

**Congressional Development of the Institutional Presidency:
Policy Advice under Separation of Powers***

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Abstract

A major potential advantage of presidents in bargaining with Congress is information. Presidents' access to high quality information requires institutions that the president trusts to process information and offer policy advice that the president deems reliable. This reliability, in turn, arises from a close linkage between the policy goals of the president and those of his advisory institutions. Yet Congress must support the maintenance of these institutions and often plays a role in their creation in statutes. Thus Congress helps the president to develop supporting institutions that then enhance the president's policy bargaining position with respect to Congress. In this paper we develop a formal model to understand this decision. We show that it can be rationalized whenever the president possesses authority over policy that Congress cannot abrogate. In this case Congress's simple decision is whether the president's exercise of irreducible policymaking authority will be informed or not, and of course Congress prefers it to be informed. We then argue that the president's role in foreign and defense policy closely approximates the conditions of the model, while the situation is more muddled in the case of domestic affairs. Finally, in a review of specific cases we show that agency creation is largely consistent with our theory.

The separate institutions sharing power in the federal government of the United States constantly battle for influence over policy and protection of institutional prerogatives. In some respects the munitions available to the president in this battle seem paltry and overmatched (Neustadt [1960]). For instance, the Constitution empowers Congress as a formal agenda setter in lawmaking, and the president holds only a qualified veto power. It also tightly cordons the president's power over spending, in that the president can neither spend money without congressional appropriation nor withhold expenditures Congress has appropriated. And yet, abstracting from dramatic punctuations (*e.g.*, Presidents Jackson, Lincoln, and Roosevelt) and occasional retrenchment (*e.g.*, President Ford), the broad sweep of power relations between the legislative and executive branches favors the latter to an increasing extent. The president plays a role as chief policymaker that was inconceivable in 1789.

A key source of the president's power is information. Scholars have recently noted (Lewis [2003]; Canes-Wrone, Howell, and Lewis [2007]) that information underpins the president's relative advantage with respect to Congress in foreign and defense policy, because in these areas the president's informational advantage with respect to Congress is particularly acute (Dahl [1950], Schlesinger [1973]). More generally presidents enjoy power advantages relative to Congress in domestic as well as foreign policy when they effectively coordinate their formidable informational resources (Dickinson [1996], Rudalevige [2002]). Even the power to persuade is in part a result of information (Neustadt [1960]).

The president's informational resources, and informational advantages over Congress, are the result of institutional choices. The Constitution does specifically allocate information to any institution.¹ Instead it allocates other powers (*e.g.* the necessary and proper clause in Article I) which in turn have been used to expand the informational capacity of the federal government, particularly the executive branch. But useful informational capacity requires more than a group of experts. It requires experts that the recipient of expert information,

¹The Constitution does entitle the president to seek written opinions from principal officers of executive departments, and obligates the president to share information annually with Congress on the state of the union. But these provisions mean that some actor must the information it has; they do not mean that said actors will be well informed. The Constitution also empowers only the president to receive foreign ambassadors, which arguably confers privileged access to information, but can also be construed as a ceremonial matter.

in this case the president and his executive agents, will trust and heed. Of course, an expert of one's choosing is more trustworthy and reliable than an expert of one's rival's choosing because the expert and decision maker share the same goals. When an expert and decision maker share the same goals, the decision maker need not discount the expert's advice on the grounds that the expert is trying to guide the decision maker to a less-than-ideal result (from the decision maker's point of view).

Scholars have stressed unilateral action by the president to develop the institutions supporting this informational capacity (Nathan [1983], Dickinson [1996], Rudalevige [2002], Krause [2002], Howell [2003], Lewis [2003]). Yet Congress has been an active participant in designing institutions in the executive branch that support its informational capacity by giving the president access to high quality, trusted advisors. This is accomplished by linking the policy preferences of the advisor with those of the president, *e.g.* by conceding control over the institutions to the president. Congress's participation is necessary because these information gathering and processing institutions are usually either created by acts of Congress, or pursuant to acts of Congress granting the president limited authority to create administrative institutions (Lewis [2003]). Moreover, except on a temporary and short-term basis, these institutions must be funded (or not) by acts of Congress. Thus, we cannot consider the development of the informational resources of the executive branch without considering the active role of Congress.

These facts present, we believe, a puzzle. Presidential power over policymaking has grown vis-à-vis Congress. This changing power balance coincides with and partly results from the president's informational advantages vis-à-vis Congress. Yet Congress is a willing partner and principal architect in the design of institutions that confer these very advantages. Therefore, Congress is actively complicit with the president in creating the institutions that have shifted power, at least in relative terms, to the president.²

In this paper we develop a formal model that explains why a rational Congress in fact has

²Silverstein [1996] notes a very similar dilemma, based on Congress ratcheting the president's powers in foreign and national security policy to ever-rising heights. Like Silverstein, we focus on congressional participation in and support for the growth of presidential power. In our case, Congress's incentives stem from a desire for informed policymaking, taking as given executive authority it must live with and cannot eliminate.

incentives to concede informational, and therefore ultimately policymaking, power to the president in this way. In brief, either by virtue of constitutional grant or practical evolution, the president possesses discretion to act authoritatively in specific areas. The discretion we refer to is unremovable and irreducible by statute; it is a discretion to make policy-relevant choices that does not result from Congressional delegations of power. Facing this fact, Congress faces a simple choice: does it prefer that these policy-relevant choices are informed or not informed? We present a model in which Congress prefers these choice to be informed; thus, it has an incentive to create the institutional underpinnings of executive informational advantage. In our model, this requires effective communication between the president and his agents, on one hand, and information providers, on the other. Effective communication, in turn, requires a close link between the policy preferences of these actors.

Put differently we argue that information for the executive follows from executive discretion to act that Congress cannot fully eliminate. The institutions to provide this information are readily supplied by the legislature, given that it cannot remove executive discretion and prefers that it be exercised in an informed way.³ The contribution of our theory is to provide microfoundations for Congress’s role in developing the institutional presidency. Note that our argument is exactly the reverse of a common one in the literature on bureaucratic discretion, which holds that discretion expands when executive (or bureaucratic) informational advantages expand (*e.g.* Epstein and O’Halloran [1999]). Our theory is not a critique of this standard result; it simply highlights a different, and previously underexplored, dynamic. In our theory executive discretion is relatively exogenous, rather than the choice to be explained, and we seek to explain the development of informational institutions.

Though the model and much of the historical evidence below is designated with the president as the final actor to determine policy, the logic is more general. It suggests that Congress should link policy advisors and policy makers. Constitutional practice and text often define

³In this sense our argument is related to the “unitary executive” debate. Calabresi and Yoo [2008] contend that essentially every president in U.S. history has asserted his Constitutional right to control the entire executive branch and to treat it as unitary. Our argument addresses the ostensibly more puzzling incentive for Congress to arrange parts of the executive branch in a relatively unitary fashion. That is, the unitary executive has not only a “demand side” from the president, but also a “supply side” from Congress.

a role for the president in making policy, but not always. If so, Congress should link policy advising bodies to the president or willingly capitulate when the president links them. If not, and allocation of policymaking roles is up to Congress, it may have reasons not to invest those roles in the president. Congress may then instead invest these functions in, *e.g.*, independent regulatory commissions, or it may make all policy decisions itself and leave the executive with purely ministerial (non-discretionary) duties.

Our formalization is based on the sender-receiver model of costless signaling; formally, we leverage recent contributions in the theory of sender-receiver games to develop a model of “delegated cheap talk” or cheap talk through agents. In the next section we present the model and its motivation in greater depth, following which we present equilibrium analysis. We then discuss implications for executive branch structure in a separation of powers system, including several cases of American institutional development to probe the predictions of our theory. Finally, we conclude. The appendix contains a technical presentation of the model.

1 Cheap Talk with Agents

Our argument extends the “cheap talk” or sender-receiver game to cover specifics of the present application. This game was introduced in a seminal paper by Crawford and Sobel [1982] and we sometimes refer to it as the C-S game. In this section we focus primarily on intuition and motivation with some notation added for clarity. The full presentation of the formal model is in the appendix.

The context in which we apply this model requires an agent who must implement a policy. We consider this agent to be an agent of the President, and assume that implementation confers a measure of authority that Congress cannot reduce over what the policy actually is. It is simplest to model the President as having complete authority to select the implementing agent’s ideal policy outcome. Obviously this departs from an advice-and-consent arrangement in which the Senate has a say in the implementing agent’s policy goals. We make this departure in recognition of the fact that the President (*i*) is an agenda setter with respect to the Senate in the appointment process, and (*ii*) has very broad authority, since the Decision of 1789, to

remove executive officials for any reason, including political or policy disagreements. Note that we are not assuming that the president has complete, instantaneous control over the preferences of every actor involved in policy implementation, from the director of the Office of Information and Regulatory Affairs to the chairman of the Federal Reserve Board. Rather we are exploring the implications of such control, in those cases where it exists, for congressional support for the president's informational capacity.

Our context also requires policy-making to present informational demands on actors in the process. We use the same simple structure ubiquitous in the sender-receiver game literature: a commonly known mapping from a combination of policy choice (which the policy process determines) and random shock (observable by only a subset of actors) into policy outcomes (which actors ultimately care about).

The key issue we are exploring is how policy expertise and information is linked with the executive's preferences, given executive authority to make policy. We assume that an expert agent exists, the expert has policy preferences qualitatively like any other actor, and that Congress determines the content of those policy preferences. The last assumption is equivalent to letting Congress determine the degree of presidential control over the expert's preferences. This is a special case of the control McNollgast (McCubbins, Noll, and Weingast [1987]) noted that Congress exerts over agency preferences. For instance, Congress can require the expert to be a plural body with party balancing requirements; can locate the expert in the Executive Office of the President, a cabinet department, or independent agency (thereby limiting presidential removal authority); can require Senate confirmation of the expert; can require findings by the expert to be put on public record, subject to input from private actors (and can fund the participation of particular actors of its choosing); and so forth. In all of these ways and more, Congress can determine the extent of its own control, and therefore of presidential control, over the preferences of bureaucratic experts. At one limit, if Congress wishes to pin the preferences of policy advisors to those of the president and executive officers, it can simply allocate complete control over the structure of advisory and informational institutions to the president. At the other extreme, the "ally principle" (Bendor and Meirowitz [2004]) implies

that Congress would pin the preferences of informational institutions to Congress itself.

More specifically, we assume that the implementing agent, the receiver r in the sender-receiver game, has preferences over policy outcomes z determined by the President P . This agent r receives a report or message m about the random shock or “state of the world” $\omega \in \mathbb{R}$ from an expert agent s , the sender in the cheap talk game. The implementing agent r then chooses a policy $x \in \mathbb{R}$ to implement. The policy outcome is then determined as $z = x - \omega$. Thus the implementing agent r makes a nontrivial policy choice that is important to all (policy-motivated) actors in the model; this reflects the irreducible discretion inherent in execution that we noted in the introduction.⁴

The sender s is an expert in the sense that it knows the state ω perfectly; the President’s implementing agent r is less informed about the random shock in the sense of knowing only the probability distribution $F(\omega)$ used to generate it.⁵ The key question in the model, motivated by the substantive question posed earlier in this paper, is what kind of preferences Congress wishes the expert agent to have. More specifically, when and why would Congress want the expert agent’s preferences to track those of the President rather than Congress itself? This will help to identify the value to Congress of linking informational and implementation functions in the executive branch, even while losing control over policy information itself. Thus, we model Congress C as determining the preferences of the expert agent s .

Thus, policy-making involves the P and C choosing the ideal policies of the implementing authority r and expert s respectively. The ideal policy outcomes of s and r are scalars denoted by v_s and v_r .⁶ These ideal points may each be any real number: there are no exogenous constraints on the constitutional actors’ choice of agents. The process continues

⁴For reasons of tractability, like Dessein [2002] we ignore issues of endogenous policy discretion or limitations on the set of actions from which the President’s agent may choose. Furthermore, our results apply even in such a framework, implying that the dilemma faced by Congress can be completely overcome only through the complete elimination of executive discretion.

⁵The important point is not that r is totally uninformed about policy absent the message from s ; rather, it is that s knows an extra piece of information on top of whatever r knows.

⁶While we will speak in terms of the institutional actors choosing the “preferences” of the administrative agents, one can interpret the model equivalently if one assumes that the institutional actors instead choose the administrative agents’ strategies. Similarly, v_s and v_r might be interpreted in looser terms such as encapsulating such concepts as the “goal” or “mission” of s and r , respectively. Viewed in this light, the theory highlights the incentives of institutional actors to achieve a shared purpose (or perhaps a common “culture”) within administrative agencies.

with a message $m \in \mathbb{R}$ from s to the authority r regarding the state of the world ω . The expert s knows the state, but can make any report it wishes to the receiver r . After s sends the message m to r , r then chooses a policy x , the true state of nature ω is revealed, all four players (C , P , s , and r) receive their payoffs, and the game concludes.

We analyze three versions of the interaction between the players, captured in three different game forms. The first of these represents a simple baseline: C has no decisions to make, while P chooses both v_s and v_r . We refer to this as the *unified control game form* or U . In the second game form, P chooses v_r first and, after this choice is observed by C , C then chooses v_s . We refer to this as the *President-goes-first game form* or PF , for “President first.” The third and final game form we analyze reverses the order of the second game form: C chooses v_s first and, after this choice is observed by P , P then chooses v_r . We refer to this final game form as the *Congress-goes-first game form* or CF , for “Congress first.”⁷

Note that in all three game forms, the preference of the authority v_r is always chosen by the President. This is because P represents the executive branch of the government. Article II of the Constitution vests executive authority in the President, and efforts by Congress to eliminate the President’s constitutional role in execution would be questionable at best in light of this provision. While the relationship between P and C differs across the three game forms, the final choice of policy is always dictated by an agent who is ultimately responsible to P .

⁷As we discuss later in the paper, the baseline represented by the U game form can be thought of as representing a situation in which legislature has completely “abdicated” its policy-making responsibilities under Article I of the Constitution, or has no authority over the administrative agency (e.g., because of some constitutional provision not present in the U.S.), or is part of a parliamentary government in which the legislative and executive branches *are* unified. In the latter case, the (strategically irrelevant) institutional actor C is merely a placeholder. It should also be noted, however, that when the unification of control of some agency is itself endogenous (e.g., situations in which the legislature delegates the authority to choose v_s to the executive in a reversible way), our findings regarding the U game form may not be appropriate, since the sustenance of the U game form may itself be correlated with unobserved characteristics of C and P .

In all the games, the payoff functions of the four players (C , P , s , and r) are given by

$$\begin{aligned}
 u_C &= -(x - \omega - \pi_C)^2 \\
 u_P &= -(x - \omega - \pi_P)^2 \\
 u_s &= -(x - \omega - v_s)^2 \\
 u_r &= -(x - \omega - v_r)^2
 \end{aligned}
 \tag{1}$$

The parameters π_C and π_P are exogenous, commonly known ideal points of C and P , respectively. The difference $\pi_P - \pi_C$ is referred to as the *preference divergence* between P and C . Throughout, we assume without loss of generality that $\pi_C \leq \pi_P$. The difference $v_r - v_s$ is the *dissonance* between r and s . The preferences of the expert and the authority are perfectly aligned when the dissonance equals zero.

We analyze the commonly-used C-S setting in which the state is uniformly distributed on $\Omega = [0, 1]$. After v_s and v_r are chosen, they become common knowledge. Then s and r play the cheap talk game with ideal points v_s and v_r . There are multiple equilibria to these games; as is typical we assume that for any ideal points (v_s, v_r) , the most informative equilibrium is played by s and r . This equilibrium maximizes the *ex ante* expected payoffs of both players.

Which Game Form? Since we do not specify one game form to capture the institutional structure in our setting, we comment briefly on the rationale for the different game forms we use. On the issue of sequence, while it may seem “natural” to develop a simultaneous-move version of the model rather than any combination of sequential game forms, we do not take this route for two reasons. First, any equilibrium in either CF or PF will also be an equilibrium in the simultaneous-move version (though there will in general exist many more equilibria – including some involving mixed strategies – in the simultaneous case). Second and more simply, the process under examination is *not* a simultaneous-move game.

Given this observation, the main reason for analyzing several different sequential game forms is that there is more than one way to interpret the allocation and sequence of decision rights in separation of powers, but the ones we analyze all yield qualitative results that support

our argument about separation of powers and the incentives of Congress.

Our focus is on Congress's incentives to decouple expert preferences from Congress and link them to the executive, which suggests a game form in which Congress influences the policy preferences of the expert, as in the *CF* and *PF* games. Separation of powers and the Article II grant of executive authority to the President suggest a game form in which the President influences the policy preferences of the executive authority, as in all three game forms. Beyond these considerations, both the *CF* and *PF* games are empirically defensible. On the one hand, the preferences and incentives of career bureaucrats are in part determined by agency structure and process (McCubbins et al. [1987], McCubbins, Noll, and Weingast [1989]) that are set by Congress and durable across many changes in presidential administrations. This points to the *CF* game, in that Congress chooses agency structure, and by implication policy preferences, to which the President must respond. On the other hand, Congress also retains the power to change agency structure as it wishes, and its *ex post* oversight authority also affects the induced preferences of bureaucratic agents. Therefore, for a given choice of senior agents by the President, Congress retains some authority to respond. This points more to the *PF* game, in that the President chooses his agents and Congress can respond if it wishes. Absent a decisive consideration for preferring one game for to the other, we analyze them both.

Though we explore the *U* game form as well, it is arguably inconsistent with the delegation doctrine, as it entirely removes Congress from policy formulation.⁸ It is as close as our model can get to a total abdication of policy-making responsibility by Congress, as there are no congressionally specified limits on executive authority and no participation, even indirect, by Congress in policy choice. Nevertheless, as we clarify below, the *U* game is interesting because of its relationship to the other games in which Congress is active and superficially seems able to sway policy in its direction.

⁸The wholesale control of policy by the President in the *U* form seems reminiscent of the provisions of the National Industrial Recovery Act of 1933 that granted the President and his agents unchecked authority to develop "codes of fair competition" for specific industries, and that roused the Supreme Court to invoke the delegation doctrine and eviscerate the statute in the *Schechter Poultry* case in 1935.

2 Analysis

We begin our analysis of the model with the preferences of each of the constitutional actors over the three game forms. While the game forms are not themselves objects of choice by the constitutional actors in our model, these preferences reveal insights about the important channels of control of the policy process, as opposed to the formal allocation of decision or participation rights. They are specified in the theorems below.⁹

Theorem 1 *In terms of ex ante expected equilibrium payoffs, P is indifferent between the U and PF game forms, and strictly prefers both to the CF game form.*

Theorem 1 implies that the executive weakly prefers appointing both the expert and the authority, and weakly prefers making his choice before Congress makes its decision. This part of the result is not especially surprising, but clearly has significant implications for the incentives of the President when making appointments and proposing administrative reforms. More interestingly, the result states that P is indifferent about the role of C , as long as P can commit to a choice of v_r before C chooses v_s .

Theorem 2 *In terms of ex ante expected equilibrium payoffs, C is indifferent between the U and PF game forms, and strictly prefers the CF game form to both U and PF .*

Theorem 2 has significant implications for the incentives of Congress regarding intervention in the informational activities within the administrative branch. Interestingly, U and PF are exactly the same from Congress's point of view. This is in spite of the fact that Congress has no role whatsoever in U , and controls the expert completely in PF . From a formal authority standpoint these are very different games, but in expected utility terms the difference is superficial. The reason is because of what the games have in common, that the President determines v_r while or before v_s is chosen. Given a choice of v_r , Congress wants full communication within the administrative hierarchy.

⁹Proofs for both theorems, and all numbered results, are contained in the appendix.

A key characteristic of equilibria of sender-receiver games is that the receiver can always do at least as well in the game as by simply ignoring the sender’s message and setting policy based solely on his or her prior beliefs about ω (i.e., according to F). In the traditional C-S setting, this implies that the receiver can do no worse than choosing policy to equal the expected value of ω . This feature has significant implications for the model examined here. In particular, regardless of which game form is considered, C ’s impact on the expected policy outcome is rather limited. In the C-S setting, policy set in any PBE equals the expected value of ω plus v_r .¹⁰ This is true *regardless of the sender’s payoff function v_s* .

We can get a better sense of the incentives and similarities among the game forms, and the qualitative results common across them, by exploring the choices by the constitutional principals in the most informative equilibrium of each game. We turn next to analysis of these equilibrium choices.

2.1 Unified Control

The U game form is simple to analyze, and we omit the details. The following proposition describes the key (and intuitive) characteristic of equilibrium behavior in this game form: P chooses a sender and a receiver who have identical preferences (i.e., there is no dissonance). Furthermore, their preferences are identical to P ’s.¹¹

Proposition 1 *In any perfect Bayesian equilibrium of U , there is zero dissonance. Furthermore, $v_s^* = v_r^* = \pi_P$.*

2.2 President Goes First

Analysis of the PF game form is only slightly more complicated than that of the U game form. The key recognition is that, in all equilibria of the C-S cheap talk model (i.e., not just those in the leading case with quadratic preferences and a uniform distribution over the state), the *ex*

¹⁰Cf. Crawford and Sobel [1982], p. 1441. Note that Crawford and Sobel do not, strictly speaking, use perfect Bayesian equilibrium as their solution concept. Nonetheless, their analysis is consistent with the additional refinements imposed by PBE.

¹¹This straightforward result provides, formally, a link between the results of Bendor and Meirowitz [2004] and our framework.

ante and interim (i.e., conditional upon the message m sent by s) expected value of the policy x is equal to the (*ex ante* or interim, as appropriate) expected value of ω plus v_r . Thus, the only effect that C can have on the equilibrium distribution of policy outcomes is to increase its variance. Substantively, C cannot affect the ideological bent of administrative policy through its choice of v_s in any way beneficial for itself after P has chosen v_r . Accordingly, it is weakly dominant, conditional on the choice of any given $v_r = \tilde{v}_r$, for C to choose $v_s = \tilde{v}_r$. Given this fact, it follows that P should choose $v_r = \pi_P$, secure in the knowledge that C will subsequently defer to this choice when selecting v_s .

Proposition 2 *In any perfect Bayesian equilibrium of PF, the following hold: (i) $v_s^*(v_r) = v_r$, and (ii) $v_r^* = \pi_P$.*

Part (ii) claims that P chooses a perfect agent as the executive authority, and part (i) claims that *whatever* authority P chooses, Congress chooses the expert to match it perfectly: there is no dissonance in equilibrium within the *PF* game form. In the *PF* game form, even though Congress would rather not face an implementing authority with preferences v_r distinct from its own, Congress has no choice in the matter. Accordingly, Congress's preference for the executive authority to act on good information rather than strategically garbled, partial information, induces Congress to choose an expert with preferences that match those of the Presidentially-appointed authority.

Put slightly differently, Proposition 2 states that, in the *PF* game form, the influence of P over the administrative policy process gives C a clear incentive to link v_s directly and solely to π_P : C 's optimal strategy is completely decoupled from (*i.e.*, independent of) π_C .

2.3 Congress Goes First

While the *PF* game gives a decisive first-mover advantage to P , the corresponding advantage does not exist for C in the *CF* game. In this game form, C has mixed incentives. In particular, C can pull the expected policy outcomes toward its ideal point by some finite amount. Furthermore, this amount is exogenous, implying that C will get its ideal point π_C as the

policy outcome in the CF game form so long as the preference divergence $\pi_P - \pi_C$ is not too large. Specifically, this occurs if and only if $\pi_P - \pi_C \leq \frac{1}{6}$. When the preference divergence is greater than this amount, the unique equilibrium is characterized by $v_s^* = \pi_P - \frac{1}{6}$. We bypass the calculations (which extend results in Dessein [2002]) and simply state the equilibrium.¹²

Proposition 3 *In any perfect Bayesian equilibrium of CF,*

$$v_s^* = v_r^* = v, \text{ where } v = \begin{cases} \pi_C & \text{if } \pi_P - \pi_C \leq \frac{1}{6} \\ \pi_P - \frac{1}{6} & \text{if } \pi_P - \pi_C > \frac{1}{6} \end{cases}.$$

Even in this game form, where C 's strategic position is at its strongest, C 's incentive is to target v_s to π_p rather than π_C , whenever P and C are not too closely aligned in ideological terms. Paradoxically, it is exactly when Congress and the President have similar policy goals that Congress desires an agent that is its ideological clone. When the preference divergence between C and P (*i.e.*, $\pi_P - \pi_C$) is large, the preferences of C 's ideal expert differ from C 's own preferences and, furthermore, are completely determined by P 's preferences. C 's ideal agent essentially “chases” P as the preference divergence between P and C grows, to maintain informative communication within the administrative hierarchy. Separation of powers, specifically control over the implementing authority r , means that P always holds some cards in interactions with C in the policy process.

An example of C 's equilibrium payoff function in an instance of the CF game (namely, with $\pi_C = 0$ and $\pi_P = 0.5$) is displayed in Figure 1. C 's equilibrium choice, v_s^* , is marked by the vertical dotted line. Also marked in the figure is the type of signaling game that would be played by s and r following each possible choice of v_s (*i.e.*, for each $v'_s \in [0, 0.5]$ the figure describes the type of signaling behavior that would be played in the most informative equilibrium of the $v'_s, v_r^*(v'_s)$ C-S game). As C concedes more to P 's policy preferences, P becomes more willing to delegate to an authority with preferences closer to C 's – capturing (along branches of the game tree that are never observed in equilibrium) a type of “give-

¹²The CF game form is equivalent to allowing C to set the agent's bias in the model examined in Section 6 of Dessein [2002].

and-take” between the two institutional actors. Eventually, if C concedes enough to P , P is essentially willing to delegate complete authority to the expert in the sense of choosing $v_r = v_s$. The figure illustrates that the closest point at which this occurs maximizes C ’s expected payoff. This is the case even though C can obtain (somewhat) informed policy-making with less extreme choices of v_s . To understand why this is the case, simply consider the analysis of the PF game form and the following fact: for $v_s < \pi_P - \frac{1}{6}$, $v_r^*(v_s) > \pi_P - \frac{1}{6}$. C ’s choice of v_s affects the expected policy outcome solely through its effect on v_r : thus, moving v_s to a location further from π_C results in both expected policy outcomes that are closer to π_C and less variance in the policy outcomes.

[Figure 1 Here]

The model above is static but has apparent implications for dynamic interaction between Congress and the executive branch. Consider a “policy problem” as an issue on which a specific policy decision must be selected from an available set of decisions (*e.g.*, a “policy window” in the sense of Holmstrom [1984]). A “policy area” is a set of policy problems that are related in the sense that a single random variable ω determines the mapping from a policy decision on each problem to an outcome for that problem. The set of policy problems in a given policy area can be partitioned into subsets $\{\mathcal{P}, \mathcal{C}\}$ (one of which may be empty in specific cases), with decisions for problems in \mathcal{P} exogenously (*e.g.* constitutionally) allocated to the president, and the allocation of decisions for problems in \mathcal{C} determined by Congress. The logic in our model shows that Congress has an incentive to create informational capacity over ω in the executive branch, to facilitate decisions on the problems in \mathcal{P} .

From this, applying standard logic in models of delegation (*e.g.*, Epstein and O’Halloran [1999]), it follows that Congress also therefore has a greater incentive to allocate control over problems in \mathcal{C} to the executive branch as well. This is because Congress has already created the institutional apparatus to learn ω in the executive branch, and this knowledge in turn increases the value to Congress of delegating authority over problems in \mathcal{C} as well. Thus the logic in our formal model is the crucial building block to establish that provision

of informational capacity to the president can lead to increasing authority of the executive branch in general, and the president in particular — even on policy problems Congress could control if it chose. The logic therefore brings us back to a claim made in the introduction, that the scope of the president’s endogenously determined authority can grow because of the informational incentives of Congress to institutionalize informational capacity in the executive branch.

3 Executive Discretion and Congressional Supply of Informational Capacity

Our argument revolves around the observation that it is beneficial to an organizational principal if information is available at the point of its application, and therefore a crucial part of the reason Congress benefits from unifying control of policy advising and execution under the president lies in separation of powers. This applies in the legislative-executive context to the extent that the president has some autonomous authority to exercise discretion over some matters that affect public policy in relevant ways. The assumption that the president does have this authority has two distinct parts: that the president has authority that Congress cannot abjure, and that this authority extends to novel public policy decisions. To summarize our formal argument with extreme brevity, we contend that when both of these conditions are met, Congress has an incentive to unify executive branch institutions under the president’s control for the purposes of facilitating sound policy advice that is actually heeded. This is furthermore true irrespective of policy disagreements Congress may have with the president.

The broadest defense of the assumption about the president’s role is Article II of the Constitution. Article II vests executive authority in the President and prevents Congress from partaking of it except in specific enumerated instances. Though it has choices about where to situate *expertise about* policy, Congress thus has no choice but to leave *execution of* law to the executive branch.¹³ Moreover, implementation and execution of policy also confers

¹³In special cases statutes may allow courts to perform an executive function to some degree, but it is implausible that this could allow Congress to circumvent the executive in general for several reasons. First, Federal courts have strongly resisted Congressional attempts to expand standing in policy questions (Fisher [1988], pp. 94-101). Second, even if the courts choose to intervene in a policy matter, the court’s decision will be effective only insofar as the executive branch is willing to implement it (*cf.* executive machinations

some irreducible amount of discretion about what policy actually is. This has been widely remarked in the contemporary literature (Schick [1983], Pressman and Wildavsky [1984], Mashaw [1990], Gailmard [2002]) and can result in part from bureaucratic drift (McCubbins et al. [1987]).

Our interpretation of Article II is bolstered by the Supreme Court’s relatively recent applications of the separation of powers doctrine in *Buckley v. Valeo* (1976) and *Bowsher v. Synar* (1986). In particular, in *Bowsher*, the Gramm-Rudman-Hollings Act of 1985 was ruled unconstitutional because it delegated executive authority to an agent, the Comptroller General, who is removable by a congressional joint resolution but not by the president. Writing for the Court in *Bowsher*, Chief Justice Burger argued that

“To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws. . . . The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess.”

Furthermore, writing in dissent, Justice White acknowledged that

“...although Congress has considerable authority in designating the officers who are to execute legislation . . . the constitutional scheme of separated powers does prevent Congress from reserving an executive role for itself or for its ‘agents.’”

However, while Congress cannot vest executive authority in agents under its own immediate control, it has had much greater luck delegating policymaking power to agents relatively independent of the president. Independent regulatory commissions in the mold of the Interstate Commerce Commission have been vested by Congress with quasi-legislative and quasi-judicial authority, and thus the power to make policy decisions having the effect of law, for over a

surrounding cases such as *Ex parte Merryman* (1861) and *Brown v. Board of Education* (1954) (McMahon [2003])). For a recent examination of the difficulties with judicial control of agency behavior, see de Mesquita and Stephenson [2003, 2007] and Stephenson [2003, 2007].

century.¹⁴ These agencies are “independent” at a minimum in the sense that their top executives are plural, and that the president must observe party balancing requirements in filling vacancies. More significantly, since at least the 1935 case of *Humphrey’s Executor v. United States*, presidents have been limited in their authority to remove the heads of independent commissions; these heads can be dismissed for cause as stipulated in statute, but not policy differences with the president.¹⁵ If Article II indeed vests *all* executive power in the president, as a dissenting Justice Scalia noted in *Morrison v. Olson*, it may be asked in what sense the independent regulatory commissions legitimately exercise executive power. Some scholars (*cf.* Lessig and Sunstein [1994]) contend they do not exercise executive power at all, but rather a distinct *administrative* power — distinct from legislative, judicial, and executive power — pertaining to their combination of quasi-legislative and quasi-judicial powers. This administrative power is not allocated to the president under Article II, and Congress has the implicit authority to allocate it as it sees fit under the “necessary and proper” clause of Article I.

In any case, whether independent agencies are rationalized by this administrative power of government, or as a collective decision by constitutional actors to read the Constitution in a new light more suitable to modern policy problems, or some other justification, they offer Congress a chance to make an end run around the executive branch strictly speaking, and therefore the president, in the policy process. Independent agencies have the authority to make and implement new policy subject to their authorizing statute, without ever answering to the president.

The key question for our purposes is the extent to which Congress can bypass the president in this way in the policy process, or equivalently the extent to which the president has inherent authority, irreducible by Congress, to affect policy in relevant ways. Scholars and court cases have long noted a sharp distinction in this respect between presidential authority in foreign

¹⁴Though the ICC was created in 1887, its regulatory scope was drastically hemmed in by both statute and the Supreme Court into the 1900’s. It was not until the Hepburn Act in 1906 that the ICC obtained significant regulatory powers, specifically the authority to set maximum rates.

¹⁵Although this doctrine and the distinction between removal authority in cabinet vs. independent agencies was enunciated by the Court in 1935, it does not follow that the president’s removal authority was only limited starting in 1935. It is also possible that the Court would have made a similar ruling in a previous case had one arisen.

and domestic policy. Article II confers not only general executive power on the president, but also allocates specific enumerated powers. These pertain most conspicuously to foreign policy and defense. For instance, under Article II the president negotiates treaties, receives ambassadors, and is commander-in-chief of the armed forces when in service of the United States. The presidential power over foreign affairs and defense conferred by these provisions is highlighted by the Supreme Court in the case of *United States v. Curtiss-Wright Export Corp* (1936). Justice Sutherland's opinion notes specifically the "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations," and that this power "does not require as a basis for its exercise an act of Congress." Thus, the president possesses constitutionally-based authority to make discretionary policy decisions in the field of foreign policy (Prakash and Ramsey [2001]). This is perhaps the strongest possible statement of presidential autonomy over policy-relevant choices.

The president's inherent powers under Article II are different in the case of domestic affairs. Compare the *Curtiss-Wright* decision to *Youngstown Sheet & Tube Co. v. Sawyer* (1952). Following the failure of steel mill management and the United Steel Workers to agree on a collective bargaining agreement in 1951, the union declared its intent to strike. President Truman, worried about the disastrous consequences of drastically reduced domestic steel output for the Korean War effort, ordered his Secretary of Commerce to seize and operate domestic steel mills. Justice Black noted that there was no statutory authority for this action, and the president did not claim any; thus the justification for the seizure, if any, must be constitutional. Justice Black's majority opinion went on to unequivocally invalidate the president's assertion of this domestic policy authority: "The President's order...directs that a presidential policy be executed in a manner prescribed by the President...The power of Congress to adopt such public policies as those proclaimed by the order is beyond question...The Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control." Of course the Constitution is not silent on enumerated powers in domestic affairs; it simply allocates them differently than foreign policy and national security powers.

Putting these decisions together, we may discern at least a stylized generalization, that in

foreign affairs, policy must go through the president; in domestic affairs, Congress has much greater flexibility to parcel out policymaking authority.¹⁶ In the former case, our theory makes a crisp prediction. Since execution, and indeed an important part of foreign policymaking generally, must be under the president's control, Congress has a strong incentive to support the president's capacity with institutions to gather, analyze, and faithfully transmit information to the president. This in turn underpins the often-noted presidential informational advantage over Congress on these issues. In the latter case, it is easy to see that Congress can gain by allocating policymaking authority to agents other than the president. Of course Congress should prefer *these* agents, as the source of policy implementation authority, to be as informed as possible. But with implementation authority decoupled from the president, this preference for information does not translate into congressional support for the *president's* informational capacity, or more generally the institutional presidency.

This difference in presidential authority under the constitution for foreign vs. domestic affairs has observable implications for the structure of administrative agencies in these areas. It is particularly useful to examine the creation of the first cabinet departments in these areas in the 1790's. The reason is that the separation of powers issues in these cases are likely to be relatively prominent. There are no organized interests or entrenched bureaucracies whose preferences may also be a factor in structural choices for new agencies, and national politics was not in a period of either weak presidents or compliant Congresses unable to fully defend the interests of the respective branches. Moreover, the administrative slate was blank at this point; there is no possible precedent of agencies with certain functions possessing certain levels of independence that might influence structural aspects of new agencies.

Five major departments were created by statute between 1789 and 1798: the departments of Foreign Affairs (later State), War, Navy, Treasury, and the Post Office.¹⁷ As the first three

¹⁶We do not accept the extreme claim that, given appropriation of funds by Congress, the president has essentially all available federal power in the areas of foreign policy and defense, nor does our theory require acceptance of this. The important point for our purposes is that there is some presidential authority that Congress cannot remove, not that the president has essentially all authority once Congress has appropriated funding.

¹⁷The position of Attorney General was created as a cabinet official in the Judiciary Act of 1789, but the Department of Justice was not created until 1870.

areas pertain to foreign policy and national defense, our theory predicts that they should have been relatively tightly linked to and unified under presidential control. On the other hand the Post Office was created pursuant to Article I section 9, which grants Congress the power to establish the Post Office and postal roads. For its part the Treasury Department obviously plays an important role in disbursing money in accordance with legislative authorization (Article I section 10). For disbursing funds and laying postal roads as Congress directs, there is much less scope for executive discretion conferred on the president by Article II than in the conduct of foreign affairs. Therefore our theory does not predict that the Department of the Treasury or the Post Office should be organized to facilitate free communication with the president.

Up to now we have considered the scope of the president's ability to influence policy as based on the constitution. However, executive discretion in some areas has arisen not from constitutional grant but rather the evolution of institutions. One such area is budgeting. Well into the twentieth century, standard practice in budgeting involved executive departments interacting directly with relevant congressional committees in submitting and bargaining over budget requests. Despite recommendations of public administration experts that the president should communicate with departments and coordinate and submit their requests, Congress was loath to give up its direct access to agencies under (Skowronek [1982]). However, the increasing scope of federal administrative activity as well as the difficulties of budgeting for a major war eventually convinced Congress of the value of presidential coordination of the budget. Congress passed and President Harding signed the Budget and Accounting Act in 1921 (after President Wilson vetoed virtually the same bill in 1919), which created the Bureau of the Budget (BOB) to lead the president's budget coordination efforts. Under the new budget process the president had discretion to cull information from departments and make budgetary proposals. The president would be unable to use this authority for any useful coordinating purpose without reliable information on the overall federal budget picture. Thus in the area of budgeting our theory predicts that Congress should grant the president extensive control over institutions to support informational capacity. While Congress obviously was not

required to grant this discretion to the president, it was discretion that could be useful only if the president had the information necessary to utilize it. Moreover, the BOB quickly became much more than merely a budgeting agency. Relatively early in its history it began to provide reliable, politically sensitive information to the White House in relation to the president’s legislative agenda in both Congress and the administration, priorities for legislation proposed by departments, and the political standing of the president around the country by way of field offices (Dickinson and Rudalevige [2004-2005]).

3.1 Case Study Evidence from Individual Departments

These predictions can be divided along two axes. First, does the president have a high degree of autonomous discretion to act in a policy area? Second, does Congress create institutions to expand informational capacity that are under the president’s direct control? To explore these predictions we examine cases arrayed in the following 2×2 typology. In brief, our theory predicts that rational institutional design results in cases in the two diagonal cells.

	Congress grants informational control	Congress retains informational control
Autonomous Presidential discretion	Dept. of Foreign Affairs (1789) Depts. of War (1789), Navy (1798) BOB (1921)	Bureau of Efficiency (1916)
Congress limits Presidential discretion		Treasury (1789) Post Office (1792)

Match: Presidential Discretion and Presidential Control of Information. The cases in the top left cell of the table are relatively straightforward. In all of these cases Congress passed statutes granting the president relatively unified control over the administrative structures created in them (Thach [1923]). The 1789 statutes creating the departments of Foreign Affairs and War contained essentially identical language, stipulating that the departments

were “executive departments” and that the secretaries were the “principal officers.” This language is significant because of the Article II Vesting and Opinions clauses: since executive power under the Constitution is vested in the president, these departments were denominated executive departments, and the Opinions clause grants the president explicit access to information from “principal officers” in “executive departments,” Congress acknowledged that the president would have a relatively free hand in directing them (Lessig and Sunstein [1994]). Moreover, since the Constitution specifically entitles the president to solicit the opinion of “principal officers” of the departments on matters under their department’s purview, the statutory language unambiguously marks these secretaries as advisors under the president’s executive control. The 1798 statute creating the Department of the Navy used essentially the same formulation, calling it an executive department and its secretary a principal officer.

The Budget and Accounting Act of 1921 is also relatively straightforward in specifying the linkage between the Bureau of the Budget and the president. BOB’s director was appointed (and freely removable) by the president with no requirement of Senate confirmation¹⁸. This gave the president free access to a team of high quality, politically responsive analysts not only for purposes of supervising budget requests, but for instituting legislative clearance requirements in the executive branch, managing the president’s legislative program, and funneling political intelligence from around the country to the White House (Moe [1985], Dickinson and Rudalevige [2004-2005], Dickinson and Rudalevige [2007]). The latter two papers explicitly demonstrate that the political responsiveness of BOB to the president was established quite early in BOB’s history, decades before President Nixon’s controversial reforms, and based on the original 1921 design of the BOB. Thus, as predicted by our theory, in all of these cases Congress created relatively unified executive structures within immediate reach of the president.

Match: Congressional Restriction of Presidential Powers. The degree unity in and direct presidential control over the Treasury Department and Post Office as created in the

¹⁸The BOB/OMB director did not become a Senate-confirmed position until 1974.

eighteenth century was more complicated (Thach [1923]). The Treasury Department, like Foreign Affairs and War, was created in 1789 but the statutory language and structure was quite different. From the first legislative debates on the topic it is clear that Congress was creating not just an advisor and support staff for the president, but an advisor for Congress and guardian of congressional-controlled purse strings as well (Casper [1989]). Early proposals in Congress suggested a multi-member executive board to head the Treasury Department, proposals that were scrapped on the assumption that a singular executive would be more accountable and energetic than a plural one. Nevertheless in the final statute creating the Treasury Department, Congress did specify the senior personnel and administrative procedures of the Treasury Department in relatively clear detail (Mashaw [2006]). The statute created positions of Secretary, Treasurer, Comptroller, Auditor, Register, and Assistant to the Secretary. It assigned specific duties to each of these officials *e.g.* for receiving and examining public accounts (Auditor); receipt, keeping, and disbursements of funds (Treasurer); keeping accounts of receipts and expenditures (Register); and superintending public accounts (Comptroller). Disbursement of funds by the Treasurer required a warrant signed by the Secretary and countersigned by the Comptroller, so that three officials were required to agree before any funds were expended. For the Secretary, statutory duties explicitly included making reports to Congress as directed by either chamber. Moreover, as Lessig and Sunstein [1994] note, the Treasury was not denominated an “executive department” upon its creation, and no Treasury official was designated the “principal officer.” This created some ambiguity under the Opinions clause of Article II about the president’s constitutional right to information from the Treasury Department, while (as noted) Congress explicitly wrote into the statute that the Secretary would provide advice and analysis to either chamber upon request. Thus, although the statute acknowledged the president’s authority to remove the Secretary and did not purport that this authority was Congress’s to grant or withhold (the “Decision of 1789,” first settled for the previously-created Department of War, applied to the Treasury and Foreign Affairs departments as well), it did specify administrative structure, limit discretion and presidential control, and provide for congressional involvement to a significantly greater

extent than the statutes creating the Departments of Foreign Affairs, War, and Navy (Lessig and Sunstein [1994], Mashaw [2006]).

The Post Office Department was created provisionally in 1789 and permanently in 1792. The 1792 statute removed earlier language stipulating that the Postmaster General was “subject to the direction of the president in performing the duties of his office.” Moreover, the 1792 statute gave the Postmaster direct authority, rather than authority superintended by the president, to enter into contracts, and gave the Department authority to operate from postal revenues (Lessig and Sunstein [1994]). Thus, relative to the the Departments of State, War, and the Navy, the Post Office Department was relatively insulated from presidential control (Mashaw [2006]). It acted pursuant to Congress’s Article I power over postal affairs, not the president’s Article II executive power. As a result, Congress did not make the Post Office a source of presidential discretion, and faced no need or incentive to place Post Office under presidential control so as to give the president reliable information on its affairs.

Mismatch: Presidential Discretion and Congressional Control of Information. If our theory is a correct depiction of the incentives behind institutional choices regarding information processing capacity in the executive branch, and Congress is always a rational institutional designer, then all institutions should be in one of the two diagonal cells of the table. When Congress realizes it cannot cabin the president’s policymaking authority, it settles for providing for informed use of that authority. When Congress can either retain policymaking authority itself by limiting executive discretion, or parcel out policymaking authority among actors besides the president, it does not have the same incentive to advantage the president in interbranch bargaining by granting him privileged control over informational capacity.

However, Congress does not always face strategic incentives as starkly as they are put in our formal model, and Congress does not always collectively possess the requisite degree of rationality to act on these incentives. In such cases institutional designs can result that are a mismatch with our theory. But rather than repudiating our theory, such cases are an important area for further examination of it: if the mismatch cases result in ineffectual

institutions, they may in fact offer further support for our theory. That is, in the strategic setting we have outlined, it may be irrational for Congress to choose institutional combinations off the diagonal cells, and Congress may nevertheless choose such combinations as a matter of fact. But if these institutions are ineffective because of a failure to connect with the president, they operate exactly as our theory predicts. Even though Congress makes irrational choices in these cases, the theory still helps us understand the consequences of these design choices and the place of these institutions in policymaking. Thus, rather than downplay these cases, we view them as important grounds for further examination of our theory.

One such “off-diagonal” case is the U.S. Bureau of Efficiency (BOE), created in 1916 as an outgrowth of a small unit in the Civil Service Commission studying efficiency ratings of federal personnel. BOE was spun out of the CSC by congressional initiative. By statute it was to serve two masters, the president and Congress; in perhaps the most comprehensive study of the BOE, Lee [2006] denominates it a staff agency of both the executive and legislative branches. BOE’s head was a presidential appointment, and its duties were something of a hybrid between the modern Government Accountability Office and Office of Management and Budget. It was to perform, at the request of either Congress or the president, analysis of management and organizational practices throughout the executive branch, and recommend improvements as necessary. In selecting the first (and only) head of BOE, President Wilson maintained the status quo by naming to the post, without any vetting or personal contact, the same man who headed the unit while it was part of the CSC (who was chosen by the CSC itself). Indeed, Wilson and subsequent presidents showed little interest in the BOE at all; it was more successful in developing a small constituency in Congress that defended its small patch of organizational real estate until opponents finally abolished it as a cost cutting move in the last days of the Hoover administration (Lee [2006]).

The BOE never became an important component of the analytic capacity of the executive branch. Abolished in 1933, a mere 17 years after its creation, it was largely eclipsed as an executive branch analysis unit by the Bureau of the Budget starting in 1921. BOE’s failure was not necessarily for lack of institutional support: BOE expenditures at their 1930 peak

nevertheless rose to almost 10 times the initial 1916 level (Lee [2006], 52-53). The BOE staff reached a maximum size of 83, with 37 analysts, in 1920 (Lee [2006], 55). By comparison, about 50 analysts staff today's Office of Information and Regulatory Affairs, the unit of the Office and Management and Budget charged with reviewing, advising on, and recommending new major rules from all cabinet departments; the entire OMB has about 500 employees in total. In the context of a far smaller federal government, the BOE had the work force to support significant informational capacity.

Our theory suggests one reason that the BOE rapidly fell into disuse: as an information processing and analysis unit, it was never particularly useful to either of its masters. This is because of a structural weakness in the BOE. Born of progressive faith in neutral competence and scientific management, with the implicit presumption that it could be a disinterested party dispensing sound advice to whomever sought it out, the BOE nevertheless developed closer links to Congress than to the president (Lee [2006]). It was not designed to give advice to the president he wanted to hear; instead it was situated in a superficially appealing organizational middle ground, not entirely the president's advisor and not entirely Congress's. With no requirement that presidents pay attention to BOE analysis, the president was free to disregard the BOE in his sphere of authority, and presidents freely did so immediately. Thus, congressional ambivalence about institutionalizing the presidency led it to the middle ground of congressionally-controlled presidential advisors. This turned out to be half a loaf that was as bad as no loaf at all. Given divergent priorities between BOE and the president, never came to trust BOE for reliable advice on the president's priorities, and therefore made little use of BOE expertise.

A mere five years after creating the BOE, President Harding signed the Budget and Accounting Act. Instead of trying to create a split-duty analysis agency shared by Congress and the president, this act created the General Accounting Office (GAO) for Congress and the Bureau of the Budget (BOB) for the president. Each of these institutions served only one principal and was more closely linked to that principal than the BOE could be to its joint political masters. Their areas of expertise overlapped significantly with BOE's, but they lacked

what our theory points up as BOE's key structural weakness. As a result, the GAO and BOB have grown into trusted and indispensable advisory and information processing units, in the case of BOB and later OMB, a cornerstone of the institutional presidency.

Empirical Studies of Congressional Support for a Unitary Executive. Several leading scholars of the presidency have recently amassed quantitative evidence on the degree to which Congress supports integrated control of executive institutions by the president. First, Lewis [2003] finds consistently that new agencies are less likely to be “insulated” from presidential control if their functions relate to foreign policy. Insulation is indicated by a number of institutional features that erect barriers between the president and the agency, such as location outside the cabinet or Executive Office of the President (which, since at least the *Humphrey's Executor* decision in 1935, has implied a limitation on the authority of the president to remove the agency head), party balancing requirements among a plural agency leadership, etc.

Second, Canes-Wrone et al. [2007] have corroborated this finding in a quantitative study of agency insulation from the president in the context of the “two presidencies” thesis. They find that agencies performing foreign policy tasks contain significantly fewer structural features that limit presidential control. Interestingly, when controlling for the effects of individual presidents, they also find that the effect of foreign affairs on structural insulation is not significantly different under divided vs. unified government. While an statistical insignificance obviously does not imply literally no difference, this result is naturally comparable to the theoretical prediction spelled out above: congressional incentives to support informed use of inherent discretion by the president are independent of its ideological conflict with the president. Partisan conflict under divided government is of course a natural proxy for ideological conflict, and thus the empirical result suggests that the effect of ideological conflict on congressional support for executive unity are at least statistically indistinguishable from zero.

3.2 *Other Institutions of Executive Informational Capacity*

The National Security Council. At a glance the National Security Council would seem to be a prime case consistent with our theory. Created in 1947, the National Security Council is a foreign & defense policy information processing organization tightly linked to the president. The National Security Advisor serves at the president's pleasure and is not subject to Senate confirmation. As a result, the NSA is typically a close confidant of the president and the NSC a locus of significant foreign policymaking. Consistent with the prediction of sender-receiver games, the president trusts and relies heavily on NSC-supplied information because the president links the preferences of the NSA with his own. Indeed, due to these facts the NSC has significantly encroached on the position of the State Department, Defense Department, and military establishments as foreign policy and national security advisors to the president. A few abortive attempts by presidents to revitalize the position of the cabinet departments only strengthen this point, because these experiments tend not to last long or undermine the position of the NSC in the long term (*e.g.*, President Reagan's initial, unsuccessful attempts to make his NSA something more of an administrative clerk in deference to Secretary of State Alexander Haig).

While the operation of the NSC relative to cabinet departments in presidential advising and foreign policymaking is consistent with the theory of sender-receiver games, the development of the NSC as a presidential advisory unit is somewhat subtle. Though conventional wisdom holds that the NSC was forced on a reluctant President Truman in the National Security Act of 1947 as a means to force the president to make more informed foreign policy decisions (Zegart [1999]), the National Security Act is better understood as enabling the development of informational capacity at the president's discretion than as forcing the development of informational capacity. The statutory design for the National Security Council provided a forum for meetings between the secretaries of State and Defense, military chiefs of staff, and the president, as statutory members of the NSC, but crucially it did not require the president to attend meetings or heed the guidance of the council. Presidents Truman and Eisenhower used the NSC haltingly in this form, and its position as a foreign policy advisor

was relatively weak (Zegart [1999]). However, the 1947 statute also provided for a small staff and a personal assistant to the president to support the council's work and coordinate its business. It was President Kennedy who recognized this part of the NSC structure as an unexploited opportunity to put in place his own people as foreign policy and national security advisors, untainted by the military and diplomatic establishments. The personal assistant grew into the position of National Security Advisor, utilized at some point by every president since Kennedy as a key player in foreign and national security affairs; the council staff grew into the analytical and information processing engine for national security in the Executive Office of the President.

Moreover, not only did Congress enable the development of this institutional arrangement in the 1947 statute, it has tacitly supported it since President Kennedy took the first steps to developing the modern NSC. This is because Congress has continued to fund the NSC and the position of the NSA, has never seriously challenged the role of the modern NSC or NSA in the foreign policy process, and has accepted the modern NSC and NSA as a key part of the foreign and national security policy process. Congress obviously has the authority to challenge the budgetary as well as organizational position of the NSC, but has always declined to do so, even in the wake of significant problems in the NSC (and therefore opportunities for challenge) revolving around the Iran-Contra scandal under President Reagan. At the same time, this amounts to Congress declining to use tools to undermine institutional innovations by the president in the area of foreign policy informational capacity. We take this as a weaker statement of congressional support than Congress actively using tools to create presidential information capacity where there previously was none.

Independent Regulatory Commissions. Our model addresses issues important for institutional choice in the early United States, but similar issues have occurred at several other points of major institutional innovation by Congress. The creation and evolution of the independent regulatory commission structure presents an example. One railroad regulation model popular in Midwestern states in the 1870's and 1880's was a commission chosen by and sub-

ordinate to the legislature, charged with recommending rate policy that the legislature could then write into law (Miller [1971]). The executive branch played essentially no role in this model and the commissions had no executive authority. Instead they were essentially specialized quasi-committees of the legislature itself, but composed of technical specialists rather than legislators and with no parliamentary rights of actual legislative committees. Since policy made pursuant to their advice was codified in a statute specifying terms of a transaction between private parties, it was in theory possible for state courts to “execute” the laws by rulings in individual cases. One of the many proposals for federal railroad regulation through the 1880’s was to essentially replicate this approach, but for a variety of reasons beyond the scope of this paper Congress opted for a different design in the Interstate Commerce Act of 1887. The Interstate Commerce Commission ended up with little authority to do much of anything in its first years (Hoogenboom [1976]) but the executive authority it had was separate from Congress. The substantive expertise it embodied was separate as well, and linked to the authority to execute policy. As federal courts began to defer to the ICC and Congress granted the commission greater authority over rail rates, it evolved into a body with formidable powers over shippers that blended policy expertise and executive authority in a single organization (Cushman [1941]). While this arrangement sacrifices Congressional control over the policy experts, it ensures that they have better strategic incentives to communicate thoroughly with the policy implementors because they share the same organizational mission and preferences. Given that Congress could not itself exercise the executive powers it granted the ICC this may simply be its best alternative.

4 Conclusion

The rise of the presidency results in part from the rise of the president’s access to high-quality information. In some cases Congress has an incentive to support the president’s informational capacity, and therefore to contribute to the rise of presidential power. The argument we advance in this paper is that this incentive follows from separation of powers when policy execution authority is lodged in the executive, and policy choices have uncertain results.

This institutional arrangement gives Congress an incentive to pin experts' policy preferences to those of the President, to facilitate policy-relevant communication with executive branch authorities that shape policy implementation and that the President is constitutionally entitled to select. While previous formal studies of legislative design of administrative structures has found that information begets discretion (Epstein and O'Halloran [1999]), our model shows the converse is true as well: discretion begets information. Viewing Congress as choosing an agent who provides policy expertise, this implies a failure of the "ally principle": Congress's ideal agent is not its ideological clone. This is nevertheless optimal in cases where a clone would not be able to provide reliable information that actually gets used in policymaking.

These incentives to link agent preferences to those of the President have implications for the structure of bureaucratic organizations in the United States. In areas where the president has a measure of discretion that Congress either cannot (by Constitutional stricture) or chooses not to abrogate, Congress supports the president's informational capacity by creating relatively unified administrative structures under the president's immediate control. This is particularly relevant for foreign affairs and national defense, and also for the president's role in coordinating the national budget. On the other hand, in areas where Congress has more freedom to allocate and control administrative discretion in its own interests, it has an incentive to do so, and not to create unified administrative structures that help to bolster the president's informational capacity. In a sense, our results bear on debates about the "unitary executive"; we show that unitariness is not necessarily undesirable for Congress. Moreover, in some cases the degree of executive unitariness is an object of congressional choice, not simply constitutional provisions, and our theory makes congressional decisions about the degree of executive unitariness intelligible.

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Appendix A Technical Details and Proofs of Numbered Results.

Appendix A.1 The Model

We consider a situation in which a set of two constitutional actors (or “principals”), C and P , are faced with choosing policy $x \in X = \mathbf{R}$. There is a state of nature $\omega \in \Omega$ that is not observed by the constitutional actors until the conclusion of the game, and the constitutional actors have state-dependent policy preferences represented by payoff functions u_C and u_P , respectively, as defined in Equation (1). The real-valued state of nature, ω , is drawn from $\Omega = \mathbf{R}$ according to a commonly known probability measure $F \in \Delta(\Omega)$.¹⁹

The Sender-Receiver Cheap Talk Model. The sender-receiver model consists of two players, one of whom (the “sender”) knows ω . After observing ω , the sender transmits a *message*, denoted by m , to the second player (the “receiver”), who interprets m , updates his or her beliefs about ω (these updated beliefs are denoted by $\beta_r(m) \in \Delta(\Omega)$) and then sets policy, $x \in \Delta(X)$.²⁰ Given the choices of v_s and v_r , the payoff functions for s and r , $u_s(\cdot; v_s)$ and $u_r(\cdot; v_r)$, respectively, are defined in Equation (1). Let $V_s = V_r = \mathbf{R}$ denote the set of feasible choices for the sender and receiver, respectively, and let $\mathcal{V} = V_s \times V_r = \mathbf{R}^2$.²¹ We refer to the instance of this model following the choice of $v = (v_s, v_r) \in \mathcal{V}$ as the *v-sender-receiver game*.

The Constitutional Actors’ Game Forms. We analyze three game forms incorporating the sender-receiver model described above. In the first, referred to as the *unified control* game form (or U), P chooses both the sender’s and receiver’s payoff functions (*i.e.*, P chooses both v_s and v_r). In the second, referred to as the *President-goes-first* game form (PF), P chooses the receiver’s payoff function, v_r , and then, after this choice is observed, C chooses the sender’s payoff function, v_s . In the third game form, referred to as the *Congress-goes-first*

¹⁹For any set Z , $\Delta(Z)$ denotes the set of probability measures over Z .

²⁰While we allow for the receiver to use a mixed strategy, this will not occur along the equilibrium path of play.

²¹For simplicity, we refer to v_s and v_r as the sender and receiver’s “payoff functions,” as opposed to the clunkier (and mathematically equivalent) $u_s(\cdot; v_s)$ and $u_r(\cdot; v_r)$, respectively.

game form (CF), C chooses the sender's payoff function, v_s , and then, after this choice is observed, P chooses the receiver's payoff function, v_r . Note that all that differs between the final two game forms (PF and CF) is the order in which the principals choose the payoff functions for the sender-receiver game – in both, P chooses the receiver's payoff function and C chooses the sender's payoff function. In all game forms, after v_s and v_r are chosen by the institutional actors, the state of nature ω is drawn according to F , the sender observes ω , and the sender-receiver game proceeds as described above.

Appendix A.2 Strategies and Equilibrium

Our analysis is game theoretic and based on *perfect Bayesian equilibrium* (PBE). The game consists of two sequential components: in the first, the payoff functions of the sender and receiver are chosen. The second is simply the sender-receiver game, with the payoff functions as determined by the principal(s). Working backwards as usual, we begin by defining strategies and equilibrium within the sender-receiver game.

The set of messages available to the sender is denoted by $M \subseteq \Omega$. The strategy for the sender is denoted by $\mu : \Omega \rightarrow \Delta(M)$ and that for the receiver is denoted by $\alpha : M \rightarrow \Delta(X)$. Similarly, after receiving message m , the receiver forms beliefs $\beta_r : M \rightarrow \Delta(\Omega)$. Define the following subjective expected payoff functions:

$$\begin{aligned}\tilde{u}_s(m; \alpha, \omega, v_s) &= \int_X u_s(x, \omega; v_s) d\alpha(x|m) \\ \tilde{u}_r(x; \beta_r^*(m), v_r) &= \int_\Omega u_r(x, \omega; v_r) d\beta_r^*(\omega|m)\end{aligned}$$

Definition 1 *Given a pair of payoff functions $v = (v_s, v_r)$, a PBE of the v -sender-receiver game is any profile,*

$$\phi^*(v) = (\mu^*, \alpha^*, \beta_r^*)$$

satisfying the following conditions:

1. For all $m \in M$ such that $\int_{\Omega} f(\omega') \mu^*(m|\omega') > 0$,

$$\beta_r^*(\omega|m) = \frac{f(\omega) \mu^*(m|\omega)}{\int_{\Omega} f(\omega') \mu^*(m|\omega')},$$

2. For all $\omega \in \Omega$, $\mu^*(m|\omega) > 0 \Rightarrow \tilde{u}_s(m; \alpha^*, \omega, v_s) \geq \sup_{m' \in M} \tilde{u}_s(m'; \alpha^*, \omega, v_s)$,

3. For all $m \in M$, $\alpha^*(x|m) > 0 \Rightarrow \tilde{u}_r(x; \beta_r^*(m), v_r) \geq \sup_{x' \in X} \tilde{u}_r(x'; \beta_r^*(m), v_r)$.

For any pair $v = (v_s, v_r) \in \mathcal{V}$, let $\Phi^*(v)$ denote the set of PBE to the sender-receiver game, given payoff functions v and let $\hat{\phi}^*(v)$ denote the following equilibrium profile:

$$\hat{\phi}^*(v) = (\hat{\mu}^*, \hat{\alpha}^*, \hat{\beta}_r^*) \in \underset{(\mu^*, \alpha^*, \beta_r^*) \in \Phi^*(v)}{\operatorname{argmax}} \int_{\Omega} \tilde{u}_s(\mu^*(\omega); \alpha^*, \omega, v_s) dF(\omega). \quad (2)$$

The profile $\hat{\phi}^*(v)$ is simply the sender's most-preferred equilibrium profile, given v . There are infinite equilibria in the v -sender-receiver game for any $v \in \mathcal{V}$ (though many are economically equivalent), and some selection criterion is necessary for analysis of the game between the institutional actors in which v is chosen. While this selection is in some sense arbitrary,²² it is intended to maximize the effect of the choice of v_s on equilibrium policy setting. To see how this the case, note first that – in the setting analyzed in Section 1, the sender's most-preferred equilibrium profile is the “most informative” in the sense that it maximizes the number of actions induced by the sender's message. For “less informative” equilibria, the effect of the message on the receiver's policy choice (and, hence, on the equilibrium distribution of policy outcomes) will necessarily be smaller. Finally, for each $v \in \mathcal{V}$, let $Y(v) \in \Delta(X \times \Omega)$ denote the distribution induced by $\hat{\phi}^*(v)$ on $X \times \Omega$.

Strategies for the principals. The strategy for principal P in U is simply a pair $\nu_P = (v_s, v_r) \in \mathcal{V}$, and C does not make any decisions in this game form. In PF , the strategy for P is a choice $\nu_P \in V_r$ and the strategy for C is a function $\nu_C : V_r \rightarrow V_s$. Similarly, in CF ,

²²In many settings, including the setting analyzed in Section 1, this selection picks out the (essentially) unique Pareto optimal equilibrium profile, where the “essentially” accounts for the fact that a continuum of different, but strategically equivalent, message strategies can support any equilibrium distribution over $X \times \Omega$.

the strategy for C is a choice $\nu_C \in V_s$ and the strategy for P is a function $\nu_P : V_s \rightarrow V_r$. In all three game forms, both of the principals know the distributions F and G and receive no additional information prior to making their choices. Accordingly, we assume that both players have correct and commonly known beliefs about ω and Y when making their choices and omit notation for their beliefs.

A perfect Bayesian equilibrium of U consists of a strategy for P , ν_P^* , such that, for all $\bar{\nu}_P \in \mathcal{V}$,

$$\int_{X \times \Omega} u_P(x, \omega; \pi_P) dY(\nu_P^*) \geq \int_{X \times \Omega} u_P(x, \omega; \pi_P) dY(\bar{\nu}_P). \quad (3)$$

A perfect Bayesian equilibrium of PF consists of a pair of strategies for P and C , $\nu^* = (\nu_P^*, \nu_C^*)$, such that for all $\bar{\nu}_P \in V_r$ and all $\bar{\nu}_C \in \mathcal{F}(V_r, V_s)$,²³

$$\int_{X \times \Omega} u_P(x, \omega; \pi_P) dY(\nu_P^*, \nu_C^*(\nu_P^*)) \geq \int_{X \times \Omega} u_P(x, \omega; \pi_P) dY(\bar{\nu}_P, \nu_C^*(\bar{\nu}_P)) \quad (4a)$$

$$\int_{X \times \Omega} u_C(x, \omega; \pi_C) dY(\nu_P, \nu_C^*(\nu_P)) \geq \int_{X \times \Omega} u_C(x, \omega; \pi_C) dY(\nu_P, \bar{\nu}_C(\nu_P)), \quad \forall \nu_P \in V_r \quad (4b)$$

A perfect Bayesian equilibrium of CF consists of a pair of strategies for P and C , $\nu^* = (\nu_P^*, \nu_C^*)$, such that for all $\bar{\nu}_P \in \mathcal{F}(V_s, V_r)$ and all $\bar{\nu}_C \in V_s$,

$$\int_{X \times \Omega} u_P(x, \omega; \pi_P) dY(\nu_P^*(\nu_C), \nu_C) \geq \int_{X \times \Omega} u_P(x, \omega; \pi_P) dY(\bar{\nu}_P(\nu_C), \nu_C), \quad \forall \nu_C \in V_s \quad (5a)$$

$$\int_{X \times \Omega} u_C(x, \omega; \pi_C) dY(\nu_P^*(\nu_C^*), \nu_C^*) \geq \int_{X \times \Omega} u_C(x, \omega; \pi_C) dY(\nu_P^*(\bar{\nu}_C), \bar{\nu}_C) \quad (5b)$$

Note that the use of Y in Equations (4a)-(5b) is equivalent to imposing that the two institutional actors have correct beliefs about each possible ensuing v -sender-receiver game. The quantifiers in Equations (4b) and (5a) play the role of the perfection refinement of PBE.²⁴

Remark 1 Throughout, Y is assumed to depend only on the choice of payoff functions, v_s

²³For any two sets Y and Z , $\mathcal{F}(Y, Z)$ is used to denote the set of functions from Y into Z .

²⁴In other words, these quantifiers rule out non-credible threats by the institutional actor who chooses second in each game form. For example, if the $\forall \nu_C \in V_s$ quantifier were dropped from Equation (5a), the set of equilibria would expand to allow P to adopt a strategy akin to “choose $v_s = \pi_P$ and I’ll choose $v_r = v_s$. Otherwise, I’ll choose $v_r = 500,000,000$.”

and v_r , and *not on the game form in which the payoff functions were chosen.*

Substituting Equation 1 into Equations (4a) and (5b), the following lemma is straightforward to prove (*e.g.*, Dessein [2002], Equation A.9).

Lemma 1 *For both $i \in \{C, P\}$,*

$$\int_{X \times \Omega} u_i(x, \omega; \pi_i) dY(\nu_P^*, \nu_C^*(\nu_P^*)) = -(E_{Y(v)}[x] - \pi_i)^2 - \sigma_Y^2(|v_s - v_r|), \quad (6)$$

where $E_{Y(v)}[x]$ denotes the expected value of x with respect to $Y(v)$ and $\sigma_Y^2(|v_s - v_r|)$ is a weakly increasing function that is uniquely minimized at $|v_s - v_r| = 0$.

The following lemma follows immediately from the presumption that $Y(v)$ represents PBE behavior in the v -sender-receiver game as selected according to Equation (2).

Lemma 2 *For any $v = (v_s, v_r) \in \mathcal{V}$,*

$$E_{Y(v)}[x] = v_r + E_F[\omega],$$

where $E_F[\omega] = \int_{\Omega} \omega dF(\omega)$.

Theorem 1. In terms of *ex ante* expected equilibrium payoffs, P has the following preferences over the game forms: $U \sim PF \succ CF$.

Proof: The proof consists of two parts: (1) showing that P 's equilibrium expected payoffs in U and PF are equal and (2) showing that P 's equilibrium expected payoff in CF is no greater than in U .

1. Lemmas 1 & 2, along with Equation (4b) jointly imply that $\nu_C^*(v_r) = v_r$ for all $v_r \in V_r$. Accordingly, Equation 4a implies that $\nu_P^* = \pi_P$ in PF . Similarly, Lemmas 1 & 2, along with Equation (3) jointly imply that any PBE of U involves $\nu_P^* = (\pi_P, \pi_P)$. Accordingly, $Y(v^*)$ is identical for C 's most preferred equilibrium in PF and U , implying that both P and C are indifferent between the two game forms in terms of their equilibrium expected payoff in each game form.

2. Given that the PBE selection in CF is described by 2, it is straightforward that P 's equilibrium expected payoff in CF can not exceed P 's equilibrium expected payoff in U : suppose otherwise, and immediately conclude that the supposition that the hypothesized strategy profile for CF satisfies Equations (5a) & (5b) implies that the hypothesized strategy profile for U violates Equation (3). ■

Theorem 2. In terms of *ex ante* expected equilibrium payoffs, C has the following preferences over the game forms: $CF \succ PF \sim U$.

Proof: The proof consists of two parts: (1) showing that C 's equilibrium expected payoffs in U and PF are equal and (2) showing that C 's equilibrium expected payoff in CF is no less than in U .

1. This follows immediately from step (1.) of the proof of Theorem 1.
2. This follows immediately from an argument analogous to that for step (2.) of the proof of Theorem 1. (Giving C the option to choose v_s first can not make it worse off than having P choose both v_r and v_s , since C can simply use the appropriate component of P 's strategy in the equilibrium of the U game form.) ■

Proposition 1. In any perfect Bayesian equilibrium of U , $v_s^* = v_r^* = \pi_P$.

Proof: Follows immediately from Lemmas 1 & 2. ■

Proposition 2. In any perfect Bayesian equilibrium of PF , (i) $v_s^*(v_r) = v_r$, and (ii) $v_r^* = \pi_P$.

Proof: Follows from Lemmas 1 & 2, and the argument for Theorem 1. ■

The following lemma describes the PBE response by P in the CF game form. The proof is omitted, as it can be found in Dessein [2002], Section A.2.

Lemma 3 In any PBE of the CF game form, $\min_{v \in \mathbf{R}} \nu_P^*(v) = \pi_P - \frac{1}{6}$.

Proposition 3. In any perfect Bayesian equilibrium of CF ,

$$v_s^* = v_r^* = v, \text{ where } v = \begin{cases} \pi_C & \text{if } \pi_P - \pi_C \leq \frac{1}{6} \\ \pi_P - \frac{1}{6} & \text{if } \pi_P - \pi_C > \frac{1}{6} \end{cases}.$$

Proof: Follows from Lemmas (1 - (3) and the presumption that the PBE equilibrium in the v -sender-receiver game is as described by Equation (2). ■

Figure 1: C 's Equilibrium Expected Utility in the CF game, $\pi_C = 0$, $\pi_P = 0.5$.

