control of the government. As a result, there is little *ex post* competition with one party in complete control. The only check on power is the threat of losing monopoly control. This is coupled with the hierarchical nature of the parliamentary system and the linear line of delegation. The parliamentary hierarchy is stitched together by the individual and collective responsibilities of cabinet members and the loyalty owed by civil servants to their political heads. The key principles of collective responsibility are confidence, confidentiality and unanimity. The first requires that the cabinet must have the confidence of parliament and will be forced to resign if it loses that responsibility. Confidentiality ensures that proceedings of cabinet and advice given to cabinet is private. Unanimity requires that all cabinet members publicly support the decisions of the cabinet or

[32] Ronald Krotoszynski, The Separation of legislative and Executive Powers in Tom Ginsburg, Rosalind Dixon (eds*) Comparative Constitutional Law* EE (2011) p248.
[33] Walter Bagehot, *The English Constitution*, (1867) p 67.

resign their posts. Individual responsibility involves each minister being required to report to parliament.

In contrast, a presidential system breaks up the natural monopoly over government along functional lines (executive, parliament, judiciary). Checks on authority come in the form of a president's veto power, legislature's override authority, and judicial review. What this creates is a multi-agent structure of bureaucratic control that in theory should exist in some form of equilibrium. The electorate is the ultimate principal which then elects multiple agents, the president and the separate houses of parliament. All three agents exert some control over each other and all three exert some control over their agents, the civil service. The result is a competitive environment in which all three branches of branches seek to control the bureaucracy.

Tsebelis comes next with a theory of veto players. He argues that how best to understand the difference between systems of government is the number of veto players that stand in the way of policy change. The difference in numbers creates a difference in institutional outcomes. The mechanism is fairly similar to that described by Moe and Caldwell – the more complex system being that with separated powers makes changes in policy, structure and scope of the administration difficult which results in a fragmented bureaucracy not easily controlled by the multiple arms of government that seek to do so. However, Tsebelis' approach offers the benefit that greater variation can be accommodated in his model given that the complexity of the system can be infinitely calibrated by adjusting the number of veto points.

With fewer veto points, policy is easily changed following a political transition and with more veto points, policy is stickier. Where veto points are greater in number agencies should appear insulated from change. In the case of a presidential system coupled with a system of separated powers, there are greater number of veto players making laws harder to change. On the

other hand, the fused powers system in a parliamentary system there are fewer. As such, fewer veto players means greater direct control by the executive over the administrative state. Greater ability to change policy should mean that bureaucratic structure is linear and unified. Difficulty in changing policy will mean greater bureaucratic fragmentation.

Tsebelis could be used to argue that in theory presidential and parliamentary systems could produce the same the bureaucratic structure. In theory both systems could have the same number of veto points.[34] Essentially they could be the same in their ease to change policy with each successive administration making insulation and fragmentation unnecessary. In this way the convergence that we see in the power of presidential and parliamentary systems over the administrative state could be explained by the similarity in their veto points. The argument essentially being that they are identical in structure and so produce identical results. However, this seems an unlikely case – veto points in parliamentary and presidential systems are themselves structurally different and in theory would always produce different results.[35] Presidential veto points are typically located within institutions that are difficult to bypass, for instance in the presidency itself in the form of the president's veto power. While veto points in a parliamentary system are easier to bypass as they typically come in the form of a component of a minimum winning coalition where substitute components are easier to find. In a scenario where such a substitute is available, the objection of one party to such a coalition becomes ineffectual. Therefore, even if these two were the only veto points in each system, the ease with which they

[34] George Tsebelis, Veto Players and Law Production in Parliamentary Democracies, in Herbert Doring (ed) *Parliaments and Majority Rule in Western Europe* (1995). Also Tsebelis Decision making in political systems: veto players in presidentialism, parliamentarism, multicameralism, and multipartyism, 25 British Journal of Political Science (1995).
[35] John Carey, Presidential versus Parliamentary Government, in Claude Menard and Mary Shirley (eds) *Handbook of New Institutional Economics*, Springer, (2005).

are bypassed would mean that faced with the effort to govern, a presidential system would have a greater obstacle to act than a parliamentary system. In theory then there is enough reason to believe that a distinction between regime types is inevitable.

Strom places a greater focus on parliamentary systems.[36] He characterizes the system of bureaucratic control as being a single chain of delegation with multiple links. At each link, a single principal delegates to a single agent or multiple non-competing agents. Strom points out that in a parliamentary system, there is a decreased reliance on competing agents. Contrary to presidential systems where voters elect multiple different agents or representatives who check each other's power. Legislatures in presidential systems produce multiple agents competing for authority, funding or other resources. The result is that in a parliamentary system there is a simple set of bureaucratic institutions that lie completely under the authority of the government, which in turn is controlled completely by the legislature. The legislature's control manifests in its ability to screen, prior to appointment, the government candidates.

Despite minor differences in the details of model described above, the obvious thrust of each is that parliamentary systems are somewhat easier to understand. Constitutionally they place the legislature at the head of the constitutional command structure. The legislature receives its popular mandate to govern from the public, they then delegate government authority to an executive that they form, the executive in turn delegates authority to a bureaucracy staffed by civil service employees and political appointees. The result is that when a party wins a majority in parliament, the strict hierarchy that is formed (sometimes referred to as a fusion of power) results in executive dominance.[37] Simply, parliamentary systems produce a single chain of

[36] Kaare Strom, Delegation and Accountability in Parliamentary Democracies, *European Journal of Political Research*, 37, (2003).
[37] Arendt Lijphart, *Patterns of Democracy*, (1999).

delegation downwards from the parliament to the bureaucracy, and accountability flows back up the chain. This is so, so long as the party remains united. With parliamentary confidence, the executive is unassailable. The only check is internal party disagreement. With preferences perfectly aligned between a single principal and its agent(s), as well as the principal (being the majority party in the legislature) able to screen members of the government before appointing them to their positions, there is little need to create a fragmented bureaucracy out of the government's control.

On the other hand, presidential systems are designed with the intention that all branches of government are equally matched constraints on the others' power. They establish an equilibrium in which none is dominant. Layered on this is the desire of each successive winning coalition to protect its policy success from future coalitions that would seek to reverse them. In the course of maintaining this equilibrium and protecting their legacy, they construct the administrative state as a fragmented set of institutions, difficult to revise, and never under the complete control of any single branch of government.

The literature on regime-types and the administrative state seems to suggest that the differences between presidential and parliamentary systems is that we should expect to see less insulation (fewer independent agencies) in parliamentary systems than in presidential ones with the latter producing greater bureaucratic fragmentation. As a result, if there was convergence, you should see more successful efforts from presidents in presidential systems to control these agencies. As seen in later chapters, the reality is perhaps more nuanced. Mapping the incentives in a principal-agent dynamic can only produce the conditions under which one set of outcomes is more likely than another. As conditions vary, so should outcomes. However, what is clear is that conditions have been favorable for presidential systems to shift in their orientation towards what

one would expect of parliamentary systems. Elaborating on what those conditions are and the incentives that exploit them is the work of the remaining chapters of this dissertation.

What all of these scholars have in common is that they examine the consequences of constitutional powers on the control structure of the administrative state. They assume as fixed and predictable the constitutional powers and prerogatives that their respective regime types allegedly afford them. Their conclusions are therefore that the package of institutional features offered by each regime type produce distinct bureaucratic rules or forms of control. Their approach may, however, not be the complete picture. The administrative state was a slow emerging phenomenon that brought about a great deal of change to the powers of the arms of the government. These changes also did not necessarily occur with, nor were they made with the intention that, the maintenance of the power equilibrium as a goal – in fact some of the powers are quite innocuous, for instance, budgetary discretion.

In describing the shift that presidential systems have undergone, much of the current literature defines the action of an overpowered presidency as one that undertakes 'unilateral action'. In other words, if chief executives were able to act independently of other arms of government in ways that neither of the regime types, based on the definitional qualities, might predict. Quite simply, if the president or prime minister were not constrained by the legislature or courts in controlling the administrative state, they would effectively be acting unilaterally. Such action seems to pose a challenge to the understanding of the regime types as explored above and this challenge deserves more of an introduction.

VI. Regime type and Unilateralism

An emergent theme of study within presidential systems is the ability of presidents to take unilateral action – action that has a more dubious legal foundation. The definition of such

action is simply the ability to bypass the legitimate authority of other branches of government and pursue an objective unheeded by typical constitutional constraints. Whether through executive orders, executive agreements, memoranda, proclamations and directives, presidents act in significant ways to unilaterally 'legislate,' that is, to change the policy status quo in a direction not preferred by a legislative majority.[38] In the context of the Unites States, Howell writes that "modern presidents often exert power by setting public policy on their own and preventing Congress and the courts-and anyone else for that matter- from doing much about it."[39] Typically, this action has been studied in the context of emergency powers held by the executive. However, much recent work has been done to understand this not as an aberrant feature of executive power under times of crisis, but instead a feature of modern government functioning.[40]

Much of this dissertation will be an attempt to depict the legal framework and political circumstances that underly a chief executive's success in bypassing the constraints that other arms of government should represent. By comparing regime-types and their constraints on executive power, the implicit argument made in this dissertation is that such an emergence is not an expected outcome of the regime types adopted by the countries in which it occurs. Constitutional and sub-constitutional unilateral powers are thus a deviation from what regime types should produce. As is apparent from the above, they are not specifically mentioned in literature describing classical versions of these regime types, and certainly not in presidential

[38] Phillip Cooper, Power Tools for and effective and responsible presidency, 29 *Administration and Society* (1997).
[39] William Howell, *Power Without Persuasion*, PUP, (2003)
[40] *Ibid*., See also Kenneth Lowande, Delegation or Unilateral Action?, *Journal of Law, Economics and Organization* (2018); Aaron Kaufman and Jon Rogowski, Divided Government, Strategic Substitution, and Presidential Unilateralism, *American Journal of Political Science* 68 (2024); Stephen Ansolabehere and Jon Rogowski, Unilateral Action and Presidential Accountability, *Presidential Studies Quarterly*, 50, (2020).

systems characterized by separated powers. It may be useful to make the implicit more explicit and argue that such powers cannot be considered a legitimate outgrowth of a regime type.

Presidential systems are based on the idea of a transactional or confrontational interaction with other arms of government. The checks and balances only work if each arm of government, in fulfilling its own function, is subject to the actions of another arm (either through *ex ante* control – permissive, or *ex post* control in the form of monitoring, punishment or reversal.) As a result, it would be antithetical in a presidential system for there to be powers that do not require the assent of any other arm of government and cannot be reviewed, reversed or punished by another arm of government.

Parliamentary systems have in some ways a simpler relationship with unilateralism. First, it may not be possible to characterize the ability of the executive to change the status quo as 'unilateral' in a system where revision or reversion is always possible by the legislature. Yet prime ministers and cabinet members can often act unilaterally to change the status quo and prevent legislature from exercising its constitutional authority.[41] For instance, through confidence procedure, block votes, decree authority, prorogation and cloture motions, political executives are able to limit the ability for parliament play a role in constraining government authority. In such cases, it would be easy to characterize such power as a perversion of the classical parliamentary system adopted.

The purpose of laying this out is simply to foreground much of the thesis that follows. The emergence of unilateral powers in both regime types suggests that maintaining an equilibrium of balanced powers, or a linear line of delegation and accountability, by adopting the

[41] *Ibid*, See Gavin Phillipson, Collaboration, Conflict and Unilateral Executive Power, *King's Law Journal*, 35 (2024).

applicable regime-type may be less successful than one might hope. Regime types will deform as the political executive in each regime type exploit their ability to act first, with fewer transaction costs, and with diminished opposition in the form of constraining institutions. A further point to consider in relation to this dissertation is form of unilateral action that forms the basis of this study. While scholarship on this topic has predominantly been focused on the ability to initiate policy without the constraint offered by countervailing institutions, here the focus is on the generation of mechanisms of control over the administrative state. With administrative agencies being the way in which policies reach the real world, these mechanisms act as the precursor to any imitation of policy. As such, unilateral power-making is perhaps somewhat more apt in describing the expansion of the control over the administrative state. As will be explored in later chapters, the distinction is not without import. Generating means of power is different from the objectives one uses power to achieve. The reasons for creating such means of power and the reasons for future political regimes to maintain them are unique.

VII. Political Parties and Regime Type Constraints

The role of the political party in the nature or functioning of regime types is important. A presidential system that possesses a separation of powers relies on branches of government to constrain each other. Yet the two political branches have separately elected members and the judiciary is staffed by judges appointed by elected leaders. For the two political branches to constrain each other, they would have to remain faithful to their institutions and not to shared political allies that may occupy the other branch.[42] The judiciary can only be impartial if judges are not bound by political allegiance to the elected leaders that appointed them. The result is that

[42] David Fontana and Aziz Huq, Institutional Loyalties in Constitutional Law, 85 *University of Chicago Law Review* 1 (2018).

co-partisans who occupy both political branches could cooperate at the expense of the constraints that should operate in a system of separated powers.[43] Should judges likewise share the political preferences of the dominant political party, they too could support the political party as opposed to check unlawful acts of the other branches of government.

Should political party affiliation overwhelm institutional loyalty, a fundamental feature of presidential systems would cease to exist. As described above, separation of powers and the checks and balances it includes, forms an important (perhaps the defining) distinction between presidential and parliamentary systems, and is certainly responsible for producing the distinct administrative designs within each regime. As a result, the triumph of political party over institutional loyalty would see presidential and parliamentary systems operate similarly. Where executive dominance is expected in the latter, without a functioning array of checks and balances, one should expect it in the former as well.

However, while the collapse of institutional loyalty and the separation of powers with it is entirely a possibility, it is not a full explanation of how presidential expansion of authority can happen. For one thing, the United States acting as an example, it is very uncommon for the same party to hold the presidency and a super-majority in the legislature.[44] Secondly, in the United States we can think of examples where a unified government has found that a legislature has constrained a president's action. For instance, Presidents Obama and Trump as candidates campaigned on immigration policy during their respective campaigns in 2008 and 2016. Obama intended to initiate comprehensive immigration reform while Trump hoped to build a wall along

[43] Daryl Levinson and Richard Pildes, Separation of Parties, Not Powers, 119 *Harvard Law Review*, 2311 (2006).
[44] A super majority being required in the US in order to overcome a possible filibuster. See Sarah Binder, The Dysfunctional Congress, *Annual Review of Political Science* (2015), 85. See also, David Mayhew, *Divided We Govern: Party Control, Lawmaking, and Investigations, 1946-2002*, Yale University Press.

the US-Mexico border. For the first two years of both of their administrations their political parties held a majority in Congress. Yet neither president gained legislative support for their respective immigration plans.[45] Finally, we have also seen presidential expansion occur on occasions where there is divided government. In fact, recent studies on unilateral actions shows that presidents rely more on unilateral action during periods divided government in order to achieve their policy goals that would otherwise not receive support from the legislature.[46]

While it would be premature and likely wrong to assume that political party fusion of the political branches plays no role in facilitating executive power expansion, we have to concede that other variables play a role and that under some conditions, party loyalty is overcome by these variables.[47] The result is that under some conditions, political party fusion of political branches can occur and under others, it does not and the presidential system may operate in the manner intended. The purpose of this dissertation is partly to explore the conditions under which the presidential system is able to maintain its separation of powers despite of, among other variables, the possibility of party loyalty reaching across branches of government.

VIII. Conclusion

The purpose of this chapter is to establish the expectations control regimes that should exist in each constitutional type. Regime type, in theory, should produce different bureaucratic structures. In parliamentary systems we should see a linear hierarchical set of institutions with

[45] Aaron Kaufman and Jon Rogowski, Divided Government, Strategic Substitution, and Presidential Unilateralism, 68 *American Journal of Political Science*, 816 (2024).
[46] *Ibid*. The empirical studies match our intuition that separation of powers constraints during periods divided government are not as robust as we assume in theory. Chapter 6 offer a theoretical explanation as to why that is.
[47] We can see evidence of this as accounts now indicates that unified government and polarization are the combination that produces the conditions favorable to executive power expansion. See Thomas Mann and Norman Ornstein, *It's Even Worse than it Looks: How the American Constitutional System Collided with the New Politics of Extremism*, New York (2012).

the legislature in ultimate control, the political executive in direct control and the bureaucrats answering to the executive. In contrast, in presidential systems we should see a fragmented administrative state with branches of government competing for direct control over agencies. The competition should produce some sort of equilibrium where no branch of government gains exclusive control over the administrative state.

To a large extent, and in crucial ways, much of what we expect to find from each regime type is manifested in the archetypal systems we have in the United States and the United Kingdom. The United States has a sprawling administrative state populated by a variety of forms of agencies, some independent and some in a closer orbit to the executive. All branches of government possess powers designed to affect the functioning of agencies. The United Kingdom, despite producing something akin to a separation of powers, nevertheless has a unified government structure with the executive in a dominant position over the bureaucracy and it's leader the leader of the legislature as well.

As uniformly reported by scholars, these constitutional systems have not remained static. While both have evolved, what has been stark is the emergence of incredibly powerful executives in presidential systems.[48] With these divergences from the expected bureaucratic regimes, we are faced with explaining why and how such divergences have occurred.

[48] Jenny Martinez, Inherent Executive Power: A Comparative Perspective, 115 *Yale Law Journal* (2006).

Chapter 3: Levers of Administrative Control

I. Introduction

It seems commonplace in many jurisdictions to claim that chief executives have the power to unilaterally set the direction of policy outcomes. Much of the current research, looking not just at the administrative state but at all acts of policymaking, have noted the decline in force of the legislature and the inherent weakness of the courts. Few have spoken about the reason for the executive's strength or resilience. The gap here is that the executive's ability to change policy in ways that have been described as unilateral, depend on its ability to control the administrative apparatus within the executive that is responsible to implementing any policy change. This points to a significant source of executive power: control over the regulatory state. However, even in this new domain of control or power, the executive is forced to be inventive in constructing mechanisms of control over the bureaucracy. In both creating means of control, and exercising, such control, the executive can seemingly act without much constraint.

While confirming the assertion that the executive has become the dominant arm of government in each jurisdiction is not the purpose of this dissertation, the hope is that a suitably general theory for the control over the regulatory state by a chief executive could go some way in explaining how such a phenomenon can exist universally. At worst, I assume that the assertion is true and that we simply need a way of explaining how chief executives have gone about accomplishing their aggrandizement. Weakening the assumption and allowing for the possibility that some variation exists in the dominance of executives across the globe still requires a claim that when a strong chief executive exists, it has control of its bureaucracy.

In order to begin the task of justifying such a claim I identify the tools that a chief executive would need in order to ensure that the bureaucracy carries out their plan. However,

there is little to guide this exercise. The typical places one would look for an orderly list of executive powers often offer little. Constitutions remain vague about the executive generally, and certainly do not mark out the ways in which they can hold sway over the bureaucracy. Likewise, macro-constitutional regime types adopted by jurisdictions say little about generic structures of the bureaucracy and how much of it will be directed by the chief executive. Nevertheless, as discussed in the previous chapter, regime type has some implications for whether the regulatory state emerges as unified under the chief executive or fragmented under the direct control of several branches if government. Each regime type produces a distinct equilibria or distribution of power over the administrative agencies.

The evolution that this dissertation is attempting to identify is the growth of powers that disrupt these equilibria. These would be the powers that are exceptions to the balanced distribution of powers that a presidential system based on a separation of powers seeks to advance, and appear more at home in the fused chain of authority in a parliamentary system. The mechanisms that emerge in a system that allows for the exclusive control of the administrative state, especially in cases where the system was designed with shared control in mind, clearly have constitutional implications. They shift power significantly, though not absolutely, towards the executive. These unusual or unexpected powers form the basis of unilateral executive authority.

However, an explanation of executive authority over the bureaucracy is incomplete without an explanation for how the executive was able to generate that authority. This, perhaps more abstract form of executive power, is incapsulated in a theory of executive legal development or change.

The question that needs to be answered is how chief executives are able to generate the tools they need to control the regulatory state, and how those tools permanently alter the structure of the executive branch of government.[1] The combination of granted powers, rule breaking, exploitation and invention, coupled with a theory of legal change (path dependence or power creation) explains executive strength with respect to control over the administrative state.

Without any clear source of law listing the means of control that the chief executive may exercise, the process of developing a theory of executive control over the bureaucracy must begin elsewhere. This chapter's aim is to explore the means of control that the executive relies on (most of which have been expanded at the initiative of the political executive). In order to understand what the political executive needs in order to command the bureaucracy, I begin by exploring the relationship between the political head of the executive (what I term the 'chief executive' or 'political executive)[2] and the agencies that make up the bureaucratic state from a rational choice perspective. Identifying the costs and incentives involved in the relationship between the chief executive and administrative agencies, as well as the manner in which regulatory state functions, helps to identify the strategies needed for the chief executive to control agencies. However, given that the argument presented here is one of institutional evolution, a theory of executive power expansion should include an explanation for how these strategies have become institutional powers of the chief executive. While this question is left for later chapters, the initial problem is tackled here: why does the political executive push ever more, beyond what many would argue are the original legal bounds of executive authority, to expand its authority over the administrative state. Finally, how are the extra-legal features of the

[1] The task of explaining the manner in which extra-constitutional power is produced is left for chapter 6.
[2] I include in this definition the president or prime minister, as well as the cabinet.

presidency embedded or entrenched for each subsequent political executive to make use of. Essentially, the process adopted in this chapter involves whittling down from more abstract descriptions of the relationships between institutions towards the more concrete levers of control that chief executives wield and the ways in which they develop them.

II. Principal/Agent Framework

The actors common to any democratic system are the legislature, political head of the executive and administrative agencies. Within any system, the legislature and executive delegate authority to those best equipped to devise and implement policy, which would be the administrative agency.[3] We imagine this dynamic to be one of principals and agents with the former doing the delegating and the latter charged with implementation. The primary objective in delegation is an alignment of interests between principal and agent. The risk is always a separation between the two brought about by corruption, performance failures, or policy drift.

The principal, in this case the chief executive, faces a range of costs resulting from the possibility of preference divergence and information asymmetry. The chief executive's ability to influence the bureaucracy also depends on a range of institutional features, including whether the agency's leadership is insulated from presidential removal, the location of the agency inside or outside the cabinet hierarchy, and the extent of presidential appointments in the agency, subject (or not) to legislative approval.[4]

Costs associated with the relationship between chief executive and agency can be categorized into three variants: agency pursues its own goals, agency actively defies the

[3] As discussed in the previous chapter, this differs across regime type, however the distinction is less relevant here.
[4]Jacob Gerson and Christopher Berry, Agency Design and Political Control, *Yale Law Journal* 2017, pg1012.

principal, or intervention by a co-equal branch.[5] They all result from the distance between the two, either a physical distance or an asymmetry in information with the consequence that the principal is unable to monitor the actions of the agent. The effort by the principal to ensure preference alignment is what we will call an effort to control the agent. To deal with information asymmetry, principals seek to build efficient systems of oversight in order to monitor the activity of their agents. In the case of the administrative state, principals seek to establish mechanisms that alert them to the emergence of any distance between their preferences and those of the agencies.

The benefit of adopting an principal/agent approach is that we can control for (or ignore) political and party constraints for the time being. When considering the power that a chief executive may wield, the reality is that much of it will be contingent on the political strength the political executive can draw from its political party, which itself is a function of its strength across the different arms of government and ultimately its voting constituents. This makes the effort at describing the degree of executive power difficult. Strength fluctuates over time and does not extend over all policy areas. However, by sidelining the vagaries of political circumstance, we isolate the inherent incentives that drive the expansion of control over the administrative state. Of course, any argument that relaxes this assumption by generalizing its findings will have to develop a theory for why. Nevertheless, by holding this assumption, we are free to explore the formal basis for executive power, even if all we can say is that these powers are useful when all the stars align.

[5] For discussion of the problems faced by Presidents in controlling the bureaucracy, see Terry Moe, The Positive Theory of Public Bureaucracy, in Dennis Mueller (ed), *Perspectives on Public Choice: A Handbook* 455 (1997).

Ultimately, this project does not seek to offer up evidence that the chief executive dominates the administrative state exclusively, comprehensively or indefinitely. In fact, there is evidence to suggest this is not the case. Within any jurisdiction there are bound to be numerous occasions when the chief executive is quite obviously not in comprehensive control of the administrative state. For instance, one study finds that an estimated 34% of all rules promulgated by administrative agencies in the United States can be directly traced to specific demands by Congress to regulate.[6] Instead, what this project is attempting to accomplish is the identification of the levers that chief executives will pull in their attempts to control the bureaucracy, whether the efforts are scuppered by exogenous circumstances or not.

III. Control in Principal/Agent Framework

What we understand from an rational choice framework is that principals seek to control agents and have their preferences align. More concretely, political principals seek to control the administrative agencies that exist within the executive branch. As mentioned above, all, some or one of the arms of government could have an interest in controlling the administrative state. In fact, the number of possible principals in any jurisdiction could be numerous.[7] In describing the relationship between the actors involved in the operation of the administrative state, the concept of control is ubiquitous and perhaps obscures more than it clarifies.[8] The difficulty is that it may not tell us as much about the relationships between institutions as we would hope which only makes locating the means of control more difficult.

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[6] William West & Connor Raso. Who Shapes the Rulemaking Agenda? Implications for Bureaucratic Responsiveness and Bureaucratic Control, 23 *Journal of Public Administration and Theory* (2013).
[7] Sean Gailmard, Multiple Principals and Policy-making, *Journal of Theoretical Politics,* (2009) who includes as possible principals, different houses of the legislature, the committees or other oversight institutions, and interest groups that may seek to control the regulatory state.
[8] See Cary Coglianese, 'Presidential Control of Administrative Agencies: A Debate over Law or Politics, *Journal of Constitutional Law*, for an argument that the distinction is meaningless.

A start may be to describe in greater detail the nature of the relationship between political principals and the administrative agencies. Ideally, a clearer understanding of where political principals may attempt to interject in agency decision-making would identify the types of mechanisms that would yield control over agencies. Developing a map of the crucial junctures where the incentives of an agency can be influenced requires breaking down the strategies that can be employed to create influence over an agency. There are four distinct strategies. The first is agenda control.[9] The legislature uses this *ex ante* in the form of administrative design, procedural requirements,[10] and for the executive in presentment powers and executive decrees. However, other forms of agenda control are important. The purposes of agencies are crucial for their functioning. In fact, some agencies in the United States are so defined by their original purposes that they become difficult to influence to pursue other aims.[11] These purposes can be settled at the agency design stage, but also during the life of the agency. Chief executives have the opportunity to signal or order agencies to follow particular objectives.[12]

The second strategy is monitoring (*ex post*) and which seems less like control and more like a necessary intermediate step towards control. In order for monitoring to influence action in the way control is perhaps normally understood requires a high probability that the now informed principal will act on the knowledge produced through monitoring. A further, and perhaps more crucial, requirement is that the political principal will be able to distinguish between a violation

[9] See Aziz Huq, The Constitutional Law of Agenda Control, *California Law Review*, 104, (2016).
[10] McNollgast, Administrative Procedures as Instruments of Political Control, *Journal of Law Economics and Organization* (1987).
[11] Nina Mendelson, Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives, *New York University Law Review*, (2003).
[12] Coglianese and Walters, Agenda Setting in the Regulatory State, *Administrative Law Review*, (2016) page 866.

of the principal's preference and adherence.[13] As issues and decisions become more complex, this may be difficult to do. A related concern is the increasing cost of monitoring. As agencies become larger and more complex, the ability to discern the preferences of decision-makers within them becomes harder. For a principal seeking to discipline an agent in complicated policy areas where expert bureaucrats are making decisions on complex issues, a great deal of expertise and oversight capacity is necessary to adequately monitor their actions.

The third is inducement and punishment done *ex post* perhaps through budget allocation or appointments or *ex ante* through a variety of incentive schemes. A principal seeking to correct deviations by an agent from the principal's preferences may seek to punish the agent. Likewise, hoping to prevent deviations, a principal may seek to discourage such behavior by providing inducements to stay the course.

The final is the binding order which could be considered a species of agenda control, though perhaps sits easier in a separate category. While instruments such as executive decrees, executive orders or memoranda have been discussed as alternatives to legislation in pursuing policy aims, they also act as means by which orders or commands are communicated through the bureaucracy. The relevant aspect of these is in the degree to which these orders are obeyed or are binding. Success in making use of this form of unilateral action depends entirely on the adequate implementation by the bureaucracy. Orders may not be legally binding, in other words, no sanctions follow any disobedience. In such cases, chief executives that issue such orders are not placed in any stronger a position of control as if they had not. They would rely on the other

[13] See Patty and Turner, Ex Post Review and Expert Policymaking: When does Oversight Reduce Accountability, *Journal of Politics* (forthcoming) for a similar argument.

mechanisms above to achieve the policy shift they desire. On the other hand, orders that are binding are self-standing mechanisms of control.

All arms of government adopt one or more of these strategies in order to tighten their grip on administrative agencies. Much of the research has focused on the ability of legislatures to directly influence the actions of regulatory bodies. Courts too have received attention for their role in policing agency action. The executive, however, has received markedly less attention in public law. The topic however looms large in much of the contemporary work done on the executive's responses to emergencies and the degradation of democracy in various jurisdictions. While much of the work adopts a normative valence, this work hopes to support such studies by providing the foundation for executive control over the bureaucracy that carries out its wishes.

IV. Control and the Levers of Control

From the above we know where to look and we know what types of control mechanisms to look for. The focus narrows on the way in which the chief executive controls these institutions. To further this narrowing down, it would be useful to describe the process of effecting control. While this is effectively delegation by the executive to the agencies, we can break it up into two stages. The first is the communication of a policy change. The second is the policy implementation stage. Chief executives will need tools to gain control of both if they hope to ensure that their preferences are accurately refracted through agency action.

For the first stage, the control of policy generation and communication, chief executives require some degree of 'in-house' expertise to conceive of the policy change, and also require a method of communicating policy changes to agencies. These typically come in the form of executive decrees, memoranda, guidance, etc. These lay down policy instruction and have the effect of expressing the principal's desires.

The next stage is policy effectuation. The implementation is where agency costs arise, and the effort of the executive is directed at aligning the preferences in order to ensure faithful execution. The tools required for policy effectuation are a mix of existing positive law, discretion, invention and evolution. A broad overview of the manner in which this process could take place is the head of government shifting decision-making upwards towards agents over which the head of government has greater control. This occurs through the chief executive's use of what I will term the 'levers of control'. These are the ways in which this occurs is the control over agency design/creation and destruction and reconstruction[14], control over appointments and removals, control over budgets[15] and centralization of agency action[16] Interrelated amongst these many levers of control is a further need of political leaders, when aggregating control over decision-making upwards, to develop advice-generating institutions.[17] This involves the provision of advice in general and not only legal advice which is unique in its strategic use as illustrated below. Below are the various levers and descriptions of their strategic value in generating influence over administrative agencies.

[14] For a good discussion of president's attitude to restructures see Peri Arnold, *Making the Managerial Presidency: Comprehensive Reorganization Planning, 1905-1996* (2008). Also note that the restructure can occur to the administrative state as a whole, or within the agency through the implementation of internal agency procedure, see Nou, 'Subdelegating Powers' *Columbia Law Review*. See also Jon D Michaels, Of Constitutional Custodians and Regulatory Rivals, *Columbia Law Review* (2016) at 253 fn 107.

[15] See Tony Prosser, *The Economic Constitution* (2004) pg 116 for the British set-up for budget allocation. Also, see 'budget veto' power which presidents might have (at state level governors have them). In the US the term is 'post-appropriations discretion', see Lewis, Political Control and Presidential Spending Power.

[16] Kathryn Watts, Controlling Presidential Control, 114 *Michigan Law Review*, (2016) at 690 – there is also the issue of resolving disputes between conflicting agency objectives (who arbitrates between agencies and presidential goals?) See Lewis, Moe, The Presidency and the Bureaucracy: The Levers of Presidential Control in Michael Nelson (ed), *The Presidency and the Political System* (2018).

[17] See Eichbaum and Shaw 'Prime Ministers and Their Advisors in Parliamentary Democracies', in *Oxford Handbook on Political Leadership* (2014).

a. Agency design / destruction / reconstruction

All jurisdictions face the same circumstances, delegation from a political principal to an expert/specialized administrative agent. In democratic systems there is the added dynamic of changing political leadership. Each new set of leaders faces the problem of dealing with existing agencies. They are staffed with bureaucrats, most of whom were not appointed by the entering chief executive. Agency goals may have already been set and new policy would have the task of supplanting a sticky bureaucratic process. The chief executive would therefore, reasonably, have concerns that the existing agencies will not carry out a policy change in the way they hope.

One response to this challenge may be through the creation of a new agency. If a chief executive is successful in the creation of a new agency, they also get to screen the bureaucrats that will be selected to staff the new agency. This is so even if the selection pool is limited to the existing civil service. Furthermore, they get to set the agency's agenda and scope thus imbuing it with an indemnity and set of preference that best aligns with those of the chief executive. There may be differences in discretion over budgets than agencies that have been created by the legislature.

Control over agency death may be a corollary to this. The power to close an agency whose purpose or agenda differs from that of the chief executive may yield the same benefits to a chief executive as creating an agency is more aligned. In doing so, the chief executive may place the legislature on the back foot in that they would need a two thirds majority to overcome a presidential veto if they intended to regulate in that arena again.

Another form that these powers may take is in the ability to reconfigure the existing agencies. Powers to shift decision-making from one agency to another, or from one bureaucrat to another even within the same agency. It may be that any political institution that seeks to exert

influence over the administrative state has the incentive to politicize as much of it as possible. This will include the degree to which positions within agencies are political as opposed to bureaucratic or civil service. [18] This links up with the appointment procedures for positions in agencies discussed below. An example of this would be that a number of politically responsive "chiefs of staff" have been appointed to supplement the work of the career head of service within departments in Canada.[19] The objective was to create a duplicate stream of administration that would supplant the less responsive career civil service within departments.[20]

Reconfiguration can also take shape through privatization. If we find that most democratic systems develop a civil service with some tenure protection, that exhibits qualities of independence and professionalism, then the ability of the president to remake the administrative state in a way to bypass this institution may prove valuable. One way in which chief executives may achieve this is through privatization.[21]

It seems clear that the power to reform the administrative state is a tool in its control, a tool capable of granting its holder the power to alter policy and manage implementation. What is therefore important is to establish the extent to which this power lies in the hands of the executive itself, or more specifically in the hands of the chief executive. We should expect to

[18] See for instance the effort currently in the UK: https://theconversation.com/dominic-cummings-wants-to-add-more-political-appointees-to-the-civil-service-heres-why-thats-a-problem-129097

[19] B Guy Peters and Jon Pierre, *Politicization of the Civil Service in Comparative Perspective* (2004) at page 5. See also for examples of creating alternate cabinet systems in France and Belgium.
[20] Donald Savoie, *Thatcher Reagan, and Mulroney: In Search of the New Bureaucracy* (1994).
[21] See Jon D Michaels 'Of Constitutional Custodians and regulatory Rivals: An Account of the Old and New Separation of Powers' *NYU Law Review* (2016) at 237. Jon Michaels, 'Privatization's Progeny, 101 *Georgetown Law Review* 1023 (2013); Jon Michaels, Privatization's Pretensions, 77 *U Chicago Law Review* 717 (2010).

find that chief executives capable of controlling their bureaucracy likely have a substantial degree of control over the remaking of the regulatory state to suit their preferences.

b. Appointment / removal power

In recognizing that agents are institutions with a hierarchical structure and lines of authority, controlling them requires controlling nodes of authority. One vital way in which this can occur is through control over the individuals that wield authority within an agency. The most common and straightforward way to do this is through appointment power.[22] Appointees monitor bureaucratic activity and communicate the chief executive's objectives to agency employees.[23] Significant power over appointments provides the chief executive with the ability to screen the bureaucrats that will be responsible for carrying out a policy change or innovation. The desire to appoint individuals whose policy preferences align with one's own, or who can credibly express loyalty is commonly termed the 'ally principle'. Generally speaking, all else being equal, political principals prefer to rely on bureaucratic agents with common interests.[24]

Appointment powers should vary by regime type. Presidential systems based on separation of powers typically allow the legislature to have some role in the appointment process. The legislature can both determine over which positions it will share power of appointment and play a role in screening the suitability of individual candidates. Legislatures can restrict the appointment powers of the chief executive through creating qualifying restrictions for appointees. Another is through ensuring partisan divide in agency leadership thus ensuring

[22] B Dan Wood and Richard Waterman, The Dynamics of Political Control of the Bureaucracy, *American Political Science Review* (2014).
[23] Lewis and Terry Moe, Struggling over the Bureaucracy: The Levers of Control, in Michael Nelson (ed), *The Presidency and the Political System*, (2009)
[24] Bendor, Glazer and Hammond, Theories of Delegation, 4 *Annual Review of Political Science* (2001); John Huber and Charles Shipan, *Deliberate Discretion? The Institutional Foundations of Bureaucratic Autonomy* (2006).

balance of party power in directing agency action.[25] Parliamentary systems on the other hand, confer complete authority on political appointment to the head of government. The chief executive can appoint and dismiss ministers and other political appointees in furtherance of the role of directing the administration and setting executive policy. Though prescriptions on the qualifications of the appointees can still be enacted by parliament.

If we take seriously the notion that countries are converging with respect to the ability to influence the administrative state, then we should expect to see an increased ability in separation of powers systems to control the appointment process of political appointees in agencies. One way in which this has been argued to happen is that chief executives can set the status quo through their nominees to which a parliament must respond or acquiesce.[26] The ability to set the agenda by proposing a candidate arguably limits the ability of the legislature to reject the appointment. This skews the screening power over political appointees in favor of the chief executive and serves to ensure that only the most objectionable candidate will overcome the help a legislature overcome its collective action problem.[27]

Moving beyond the nomination process, there are several categories of appointments that a chief executive can make in the regulatory state. The first are regular political appointments within the bureaucracy. These are the political positions held by appointees for, at longest, the duration that the elected administration remains in power. A great deal of research has been devoted to the ways in which chief executives use the appointments strategically to further their policy aims and gain a tighter control over the workings of the administrative agencies. The core

[25] See William Howell, Agencies by Presidential Design, *The Journal of Politics* (2002) at pg 1099 for discussion of these restrictions in the US context.
[26] Lewis, Moe *supra* at note 23 at 383.
[27] It of course should be stated that much of the work on political appointees points out the driving force behind opposition in the legislature is whether the exists a divided government or not.

tradeoff that the scholarship has identified is expertise versus loyalty.[28] The political executive can appoint loyalists committed to furthering their objectives, or competent bureaucrats who are more difficult to control but may have stronger influence over agency action based on their credibility. The second are appointments made during exceptional circumstances. These are appointments made either during states of emergency or during periods when the legislature is not in session (recess appointments). These include acting appointments and they are usually made with fewer procedural hurdles that need to be overcome, for instance, they may not require legislative approval. These appointments are again of strategic importance in gaining control over administrative agencies.[29] The third category, closely related to the act of making an appointment, is the refusal to make an appointment. This is the ability of the chief executive to hold open a vacancy in an administrative agency with the aim of stalling the institution's operations.[30]

We should expect to see powerful chief executives converging in their ability to strategically make use of appointments across these categories to administrative agencies in an effort to direct their activities. Any variation in the degree of freedom chief executives have in exercising these powers would constitute effective constraints on the chief executive's ability to control the regulatory state.

The above deals with political appointments. However, there is also the potential that chief executives can exert influence over civil servants or career bureaucrats. These individuals, largely considered to be the hub of expertise, are supposed to be politically neutral. The notion of

[28] Anne Joseph O'Connell, Loyalty-Competence Trade-offs for Top U.S. Federal Bureaucratic Leaders in the Administrative Presidency Era, *Presidential Studies Quarterly* (2019)
[29] Anne Joseph O'connell, Actings, *Columbia Law Review* (2020).
[30] Anne Joseph O'Connell Vacant Offices: Delays in Staffing Top Agency Positions, *Southern California Law Review* (2009); See also, Kristina Kinane, Doctoral Thesis, University of Michigan, (2019).

an independent civil service is deemed important for effective and efficient government.[31] In some cases, an independent civil service and the institutions to guarantee it are stipulated in the country's constitution.[32] As a result, for chief executives that seek to create and implement policy, a stumbling block will be the extent to which policy implementation is in the hands of a civil service that is independent. Powers over the civil service may include transferring personnel out of agencies to new positions where they will be less of an obstruction or reassigning career civil servants to different tasks within agencies.

c. Budget Control

Budgetary powers in the hands of the chief executives are an important avenue for influence over the administrative state. Much of the budgetary process is in any jurisdiction is a function of statutory prescription, prerogative and norms. Some constitutions possess general principles that guide the creation of the budget, though details of the process are usually omitted. Budget creation, regardless of regime type or constitutional setting, involves both the executive and the legislature. Typically, the former is involved in proposing a draft budget, and the latter appends amendments and passes the final budget. Important for levers of control over the administrative state are the spending powers exercisable by the chief executive that do not involve the approval of the legislature or review by courts. These, typically discretionary, areas of spending authority, adds to the chief executive's ability to fund unilateral changes in policy or institutional development. The greater the ability of the chief executive to supplant the legislature in this function, the more it is able to unilaterally change policy without the legislature intervening.

[31] B Guy Peters and Jon Pierre, *supra* at note 19 at pg2.
[32] South Africa, Brazil, Colombia, Costa Rica, Egypt, Haiti.

The contemporary view of delegation between the legislature and executive, across regime types, has the legislature responsible for allocation of funds for the performance of the agencies' statutory functions. The control dynamics emerge from the ability of legislature to limit the decisions the executive is able to make by limiting its funding to endeavors that it would approve. Any divergence from these goals by the agency is costly as it would have to acquire additional funds from the legislature in order to do so. As a result, the legislature is able, through its budgetary allocation, to circumscribe the degree of divergence from the status quo that an agency can travel.[33] To the extent that chief executives have discretion over spending, agencies have another potential source of funding and policy instruction.

To some extent, discretion over spending is inevitable. It would be counterproductive for the legislature to provide detailed instructions about how funds are to be spent. One can assume that over the course of the disbursement period, costs will change, problems may arise, and new opportunities may present themselves. It is understandable that a certain amount of discretion is left with the executive in order to cope with these eventualities. The focus here is then on the ability of the chief executive to exploit the discretionary powers available in service of directing agency action. This occurs either through allocating funds to agencies or projects that further the aims of the chief executive, or through dispensing punishments to agencies that drift from its preferences by reducing funding after such drift becomes apparent.

Additional forms of control could be initiated through monitoring and approval of agency spending or budgeting. This could be accomplished through the combination of several other mechanisms, such as procedural rules which divert agency decision-making on spending to a

[33] Nolan McCarty, The Appointments Dilemma, *American Journal of Political Science*, (2004).

specialized institution under the control of the chief executive, or to political appointees of the chief executive who then approve or reject spending decisions.

Control over spending is the bedrock upon which many of the other mechanisms are used. The ability to unilaterally create agencies includes the ability to provide them with funding. The ability unilaterally to appoint advisors, policy 'Czars', and more generally, expand the layers of political appointees that staff agencies, requires an ability to pay them. As a result, executives that are able to operate unilaterally, have large discretionary powers over allocated funds, or have large amounts of discretionary funds at their disposal.

d. Centralization of Agency Action

Two important aspect of control that chief executives will need in order to achieve are adequate monitoring of decision-making and decisive influence over decision-making. The difficulty faced by chief executives is that agency action is often complex and voluminous. The former issue means that chief executives can find it difficult discerning and weighing the effects of agency action. As a result, determining whether the action diverges from the chief executive's preferences can be difficult. The latter objective, influencing decision-making, requires crucial points of the decision-making process to be shifted to institutions or individuals that are the chief executive's political allies. The methods by which this can be achieved are procedural processes that divert decision-making and institutions within the orbit of the chief executive that provide expert advice on agency action and are able to make decisive decisions.

The result is the establishment of an administrative set of agencies within the orbit of the presidency that mirrors much of the technical expertise of the administrative state (certainly the portions that chief executives seek to control). However, policing a growing, complex, bureaucracy is an expensive exercise. There is the concern of the volume of activity that any

monitoring institution has to oversee. It would be infeasible to replicate all agency function within the office of the chief executive. The solution is therefore to produce institutions capable of monitoring of, and advising on, administrative agency action to some limited extent, as well as instituting some procedural mechanism that highlights or reveals actions that are of particular interest to the chief executive.

Much like legislatures create administrative procedure designed to send up red flags when violations occur, procedures that are able draw the attention of supervisory bodies to agency action that is most likely to be of political interest to the chief executive can be instituted. Furthermore, chief executives possess a few advantages, 1) they have a formulated agenda of what they want to achieve and target agencies and specific agency action that relates to these objectives; 2) agencies have general preferences that alert chief executives about which to target for extra monitoring.[34] As a result, mechanisms are used to throw up only those issues that are of interest to chief executives. These can come in the form of reporting guidelines with thresholds that trigger political oversight, coordination of specific agency action, regulatory veto powers over agency action.

In summary, in cases where we find an executive in control of administrative agencies, we should expect to find, 1) institutions designed to monitor 2) institutions designed to advise 3) mechanisms to assist in monitoring in the form of reporting guidelines[35] and thresholds, etc.

[34] Kenneth Lowande, Who Polices the Administrative State?, *Journal of Politics* (2018).
[35] See Jennifer Nou, Inter-Agency Coordination, 129 *Harvard Law Review*, 421 (2015) which looks at the mechanisms used to create reporting and information from agencies upwards towards political appointees (agency heads).

V. Why do Presidents Seek More Power?

Now that we have a set of tools that theoretically could be used by the political executive to exercise control over the bureaucracy, the interesting question is why are these tools formed. The creation of extra-legal power is complex as it necessarily involves the branches of government that share those powers or at least share an interest in controlling the administrative state. With that, what can be initially explored are the incentives the political executive has to expand control over the administrative state. Essentially, assuming there are rules which grant the political executive the levers as described above, what are the political executive's incentives for pushing beyond those rules. Part of this assumption is that where these levers have some legal basis for existing, the manner in which they may be used, or the extent of control they may grant the political executive, is constrained in way that maintains the checks and balances equilibrium. The incentives that would drive overreach then would provide the reason for the expansion of presidential control over the bureaucracy. Once clear on these, focus can turn to how these 'rules' are generated when they are not explicitly stated in any source of law. Below is an informally modeled interaction between a political executive, the voter and the bureaucrat which would help in revealing these incentives.

In order to begin exploring the incentives of the political executive, the world in which they operate must be sketched. There exists a political relationship between the bureaucracy and the politician. This has been modeled before and there is a great deal of theory which illustrates how this all plays out.[36] However, none of the models to date allow us to understand why

[36] Kathleen Bawn, Political Control Versus Expertise: Congressional Choices about Administrative Procedures, *American Political Science Review*, 89, (1995); Epstein and O'Halloran, *Delegating Powers: A Transaction Cost Politics Approach to Policy Making under Separate Powers* (1999); John Huber and Charles Shipan, *Deliberate Discretion? The Institutional Foundations of Bureaucratic Autonomy* CUP, (2002); John Patty and Ian Turner, Ex Post Review and Expert Policy Making: When Does Oversight Reduce Accountability?, *The Journal of Politics* 83, (2021).

politicians would seek to expand their control over the bureaucracy. Using Ferejohn's set up we have a decent way of thinking about how tools of control over the bureaucracy are used.[37] Essentially, in Ferejohn's model, the relationship between the voter and their politicians is a principal-agent relationship afflicted with moral hazard. If there are issues that are of concern to voters, for instance unemployment or crime, the voters do not know if the politicians are to blame or if these issues are the product of exogenous factors beyond the politicians control. In light of this uncertainty, it is unclear how the voter should hold the politicians accountable.[38] Using this framework, with some important extensions, we can use the presence of the voter to establish the conditions under which a political executive would be moved to expand its control over administration.

Ferejohn's model is seminal in studying voter accountability, however, it needs to be augmented to get any insights on the impact the bureaucracy has on both the politician and the voter. Therefore, instead of the two players that Ferejohn establishes, the voter and the politicians, I expand the model to include all three relevant actors: The voter, the political executive and the bureaucrat. What do each of these actors want? The voter wants public goods – what they are always after is the product that government produces. The politician has a more complex set of incentives. First they want reelection – which means giving the people what they want. Second, they want the bureaucrat to accomplish tasks that serve their own private needs (I call this private only to distinguish it from the interests of the voter – for instance party goals that may be at the expense of the voter – not necessarily corruption though that it may be). The bureaucrat wants to expend effort on projects that produce public goods. I assume that

[37] John Ferejohn, Incumbent Performance and Electoral Control, *Public Choice*, 50, (1986).
[38] *Ibid*.

bureaucrats are mission driven and would prefer to expend effort on public goods provision as opposed to private goods in the interest of the political executive.[39] This essentially establishes the conflict of interest that we know can exist between the political executive and the bureaucracy.[40]

What we have is a chain of accountability from voter to politician and from politician to bureaucrat. Voters set the standard at which they expect the public goods to be provided (they effectively set the level of public goods that should be provided). This is essentially the standard that the political executive must meet in order to get reelected. The political executive sets the incentives for the bureaucrats.[41] The political executive is able to do this by allocating resources to the projects that generate public goods, these would be projects that the bureaucrat would prefer to expend effort towards. This ability to direct the efforts of the bureaucracy may come in the form of control over budgets, agenda setting through executive decrees, appointment of political bureaucrats and oversight – the levers described above. Imagine for now that the maximum limit of these resources are exogenously established – in effect there are rules (laws set by a legislature or court) establishing the amount of these resources and that the level would not exceed some amount that would maintain the checks and balances equilibrium. In other words, for the sake of argument, each of these variables is established by another branch of government that the political executive does not control.

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[39] See Dan Honig, *Mission Driven Bureaucrats* OUP, (2024).
[40] Essentially building on recent work where the executive and the bureaucrat work together to produce public goods. See Dana Foarta, How Organizational Capacity Can Improve Electoral Accountability, *American Journal of Political Science*, (2022); Tara Slough Bureaucratic Quality and Electoral Accountability, *American Political Science Review*, (2024).
[41] As a free-standing strategic actor, the bureaucrat can choose to either expend effort on the projects the political executives wishes they work on, or to resist the wishes of the political executive by doing no work at all.

Assume that the bureaucrat's effort is a fixed value. In other words there is a finite amount of a bureaucrat's time or effort that can be allocated to work. In this scenario one sees the incentive that the political executive has in being able to allocate which tasks the bureaucrat expends its effort on. Assume there are two projects that the bureaucrat could expend effort towards, one is a private good for the political executive, and the other is a public good pursuing the agency's mission. It is clear that the political executive would like to allocate as much of the bureaucrat's effort towards the private good as possible. Yet, it also clear that if the bureaucrat is made to forgo a certain amount of effort that it would prefer to spend on the public good, it will resist and stop work all-together.

Under this scenario the political executive is concerned about reelection while also maximizing the private rents he is able to extract from the bureaucrat. The voter, however, can set the standard for reelection. The higher the standard goes, the more the political executive will have to allocate resources to projects that the bureaucrat prefers – public projects.[42] Making one important change to the model can reveal the incentives we are after. In this scenario, loosening the restriction that the resources available to the political executive – the levers of control – are exogenously set, and allowing the political executive to expand those resources would allow it to pursue both of its objectives – reelection and adequate public goods provision, as well as private rents. In other words, if we allow for the possibility that the manner in which and the extent to which the executive controls the administrative state set by the legislature (or a court or constitution) can be shifted by the political executive, more stringent voter expectations would increase the likelihood that the political executive would seek to expand its control. Simply, if

[42] There is a limit problem here as too high a standard would incentivize the political executive to simply consume the entire set of resources themselves as they no longer care about reelection.

the president can break the constraints placed on him by the legislature and the courts in controlling the administrative and supply the bureaucrats with more resources, the president could accomplish the goal of appeasing constituents and services private rents.

To complicate the incentive structure, one could assume that the executive can allocate the tasks that the bureaucrat must expend its effort on, and the bureaucrat sets the amount of effort that they are willing to expend. In other words, there is nothing yet to guarantee that the bureaucrat will comply with the allocation set by the political executive. In effect, the political executive must allow for some allocation to the tasks that the bureaucrat prefers in order for the bureaucrat to decide to expend any effort at all (or to resist).[43] Ordinarily you would see a political executive balancing the level of independence that the bureaucracy had to pursue their own aims with the amount of resources they could divert for their own ends. However, in a scenario where you can expand the control resources and budget, we would again see an increase in the incentive pressure for the political executive to expand the resources they are able to expend so as to ensure that the bureaucrats do not resist and that private rents are generated.[44]

Now we introduce the exogenous forces that impact the expectations of the voter. Assume that the economy is particularly bad, or at least the voter believes it to be. In such a circumstances one would expect that the voter would increase its expectation of, or standard for, government production. Essentially this would make reelection harder for the political executive. In this scenario, if the political executive valued reelection enough, he would shift more of the budget allocation towards the tasks that generate public goods. However, again, if we relaxed the assumption that the budget allocation was fixed, we would see the political executive keep a

[43] Jennifer Nou, Civil Servant Disobedience, 94 *Chicago Kent Law Review* 349 (2019) .
[44] There are some other complications to this model that are not necessary to solve – the commitment problem based on who makes their choice first.

shared allocation between private and public goods and instead increase the budget amount as he would be necessarily better off for doing so.

The underlying intuition here is that if the rules of control over the administrative state are not fixed, there are several conditions that could produce increased expectation of public goods from the political executive which would incentivize the political executive to increase control over the administrative state. What we are missing here is a reason for the rules of control being malleable. That will be explored in chapter 5.

VI. Executive Power's Staying Power

Despite having revealing the incentives which drive the growth executive control over the administrative state, there is the question of why extra-constitutional changes to the presidency persist. If changes are not entrenched by political majorities, how do they remain durable? The importance of this question is simply that, regardless of how the initial change or expansion of power is generated, for a change to be constitutionally relevant, it is arguable that it should be something more than simply the unpunished action of a single executive.[45] Aberrations in executive structure or authority is simply not enough to claim that the constitutional order has changed (quite simply a constitution by definition should extend beyond the governance of a single instance or event). The power should be available to a subsequent generation of executives. Of course, there is no formal or defined requirement for the length of time that the new status quo remains in place. What is clear is that the political executive is innovative, either in the powers it creates or in the ways that it exploits existing power.[46] Arguing that the

[45] Similar argument made by Emily Zackin, The Role of the People in Unwritten Amendments, in Richard Albert, Ryan Williams, Yaniv Roznai (eds.) *Amending America's Unwritten Constitution*, CUP, at 93.
[46] William Howell, *Power Without Persuasion* (2003) page 13.

institution of the chief executive has evolved requires explaining how the generation of a power or its novel use, becomes a lasting part of the institution.[47]

One area of recent research is the notion that presidents (primarily) are norm breakers.[48] Norms, being an amorphous instrument the product of more decentralized and diffused political or social processes, may not capture every instance of unilateral power discussed here. First, little seems to explain how norms are created.[49] However, norms may not include all of what a chief executive may interact with in order achieve control over the administrative state.[50] In some cases, the chief executive is venturing into a vacuum where no prescriptions or proscriptions to action exist. Unless there is a constitutional norm that a chief executive may only act in ways prescribed by law, this seems to be a norm-less terrain. In addition, chief executive may break existing rules or laws in order to accomplish their task.[51] Generally, defining the correct instrument, whether norms, law, or convention, seems less material than the mechanism involved in developing what may more abstractly be a 'constitutional precedent' - the birth and first use of a power by a chief executive that then allows its successor the same privilege.

There are two possible ways in which powers are entrenched within a legal system. The first is through a high-stakes episode of success or failure.[52] High stakes mean there is much to

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[47] See for example for a broader argument, Jerry Mashaw, *Creating the Administrative Constitution* (2012). However, successful use of the power still remains contingent.
[48] Oren Tamir, Constitutional Norm Entrepreneuring, *Maryland Law Review* 80 (2021) and Daphna Renan, Presidential Norms and Article II, *Harvard Law Review* (2021).
[49] For instance, see Jon Elster, *Unwritten Constitutional Conventions* (2010) where the author characterizes the end of norms being much like 'soap bubbles' that can explode at a single contravention. Cf Adrian Vermeule, Atrophy of Constitutional Powers, *Oxford Journal of Legal Studies* (2012) who paints a picture of slowly decaying constitutional powers through disuse.
[50] William Howell, *Thinking about the Presidency*, (2013).
[51] See Kenneth Shepsle, *Rule Breaking and Political Imagination*, (2017).
[52] A theory roughly following Mark Tushnet 'Constitutional Hardball' 37, *J Marshall Law Review* 523 (2004); also Adrian Vermuele and Eric Posner, Constitutional Showdowns, *University of Pennsylvania Law Review* (2008).

be gained by taking a particular action and there is the strong likelihood of there being much opposition. Success would signal a significant loss by those who opposed the power and would lead to the entrenchment of the power. Potential opposition would face higher costs in overcoming the collective action problem in mounting credible opposition to the subsequent use of the power. The intuition would be that a crushing defeat would be harder to recover from for the opposition to the power-grab. The second way entrenchment could occur is through a historical pattern of use or disuse. There are ample examples of US federal courts endowing executives, particularly presidents, with de facto authority on the basis of what Justice Felix Frankfurter called the 'gloss' of constitutional legitimacy born of "a systematic, unbroken, executive practice".[53] This same approach has been used in adjudicating disputes over presidential actions involving executive agreements, war powers, recess appointments, pardons, executive privilege, and a wide range of other issues.[54] Historical precedent creates de facto constitutional authority which then persists.

Both of these methods of entrenchment could play a role in the development of levers of control over the administrative state. What we do not have is a theory which explains the conditions under which some of the innovative steps become entrenched and others do not. In particular, why it is that the innovations pioneered by one political executive is maintained by future political regimes. The reality is that the problem of coalitional drift is most acute in the area of the norm-busting, unilateral decree wielding, political executive. No political executive

[53] *Youngstown* 610-611

[54] Trevor Morrison and Cutis Bradley, Historical Gloss and the Separation of Powers 126 *Harvard Law Review* (2012) and Curtis A. Bradley and Trevor W. Morrison, Presidential Power, Historical Practice, and Legal Constraint, 113 *Columbia Law Review* 1097-1162 (2013); Daryl J. Levinson and Richard H. Pildes, Separation of Parties, Not Powers, 119 *Harvard Law Review* 2311 (2006); Daryl J. Levinson, Empire-Building Government in Constitutional Law, 118 *Harvard Law Review* 915 (2005).

can bind future political elites to the policy choices that they made. There are however a number of incentives that one can identify which would be useful to establish the intuition for a mechanism governing the durability of executive aggrandizement.

There is scholarship which suggests that there are costs to revoking or reversing exercises of unilateral power. These costs stand as a reason why some policies generated through the use of newly established authority persist. Essentially, there are transaction costs that are associated with actions that have already taken place. The result of an attempt to reverse policy is that interest groups, whether in the legislature or the polity that have benefited from the policy would resist its termination.[55] There is also the possibility that the policy would have produced immutable goods which would stand as a sunk cost and would be politically damaging if the policy were abandoned.[56] These theories though have a fundamental problem in explaining the persistence of the power that produced the policy outcomes. The power itself, arguably, does not produce an interest for interest groups – the policy outcome does. In fact, the interest groups hoping to ensure the continuation of the policy would strive to ensure that the underlying power persists but that the power to remove the policy does not.

Ultimately, though the reasons why presidents want more power could be used to explain some of the reason why extra-legal power persists despite how easy it is, in theory, to overturn. First, it depends on what the political executive wants the bureaucracy to do.[57] Lower allocation control in order to incentivize the executive to invest effort.[58] The stronger the private aims or

[55] Adam Warber, *Executive Orders and the Modern Presidency* (2007);
[56] Kenneth Lowande, Executive Action that Lasts, *Journal of Public Policy*, 44 (2024)
[57] See William Howell and Terry Moe The Strongman Presidency and the Logics of Presidential Power, *Presidential Studies Quarterly*, 53, 145 (2023).
[58] This does parallel the delegation model which seeks to exploit expertise. See Epstein and O'Halloran *supra* note 36.

more extensive the private agenda of the incoming administration would again create a strong incentive to control more of the administrative state's resources. Essentially, as presidential administrations seek to serve the interests of smaller and smaller interest groups, the more they will need greater allocative power in order both serve those interests and produce enough public goods to get reelected.

Second, and relatedly, if one considers the ideological distance between two leaders, one replacing the other, there is empirical evidence that suggests that the greater the ideological distance, the more turnover there is in policy outcomes.[59] The rationale is simple: the more you disagree with your predecessor the more you would want to repeal their policy initiatives. The easiest (though not costless) policies to overturn are those that were initiated using claimed extra-constitutional authority[60] – i.e. broad use of executive orders, memoranda, oversight bodies, budget powers, political appointments and changes to agency structure. As the ideological distance grows, therefore, the incentive to maintain the authority that produced the policy outcomes for the predecessor increases. There is a gravitational pull towards maintaining these levers in order to reverse the actions taken by predecessors. Perhaps a useful example of this is the 'Mexico City' policy that prohibits the granting of foreign aid to countries that provide abortions. President Reagan enacted the original policy, President Clinton rescinded it, President Bush reinstituted it, and President Obama again withdrew it, President Trump not only reenacted it but also expanded it, and President Biden reversed it.[61] None of these presidents, however,

[59] Julia Gray and Jeffrey Kucik, Leadership Turnover and the Durability of International Trade Commitments, *Comparative Political Studies*, 50, (2017).
[60] As an example of this see Julian Nyarko, Stickiness and Incomplete Contracts, *University of Chicago Law Review*, 88 2021 where treaties are more durable than congressional-executive agreements.
[61] Original policy 82 FR 8495, January 23, 2017.

argued that they lacked the authority to make any such policy. None sought legislative support to bar any such policy from being instituted or revoked.

As power to make or reverse policy persists with little opposition from the branches of government that are designed to provide the checks and balances, the argument that the distinction between presidential and parliamentary systems strengthens.

VII. Conclusion

There is an inherent control problem with the administrative state best characterized as a principal/agent problem. Admittedly this is an over-simplified characterization of the relationship between the political executive and the administrative state in a presidential system. As described in chapter 2, in presidential systems there exists in reality a multiple principal/agent relationship. Nevertheless, in order to understand how the political executive would control the administrative state (and the levers of control that link the two even under a checks and balances equilibrium), it is important to lay out the channels through which the political executive would exercise expanded control over the bureaucracy. What we have then is a menu of mechanisms that, if expanded or used beyond their original scope, could be used to control the administrative state. It is these mechanisms that have therefore been the venues of executive inspired expansion.

Before showing how that expansion has occurred, it was important to establish the why. In other words, this chapter also laid out the incentives that drive the political executive's expansion of power. Essentially, electoral pressure to generate public goods and the desire to generate private goods pushes political executives to expand their ability to control the inputs to the bureaucracy (for instance, budgets) and allocative power (decree, oversight and discipline) over the bureaucracy.

Beyond the question of why the power is expanded, there is the question about why expanded power persists. In other words, one would ordinarily think that extra-legal power would be unstable. It would fluctuate with each successive political change in government. Yet we see that norms or rules that are augmented in order to expand executive power seem to be durable. The reason for this, as described above, is that each successive political executive wants the same power that generated a policy choice in order to be able to reverse it. The durability of the power has an inverse relationship to the durability of the policy choice.

Chapter 4: Administrative Reform and Constitutional Responsibility

I. Introduction

As the administrative state grew, it became a set of important political tools and yet simultaneously difficult to control. As bureaucracies developed in western democracies, the template that is often used in the constitutional design of non-western countries, it was not immediately obvious who should control administrative agencies. While it was clear that legislatures had the job of creating bureaucratic institutions, the arm of government that would control their operation became an increasingly fraught question.[1] When agency action no longer looked quite as simple as implementing the plain language of legislation and increasingly appeared to include policy design, both the legislature and executive staked a claim over controlling agency decisions. Yet, as a practical matter, it seems that the executive arm of government has come off better in this debate.[2] This is despite the difference in constitutional systems that jurisdictions possess. Explaining why the executive tends to expand its control over the administrative state in a parliamentary system, a system with a fused legislative-executive

[1] The literature on this debate is voluminous. Martin S. Flaherty, The Most Dangerous Branch, 105 *Yale Law Journal* 1725 (1996); Abner Greene, Checks and Balances in an Era of Presidential Lawmaking, 61 *University of Chicago Law Review* 123 (1994).

[2] See Daryl J. Levinson, The Supreme Court 2015 Term Foreword: Looking for Power in Public Law, 130 *Harvard Law Review* 31, 39 (2016); Mariana Mota Prado, Assessing the Theory of Presidential Dominance: Empirical Evidence of the Relationship Between the Executive Branch and Regulatory Agencies in Brazil in Susan Rose-Ackerman, Peter Lindseth and Blake Emerson (eds), *Comparative Administrative Law*. Edward Elgar (2017). I use the term 'political executives' to include the chief executive and the cabinet which together constitute the political leadership of the executive branch of government. This formulation is broad enough to include systems of government which included a divided head of government (prime minister and elected president). Though such systems adopt dual-heads of government as a constraint on executive power, my account of the ability to control the administrative state is still applicable even where distinctions in the outcomes can be characterized as distinction in degree of control. The outcome of the tilt towards executive control of the administrative state can still be present in any constitutional system even if some are able to limit the extent of control somewhat.

bodies, is rather straightforward.[3] Certainly more so than explaining the similar outcome in a system with separated powers where arms of government are expected to constantly compete over power thus ensuring that no one arm can accumulate all of it.

While chapter 3 laid out the manner in which a political executive would control the administrative state, here question becomes how the political executive is able to remake the administrative state through reorganization or institutional reform. Reform is inevitable as the needs of public administration evolve and the burden on the administrative state grows. What remains a reality is that we see instances, perhaps even a rapidly growing number of instances, where the executive is given a primary role or is the protagonist in reforming the bureaucracy.[4] Specifically, they are able to propose the reforms that should be made, and they are given the ability to generate evidence in support of their proposals (through commissions etc.), evidence which makes it more costly for any opposition to argue against the plan. Sometimes, the institutional prerogative is more extreme, for instance, where executive plans for reform are taken as effective unless the legislature votes them down – default application.

Examples of constitutional systems which have adopted a separated arms of government structure and have also allowed the executive to drive administrative reform are not in short supply. Brazil, under a presidential system with separated powers[5], had a fragmented bureaucracy with agencies that displayed varying degrees of independence. The difficulty in ensuring the optimal performance of the administration led President Luna in 2003 to convene an

[3] Lorne Sossin, The Puzzle of Independence and Parliamentary Democracy in the Comon Law World: a Canadian Perspective in Susan Rose-Ackerman, Peter Lindseth and Blake Emerson (eds), *Comparative Administrative Law*. Edward Elgar (2017).
[4] William Howell on Agencies by Presidential Design, *Journal of Politics* (2009).
[5] See Keith Rosenn, Separation of Powers in Brazil, *Duquesne Law Review* (2009) for a history of the separation of powers principle in Brazil.

inter-ministerial working group to assess the organization of the bureaucracy. The working group produced a draft bill which constituted a general administrative law. Importantly from the perspective of reorganization, the proposed legislation had the aim of shifting policy-making authority from agencies to ministries and instituting changes to the process of appointing heads of agencies in ways that favored sitting presidents.[6]

South Korea is another presidential system that has the administrative reform process driven by the executive. After ending 30 years of military-controlled authoritarian government, president-elect Kim Young-Sam proclaimed that continuing the democratization process, promoting globalization, and restructuring in favor of small government would be the guiding principles of his administration. President Kim Dae-Jung took office in 1998 at the beginning of the financial crisis and instituted NPM-driven reform policies, which received wide public support. The process for reform was initially institutionalized by the passage of the Basic Act on Administrative Regulation in 1997. The aim of the legislation was to initiate much needed reform to a fragmented and outdated administrative system. The legislation created the Regulatory Reform Committee within the office of the presidency and established it as the central body for regulatory reform. The Committees function include the review and approval of reform plans submitted by ministries and agencies. As such, the President plays an influential role in the design of administrative reforms through a central oversight institution.[7] Mexico[8] and

[6] The heads of agencies would be placed on 4 year fixed terms which would make result in openings at the head of agencies coincide with presidential elections. See OECD Review of Regulatory Reform: Brazil Strengthening Governance for Growth (2008) pg 221.
[7] Choi, A Radical Approach to Regulatory Reform in Korea, Presented at 2001 Conference of the American Society for Public Administration at Rutgers University, New Jersey, US.
[8] OECD Report on Mexico;

France[9] have undergone reform programs driven by centralized executive agencies with the legislature offering little resistance.[10]

A process of administrative reform also allows for the alteration of the bureaucracy's function and purpose. In the hands of a single arm of government reform powers which could be a means to establish greater control over the bureaucracy, alter policy objectives and subvert the intention that led to the creation of specific institutions. Such power typically is not readily apparent in any constitution nor does it leap out as an obvious corollary of a specific constitutional set-up. In fact, in a system of separated powers especially, the power to fundamentally change the institutional design which a legislature has enacted raises significant constitutional issues.[11] The result of such administrative reforms has been the establishment of an administrative state that is more amenable to executive control. Some of the largest accomplishments of such reforms has been the creation or expansion of the office of the executive with the capacity to centralize decisions of the administrative state, increase oversight etc. over the administrative state. What remains important to understand, and is the subject of this chapter, is how such a power emerges and why it happens to fall in the hands of the executive arm of government.

Below I extend a fundamental model of strategic behavior in order to explain the incentives which lead legislatures to grant executives the capacity to reorganize the executive branch. The capacity in question is the generation of expert advice within the executive which

[9] OECD, Making Reform Happen Lessons from OECD Countries at pg 81
[10] *Ibid*.
[11] If one were to assume that the authority for such a change was delegated by the legislature to the executive, see for instance the present debate on the constitutionality of delegation from the legislature to the executive in the US context. Defenders of expansive delegation have gone so far as defend all but the delegation of casting votes for the passage of legislation. Proponents of restricting delegation have largely based their claims in the original meaning of the US Constitution at the time of the country's founding.

then, at least partially, justifies the delegation of reorganization authority to executive branch. The reason why it only partially justifies such delegation is a simple temporal one. The first time a legislature grants the ability to generate expert advice necessary to reorganize the executive branch, it has to have done so with the intention to also delegate the authority to do so. In a delegation model, there would have to be an exogenous reason (in other words, a reason not linked to expertise or capacity) which justified the decision to delegate reorganization authority to the executive. A look at the process by which reorganization authority was initially delegated is necessary. In the context of the US, the representative case of a presidential system used in this study, the Reorganization Act of 1939 was passed because of a consensus view that the President's role as a national representative, a role unencumbered by sectarian constraints that legislators faced, made him more capable of achieving the aims of administrative reorganization. However, regardless of the efficiency gains or improvements in the quality of administration, the result of such a power has inexorably lead to an expansion of the office of the presidency and increased control over the bureaucracy. The consequence being that in a presidential system based on a separation of powers, the power to reorganize the executive has shifted the balance of power in a manner that tracks with what one typically expects to find in parliamentary systems.

II. Constitutional Systems and Reorganization

Recall that the expectation based on constitutional system type is that differences should exist in the extent to which the executive controls the administrative state.[12] Parliamentary systems establish a fused constitutional system with authority delegated linearly from the voter,

[12] Terry M. Moe & Michael Caldwell, The Institutional Foundation of Democratic Government: A Comparison of Presidential and Parliamentary Systems, 150 *Journal of Institutional and Theoretical Economics*, 171 (1994) and Matthew Palmer, Toward an Economics of Comparative Political Organization: Examining Ministerial Responsibility, *The Journal of Law, Economics, and Organization*, 11, (1995). See Chapter 2 above.

to the legislature, then the executive and finally to the bureaucracy. Especially under the Westminster system, a principle of parliamentary supremacy places the power of the legislature above that of any other branch of government. The fused system, with the leader of the majority party in parliament heading the executive, ensures that executive dominance should prevail while the leader of the party maintains the confidence of their party compatriots. The majority in the legislature has the incentive to create for the executive all the tools of control over the administrative that it needs to achieve its policy goals. The opposition legislature supports this arrangement because they would like the same set of powers and latitude when they are in power.[13]

Separated powers systems on the other hand should produce something quite different. There are multiple veto points which makes passing legislation very difficult and less common. The result is that there is an opportunity for winning coalitions, through legislation, to entrench administrative agencies, protecting them from future legislative majorities. They may do this while also ensuring that the agencies are not vulnerable to political interference by future presidents through mechanisms that ensure their independence. One would expect to find that in such a scenario, the administrative state would be fragmented and varied in institutional character with pockets of institutional independence. From this, it would seem reasonable to assume that the executive would not necessarily have the same interest with respect to the administrative state as does the legislature.

One could assume from this that in the specific case of administrative reform, one would likewise see a distinction between the two constitutional types. In both cases legislation can be

[13] Moe and Caldwell, *ibid*.

required to initiate reform. Yet in parliamentary systems, administrative reform efforts are led by the executive. The fact that the legislature and the executive have the same interests, and that expertise lies in the executive, means that it is understandable that the executive would take the lead in bureaucratic reform. In separated powers systems, such efforts would be led by the legislature, the arm of government responsible for the creation of the administrative state and, presumably, jealously protective of that prerogative.

What we see occurring is that legislatures under any constitutional system have the incentive to cede control over administrative reform to the political executives. In doing so, the legislatures arm the executive with a substantial tool to control functioning of the administrative state. Ultimately, where one would assume that constitutional system-type would produce a distinction in the manner in which administrative reform was controlled, such a distinction simply does not materialize. A more exact description of the process of convergence is that the systems based on separated powers have moved towards to parliamentary systems. Parliamentary systems therefore act as a baseline – executive dominance over administrative reform. The process that then needs to be explained is how separated powers systems loosen the constraints that their underlying logic suggest they have on the executive's role in administrative reform. How that will be accomplished in this chapter is the assessment of the quintessential presidential system with separated powers, the United States, and the emergence of the US presidency as the primary protagonist in administrative reform.

III. Administrative Reform and Control

Reorganization can lead to two forms of augmentation of control. First, reorganization can result in direct control through the assumption of decision-making power directly or can

achieve quite the opposite through privatizing bureaucratic functions.[14] Creating institutions that can generate and implement policy that are under the direct control of the political executive or are independent of any political control. The second way in which control is exercised is less direct - through the creation of institutions that aid in oversight over the administrative agencies. By reducing informational asymmetries through the creation of oversight mechanisms, the political executive can better align the actions of the administrative agencies with its own. This latter set of actions has led to a phenomenon commonly known as centralization through the construction of the managerial political executive.[15] Centralization allows for the use of other levers of control such as appointment powers, budget discretion, or executive orders more effectively to achieve policy aims. In more dramatic scenarios, decisions made by administrative agencies are relocated to political appointees.

In the context of a system based on the separation of powers, what remains less understood is the process that leads to executives to assume power over reorganization. How is it able to remake the bureaucracy, and the executive arm of government as a whole, in a manner which makes realizing policy objectives simpler? The question becomes interesting in the context of constitutional systems. In any constitutional system, whether parliamentary or separated powers, the legislative arm has the formal responsibility to construct the administrative state which it does through the passage of legislation[16]. However, what has emerged over the course of constitutional evolution has been the marginalization of legislatures from the reform of the bureaucracy. This is despite the reality that drastic fixes to the administrative state can look a

[14] See Chiara Cordelli, *The Privatized State*, (2020).
[15] In the US cites, UK, Canada, South Korea, Japan.
[16] Of course we can have the debate about whether that power can be delegated – nevertheless, the power is uniformly understood to be legislative.

lot like creating it. In the course of reform, agencies are created, destroyed, or moved, or the scope of their operations and authority are expanded or narrowed.

The result is that the identity of the arm of government that takes the lead role in designing the amendments to the administrative state can raise significant constitutional issues. Whether the process of reform is legislative or executive led can have significant consequences for how agencies operate.[17] There is perhaps no distinct pattern of reform that either arm of government would necessarily adopt uniformly. In some cases, a political executive may find it expedient to privatize components of the bureaucracy and in others it may seek to draw agency decision-making closer to its sphere of control.[18] Likewise, legislatures may swing between administrative decentralization, executive dominance, or increased legislative oversight and control. These two arms of government may overlap in their preferences or they may not. Importantly, however, a separated powers system allows for the possibility that they diverge in their preferences over the design of the administrative state. The consequence of any divergence is that there is a meaningful distinction in an executive or legislative led process and the choice between the two can have substantial consequences for which arm of government controls the administrative state.

How this question of institutional choice is resolved in practice is a product of some strategic interaction between arms of government. The dynamics of such an interaction could be presented in several forms. One way that it could be understood is as a product of bargaining

[17] More than this, it can have far ranging political ramifications in a system where the legislature and the executive can be held by two different political parties thus laying the groundwork for partisan attacks on the administrative state which can be seen as a tool in the hands of the executive as a means to frustrate legislative aims. See Gillian Metzger, The Supreme Court 2016 Foreword: 1930s Redux: The Administrative State Under Siege, 131, *Harvard Law Review* (2017).
[18] Jon D. Michaels, *Constitutional Coup: Privatization's Threat to the American Republic* (2017).

between the legislative and executive branches.[19] Each can have different interests with respect to the design and control of the administrative state and in most cases, the legislative branch must agree to pass legislation and appropriate funding for the reformed administration. However, as with any bargaining interaction, the parties may differ in their bargaining power resulting in one party effectively leading the process with the outcome better reflecting their preferences than those of the other parties. An important element that may determine the outcome of a bargaining interaction between the executive and the legislature is the role that an audience to the process may play in meeting out punishment against the party that may appear to not share their preferences. This opens the possibility that other features of the executive or legislature could be important in shaping the perception of the audience with respect to the bargaining positions of the parties. The bully pulpit of the executive may be highly effective in ensuring that the blame for a failure to reach a bargain will be assigned to the legislature thus ensuring that the legislature will be amenable to concessions in favor of the executive.[20]

Yet bargaining would not explain the expansion of the political executive and the ability to initiate administrative reform. Bargaining is the cooperative or noncooperative division of a pie with each side seeking to maximize its share of the pie. In the case of administrative reform we have an arm of government that is, at least at constitutional face value, in possession of the whole pie.[21] The legislature can act independently of the political executive to initiate the creation and reform the administrative state. The process that led to the allocation of reform

[19] See Sean Sullivan, Powers, But How Much Power, Game Theory and the Nondelegation Principle (2018) Virginia Law Review – characterizes the relationship between the two arms of government as a bargaining game.
[20] Such a model was developed by Tim Groseclose and Nolan McCarty, The Politics of Blame: Bargaining Before an Audience, *American Journal of Political Science* 45, 100 (2001).
[21] *Cf* Aziz Huq, The Negotiated Structural Constitution, *Columbia Law Review* 114, 1595 (2014).

prerogative to the executive appears less like two parties battling over a power with the result being some form of power-share arrangement between them. Instead, it appears more like the legislature formally granting the executive a power that it exercised at least once before for the purposes of reform. What we are trying to explain is why would the legislature pass on that agenda-setting power to the political executive even when that would lead to an erosion of its power to control the administrative state.

An alternative argument to one based on a bargaining theory is that the institution that possesses the most knowledge of the administrative state, and administrative governance gets the job of reforming the administrative state. This is not a complicated argument, and it relies on traditional theories of delegation. Assuming first that the legislature does in fact play an important constraining role in reforming the administrative state (at least in theory) by passing legislation for any reform that does occur or by legislating the procedure by which reform occurs, the question becomes why the legislature delegates the primary role of designing the reform to the political executive. Quite simply, if we understand reform as being a task for which expertise is required, then does the legislature have that expertise, and if not, is it rational for the legislature to delegate the responsibility to an agent that does?

However, delegation models do not solve one particular problem which is that in the case of the administrative state, the institution that typically gets the job, the political executive, is not by default an expert. No constitutional system insists that the political executive have the capacity to oversee the administrative state. Despite constitutional provisions that place the political executive at the head of the administrative state, it is not a forgone conclusion that they would know the most about the administrative state, public administration, or the details of particular policy areas and thus be the obvious candidate for being given the job of fixing it. This

problem is only magnified by the increasing complexity of tasks of the administration. A political executive structured according to the often brief provisions of a typical governing constitution, does not possess the capacity to gain sufficient insight into the operations of the bureaucracy to warrant delegation.

In explaining then the evolution of the powers of the political executive, the core problem is what explains the development of expertise within the political executive. In other words, how do political executives become endowed with the expertise sufficient to make it rational that the legislature grant it, or acquiesce to its assumption of, the primary role in reforming the administrative state. Answering this question should also provide an explanation for the growth of the political executive and a fundamental shift in the constitutional structure of many states.[22] Before building a theory which would explain the expansion of executive power over administrative reform, a brief description of what that dominance has come to look like is necessary.

IV. Reorganization and Control – United States and the United Kingdom

Wholesale changes to the administrative state and the institutions it comprises is a substantial task. It commonly falls under the formal authority of the legislative branch to impose a change. However, it is typically not the legislative branch that takes the lead in designing the changes that take place. That privilege usually lands in the lap of the political executive. The results are typically that the structure of the administrative state better reflects the interests of the

[22] There is much recent literature on the 'amendment' of small-c constitutions. The manner in which constitutions or constitutional institutions and rules change, See Bruce Ackerman, We The People, Volume 1: Foundations (1993); Richard Albert, Yaniv Roznai and Ryan Williams. *Amending America's Unwritten Constitution* (Cambridge University Press, 2022); Adam Chilton and Mila Versteeg, Do Constitutional Unamendability Rules Make a Difference?, Working Paper (2025), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5202705.

political executive. In an effort to understand the incentives we should expect to find under the two pure constitutional system types, the paper will focus on administrative reforms the two jurisdictions which reflect the archetypal constitutional systems, the US representing presidential systems and the United Kingdom representing the parliamentary systems.[23] Given that parliamentary systems are designed in order to facilitate executive dominance over administrative reform, the task here will be to understand the reasons for the US, under a presidential system, evolving in the direction of parliamentary systems.[24]

In the United States, between 1932 and 1981, Congress periodically delegated authority to the President to develop plans for the reorganization of portions of the federal government and to present those plans to Congress for consideration under special parliamentary procedures.[25] The procedures allowed the plans to go into effect unless one or both houses of Congress passed a resolution rejecting the plan – a legislative veto. The process quite obviously placed the President in the driving seat of administrative reform with Congress required to muster a majority of votes to oppose the proposed plans.[26] The comparative advantage of a single decision-maker against a multi-member voting institution playing an important role in tipping the institutional division of power in favor of the president.[27]

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[23] Of course, variations in the systems exists and the task of classifying the systems under any grouping of system types is often controversial. See Shugart and Carey, *Presidents and Assemblies: Constitutional Design and Electoral Dynamics*, CUP (1992).
[24] As in the rest of the dissertation, the choice of the US is that it represents the archetypal presidential system with separated powers undergirded by a principle of balanced arms of government that constrain one another.
[25] Procedures that enabled an expedited passage of the proposed plans in legislation.
[26] William Howell, *Power Without Persuasion* (Princeton, 2003) for the advantage that single decision-makers have over multi-member voting institutions.
[27] *Ibid*.

In 1984, the mechanism was amended to require Congress to act affirmatively in order for a plan to go into force. However, by the end of 1984 the authority expired and it has not been available to any President since. During its existence, Presidents used the reorganization authority regularly, submitting more than 100 plans between 1932 and 1984. Presidents used the authority for a variety of purposes, from relatively minor reorganizations within the individual agencies to the creation of large new organizations, including the Department of Health, Education and Welfare; the Environmental Protection Agency; and the Federal Emergency Management Agency.

The end of reorganization authority clearly represents a decline in the President's authority to exert influence over the administrative state through this avenue with Congress stepping in as the primary constraint.[28] While the change is important with respect to the power of the Congress over the reorganization, it is arguable, and it certainly has been argued, that the change had little effect on the balance of power between the executive and the legislative branch. In short, the managerial presidency had already been created, delegation to the administrative agencies continued and formal reorganization had fallen behind in the list of presidential priorities when it came to means of controlling agency action.[29]

In the UK, concern with the reform of the machinery of government developed later than it did in the US. The momentum for reform really began with Britain's effort at post-war planning in 1917. Prime Minister David Lloyd George established the Haldane Committee as a means of reorganizing the fragmented war-related agencies that had emerged in the years prior,

[28] David Lewis, Deconstructing the Administrative State, *Journal of Politics*, (2019) at 782.
[29] John Dearborn, The Historical Presidency: The Foundations of the Modern Presidency: Presidential Representation, the Unitary Executive Theory, and the Reorganization Act of 1939, *Presidential Studies Quarterly* (2019).

and developing a coherent central administration which would be designed to operate effectively. The Committee relied on experienced civil servants and academics specialized in public administration to offer testimony that would assist the Committee in generating its proposals. It also mediated differences of opinion between departments as to the needs for reform. What emerged from the Committee was the recommendation for a streamlined cabinet and expanded secretarial and advisory capacity at the cabinet and prime ministerial level. This included a Department of Research which would assist in the formulation of policy. Unlike the US reorganization process, the only step required in order to put in place the Committees proposal was the adoption of it by the Cabinet led by the Prime Minister.[30] Though it took years to implement, the reform proposals were adopted and achieved a hallowed status as the benchmark of much of the reforms that took place over the decades that followed.[31]

The history of reorganization suggests that between a parliamentary system like the UK, and a presidential system in the US, there appears to be some convergence in the manner in which reorganization power emerged. The political executive in both systems have emerged as the source of the design of reorganization of the administrative state. This is especially puzzling given that Congress is often regarded as having asserted itself as holding primary control over the bureaucracy, epitomized by the passage of the Legislative Reform Act, and less directly, the

[30] For a broader discussion of the rise of the executive in the UK, see Andrew Hill and Anthony Whichlow, *What's Wrong with Parliament?* (1964) or Philip Norton, *The Commons in Perspective* (1981).
[31] Peri Arnold, Reorganization and Regime in the United States and Britain, *Public Administration Review* (1988).

Administrative Procedure Act.[32] So why would Congress equivocate in its position on who should control the bureaucracy when it came to who gets to reorganize it?

V. Theory

The empirical suggestion of convergence implicates an underlying theory which explains why the political executive is typically placed in the driving seat of administrative reforms. For a parliamentary system, the explanation for executive dominance in the reorganization process may be simple. Delegation from the legislature to the executive can largely be explained by the fused system of government.[33] Where preferences align perfectly, delegation to an expert or single decision-maker is costless and only yields benefits. The larger, or more surprising, shift in the balance of institutional power is the delegation of reform prerogative from the legislature to the executive under a system of separated powers, such as in the United States. It is this latter exercise which beggars a theoretical explanation. Put simply, a separated powers system creates a principal agent problem for both the executive that seemingly operates the administrative agencies and the legislature that created it.[34] Both, in theory, have some interest in ensuring that the agencies reflect their preferences.[35] And yet it is plausible to expect that the two arms of government will not always share the same preferences for the outcomes of the bureaucracy. The

[32] See Joanna Grisinger, *The Unwieldy American State: Administrative Politics Since the New Deal* (2012), 109, and David Rosenbloom, Whose Bureaucracy is This, Anyway? Congress' 1946 Answer, 34 *PS: Pol.Sci and Politics* 773 (2001), 774.
[33] It should also be pointed out that in parliamentary systems, the executive has the benefit of being able to present bills in Parliament. The executive can directly propose legislated administrative reform in parliamentary systems, whereas presidential systems do not afford the executive the same power. See Zachary Elkins, Strong Citizens, Strong Presidents: The Architecture of the Inclusionary Turn in Latin America, in Diana Kapiszewski, Steven Levitsky, and Deborah Yashar (eds) *The Inclusionary Turn* (2021).
[34] See David H. Rosenbloom Public Administration Theory and the Separation of Powers, *Public Administration Review* (1983).
[35] See Michelle Vachris, Principal-Agent Relationships in the Theory of Bureaucracy, in Charles Rowley and Friedrich Schneider (eds.), *The Encyclopedia of Public Choice* (Springer, 2004).

fundamental question then is which institution is best positioned for the responsibility of designing the manner in which the governance systems is optimized. However, with the legislature required to pass legislation with respect to administrative reform, it is in the position of assigning this role. The door is opened for a delegation of authority but there is little clear reason for the legislature to delegate this authority to the political executive, at least not without further elaboration of the standard models of delegation.

What we can assume remains true from standard delegation models is that the design of optimizing what exists in order to achieve greater efficiency is a process that requires expertise or capacity. It would thus be rational to delegate the task of designing such reform to which institution had the greater ability to complete the task. A standard model of delegation may thus focus on the fact that the legislature faces insurmountable collective action problems and is incapable of coalescing preferences around a single proposal for the reform of the administration. The result being that they delegate the task of formulating the specifics to the executive branch, a body that faces no such challenges. Perhaps the political executive is simply in possession of more information on how best to reform the administrative state and thus deserves the role of doing so.

Without stating that these arguments fail entirely to explain the reason for placing the executive in the driving seat, they could be bolstered. Gridlock alone would not explain why the power was given to the chief executive, a body that in many instances, at least at the time the power was initially granted, constituted little more than the chief executive and a handful of department secretaries or ministers. A bad decision that can be taken quickly is not clearly better than no decision at all. An explanation that relied on expertise faces the same problem. As a matter of constitutional design, the political executive is not placed in a position to itself possess

expertise in any given policy domain. Its singular inherent quality is political accountability and an ability to act decisively within its lawful bounds. If we assume, however, that the legislature has an interest in having complex problems solved by qualified experts, political accountability and ease of decision-making are not features that serve that purpose. The question remains, why would the legislature delegate the task of reforming the administrative state to the political executive and not to an agency of its own design which possesses experts in the relevant fields.

a. Cheap talk model

Delegation by a legislature to administrative agencies is done in the context of a principle/agent problem. Congress acting as the principle must decide how much authority to delegate to an agency while facing a probability that the agency will fail to align its aims with those of Congress. Many explanations for how delegation occur have been offered. The conventional version put forward by David Epstein and O'Halloran provides a foundation. The authors argue that legislators delegate to the bureaucracy to avoid the costs of legislative politics, take advantage of bureaucratic expertise and keep their workloads manageable. However, delegation of substantial discretion can also result in bureaucratic drift and legislators do not get full advantage from bureaucratic activities as agencies pursue their own goals. Congress chooses the scope of delegation by assessing the relative transaction costs associated with making broad delegations versus narrow prescriptions of bureaucratic tasks.[36] Further features of legislative controls, for instance the presence of *ex post* means of control, policy uncertainty or the complexity of the policy area also altar the degree of delegation that takes place.[37]

[36] David Epstein and Sharyn O'Halloran, *Delegating Powers: A Transaction Cost Politics Approach to Policy Making under Separate Powers* CUP (1999).
[37] John Huber and Charles Shipan, *Deliberate Discretion : The Institutional Foundations of Bureaucratic Autonomy* (CUP 2006).

At its core, the theoretical justification for delegation acknowledges that the process is driven by a rational exploitation by the legislature of expertise that the recipient of the delegated authority possesses. Legislators do not have the time or expertise to fully resolve the details of complex problems over which they legislate and so they delegate some degree of discretion to agents capable of doing so. A more complete theory of delegation would also include the possible incentives for delegation created by elections and the changes in legislative coalitions that could arise.[38] Legislators could delegate difficult or socially costly decisions to agencies and thereby claim credit for solving a problem while avoiding the blame for the costs of the chosen solution.[39] Despite the presence of more nuanced approaches to the problem of delegation, models still, at least implicitly, assume that delegation is motivated by the presence of expertise.[40]

However, this foundational assumption to the traditional models of delegation does little to explain delegation to the political executive directly, at least when considered from a historical perspective. Delegation of executive reorganization in many instances preceded the expansion of the political executive or the creation of the managerial executive office in the manner we recognize today. Policy expertise at that level of the administrative hierarchy is not part of traditional constitutional design. In fact, policy expertise at the level of the head of the executive

[38] Collection of court cases where expertise was used to legally justify delegation from jurisdictions to indicate that delegation in any constitutional context has this as the underlying motivation and justification.
[39] David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (2008)
[40] Daniel Carpenter, *The Forging of Bureaucratic Autonomy* (Princeton, 2001).

has been a product of institutional evolution and executive reorganization across all mature constitutional systems.[41]

Yet as indicated, we cannot rely on the assumption that the political executive has greater knowledge of how the administrative. As a matter of institutional design, political executives are not created as subject-matter experts in any policy area and are typically not even granted the means to strictly oversee bureaucratic activity.[42] Specifically, political executive was not conceived as an institution that could develop sophisticated policies such as new or improved models of administration. This is made apparent by the early years of the American presidency which comprised of little more than the President and a few secretaries.[43]

As a result, a theory that relies on the delegation of discretion to an institution that possesses greater institutional capacity would not apply to what, at least on a facial reading of any constitution, would constitute a political executive. Specifically, delegation of reorganization authority could not rationally be explained by assuming that the legislature was taking advantage of an institution's greater expertise in the area. The legislature had enough information to create the agencies, would it not have enough information to modify their structure and optimize their performance?

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[41] B Guy Peters, R A W Rhodes and Vincent Wright, *Administering the Summit: Administration of the Core Executive in Developed Countries* (Palgrave, 2000); Andrew Rudalevige, *The New Imperial Presidency: Renewing Presidential Power after Watergate,* (Michigan 2005); Peri Arnold, *Making the Managerial Presidency* (Kansas, 1998).

[42] Of course many constitutions do title the executive has 'head of the administrative state' and in jurisdictions where constitutions have done so, the argument can be made that the expansion of the executive in order to fulfill this constitutional role was required.

[43] As the administrative state became more complex, this feature of the presidency became a reason for enlarging the Office of the Presidency. See Jerry Mashaw, *Creating the Administrative Constitution* (2012).

In addition, by itself, the traditional models of delegation would not explain why the executive office of the president was expanded, or the development of what are now more recognizable political executives. It is only with the expanded office of the political executive, filled with experts and policy makers that in many cases overlap with the skills possessed by administrative agencies, that the traditional models of delegation explain the assigning of reform authority by the legislature to the president. The traditional models only work in the modern era because the political executives are large institutions that can draw on their own institutional capacity in order to initiate policy (they possess the investigative and oversight capacity necessary).

In understanding the incentives faced by the legislature in delegating reorganization authority to the political executive, we begin first with a description of the structure of any bureaucracy which is simply that it exists as hierarchy. At the top sits a political head who operates under the instruction of the chief executive and below them are experts. The political heads set the agencies' agenda and decide on policy outcomes. The agencies provide information and implements decisions. This has the makings of a classic principal-agent setup. One way of measuring the costs the principal may face in its relationship with its agent would be the quality of the information provided or its use. A focus on information, the currency that experts trade in, makes this perspective useful in modelling the relationship between political principals and expert agencies.[44]

Critical to this setup is the fact that there is an information flow from the expert to the political leadership who then acts based on the information provided. This scenario lends itself to

[44] Michael Ting and John Huber, Civil Service and Patronage in Bureaucracies, *Journal of Politics*, 83, 902 (2021); Michael Ting, Politics and Administration, *American Journal of Political Science* 61 305 (2017).

a standard sender-receiver, or 'cheap talk' model, in which a sender is able to costlessly send a message regarding the state of the world to the receiver who then acts based on the information received. The assumption on which this rests is that the sender has information about the state of the world that the receiver does not – specifically in the context of the administrative state, the expert agency has information that the political executive does not possess. In all cheap talk models, the mechanism is simple – the signal sent from the sender to the receiver is informative only to the extent that the sender and receiver's incentives converge. The reason is that the sender can influence the actions of the receiver by manipulating the content of the communication sent. The results of the basic cheap talk model can be summarized as being that, 1) completely truthful communication is impossible unless the two parties have identical preferences. 2) if their preferences are sufficiently different, no credible communication is possible, even when such an outcome is Pareto inefficient; and 3) as the two parties' preference align, more information can be communicated between the two parties.[45]

However, a modification of the model is required in order to incorporate the two constitutional actors, the legislature and the president. Including these institutions as actors to a cheap talk model can help illustrate the incentives a legislature may have in creating or allowing there to be created an expert political executive – even when that expertise overlaps or displaces the administrative agencies that the legislature has created or could create. Instead of just having two parties, the sender (agency) and receiver (political head), we have four: sender (agency), receiver (political head), president and legislature. The inclusion of a president and legislature also replicates the dynamic between the institutions in a separated powers system based on a balance of powers. The two are permitted to have their own policy preferences which may

[45] Vincent Crawford and Joel Sobel, Strategic Information Transmission, *Econometrica*, 1431 (1982).

diverge. However, crucially, the model assumes that the legislature has the desire to ensure that the policy is informed by an expert's accurate depiction of the state of the world.[46] In other words, that it is an informed policy decision.

Aside from possessing distinct policy preferences, an additional feature of a separation of powers model is that both the president and the legislature can choose its delegate. The legislature is permitted to define the preferences of the agency (the sender) and the president can define the preferences of the political head of the agency (the receiver). The two delegates then play a cheap talk game where a policy is chosen by the receiver in a world where there is uncertainty about the policy's outcome.[47] There is a sender and receiver who respectively operate at two different levels of an administrative agency, which makes a policy choice in the face of uncertainty. The sender acts as the 'expert' and the receiver as the 'authority'. The sender or expert has perfect knowledge of the state of the world but can send any message to the receiver, whereas the receiver does not and cannot verify the information that it receives. The two need not have the same preferences over the outcome of the policy choice.

As with any cheap talk model, a crucial part of the model is that the receiver can opt to ignore an expert that had preferences too dissimilar from itself. In other words, if the receiver has good reason to distrust the information from the sender, which would be the case if the two had sufficiently different policy preferences, the receiver would do better to rely on the prior beliefs on the state of the world. Simply, the receiver can never do worse than simply choosing a policy based on their own expected value of the state of the world and would opt for that course of

[46] Kathryn Watts, Controlling Presidential Control, 114 *Michigan Law Review*, 683 (2016) for case studies which illustrate Congress' desire to have administrative decisions be expert-based.
[47] The decision to model the game in this way is that in separated powers systems, the president is typically vested with the final authority over bureaucratic outcomes.

action if the sender had the incentive to manipulate the information given to the receiver. In other words, because there are no legal or practical obstacles to acting contrary to agency advice, the president can act in an uninformed manner.[48] The president's option to ignore experts results in generating an incentive on the part of a legislature that has the interest to maintain informative communication within the administrative hierarchy to provide the president with agents that possess the president's own preferences. The legislature is disincentivized from using access to information as a means of controlling the president's use of authority.

Now imagine that the two political principles – Congress and the President get to choose their respective candidates to fill the role of sender and receiver. Congress gets to choose the sender – the agency expert. This accords with its prerogative to design the administrative state – create agencies and assign their responsibilities. The President on the other hand, selects the political head of an agency, exercising the constitutionally granted appointment power. Crucially, it remains the authority of the political head to select a policy from the set of policy choices that exist and on the basis of information received from the agency expert.

At its core, the results of the model are simply driven by the fact that a legislature would prefer that if there is information of the world that the expert has that is policy relevant, the

[48] This assumption is debatable and administrative law does play a role here. See Massachusetts v EPA 549 U.S. 497 (2007). See also Jody Freeman and Adrian Vermuele, Massachusetts v EPA: From Politics to Expertise, *The Supreme Court Review* 1, 51 (2007). Essentially, the Court told the EPA that it needed to make a scientific determination regarding whether the emissions from new motor vehicles do or do not endanger the public health or welfare within the meaning of the Clean Air Act. According to the Court, policy-driven considerations were to factor into the EPA's decision to regulate or not to regulate, if at all, only after the EPA made an expert judgment. This is not a case that speaks directly to a President's obligation to make policy based on expert advice. It suggests more that decisions made by agencies should be based on expert advice. It is perhaps a strong indication that courts, like legislatures, prefer that decisions be based on expertise. While there is obviously pressure for presidents to base decisions on expertise, See Watts, supra at 46, there is as yet no legal obligation to do so. See also Louis J. Virelli III, Science, Politics, and Administrative Legitimacy, 78 *Missouri Law Review* 511, 514 (2013).

legislature would rather that the expert be a person that the President will listen to than not. Interesting, the timing of the game does not affect the finding. For instance, if Congress was able to select the agency expert before the President (thus without knowing who the President has selected) or after the President, it would make little difference to who Congress would select. Under all conditions, the legislature prefers to choose an expert that reflects the preferences of the executive as the dissonance between the preferences of the legislature and the executive expands. There is simply a limit to the extent to which the legislature can impact the policy outcome by selecting an expert that reflects its own preferences before the executive is better off implementing a policy without expert advice. In effect, while previous models of delegation suggest that information attracts delegated discretion, this is a formal description of the converse: discretion attracts information.

The crucial aspect of the model is that the president is given constitutional authority to implement a policy – or more precisely that the implementing authority falls under the direct control of the political executive. It is due to this circumstance that the legislature is incentivized to anchor the preferences of the expert to that of the president as that is the only way in which to ensure the flow of accurate information into policy formulation.

The mechanism derived from the model explains the reasons for granting the president access to information from sources that match the president's preferences.[49] In practical terms,

[49] The core assumption that underlies the model is that the implementing authority is assumed to be placed in the hands of the president. However, that may not be consistent across policy spaces within a single jurisdiction or across jurisdictions. For instance, see Kevin Stacks, The President' Statutory Powers, *Columbia Law Review* (2006) for a discussion of the fact that in the US, the accepted position is that the President is always included in legislative delegation to the agency officials, at least impliedly. The model thus explains that the variation one might see empirically in the allocation of experts to presidents or independent agencies could be explained by whether there is in fact a belief that the president had implementing authority. This reveals an important question left unexplained by the model.

the model explains why the president is given an expanded office comprising experts and advisors specialized in areas usually within the purview of administrative agencies and departments. This includes equipping the president with access to the expertise needed to take the lead role in reorganizing the bureaucracy. In doing so, a gap in the delegation theory is filled, one which explains why the legislature would delegate to the political executive the task of reorganizing the administrative state.

The crucial insight that the model produces is that the desire to build the managerial presidency emerges because it is believed that the authority for policy choice resides with the political executive.[50] It is this constitutional or practical authority which encourages the legislative development of the political executive. The authority can emerge directly from constitutions which place the power to choose between policy options in the hands of the political executive. The authority could also emerge through a political consensus built between institutions. In other words, the important constitutional position that results in the expansion of the ability of the political executive to control the administrative state is that the political executive has been granted the ability to make final decisions with respect to administrative

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For each policy space, does that constitutional authority exist or can we argue that it does for any delegated authority.

[50] There is a weakness in the model. The authors argue that because the Constitution grants the President final authority over the choice of policy, Congress was incentivized to create for the President sources of information that are completely under her control. However, the US Constitution in fact deliberately does the opposite. The draft of the Constitution sent to the committee concerned with Article II in mid-August of 1787 proposed to define a handful of specific Departments and their responsibilities, and to create a council modeled on parliamentary lines, while explicitly reserving to the President the right of decision after receiving its advice. The draft of Article II returned to the Constitutional Convention, and adopted by it, rejected this approach. Yet in defining the President's power in relation to the domestic government Congress was to create, and in contrast to the draft it rejected, the Constitution does not provide that the actions that government takes are to be the President's; it says only that she may "require the Opinion, in writing, of the principal officer in each of the executive Departments, upon any subject relating to the duties of their respective Offices." Like the "faithful execution" clause, this language accepts that actual administrative duties will be placed in others than the President.

output. In the context of reorganization the issue becomes whether the president was deemed to have the requisite authority to reorganize the administrative state. If such an assumption is justified, then the model would explain why Congress would furnish the president with the administrative capacity within the orbit of the president to carry out reorganizations. The next section presents evidence that the assumption can indeed be justified.

VI. US Presidential Reorganization Authority

Analyzing the US case more closely reveals support for the hypothesis that the crucial facilitator in the enlargement of the office of the Presidency was the fact that there was agreement amongst lawmakers that the President was responsible for policy choice, and specifically, was responsible for the choice of administrative reform. This may then add support to the broader claim that in any jurisdiction where such responsibility is recognized as belonging to the president, there is a push to equip her with the tools to make informed policy choices. With specific reference to reorganizations, the recognition that presidents have the authority to reorganize the administrative state leads to the provision of capacity to the president sufficient to accomplish that task.

The US is an unusual case in one respect: the US Constitution says very little about the powers of the President. Of course, given that the modern administrative state postdates the Constitution, it is understandable that there is little mention in the text regarding the President's powers over agencies or policy. Nevertheless, there has been considerable debate amongst scholars of the administrative state and presidential powers regarding the constitutional position of the president and administrative agencies. This debate is less relevant for the purposes here which is simply to explain the reason for the President's power over reorganization. However, what is relevant is that a relatively straightforward argument can be made on the back of a

reading of Article I and II of the Constitution that Congress is granted the power to create agencies, fund them at will, set the terms for the appointment of their officers, and vest certain powers in those officers. As a result, Congress is constitutionally granted the power of institutional design – which includes re-design – of the administrative state.[51]

The theory proposed above sets up the proposition that there is some understanding amongst those responsible for the construction of the political executive that the executive possesses the authority to make crucial policy decisions. Moreover, these are complex decisions that would benefit from expert advice. The legislature, in desiring good policy over bad (and desiring good policy that it may not agree with politically, over bad policy) would rather have a political executive have access to expert advice. However, the legislature is aware that the political executive will disregard expert advice that it cannot trust and will only trust experts that share its preferences. As such, the legislature is, under most circumstances, incentivized to allow the political executive to control the preferences of the experts.

Given little support in the text of the Constitution, what we need to then establish is some foundation for the first proposition that there was some consensus regarding the authority of the political executive. With regard to reorganization, the belief in Congress was that the President does have the authority to decide. There was conflict over what the basis of that authority was and Congress concluded that the best position was that the President's role as a national representative could overcome the sectarian differences that Congress could not. Following the formation of this consensus, the issue became equipping the President with the means to carry

[51] Stephen Skowronek and Karen Orren, *The Policy State*, (2017) pg 114.

out the task of reorganizing the executive branch. The solution was providing the President with the ability to hire experts with little constraint.

VII. Recognizing Authority

With the passage of the 1939 Reorganization Act and the debate that preceded it, it is relatively clear that Congress believed that the President had the authority to conduct executive branch reorganizations. Congress arrived at the conclusion that the President is in the best position to tackle reorganizations after a crucial debate on presidential and congressional representation, the structure of government and the constitutional division of labor. The result was the 1939 Reorganization Act which constituted a new presidential power to initiate reform of the executive branch while also placing Congress on the backfoot in exercising any kind of constraint.[52]

Preceding the passage of the 1939 legislation, the early battles over who should be able to reorganize the executive branch had resulted in the conclusion that Congress retained that power – or at the very least that the president did not have that power.[53] This conclusion was up-ended, however, in the 1930s. In 1936 Franklin Delano Roosevelt initiated the President's Committee on Administrative Management (informally known as the Brownlow Commission), a commission headed by prominent public administration scholar, Louis Brownlow. The stated purpose of the commission was to address weaknesses of the executive and equip the President

[52] It may be argued that the enactment of the 1939 Act was a product of partisanship. President Roosevelt, a Democrat had the benefit of a Democratic majority in Congress. A weighty argument could be made this fact adequately explains the granting of such a crucial prerogative to the President. However, partisanship in fact played little role in the passage of the Act. The debate regarding the proper role of Congress in executive reorganizations was within the Democratic party. It was a revolt by congressional Democrats which scuppered an earlier attempt to pass a reorganization bill in 1938. The debate which occupied both sides of the isle was on institutional design and constitutional authority.

[53] The results of the Keep Commission was flatly rejected by Congress.

with assistance needed to properly govern the bureaucracy. Two of the recommendations of the Brownlow Commission were the establishment of an executive office of the president and the ability of the President to reorganize the executive branch. The initial attempt to bring about these objectives in legislative form failed in 1938.

In response to the Brownlow Commission and its recommendations, Congress, through Senator Harry Byrd (D-VA) initiated its own expert commission by recruiting the Brookings Institute to evaluate the needs of the executive branch. Its recommendations would mean that both arms of government had produced distinct evaluations of the same subject – how should the executive arm of government be reformed and who should be responsible for doing it. In many respects the reports of the two expert commission diverged,[54] however where they settled on agreement was on the comparative advantage of the President to evade the constraints of parochial interests in a way that Congress was unable. The President possessed a national orientation and could therefore act in a manner that would yield net benefits for the whole country when restructuring the federal executive. Where lawmakers may be focused on a single agency or a subset of them, a president could achieve the goals of reorganization because they possess a broader perspective and are nationally accountable.

The Brownlow Commission report stated as its overall justification for placing the reorganization authority in the hands of the president as being the president's ability to overcome localistic and special interests. The Report stated that the "[t]he President is indeed the one and only national officer representative of the Nation."[55] It added, "[o]ur national will must be expressed not merely in a brief, exultant moment of electoral decision, but in persistent,

[54] John Dearborn, *Power Shifts: Congress and Presidential Representation*, University of Chicago (2021) page 106.
[55] Report at 1.

determined, competent day-by-day administration of what the Nation has decided to do."[56] This position would of course be understandable from a Commission established by the President. However, these same points were made by Congress' Brooking Commission Report. The Brookings Report pointed to congressional representation as the problem, comparing Congress to a family whose members care only about their "divergent interests" rather than "matters affecting the family as a whole."[57] The Report then went on to recognize the President's substantial responsibility in reorganizations given that he was "held by the people responsible for the administrative results"[58] Lewis Merriam in a later published version of the Report stated that the "[The President] is not the representative of a state or a congressional district. His constituency is the entire country and his position is such as to give him a sense of responsibility to the whole people. He may therefore take a national as distinct from a sectional point of view."[59]

These arguments then found their way into congressional debates on the reorganization authority. Senator James Byrnes (D-SC), who sponsored the legislation stated that "the purpose of the Reorganization Bill is to make Government a more efficient instrument for accomplishing the will of the people."[60] Other lawmakers made similar points. Representative Jed Johnson (D-OK) pointed out that congressional parochialism was an obstacle to reorganization, as the "departments and agencies are too powerful" due to their "many friends in an out of Congress."[61] Senator Lister Hill (D-AL) pointed to a speech by Solicitor General Robert Jackson to explain

[56] Report at 53.
[57] Investigation of the Executive Agencies of the Government, Preliminary Report at 2.
[58] Investigation of the Executive Agencies of the Government, at 18.
[59] Meriam, "Part I: An Analysis of the Problem", 117-118.
[60] Government Reorganization Speech, Station W.O.L., February 13, 1938, 1, James Byrnes Papers, Special Collections Archives, Clemson University, Clemson, SC.
[61] Congressional Record, 76th Congress, 1st Session (March 7, 1939), 2395.

the logic of presidential representation: "The President has every citizen of the United States as a constituent, but every Senator or Representative is primarily a representative of a section, however much he may desire to take a national view."[62]

What was clear was that a consensus had formed that with respect to reorganization of the executive branch, the consensus was that the President possessed the constitutional authority to lead the process. As a result, the form that the 1939 Reorganization Act took was to provide the President the ability to initiate a reorganization by submitted a plan to Congress, which would go into effect unless both houses of Congress voted to oppose it. With this consensus in place, it becomes simpler to rely on the model above to explain why Congress equipped the President with institutional capacity to carry out the task of reorganizations – and importantly did not have the President rely on expertise located in any of the agencies.

VIII. Building institutional capacity

With the passage of the 1939 Reorganization Act and the debate that preceded it, it is relatively clear that Congress believed that the President had the authority to conduct executive branch reorganizations. However, it was also obvious that the President did not possess the tools necessary to carry out the reorganizations that achieved the goal of a more efficiently run bureaucracy. Reorganizations occur with the advice of experts of public administration, insight into the functioning and financing of the administrative agencies, and specific policy areas in which agencies operate. None of these are by constitutional design granted to a president and as the administrative state grew, so did the president's monitoring costs.

[62] Quoted in Appendix to the Congressional Record, 76th Congress, 1st Session (February 27, 1939), 708.

Congress then needed to provide the President with the institutional capacity, or acquiesce to the President's efforts to produce it. However, the experts that a president would want and the experts that Congress bestows are not located within agencies where one might expect. Instead of independent experts or experts housed within already existing administrative agencies, experts are handed to the president directly. As the model described above suggests, the reason for this is that Congress recognizes that if the presidency were given access to experts that were not completely under its control, the President would simply not make use of the proffered advice and the executive branch would have a President with authority and no expertise – the worst of all possible scenarios.

In the case of reorganizations, the most direct form of expertise that the President relied on was the use of commissions – the hiring of experts directly by the President. Regardless of their political value[63] as a means of swaying public opinion, the commissions used in the process of administrative reorganization had a decidedly more concrete use. Commissions allowed presidents to leverage experts in the field of public administration to design and argue for a bureaucracy that met the president's objectives. However, presidential commissions are administrative bodies within the executive, they typically require some costly infrastructure in order to function and the members of these commission are commonly paid. In other words, their establishment is not an inconsequential exercise of presidential power and often requires, at least, the implicit consent of Congress.

Aside from the propensity of presidents to rely on commissions to design and make a case for reorganizations, two episodes illustrate Congress' role in equipping the presidency with

[63] David Miller and Andrew Reeves, Attitudes Towards Delegation to Presidential Commissions, *Presidential Studies Quarterly*, (2017).

the tools necessary to carry out reorganizations. The first is the history of the Bureau of the Budget. An institution that Congress first established with the hope that information on the financing and budgeting of agencies could be generated for the President when deciding on reorganizations and in the budgeting process. However, where Congress located the institution is relevant to establishing the mechanism described in the model above. The second has to do with the impact of Congress' efforts at constraining the President's ability to establish panels of experts within the executive branch, and specifically within the office of the presidency.

IX. Bureau of the Budget

As the administrative state grew, its financial burden increased. Following years of running the administration at a deficit, Congress began to aggressively attempt to curb the burden of the bureaucracy on the country's finances. In March 1909, James A. Tawney (Rep. N.Y.), chairman of the House Committee on Appropriations, said of the recently passed appropriations bill, "In no period except in time of war have the expenditures of our National Government increased so rapidly…This fact may well cause our people…to reconsider the necessity of checking this growing tendency towards excess."[64] Nelson W Aldrich (Rep., R.I), the chairman of the Senate Finance Committee stated: "The rapidity with which our national expenditures have increased within the last three years is a source of great anxiety if not alarm."[65] In the face of this problem, the need for greater administration of the bureaucracy's finances grew. In other words, there was a technical problem of overspending that needed a resolution, and experts were required in order to provide it. The goal of reorganizations became the desire to better control and limit the costs of an expanding bureaucracy.

[64] Quoted in Henry Jones Ford, *Cost of Our National Government: A Study in Political Pathology* (1910), pg. 3
[65] *Ibid*.

In an effort to accomplish a reduction in spending, Congress established the Bureau of Efficiency (BOE) in 1916. Congress placed the BOE within the Civil Service Commission and had it operate as a free-standing, independent unit in the Executive Branch. The scope of operation of the BOE included personnel studies, analysis of management practices. Importantly, under the appropriations acts funding the agency in 1916 and 1917, the BOE was instructed to "establish and maintain a system of efficiency ratings", "investigate the administrative needs in the several executive departments and independent establishments", and to "investigate the duplication and methods of business in the various branches of government service". Functionally, the BOE was a congressional agency (staffed by legislative appointees) housed in an independent unit in the executive branch. As political historian, Peri Arnold, describes it, "Congress wanted to institutionalize investigative capacity, but was more comfortable with that operation tucked safely under legislative supervision".[66] Others more bluntly described the agency as, "notwithstanding that its legal status is that of a part of the administrative branch of government", the BOE was a "direct agent of the legislative branch".[67]

It was designed to provide informational capacity about the executive branch organization from the perspective of Congress to the president. It was intended to be an information-generating support institution for the presidency under the direction of Congress. Congress would control the specific topics of study and the particular officials within the executive branch to whom the information would be submitted.

[66] Peri Arnold, *Making the Managerial Presidency: Comprehensive Reorganization Planning 1905-1996*, (1998) at 45.
[67] Gustavus Weber, Organized Efforts for the Improvement of Methods of Administration in the United States, (Appleton, Institute for Government, 1919)

The result of Congress' efforts were, however, disappointing. Unsurprisingly, the BOE's organizational reform recommendations to the president's officers went unheeded.[68] Arnold's assessment of the BOE's failed efforts to advise executive reorganization planners in the Harding administration, was that Secretary of Commerce Herbert Hoover held greater sway than the BOE "because of its ambivalent situation [as an agent of Congress] and its distance from the President." Arnold concludes that "[a]n advisory-teaching relationship…required a combination of proximity, trust, and the willingness of a president to grant an adviser independent authority".[69]

The BOE was officially closed and its records were transferred to the Bureau of the Budget (BOB) in 1933. Arnold describes the amalgamation as the "end of a legislative pretension to a capacity to guide administration."[70] In the first reorganization under the 1939 Reorganization Act placed the BOB in the newly constructed Office of the Presidency. The episode is useful in highlighting that Congress was unable to create information-generating support for the presidency outside of the control of the president. If Congress intended for the president to be properly advised on reforming the design and operation of the executive branch, it needed to bolster the capacity of the presidency to generate information.

The result of this action was that the Bureau of the Budget, and its current version, the Office of Management and Budget, grew to become a crucial tool in the control of administrative agencies, both as a result of its ability to centralize agency functions[71], as well as the provision of

[68] Mordecai Lee, *Institutionalizing Congress and the Presidency: The US Bureau of Efficiency, 1916-1933* (2006)
[69] Arnold, *supra* note 66 pg 64-65.
[70] *Ibid* pg 242.
[71] Eloise Pasachoff, The President's Budget as a Source of Agency Policy Control, *Yale Law Journal*, 125, 2182 (2016).

information and expert advice to the presidency. It became one of the central means through which the President exercises control over the administrative state.

X. Tawney and Russell Amendment

Congress was, however, entirely aware of the risks of a President with the capacity to generate information independently of any other branch of government. In early efforts to reorganize the executive branch, the President relied on the use of independently constituted commissions of experts to design and advocate for the reform of the administrative state. Congress initially responded by attempting to limit the ability of the president to employ experts without the input of Congress. Yet, the constraints put in place by Congress were seen early as unenforceable, and they have in effect been so.

On June 1, 1905, Theodore Roosevelt created a commission of officials with the task of recommending administrative reforms.[72] Congress sought to oppose the assertive claim of authority over the reform of the executive branch. It first only granted the Commission the measly sum of $5000 in response to the presidential request of $25,000 for outside experts. In 1909, President Roosevelt created the Council of Fine Arts by executive order. The Council would review and permit future plans for federal buildings, grounds and statuaries. This triggered an even stronger reaction from Congress. Representative Tawney, Chairman of the House Appropriations Committee, introduced an amendment to the Sundry Civil Appropriations Bill forbidding the use of appropriated funds for the "compensation or expenses of any

[72] The Commission had five members, Charles Keep, Assistant Secretary of the Treasury; James R. Garfield, Commissioner of the Bureau of Corporations; Frank Hitchcock, First Assistant Postmaster General; Lawrence Murray, Assistant Secretary of the Department of Commerce and Labor; and Gifford Pinchot, Chief of the Forest Service. Keep was assigned the position as Chair and the Commission became known as the Keep Commission.

commission, council, or board" unless Congress had authorized its creation. The bill was ultimately passed into law with the Tawney Amendment.

Despite signing the bill into law, President Roosevelt believed the Tawney amendment to be unenforceable. The President later argued that "Congress cannot prevent the President from seeking advice. Any future President can do as I have done, and ask disinterested men who desire to serve the people to give this service free to the people through these commissions."[73] Less than two months after the passage of the Act, the Attorney General, George Wickersham, offered the following interpretation of the Tawney Amendment: "[it] affected only commissions or boards constituted without authority of law."[74] The Attorney General of course did not specify what actions would constitute the 'authority of law' leaving open the space for the President to claim that an executive order would satisfy that requirement. In fact, the Attorney General, in a later opinion, doubled-down on the ambiguity by stating that every action that an agency or President takes does not have to be spelled out in legislation to justify the creation of an expert panel. The Attorney General concluded: "Congress did not intend to require that the creation of the commissions, etc. mentioned should be specifically authorized by a law of the United States, but that it would be sufficient if their appointment were authorized in a general way by law."[75]

Within the bureaucracy, the Attorney General's interpretation was uniformly adopted. An example occurred in the year the Tawney Amendment was passed. The War Department in 1909 was tasked with a range of infrastructure development functions. One constraint that Congress

[73] Theodore Roosevelt, *Theodor Roosevelt, An Autobiography* at 431 quoting his memorandum to Congress.
[74] 27 Op. Attorney General 300 (1909) 406 and 407. Following closely after the first opinion, the Attorney General issued a subsequent opinion which held that the 1909 law did not apply to groups consisting entirely of government officers or employees dealing with matters relating to their scope of employment. 27 Op. Attorney General 208 (1909)
[75] 27 Op. Attorney General 432, 437 (1909)

placed on the performance of the department's tasks was that it not harm the 'scenic grandeur of the Niagara Falls". The Department made it clear that it did not have any expertise in maintaining 'scenic grandeur', and when it was under similar constraints in the past, had simply contracted outside experts to assist. The constraint was thus deemed as sufficiently authorizing the hiring of experts and the establishment of a commission tasked with ensuring that the Department's efforts did not violate its obligation to preserve the aesthetic quality of the Niagara Falls. The Interior Department in 1961 faced a similar predicament. It was under various statutes obligated to consult private parties on matters related to forestry. Instead of conducting these consultations itself, the Department contracted advisory bodies to do so. It did so on the basis that the advisory bodies were sufficiently 'authorized by law', specifically, the statutes that required consultations to occur.[76]

The result has been an executive keen to establish bodies of self-selected experts in order to provide advice. In many cases the expertise is needed due to lack of it within the administration. However, in many cases the expertise exists within the bureaucracy, yet additional experts are appointed by the political executive. Importantly, Congress did not challenge or oppose most of the appointments and funded the commissions that emerged following the amendments and in fact generally allowed for their funding.[77] Even where Congress did oppose the commission's formation, the President was able to make use of discretionary funding sources like the Emergency Fund. Moreover, nothing stopped the President from appointing unremunerated experts.

[76] 40 Comp. Gen. 478 (1961).
[77] Jay Bybee, Advising the President: Separation of Powers and the Federal Advisory Committee Act, 51 *Yale Law Journal* (1994), pg 69.

The result was that Congress attempted legislative interventions to limit the president's access to expert advice with respect to reorganizations. However, after recognizing that the president had authority to make decisions with respect to reorganizations, furnished the president with the requisite expertise necessary to make informed decisions.

XI. Conclusion

Constitutions act as the basic outline for the type of governing system that a country operates. What often remains conspicuously vague in constitutions is the manner in which the bureaucracy should be controlled. Yet, bureaucracies have become crucial components of the government structure. As such, they have become fought over instruments of power between arms of government. With their size and complexity, they have also become increasingly difficult for any arm of government to control. The interaction between bureaucracies and constitutional design is however a question that has received only general overview.[78] Yet given how important an instrument the administrative state is, in whose lap it lands has large consequences for the balance of powers between arms of government. Moreover, balance of powers is a subject which constitutions and constitutional systems often have much to say. This is especially true of constitutional systems that have separated arms of government and hope that each will act as a constraint on the other.

One aspect of constitutions which is often made explicit, or at least obvious, is the choice of government or system type. Of the two most identifiable and general categories of constitutional systems, presidential systems are theorized to operate in one way or another and parliamentary systems produce something different. Parliamentary systems have an executive

[78] Susan Rose-Ackerman, Peter Linseth and Blake Emerson, *Comparative Administrative Law*, Edward Elgar, (2017).

branch formed from the parliamentary majority. They are fused and the degree of separation in the preferences between the executive and the legislature is expected to be little.[79] In such a scenario, the question of control over the bureaucracy is far less fraught. Given no principle of shared power between the branches of government, and no objective to maintain a balance of power between them, it is less important in terms of constitutional norms which arm of government makes the decision to reorganize the administrative state. Practicality may drive the delegation of such a task to the executive and parliament plays little role in designing reforms.

What we find, however, is that the executive arm of government tends to make greater inroads in an effort to control the administrative state regardless of the constitutional type that a jurisdiction may have adopted. One domain in which this appears to be the case is in administrative reform. This chapter seeks to explain why this evolution is so prevalent by establishing that a set of incentives exist on the part of the legislatures in systems of separated powers that encourage them to build the capacity of the political executive and delegate to them the prerogative to reorganize the administrative state. These incentives exist regardless of constitutional system types, and to a large extent, constitutional provisions in written constitutions.[80] As such, contingent on there being some consensus that a president holds the power to reorganize the administrative state, one can expect the legislature to equip the president to carry out that task.

[79] Assuming of course that the government maintains the confidence of parliament. Should such confidence fail, a new government is formed or elections are held.
[80] Should a constitution specifically state that the President is not afforded specific powers, it could be difficult for such powers to exist as a basis for the building of informational capacity.

Chapter 5: Constitutional Change and Executive Evolution

I. Introduction

What we have established: constitutional design should have a specific impact on the structure of the administrative state and the manner in which it is governed. One would expect under a separated powers system for there to be a vigorous competition over influence of the administrative state. Under a parliamentary system, you instead see tight executive control over the bureaucracy while the government holds the confidence of parliament. Yet, under both, and arguably, every constitutional system, there has been some evolution in the control of the administrative state. This has become a popular refrain in the literature. Yet the literature so far does not explore the manner in which, how, executives change over time. It is quite obvious they do, but the means by which this occurs is underexplored. We also have a clear description of what control levers we should be looking for. How would any branch of government control the administrative state. With these in hand, the purpose here is to begin the exploration of how the levers of control fall into the hands of the executive, especially in separated powers systems where the executive is not the obvious destination.

The growth of the administrative state has yielded a set of multiple institutions with institutional goals (they are always to some degree independently minded in that they have some institutional goals to fulfill). If any control is the goal then tools of means of control must be established by whichever institution seeks to control them. Whether by dint of open ended constitutional provision or some other advantage, the presidency often is able to create means of control over the administrative state unchallenged by other institutions. This has all occurred at a time when the power of the institution of the presidency has grown substantially. Legal scholars have for a time debated the idea that the presidency is a growing thing and whether it is a bug or

feature of the constitution.[1] Prakash admirably details the manner in which the presidency in the United States has steadily expanded over the many years and under successive presidencies. His account would not be unfamiliar in many jurisdictions.[2] Presidencies and prime ministerial offices have expanded in power and authority.

Yet this has all occurred in the foreground of a constitutional question: can the principle of separation of powers allow any single arm of government to wield a disproportionate share of authority over the administrative state? The question has weight because whichever arm of government does control the administrative state necessarily becomes more powerful – potentially upsetting the equilibrium of balanced powers that sits at the core of the separation of powers.[3] Furthermore, whichever arm of government does disproportionately control the administrative state has generated for itself extra-legal powers in order to effectuate such control. Under an equilibrium approach to the separation of powers, administrative control over the administrative state is simply a power over which arms of government should check each other's power.[4] In this scenario, no single arm of government has sole control of the administrative state and its operation is the subject of a contest between branches of government. Another version of separation of powers and bureaucratic structure is that the administrative state simply falls under the authority of the political head of the executive and its actions should only be subject to the

[1] Saikrishna Bangalore Prakash, *The Living Presidency: An Originalist Argument Against Its Ever-Expanding Powers*, (Harvard, 2020).
[2] Margit Cohn, *A Theory of the Executive Branch: Tension and Legality*, OUP, (2021).
[3] See Eric Posner, Balance of Powers Arguments, the Structural Constitution and the problem of Executive "Underenforcement", 164 *University of Pennsylvania Law Review*, 1677, (2016) for a description of the separation of powers as an equilibrium.
[4] Blake Emerson, The Binary Executive, *Yale Law Journal Forum*, (2022) and Gillian Metzger, The Supreme Court 2016 Term: Foreward: 1930s Redux: The Administrative State Under Siege, 131, *Harvard Law Review* 1 (2017) together would paint the picture of the court stripping away power from the administrative state and sanctioning the growth of executive control over the administrative state and thus ensuring a feeble yet unitary executive.

loosest of judicial review, a distant legislature, and ultimately should only be constrained by the voting public.

It is hard to argue that the latter scenario does little more than hollow out the principle of separation of powers, checks and balances or any other similar normative principle. At the core of the separation of the powers is the idea that unilateral expansion of power by one institution should be forcefully impeded by others. And this is all done in the interests of liberty. By constraining the ability of any one institution from accumulating power, the liberty of the citizenry is ensured. In short, the separation of powers is a democracy enforcing mechanism. The result is that citizens should likewise have an interest in ensuring that the balance of powers between institutions remains. Citizen interests are thought of as the final check in a constitutional democracy. If all else fails, the citizen retains the fundamental right to remake the government. The conclusion is that any change in constitutional authority should be of interest to both institutions jealous of their prerogative, as well as the citizen who hope to maintain the functioning of their democratic rights.

All of this suggests that it is not unreasonable to assume that under some circumstances, one would expect there to be conflict between branches of government, with the executive making claims to increased authority and the legislature attempting to maintain its constitutional authority over the policy making process.[5] The question is then, given the possibility of a robust challenge, how does the executive gain authority that it does not expressly have over the

[5] The most obvious scenario being under a system of divided government, however as established below, one should and in fact do, see a fight regardless of a unified or divided government. See Craig Volden, A Formal Model of the Politics of Delegation in a Separation of Powers System, *American Journal of Political Science* 46 111 (2002) describing the theoretical conditions under which a legislature in a unified government provides checks on presidential power.

administrative state? This question however is nestled within a broader question of how the executive can initiate constitutional change.

In answering this broader question, the most compelling contemporary argument made is that the constitutional gaps between provisions on the powers of the executive especially, or the flexibility in the interpretation of statutory text, provides fertile ground for the executive to expand its authority. The executive exploits vagueness in the grant of its authority or the constraint of its power to expand its control over the administrative state. Take for instance the United States, presidents' use of unilateral power stems from their position as a constitutional officer and head of the executive branch. The US Constitution makes no explicit reference to unilateral authority. It instead, in Article II, simply grants presidents "[t]he executive power" and entrusts them with "[taking] care that the laws be faithfully executed". Explaining the expansion of the power of the executive, most legal scholars in the US context have simply pointed to the vagueness of the terms in Article II of the Constitution.[6] Yet vagueness does not explain why presidents are *permitted* to expand their power. It only outlines the scope within which presidents are able to make claims of constitutional authority. In section B and C, I argue that that current explanations for general constitutional change, and specific change in the authority over the administrative state, do not adequately explain the expansion in executive power. Instead, as described in section D, I argue that vagueness can at most provide the opportunity for the executive to make a claim of authority (either authority it claimed it always had or authority that is justified to take). What we then need is a theory that describes what happens when such a claim is made – what happens to it? Is it challenged? If it were challenged, the common belief is that such a challenge would be adjudicated by courts. Yet, as explained in section E, courts have

[6] Daphna Renan, Presidential Norms and Article II, 131 *Harvard Law Review*, 2187 (2018).

proven to be an ineffective forum in which to deal with all claims made by the executive. So what then? Section F deals with the possible explanation that persuasion is the method for resolving disputes in constitutional interpretation.

II. Theories of constitutional change

Greater control over the administrative state necessarily involves a shift in the balance of constitutional power between the branches of government. If subject to entrenchment, such change would fall in the category of constitutional change. More specifically, a change to the original constitutional design. Where initially there was a system of balanced powers and a set of effective checks on each branch of government – some within the grasps of branches of government themselves – what emerges is something different. While no formal constitutional amendment took place and in the formal sense the system remains as it appears in constitutional text, in practice a different regime emerges.

Naturally we think about how this change occurs. We typically do not think that change this fundamental occurs outside of the mechanisms built in the constitution for change. Yet given the frequency with which major constitutional change occurs, there have been more than a few attempts at explaining how and why it occurs. There have been some general theories of how fundamental constitutional change occurs and some theories that attempt to explain specific extra-constitutional changes.[7] Some of these theories may find purchase in explaining the growth of the presidency through control over the administrative state. In fact, to some extent, the explanation given in this chapter and chapter 6 build on some aspects of the work done on

[7] See, for example, Bruce Ackerman, *We The People: Transformations* (1998); David Strauss, *The Living Constitution* (2009).

constitutional change. However, without a clearer articulation of the mechanism of change, many of these theories miss some of the more crucial actors, dynamics and reasons for change.

Perhaps most prominent among these works is Bruce Ackerman's depiction of constitutional moments which he uses to explain many of the significant changes in the United States' constitutional foundation.[8] As one of the significant 'moments' in US constitutional history, Ackerman argues that the New Deal changes ushered in by President Franklin Roosevelt through novel interpretations of the US Constitution was approved by an overwhelming majority in Congress and subsequently ratified by the people. In explaining why the courts affirmed these extraordinary interpretations and the change in the constitutional fabric of US public law, Ackerman posits that they were simply affirming the amendment that had already taken place.

A further concern for Ackerman's theory of constitutional moments is that it does not consider the important set of incentives that each actor in the process of change may have. Especially in a presidential system that adheres to strong conception of the separation of powers, institutions may not easily cooperate with one another. These incentives may place actors initially in opposition with one another and an explanation of change would have to explain the conditions under which these incentives are overcome. Furthermore, some actors may have incentives which conflict with one another and an explanation of change would have to explain how those incentives are weighed by the actor and their decisions made. In the context of the expansion of the administrative state, the citizen in Ackerman's story gets a welfare state working for her benefit. But in reality (and certainly as things developed) there was an expansion of power held by one branch of government and a decline in checks on that branch by other

[8] *Ibid.*

branches of government. How does this factor into the citizen's assent of the constitutional change and would the citizen then assent to any constitutional change that on its face was of benefit to them? Probably not.

These difficulties are not resolved by recounting periods when a significant number of people experienced moments of intense participation and deliberation. These periods are in fact so extraordinary that it is difficult to argue that any other than the three moments identified by Ackerman can count as 'constitutional moments'.[9] Moreover, it would be unreasonable to assume that the constitutional moments identified by Ackerman would continue to generate the impetus for change to the same areas of constitutional law today. For present purposes, the example of the constitutional moment that affirmed the New Deal reveals this concern. Much of the modern administrative state's structure was designed during the initiation of the New Deal and its size ballooned as a result of these changes.[10] However, it would be hard to argue that the moment that brought about the New Deal continues to explain the changes in presidential power that continues to this day. Some other animating force must be the culprit for the expansion of presidential authority resulting from, for instance, the creative use of recess appointments to staff administrative offices.[11]

[9] See Michael McConnell, The Forgotten Constitutional Moment, *Constitutional Commentary* (1994); Daniel Taylor Young, How Do You Measure a Constitutional Moment? Using Algorithmic Topic Modeling to Evaluate Bruce Ackerman's Theory of Constitutional Change, 122 *Yale Law Journal*, 1990 (2013).
[10] Karen Orren and Stephen Skowronek, *The Policy State*, (2017).
[11] See Christine Kinane, Control Without Confirmation: The Politics of Vacancies in Presidential Appointments, *American Political Science Review*, 115, (2021) in which the propensity of the executive to fill vacant positions in the administrative state with unconfirmed, temporary officials or simply to leave the positions vacant in order to hamper the functioning of the agency.

Eric Posner and Adrian Vermuele's constitutional showdowns offer an alternative account of the expansion of executive authority.[12] The authors argue that the interactions between branches of government produce constitutional law. However, the actions of branches of government that are designed to constrain the presidency are incentivized by states of emergency. As a result, changes in constitutional law are confined by states of emergency. The idea is that panic induces an increase in power for the executive as such states justify granting the executive increased authority to solve dire problems. But the theory does not explain how executives who claim power, even under states that they publicly declare are dire, are successfully constrained. For instance, President Joe Biden claimed that the pandemic established a state of emergency dire enough for the pausing of evictions and that the crushing burden of student loan debt required that they be forgiven.[13] Both of those claims of authority were successfully challenged.[14] It therefore seems logical to conclude that constitutional change occurs under both circumstances that could be deemed emergencies and those that are not. In fact, the description of constitutional change with the executive as the protagonist has always been that of a process using the rules for the governing of normal political circumstances in a manner to enhance executive authority.[15]

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[12] Eric Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic*, (2011); Eric Posner and Adrian Vermeule, Constitutional Showdowns, *University of Pennsylvania Law Review*, 991 (2008).

[13] See Federal Register Vol. 86, No. 60 March 31, 2021; Statement from President Joe Biden on Approving Student Debt Cancellation for over 5 Million Americans available at: https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2025/01/13/statement-from-president-joe-biden-on-approving-student-debt-cancellation-for-over-5-million-americans/.

[14] *Biden v Nebraska* 600 U.S (2023) and *Alabama Association of realtors v Department of Health and Human Services* 594 US (2021). See also Tom Ginsburg and Mila Versteeg, The Bound Executive: Emergency Powers During the Pandemic, *International Journal of Constitutional Law* 19 (2021) on the constraints imposed on the executive during the Covid 19 pandemic.

[15] Tarunabh Khaitan, Executive Aggrandizement in Established Democracies: A Crisis of Liberal Democratic Constitutionalism, 17, (2019) at 352.

In contrast to Ackerman's theory of constitutional moments, David Strauss contributed a theory of the living constitution as an explanation of the change that constitutions undergo over time.[16] According to Strauss, constitutional change through constitutional amendments, or momentous moments in social life, explained less of constitutional change than the accretion of constitutional understanding reflected in judicial precedent. Much of Strauss' project however concerns the legitimacy of constitutional change.[17] What Strauss does develop as the process of change involves two mechanisms. The first is that law is drawn from the past – past practices, judicial precedent, practices of branches of government and even society at large contribute to what is law. As those facts of history change, so does the law. The second mechanism is moral judgment. When law is not clear, a judgment is made that certain principles are more fair or just, or simply better as a matter of public policy. Together, these mechanisms form the foundation of the common law process. Strauss' theory offers a promising perspective for executive aggrandizement. It is incremental. It allows for extra-constitutional, extra-legal sources of change and it isn't dependent on a narrow set of unlikely conditions to exist for such change. However, Strauss' explanation of the process of change is general. As such it leaves open substantial room for more detailed explanations of incremental constitutional change. Strauss' theory also relies heavily on change being reflected in judicial precedent.

Where the growth of executive power has been discussed, it is within the context of declining democracy. For instance, Khaitan argues that the general expansion of executive power is as a result of the weakening of democratic constraints on the executive.[18] As he puts it, the erosion of electoral accountability to the citizen, the weakening of checks held by the other

[16] David Strauss, *The Living Constitution* (2010).
[17] The project sets up as its primary antagonist originalist theories of constitutional adjudication.
[18] *Ibid*.

branches of government and institutions, and the reduction of the oversight conducted by civil society, the media and the academy all explain the rise in executive power. The obvious concern is that the specific context of the argument is democratic decline. Without more to explain the reasons for 'democratic decline' it's easy then for the diagnosis to take on much of the subject heading – it's a little circular. Essentially selecting on the dependent variable – it explains why or how executive expands power in declining democracy is because it is a declining democracy. His argument is therefore a narrow explanation of the growth of executive power and only highlights conduct that ordinarily exists within the context of a declining democracy. Much like Strauss, Khaitan's argument hits many of the right notes but it lacks a clear working mechanism which grapples with all the political actors and incentives involved in the production of constitutional change. In what way does electoral accountability play a role in the rise of executive power? Why would it decline?

III. Theory of constitutional change with respect to the executive

So we have general theories of constitutional change in which we find that an important role of the citizen should be defined. Some where it is clear that the circumstances under which the authority claimed by the executive play an important role in dictating whether the executive successfully walks away with the power. It is clear that the rise of the administrative state was always a pivotal constitutional moment. Whichever branch came to wield the most control over it would create an imbalance that runs in tension with constitutional design. But this does not explain why or how the executive came to control the administrative state. For this, there have been other explanatory and normative attempts to explain or justify the phenomenon.

One theory that straddles both explanation and justification is that the threat to liberty that the rise of the administrative state presents was reason enough to place it under the control of the

executive branch of government. Treating the administrative state as a fourth branch and having it expand in authority as it grew in size, meant that you have a competitor to all institutions. Placing it under the control of the executive could be seen as a way to eliminate a rival.[19] The stated reason also reveals a different understanding of the means by which the citizen's liberty is maintained – control of the headless-fourth branch should be by the popularly elected president. This should not undermine anything here though. The question remains, why, in eliminating a threat would competing branches of government assign the power to only one of their competitors?

Much of the current understanding involves the political executive taking advantage of a lack of law which meaningfully constrains its actions. Much of the argument takes advantage of the indeterminacy of law and non-law which provides an opportunity for the expansion of authority. Specifically, the legislation from which the administrative state is built is more often than not vague and filled with discretion-conferring language. As such, the political executive is in the position to exploit unclear language or vague grants of discretion in order to initiate policies or take actions that may be at odds with the intention of other branches of government, or at least not expressly permitted.[20] Importantly, the executive is better placed to take advantage of vague legislation in order to expand its authority. This explanation is however incomplete or simply stated at a level of generality that misses crucial details. For one thing, discretion can only be exploited within some reasonable interpretation of the existing law. Even the most lenient of judicial constraints would find it hard to sanction interpretation of enabling legislation that no

[19] See Free Enterprise Fund v Public Co. Accountability Oversight Board 561 U.S 477 for a description of the argument. See also Blake Emerson, Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court's Political Theory, 73 *Hastings Law Journal* 371 (2022) at 379.
[20] The primary explanation offered by Margit Cohen, *The Theory of the Executive Branch* (2021).

reasonable interpretative approach could justify. Otherwise, we would hardly be dealing with a legal system at all. As such there is some point beyond which vagueness would not explain the expansion of executive authority.

Perhaps most important is that in theory, the use of discretion can be reversed by acts of the legislature and the courts. There is inevitably a claim of discretion when the executive attempts to expand its authority but there is always uncertainty to some degree as to how much discretion there actually is.[21] In other words, the claim can be disputed or adjudicated, both formally and through non-judicial constitutional mechanisms. There is a need for an explanation as to why courts and legislatures do not do so when the political executive exploits discretionary language in enabling statutes. In other words, discretion explains the latitude that an executive can use to alter their constitutional bounds. It does not explain how or when they are able to do so without a response from other branches of government. While the rest of the story may depend on an understanding of the political dynamics of institutions, it together is the fuller picture of the amendment process that constitutions undergo with respect to the administrative state and the executive branch.

IV. Legal Claims of Constitutional Authority

So, what should we be looking at then? We know that executive authority can be expanded into terrain where there is no law.[22] It can be expanded where there is law and the law is broken. Where there are norms, and the norms are violated. Where there is a reinterpretation of the law and that reinterpretation is accepted. It could occur under specific circumstances and not

[21] While there is always uncertainty in law, there is likewise always uncertainty about just how much uncertainty there is. This leaves open the space for conflicting claims of uncertainty.
[22] See as well, Bruce Ackerman, *The Decline and Fall of the American Republic*, (2010) at pg37 for a description of President Clinton's claims of the administrative power.

others (for instance divided government or not). We know that the president initiates or at least has the greater incentive to initiate the expansion of executive authority. Though other branches of government could find that their interests are served by the executive possessing the authority to solve a problem.[23] Change in constitutional authority is made by presidents and they can do so either by asking for authority from another branch of government (typically the legislature) or by claiming authority (acting and justifying the action through constitutional claim).[24]

In all cases of legitimate expansion of executive authority, we assume that there is a plausible legal justification for the expansion. Presidents must establish, or have established for them, a lawful basis for the authority they claim.[25] An act or request and its justification together constitute a claim for constitutional authority. It may or may not be accompanied by a public statement of the legal foundation of the claim, yet an implicit argument is always assumed to exist. In any legal system there are typically more than a single method of interpretation which could form the foundation of any claim for constitutional authority. The result of this is that there is the potential, and in fact the likelihood, that not all actors involved in legal interpretation will agree on the proper method of legal interpretation or even whether any single method was used correctly.[26] The presence of multiple avenues of legal reasoning has created ample opportunity for conflicting constitutional claims to be made on the same issue.[27]

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[23] Perhaps blame avoidance – see R Kent Weaver, The Politics of Blame Avoidance, 6 *Journal of Public Policy*, 371 (1986).
[24] William Howell and Stephane Wolton, The Politician's Province, 13 *Quarterly Journal of Political Science*, 119 (2018).
[25] PJ Cooper, By Order of the President: Administration by Executive Order and Proclamation, *Administration and Society* (1986) 18:233-262 at 242.
[26] Phillip Bobbitt, *Constitutional Interpretation* (1991); Richard Fallon, *infra* at note 36 , Berman and Kevin Toh, On What Distinguishes New Originalism from Old: A Jurisprudential Take, 82 *Fordham Law Review* 545 (2013), Aharon Barak, *Purposive Interpretation in Law*, (2005).
[27] David Strauss, Presidential Interpretation of the Constitution, 15 *Cardozo Law Review* 119 (1993) that makes this claim for presidents – but this is equally true of all branches.

A presidential system that adheres to a strong conception of the separation of powers adds a unique element to the claim making process. A president's assertion of constitutional and/or statutory authority for the exercise of authority does not mean that other political actors will uncritically accept the president's claim. The core of the Madisonian separation of powers is the checks of power that competing constitutional institutions have over one another. While presidents may claim authority, they do not do so necessarily without controversy. Together, these conditions provide for a contest of claims between branches of government.[28] Given the underlying rationale for the separation of power, one should expect there to be many conflicts of interest and thus many conflicting possible interpretations of the law. [29]

Examples of such claims made by presidents are, for instance, the claim that exclusive control over the administrative state should fall in the hands of the President, based on the interpretation of Article II of the Constitution "[t]he executive Power shall be vested in a President of the United States of America." This is in contrast to Article I where the legislative authority of Congress is limited to powers "hearin granted". The lack of a similar qualification in Article II suggests that the framers intended for control of the executive branch by the president to be unqualified.[30] While public and seemingly spontaneous attempts to claim authority are plentiful, there are also formal or official opportunities for presidents to claim authority. For instance, in Presidential signing statements that presidents are able to release along with their signature when making a bill into law. President's often articulate their own interpretation of

[28] Aziz Huq, The Negotiated Structural Constitution, 114 *Columbia Law Review* 1595 (2014).
[29] Steven Calabresi and K Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary (1992) 105 *Harvard Law Review* 1153, 1156, where the separation of powers is described as 'institutionalising conflict'
[30] Steven Calabresi and Christopher Yoo, The Unitary Executive: Presidential Power from Washington to Bush (2008); John Yoo, Unitary, Executive or Both?, *University of Chicago Law Review*, 1935 (2009). a

their authority with respect to the new law and how they intend to implement it. A prominent example of this was President George Bush who objected on constitutional grounds to more than 500 provisions in more than 100 pieces of legislation during his tenure in office. In many of his statements he stated explicitly that he will not enforce or will use his own interpretation of the law or specific provision of it.[31] Veto messages are also opportunities for presidents to articulate claims of their own authority. The classic example is President Jackson's veto message with respect the attempt to create a national bank.[32] Most recently Biden issued a similar veto message with respect to legislation aimed at limiting his ability to forgive student loans.[33] Biden claimed that any such legislation would undermine an authority that he believed he already possessed. The president's reason for vetoing the legislation was the executive branch's interpretation of congress' constitutional authority.

a. Claims of authority and their resolution

Simply, with the multiple methods of constitutional interpretation, the natural vagueness of language, the oft-cited lack of constitutional text on the powers of the executive, there is the possibility that multiple claims of legal authority could be produced. Layered on this, there is the possibility that divergent incentives could divide the branches of government. However, the notion at each branch of government can make constitutional claims (and thus the executive is certainly one of the possible claimants) is not new. Better articulated in the US, 'departmentalism' has appeared as an antagonist in some of the arguments regarding the role of the judiciary as the supreme interpreter of the constitution. Departmentalism is the theory that

[31] Brookings https://www.brookings.edu/articles/the-threat-of-bushs-signing-statements/.
[32] Christina Rodriguez, Presidential Authority to Decline to Follow Supreme Court Opinions, 102 *North Carolina Law Review*, 1411 (2024).
[33] See Message to the House of Representatives – President's Veto of H.J Res. 45 available at: https://bidenwhitehouse.archives.gov/briefing-room/presidential-actions/2023/06/07/message-to-the-house-of-representatives-presidents-veto-of-h-j-res-45/.

each branch or department has an equal and independent authority to interpret the constitution in guiding its own actions.

What has been described in US scholarship as departmentalism finds a close cousin in the political constitutionalism of common-wealth systems. Political constitutionalism considers the constitution as a political instrument, the political constitution. In essence, constitutions inherently have gaps in meaning. We know that constitutional gaps are, to the extent that language has some inherent vagueness, inevitable. However, there are also intentional gaps. These functional silences are necessary to achieve consensus (through some sort of political bargain) or a prudent postponement on a decision to future deliberations. In any case, the idea is that the law will be filled in somehow in the future through political as opposed to judicial means. In thinking about how those gaps are filled, we can conceive of the constitution as a framework in which these gaps are filled. They establish a procedure through which differences can be negotiated by assigning roles and functions to institutions who then operate in some tension or collaboratively to govern in terms of the constitution.[34] They also add the outer limits of fit that any constitutional interpretation would have to adhere to.[35]

Both departmentalism and political constitutionalism describe a world in which constitutional disputes are inevitable, are participated in by multiple actors including branches of government, and are resolved through some unexplained political process. Where both theories are weak is that they fail to add much in describing how constitutional change takes place. Scholars making use of this theory have not addressed the mechanics of change and have instead focused on the legitimacy of actions taken by different branches of government or the normative

[34] Huq, *supra* note 28.
[35] Ronald Dworkin, *Law's Empire* (1986) and Richard Fallon, *supra* at note 36.

weight that each branch's interpretations should carry. Accepting that each branch of government has the ability to interpret the constitution would undermine the judiciary's claim to supremacy in this area. Fallon's discussion is that there are a host of constitutional theories or arguments that may be adopted. The way in which they are chosen is based on some set of external criteria. Following this argument to its conclusion would mean that the way in which a conflict should be decided is that whoever is the arbiter, simply has a set of criteria, based on that set they have adopted an interpretive frame through which to assess constitutional arguments and then simply chooses the argument or outcome that best aligns with that frame.[36] However, it is important to point out that the identity of the arbiter remains unknown and there is little to suggest that this is how these disputes are currently resolved.

But claims have also become a topic when discussing the expansion of executive power. Not only is there a normative conversation of the legitimacy of inter-branch claims, but there is a positive concern for the role that claims play in constitutional shifts in authority. There has been recent debate on the instrumental value of legal claims made by the executive. More precisely, a focus on the lawyers within the executive and their role in ensuring fidelity to the rule of law. In some cases these lawyers have been argued to comprise a significant constraint on the actions of the potentially unlawful actions of the executive. Such a view of the work of government lawyers however is predicated on the view that their function is to provide advice that has the effect of reconciling the executive's belief of the lawfulness of its actions and what the predictable conclusion of the judiciary. In other words, you should have some belief that what was provided

[36] See David Strauss, What is Constitutional Theory?, 87 *California Law Review* 581 (1999). See also, Fallon, How to Choose a Constitutional Theory, 87 *California Law Review* (1999). Kenneth Einar Himma, Making Sense of Constitutional Disagreement: Legal Positivism, the Bill of Rights and the Conventional Rule of Recognition in the United States, *Journal of Law and Society* (2003 2002).

by the executive lawyers is what would have been concluded by a court of law if challenged.[37] But of course, that view can only exist if the legal advice is given in a manner which ensures that it is impartial etc. As scholars in the US have begun to argue, that has not been case in the development of the Executive's use of the legal advice. In fact, the control over the institution that offers legal advice is an important development.[38]

This suggests that there is an incentive to control the breadth of legal claims that can be made. The claims play an instrumental value and can act as a constraint on the expansion of power. The question is, in what way does the claim hold instrumental power – what is it used for?

b. Judicial Claim resolution

In short, knowing that each branch of government is able to produce claims about the meaning of the constitution or legislation does not help in explaining how any given claim becomes the dominant interpretation. The traditional argument is that judicial supremacy is the solution to this problem and that courts will adjudge which claim is superior. [39] Thus the judicial model of claim resolution has been the implicit paradigm in which constitutional change has been modelled.[40] It's easy to see the conclusion that the courts are the best placed to decide question of law. They exist as neutral and expert panels built to adjudicate legal disputes. As a

[37] Zachary Price, Reliance on Executive Constitutional Interpretation, *Boston University Law Review* (2020)
[38] See Conor Casey and David Kenny, The Gatekeepers: Executive Lawyers and the Executive Power in Comparative Constitutional Law, 20 *International Journal of Constitutional Law* (2022).
[39] Strauss *supra* at note 36.
[40] Martin Shapiro, *Courts: A Comparative and Political Analysis* (1986).

separate branch of government, they are best placed as a coequal branch to mediate between the other branches. Even the most recent political models are based on this framework.[41]

Leaving aside the normative justification for a judicial model[42], or the growing normative arguments against it[43], the question is whether courts actually play the dominant role in adjudicating legal disputes? There is a descriptive project here which would suggest that perhaps they should not. And if they do not, then we should be looking for other mechanisms that contribute to the change that can occur to the constitutional division of powers driven by a branch of government.

First, many of the conflicts are not brought before courts. Some are, but not all. This indicates that there is a prior choice whether a judicial challenge is made at all. If such a challenge is brought, the court is one forum in which it may be resolved. Challenges can also be channeled through political mechanisms, impeachment being an extreme example, elections, legislative hearings and legislation being a routine ones. And then, of course, no challenge may be made at all. Given the multiple avenues through which a challenge may be brought, it is logical to assume that the decision to make a challenge is not necessarily made with reference to court precedent and the prospects of success in

[41] William Howell, Kenneth Shepsle and Stephane Wolton, Executive Absolutism: The Dynamics of Authority Acquisition in a System of Separated Powers, *Quarterly Journal of Political Science* 18 (2023), Gretchen Helmke, Mary Kroeger and Jack Paine, Democracy by Deterrence: Norms, Constitutions, and Electoral Tilting, *American Journal of Political Science,* (2022).
[42] For a leading defense of judicial supremacy see Larry Alexander & Frederick Schauer On Extrajudicial Constitutional Interpretation 110 *Harvard Law Review* (1997).
[43] For instance, and perhaps most famously, John Hart Ely's *Democracy and Distrust* (1980)which limits the objective of judicial review to the supervision of the political process (implying that political bargains should remain untouched by courts unless the exception is triggered) and the exception that rights and interests of the minority should be protected from discrimination as a result of democratic malfunctions. Normative arguments emerged as a response to the fear or the actual judicialization of politics following the passage of human rights legislation or the rights in liberal constitutions. See Aileen Kavanaugh, Recasting the Political Constitution: From Rivals to Relationships, *King's Law Journal* (2019).

judicial proceedings.

It is important to point out the common argument that even when courts do attempt a resolution, at most they make a claim of judicial supremacy which it then requires that other branches of government support.[44] While the possibility of a court decision being legitimately ignored has been defended under some conditions in legal scholarship[45], it is nevertheless important to recognize that courts are only in the position to make a claim for judicial supremacy which may be rejected by other branches of government. Articulated legal positions like departmentalism or legitimate executive disobedience, have opened up the scope for a contest over whether courts are in fact listened to at all – with other branches of government able to argue that they don't have to. [46]

This falls in line with the broader literature on courts and political maneuvering. Even the broader literature on courts points towards a political environment that matters a great deal for the resolution that courts are able or willing to craft. For instance, Theunis Roux in exploring the Constitutional Court in South Africa, argues that the court would make decisions taking into account the possibility that the executive may retaliate against it for decisions that aggravate the executive's policy preferences.[47] James Fowkes, in a response to Roux, argues that the court is not being strategic in avoiding conflict so much as taking its cues as to the breadth of its legitimacy from the dominant political party.[48] One could point to non-legal incentives which

[44] Kieth Whittington, *Political Foundations of Judicial Supremacy* (2007) at 9.
[45] William Baude, The Judgment Power, *Georgetown Law Journal*, (2008) if such an obligation does not exist, it is not entirely clear that it would violate some principle of constitutionalism like the rule of law.
[46] Richard Fallon, Executive Power and the Political Constitution, *Utah Law Review* (2007).
[47] Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (2013). Cf James Fowkes, *Building the South African Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa*, (2017) who does not disagree with the strategic reality of the constitutional court but instead differs on the description of the court's action.
[48] Fowkes, *Ibid*.

courts face in the disputes between legislatures and executives – moving when it moves in a sense.

Then you also have the issue of whether the courts are effective even when they do step in and decide issues on first order principles.[49] Take Clinton v New York (1998) as an example. You have President Ronald Reagan in his 1986 State of the Union address asking for the Line Item Veto. Congress declined to give it to him. Then a decade later Congress gives it to Clinton in the Line Item Veto Act. 2 years later the Supreme Court strikes it down stating that the line item veto power granted the president considerable and unconstitutional unilateral power over the budget. Here you have Congress initially declining to grant the executive power, then acquiescing and then the court strikes it down. Nevertheless, under Bush and Trump, the presidents showed considerable ability to control budgets (it should be pointed out that they also asked for the line item power).[50]

Exploring the incentives of the courts illustrates that much more could influence its desire to enter the fray between branches of government than simply to establish the correct interpretation of the law. In fact, it would be easy to imagine that courts have incentives which tilt towards the expansion of executive power in general. One could assume that courts have in mind to ensure that the presidency is adequately equipped with the authority needed to solve unknown future problems. They weigh this concern against the present need to constrain a presidency that seeks to expand its authority beyond constitutional limits. If one assumes that precedent is a significant constraint on judicial action, then the greater the threat the court

[49] By first order principles I mean that courts are actually answering the question of whether the act is constitutional and not using second order reasons to decide the matter.
[50] See David Froomkin and Ian Shapiro 'The New Authoritarianism in Public Choice', 71 *Political Studies* (2021) at page 4 for a description of the events.

anticipates in the future the more willing they are to allow the expansion in presidential authority.[51] In effect, the court under the condition of sufficient fear about the future, would prefer the president have more power so as to solve greater problems than the risk of permanently fixing the power of the presidency at the status quo.

Even when courts do take these cases, they have begun doctrines of deference to political pacts entered into by political branches in history, using them in much the same way as judicial precedent to govern current conflicts.[52] If these pacts are systematically tilted in favor of the executive, using historical practice will more often than not lead to the expansion of executive authority.[53] Coupled with this is the newly documented judicial aversion to novelty. Courts, operating under this predisposition would find that a deviation from an existing relationship between Congress and the President – if the pattern has existed for a stretch of time – must be unlawful.[54] Generally, what has emerged is a catalogue of separation of powers avoidance of techniques.[55] Courts shy away from rebalancing what is a shift in the separation of powers equilibrium. They do so for seemingly innumerable reasons which are second-order to the proper interpretation of the law.

Things like the political question doctrine are built upon a presumption that there is a capacity asymmetry in legal interpretation. There are some branches of government that are just better at interpretation in certain domains. Here the argument would be that the political nature of the nature of the relationship between political branches should be sorted out by those branches

[51] Howell, Wolton and Shepsle *supra* at note 41.

[52] See also the origin of the doctrine of deference to executive interpretation more generally. Aditya Bamzai, The Origins of Judicial Deference to Executive Interpretation, 126 *Yale Law Journal* (2017).
[53] Cohn, *supra* at note 2.
[54] NLRB v Noel Canning 573 US 513 (2014).
[55] Payvand Ahdout, Separation of Powers Avoidance, 8 *Yale Law Journal* 132 (2023).

as opposed to the court. This makes jurisprudential turns like the political question doctrine distinct from the practice-based doctrines that have evolved.[56]

More charitable descriptions of courts' approach to resolving interbranch conflict have emerged. Some have described the approach taken by the courts as an effort to facilitate dialogue between branches. In other words, that the courts would encourage branches of government to come to an agreement regarding the legal issue. [57] While often the role of courts as facilitators of dialogue is in the context of socio-economic rights and the obligations of the state[58], the theory has also been used in the context of separation of powers.[59] Regardless of the objectives of courts, if courts are indeed hoping to have the political branch resolve their own conflicts, courts are not resolving the cases themselves.

If courts are to be thought of as the arbiter of conflicting interpretation between branches of government, then they would have to do exactly that and do it all. Anything less and the question would be abstracted up a level: what really does decide which interpretation of the law wins? Courts playing a secondary role in the resolution of conflicts reveals that resolutions occur through other means – constitutional change in the balance of power occurs through other means. When courts do get involved, they would sooner uphold a resolution achieved through other mean than resolve the dispute as if they were newly presented with it.

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[56] See Whittington, *supra* at note 44 at 14.
[57] Jiunn-rong Yeh, Presidential politics and the judicial facilitation of dialogue between political actors in new Asian democracies: Comparing the South Korean and Taiwanese experiences, 8 *International Journal of Constitutional Law*, (2010)
[58]Rosalind Dixon, Creating Dialogue About Socioeconomic Rights: Strong-form versus Weak-form Judicial Review Revisited, 5 *International Journal of Constitutional Law* (2007).
[59] The latest being Aileen Kavanaugh's *The Collaborative Constitution* (2023) and Whittington *supra* at note 44.

Establishing that courts are not a primary constraint on the expansion of executive power is not however most one can say about courts. Courts in fact play an active role in encouraging the expansion of executive power. They do so by adopting what many have argued is a virtue of judicial reasoning: judicial minimalism.[60] Many constitutional courts have adopted the principle that apex courts should strive to make narrow judgements, ones narrowly structured around specific facts.[61] Sunstein made famous this form of judicial minimalism.[62] The logic is intuitive: courts cannot foresee how their judgments will impact future cases and would waste resources attempting to do so. Along with an increase in decision costs, broad rulings increase the possibility of error. Likewise, there are concerns around the use of advisory opinions which again could be used to broadcast the likely direction the courts would rule on future cases if brought before it. Constitutional courts typically do not issue them.[63] In the United States, federal courts are not permitted to issue advisory opinions. Such opinions are thought to depart from the judicial role within which courts must inhabit.[64]

As a result, courts often try and restrict themselves to 'cases or controversy'. This sentiment was raised in the context of the executive in *Youngstown Sheet & Tube Co. v Sawyer*,[65] where Justice Jackson wrote that "court decisions [about the scope of presidential power] are indecisive because of the judicial practice of dealing with the largest questions in the

[60] Judicial minimalism has been criticized on normative grounds, see Owen Fiss, The Perils of Minimalism, *Theoretical Inquiries in Law* (2008); Tara Smith, Reckless Caution: The Perils of Judicial Minimalism, *New York University Journal of Law and Liberty* (2010).
[61] Yvonne Tew, Strategic Judicial Empowerment, *The American Journal of Comparative Law* (2024).
[62] Cass Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court*, (1999).
[63] Christopher Elmendorf, Advisory Counterparts to Constitutional Courts, *Duke Law Journal* (2007).
[64] Phillip Kannan, Advisory Opinions by Federal Courts, 32 *University of Richmond Law Review* 769 (1998)
[65] 343 US 579 (1952).

narrowest way".[66] *Ex Parte Quirin*[67] provides another example where the court stated that "it is unnecessary for present purposes to determine to what extent the President as commander in Chief has constitutional power to create military commissions without the support of Congressional legislation".[68] In *Hamdan v Rumsfeld*,[69] the court held that "whether...the President may constitutionally convene military commissions without the sanction of Congress…is a question this Court has not answered definitively, and need not answer today".[70] However, by understanding the incentives of the executive, the narrower the courts' judgements, the more uncertain the executive is about what reaction the court may have to its moves to expand its authority. The intuition behind this is rather simple. "there are strong arguments against sweeping judicial opinions and advisory opinions, however, they add to the scope of executive aggrandizement that we are witnessing.

Assume there is a status quo position in the law regarding the powers of the president. Assume one can plot a court's and executive's respective ideal policy points along a spectrum but that each has a set of preferences that they prefer less than their ideal point, but more than the status quo. These preference are distributed to the right and left of their ideal points and have a fixed point on either end – a fixed interval. Assume further that the executive does not know exactly what the court's ideal point is, it is only aware of the interval and that the court's preferences are distributed across this interval. A final assumption is that the court, when reviewing the action of the president can only assent to it or reinstate the status quo. The range of preferences that the court has then signifies the extent of uncertainty that the executive feels

[66] *Ibid* at 343.
[67] 317 US 1 (1942).
[68] *Ibid* at 317.
[69] 58 US 557 (2006).
[70] *Ibid* at 592.

regarding what the court may accept. As a result, the level of uncertainty expands as the range of preferences widen. But because the worst that the executive can get is the status quo, one *or* the other tail of the court's preferences will move closer to the executive's ideal point. In simple terms, the executive could never do worse than the status quo even if the court's preference interval expands, however, as the interval expands, the executive can do better. Furthermore, the executive would only ever care about one side of the tail of the Court's distribution – the one closest to its ideal point.[71]

This allows the executive to push for a point closer to its ideal as uncertainty about what the court's preferences are increases. However, this is based on the assumption that the court will stay at the status quo – a reasonable assumption given stare decisis and judicial minimalism. And also that the executive would not seek a move greater than the status quo that lies further away from its ideal point. The status quo weakly dominates any point greater than the status quo that exists in the opposite direction of its ideal point. All those points and the probability that the court may prefer them would not feature in the executive's calculus. It is in this way that judicial minimalism, a feature of the courts' approach to big questions of separation of powers, contributes to the expansion of executive authority. Far from being an impartial and objective arbiter of claims between the executive and congress, the judiciary in fact, acts in favor of the executive by increasing the scope for claims of authority made by the executive.

V. Non-Judicial Claim Resolution

What seems plainly clear is that as a matter of practical reality, the judicial model of adjudication has come under increasing strain. Nevertheless, fluctuations in the authority exercised by branches of government illustrate that these disputes do get resolved and they have

[71] For a formal exposition of this model, see Appendix.

a large impact on constitutional law. Without courts operating as the primary mechanism for the resolution of these disputes, the remaining two candidates between whom a resolution can be generated are the political executive and the legislature. The outcome rests on some sort of bargain, resulting in action or inaction by one or both of these institutions.

The need for some sort of mechanism of claim resolution has been presaged by a fundamental debate in jurisprudence regarding the manner in which legal disagreements are resolved. Born from the Hartian position that what counts as law is what officials in the jurisdiction generally accept and treat as law. A challenge to this position was what would occur when officials simply do not agree. What is often suggested as the basis of this challenge is the fact that in the US, a seemingly interminable battle between competing methods of legal or constitutional interpretation rages. Baude and Doerfler, for instance, in describing the debate of interpretative method, state that the disagreement between originalists and non-originalists is "old news and so provides neither camp additional reasons for pause".[72] Officials quite obviously do not agree on how to interpret law and so cannot agree on what the law is. Does that mean that the United States does not have a legal system? The response to this challenge is that there is a difference between agreement on what the instrument of law is (for instance the constitution or a specific piece of legislation) and what it means.[73] While the core of this response is not as relevant here, what Leiter and Watson allude to is that much of what the law means is something worked out somehow between officials. It is how that debate is worked out that is relevant here.

[72] William Baude and Ryan Doerfler, Arguing with Friends, 117 *Michigan Law Review* 319 (2018).
[73] Brian Leiter, Explaining Theoretical Disagreement, *The University of Chicago Law Review* (2009) and Bill Watson, How to Answer Dworkin's Argument from Theoretical Disagreement Without Attributing Confusion of Disingenuity to Legal Officials, 36 *Canadian Journal of Law and Jurisprudence* (2023).

In a scenario where courts are not the immediate audience of constitutional claims and the law is indeterminate without some form of authoritative interpretation, how do competing interpretations get resolved? More specifically, in a scenario where the president claims authority based on an interpretation of the law, what would explain the permissiveness of congress? There has been some effort in describing the institutional advantages and disadvantages that some institutions have in pursuing their interests. Authors have pointed to institutional features of the presidency which allow it to advance its interests ahead of other branches. For instance the ability of the president to communicate directly with the voters, the bully pulpit, allows the presidency to shape the preferences of voters.[74] However, the relative weight that each actor is able to bring to bear is secondary to the type of adjudication that takes place.

To start rather simply, a claim could be understood as existing between two actors, the sender and receiver of the claim, for instance, in a bargaining scenario between the maker of the claim, the holder of the claimed item. If the claim is successful the holder of the claimed item hands it over. However, there are several ways one could characterize the manner in which the claim achieves success. One could describe it as a scenario in which an actor is successfully persuaded by the legitimacy of the claim, and as such the holder of the claimed item hands it over. The dynamic appears to be one resting on the validity of those claims and the arguments used in their justification. In other words, the persuasiveness of those arguments. One could otherwise describe it as a bargain in which an actor of the claimed item is offered enough of something else that they want by the claim-maker that they are then indifferent to whether they continue to hold the claimed item or not.

a. Expansion as Successful Persuasion

[74] Jeffrey Tulis, *The Rhetorical Presidency* (1987)

One way of thinking about constitutional change is that there is a process of persuasion taking place.[75] A structural change is initiated and an argument of constitutionality is proffered either that the change is constitutionally required or that the legal authority always existed and no change has in fact occurred. This claim is then weighed against competing claims and if it is successful in persuading some sort of adjudicator, then the change is permitted. This is often how the process of change is characterized.[76] Richard Neustadt's classical depiction of the American Presidency casts the process in this way. Neustadt produced a prominent theory of the presidency in the United States wherein the president is placed in a position where their policy agenda hinges on their ability to persuade other actors to cooperate. The president is gifted with a variety of tools that make them especially adept at persuasion, for instance the bully pulpit and their own, national, constituency. Contemporary accounts of presidential power incorporate this vision. Daphna Renan in articulating the forms that the president takes in American public law and the power drawn from them, incorporates persuasion as a function of the personal presidency and the powers of the institution are a separate concern.[77] However, whether presidents are engaged in persuasion at all has come under more searching criticism. William Howell largely pioneered a depiction of the presidency as relying less on persuasion and more on the blunt use of unilateral action as a means to accomplish its goals.[78] Simply, a president need not expend resources in persuading other branches of government to side with its policy objectives. Instead, gifted with the institutional powers of being able to act before any other branch of government, and facing less costs in doing so, means that the presidency can achieve its goals without the

[75] For a treatment of law and persuasion in deciding moral choices, see Bert Huang, Law as Persuasion, in Gerson and Steckel (eds.) *The Cambridge Handbook of Marketing and the Law* (2023)
[76] Douglas NeJaime, Constitutional Change, Courts and Social Movements, 111 *Michigan Law Review*, (2013); Colin Starger, Constitutional Law and Rhetoric, 18 *Journal of Constitutional Law*, (2016).
[77] Daphna Renan, The President's Two Bodies, 120 *Columbia Law Review,* (2020).
[78] Howell, *Power without Persuasion: The Politics of Direct Presidential Action,* (2003).

assistance of other branches of government. Once the action has taken place, it is too costly for other branches of government to undo.

Howell's criticism, however, does not go far enough, or perhaps deep enough. First, a formal assessment of a persuasion theory of constitutional change would reveal how unlikely it is as an explanation of how claims of authority are adjudicated. Persuasion is impossible between two actors who are both rational (they understand the sender's strategy and update their beliefs accordingly). Second, Howell's own theory lacks an explanation of the incentives beyond cost of a legislature and/or a court when deciding whether to challenge executive aggrandizement or not. Differing slightly with Howell, I argue that unilateral action is not a complete explanation of the unchallenged expansion of presidential power. It places too much weight on the institutional costs associated with a legislature enacting laws or a judiciary adjudicating a case in opposition to the actions of the presidency. It fails to take into account the distinct incentives that each institution may have. As a result, it leaves open the question why these opposing institutions, which have the authority to augment their institutional design to lower costs associated with their function, do not invest in such augmentation.[79] In addition, legislatures especially face no institutional obstacle in prospectively constraining a presidency. There is no institutional need for the legislature to be reactive to the constitutional claims of the executive even though one can perhaps think of pragmatic reasons why they may want to be.

How does persuasion actually operate? Persuasion has a central puzzle. In order for there to be the possibility for persuasion, you need at least two parties: a decision-maker and a messenger. The messenger's objective is to persuade the decision-maker based on information

[79] This has become a recent point of debate as scholars have begun contemplating why Congress does not invest in its institutional capacity to thwart presidential actions. See Beau Baumann, Resurrecting the Trinity of Legislative Constitutionalism, 134 *Yale Law Journal* (2025, forthcoming).

that it possesses which the decision-maker does not. As a starting point, it is useful to imagine that the sender (or messenger) has no restrictions on what they can say, and knowing that the receiver will decide based on their message, will provide a message that will induce the decision-maker to decide in a manner that best suits their preferences. However, the receiver, knowing this, has no reason to ever pay attention. The challenge then is to describe the conditions under which persuasion is ever attempted and successful.[80]

What underlies any model of persuasion is a simple structure: there is an interaction between a sender and a receiver. In every version, the sender knows something that the receiver does not. This is why the receiver might listen to the sender and potentially be persuaded to act differently based on what the sender says. Here, the reality is that there must be an asymmetry of information between the messenger and the decision-maker for persuasion to be a possible strategy. In the context of adjudicating constitutional claims, the requirement then for persuasion would be information about the legal argument that the decision-maker (or simply the target of messenger) does not have and cannot verify.

If we are to assume that the party typically in a position to be persuaded by a claim of constitutional authority proffered by the executive is the legislature, the question becomes whether the legislature exhibits the requirements necessary for persuasion to be the manner in which it makes its decision whether or not to challenge the executive's claim. Essentially, is it possible for there to be information about the legal claim that the legislature is unable to possess on its own. Without delving into the nature of a legal interpretative claim[81], it would be easy

[80] Commitment, common purpose etc. See Andrew Little, Bayesian Explanations for Persuasion, 35 *Journal of Theoretical Politics* (2023)

[81] One could conceive of an interpretive claim as possibly constituting a claim about the communicative content of law, the manner in which legal texts make law, heuristics for locating law or instructions on what to do when law runs out.

enough to determine that because a legislature is in a position to make legal claims about the constitutionality of executive action, it would be privy to the same 'information' as any other institution that could make the same claim. It would therefore be impossible to describe the process of executive claim adjudication as being one where persuasion decides the outcome. Some other process better captures claim adjudication and in the next chapter I argue that it is a bargain struck between the executive and opposition institutions with the average citizen's preferences at the core of bargain.

VI. Conclusion

In presidential systems, the expansion of executive power creates an imbalance in the separation of powers or checks and balances equilibrium. In its most general sense, it is a change in constitutional structure. As a result, expansion of executive power should be classed as a constitutional change. With this comes the question of the conditions under which such change occurs. General theories of constitutional change capture some of the process, and some of the actors. Most important is the focus on the citizen as a part of the process of constitutional change. Theories of changes in executive power, while still a growing area of research, have yet to provide a sophisticated explanation for how growth occurs.

In developing my own theory of constitutional change with respect to the growth of executive power, I begin with describing the process as the potential conflict of constitutional claims of authority. Each branch of government is in a position to make a claim with respect to the appropriate authority of the executive. The question becomes how such claims are verified. In essence, which claim wins? Ordinarily, courts are thought of as the ideal institution to decide on the veracity of legal claim. Yet for a host of reasons, courts do not end up playing this role. An alternative process for resolving conflict of claims might be persuasion. If one side is

persuaded by the veracity of a claim, that would account for its resolution. Yet persuasion simply cannot be what occurs between branches of government. So if persuasion is not what is at play in determining the outcome of a claim of authority, what is? In the next chapter I put forward a formal model in which I develop a mechanism for identifying the conditions under which constitutional claims to authority are resolved.

CHAPTER 6: MODEL OF CONSTITUTIONAL CLAIM RESOLUTION

I. Introduction

Chapters 3 and 4 have introduced the menu of mechanisms that the political executive can employ to control the bureaucracy. They illustrated the incentives which generate the expansion of executive power and those that encourage the persistence of extra-legal executive authority. What remains is an explanation of the conditions under which rules and norms are successfully augmented by the political executive. As described in chapter 5, the way to characterize this process in a presidential system is as an extra-legal claim of authority by the political executive which could be countered or challenged by an opposing branch of government. These claims then go through some sort of adjudication in order to determine whether the political executive will succeed in its attempt to gain greater control over the administrative state. The judiciary and the legislature stand as the primary candidates to conduct the adjudication in a system based on the separation of powers. It would appear, however, that the judiciary does not reliably take on the role of determining the correctness of constitutional claims of authority. Instead, there is an antecedent process of determining whether a challenge to the political executive's claim will be forthcoming.

If courts do not play the primary role in adjudicating claims, and persuasion plays no role, then all that can remain is bargaining. However, in a democratic system, it is important to include the citizen in any stylized bargaining game between political institutions. The assumption is that elections are the only real constraint on the actions of any public body. While perhaps too restrictive an assumption, the reality is that for any means by which accountability is to be forced on public actors, the median voter must be supportive of it. The idea that public support impacts the functioning of public bodies, especially the

judiciary, has a long tradition in public law.[1] Using this intuition, an interaction between political institutions for the allocation of power happens in the shadow of public opinion. In this way, bargaining occurs before an audience.[2]

A crucial aspect of the descriptive claims of constitutional change that should be drawn from the existing literature is that the voters do play a role. While Ackerman most prominently highlighted the citizenry, there has been no attempt to place the citizen in a detailed process of constitutional change with respect to the separation of powers.[3] More importantly, in order to justify the citizen's role, it is important to highlight its interest in the balance of separation of powers, the objective of the principle being the preservation of democracy. However, the tradeoff faced by the citizen is potentially the enactment of policies that they prefer by an empowered executive. As a result, the citizen trades-off between an attachment to the constitutional balance of powers and its preference for the policies that a strengthened executive can enact.

II. The Model

With the three actors identified - an executive, the citizen and an opposition made up of one or both of the legislature and judiciary - how then does the interaction occur? The intuition behind the proposed model below is that the maintenance of the balance of power (or the operation of the checks and balances) requires the involvement of the executive, the

1. Robert M. Cover, Foreword: Nomos and Narrative, 97 Harvard Law Review 4, 28 (1983); Robert Post and Reva Siegel, Democratic Constitutionalism and Backlash, 42 Harvard Civil-Rights Civil-Liberties Law Review 373 (2007); H Jefferson Powell, A Community Built on Words: The Constitution in History and Politics 6 (2002).

2. Tim Groseclose and Nolan McCarty, The Politics of Blame:Bargaining before an Audience, 45 American Journal of Political Science 100 (2001).

3. Bruce Ackerman, We the People: Transformations, (1998)

constraining institution and the citizen.[4] The role of the citizen is crucial and what distinguishes this model. However, establishing the role of the citizen is more complex than simply allowing for an arbitrary citizen support value for the incumbent. First, there is a question of the nature of the interest that the citizen may have in the expansion of executive authority or power. The question here parallels one tackled in the literature on democratic erosion.[5] Why do citizens care about the degrading of their political system? The common assumption is that citizens have an interest in maintaining their ability to hold their politicians accountable. However, they also have a partisan interest - either in the incumbent or in the opposition. For the purposes of executive aggrandizement, citizens have a similar interest. Citizens have an interest in the maintenance of the balanced sharing of power between the branches of government produced by the checks and balances that accompanies the separation of powers. Citizens have an obvious liberty interest in ensuring that none of the branches of government become too powerful. Citizens also have a partisan interest with respect to the executive - they either prefer the executive or they do not. The citizen then weighs both interests against each other in choosing whether to support or decry the expansion of executive authority. As a result, the actors in the model below are the executive and a constraining branch and a non-strategic public. The model sets out how these three actors interact in a manner that maintains a separation of powers equilibrium.

The mechanics of the model are based on a set of reasons for action. Assuming there is a separation of powers equilibrium at the start of the model, I assume that there are four main

4. This mirrors Przerworski's idea of a 'self-enforcing democracy' in which the actions of the incumbents, opposition leaders and citizens mutually reinforce the democratic rules of the game. See Adam Przerworski, Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America (1991) and Adam Przeworski, Democracy as Equilibrium, 123 Public Choice 253 (2005).

5. Zaotian Luo, and Adam Przeworski, Democracy and its Vulnerabilities: Dynamics of Democratic Backsliding, 18 Quarterly Journal of Political Science 105 (2023); Caterina Chopris, Monika Nalepa and G Vanberg, A Wolf in Sheep's Clothing: Citizen Uncertainty and Democratic Backsliding, Journal of Politics (forthcoming); Edoardo Grillo and Carlo Prato, Reference Points and Democratic Backsliding, 67 American Journal of Political Science (2023).

strategic reasons for the separation of powers equilibrium to be unbalanced. The first is that the executive will claim excessive authority if the expected challenge to its action fails to constrain them. This claim should be thought of as an extra-constitutional claim despite the fact that the executive undoubtedly justifies the claim on constitutional grounds. Second, the executive can offer concessions to the opposition (being the judiciary or legislature) or expend some cost in order to intimidate or threaten them to accept the claim of power. If this transfer benefits both the executive and the opposition, then no challenge to claim arises.[6] Third is that the citizen may not always observe or know how to adjudicate the claim of authority. This introduces a appropriate degree of uncertainty regarding the claims of the executive and whether they are in fact extra-constitutional. Importantly, there is also the possibility that the opposition could initiate a claim of constraint regardless of whether the executive has claimed a constitutional power or not – the opposition could attempt to constrain the executive by challenging the executive's existing power. Given the degree of uncertainty that the citizen faces, it is important that the citizen rely on third party signals in order to assess the claims made by the political institutions. Finally, as mentioned above, the citizen balances partisan attachments to the executive against its interests in maintaining the constitutional equilibrium.

The model attempt to include dynamics that one could hardly imagine are not relevant when discussing executive aggrandizement. One important one is that the opposition, being either the legislature or the judiciary, could be coopted by the executive. This finds support in the literature in works that emphasize the breakdown of the distinction between the party and the institution. With the rise of the political party and its increased inter-

6. The aim here is to create a link between the executive and the legislative majority that could vary depending on whether there is a unified government or not. One could assume that under a unified government condition, the cost necessary to avert a challenge is lower than under a divided government. It would not change the analysis drastically how one views the effect of the unified government condition. One could nevertheless assume that some cost would be required if only in the form of transaction costs necessary to 'whip' members of one's own party.

nal discipline, a united government essentially erodes checks and balances.[7] However, as empirical research has shown, this is not always the case suggesting that even in a united government, support is conditional.[8] The opposition institutions are in fact a potential client of the executive – available to receive benefits in exchange for acquiescence for actions of the executive. The empirical evidence of united governments constraining the executive suggests that an executive must nevertheless do some work to overcome the incentives built in by the separation of powers regardless of which party controls the legislature. While it is true that a united government may mean that the executive has to do less to coopt potential opposition, some form of transfer is required. The exchange is also weighed against the support of the citizenry – overwhelming support for a challenge against the executive's actions should mean that any payoff from the executive must be impossibly large.

The model involves a single round of play in which the executive attempts to expand its authority. It includes three actors: the executive, the opposition and an infinite number of citizens. I assume that the executive has a share of the constitutional authority (θ) of total authority (W). The opposition has the remainder $(1-\theta)W$. Coupled with the share of power, I assume that the political actors have an incentive to increase their share of power and do not inherently value the separation of powers.

In the model's initial step, the executive chooses whether to claim additional authority or not. This claim for authority succeeds unless the opposition generates enough support to successfully challenge. If the executive is successful, the share of power ceases and the executive has the claimed authority. If the executive chooses to claim additional authority, it

7. Daryl Levinson and Richard Pildes, Separation of Parties, Not Powers, 119 Harvard Law Review, 2311 (2006).

8. Alexander Bolton and Sharece Thrower, Checks in the Balance: Legislative Capacity and the Dynamics of Executive Power (2022) at 126.

may offer concessions ($c \geq 0$) to the opposition to not attempt a challenge. This would constitute the cooptation attempt or a punishment that the executive promises to the opposition.

In the next step, the opposition observes whether a legitimate claim of authority has been made. In other words, the question is asked: is this power that the executive actually possesses or this additional or extra-constitutional power that the executive has claimed? It is important to note that the citizen is not assumed to be in a position to make the same evaluation. Instead, the citizen relies on signals in order to assess the claim. The opposition then decides whether to challenge or not to challenge. If the opposition fails to challenge, the opposition receives (c) but gets no share on the power (0) payoff as opposed to its $(1-\theta)W$.

The citizen chooses whether to protest or not after the opposition has made its choice. A fraction (α) (with $\frac{1}{2}\alpha \leq \alpha < 1$) of the population supports the executive, while a fraction $1-\alpha$ does not support the executive. This could match support for the president and those that do not. It could also mirror those that support the reason for the claimed authority (the objective stated by the executive) and those that do not. Each citizen gets a payoff of p_0 or p_1 from supporting or opposing the executive. In other words, a citizen that opposes the executive gets p_0 from protesting and an executive supporter gets p_1 from protesting. This adds the realistic weight in favor an executive that a citizen supports and a weight in favor of protesting an executive that the citizen does not support. In addition, each citizen i has an individual separation of powers value $SOPi \geq 0$, which is drawn from probability distributions $F_0(SOPi)$ and $F_1(SOPi)$ for executive supporters and non-supporters, respectively. Citizens gain $SOPi$ from choosing the action that maintains the separation of powers.

Citizens do not directly assess the legitimacy of the claim of authority. As such, they each have a belief as to whether the claim is extra-constitutional. I assume that in any equilibrium

where challenges never happen, the off-equilibrium belief of γ of citizens after observing a challenge is initially 1/2. This is done for simplicity though the equilibrium changes little with other values of gamma. Following a challenge, each citizen gets an independent signal s_i of whether the claim is extra-constitutional, with a fraction $h > \frac{1}{2}$ receiving the correct signal. Very clear cases of extra-constitutional claims are closer to 1 and those that are less clear are closer to 0.

The probability of a protest from the citizenry is equal to the fraction of citizens who protest. After a successful protest, the executive loses the claim and receives a payoff of 0. The opposition is then able to claim the status quo which in the next round of the game is $(1 - \theta')W$. This all leaves us with the following flow of the model:

1) The game begins in a separation of powers equilibrium. The executive decides whether to claim extra-constitutional power or not. If she does then the executive can choose some transfer $c \geq 0$ to the opposition.
2) If a claim is made, the opposition observes the extra-constitutional claim and decides whether to challenge or not. If no challenge emerges then it gets c and no power - the separation of powers shifts in favor of the executive.
3) If the opposition challenges, then the citizens decides to protest or not. Citizens do not directly assess the claim. The citizen, after observing a challenge realizes that there is a constitutional question and has to decide a side. Was there a violation or not? They have an initial 50% belief – they are uncertain.
4) The likelihood of successful protest is equal to the proportion of the citizenry that decides to protest. If the protest is successful, the executive abandons the claim and if the protest is unsuccessful, the executive wins the claim and the power is allocated to the executive.

The aim here is to solve for the separation of powers equilibrium - in other words, a state where the executive does not make extra-constitutional claims of authority and the opposition challenges if and only if an extra-constitutional claim is made. It should be clear then that the model requires that challenges occur off the equilibrium - in other words, the outcomes of interest to us occur when the equilibrium fails. However, when a citizen observes a challenge, two dueling constitutional interpretations, they are unsure of which to believe is correct. The solution is a perfect Bayesian equilibrium.

III. Analysis

We begin with determining the conditions under which the citizen will choose to protest - the probability of a successful protest. In other words, these would be the conditions under which the citizen believes that an extra-constitutional claim has been made. The assumption is that the executive has made such a claim. As mentioned, the citizen after observing a claim has an initial belief of $1/2$ that the claim is extra-constitutional before a signal s_i and a h belief signifying the belief after. h then acts as a indication of the signal's accuracy.

Given this, if supporters of the executive receive a signal that the claim is extra-constitutional, the protest if

$$hSOP_i > (1-h)SOP_i + p_1 \text{ which is equivalent to } SOP_i > \frac{p_1}{2h-1}.$$

If non-supporters of the executive receive the signal that the claim is constitutional, they will protest if

$$(1-h)SOP_i + p_0 > hSOP_i \text{ which is equivalent to } SOP_i < \frac{p_0}{2h-1}.$$

If the non-supporters of the executive receive a signal that the claim is extra-constitutional, they will always protest since they will be able to maximize both their partisan preference as

well as their attachment to the separation of powers. Likewise, is supporters of the executive receive a signal that the claim is constitutional, they will never protest. As such, the above illustrates the tradeoff that citizens make between their partisan interests and their attachments to the separation of powers. The result is the fraction of citizens that will protest. This will be possible when incorporating the distribution $F_1(SOP_i)$ which is the cumulative distribution of SOP_i values for the supporters of the executive, the fraction of supporters, α that support the executive and the fraction of citizens h that receives the correct signal.

After a violation, the fraction that protests and thus the probability of a successful protest q_v is

$$\begin{aligned} \mathrm{q}_{ec} \equiv \alpha h[1 - F_1(\tfrac{p_1}{2h-1})] + (1-\alpha)h \\ + \text{ (1-}\alpha)(1-h)F_0(\tfrac{p_0}{2h-1}). \end{aligned} \tag{6.1}$$

These variables represent the supporters of the executive who receive the correct signal and have SOP_i values greater that $\frac{p_1}{(2h-1)}$, as well as all of the non-supporters who received the correct signal, and finally the non-supporters who received the incorrect signal and have SOP_i values below $\frac{p_0}{(2h-1)}$.

After no extra-constitutional claim, the probability of a successful protest q_{cc} is

$$\alpha(1-h)[1-F_1(\frac{p_1}{2h-1})]+(1-\alpha)(1-h)$$

$$+\ (1\text{-}\alpha)hF_0(\tfrac{p_0}{2h-1})$$

(6.2)

What is apparent from this is that an extra-constitutional claim increases the probability of a successful protest.[9] To calculate the extent of the increase would allow us to measure the extent of stability in the separation of powers. The calculation would be as follows:

$$q_{ec}-q_{cc}=(2h-1)\{\alpha[1-F_1(\frac{p_1}{2h-1})]+(1-\alpha)[1-F_0(\frac{p_0}{2h-1})]\} \tag{6.3}$$

From this we can deduce that $1-F_1[\frac{p_1}{2h-1}]$ is the fraction of citizens with attachments to the separation of powers so great as to overwhelm their partisan attachments to the executive when they get the correct signal. This illustrates that the increase in the number of citizens that choose to protest an extra-constitutional claim of authority is dependent on the information quality they receive (h) and the total fraction of citizens with sufficiently high attachments to the separation of powers.

With the conditions under which the citizen will choose to protest, the next issue is to determine the conditions under which the opposition will choose to challenge. The opposition

9. Simply, $0 \leq q_{cc} \leq q_{ec} \leq 1$.

may choose to challenge regardless of whether the executive has made an extra-constitutional claim. This corresponds to the ability of the legislature or judiciary to claim that a power of the executive is extra-constitutional in cases when it is not. We would then be able to determine both when the opposition will choose to challenge extra-constitutional claims and their opportunity to proactively neuter the executive.

After an extra-constitutional claim, the opposition will challenge if

$$q_{ec}[W + \frac{\delta(1-\theta')W}{1-\delta}] + (1-q_{ec})(0) \geq c \tag{6.4}$$

After no extra-constitutional claim is made, the opposition will challenge if

$$q_{cc}[W + \frac{\delta(1-\theta')W}{1-\delta}] + (1-q_{cc})(0) \geq (1-\theta)W + \frac{\delta(1-\theta')W}{1-\delta}. \tag{6.5}$$

Equation 5 is equivalent to

$$q_{cc} \geq 1 - \frac{\theta(1-\delta)}{1-\delta\theta'}. \tag{6.6}$$

The final step is to determine the conditions under which the executive will choose to make an extra-constitutional claim. In conjunction with the choice to make the claim, the executive chooses the level of transfer it makes in the attempt to coopt the opposition (cooptation offer of c). There are two possible outcomes of this choice. The first is that the executive decides to offer the minimal cooptation offer necessary to coopt the opposition. The second is that the executive offers no transfer ($c = 0$) and risks a protest.

In the first case where only the necessary c is offered, the amount is calculated in equation 4. As such the executive prefers a constitutional claim to an extra-constitutional claim with a transfer of c if

$$+\frac{\delta\theta}{1-\delta} \geq \frac{W}{1-\delta} - q_{ec}[W + \frac{\delta(1-\theta')W}{1-\delta}] \tag{6.7}$$

Which is equivalent to

$$q_{ec} \geq \frac{1-\theta+\delta(\theta-\theta')}{1-\delta\theta'} = 1 - \frac{\theta(1-\delta)}{1-\delta\theta'}. \tag{6.8}$$

Combining all the above conditions we are able to construct the separation of powers equilibrium. In order to do this we use the condition under which the executive does not make an extra-constitutional claim (equation 8) and the opposition only challenges the power of the executive when there is an extra-constitutional claim (equations 4 and 6). Therefore, the equilibrium exists if and only if

$$q_{ec} \geq 1 - \frac{\theta(1-\delta)}{1-\delta\theta'} \geq q_{cc} \tag{6.9}$$

IV. Implications

A key result from the model is that for there to be a stable separation of powers equilibrium, the current and future power of the political institutions must have limits. Specifically, the θ and θ' must be moderate in order for the separation of powers to be maintained. The lower the share of power that the executive possesses the more they are inclined to claim

extra-constitutional power. The more power the executive has, the more the opposition will be inclined to attempt a challenge in order to constrain the executive. However, under such conditions, the executive is increasingly incentivized to make extra-constitutional claims as it anticipates additional constraints. However, at moderate levels of executive power, separation of powers can maintain equilibrium.

Pointing to other important variables, the level of partisanship among the citizenry and their attachment to the separation of powers contributes to the stability of the distribution of power across branches of government. Simply, as the citizens' attachment to the separation of powers increases and the level partisanship decreases, the share of citizens willing to protest an extra-constitutional claim increases. However, even as the attachment to the separation of powers increases, the crucial variable that generates the sufficient number of protesting citizens becomes the quality of the extra-constitutional signal that they receive. This highlights clearly the crucial role that media quality plays, especially when partisanship is low. In fact, where media accuracy is low, increasing the level of attachment to democracy or decreasing the level of partisanship can actually increase the probability that the separation of powers equilibrium will fail. As citizen protests become easier to trigger with an incorrect signal of an extra-constitutional claim, the opposition may be tempted to launch a challenge claiming that the executive wields unconstitutional authority.

A significant implication of the model is its use in providing the mechanism which is responsible for the maintenance of the distinction between presidential and parliamentary systems. The model describes the manner in which a system of checks and balances can be maintained. There is however some question as to whether the model describes a process of executive power expansion in both a presidential and parliamentary system. The question is ultimately not consequential in resolving one of the primary questions posed in this dis-

sertation: does the distinction between presidential and parliamentary systems matter with respect to the distribution of power between branches of government over the administrative state? In theory we should see presidential systems share power in sort of equilibrium while parliamentary systems should see the executive dominate over the administrative state. If the model explains how growth in executive authority over the administrative state occurs in both systems as opposed to only presidential systems, we would nevertheless have the conditions for when the distinction between the two regime types dissolves.

The reality is, however, that the model would have to be adapted to an extent in order to describe the manner in which extra-constitutional claims are adjudicated in parliamentary systems. The model above assumes that the citizen weighs partisan attachments against a liberty interest in the separation of powers. The idea being the citizen has an interest in checks and balances constraining the accumulation of power in the hands of any branch of government including the executive. Such an interest however does not necessarily exist in parliamentary systems. As described in Chapter 2, parliamentary assume that power is concentrated in the legislature and exercised by the executive. Citizens would arguably have no interest in maintaining constraints on the power of the executive except as it had to with electoral constraints. Without evidence suggesting that citizens have an equal interest in maintaining a separation of powers equilibrium in parliamentary systems, the model above would only be apposite in presidential systems.

V. Conclusion

The model above illustrates the conditions under which the separation of powers can survive extra-constitutional claims of authority from the executive. In order to do so, the opposition branches of government (or other institutions tasked with formally checking the power of the presidency) must be able to generate sufficient citizen support in order to deter

the presidency from making extra-constitutional claims. The model suggests several implications that would form the normative basis for arguments ranging from constitutional design to press freedom and legitimacy.

The primary result of the model is that the separation of powers is more stable when the executive is given a sufficient amount of power to act and opposition institutions are powerful enough to provide a sufficient check. Furthermore, citizens must have reliable information on the nature and veracity of the constitutional claims that their political leaders make. Finally, partisanship can nevertheless overwhelm the liberty interest that citizens may have in maintaining a balance of powers among branches of government.

Chapter 7: Conclusion

In the field of constitutional design, parliamentary and presidential systems, in theory, are distinct. As such, they have historically been at the core of the choice of institutional design. Much of the debate surrounding the adequacy of each of these models sought to weigh which of the two were preferable in providing a basis for the peaceful existence of a polity. More recently, however, there have been strong arguments about whether they are practically distinct – do they in reality produce different outcomes? There is much to suggest that in reality the two models produce governance systems which are fundamentally more similar than we otherwise would expect.

What has yet to receive much attention is whether they produce different outcomes with respect to their administrative governance. This dissertation seeks to answer this question. The first task in doing so is to establish what kind of administrative design each regime type should produce in theory. This forms the baseline of what one should expect to see in the world. What we find is that parliamentary systems should produce a fused system of authority with the legislature in ultimate control, the political executive in practical control and the administrative state wholly under the command of the executive. Presidential systems on the other hand, with its separation of powers and checks and balances, should produce a vast and complex administrative state with portions of it designed to be independent of any practical or operational control, and with the branches of government checking each other's control over whatever remains.

In reality, however, what is commonly reported about presidential systems is that they have taken on many of the characteristics of a parliamentary system. Political executives in

presidential systems have routinely become more in control over the administrative state. They have developed for themselves the capacity to control, reshape or destroy the administrative state in much the same way as the political executives in parliamentary systems are designed to do. The question becomes how political executives in presidential systems have been able to transform their regime types in such a manner as to resemble important aspects of parliamentary systems. In exploring this question the dissertation uses the United States as the archetypal example of a presidential system.

The ways in which the political executive is able to control the administrative state is through a set of levers. The power to create or destroy an agency, appoint political heads of agencies or control the budget of agencies are all means of shaping the administrative state in a manner which aligns with the political executive's policy objectives. To some extent, and in order to maintain an equilibrium of balanced power over the administrative state, the political executive is granted some *de jure* authority with respect to these levers. Yet, use of these levers in a manner not plainly permitted by law has been a feature of the evolution of the political executive's control over the administrative state.

Before tackling how the political executive expands the power it is given, I lay out the incentive mechanisms that encourage the political executive to expand its authority over the administrative state. If one considers the requirement that the political executive must set the priorities of the bureaucrat while also controlling the resources with which the administrative state has to operate, one can build a model which details why the political executive would want to either increase control over the bureaucrat or increase control over the resources that the bureaucrat has to operate. Both of which would result in the increase in the power that the levers grant the political executive. Assuming that the political executive would prefer the bureaucrat

accomplish tasks that serve the narrow interests of the political incumbent, while the bureaucrat would prefer to perform tasks that are in the public interest, how much of either is able to get done is dependent on how much total resources there are for the bureaucrat to use. The more there is to use, the more the politician can serve their own interests once the bureaucrat is satisfied serving the public interest. If the levers of control are means of increasing resources, such as control over budgets, or limiting discretion of bureaucrats through political appointees, then political executives will be eager to enhance the potency of those levers in order to serve their own interests.

If one considers levers of control as being the manner in which micro-management of the administrative state is facilitated, there is the separate question of how major administrative reform takes place. Increasingly in presidential systems, administrative reform or the remaking of the administrative state has fallen into the hands of the political executive. This is unexpected as the separation of powers and the legislature's role in creating the administrative state would suggest that the legislature would be responsible for re-making the administrative. As such, there is much that should be explained in why the legislature would allow the political executive to do what it ought to want to do itself. I sketch a modified information model in order to illustrate the incentives the legislature has which encourage it to allow the political executive to re-design the administrative state to best align with its policy preferences. The result is that the political executive has not only been granted the ability to re-form the administrative state, but is has also been granted the ability to construct for itself an administration within the political executive which rivals that of the administrative agencies – an institution which has come to be known as the presidential administration.

The development of levers of control and the ability to remake the administrative state have the effect of transforming fundamental constitutional structures in presidential systems. As the political executive gains power and the other branches of government are unable or unwilling to check its expansion, the checks and balances commonly associated with a presidential system no longer function. The result being a collapse of the distinction between presidential and parliamentary systems. Constitutional change of this magnitude should be explained. There have been some theories that aim to illustrate how constitutional change of this magnitude occurs, though none suit this particular problem very well or are detailed enough to offer any tractable theories. In an effort to develop a theory I begin with exploring how expansion of executive authority typically takes place in a presidential system. It appears to be the assertion by the political executive of some claim to extra-constitutional authority that could be challenged by opposition branches of government. There is an initial question of when the opposition chooses to challenge and then how the adjudication takes place. Skipping over the former question, this contest of claims needs to be resolved. The common expectation is that the judiciary resolves these claims. However, the United States and other jurisdictions have shown that the judiciary is not well placed to do so and often does not do so. Even when they do, there seems to be other factors which explain when they do.

The other possibility for resolving claims of extra-constitutional authority is that there is some sort of persuasion that takes place. Perhaps opposing branches are persuaded in the legitimacy of the claim – that the authority claimed is in fact lawful. Yet persuasion is not how one could describe the process. Persuasion would require that the party that seeks to persuade has some knowledge of the true state of the world that the party to be persuaded does not. However, in making legal claims, it is hard to argue that an aspect of the legal claim is not available to the

opposition branches of government. In other words, the ability to create an independent view of the legal authority of the political executive renders opposition branches incapable of being persuaded. As such, the problem is how do successful claims by the political executive of extra-constitutional authority take place.

I develop a model which seeks to explain how extra-constitutional claims are adjudicated in presidential systems based on a separation of powers. In doing so, I assume that citizens have a liberty interest in maintaining the checks and balances that accompanies the separation of powers but they also have partisan interests either for the incumbent or an opposition. I identify the other actors as the executive and any potential opposition. The opposition chooses whether or not to challenge an extra-constitutional claim of authority based on the probability of success of such a challenge (represented by the choice of the median voter based on their interests and the quality of the signal that the citizen receives of the lawfulness of the claim), as well as a cooptation effort by the executive. With all of these in place, I can derive the conditions under which an extra-constitutional claim is made, challenged and resolved.

Since the end of the Second World War, deliberate constitutional design has been an important aspect of designing peaceful societies. The hope was that through choosing between a wide array of constitutional models, we could ensure that societies evolve within certain bounds, guided by a grand political bargain accepted by all citizens. Yet, as we have seen at least in the case of the political executive, evolution extends beyond those bounds in ways that we would ordinarily expect citizens to oppose. Given that maintaining a constitutional democracy is ultimately in the hands of the citizenry, the puzzle such extra-constitutional evolution, or the re-making of the constitutional order, is worth explaining. The model I propose in this dissertation hopefully goes some distance further than we have gone in understanding the expansion of the

political executive. Moreover, I hope that the dissertation reveals some aspects of constitutional design and features of societies that are not necessarily crucial in maintaining the bounds of a constitutional democracy and those that are.

Appendix

The players are the president and the court: $[P, C]$. There is an exogenously set status quo q such that $q > 0$ exists. The players' preferences are over the action space $X = R$.

The president's preferences are represented by a twice continuously differentiable, single-peaked concave utility function $U_p(\cdot)$. The peak sits at an ideal point p. The court's preferences are represented by a symmetric single-peaked utility function $U_C(\cdot)$. One could consider the ideal point of the court as being the ideal point of the median judge. The president's ideal point is fixed at $p = 0$. $|q - p| = q$ would then represent the conflict between the status quo and the president's ideal point.

The president is assumed to be uncertain as the court's ideal point. The president only knows that the court's ideal position is uniformly distributed on the interval $[c_l, c_h]$. Furthermore, the lower bound $c_l < q$ and the upper bound is $c_h > q$.

The sequence of the game is as follows:
1) Nature chooses the court's ideal point, $c \in [c_l, c_h]$.
2) The president takes an action $x \in$.
3) The court either accepts or vetoes the president's action. If the court vetoes the action, the initial status quo prevails and the president pays a cost $r \geq 0$. This cost is distinct from the inherent cost the president endures by getting the status quo. This cost could be assumed to be a political costs that president faces from losing a court battle.

The president's strategy is a choice $x \in$. The court's strategy is a mapping $\rightarrow veto, uphold$.

The court will uphold the president's action if $U_c(x) \geq U_c(q)$, and the court will veto if $U_c(x) < U_c(q)$. This translates into: if $c \leqq$, the court will uphold if $x \leq 2c - q$ and will reject if $x > 2c - q$.

The president maximizes his expected utility:

$$EU_p(x) = Pr(c \leq \frac{x+q}{2})U_p(x) + Pr(c > \frac{x+q}{2})[U_p(q) - r] \tag{6.10}$$

The probability that the court upholds the president's action $= Pr(c \leq \frac{x+q}{2}$ and the probability that the court rejects the president's action $= Pr(c > \frac{x+q}{2})$. The president's optimal choice is calculated from:

$$argmax_{x \in [max0, 2c_l - q]} Pr(c \leq \frac{x+q}{2})U_p(x) + Pr(c > \frac{x+q}{2})[U_p(q) - r] \tag{6.11}$$

What this illustrates is that the president has to weigh the fact that if he selects a point further from the status quo and closer to his ideal point, his payoff would be greater if the court upholds it. A choice further from the status quo increases the probability that the court will reject it, thus resulting in a lower payoff for the president.

From this we can determine what would occur if the court's ideal point is uniformly distributed on the interval $[-\beta + c_m, \beta + c_m]$. With the mean of the distribution remaining constant the president effectively is more uncertain about the court's preferences. The result is that the president's optimal strategy moves closer to the court's ideal point. So while we would expect that that greater uncertainty would make a president more cautious, these results suggest otherwise. Instead, when the president is more uncertain about the court's

preferences, there exists more heterogeneity regarding the probability that the court will uphold or reject a change from the status quo. However, the court's ideal position could be closer on the president's side of the status quo and would thus allow more aggressive changes. On the other hand, the court's ideal point could be on the other side of the status quo where the court would veto any change from the status quo towards the president's ideal point. But the president would always opt for a change towards his ideal point or would opt for the status quo making the likelihood that the court's ideal point on the opposite side of the status quo irrelevant.