Disappearing Commissioners

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ABSTRACT: Independent regulatory commissions are, in the face of a judicial campaign against their independence, suffering from an internal ailment that is just as serious. These mainstays of the administrative state, including the Federal Trade Commission, National Labor Relations Board, and other important regulators, are becoming one-person bands. Growing dominance by their chairs is occurring in tandem with a rash of associate commissioner resignations. We suspect these trends are related.

The phenomenon of the disappearing associate commissioner threatens the very purpose of independent commissions. The trend has degraded commissioners' ability to marshal expertise, resist the political branches' influence, and deliberate as multimember bodies. This Article shows how chairs and chair-supervised staff have wrested control from other commissioners; how the White House, executive agencies, and Congress have encroached on commissions' turf; and how an increasingly partisan climate has turned deliberative discussions among commissioners into party-line votes. Leveraging data on 684 current and former commissioners on eleven key commissions, the Article then identifies associate commissioners' growing propensity to exit their positions early in their terms.

These developments suggest that many of the perceived benefits of the independent commission form fail to be fully realized. Shorter tenures erode commissions' political insulation and collective experience and may degrade the quality of their deliberations and the signal value of dissents from commission daises. Whereas proponents of independent commissions vigorously defend the form against judicial challenges, they have failed to confront these developments that, as a functional matter, chip away at the purposes that independence is designed to serve.

To address this oversight, we offer several prescriptions to reinvigorate commissions. Most notably, Congress should encourage associate commissioners to serve their full terms by granting them greater programmatic authority,

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agenda-setting power, and tiered or deferred compensation that rewards lengthy service. Through these and other changes, officials can help restore commissions to their previously exalted place in the administrative state.

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INTRODUCTION

Independent agencies are under threat. Judicial challenges to the form are reasonably well understood: Supreme Court decisions striking down their leaders' job protections erode these agencies' insulation from political actors, and judicial opinions subjecting their regulations to cost-benefit analysis

reduce their autonomy.[1] Policymakers and scholars, however, have all but ignored an equally important *internal* challenge to their functioning: the disappearing associate commissioner. For those who believe in the original congressional vision of the independent commission—i.e., that Congress designed these entities to bring expertise to bear on policy, insulate policymakers from partisan politics, and in some cases foster deliberative decision-making—this disempowerment of associate commissioners and their ever-shortening lengths of service suggest a grim future for the independent commission form.

This Article is the first to identify the disappearing commissioner phenomenon and explain how it came to occur. Across a wide variety of commissions, legal changes have empowered chairs and agency staff at associate commissioners' expense; political actors' enhanced monitoring of commissions has reduced their discretion; and polarization has split once-deliberative bodies along party lines. Contemporaneous with these developments, associate commissioners are heading for the exits with increased frequency. Our analysis of 684 commissioners on eleven key commissions, from each commission's establishment to the present, reveals an unmistakable secular decline in length of service across most commissions. Strikingly, associate commissioners' mean tenure dropped by one-third in the past generation, from 6.0 years in the 1980s to 3.9 in the 2010s, with declines in each decade along the way.

This development has profound implications for the administrative state's functioning. Most importantly, shorter tenures reduce commissions' collective experience and political insulation and may degrade the quality of their deliberations. These developments are significant because Congress intended to foster precisely these qualities—expertise, insulation from political actors, and deliberation—when it included fixed terms, removal protections, and multimember structures in the design of many of these entities.[2]

The disappearing-commissioner phenomenon is occurring in the midst of a decade-long judicial campaign against independent agencies. Indeed, associate commissioners have been leaving their jobs even more quickly in the last decade, perhaps because of this judicial hostility. Courts impinge on commission independence in two ways. One string of decisions has made it easier to fire agency leaders and personnel—an important development because insulation from removal is one of the most important guarantees of independence.[3] The first major salvo on this front came in 2010, when the Supreme Court placed limits on multilevel statutory removal protections of

1. *See infra* notes 4–11 and accompanying text for a review of these efforts.

2. *See infra* Part III.

3. *See* Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1207–09 (2014).

executive-branch officers except for good cause.[4] Ten years later, the Court concluded that Congress could grant for-cause removal protections only on multimember commissions and on inferior officers with no policymaking authority.[5] The Court also held in 2018 that adjudicators with job security who are employed by an independent commission are constitutionally deficient.[6] So are patent adjudicators who enjoyed judge-like independence from "review by a superior executive officer."[7] A recent Fifth Circuit case purports to go further still, holding that enforcement proceedings before administrative law judges with removal protections are unconstitutional essentially across the board.[8]

The second string of decisions seeks to subject independent commissions to cost-benefit analysis requirements when making policy—a new development that also constrains commission decision-making. In 2011, the D.C. Circuit held that a congressional requirement that the Securities and Exchange Commission ("SEC") consider the effects of its proposed rules on efficiency, competition, and capital formation meant that the commission must conduct a cost-benefit analysis of those proposed rules.[9] Another court held that the Financial Stability Oversight Council must perform a similar analysis in its adjudications.[10] Executive branch officials also ponder mandating independent agencies to submit their rules to the White House for cost-benefit review.[11]

4. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 484 (2010). Specifically, the Court held "multilevel protection from removal"—i.e., situations in which both the executive-branch officer and that officer's superior possess statutory removal protection—"is contrary to Article II's vesting of the executive power in the President." *Id.*

5. Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2192 (2020).

6. Lucia v. SEC, 138 S. Ct. 2044, 2051–55 (2018). Because the SEC staffers, and not the commissioners themselves, selected the adjudicators, the cases that these adjudicators presided over had to be retried in some circumstances, at least if the defendant had raised the constitutional infirmity at the administrative proceeding. *Id.* at 2055.

7. United States v. Arthrex, Inc., 141 S. Ct. 1970, 1981 (2021).

8. Jarkesy v. SEC, 34 F.4th 446, 449–50 (5th Cir. 2022).

9. *See* Bus. Roundtable v. SEC, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011) ("[T]he Commission inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified . . . .").

10. MetLife, Inc. v. Fin. Stability Oversight Council, 177 F. Supp. 3d 219, 223 (D.D.C. 2016). The Chamber of Commerce, an influential interest group, is pursuing a litigation strategy to impose similar restrictions across independent commissions. *See* John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882, 912–19, 950–55 (2015) (reviewing the Chamber's litigation efforts); WILLIAM L. KOVACS, JOSEPH M. JOHNSON & KEITH W. HOLMAN, U.S. CHAMBER OF COM., CHARTING FEDERAL COSTS AND BENEFITS 9 (2015), https://www.uschamber.com/assets/archived/images/021615_fed_regs_costs_benefits_2014reportrevise_jrp_fin_1.pdf [https://perma.cc/BL5B-37RF] ("Independent regulatory agencies should be held to identical standards as executive branch agencies for high impact rulemakings.").

11. The former Office of Information and Regulatory Affairs ("OIRA") Director and current D.C. Circuit Judge Neomi Rao made the case for cost-benefit analysis requirements for independent agencies. Neomi Rao, *Regulatory Review for Independent Agencies*, YALE J. ON REGUL.: NOTICE & COMMENT (Dec. 14, 2016), https://www.yalejreg.com/nc/regulatory-review-for-independent-agencies-by-neomi-rao [https://perma.cc/MWA2-35RW].

Administrative law scholars understandably devote considerable attention to these developments in the courts.[12] In so doing, however, they overlook commissions' internal dynamics. That is a mistake. Although changes in commissions' operations and associate commissioners' shorter tenures do not change the formal, independence-promoting statutory features commonly found in commissions, they do generate sea changes in commissions' *functional* independence.[13] In terms of their practical consequences, these changes arguably are as important as developments in the courts.[14]

Accordingly, it is high time that policymakers and scholars consider these developments on commission daises. This Article calls them to do so. Part I describes a litany of ills facing associate commissioners: declining relative power in the face of aggrandizing chairs and the staff members whom they supervise; increased encroachment on commissions' turf by essentially every other major actor in federal government; and an increasingly partisan climate that has turned deliberative discussions among commissioners into party-line votes.

Part II presents the first accounting of commissioners' tenures in office. This analysis of 684 commissioners (or equivalent officials) on eleven important commissions shows a substantial secular decline in associate commissioners' lengths of tenure for most of these entities. Equally notably, commission chairs do not exhibit similar behavior.

Part III details potential consequences that associate commissioners' propensity to head for the exits early may bring. In brief, shorter tenures reduce expertise, widen avenues for influence from the political branches, shift power to commission chairs, increase the frequency of former commissioners parachuting to lobbying firms, encourage short-term thinking, and discourage rulemaking as a vehicle for policy changes.

Finally, for those that are convinced that early exit from commissions is problematic, Part IV offers policy prescriptions. From bestowing greater responsibility on associate commissioners and implementing seniority-based compensation for all commissioners, to greater pressure for nominees to provide assurances that they will serve their full term, policymakers could deploy a variety of carrots and sticks to reverse the trend towards early exit if they so desire.

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12. *See, e.g.*, Christine Kexel Chabot, *Interring the Unitary Executive*, 98 NOTRE DAME L. REV. 129, 132–33 (2022); Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court's Political Theory*, 73 HASTINGS L.J. 371, 408–21 (2022); Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 2–8; Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 17–33 (2017).

13. *See infra* Sections III.A–.B (discussing how associate commissioners' shorter tenures may reduce agency expertise).

14. *See* David Zaring, *Toward Separation of Powers Realism*, 37 YALE J. ON REGUL. 708, 708 (2020) (contending that Supreme Court decisions "finding venerable parts of the administrative state . . . to be unconstitutional . . . make no real-world difference because of the modest remedies paired with those [decisions]").

I. ASSOCIATE COMMISSIONERS ARE ON THE ROPES

Independent commissions were created to be collegial, bipartisan, apolitical, and expert. But since their creation, profound shifts have occurred concerning the relative power of associate commissioners vis-à-vis chairs, the extent to which commissioners are insulated from political actors, and the larger political climate in which commissions operate. Taken together, these phenomena disempower associate commissioners—and, for some of these developments, commission chairs as well—and reduce their ability to serve the public. This Part discusses each of these developments in turn: the aggrandizement of chairs' power, both directly and through their control of commission staff; new legal mechanisms that allow the White House and Congress to intrude on matters that previously were in commissioners' exclusive sphere; and the replacement of collaborative, deliberative norms in favor of sharp-elbowed partisanship.

A. *THE RISE OF STRONG CHAIRS*

The power vested in associate commissioners relative to chairs is a shadow of what it was in the New Deal era. Three developments have contributed to this decline: a turn toward the "strong chair" model at many commissions; a shift from adjudication to rulemaking; and a propensity for commissions to subdelegate authority to staffers that are accountable to chairs alone.

1. Reorganization Plans Empower Chairs

A series of reorganization plans in the mid-twentieth century empowered chairs at the expense of associate commissioners.[15] Under the so-called "strong chair" model that these plans effectuated, chairs essentially operate as chief executive officers: hiring staffers, setting budgetary priorities, distributing functions among the agency's offices, and the like.[16] They also control the agenda concerning the matters on which the full commission votes.[17]

The strong chair model dates to the postwar decades. A 1949 report from the influential Hoover Commission advised that "[a]dministration by a plural executive is universally regarded as inefficient" and recommended that commissions' "administrative responsibilit[ies] be vested in the chairman," while retaining a multimember decision-maker for their "regulatory duties."[18] President Harry Truman effectuated the Hoover Commission's recommendations, issuing reorganization plans in the early 1950s for many

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15. *See* Todd Phillips, *Commission Chairs*, 40 YALE J. ON REGUL. 277, 281–83 (2023).

16. *See id.*; MARSHALL J. BREGER & GARY J. EDLES, INDEPENDENT AGENCIES IN THE UNITED STATES: LAW, STRUCTURE, AND POLITICS 295–96 (2015).

17. BREGER & EDLES, *supra* note 16, at 350.

18. COMM'N ON ORG. OF THE EXEC. BRANCH OF THE GOV'T, THE INDEPENDENT REGULATORY COMMISSIONS, H.R. DOC. NO. 81-116, at 5–6 (1949) (quoted in BREGER & EDLES, *supra* note 16, at 295).

independent regulatory commissions.[19] President John F. Kennedy continued these efforts by issuing additional plans in the early 1960s.[20] These initiatives established the chair's primacy over the agency's executive and administrative functions.[21] Congress soon enacted the plans into law.[22] Many of these enactments are still in effect today.[23]

Contemporary chairs possess powers that associate commissioners can only envy. The most important of these authorities are the power to set the commission's voting agenda and the power to manage commission operations as, functionally, the chief executive officer. The authority to decide which proposals to place on the commission's agenda for a vote enables the chair to craft proposals that come closest to her preferences while still being favored by the median commissioner over the status quo.[24] Relatedly, agenda control also enables the chair to block consideration of measures that she opposes but that would garner majority support.

The chair's control of the commission's operations also is crucial. It enables the chair to allocate the agency's budget among suboffices and functions and assign staff to specific activities.[25] Perhaps most importantly, the chair is authorized to hire, promote, demote, and terminate employees within the bounds set by civil service merit protection laws.[26] That set of authorities may induce agency employees to serve the chair's interests and pursue her priorities over those of other commissioners. Understandably, some chairs guard this role jealously. For instance, one recent Federal Communications Commission ("FCC") chair barred career civil servants from communicating with associate commissioners without the chair's prior approval.[27]

Further, the directors of enforcement in the SEC, Commodity Futures Trading Commission ("CFTC"), and several other commissions report to the chair alone.[28] Because enforcement actions signal commission

19. BREGER & EDLES, *supra* note 16, at 295.

20. *Id.*

21. *Id.* at 295–96.

22. *Id.* at 297. To be sure, the relative power of chairs ebbs and flows. *See, e.g.*, Revisions to Rules of Practice, 86 Fed. Reg. 38542, 38543 (July 22, 2021) (to be codified at 16 C.F.R. pts. 0, 1) (authorizing the chair, rather than the agency's chief administrative law judge, to select the person who will oversee a rulemaking).

23. *See* BREGER & EDLES, *supra* note 16, at 297.

24. *Cf.* Kenneth A. Shepsle & Barry R. Weingast, *The Institutional Foundations of Committee Power*, 81 AM. POL. SCI. REV. 85, 95 (1987) (describing the importance of similar agenda-setting power held by chairs of congressional committees).

25. *See* Phillips, *supra* note 15, at 280–81.

26. *See id.*

27. COMM'N ON ENERGY & COM., DECEPTION AND DISTRUST: THE FEDERAL COMMUNICATIONS COMMISSION UNDER CHAIRMAN KEVIN J. MARTIN 2–3, 20 (2008), http://jerrykang.net/wp-content/blogs.dir/1/files/2011/10/cache-lh_-fcc-majority-staff-report-081209a.pdf [https://perma.cc/F45B-33M4].

28. *See, e.g.*, Reorganization Plan No. 10 of 1950 § 1(a)(1), 15 Fed. Reg. 3175 (May 25, 1950) (transferring to the SEC's Chair "the executive and administrative functions of the

priorities and settlements of these actions can hold precedential weight in pursuing future settlements, some argue that regulation can in effect be made "by enforcement."[29] The direct reporting relationship between the chair and the director of enforcement at these commissions provides the chair with an outsized role in policymaking.[30]

Finally, despite not addressing the subject of a chair's authority on its face, the Government in the Sunshine Act of 1976 empowered chairs at the expense of associate commissioners. The Act mandates that certain "meetings" of independent regulatory commissions "shall be open to public observation."[31] Because discussions among multiple commissioners are subject to the Act but those among a single commissioner and staff are not, the Act encourages chairs to shift the relative mix of voices whom they consult in the development of policy away from fellow commissioners and toward staff.[32]

2. The Shift to Rulemaking Empowers Staff and, Indirectly, Chairs

Many commissions also have shifted the locus of their policymaking activity from adjudications to rulemakings. On net, this shift reduced associate commissioners' ability to affect outcomes. During the New Deal era, most agency actions took the form of adjudications.[33] Even those commissions that issued substantive rules—e.g., the FCC, SEC, and Interstate Commerce Commission ("ICC")—devoted relatively little attention to rulemaking vis-à-vis adjudication.[34] That changed during the 1960s. By the end of that decade, rulemaking had supplanted adjudication as the primary form of decision-making in many commissions.[35]

Commission, including functions of the Commission with respect to (1) the appointment and supervision of personnel employed under the Commission").

29. *See, e.g.*, James J. Park & Howard H. Park, *Regulation by Selective Enforcement: The SEC and Initial Coin Offerings*, 61 WASH. U. J.L. & POL'Y 99, 99–101 (2020); CTR. FOR CAP. MKTS. COMPETITIVENESS, U.S. CHAMBER OF COM., EXAMINING U.S. SECURITIES AND EXCHANGE COMMISSION ENFORCEMENT: RECOMMENDATIONS ON CURRENT PROCESSES AND PRACTICES 14 (2015), https://www.centerforcapitalmarkets.com/wp-content/uploads/2015/07/021882_SEC_Reform_FIN1.pdf [https://perma.cc/624W-SM6X].

30. *See* Reorganization Plan No. 10 of 1950, *supra* note 28.

31. 5 U.S.C. § 552b(b) (2018). The Act also covers certain other multimember entities within the federal government. The Supreme Court has interpreted the statute to apply only to when multiple commissioners "deliberate[] upon matters that are within . . . [their] formally delegated authority to take official action." FCC v. ITT World Commc'ns, Inc., 466 U.S. 463, 472 (1984).

32. BREGER & EDLES, *supra* note 16, at 320.

33. Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1140, 1145 (2001).

34. *Id.* at 1146.

35. *See id.* at 1147 n.31 (collecting citations regarding the shift from adjudication to rulemaking in many agencies during the 1960s and 1970s); J. Skelly Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 375 (1974) (declaring that "[a]dministrative law has entered an age of rulemaking").

The shift to rulemaking may have left associate commissioners with less input into decisions. Consider, for instance, the relative roles of the average judge on a multimember panel versus the average lawmaker. Judges on panels take an active role in virtually all stages of proceedings—reading briefs, participating in oral argument, and the like—with the assistance of a small number of clerks and other support staff. They then confer privately to deliberate, where minds can be changed.[36] By contrast, the typical lawmaker plays a much more passive role. Party and, to a lesser extent, committee leaders direct the lawmaking process in the contemporary Congress.[37] The specifics are hammered out among leadership-controlled staff members. Aside from the handful of legislators serving in leadership, the involvement of most members of Congress is limited to their roll-call vote on the bill.[38] Most legislators do not read even major legislation, much less exert influence over its content.[39] Essentially, the proceedings of multimember courts involve the active, consequential participation of panel members, whereas the role of the average lawmaker in the legislative process is much more passive.

A similar distinction exists concerning agency adjudications versus rulemakings. The Federal Trade Commission's ("FTC") procedures for the two forms of policymaking are illustrative. For a party seeking to appeal the decision of an FTC administrative law judge, the next step is typically review by the full commission.[40] The process is similar to appellate court review: the parties (along with amici, if permitted) file briefs, the parties participate in oral argument, and the commission renders a written decision.[41] The FTC's rulemaking procedures—which the agency recently announced it will "reinvigorate"[42]—are governed by the rulemaking provisions of the Administrative Procedure Act ("APA") of 1946.[43] As detailed *infra*, rulemaking is an increasingly complex process requiring detailed technical assessments to

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36. *See* Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 851–52 (2006); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1719 (1997).

37. *See* John Aldrich & David Rohde, *The Logic of Conditional Party Government: Revisiting the Electoral Connection*, *in* CONGRESS RECONSIDERED 269, 271–72 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 7th ed. 2001).

38. *Id.*

39. *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 972–73 (2013).

40. 16 C.F.R. § 3.52(b) (2023).

41. *See id.* §§ 3.52(b)–(h).

42. Press Release, Fed. Trade Comm'n, FTC Acting Chairwoman Slaughter Announces New Rulemaking Group (Mar. 25, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/03/ftc-acting-chairwoman-slaughter-announces-new-rulemaking-group [https://perma.cc/4SBM-5TCR].

43. *See* 5 U.S.C. § 553; *see also* 15 U.S.C. § 57a (FTC Act provision outlining additional requirements for rulemakings concerning unfair practices). These requirements are in addition to the section 553 requirements. *Id.* § 57a(b)(1).

pass muster with courts.[44] As such, the details tend to be delegated to staff employees, who are under the control of the commission chair in most cases.[45] Associate commissioners' role may be restricted to simple up-or-down votes on the proposed rule, along with the ability to make marginal changes.[46] That description—delegation to staff who report to leadership, with rank-and-file policymakers left to weigh in mostly via roll-call votes—sounds a lot like the contemporary Congress, in which backbench lawmakers have little power.

In summary, the transition from adjudications to rulemakings entails moving from a form of policymaking in which all commissioners participate directly in the proceedings to one in which commission staff—recall, under the chair's supervision[47]—take a highly active role. That transition leaves associate commissioners with relatively less input in the policymaking process.[48]

3. Subdelegations Empower Staff and, Indirectly, Chairs

Finally, subdelegations to commission staff also disempower associate commissioners. Between 1980 and 2016, independent regulatory commissions recorded in the Federal Register six hundred discrete subdelegations of authority from the commissioners to others.[49] Each of these subdelegations reassigned binding governmental authority from commissioners to officials—civil servants, in the case of 365 of these six hundred subdelegations—over whom the delegators exercised limited control. As an example, consider that the National Transportation Safety Board empowers its general counsel "to compromise, settle, or otherwise represent the Board's interest in judicial or administrative actions to which the Board is a party or in which the Board is interested."[50] That subdelegation grants the general counsel—a career appointee—broad power.[51]

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44. *See infra* notes 82–84 and accompanying text.

45. *See* Phillips, *supra* note 15, at 286–88. One can reasonably assume the existence of some slack in the principal-agent relationship between commission chairs and staff. *See generally* Sean Gailmard & John W. Patty, *Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise*, 51 AM. J. POL. SCI. 873 (2007) (discussing slack between appointees and civil servants).

46. *See* Phillips, *supra* note 15, at 288 ("Simply as a matter of disparate resources, commission chairs direct staff to draft regulations that adhere to their visions while associate commissioners are left to negotiate textual changes to their chairs' documents.").

47. *See* discussion *supra* Section I.A.1.

48. As we discuss in Section III.D *infra*, a second shift is now underway: from rulemakings to "regulation by enforcement." This more recent trend has not militated against the empowerment of chairs. That is because regulation by enforcement enables commission chairs, in concert with their chosen enforcement division heads, to set policy in a way that cuts out the role of associate commissioners.

49. Figure calculated by authors from subdelegations dataset. *See generally* Brian D. Feinstein & Jennifer Nou, *Submerged Independent Agencies*, 171 U. PA. L. REV. 945 (2023) (describing these data).

50. 49 C.F.R. § 800.24(i) (2021).

51. COMM. ON OVERSIGHT & REFORM, U.S. HOUSE OF REPRESENTATIVES, UNITED STATES GOVERNMENT POLICY AND SUPPORTING POSITIONS 183 (2020), https://www.govinfo.gov/content/pkg/GPO-PLUMBOOK-2020/pdf/GPO-PLUMBOOK-2020.pdf [https://perma.cc/HP8R-LH

These devolutions of authority reduce associate commissioners' power in a straightforward manner. Some issues that were previously decided exclusively at the commission level—or at least that *could* be decided at that level—are now in the hands of individuals over whom associate commissioners have little influence.[52] Even where commissioners retain concurrent authority, civil servants can act unilaterally and with little fear of reversal.[53] Michael O'Rielly, a former associate commissioner on the FCC, expressed frustration with how subdelegations disempower associate commissioners:

> [I]t is extremely problematic for the Commission to have a 3-to-2 vote that includes broad delegation to the staff to address a subject area further. As a minority commissioner, it is bad enough to have your ideas and concepts rejected as a whole and have little to no input on an item (unless you completely ignore your principles). It is worse to see the extension of those decisions expanded upon for years to come by a bureau under delegated authority.[54]

Remarkably, subdelegations may produce a net *increase* in chairs' power relative to associate commissioners. Recall that chairs on most commissions

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SV] (noting that the NTSB general counsel is a career appointment). For other subdelegations, the relevant commission and its internal subdelegatee exercise concurrent authority over a subject. For instance, the Dodd–Frank Act of 2010 requires the Commodity Futures Trading Commission ("CFTC") to issue regulations for "real-time public reporting" of swaps transactions. 7 U.S.C. § 2(a)(13). To prevent evasion of these regulations, Congress also empowered the CFTC to classify transactions as swaps even when no derivatives clearing organization has done so. *Id.* § 2(h)(4)(B). In 2013, the CFTC subdelegated several of these powers—e.g., the power to determine new swap categories—to the director of the commission's Division of Market Oversight. Procedures to Establish Appropriate Minimum Block Sizes for Large Notional Off-Facility Swaps and Block Trades, 78 Fed. Reg. 32866, 32940 (May 31, 2013) (to be codified at 17 C.F.R. § 43.7(a)). Although the commissioners retained concurrent authority to make these determinations, the division director's determinations also are binding. *See* Feinstein & Nou, *supra* note 49, at 962 (explaining when agency employees' decisions become judicially enforceable under the *Accardi* doctrine).

52. Indeed the heightened propensity for appointees to subdelegate when their views are aligned with agency civil servants' views, as well as the greater frequency of subdelegations during the "midnight" period leading up presidential transitions, both suggest that current appointees may intentionally subdelegate to civil servants as means of disempowering subsequent appointees. *See* Brian D. Feinstein & Jennifer Nou, *Strategic Subdelegation*, 20 J. EMPIRICAL LEGAL STUD. 746, 781 (2023). The disempowered individuals naturally include future associate commissioners.

53. *See* United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 267–68 (1954). *See generally* Thomas W. Merrill, *The* Accardi *Principle*, 74 GEO. WASH. L. REV. 569 (2006) (discussing the *Accardi* doctrine, which requires agencies to follow their own rules, including rules concerning subdelegations of authority).

54. Michael O'Rielly, *Delegated Authority: Serious Objections and Solutions,* FED. COMMC'NS COMM'N: FCC BLOG (Feb. 2, 2015, 3:47 PM), https://www.fcc.gov/news-events/blog/2015/02/02/delegated-authority-serious-objections-and-solutions [https://perma.cc/S4QA-WXWW].

exercise substantial control over staff.[55] Accordingly, by empowering staff at the expense of all commissioners, subdelegations paradoxically may leave chairs with a relatively stronger hand vis-à-vis their fellow commissioners.

B. Extra-Commission Officials' Greater Involvement

A second set of developments, occurring in parallel with the rise of strong chairs, has eroded regulatory commissions' vaunted independence. This Section highlights five developments that chip away at commissions' political insulation. Unlike the previous developments, which shift the relative balance of power on commission daises from associate commissioners to chairs, the developments discussed in this Section reduce the power of all commissioners.

First, the Congressional Review Act ("CRA") of 1996 empowers Congress and the President to exert greater control over independent regulatory commissions. Under the CRA, independent regulatory commissions and other executive-branch agencies must report new rules to Congress before those rules can take effect.[56] Lawmakers seeking to block the rule would then introduce a joint resolution of disapproval, which both chambers may consider via a fast-track procedure that, crucially, can be passed without the need for cloture in the Senate. If both chambers pass the resolution and the President signs it (or supermajorities in both chambers to override a presidential veto), not only is the rule rejected, but the issuing agency also is precluded from reissuing a rule "in substantially the same form," with no expiration date for this preclusion specified.[57] Thus, the CRA provides the political branches with an additional theoretical source of leverage over independent regulatory commissions and other executive-branch entities.

For executive agencies, however, the CRA rarely has bite. A successful resolution of disapproval requires the White House's support (or veto-proof House and Senate supermajorities). White House assent to a CRA resolution presumes that the President and agency disagree—an unlikely occurrence where the President's removal power can compel the heads of executive agencies to fall in line.[58] It is no surprise, then, that most successful uses of the CRA occur following presidential transitions, when the current President opposes a rule issued during the previous administration.

In contrast, the CRA can have greater force for independent regulatory commissions. Fixed terms and for-cause removal protection insulate commissioners from White House control. Thus, these features of independence may increase the daylight between presidential and commission priorities.

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55. *See* discussion *supra* Section I.A.1; *see also* BREGER & EDLES, *supra* note 16, at 295–96 (explaining that a chair of an agency operates as the agency's chief executive as well as its administrative officer).

56. 5 U.S.C. § 801(a)(1).

57. *Id.* § 801(a)(1)–(b)(2).

58. For a discussion of how the presidential power to remove disloyal appointees compels their fealty to presidential priorities, see Rao, *supra* note 3, at 1244.

With independent regulatory commissions possessing a heightened likelihood of conflict with the White House—compared to executive departments helmed by officials whom the President may remove at will—the potential that the President may sign a CRA resolution passed by Congress is elevated. Indeed, the record of successful uses of the CRA to reject independent-agency rules in the middle of a presidential term suggests that the CRA can bend independent regulatory commissions to political actors' wills.[59]

Second, independent regulatory commissions face growing scrutiny to justify their proposed rules to the White House. Since the early 1980s, they have operated under a mandate to assess the impact of proposed rules on small businesses and reconsider those with an undue impact[60]—all to courts' satisfaction.[61] Since the mid-1990s, they must convince the White House Office of Information and Regulatory Affairs ("OIRA") that any proposed regulation that would require members of the public to submit information to the agency minimize costs to the public and maximize benefits of the information.[62]

Third, directives that independent regulatory commissions coordinate on policy with executive agencies further pull these agencies into the White House's orbit. For instance, presidents create interagency working groups that compel the heads of independent regulatory commissions and executive agencies to confer, with the presumed aim of greater collaboration.

The President's Working Group on Financial Markets ("PWG") is illustrative. President Reagan established the group, selecting as its members the Treasury Secretary and the chairs of the Federal Reserve Board of Governors, SEC, and CFTC.[63] The Treasury Secretary—notably, the only executive-agency representative on the body—serves as chair.[64] The PWG was established to investigate the causes of the October 1987 stock market crash and issue recommendations.[65] It later morphed into an occasional forum for these officials to discuss the financial regulatory issues of the day, meeting every few months in the late 1990s.[66] By the mid-2000s, it met every few weeks. Importantly, by that point it served as a tool for the Treasury Secretary to influence financial policy matters that are formally outside of Treasury's

59. *See* Act of June 30, 2021, Pub. L. No. 117-24, 135 Stat. 296 (disapproving an OCC rule defining the circumstances under which certain financial institutions are considered to be lenders); Act of June 30, 2021, Pub. L. No. 117-22, 135 Stat. 294 (disapproving the EEOC's conciliation procedures); Act of May 21, 2018, Pub. L. No. 115-172, 132 Stat. 1290 (disapproving the CFPB's auto-lending rule); Act of Nov. 1, 2017, Pub. L. No. 115-74, 131 Stat. 1243 (disapproving the CFPB's arbitration-agreement rule).

60. Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601–612.

61. *Id.* § 611.

62. Paperwork Reduction Act of 1995, 44 U.S.C. §§ 3501–3520.

63. Exec. Order No. 12,631, 53 Fed. Reg. 9421 (Mar. 18, 1988).

64. *Id.* § 1(b).

65. *Id.* § 2.

66. *See* Deborah Solomon, *Paulson Pulls for U.S. Markets*, WALL ST. J. (Oct. 23, 2006, 12:01 AM), https://www.wsj.com/articles/SB116156338980900442 (on file with the *Iowa Law Review*).

turf.[67] The PWG continues to coordinate on financial policy proposals, most recently concerning money-market funds and stablecoins.[68]

Other interagency coordination mechanisms are established by statute. The Financial Stability Oversight Council ("FSOC") is perhaps the highest profile. Established in the wake of the global financial crisis of 2007 to 2008, FSOC gathers financial regulators from across agencies to identify and respond to risks to financial stability, most prominently by designating financial institutions and financial market utilities as "systemically important," thus subjecting them to heightened regulatory scrutiny.[69] The (politically responsive) Treasury Secretary chairs FSOC, with most of the other voting members being the chairs or directors of independent financial regulatory agencies.[70] Notably, for FSOC to take action under some of its most important authorities, two-thirds of FSOC's voting members, *including the Treasury Secretary*, must vote in the affirmative.[71] Thus, the Treasury Secretary's privileged status on FSOC injects additional political influence into independent agencies' regulatory portfolios.[72]

Anecdotal evidence suggests that interagency coordination has been increasing over time. For instance, Hiba Hafiz recounts the Nixon-era origins of interagency coordination on labor policy,[73] continued efforts during the next several administrations, followed by a more assertive turn during the Obama and Trump administrations.[74] Indeed, Professor Hafiz concludes that one goal of the Trump administration's interagency coordination initiatives was to "centralize control over independent agencies by Executive agencies."[75]

67. *See id.* ("The Working Group is a significant lever to influence policies outside the Treasury's bailiwick.").

68. Press Release, U.S. Dep't of the Treasury, President's Working Group on Financial Markets Releases Report and Recommendations on Stablecoins (Nov. 1, 2021), https://home.treasury.gov/news/press-releases/jy0454 [https://perma.cc/LW3M-Z2HC]; PRESIDENT'S WORKING GRP. ON FIN. MKTS., PROPOSALS TO REDUCE PRIME MMFS VULNERABILITIES 1 (2021), https://home.treasury.gov/system/files/221/TBACCharge2Q32021.pdf [https://perma.cc/67YU-2LHM].

69. *See* 12 U.S.C. §§ 5321–5374.

70. *Id.* § 5321(b).

71. *See id.* § 5323(a)–(b) (voting rules to subject nonbanks to Federal Reserve supervision). *But see id.* § 5331(a) (requiring a two-thirds supermajority but not the Treasury Secretary's assent to take actions to mitigate a bank holding company's grave threats to financial stability).

72. *See* Jacob E. Gersen, *Administrative Law Goes to Wall Street: The New Administrative Process*, 65 ADMIN. L. REV. 689, 699 (2013) (asserting that the Secretary's role on FSOC constitutes "an attempt to add political control").

73. Hiba Hafiz, *Interagency Coordination on Labor Regulation*, 6 ADMIN. L. REV. ACCORD 199, 209–12 (2021).

74. *Id.* at 217–20 (Obama); *id.* at 220–21 (Trump).

75. *Id.* at 220–21.

The natural consequence of these interagency coordinative measures—whether created via statute,[76] executive order,[77] or informally[78]—is to erode independent regulatory commissions' insulation from politically responsive actors. That they appear to be more frequently established or utilized in recent administrations suggests that this erosion is accelerating.

Fourth, lawsuits provide executive agencies with another growing source of influence over independent regulatory commissions. Bijal Shah identifies approximately 120 lawsuits against these commissions that were filed by the Justice Department on behalf of executive agencies from the mid-twentieth century through 2018.[79] The vast majority of these lawsuits seek either to restrict commissions' authority in areas of overlapping jurisdiction or to overturn a commission's adjudication that, if it were to stand, would bind an executive agency or limit its choice set.[80]

These instances of executive agencies suing independent regulatory commissions have become more frequent. We use Professor Shah's data to generate Figure 1, which reports the number of executive-agency lawsuits per year filed against independent agencies that were decided by federal courts from 1933 through mid-2018. The figure uses a smoothed regression line to highlight time trends; the gray shaded region around the line shows the ninety-five percent confidence interval.

76. *See, e.g.*, 12 U.S.C. §§ 5321–5322 (establishing the Financial Stability Oversight Council).

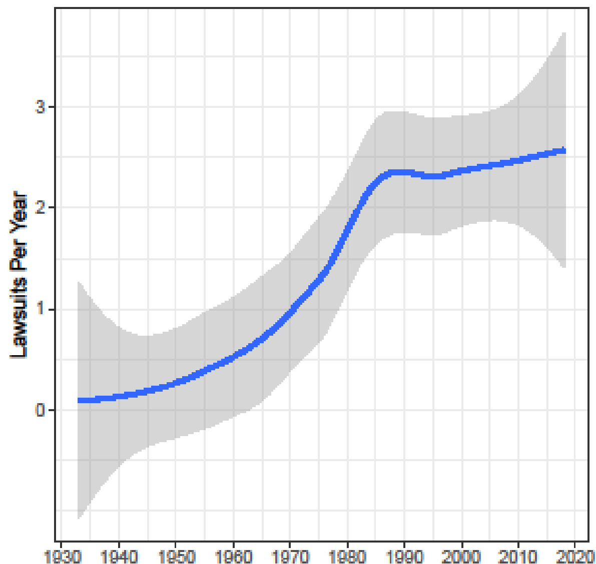
77. *See, e.g.*, Exec. Order No. 11,821, 39 Fed. Reg. 41,501 (Nov. 27, 1974) (establishing the Council on Wage and Price Stability).

78. *See* Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805, 825–26 (2015) (providing examples).

79. Bijal Shah, *Executive (Agency) Administration*, 72 STAN. L. REV. 641, 646, 713–16 (2020).

80. *See id.* at 646–47.

Figure 1: Lawsuits by Executive Agencies Against Independent Regulatory Commissions



The figure shows a steady increase in executive-agency lawsuits against independent agencies approximately from the early 1950s through the late 1980s, with the phenomenon plateauing thereafter. This increase constitutes another factor chipping away at these entities' insulation from politics.

Fifth, the judiciary has expanded its reach into independent regulatory commissions. A growing set of courts and scholars argue that the APA and agencies' organic statutes require these entities to conduct cost-benefit analyses for their rules to survive judicial review.[81] That despite the fact that these entities, unlike executive agencies, are not subject to presidential directive to submit their proposal rules to OIRA.[82] For instance, the SEC's statute requiring it to consider "efficiency" in rulemaking was the basis for a D.C. Circuit decision requiring a weighing of costs and benefits.[83] As another example, a district court required FSOC to perform a cost-benefit analysis

81. For an example of this sort of advocacy, see Cass R. Sunstein, *Cost-Benefit Analysis and Arbitrariness Review*, 41 HARV. ENV'T L. REV. 1, 6 (2017) ("[A]ny decision not to quantify costs and benefits, or to show that the latter justify the former, does require some kind of explanation . . . .").

82. *See* Exec. Order No. 12,291, 46 Fed. Reg. 13,193, 13,195–96 (Feb. 17, 1981) (establishing OIRA review of executive agencies' proposed rules); Exec. Order No. 13,771, 82 Fed. Reg. 9339, 9340 (Jan. 30, 2017) (issuing most recent executive order on the subject).

83. *See* Bus. Roundtable v. SEC, 647 F.3d 1144, 1148–51 (D.C. Cir. 2011); Chamber of Com. v. SEC, 412 F.3d 133, 142–44 (D.C. Cir. 2005).

justifying the designation of MetLife, an insurance company, as a "systemically important financial institution," subject to additional regulation.[84]

Judicial attention to cost-benefit analysis is far from the only example of courts abrading independent regulatory commissions' discretionary authority and insulation from politics. Most notably, a fast-developing major questions doctrine,[85] renewed attention to nondelegation principles,[86] and the erosion of for-cause removal protection for independent regulatory commissioners further reduce commissions' authority and independence.[87]

C. POLARIZATION COMES TO THE COMMISSIONS

As with many other institutions, partisanship is pervasive in independent regulatory commissions. Several key commissions have witnessed a breakdown in deliberative norms in recent decades. The SEC ("splintered into

84. MetLife, Inc. v. Fin. Stability Oversight Council, 177 F. Supp. 3d 219, 242 (D.D.C. 2016) (concluding that the MetLife designation "decision intentionally refused to consider the cost of regulation, a consideration that is essential to reasoned rulemaking").

85. In *Biden v. Nebraska*, the Court invoked the major questions doctrine in response to the "economic and political significance" of a $430 billion student debt relief plan, holding that the HEROES Act used to justify the plan "provides no authorization for the Secretary's plan even when examined using the ordinary tools of statutory interpretation—let alone 'clear congressional authorization' for such a program." Biden v. Nebraska, 143 S. Ct. 2355, 2375 (2023) (providing that agencies who adopt regulations of such significance must point to clear congressional authorization to do so).

86. Justice Gorsuch advocated that the rarely used nondelegation doctrine should be reinvigorated in a dissent joined by two other Justices, noting that the "doctrine [operates] in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency," requiring that a "statutory gap" not be filled where it "concerns 'a question of deep economic and political significance.'" Gundy v. United States, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting) (quoting King v. Burwell, 576 U.S. 473, 486 (2015)). Justice Alito wrote in a concurrence that he would be open to a reconsideration of the nondelegation doctrine. *Id.* at 2130–31 (Alito, J., concurring). And Justice Kavanaugh, who did not vote in *Gundy*, wrote elsewhere that "Justice Gorsuch's thoughtful *Gundy* opinion raised important points that may warrant further consideration in future cases." Paul v. United States, 140 S. Ct. 342, 342 (2019). For a discussion, see Zaring, *supra* note 14, at 720.

87. For instance, in *West Virginia v. EPA*, a case concerning the EPA's power to encourage power plants to shift away from coal toward wind and solar, the Court explained that "in certain extraordinary cases . . . something more than a merely plausible textual basis for the agency action is necessary" to permit a new agency to go forward. West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022). In the case of *EPA*, the policy was to encourage power providers to switch away from coal and toward gas and renewable energy. *Id.* at 2602–03. To do so, "[t]he agency instead must point to 'clear congressional authorization' for the power it claims." *Id.* at 2609 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)); *see also supra* notes 3–8 and accompanying text (discussing recent cases concerning for-cause removal of independent commissioners).

factions"),[88] FTC ("partisan rancor is . . . back in vogue"),[89] Nuclear Regulatory Commission ("NRC") ("disregard for . . . bipartisan collaboration"),[90] FCC ("bitter and partisan"),[91] and Consumer Product Safety Commission ("CPSC") ("a partisan rift") provide some examples.[92] Leaders in some agencies also contended with a recent presidential administration intent on stripping those agencies of capacity and subverting their missions.[93]

This turn toward a more partisan orientation reflects similar developments in American politics. Political elites have sorted along ideological lines into two internally cohesive and externally divergent parties during the past several decades.[94] Independent regulatory commissions are not immune from such developments, particularly with so many commissioners selected from the Beltway "political class."[95] A growing number of commissioners have backgrounds as congressional staffers.[96] Inculcated in Congress's culture of partisan hardball, these Hill staffers-turned-commissioners import these

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88. Floyd Norris, *Independent Agencies, Sometimes in Name Only*, N.Y. TIMES (Aug. 8, 2013), https://www.nytimes.com/2013/08/09/business/independent-agencies-sometimes-in-name-only.html (on file with the *Iowa Law Review*) ("[T]he S.E.C. has in recent years splintered into factions far more than ever before."); *see also* Floyd Norris, *Help Wanted at the S.E.C.; Help Needed for Reforms*, N.Y. TIMES (Nov. 13, 2002), https://www.nytimes.com/2002/11/13/business/help-wanted-at-the-sec-help-needed-for-reforms.html (on file with the *Iowa Law Review*) (reporting that the Commission's deliberations concerning selecting the first chair of the newly established Public Company Accounting Oversight Board "dissolved into partisan bickering" and that this "squabbling and lack of cooperation . . . spill[ed] over to other commission matters").

89. Leah Nylen, *"Unlike Anything I've Seen at the FTC": Biden's Chair Makes Her Public Debut*, POLITICO (July 1, 2021, 8:49 PM), https://www.politico.com/news/2021/07/01/ftc-lina-khan-antitrust-chair-497764 [https://perma.cc/A222-LYX7].

90. *See* John M. Broder & Matthew L. Wald, *Report Blasts Management Style of Nuclear Regulatory Commission Chairman*, N.Y. TIMES (June 10, 2011), https://www.nytimes.com/2011/06/11/science/earth/11nuclear.html (on file with the *Iowa Law Review*) (reporting allegations that the NRC chair "exhibit[ed] complete disregard for . . . bipartisan collaboration" (quoting Illinois Representative John Shimkus)); Matthew L. Wald, *Split Within Nuclear Regulatory Agency*, N.Y. TIMES (July 20, 2011), https://www.nytimes.com/2011/07/21/science/earth/21nuke.html (on file with the *Iowa Law Review*) (similar).

91. Stephen Labaton, *F.C.C. Faces a New Set of Challenges After Powell*, N.Y. TIMES (Jan. 24, 2005), https://www.nytimes.com/2005/01/24/business/media/fcc-faces-a-new-set-of-challenges-after-powell.html (on file with the *Iowa Law Review*).

92. Andrew Martin, *After Long Battle, Safer Cribs*, N.Y. TIMES (July 15, 2011), https://www.nytimes.com/2011/07/16/business/with-new-safety-rules-for-cribs-makers-scramble-and-retailers-fume.html (on file with the *Iowa Law Review*).

93. *See* David L. Noll, *Administrative Sabotage*, 120 MICH. L. REV. 753, 756–58 (2022); Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585, 587–90 (2021).

94. *See* MATTHEW LEVENDUSKY, THE PARTISAN SORT: HOW LIBERALS BECAME DEMOCRATS AND CONSERVATIVES BECAME REPUBLICANS 2–11 (2009); *see also* Morris P. Fiorina, Samuel A. Abrams & Jeremy C. Pope, *Polarization in the American Public: Misconceptions and Misreadings*, 70 J. POL. 556, 557 (2008) (describing greater partisan polarization among political elites than the general public).

95. *See* Brian D. Feinstein & M. Todd Henderson, *Congress's Commissioners: Former Hill Staffers at the S.E.C. and Other Independent Regulatory Commissions*, 38 YALE J. ON REGUL. 175, 234–35 (2021).

96. *Id.*

partisan folkways to commission daises.[97] Moreover, in recent years fewer Democratic political appointees hail from the comparatively bipartisan private sector, as progressive groups have successfully pushed for a litmus test ruling out most candidates with such backgrounds.[98]

To be sure, Congress did not design commissions to be wholly apolitical. The organic statutes for nearly two dozen independent regulatory commissions, including the FCC, SEC, and other high-profile agencies, contain partisan balance requirements, which typically mandate that "no more than a bare majority" of commissioners hail from any one political party.[99] As the two major parties have polarized, however, we have seen greater ideological divergence among the members of these agencies with partisan balance requirements.[100]

Where partisan considerations alter commissions from fora in which commissioners learn from and persuade each other to one in which they mimic partisan actors in Congress and other political institutions,[101] that development could reduce commissioners' efficacy and the utility they derive from service.

II. ASSOCIATE COMMISSIONERS ARE HEADING FOR THE EXITS

The previous Part identified several trends—grouped under the broad themes of aggrandizement of commission chairs, less insulation from political actors, and more overtly partisan climates on commission daises—that diminish either the power of commissions in toto or associate commissioners' roles therein (or both). These trends reduce the returns to commission service, particularly for associate commissioners.

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97. *Id.* at 235.

98. *See* Patrick Temple-West, *Warren Allies Delay Obama's SEC Pick*, POLITICO (July 7, 2015, 5:17 AM), https://www.politico.com/story/2015/07/barack-obama-elizabeth-warren-sec-wall-street-119780 [https://perma.cc/AH5E-BUWB] ("Elizabeth Warren and her liberal allies appear to be on the verge of another victory in their battle to stop the White House from choosing financial regulators with ties to Wall Street."); *see also* Burgess Everett, *Controversial Judicial Pick Asks Biden to Withdraw After Failing to Win Dem Support*, POLITICO (May 18, 2023, 12:36 PM), https://www.politico.com/news/2023/05/18/biden-admin-expected-to-withdraw-controversial-judicial-pick-00097665 [https://perma.cc/27YV-AQRY] (explaining President Biden recently withdrew his judicial nomination for Michael Delaney after opposition from democrats due to Delaney's position as a board member for the New England Legal Foundation, a probusiness organization that opposes progressive ideals on labor rights, climate change, and consumer protection in favor of corporate interests). Moreover, "Congress actively discourages private-sector views on the National Credit Union Administration, where '[n]ot more than one' out of the three board members may hail from a credit union." Feinstein & Henderson, *supra* note 95, at 183 (quoting 12 U.S.C. § 1752a(b)(2)(B)).

99. Brian D. Feinstein & Daniel J. Hemel, *Partisan Balance with Bite*, 118 COLUM. L. REV. 9, 18, 31 (2018).

100. *See id.* at 39–57.

101. *See supra* notes 88–92 and accompanying text.

The natural inference from these developments is that associate commissioners would find their jobs less rewarding. In this Part, we identify an important potential consequence of these developments: a decline in the length of service for associate commissioners that is increasingly picking up speed.

A. Overview

We begin this examination of commissioners' terms of service by gathering information on all members of eleven key independent regulatory commissions from their inception through the present.[102] Excluding currently serving commissioners, that exercise yields 684 individuals who have served on one of these commissions.

This data collection relies in substantial part on David Nixon's Independent Regulatory Commission Database.[103] Professor Nixon identifies the start and end dates for every individual to serve on these eleven commissions through 2000. We extend his data collection through 2022.[104] Then, we scour agency websites, government manuals, and the like to determine whether each individual served as commission chair. Table 1 reports descriptive and summary statistics from this dataset.

102. These commissions are: the Board of Governors of the Federal Reserve System ("FRS"); CPSC; Equal Employment Opportunity Commission ("EEOC"); FCC; Federal Election Commission ("FEC"); Federal Energy Regulatory Commission ("FERC"); FTC; National Labor Relations Board ("NLRB"); NRC, along with its predecessor the Atomic Energy Commission; National Transportation Safety Board ("NTSB"); and SEC.

103. David C. Nixon, *ICPSR #4221 – 'Independent Regulatory Commissioner Database, 1887-2000,'* INTER-UNIV. CONSORTIUM FOR POL. & SOC. RSCH. (Sept. 25, 2007), https://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/4221 [https://perma.cc/4D7G-H3AU].

104. Our dataset can be found here: Brian D. Feinstein & David Zaring, *ResearchBox # 2075 'Disappearing Commissioners,'* RESEARCHBOX, https://researchbox.org/2075 [https://perma.cc/72PF-73VD] [hereinafter *Disappearing Commissioners* Dataset]. For each individual, we record the years in which they entered and left service as a commissioner, the number of consecutive years of service, and whether they served as chair at the time of their departure. For the fifteen commissioners that served nonconsecutive terms, each nonconsecutive term had its own row in the dataset.

Table 1: Summary Statistics[105]

Agency	Statutory Term[106]	Included Years[107]	Num. of Comm'rs	Mean Serv. Length (SD)	Median Serv. Length
Board of Governors of the Federal Reserve System	14 years	1914–2022	93	6.60 (5.50)	5
Consumer Product Safety Commission	7 years	1972–2021	28	5.57 (3.27)	5
Equal Employment Opportunity Commission	5 years	1965–2019	39	4.92 (2.91)	4
Federal Communication Commission	5 years	1934–2021	84	5.93 (4.88)	5
Federal Election Commission	6 years	1976–2020	27	7.74 (6.34)	5
Federal Energy Regulatory Commission	4 years	1977–2021	40	4.78 (2.31)	4
Federal Trade Commission	7 years	1915–2021	86	5.43 (4.39)	4

105. *Disappearing Commissioners* Dataset, *supra* note 104.

106. Jennifer L. Selin, *What Makes an Agency Independent Codebook* [hereinafter Selin, *Codebook*], https://my.vanderbilt.edu/davidlewis/files/2018/07/selin_indep_codebook.pdf [https://perma.cc/92W5-TAKA]. *See generally* Jennifer L. Selin, *What Makes an Agency Independent?*, 59 AM. J. POL. SCI. 971 (2015) [hereinafter Selin, *What Makes an Agency Independent?*] (developing estimates of agency independence using collected data). For CPSC commissioners, commission terms begin to run "from the date of the expiration of the term for which [the commissioner's] predecessor was appointed." 15 U.S.C. § 2053(b)(1)(B).

107. Notionally, our study runs until 2022. Because we exclude currently serving commissioners, however, the end date for each agency refers to the date of the last commissioner departure prior to our data collection in early 2022. This year is earlier than 2021 for most commissions.

Agency	Statutory Term[108]	Included Years[109]	Num. of Comm'rs	Mean Serv. Length (SD)	Median Serv. Length
National Labor Relations Board	5 years	1935–2021	77	4.51 (4.22)	4
Nuclear Regulatory Commission[110]	5 years	1946–2021	71	4.52 (2.56)	4
National Transportation Safety Board	5 years	1967–2021	42	5.67 (3.73)	4.5
Securities & Exchange Commission	5 years	1934–2022	97	4.08 (2.71)	4
All Included Commissions	—	1914–2022	684	5.31 (4.18)	4

The table reports that, among these commissions, FEC commissioners serve the longest, with a substantial number serving beyond their initial five-year statutory term. SEC commissioners have the shortest tenures. Given that securities law practice tends to be more lucrative than many other private-sector positions, it makes sense why SEC commissioners find the exits quicker than their counterparts experienced in less remunerative regulatory subjects.[111]

B. *Time Trends*

Next, we turn to examining time trends in commissioner service. We uncover a distinct downward trend in commissioners' length of service. The mean commissioner appointed during the 1980s served approximately 5.8 years. That mean decreased in each subsequent decade, reaching 4.1 years in the 2010s. The decline is concentrated among associate commissioners.

108. Selin, *Codebook*, *supra* note 106. *See generally* Selin, *What Makes an Agency Independent?*, *supra* note 106 (developing estimates of agency independence using collected data). For CPSC commissioners, commission terms begin to run "from the date of the expiration of the term for which [the commissioner's] predecessor was appointed." 15 U.S.C. § 2053(b)(1)(B).

109. Notionally, our study runs until 2022. Because we exclude currently serving commissioners, however, the end date for each agency refers to the date of the last commissioner departure prior to our data collection in early 2022. This year is earlier than 2021 for most commissions.

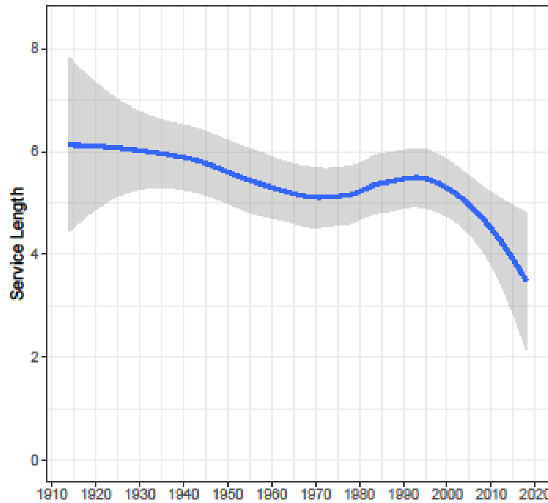
110. Includes members of the predecessor Atomic Energy Commission (1946–1975).

111. *See* David Zaring, *Against Being Against the Revolving Door*, 2013 U. ILL. L. REV. 507, 519.

Whereas the length of service for commission chairs ebbed and flowed, the mean tenure for associate commissioners witnessed a monotonic decrease during this period: from 6.0 years in the 1980s, 5.1 years in the 1990s, 4.8 years in the 2000s, and 3.9 years in the 2010s.

Figure 2 illustrates these trends. A lowess curve—i.e., a locally weighted, nonparametric regression line, essentially a trend line—shows the average tenure over time, along with associated ninety-five percent confidence intervals in gray. The figure shows a secular decline in term length, with an appreciable drop starting around 1995.

Figure 2: Commissioners' Length of Service[112]



Figures 3 and 4 display similar information for commission chairs and associate commissioners, respectively.

112. *Disappearing Commissioners* Dataset, *supra* note 104.

Figure 3: Commission Chairs' Length of Service[113]

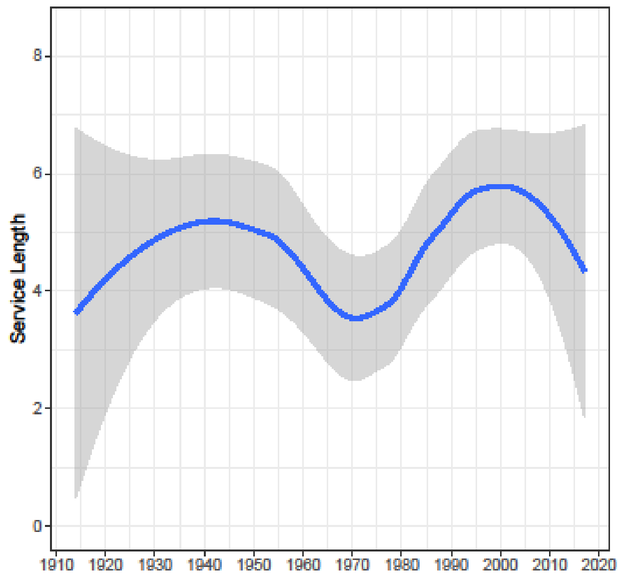
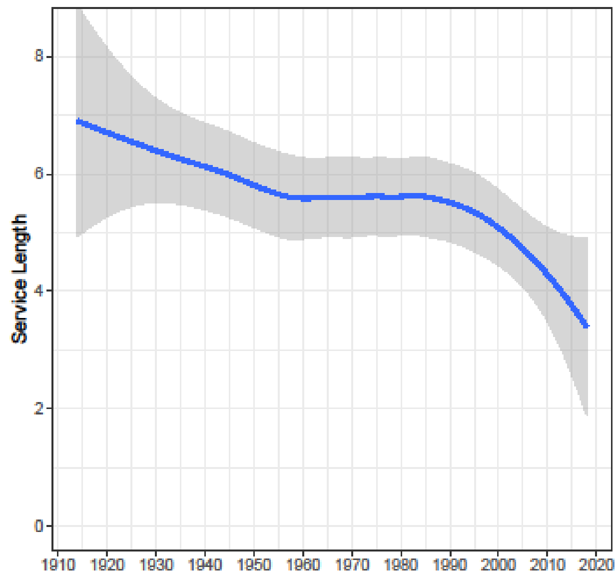


Figure 4: Associate Commissioners' Length of Service[114]



113. *Id.*
114. *Id.*

Figure 4 shows a clear decline in associate commissioners' lengths of service, particularly in recent decades. The story is more complicated concerning chairs; Figure 3 displays that chairs' average lengths of service fluctuates, with the average length declining in recent decades.[115] Whereas the trend is clearly downward for associate commissioners, chairs' over-time behavior is more mixed.[116]

Table 2 provides a different perspective on this decline. The table reports commissioners' mean length of service in two eras: the 1980s through 1990s and 2000s through 2010s. Associate commissioners' terms are 1.21 years shorter in the latter period versus the former. This difference in means achieves conventionally accepted levels of statistical significance. For chairs, by contrast, the means are essentially identical, and we cannot reject the null hypothesis that these trivial differences are due to chance.

115. For chairs, regressing length of service on the year in which the individual began serving on the commission yields null results. For associate commissioners, the coefficient estimate is negative and statistically significant at the $p < 0.01$ level (β=0.024, SE=0.007). With $R^2 = 0.02$, however, the year in which an associate commissioner began service explains little of the variance in those individuals' lengths of service.

116. Readers may wonder whether the overrepresentation of members of the Federal Reserve ("Fed") Board of Governors early in this series skews our results. When the Fed was established in 1914, governors served ten-year fixed terms. Congress extended that term to twelve years in 1933 and to fourteen years in 1935. 12 U.S.C. § 241; *see also The Federal Reserve System After Fifty Years: Hearings on H.R. 3783, H.R. 9631, H.R. 9685, H.R. 9686, H.R. 9687, and H.R. 9789 Before the Subcomm. on Domestic Fin. of the H. Comm. on Banking & Currency*, 88th Cong. 26 (1964) (statement of William McChesney Martin, Chairman, Federal Reserve Board and C. Canby Balderston, Vice Chairman, Federal Reserve Board), https://fraser.stlouisfed.org/files/docs/historical/house/1964_house_fed50_v1.pdf [https://perma.cc/M6LK-GSZB] (explaining the historical changes to term limits for the Board reflect its independence from politics). In practice, Fed governors serve substantially less than this ten-to-fourteen-year ceiling: 6.6 years on average. With the Fed overrepresented in the earliest decades in our dataset (before other agencies were established) and with the maximum length of service for Fed governors substantially longer than that for other commissioners, however, one may ask whether the preponderance of Fed governors early in our dataset drives our results.

This concern is unfounded. Reproductions of Figures 1 through 3 without the Federal Reserve appear substantially similar after approximately 1930. Notably, the downward trend in recent decades apparent in Figures 1 and 3 remain intact. Table 3 and the Appendix figures show that this downward trend is present in many agencies beyond the Fed.

Table 2: Differences in Means[117]

	Mean Tenure, 1980–1999	Mean Tenure, 2000–2019	Difference in Means	t-statistic
Associate Commissioners	5.59	4.38	1.21	2.94 **
Chairs	5.47	5.48	-0.01	-0.03
All Commissioners	5.56	4.64	0.92	2.55 *

Further, the trend is apparent across most of the eleven commissions in our study, as the figures in the Appendix show. Table 3 summarizes these trends. As the table reports, eight of the eleven commissions have witnessed a gradual decline in commissioners' lengths of service.[118] There does not appear to be any one precipitating event; the decline begins in the 1930s for the FTC but in the 2000s for FERC.

117. *Disappearing Commissioners* Dataset, *supra* note 104. Differences in means and associated t-statistics calculated using Welch's two-sample t-test. *** signifies $p < 0.001$, ** $p < 0.01$, * $p < 0.05$, † $p < 0.10$.

118. We include the FEC among these eight. Although the FEC has seen a slight uptick in commissioner term lengths in recent decades, the overall trend since the 1980s has been a substantial decline.

Table 3: Trends in Commissioner Service Length[119]

Agency	*Trend*
Bd. of Governors, FRS	Declining since 1950s
CPSC	Declining since 1990s
EEOC	Declining since 1980s
FCC	Increasing (slightly) since 1980s
FEC	Declining from 1985-2000; then slight increase
FERC	Declining since 2000s
FTC	Declining since 1930s
NLRB	Declining since 1960s
NTSB	Steady
NRC	Declining since 1990s
SEC	Declining (slightly) since 1980s

The persistent decline in commissioner term lengths—concentrated among associate commissioners and present across most independent regulatory commissions—is remarkable. In the next Part, we discuss possible causes of this decrease.

119. *Disappearing Commissioners* Dataset, *supra* note 104.

III. THE CONSEQUENCES OF DISAPPEARING COMMISSIONERS

Associate commissioners' ever shorter terms in office have ramifications for their agencies' functioning. This Part focuses on four potential consequences. First, earlier exits impede commissioners' acquisition of expertise and, with more frequent open seats presenting opportunities for appointments, increase political actors' involvement. Both dynamics thwart Congress's core purposes in establishing these entities: to encourage expertise-driven, politically insulated decision-making. Second, associate commissioners' shorter tenures shift the balance of power in favor of chairs, who can draw on their comparatively longer experiences. Third, abbreviated government service implies greater rotation of the proverbial revolving door, which places former high-ranking government officials in the service of private sector firms that they formerly regulated. Fourth, officials with shorter time horizons may engage in short-term thinking to the detriment of longer-term objectives and favor enforcement actions that can deliver quick wins over the longer, more thorough rulemakings. Although these changes are not uniformly negative, we argue that, on balance, shorter tenures are detrimental to independent regulatory commissions' functioning.

A. *FRUSTRATING CONGRESS'S AIMS TO PROMOTE EXPERTISE AND RESIST POLITICAL INFLUENCE*

Associate commissioners' shorter tenures threaten to undo the advantages of the commission model concerning expertise and insulation from political actors. *First*, concerning expertise, the less time commissioners spend at their agencies, the less institutional knowledge they can obtain. Relatedly, knowing that they will soon head for the exits reduces commissioners' incentive to invest in the costly acquisition of expertise.[120]

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120. Further, statutory provisions providing for staggered terms reduce the likelihood that commissions are left with unexperienced leadership. When commissioners serve their entire terms, vacancies do not persist, and terms are staggered—e.g., for a five-member commission with five-year terms, one commissioner is replaced each year—there will always be someone on the commission who knows their way around the agency serving in the final year of their term. As commissioners leave their terms earlier and earlier, however, the amount of expertise at the top will also decline, as few commissioners serve out their terms sufficiently long enough to build the wealth of experience to be bequeathed to their juniors.

Notably, corporate lawyers often cite the risk of short-termism as a justification for staggered boards, which are structured like commissions, with staggered terms for directors. *See, e.g.*, Simone M. Sepe & Charles K. Whitehead, *Rethinking Chutes: Incentives, Investment, and Innovation*, 95 B.U. L. REV. 2027, 2046–47 (2015) (recommending "insulating directors from shareholder pressure so they can credibly commit to a long-term investment strategy"); Richard H. Koppes, Lyle G. Ganske & Charles T. Haag, *Corporate Governance out of Focus: The Debate over Classified Boards*, 54 BUS. LAW. 1023, 1028 (1999) ("[C]lassified boards, at least in major U.S. companies, are more likely used to promote the stability necessary for strategic, long-term planning."); *cf.* William C. Johnson, Jonathan M. Karpoff & Sangho Yi, *The Bonding Hypothesis of Takeover Defenses: Evidence from IPO Firms*, 117 J. FIN. ECON. 307, 329–30 (2015) (showing that

With less expertise on the commission dais, commissioners presumably rely more on knowledgeable others: agency staff, lobbyists, and the like.

This reduction in experience presents a fundamental challenge to the independent agency structure. Fixed terms and for-cause removal protections—two common hallmarks of regulatory commissions[121]—encourage long tenures in office. Statutes mandating staggered terms for commissioners encourage the presence of some senior commissioners, who can convey knowledge to new colleagues, at all times.[122] These features, in turn, enable commissioners to acquire and convey expertise.[123] And, for many observers, greater expertise is the *raison d'être* of independent agencies.[124]

Indeed, Congress has explicitly connected longer tenures in office with greater expertise. To justify the inclusion of fixed terms for commissioners in the FTC's organic statute, a Senate committee explained "that the terms of the commissioners shall be long enough to give them an opportunity to acquire . . . expertness."[125] In *Humphrey's Executor v. United States*—the leading case upholding statutory for-cause removal protections—the Supreme Court concluded that these protections are necessary to effectuate Congress's intent to, inter alia, "create a body of experts *who shall gain experience by length of service*."[126]

Second, truncated tenures in office diminish agencies' insulation from political actors. Fixed terms and for-cause removal protection temper the political branches' ability to influence independent regulatory commissions.[127]

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antitakeover defenses, such as a staggered board, may provide a valuable commitment from shareholders to other stakeholders in the context of specific relationships).

121. *See* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 786, 790 (2013) (reporting that twenty-three agencies contain both features and thirty-three additional agencies have statutorily specified tenures but not removal protections).

122. *See, e.g.*, 15 U.S.C. § 78d(a) ("[T]he terms of office of . . . [SEC] commissioners first taking office after June 6, 1934, shall expire as designated by the President at the time of nomination, one at the end of one year, one at the end of two years, one at the end of three years, one at the end of four years, and one at the end of five years, after June 6, 1934.").

123. *See* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 29 (2010) ("Giving agency officials tenure for a term of years can also foster expertise, as agency heads gain wisdom from their experience on the job. The terms must be sufficiently long to allow agency heads to gain the relevant experience. And in the case of multimember agencies, the terms of the members must be staggered so that institutional expertise can accumulate without gaps." (footnote omitted)).

124. *See, e.g.*, Humphrey's Ex'r v. United States, 295 U.S. 602, 625 (1935) (describing a "[c]ongressional intent to create a body of experts"); Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 612 (2010) ("Independence was traditionally justified, particularly during the New Deal era, as promoting expertise.").

125. S. REP. NO. 63-597, at 10–11 (1914).

126. *Humphrey's Ex'r*, 295 U.S. at 625 (emphasis added); *see also* Ill. Cent. R.R. Co. v. Interstate Com. Comm'n, 206 U.S. 441, 454 (1907) (referring to the members of the Interstate Commerce Commission as "appointed by law and informed by experience").

127. *See* Barkow, *supra* note 123, at 27–28 ("Empirical studies on when Congress opts for good-cause provisions support the view that this design feature seems largely aimed at stopping presidential pressure in particular and not necessarily at preventing interest group or partisan

Taken together, these features delay the date on which a new president may install her own appointees in a majority of seats.[128] During this delay, current commissioners who were appointed by a previous president and confirmed by a previous Senate continue to exercise power.[129]

By contrast, when commissioners do not serve their full terms, the White House is able to update commission rosters more frequently. More frequent turnover among commissioners increases the likelihood that commissioners will be selected by the current President and confirmed by the current Senate. Thus, greater turnover among commissioners produces heightened responsiveness to presidential priorities.[130]

The other side of this coin, naturally, is that policymaking will be less stable as commissioners head for the exits earlier. Whether greater responsiveness to a democratically accountable President is preferable to greater policy stability across presidential transitions is in the eye of the beholder.

Regardless of one's position on the optimal balance between political responsiveness and stability, it is important to recognize that privileging the former over the latter contravenes Congress's intent in creating these entities. According to Rachel Barkow, "[s]tability has been a driving motivator since the creation of the earliest independent agencies."[131] Kirti Datla and Richard Revesz agree, asserting that "[o]ne of the motivations behind for-cause removal protection is stability."[132]

The FTC is once again illustrative. The FTC Act's legislative history called for "an administrative board . . . which would have precedents and traditions and a continuous policy and would be free from the effect of such changing incumbency."[133] Further, that the longest terms in the administrative state are

influence in general."); Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 259–60 (asserting that agency independence "is based largely" on for-cause removal protection, fixed terms, and partisan balance requirements).

128. *See* Barkow, *supra* note 123, at 38–40.

129. *See generally* Kenneth A. Shepsle, *Bureaucratic Drift, Coalitional Drift, and Time Consistency: A Comment on Macey*, 8 J.L. ECON. & ORG. 111 (1992) (describing this condition).

130. *See* Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 459 (2008). Devins and Lewis also find that, following a presidential transition, commissioners who share the new President's party stay at their posts until eleven months before their fixed term ends on average, whereas opposition-party commissioners remain in their positions until four-and-a-half months before their term ends on average. *Id.* at 472. That difference suggests that opposition-party commissioners serving on commissions with partisan-balance requirements strategically delay their departures to push back the date on which the President's party will hold a majority of seats. This partisan difference in commissioner turnover complicates, but does not negate, our basic claim that more frequent turnover yields greater agency responsiveness to the President.

131. Barkow, *supra* note 123, at 24.

132. Datla & Revesz, *supra* note 121, at 820. For regulatory commissions with statutory removal protection, they explain, "the President will be faced with at least some holdover appointees and will not be able to exert influence" until their terms expire. *Id.*

133. 51 CONG. REC. 10376 (1914) (quoted in Barkow, *supra* note 123, at 24).

for members of the Board of Governors of the Federal Reserve System, who are authorized to serve fourteen-year terms,[134] is not coincidental, as monetary policy requires a steady hand and long-term perspective.[135]

Essentially, Congress's inclusion of fixed terms and removal protection in these commissions' organic statutes constitutes a deliberate decision to favor policy stability over democratic accountability with respect to specific issue areas. That decision deserves a degree of respect. Associate commissioners' ever-shortening terms chip away at the balance between stability and accountability that Congress established for these commissions.

B. Shifting Power to Chairs

Associate commissioners' decreasing relative power may not only be a *cause* of their shorter spans in office, as discussed *supra* Section I.A, but also a *consequence* of it. As associate commissioners' tenures in office shrink, the "experience gap" between chairs and associate commissioners grows. Presumably, with chairs' greater relative experience comes greater knowledge of bureaucratic politics, i.e., what levels to pull to exert influence.[136] That chairs have greater relative experience vis-à-vis associate commissioners suggests that, when the two groups hold different views, chairs are more likely to carry the day.

Research on state legislatures is instructive. State lawmakers that face a term limit—i.e., a law barring them from running for an additional term in office—rely more on staff, lobbyists, and the like.[137] Essentially, term-limited lawmakers have a reduced incentive to invest in personal expertise. We posit a similar effect on commission daises. With the expectation that they will spend relatively little time at their jobs, inexperienced associate commissioners will rely more on commission chairs and especially commission staff—who are in several senses subject to the chair's control.[138] This reliance diminishes associate commissioners' relative roles and empowers those whom they follow.

A commission dais on which the chair is more experienced, and thus better able to wield power, than associate commissioners also may produce several downstream effects. For one, power imbalances may stymie deliberation. The multimember structure is designed to foster deliberation and thus, the

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134. 12 U.S.C. § 241.

135. Barkow, *supra* note 123, at 24; Jacob E. Gersen, *Designing Agencies*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 333, 348 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010).

136. For a biographical account of how experience in bureaucracies can be leveraged to influence outcomes, see generally BARTON GELLMAN, ANGLER: THE CHENEY VICE PRESIDENCY (2008).

137. *See, e.g.*, John M. Carey, Richard G. Niemi, Lynda W. Powell & Gary F. Moncrief, *The Effects of Term Limits on State Legislatures: A New Survey of the 50 States*, 31 LEGIS. STUD. Q. 105, 124 (2006).

138. *See supra* Section I.A.1.

thinking goes, ultimately lead to better outcomes.[139] The ideal of free exchange of ideas among equals may be diminished, however, when some participants have greater experience than others. Similarly, well-reasoned dissents can challenge the commission majority to improve its decision or, alternatively, act as a "fire alarm" signaling to congressional monitors, litigants, or others that something is amiss.[140] To the extent that imbalances in service length imply imbalances in power or expertise, these imbalances reduce the signal quality of novice commissioners' contributions to deliberations and written dissents.

Depending on one's perspective, however, a reduction in associate commissioners' relative power may not necessarily be a normative bad. Ganesh Sitaraman and Ariel Dobkin argue that an agency headed by a single director is preferable to a multimember commission because the former "unif[ies] power under an active and energetic leader with ultimate decisionmaking authority."[141] In contrast, multimember commissions diffuse accountability and engender inefficient decision-making processes.[142] To the extent that experiential and power imbalances commissions toward a functional single-leader structure, they may deliver these benefits.

C. Accelerating the Revolving Door

The phenomenon also may have implications for the revolving door, the much bruited phenomenon of public sector officials leaving federal service to work for the industries they previously regulated. If the private sector can be thought to purchase former officials' expertise or connections, commissioners with shorter tenures have less to offer. So the revolving door may spin faster, but with fewer consequences. Those readers that are concerned about the revolving door may see this feature as an advantage.[143]

On the other hand, the changing professional backgrounds of commissioners may make K Street a more attractive post-commissionership destination for those commissioners who seek to departure the commission prior to the end of their term. The biographies of associate commissioners are changing, with fewer law firm partners and more former Hill staffers

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139. *See* Verkuil, *supra* note 127, at 260–61 (asserting that because appellate panels with multiple judges "promise[] greater accuracy (and thereby fairness) because of the dialectical nature of the deliberative process," so too should multimember agencies).

140. *See* Sharon B. Jacobs, *Administrative Dissents*, 59 WM. & MARY L. REV. 541, 587–92 (2017) (explaining that dissents can improve majority's reasoning); *id.* at 578–79 (detailing separate statements' fire alarm function); Feinstein & Hemel, *supra* note 99, at 73 (similar).

141. Ganesh Sitaraman & Ariel Dobkin, *The Choice Between Single Director Agencies and Multimember Commissions*, 71 ADMIN. L. REV. 719, 726 (2019).

142. *Id.* at 723.

143. Opponents of the revolving door posit that "'capture' theory arises out of concerns with the revolving door between industry and regulators, or regulators who over time become too cozy with the industry they are supposed to monitor." William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1609 n.223 (2007).

making the grade.[144] These associate commissioners may view the positions as not ends in themselves, but rather as springboards to the private sector.

D. Altering the Policymaking Process & Its Outcomes

Finally, associate commissioners' shorter service may influence the policymaking process and, ultimately, policy outcomes. For one, commissioners planning an exit may prefer enforcement actions over rulemakings to set policy. Administrative law imposes several requirements on rulemakings that serve important interests. Perhaps the best known is the APA's notice-and-comment procedure.[145] The APA's requirement that agencies solicit public comment on proposed rulemakings compels them to consider perspectives that they might not otherwise hear.[146] That feature helps ensure that they have more complete information before them when they move to finalize the rule.[147] It provides a "fire alarm" to Congress and other extra-agency actors to assist with these groups' monitoring of administrative activity, as previously discussed.[148] Some scholars argue that notice-and-comment rulemaking also bolsters agencies' perceived legitimacy.[149] In addition, to survive arbitrary-and-capricious review in the courts, agencies must provide "an adequate basis and explanation" for their rules.[150] That explanation typically is given during the rulemaking process.

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144. *See* Feinstein & Henderson, *supra* note 95, at 184–86, 193.

145. *See* 5 U.S.C. § 553 (setting out the requirements for notice-and-comment rulemaking).

146. *See* Brian D. Feinstein, *Identity-Conscious Administrative Law: Lessons from Financial Regulators*, 90 GEO. WASH. L. REV. 1, 10–12 (2022) (summarizing this argument).

147. *See* Brian D. Feinstein & Abby K. Wood, *Divided Agencies*, 95 S. CAL. L. REV. 731, 778–79 (2022).

148. *See supra* Section III.B; *see also* Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 434 (1989) ("A fire alarm converts the oversight job of a politician from active monitor to reactive servant of affected constituencies . . . ."); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166, 175 (1984) (noting "Congress's . . . preference for fire-alarm oversight [which] entails a preference for command-and-control regulatory policy").

149. *See, e.g.*, Michael Sant'Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U. L. REV. 793, 843 (2021) ("Enhancing public engagement with agenda setting and rule development will lend greater democratic accountability and legitimacy to policymaking than other remedies for the administrative state's 'democracy deficit.'"); Nina A. Mendelson, *Foreword: Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1343 (2011) ("An agency's public proposal of a rule and acceptance of public comment prior to issuing the final rule can help us view the agency decision as democratic and thus essentially self-legitimating."); Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENV'T L.J. 60, 67 (2000) (asserting, in a discussion of notice and comment, that "involvement in a process enhances perceptions of legitimacy among participants, independently of whether outcomes ultimately favor [them]").

150. *See* Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 34, 43 (1983).

We think these procedural features of rulemakings ultimately improve the final rules that the process produces. But rulemakings also involve considerable time and resource costs. Agencies must gather data, communicate with stakeholders, consider comments received, draft regulatory text, and, for some independent regulatory commissions, perform cost-benefit analysis.[151] From issuance of a notice of proposed rulemaking to final disposition, the process takes nearly one year at the SEC and nearly two at the FCC.[152]

Commissioners intent on resigning in the near future may decide to forego rulemaking because, given their short time horizons, they place particular emphasis on short-terms costs. Such an approach is understandable. After all, why begin a lengthy rulemaking which you may not remain in office to see to completion?

Instead, commissioners who are planning their exit may prefer to establish policy through enforcement. Enforcement actions do not go through notice and comment, can generate favorable headlines, and can even be "won" by extracting a fine or settlement from a supposed bad actor.[153] But it is difficult for private actors to plan for regulatory environments that emphasize enforcement campaigns.[154] Enforcement actions make policy without taking comment from the entirety of interested parties and suffer from all of the

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151. *See* Jennifer Nou & Edward H. Stiglitz, *Strategic Rulemaking Disclosure*, 89 S. CAL. L. REV. 733, 734–35 (2016).

152. Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 959 n.180 (2008).

153. For an explanation of why a rule takes a long time to promulgate—the time from start to finish lasts between forty-seven and ninety-five months on this account, see *Regulatory Accountability Act of 2011: Hearing on H.R. 3010 Before the H. Comm. on the Judiciary*, 112th Cong. 86, 93 (2011) (testimony of Sidney A. Shapiro, Univ. Distinguished Chair in L., Wake Forest Univ. Sch. of L.). For a classic discussion of the ossification of rulemaking, see Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1387–436 (1992). Some scholars worry less about ossification than does McGarity. *See, e.g.*, Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414, 1420–22 (2012) (concluding that the rulemaking remains efficient in at least some parts of the federal bureaucracy).

154. For a classic example of this critique, see Harvey L. Pitt & Karen L. Shapiro, *Securities Regulation by Enforcement: A Look Ahead at the Next Decade*, 7 YALE J. ON REGUL. 149, 156 (1990) ("The SEC *has*, at times, resorted to *ad hoc* enforcement of the federal securities laws in particular contexts, in the absence of meaningful advance guidance (or warning) to those subject to the agency's jurisdiction, in large measure because of the agency's institutional fear that any specific regulations it might promulgate could prove underinclusive or susceptible of easy evasion."). *See also* Donna M. Nagy, *The Costs of Mandatory Cost-Benefit Analysis in SEC Rulemaking*, 57 ARIZ. L. REV. 129, 133 (2015) (worrying that agencies might "entirely bypasses the rulemaking process on particularly contentious issues to formulat[e] new regulatory policy through the prosecution of enforcement cases"); Douglas C. Dreier, Note, *The Lending-Limit Combination Rules: Regulation by Enforcement at the OCC*, 62 DUKE L.J. 1747, 1751 (2013) (noting that financial regulators "ha[ve] received criticism for bypassing the rulemaking process and instead making policy through enforcement actions and no-action letters—in other words, for regulation by enforcement" (footnote omitted)).

infirmities that plague policymaking through adjudication.[155] To be sure, there are some advantages to enforcement-based policymaking; it can be more cautious, more flexible, and burden agency resources somewhat less.[156] Yet a decision to favor enforcement over rulemaking not based on a weighing of each activity's relative merits, but because commissioners already have one foot out of the commission's door surely is suboptimal.

In addition, briefer tenures may encourage short-termism, or the overemphasis on near-term relative to long-term results.[157] In the corporate context, research shows that boards of directors with frequent turnover are less likely to plan for the long run.[158] That tendency places corporations with stable boards at an advantage when it comes to planning beyond the results required in the next quarterly report.[159]

The same pressures may apply in the commission setting. Associate commissioners who know they will not be around for long have less incentive to tackle complex, time-intensive problems and greater reason to emphasize quick wins and short-term thinking.[160] At the worst, that mentality could lead commissioners to push the most challenging and important problem into the future, where they will be someone else's problem.[161] In essence, short-termism may sap commissioners of the desire to take on the burden of solving

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155. James Park reviews the standard critique in James J. Park, *The Competing Paradigms of Securities Regulation*, 57 DUKE L.J. 625, 635 (2007).

156. For an example of a proponent of this sort of regulation, see generally Todd Phillips, *A Change of Policy: Promoting Agency Policymaking by Adjudication*, 73 ADMIN. L. REV. 495 (2021) (arguing that agencies now make policy through rulemaking and should return to the adjudication model in many cases); Cameron F. Kerry & Daniel J. Weitzner, *Rulemaking and Its Discontents: Moving from Principle to Practice in Federal Privacy Legislation*, BROOKINGS (June 5, 2019), https://www.brookings.edu/blog/techtank/2019/06/05/rulemaking-and-its-discontents-moving-from-principle-to-practice-in-federal-privacy-legislation [https://perma.cc/2S3U-DNWA] (stating a "preference for adjudication over rulemaking reflected a conscious choice to err on the side of flexibility").

157. *See* Roger L. Martin, *Yes, Short-Termism Really Is a Problem*, HARVARD BUS. REV. (Oct. 9, 2015), https://hbr.org/2015/10/yes-short-termism-really-is-a-problem (on file with the *Iowa Law Review*).

158. *See, e.g.*, Ivan Marinovic & Felipe Varas, *CEO Horizon, Optimal Pay Duration, and the Escalation of Short-Termism*, 74 J. FIN. 2011, 2011 (2019).

159. *See id.* Delaware corporate lawyers have expressed concerns in the past that underinsulated boards might produce "excessive management short-termism." Martin Lipton & William Savitt, *The Many Myths of Lucian Bebchuk*, 93 VA. L. REV. 733, 734, 745–47 (2007). Along these lines, "[w]hile some Delaware cases have indicated that boards of directors should act in the long-term interests of their firms, these cases provide that boards have the discretion to determine the time horizons for their decisions which means that they can readily engage in short-termism without fear of liability." Lynne L. Dallas, *Short-Termism, the Financial Crisis, and Corporate Governance*, 37 J. CORP. L. 265, 357 (2012).

160. *See* Dallas, *supra* note 159, at 357.

161. This is also thought to be a problem for corporate oversight. "The officer or director has 'IBG, YBG' ('I'll be gone, you'll be gone') in the back of his mind, especially given the frequency of job-hopping among executives." Colin Marks & Nancy B. Rapoport, *The Corporate Lawyer's Role in a Contemporary Democracy*, 77 FORDHAM L. REV. 1269, 1291 n.134 (2009).

complex problems through ambitious policymaking and instead direct their time toward more immediate gratifications.[162]

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To summarize, shorter tenures may reduce commissions' collective experience and political insulation; degrade the quality of their deliberations; reduce the signal value of "fire alarms" from associate commissioners; shift policymaking from rules to less considered and more opaque formats; and encourage short-term thinking and quick wins over tackling long-term or complex problems.[163]

Depending on one's perspective, there are positive developments as well. Most prominently, shorter tenures facilitate greater political control and democratic responsiveness. Even here, however, it is important to consider that Congress intended political insulation, along with expertise and deliberative decision-making, to be core characteristics of independent regulatory commissions. Indeed, Congress included fixed terms, removal protections, and a multimember structure in its design of many of these entities precisely to these objectives.[164] Accordingly, we conclude that, on balance, the consequences of associate commissioners' shorter tenures are strongly negative.

IV. FIXING THE DISAPPEARING COMMISSIONER PROBLEM

This Part offers policy prescriptions to reverse the trend of declining tenures among associate commissioners. Importantly, these proposals rest on the premise that disappearing commissioners is a problem worth fixing. Others disagree with the premise that the independent commission form is worth maintaining.[165] An analogy might perhaps be drawn to judges, who have life tenure, and so, according to Kathryn Watts, "the members of the Court—unlike the heads of [executive] agencies—are insulated from direct political oversight."[166] If you like independent judges, you might like administrative agencies, but if you find the role of the judiciary in American

162. An analogy might be drawn to the similarly short windows faced by officials appointed to lead agencies in an acting capacity (for example, if the original appointee retires or is fired). "Commentators worry that the lack of confirmed officials contributes to agencies progressing slowly with important initiatives and employing unhappy workers." Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV. 613, 695 (2020).

163. *See supra* Part III.

164. *See supra* Sections III.A–.B.

165. As we have observed, short tenures empower political oversight and could even lead to the decline of the independent agency project, a project that some—though not us—believe has unduly interfered with executive power. For a relatively extreme version of this critique, see generally PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014).

166. Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA. L. REV. 1, 36 (2011).

life to be too important, you might not want their independence replicated, to a degree, in the rest of the government. Accordingly, we agree with the premise that the independent commission form is worth maintaining—but also recognize that your mileage may vary.

Accepting the premise that the disappearing-commissioner phenomenon is problematic, we begin with actions that Congress should take. For one, Congress ought to enact statutory changes to elevate associate commissioners' roles. Empowering associate commissioners not only would reequilibrate the distribution of power between chairs and associate commissioners, it also would make the latter positions more attractive and thus reduce associate commissioners' early departures. Congressional action to extend the statutory "cooling off" period during which former government officials cannot lobby their agency also would discourage early exit. Individual senators should consider securing commitments from nominees, under oath and in public, to serve for their entire statutory term. Finally, executive-branch actors can take actions to discourage early exit, including increasing responsibilities and compensation with seniority.

A. Statutory Reforms

Congress has the freest hand when it comes to reversing this trend. To encourage associate commissioners to serve their full terms, Congress could enact statutory changes to elevate associate commissioners' roles. For instance, rather than the chair overseeing all staff, specific associate commissioners could supervise particular bureaus or offices within the commission. Such an approach would not be novel. In the Federal Reserve, the Vice Chair for Supervision of the Board of Governors is charged with "oversee[ing] the supervision and regulation[s]" of bank holding companies and other Fed-supervised financial firms.[167]

In addition, Congress could amend commissions' organic statutes to wrest the power to place items on the agenda from the chair and grant it to each individual commissioner. If this atomized approach to setting a commission's agenda is too unwieldly, an alternative would be to empower subsets of commissioners to place items on the agenda, akin to the Supreme Court's *certiorari* process by which the Court grants review based on the vote of only four out of nine Justices. By empowering associate commissioners with a role in agenda-setting, Congress could enhance the attractiveness of the positions and thus discourage early exits.

Congress also could encourage commissioners to serve their full terms by increasing their responsibilities as they accrue seniority. Rewarding seniority is common in many positions, including in the judiciary, where the selection

167. 12 U.S.C. § 242.

of chief judges on the lower federal courts takes length of service into account.[168]

Congress also could discourage early exit through its structuring of associate commissioners' compensation. Many businesses encourage valuable employees to stay with a combination of carrots and sticks.[169] On the positive side, many private employers allow the exercise of stock options and the like available only after a certain period of service to the company. Congress could take a similar approach, increasing agency officials' compensation and tying receipt of the increase to completion of a delineated period of service. Early resignations would mean the forfeiture of this compensation—essentially, a "golden handcuffs" approach to retaining associate commissioners.[170]

Congress has sticks as well as carrots to offer. Currently, commissioners and other "very senior" executive-branch officials cannot lobby their former agency (or any senior personnel across government) "within 2 years after the termination of [their] . . . service."[171] That cooling off period could be revised to extend two years beyond the end date of the commissioner's statutory fixed term, where applicable. This extension would discourage commissioners from jumping ship early—after the White House and Senate have invested resources in their nomination and confirmation—to lobby their former agency.

B. Changes to the Confirmation Process

The nomination and confirmation processes also offer opportunities for individual elected officials to take action. Given the stakes involved in appointing an officer to a removal-protected position over which the political branches have limited *ex post* control, it is unsurprising that the Senate brings a particular seriousness to its role in evaluating nominees to independent regulatory commissions. Among those nominations that ultimately clear the Senate, nominations to commissions take more time than other executive-branch nominations[172]—and this time to appointment is getting longer.[173]

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168. *Id.* § 136(a).

169. *See, e.g.*, Erin McDowell, *15 Jobs That May Seem Off-Putting but Pay Surprisingly Well*, BUS. INSIDER (Oct. 30, 2020, 10:45 AM), https://www.businessinsider.com/dirty-and-dangerous-jobs-nobody-wants-how-much-they-pay-2019-7 [https://perma.cc/8LZ2-MQVV] (noting that workers holding unusually dangerous jobs sometimes receive wage premia).

170. Brian Klaas, *Golden Handcuffs: Getting Dictators to Exit*, GLOBALIST (Feb. 25, 2017), https://www.theglobalist.com/golden-handcuffs-getting-dictators-to-exit [https://perma.cc/W8U4-CDRH]; 1 MARVIN HYMAN, CORPORATION FORMS § 12:53 (2023), Westlaw CORPFORMS ("[G]olden handcuffs serve to keep key employees tied to the company for a fixed number of years."). As Richard Lazarus has put it, "[p]olitical scientists, philosophers, scientists, and economists refer to such self-imposed restraints on future behavior as 'precommitment' strategies." Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1195 (2009).

171. 18 U.S.C. § 207(d).

172. Anne Joseph O'Connell, *Shortening Agency and Judicial Vacancies Through Filibuster Reform? An Examination of Confirmation Rates and Delays from 1981 to 2014*, 64 DUKE L.J. 1645, 1671 (2015).

173. *See* Devins & Lewis, *supra* note 130, at 474.

The rate of failed nominations also is higher for independent regulatory commissions than other executive-branch positions.[174]

Nonetheless, there is more that the White House and Senate can do. For instance, senators should consider announcing that they will refuse to confirm a nominee for a given commission seat until the current commissioner's term has ended, regardless of whether that commissioner makes an early exit. Relatedly, the White House should elicit commitments from potential nominees to serve their entire term as a condition of nomination.[175] Better still, senators serving on the relevant committee should use nomination hearings to question nominees about their intentions to serve their entire term and, ideally, to elicit commitments that they do so. That approach would secure a commitment made under oath and in public.

Admittedly, nonbinding pronouncements from elected officials instantiate a credible commitment problem: none of these actors can be held to their promises.[176] Consider that Members of the Fed's Board of Governors are—in theory—placed on the Board for fourteen-year terms.[177] Fed Governors rarely even come close to serving for that period.[178] Nonetheless, there are reasons to believe that expressive commitments can be meaningful, and the precommitment strategy is easy to adopt, requiring only a change in expectations, rather than a statute or regulatory change.[179]

CONCLUSION

When making assessments, people tend to systematically focus on aspects of the situation that are prominent or distinctive and ignore those that are not.[180] Legal scholars are not immune to this type of salience bias. Scholars grappling with the future of independent agencies tend to focus on headline-grabbing judicial decisions and their implications for the trajectory of legal

174. *See* O'Connell, *supra* note 172, at 1652, 1661 (reporting a nomination failure rate of 18.8 percent for cabinet officials and 30.5 percent for independent regulatory commissioners during the period from 1981 to 2014).

175. For a discussion of how precommitment strategies operate, see Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics,* 88 CALIF. L. REV. 1051, 1117 (2000).

176. *See generally* Douglass C. North, *Institutions and Credible Commitment,* 149 J. INSTITUTIONAL & THEORETICAL ECON. 11 (1993) (discussing credible commitment problems in governance).

177. Banking Act of 1935, ch. 614, 49 Stat. 684, 704 (codified at 12 U.S.C. § 242).

178. *See* Peter Conti-Brown, *The Institutions of Federal Reserve Independence,* 32 YALE J. ON REGUL. 257, 308–10 (2015).

179. As Andrew Kean Woods has put it, "[e]xpressive commitments can be reputationally costly because they are made to a large audience, and are seen as broadly characteristic of the actor making the expression, putting the actor's reputation on the line." Andrew Keane Woods, *The Transparency Tax,* 71 VAND. L. REV. 1, 31–32 (2018).

180. *See* Shelley E. Taylor, *The Availability Bias in Social Perception and Interaction, in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 190, 192 (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982).

doctrine concerning separation of powers—and neglect long-term incremental changes in administrative governance.

This Article provides a course correction. It spotlights several secular trends that have profound implications for the functioning of independent regulatory commissions. Specifically, chairs and chair-supervised staff have been empowered at associate commissioners' expense; elected officials' greater involvement has reduced commissions' discretion; polarization has reduced the prospect of deliberation, a key advantage of the multimember form; and associate commissioners are leaving their positions with increased frequency, leaving commissions with less experience and the political branches with greater opportunities for influence via appointments.

These developments have been slowly building; we suspect they will continue on that course into the future. None of these developments are new or particularly high profile. Unsurprisingly, therefore, they have mostly been overlooked.[181]

Taken together, however, these developments have degraded commissioners' ability to marshal expertise, resist political interference, and deliberate. In other words, the fears that some commentators have expressed concerning the likely effects of the Supreme Court's trajectory on separation-of-powers cases already are, as a functional matter, to some extent being realized. This situation is attributable to trends in agency practices, not in the law. Accordingly, administrative scholars concerned with the future of agency independence should look to developments within agencies as well as those in the courts.

181. Indeed, this Article is the first to observe associate commissioners' increasingly early exits. Although several scholars have discussed a single one of these elements in isolation, see, for example, Phillips, *supra* note 15, at 312–13 and Shah, *supra* note 79, at 684–85, none has grappled with how they combine in ways that are greater than the sum of their parts.

APPENDIX

The figures in this Appendix convey trends in commissioners' length of service across eleven major independent regulatory commissions. Each commissioner in our dataset is denoted with a dot, showing the year in which they were appointed on the x-axis and their length of continuous service on the commission on the y-axis.

Figure A.1: Board of Governors of the Federal Reserve System

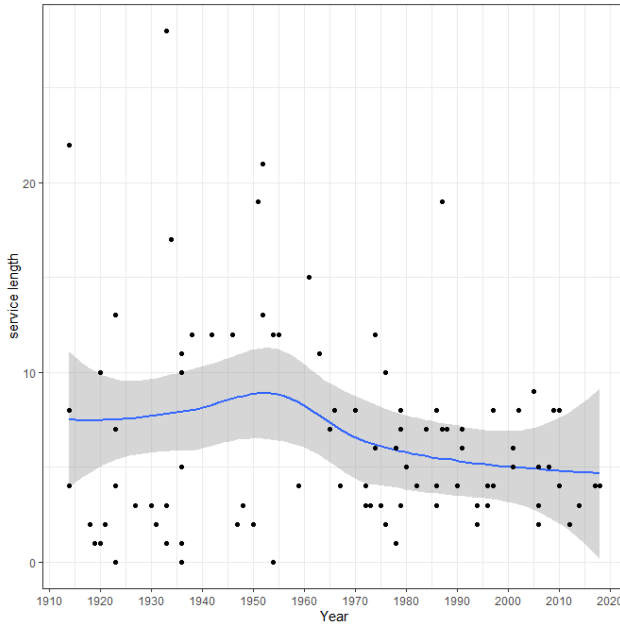

Figure A.2: Equal Employment Opportunity Commission

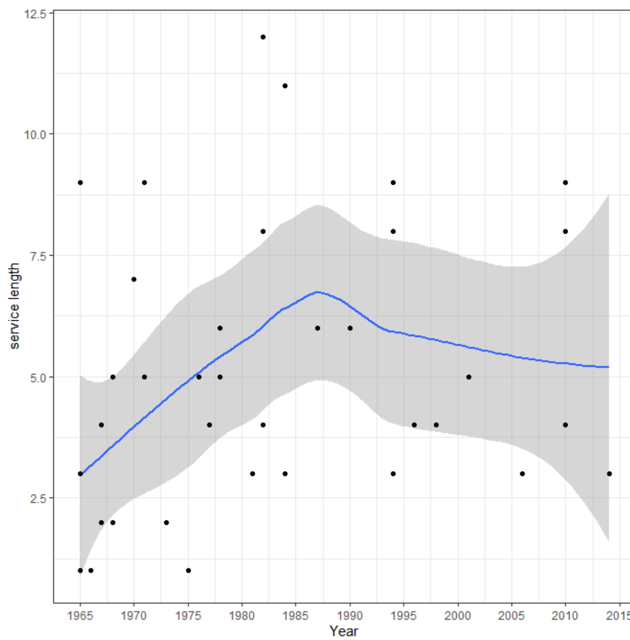

Figure A.3: Consumer Product Safety Commission

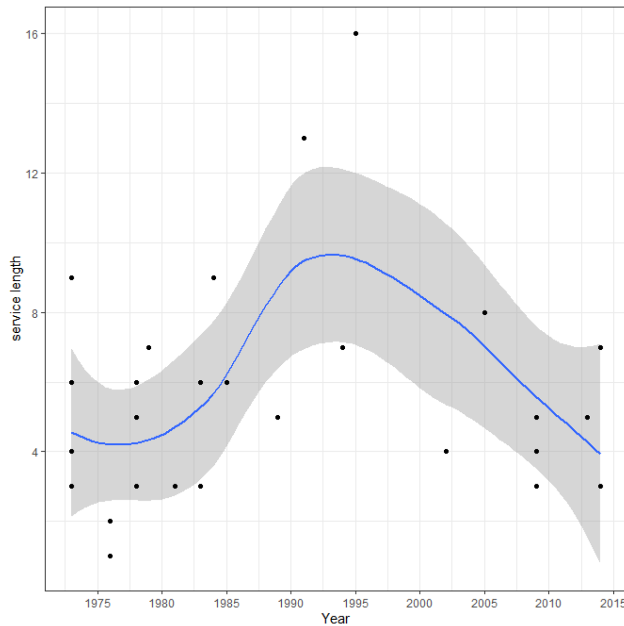

Figure A.4: Federal Communications Commission

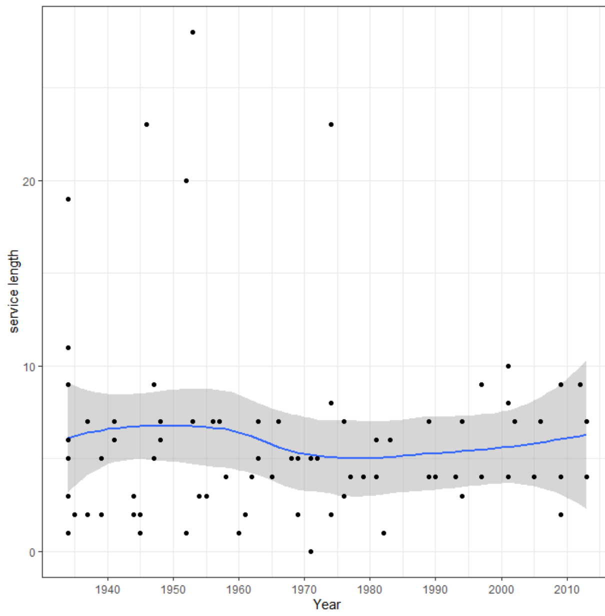

Figure A.5: Federal Election Commission

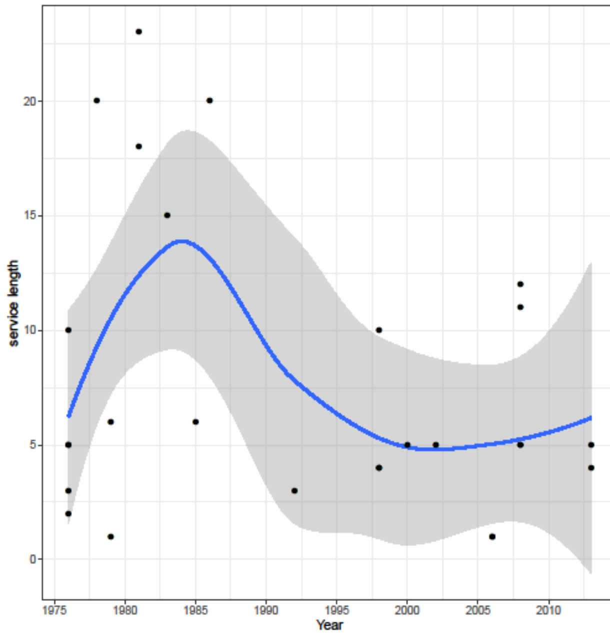

Figure A.6: Federal Trade Commission

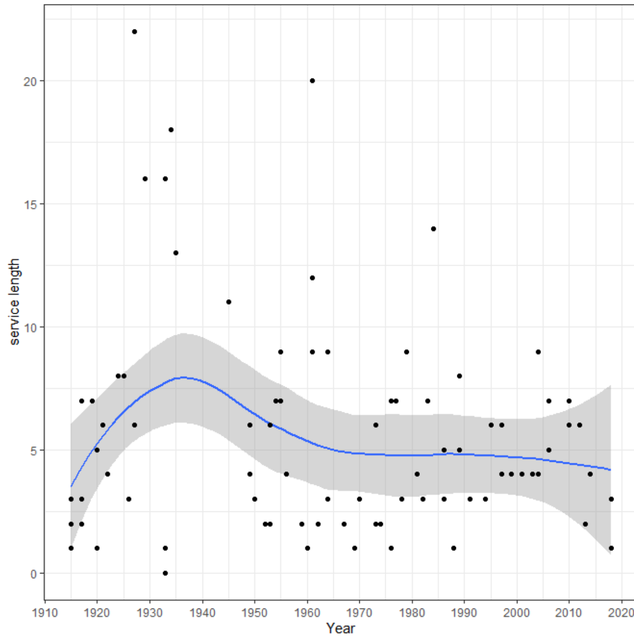

Figure A.7: Federal Energy Regulatory Commission

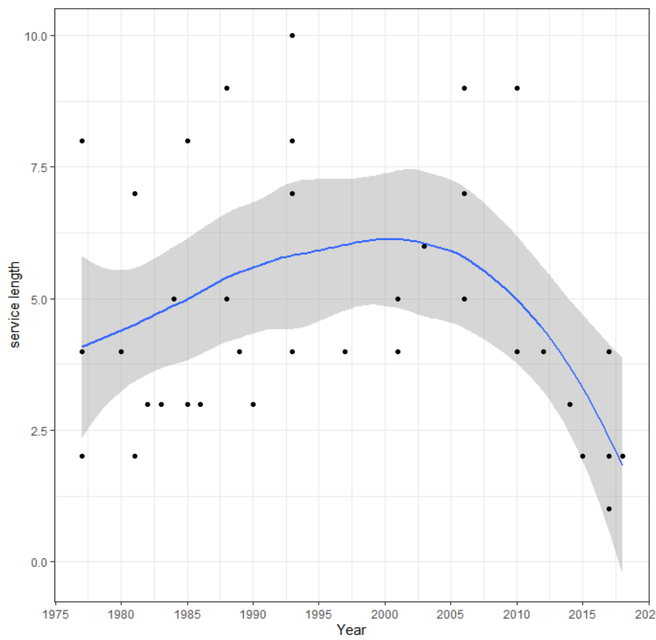

Figure A.8: National Labor Relations Board

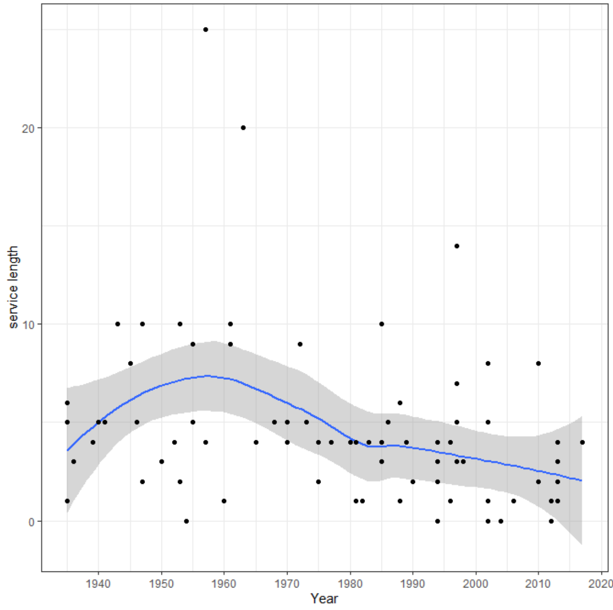

Figure A.9: National Transportation Safety Board

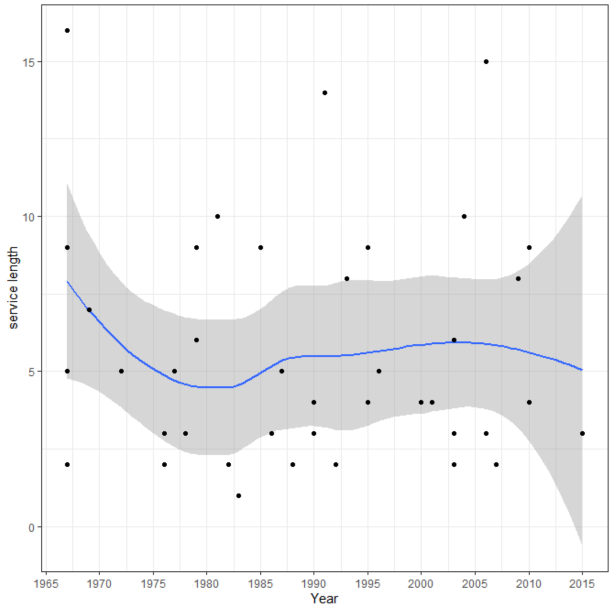

Figure A.10: Securities and Exchange Commission

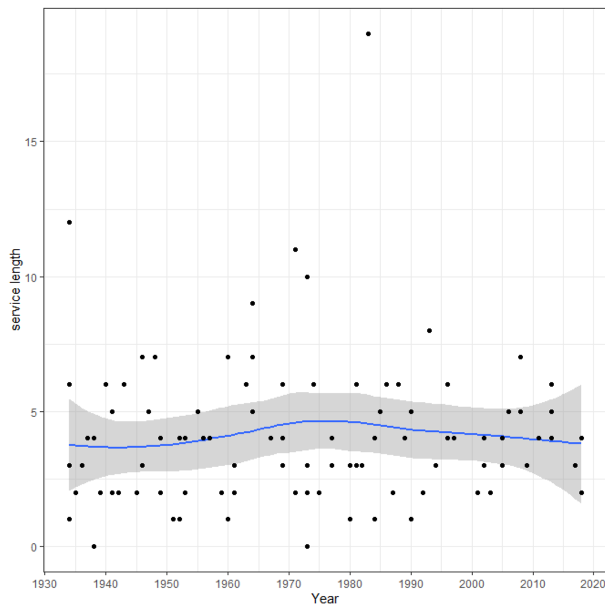

Figure A.11: Nuclear Regulatory Commission