

## 15 Presidents and the Bureaucracy

### Management Imperatives in a Separation of Powers System

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title OK?

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*“Chief executive” is not a presidential title that appears in the Constitution; indeed the constitutional separation of powers grants considerable authority over the executive branch, or bureaucracy, to Congress as well as to the president. Nonetheless, modern presidents work hard to maximize their control of the bureaucracy, partly because the public holds the president accountable for bureaucratic performance and partly because the bureaucracy is an important arena of policymaking. After reviewing the constitutional and historical aspects of the relationship between the presidency and the bureaucracy, David Lewis uses a case study of the creation of the Department of Homeland Security in 2002 to illuminate why presidents seek to be “chief executives” and why they usually succeed.*

In November 2002 Congress enacted and the president signed into law a bill creating a new cabinet department, the Department of Homeland Security (DHS). A massive undertaking, the new department combined twenty-two agencies and more than 170,000 employees from seventeen different government employee unions. It includes agencies as varied as the Coast Guard, the Secret Service, and parts of the former Immigration and Naturalization Service. The new department is responsible for airport security, which means it interacts with passengers at every major airport in the United States. It houses the employees who work at the borders inspecting goods, collecting customs, and directing traffic between countries. The DHS was assigned responsibility for policies as varied as drug interdiction, food inspection, and disaster relief.

The Department of Homeland Security is just one part of the federal bureaucracy that the president, as chief executive, oversees. One of the most important sources of presidential influence on public policy in the modern era is the president's power over the federal bureaucracy. The president presides over fifteen cabinet departments and fifty-five to sixty independent agencies staffed

by two and a half to three million federal civilian employees.<sup>1</sup> These agencies and personnel and the processes that shape their behavior make up the machinery of the federal government. The only direct contact most citizens have with the federal government is with an agency such as the Social Security Administration (social security benefits), the Department of Defense (military services), or the Department of State (passports and visas). The federal bureaucracy makes important decisions influencing the economy, national security, the environment, and individual citizens. Federal employees in the bureaucracy determine whether RU-486 is available in the United States, what levels of pollutants are allowable in the land, water, and air, and what economic activities are appropriate.

Constitutionally, Congress is the lawmaking branch. But the growing volume and complexity of federal activity have led Congress to delegate increasing policymaking authority to the president and federal agencies.<sup>2</sup> Because the bureaucracy makes so many important public policy decisions, Congress and the president have struggled to control it. Both elected branches direct, monitor, and compete to influence the decisions of federal bureaucrats. The Constitution endows each branch with a legitimate claim on the bureaucracy and invites them to struggle for control.

In this chapter I explain how the separation of powers system enumerated in the Constitution, coupled with the historical interaction between the elected branches of the federal government, has created strong incentives for modern presidents to increase their administrative power in order to manage the bureaucracy. The president's administrative power is constrained both by an occasionally competitive Congress and by the president's own need for an effective bureaucracy. Using the creation of the Department of Homeland Security as a case study, I show the means by which modern presidents seek to control the administrative state and the techniques Congress uses to blunt presidential influence. I conclude that although the contest for bureaucratic control may not create the most effective bureaucracy, it does limit the dominance of any one branch, which is what the Founders intended.

### **Constitutional Framework**

The Constitution's Framers wanted the national government's power to be limited but effective. Having just fought a war of independence against an unresponsive British crown, the Founders did not want to put substantial political authority into the hands of one man. One way they guarded against tyranny

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was through democratic elections. *Federalist* no. 57 discusses the importance of a “vigilant and manly spirit which actuates the people” and is exercised through elections. The Founders also famously agreed upon the system of checks and balances. Power was divided and shared among the three branches, as well as among different levels of government. Working carefully to limit the power of the new government, however, the Founders were also concerned about its effectiveness. After suffering through incompetent administration under the weak Articles of Confederation, they understood the need for effective governance. Under the Articles the national government could not respond effectively to the actions of pirates, quell domestic insurrection, or soundly administer other national policies.

In view of these conflicting impulses toward freedom from tyranny and effective administration, it is no surprise that the president and Congress have shared control of the bureaucracy since the nation’s founding. The Constitution provides very little detail about the machinery of government. Although it describes the origin, structure, and powers of Congress, the president, and the courts, it only speaks indirectly about the machinery that carries out the government’s business. It mentions departments and officers and how the officers are nominated and confirmed, but it does not describe what the departments are, what they do, what they look like, or who should direct their day-to-day business. Such details were left for the branches to define through political interaction.

Presidents have the most obvious claim to manage the federal bureaucracy. The Constitution designates the president as chief executive and charges presidents to ensure that the law is faithfully executed. Even this most basic designation, however, reflects the profound ambivalence the Founders had about executive power. Article II begins, “The executive power shall be vested in a president of the United States.” It is unclear what powers are encompassed in the president’s designation as chief executive. The vagueness of this “vesting clause” has been used at different times to claim both expansive and limited powers for the president. Indeed, many of the most significant executive orders make reference to Article II powers generically and “the executive power” implicitly. The paucity of specific enumerated powers in Article II stands in contrast to the long list of Congress’s powers in Article I, such as the power to regulate interstate commerce, to coin money, and to lay and collect taxes.

The Constitution also endows the president with the power to nominate the principal officers of the bureaucracy with the advice and consent of the Senate.<sup>3</sup> The president has the power to request in writing the opinions of department

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heads, but no clause details the extent to which presidents can tell department heads what to do. Arguably, the president has more control over the foreign affairs and military bureaucracy than the domestic bureaucracy because the president is commander in chief and has the power to negotiate treaties subject to Senate approval.

Congress also has a claim to manage the bureaucracy. Apart from the Senate's responsibility to advise and consent on nominations, the Constitution designates Congress as the lawmaking branch. Congress writes the laws that federal agencies implement and thus has an interest in ensuring that those laws are implemented in a manner consistent with its wishes. Over the years, the legislative branch has created most of the federal government bureaucracy by statute.<sup>4</sup> Congress also appropriates all the money for agency activities, including salaries, infrastructure, and programs. Congress has always been actively involved in monitoring and directing the bureaucracy through oversight hearings and investigations.

### Historical Change

For a large portion of the nation's history Congress dominated the bureaucracy as it did most national policymaking.<sup>5</sup> Not only had government agencies been created by Congress, but they were limited in scope and complexity, reducing the difficulty of legislative monitoring of bureaucratic behavior. In 1829 President Andrew Jackson could say without much disagreement, "The duties of all public officers are, or at least admit of being made, so plain and simple that men of intelligence may readily qualify themselves for their performance; I can not but believe that more is lost by the long continuance of men in office than is generally to be gained by their experience."<sup>6</sup> Most federal jobs required little previous training or experience, and the vast majority of government employees worked in the Postal Department, customshouses, land offices, and the War Department. Most worked outside Washington, D.C.

Patronage practices—the so-called spoils system—gave Congress substantial control over bureaucratic personnel. Since presidents relied on the work of party members to get nominated and elected, they were beholden to national and state party leaders when it came time to hire federal employees. Because members of Congress were tied in deeply to the same national and state party machines, they controlled most personnel decisions, particularly in their own districts and states. No formal civil service system existed prior to 1883, which meant that federal employees were hired, fired, and promoted at the discretion of elected officials

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and their appointees. A large portion of the bureaucracy owed its allegiance principally to congressional patrons rather than the president.

In time Congress's grip on the federal bureaucracy weakened. The federal government's responsibilities grew in volume and complexity, particularly after the Civil War. The nation confronted massive immigration, technological changes, economic crises, labor strife, and an increased role in the international economy and world politics. These changes made it more difficult for Congress to manage the bureaucracy and altered the nature of federal employment. Increasingly, government agencies required specific skills or expertise that could only be obtained through a modern, merit-based personnel system. In 1883 Congress passed the Pendleton Act, which created a merit-based civil service. Although the new system initially covered only 10.5 percent of all federal employees, its rapid expansion weakened the ties between members of Congress and the federal bureaucracy.

The weakening of Congress's relationship with the bureaucracy was accentuated by problems arising from Congress's own fragmented structure. Congress was divided into policy-based committees that dealt directly with different federal agencies, and the members of each committee typically deferred to each other in votes on the floor. Agencies submitted their budgetary and policy requests to these committees directly, rather than through the president. The resulting fragmentation of control made it difficult for Congress to direct overall policy or spending. This difficulty was brought into sharp relief by periodic wars and economic crises. In the aftermath of World War I, which generated large federal deficits, Congress passed the Budget and Accounting Act of 1921. The act created a Bureau of the Budget that would combine every agency's estimates into one federal budget. It became the vehicle for presidential influence over spending.

The crises of the Great Depression and World War II produced a sea change in presidential power with regard to the bureaucracy. Congress delegated significant authority to the president to create, staff, and reorganize the federal bureaucracy to combat the depression and prosecute the war. Government employment increased by more than four hundred thousand between 1933 and 1940. President Franklin Roosevelt oversaw the creation of scores of new federal agencies and programs, such as the Works Progress Administration, the Securities and Exchange Commission, and Social Security.<sup>7</sup> Starting in 1939 Congress regularly granted the president reorganization authority to help rationalize the expanding bureaucracy. Congress exercised only loose control over the president's spending power.<sup>8</sup>

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Such authority, once given, was hard to take away. Although it might have been in Congress's interest to reassert control over the bureaucracy, partisanship and reelection concerns often trumped such efforts. In the 1930s and early 1940s Democrats controlled both chambers of Congress and the presidency. Democratic members of Congress were often happy to have a Democratic president manage the bureaucracy, freeing them to focus on getting reelected or on other issues of concern to the party.<sup>9</sup> Republicans were less enthusiastic about presidential control but had little power to do anything about it. When Republicans finally achieved a majority in Congress in 1946 they delayed efforts to reform the executive branch in anticipation of electing a Republican president in 1948. Even so, Republican reform proposals were not consistently anti-president. They focused on rationalizing the federal bureaucracy through study commissions, shrinking federal employment and expenditures, and even extending the president's reorganization authority. Congressional Republicans did not want to limit a president who might use his power for Republican aims.

### **Modern Presidents and Public Management**

Although both the president and Congress have legitimate constitutional and historical claims to the management of the bureaucracy, the president's perspective is different than Congress's. This difference traces partly to their different constitutional powers. A reasonable interpretation of the president's authority, and the one adopted by modern presidents, is that the president is obligated to direct the national bureaucracy. In order to faithfully execute the laws the president needs to control the administrative apparatus of government.

Another source of the two branches' differing perspectives is the difference between the election incentives for presidents and those for members of Congress. Members of Congress represent single districts or states and pursue activities that are likely to ensure their reelection in those constituencies. But the electorate holds the president accountable for the successes and failures of the entire government.<sup>10</sup> If the bureaucracy experiences a large public failure, if a visible social problem is ignored, or if federal agencies produce conflicting and complicated directives, the president is ultimately held accountable. Presidents, along with vice presidents, are the only officials elected by the whole country. Their reelection and historical legacy are on the line if the bureaucracy fails to perform.

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Every modern president has attempted to control the bureaucracy by using constitutional powers such as appointment and removal and unilateral executive action. Presidents also have used congressionally delegated powers of budgetary review and executive reorganization.

Presidents attempt to gain control of the bureaucracy through a variety of personnel strategies. First, they can screen prospective appointees carefully for loyalty. In 2004 there were more than 3,000 presidential appointees in various federal agencies.<sup>11</sup> These appointees can have a dramatic influence on policy because agencies have so much discretion in how they implement the law. Second, presidents can seek to alter the number of appointed positions either by law or through executive action. Finally, presidents can work to have agencies excluded from the merit-based civil service system created in 1883. This allows the president's appointees more flexibility in hiring, firing, and promotion. Since the early 1970s the percentage of employees in the traditional merit-based civil service system has been decreasing. In the administration of George W. Bush both the Department of Homeland Security and the Department of Defense were authorized to create new personnel systems outside the merit system.

In addition to personnel strategies presidents have used both the reorganization authority granted by Congress and their spending power to influence the activities of the bureaucracy. Under the most common form of reorganization authority, presidents formulate proposals to create, reorganize, and terminate administrative agencies and submit them to Congress. If Congress fails either to alter or to disapprove the plans promptly, they go into effect. The collective action problems of Congress usually have made it difficult to respond to these presidential initiatives. Congressional leaders have found it hard to drum up support and interest and schedule votes within the short time allowed. The proposals are also unamendable, meaning that the president only has to design a plan acceptable to at least half the members in each chamber. This authority has currently lapsed, and no president since Reagan has used it.<sup>12</sup>

Presidents influence the federal budget because they draft it. Presidents receive budget estimates from the agencies, modify them, and put them together in a unified budget. The president's Office of Management and Budget (OMB) reviews, coordinates, and makes all final decisions on agency budget requests before submitting the federal budget to Congress. It keeps a tight rein on agency spending requests in order to achieve the administration's policy goals through the budget. Although Congress must appropriate all money spent by the bureaucracy, legislators can be more or less specific about how funds are

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used. In some cases Congress creates numerous specific accounts and prohibits the transfer of money among them. Sometimes it even specifies how money is to be allocated *within* accounts. In other cases Congress simply appropriates a lump sum and allows informal understandings with the agency to govern how the funds are spent. Presidents can influence policy by securing more lump sum appropriations and by taking advantage of congressional vagueness in appropriations language and procedures.<sup>13</sup>

One might think that presidential attempts to increase the number of appointees, to get more control of the budget, or to reorganize an agency might offend the sensibilities of Congress. This is often not the case, however, for two reasons. First, legislators usually care little about defending the institutional interests of Congress against presidential encroachment. Members of Congress represent individual districts and states. Voters have elected them to ensure the well-being of their district or state. Protecting the institutional interests of Congress is a classic public goods problem. All members would be better off cooperating to protect the institution, but few have an incentive to cooperate in any specific case. Members would rather spend their time securing particularistic benefits or legislation that will get them reelected. Second, at any given time a large number of members will prefer that the president influence the bureaucracy rather than other members of Congress. As a consequence, Congress has strong incentives to limit presidential power only when it has different policy views than the president, when it is unified against presidential influence, or when presidential action may directly affect members' reelection interests.

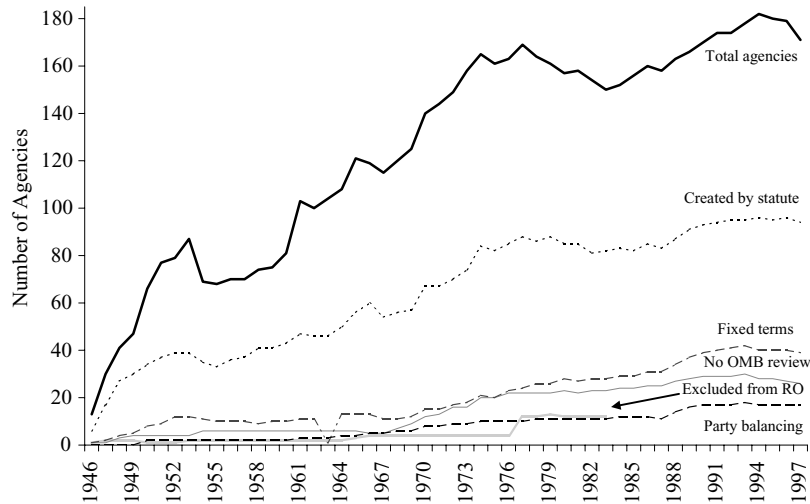
When Congress does unite to blunt presidential influence it does so by writing specific statutes restricting executive behavior. On matters of personnel, members carefully review the nominees the president puts forward, restrict by law the number of appointed persons, or write specific statutes that limit whom presidents can nominate and under what conditions appointees can be removed. Congress also anticipates and responds to presidential abuses of reorganization and spending powers. In the early 1960s President Kennedy, rebuffed in his attempts to create a Department of Urban Affairs by statute, proposed a reorganization plan to accomplish the same goal.<sup>14</sup> Congress subsequently included a new provision in the president's reorganization authority that no new cabinet departments could be created by reorganization plan. When Congress worries about presidential budgetary influence it can remove an agency from executive budget review and mandate that it submit its budget requests directly to Congress.<sup>15</sup> In cases where presidents have abused their spending authority, Congress has responded by writing more specific statutes.

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**Figure 15.1** Cumulative Number of Agencies Created Since 1946 with Characteristics That Insulate Them from the President



For example, when President Nixon refused to spend money Congress had appropriated, it responded by passing the Congressional Budget and Impoundment Control Act of 1974.

Historically, Congress has asserted control of the bureaucracy in an episodic, incomplete, and defensive fashion. This is not to say that Congress's actions have had no effect on the distribution of power. On the contrary, Congress has successfully limited presidential influence over the bureaucracy in a number of cases. For example, Figure 15.1 graphs the number of agencies created from 1946 to 1997 along with the statutory characteristics that insulate them from presidential control. These include fixed terms for appointees, which limit the president's removal power; statutory exclusion from budget review, which limits the president's budgetary powers; exclusion from the president's reorganization authority; and party-balancing requirements for presidential appointments. The number of agencies created with one or more of these characteristics has increased over time, evidence that a small but growing portion of the bureaucracy is at least partly insulated from direct presidential control. This poses significant problems for presidents trying to manage the federal bureaucracy.<sup>16</sup>

#### A Case: The Department of Homeland Security

The Constitution's invitation to the president and Congress to struggle to control the bureaucracy is reflected in the creation of the Department of

Homeland Security. The case illustrates how institutional incentives and partisan concerns shape perspectives on the design and functioning of a new department.<sup>17</sup> The most newsworthy part of the politicking over the DHS involved Bush's push for more executive control of the department. The major sticking point for Congress was Bush's demand for flexibility in hiring, firing, and promoting workers, as well as for the power to exclude from union representation employees who work in offices involved on national security matters (as defined by the administration).<sup>18</sup>

Three explanations are commonly given for Bush's insistence on managerial flexibility. The first is that his conservative Republicanism either made him favor more executive control in general or made him anti-union in particular.<sup>19</sup> Bobby Harnage Sr., the former president of the American Federation of Government Employees, stated that Bush's action "means nothing less than gutting the civil service merit system and busting employee unions."<sup>20</sup> Sen. Joseph Lieberman, D-Conn., said, "Repeatedly, the Bush administration has failed to treat federal employees with respect and dignity and that has got to stop. . . . The administration partisanly and, I think, stubbornly, insisted on fighting over civil service issues."<sup>21</sup> Harnage and Lieberman had reason to be suspicious. The Bush Administration's management agenda includes a focus on managerial flexibility and competitive sourcing.<sup>22</sup> For example, Bush fought to protect the ability to hire contract workers, rather than government employees and union members, for airport security when the Transportation Security Administration was created in 2001.<sup>23</sup> His Defense Department has publicly requested more managerial flexibility as well.<sup>24</sup>

A second explanation of Bush's insistence on controlling personnel in the new department is that his managerial training as an MBA and his experience in business made him want private business-style control over personnel. Bruce Buchanan claims that Bush "conceives of himself as an executive in the Harvard B-school mold," and Stephen Wayne argues that Bush and his advisers "are business executives and they want to govern as business executives."<sup>25</sup>

The final explanation for Bush's insistence rests on his personality and the personality of his staff. Wayne argues that many Bush advisers who previously served in other administrations resent the erosion of presidential power since Watergate and have sought to reverse that course under Bush.<sup>26</sup> The Bush administration's refusals to turn over documents related to Vice President Cheney's energy task force and to allow Tom Ridge to testify before Congress when he was head of the Office of Homeland Security support this view.<sup>27</sup>

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A closer look, however, provides a more accurate understanding: Bush was acting as all the modern presidents before him have in seeking greater executive control over the bureaucracy. That said, his means for achieving it were probably influenced by his partisanship.

#### *Pre-9/11 Calls for Action*

Recommendations to create a new domestic security agency date from the Clinton administration. In 1998 the administration recognized that many agencies were responsible for responding to terrorism, and Clinton appointed National Security Council staff member Richard Clarke to coordinate these federal efforts.<sup>28</sup> In 1999 the U.S. Commission on National Security/21st Century, commonly referred to as the Hart-Rudman Commission, released a report in which it concluded that international terrorism posed a real threat to domestic security. In January 2001 the commission recommended creating a cabinet-level domestic security agency.<sup>29</sup>

By 2000 there was general agreement in Congress that changes were needed but no consensus about what those changes should be.<sup>30</sup> Rep. Tillie Fowler, R-Fla., proposed legislation to set up a coordinating office in the federal government. Fowler's bill passed the Republican House but not the Democratic Senate. A bill introduced in the Senate by John Kyl, R-Ariz., mandated that the president set up an interagency task force on how to stop fund raising by international terrorist groups.<sup>31</sup> In 2001, Rep. Mac Thornberry, R-Texas, introduced legislation to create a new national homeland security agency modeled on the Hart-Rudman Commission's recommendations. Bills to create a new presidential council to oversee domestic preparedness and to direct the president to create a domestic security strategy were introduced by Rep. Wayne Gilchrest, R-Md., and Rep. Ike Skelton, D-Mo., respectively.<sup>32</sup>

For its part, the Bush administration announced on May 8, 2001 that Vice President Cheney would head an interagency group to manage the federal government's response to terrorist attacks and that Federal Emergency Management Agency director Joe Allbaugh would coordinate state and local disaster response efforts.<sup>33</sup> Nevertheless, efforts to develop a national domestic security strategy and to coordinate federal, state, and local actions were not far along when the terrorists attacked on September 11, 2001.

#### *After 9/11*

After the terrorist attacks Congress sought a remedy to the perceived deficiencies in national preparedness.<sup>34</sup> Apart from investigating why the attacks

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were not prevented, members of Congress jump-started their earlier efforts to create a new homeland security agency.<sup>35</sup> On October 20, 2001, in a nationally televised address, President Bush announced the creation of an Office of Homeland Security (OHS) within the Executive Office of the President, perhaps hoping to preempt legislative action by Congress. The new office's purpose was to coordinate the federal government's response to terrorist threats and attacks. The president named Tom Ridge, the former governor of Pennsylvania, as director.

The creation of the OHS, however, did not deter members of Congress from pushing legislation to create a new homeland security agency. Other members sought to explicitly authorize the OHS in statute, requiring Senate confirmation of its director and giving the director control of the antiterrorism budgets of the agencies involved in domestic security.<sup>36</sup> The Bush administration tried to forestall both of these efforts, but refusing to allow Ridge to testify before Congress did not help its case. In late October 2001 Bush invited leading Democratic and Republican members of the Intelligence, Armed Services and Government Affairs Committees to the White House and asked them to delay creating a new department. Some administration officials defended the OHS as sufficient to the task.<sup>37</sup>

Members of both parties nonetheless pressed forward with bills to create a new department, and on May 22, 2002, the Senate Government Affairs Committee approved Senator Lieberman's bill (S 2452) to create a department of homeland security. On June 6, faced with strong bipartisan support for a homeland security bill, the administration reversed course and announced its own proposal for a department of homeland security.<sup>38</sup> Clearly, the administration wanted to gain some control over the creation of the department and take credit for it.

In most ways, Bush's proposal was very similar to the Senate bill. But the administration's version asked for more executive control, especially over personnel, reorganization, spending, and secrecy.<sup>39</sup> The president wanted authority to construct a new personnel system with more managerial flexibility, knowing that the ability to hire, fire, promote, and define positions would come at the expense of civil service and union protections.<sup>40</sup> Seventeen unions represented employees in the agencies the administration proposed to move into the DHS. Consolidating these personnel systems would be facilitated by granting the secretary authority to reorganize the agencies when they became part of the new department.<sup>41</sup> The administration also sought more control of the department's financing, requesting authority to transfer up to 5 percent of the funds appropriated to one account to

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other accounts.<sup>42</sup> Finally, it sought exemptions from the Freedom of Information Act and the Federal Advisory Commission Act.<sup>43</sup>

On July 19, 2002, the select committee that the House created to consider this legislation approved the administration proposal. One week later the full House passed the bill, after rejecting amendments that sought to guarantee something closer to the prevailing level of federal worker protections.<sup>44</sup> The Senate bill that passed out of committee on July 25 was different, particularly in the areas of federal worker protection and the president's spending power.<sup>45</sup> The White House threatened to veto the Senate version of the bill.<sup>46</sup>

Senate moderates tried for months to work out a compromise on the personnel issues, but without success. September 11, 2002, came and went, and Congress adjourned to campaign for the November midterm elections without a homeland security bill. Many Republicans, including Bush, used the lack of a bill as a campaign issue.<sup>47</sup> After the Republicans did well in the elections, regaining control of the Senate, Senate moderates relented and accepted the administration's provisions concerning personnel in the new department.<sup>48</sup> Congress passed the bill on November 22, 2002, and three days later the president signed it into law.

As enacted the law gave the president most of what he wanted. It designates twenty-five positions to be appointed by the president and confirmed by the Senate<sup>49</sup> and gives the secretary of homeland security authority to create the new personnel system the administration desired. The only limitation on this authority is that any proposed change in personnel rules can only take effect after two months, giving federal worker unions time to review the proposal and seek mediation. If after two months the unions and the administration still disagree, the administration has the authority to put the new rules into effect.<sup>50</sup> The secretary can reorganize, merge, or move the twenty-two agencies that were folded into the new department, as long as the relevant congressional committees receive sixty days' notice.<sup>51</sup> The only exceptions are the Coast Guard, the Transportation Security Administration, and the Secret Service, which must remain distinct entities within the new department. The law grants the new secretary authority to transfer up to \$640 million between accounts for two years, significantly less than what the administration requested.<sup>52</sup> It also exempts the department's advisory committees from provisions of the Federal Advisory Committee Act that require open meetings.<sup>53</sup>

#### *Why Did the President Seek More Executive Control?*

Why did Bush push so hard for managerial and personnel flexibility in the DHS? Were his actions driven by partisan concerns, by his own managerial

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background and temperament, or by the personal convictions of his closest advisers, notably Dick Cheney? Although all three considerations probably had some influence, it is also likely that Bush's pursuit of executive control was driven by the imperatives of his office. In the debate about whether to give the president the spending power he requested, Rep. David L. Hobson, R-Ohio, said, "All presidents want unlimited authority. . . . We have a responsibility to maintain a balance . . . and we're struggling with that." David R. Obey, D-Wis., said, "There's never been a president who didn't think that Article I of the Constitution was a serious mistake [in giving the appropriations power to Congress]." <sup>54</sup>

All presidents want more, rather than less, control of executive branch agencies, regardless of their partisan affiliation. Presidents are held accountable, fairly or unfairly, for the functioning of the entire government, particularly when it comes to national security. It is a lot easier for voters to assign credit or blame to the president than to their member of Congress, who is just one of 535 in a bicameral legislature. It should come as no surprise that presidents seek power commensurate with their accountability.

Other recent examples of agency creation also show this to be true. The process of establishing every major agency since 1989 has stalled at one time or another because of disagreements between the president and Congress about the degree of presidential control of personnel.<sup>55</sup> For example, in the 1998 Energy Department reorganization that created the National Nuclear Security Administration (NNSA), President Clinton and Energy Secretary Bill Richardson fiercely resisted attempts by Congress to insulate the new agency from presidential and secretarial control.<sup>56</sup> Clinton deployed his full arsenal of weapons, including the veto power, unilateral action, and support from like-minded members of Congress, to forestall congressional attempts to reduce his influence by limiting the number of presidential appointees, giving the administrator a fixed term, and cutting off the new agency from existing Department of Energy local and regional offices and from its staffing and support functions. In 1990 an agreement to elevate the Environmental Protection Agency to a cabinet department was derailed by conflicts between President Bush and Congress about presidential appointments in the new department and about whether a new, independent environmental statistics bureau would be headed by a career employee or by someone appointed by the president.<sup>57</sup>

Indeed, enhancing the president's administrative control has been on the agenda of most modern presidents, if not when they assumed office then by a few years into the term. This is not to say partisanship plays no role in the way

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presidents try to gain control over personnel. Democratic presidents have been less willing than Republicans to go after unions directly, but they have been perfectly willing to increase the number of political appointees who manage civil servants, to create by executive action agencies that have a lower percentage of civil servants than those created by statute, and to create entirely new agencies to avoid having to deal with existing ones that are unresponsive. The reason FDR created so many new agencies during the New Deal, rather than delegate authority to existing ones, was that he believed the existing agencies would not respond to his direction.

It is impossible to understand Bush's push for more executive control of the DHS apart from an understanding of the presidency and its incentives. In the same circumstances, all presidents who understood their strategic position would have sought more control over the proposed department. Presidents feel keenly the effects of previous attempts to limit executive control. What varies among presidents is their strategies for achieving control and their ultimate success or failure in doing so. Personal factors such as ideology, background, and personal proclivities may affect their choice of strategy and their success or failure. The context is defined by the strategic position of the presidency.

#### *Why Congress Did Not Stop the President*

Of course, President Bush did not get all he wanted in the Department of Homeland Security. His original requests concerning budgetary authority, reorganization powers, and personnel had to be adjusted to accommodate the interests of Congress, even if only by a small amount. For several reasons, however, Congress was not able to limit seriously the president's pursuit of administrative influence. First, it is extremely difficult for Congress to restrain presidents in national security matters, particularly in the aftermath of a crisis like the 9/11 terrorist attacks. Second, although all members have an institutional interest in restricting presidential incursions into appropriations, spending, and personnel, that interest is less among members of the president's party. Few Republicans in the House or Senate fought hard to limit the president's powers. Not surprisingly, the roles were reversed four years earlier when Congress was wrangling over the creation of the National Nuclear Security Administration. Because Clinton was president, congressional Republicans sought to limit executive influence over the agency, and Democrats fought to protect the president's prerogatives. Finally, the 2002 midterm elections sent a strong signal to Democrats that opposing President Bush on the issue of homeland security could damage their reelection chances. Taken together, partisan and reelection

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interests made it difficult for members of Congress to successfully oppose the president's request for more administrative power.

### **Conclusion**

In a speech at Princeton University on November 16, 2004, former counterterrorism czar Richard Clarke argued that significant vulnerabilities remain in American homeland security. He argued that the DHS had failed in areas in rail, port, and industrial plant security because of poor management. The DHS, Clarke said, had been created with too many presidential appointees; its politicized structure created a system in which unqualified appointees, rather than experienced career civil servants, were making policy decisions.

Obviously, the success or failure of the DHS will have huge consequences for personal security, the economy, and the environment. The case of the DHS illustrates not only how important presidential management of the bureaucracy is, but also why presidents care so much about issues of control. Presidents who are going to be held accountable for the functioning of the DHS and the rest of the bureaucracy have strong incentives to make sure that the bureaucracy responds to executive control. Understanding these kinds of institutional incentives is imperative for understanding the actions of modern presidents and the public policies they pursue.

Although some disagree with Clarke's assessment of DHS's progress, the case of homeland security illustrates that the struggle to control the bureaucracy does not necessarily lead to effective agencies. Both Congress and the president prefer effective bureaucracies to ineffective ones, but political considerations and legislative compromises, more often than concerns for effectiveness, explain how new agencies are designed. President Bush sought more executive control of the DHS, but his efforts were diluted by Congress. Congress continues to direct and limit the discretion of the DHS through legislation, appropriations, and informal oversight. The president may argue that these limits undermine his effectiveness, but Congress can respond that they prevent executive power from being exercised irresponsibly.

For better or worse, continuing struggle between the branches is what the Founders wanted. The Constitution was not designed to empower an administrative state. Rather, it was designed to limit the power of government to prevent it from being used tyrannically. A perfectly effective bureaucracy can also be a perfectly tyrannical one. Compromises, incremental measures, and limits on executive discretion are the products of the jealous contest for power created by the checks and balances in the Constitution.

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## Notes

1. The agency count excludes smaller boards and commissions, quasi-official agencies such as the Smithsonian Institution, and multilateral and bilateral agencies staffed jointly by personnel from the United States and other countries. *United States Government Manual, 2004–2005* (Washington, D.C.: U.S. Government Printing Office); U. S. Office of Personnel Management employment statistics from March 2004 *Employment and Trends* publication, [www.opm.gov/feddata/html/empt.asp](http://www.opm.gov/feddata/html/empt.asp).

2. Congress recognizes several advantages to delegating policymaking authority. Delegation allows Congress to benefit from agency expertise. Most members of Congress are generalists, only infrequently informed about the details of various important policy issues. Delegating policymaking authority allows Congress to benefit from having experts make decisions. Delegation also preserves the discretion necessary for effective program implementation. Further, it allows Congress to allocate its time and resources to other issues. Members often enlist the help of interest groups and other third parties to help them make sure that federal bureaucrats use their authority appropriately. See David Epstein and Sharyn O'Halloran, *Delegating Powers: A Transaction Cost Politics Approach to Policy Making under Separate Powers* (New York: Cambridge University Press, 1999); Mathew D. McCubbins, Roger Noll, and Barry Weingast "Administrative Procedures as Instruments of Political Control," *Journal of Law, Economics, and Organization* 3 (1987): 243–277.

3. The Constitution is silent on the matter of removal. It was not until *Myers v. United States* (1926) and *Humphrey's Executor v. United States* (1935) that the major contours of the removal power were outlined.

4. Since 1946 less than half of all federal agencies have been directly created by statute. In the other cases executive actors created agencies by executive order, departmental order, or reorganization plan, often with implicit or explicit approval from Congress. See David E. Lewis, *Presidents and the Politics of Agency Design: Political Insulation in the United States Government Bureaucracy, 1946–1997* (Stanford: Stanford University Press, 2003).

5. There were exceptions to this general pattern. Some agencies developed substantial autonomy because of their expertise, creation of sympathetic political interests, and shrewd politicking. See Daniel P. Carpenter, *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862–1928* (Princeton: Princeton University Press, 2001).

6. As quoted in Leonard D. White, *The Jacksonians* (New York: Macmillan, 1954), 318.

7. Source for employment statistics: Harold W. Stanley and Richard G. Niemi, *Vital Statistics on American Politics, 2001–2002* (Washington, D.C.: CQ Press, 2001).

8. For an unsurpassed discussion of the president's spending power see Louis Fisher, *Presidential Spending Power* (Princeton: Princeton University Press, 1975).

9. Congress did enact the Legislative Reorganization Act of 1946, which stabilized the congressional committee system and mandated that committees exercise "continuous watchfulness" over agencies in their jurisdiction.

10. See Peri E. Arnold, *Making the Managerial Presidency: Comprehensive Reorganization Planning, 1905–1996* (Lawrence: University Press of Kansas, 1998); Herbert Emmerich, *Federal Organization and Administrative Management* (University: University of Alabama Press, 1971); Terry M. Moe, "The Politics of Bureaucratic Structure," in *Can the Government Govern?* ed. John E. Chubb and Paul E. Peterson (Washington, D.C.: Brookings Institution Press, 1989); Terry M. Moe and Scott A. Wilson, "Presidents and the Politics of Structure," *Law and Contemporary Problems* 57 (1994): 1–44.

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11. There are primarily three types of appointed positions, those requiring Senate confirmation (about 1,150); those in the middle level of federal management, just below the Senate-confirmed appointees (700); and other, lower-level appointed staff in confidential or policymaking positions (1,500). Those in the first category are created only by statute and correspond with the “principal officers” defined in the Constitution. Only about 950 of them are full-time, salaried positions. Excluding ambassadors and U.S. attorneys, about 600 Senate-confirmed individuals serve in full-time policymaking positions.

12. Since the Supreme Court struck down the legislative veto in *INS v. Chadha* (1983), the president’s reorganization authority has lapsed. Any president now wishing to reorganize the bureaucracy must do it directly through legislation.

13. See Fisher, *Presidential Spending Power*, 1975.

14. Roscoe Drummond, “President and Politics: Rough Tactics Can Hurt,” *Washington Post*, March 3, 1962, A11; Roan Conrad, “Law Lapses to Reshape Agencies,” *Washington Post*, January 2, 1969, A11.

15. David E. Lewis, “The Adverse Consequences of the Politics of Agency Design for Presidential Management in the United States: The Relative Durability of Insulated Agencies,” *British Journal of Political Science* 34 (2004): 377–404.

16. *Ibid.*

17. For a good overview of the legislative history post-9/11 see “Homeland Security Department,” *CQ Weekly*, December 7, 2002, 3191.

18. See Adriel Bettelheim, “Work Rules Throw Wrench in Homeland Security Bill,” *CQ Weekly*, August 3, 2002, 2101; Adriel Bettelheim, “Senators Band Together to Reconcile Labor Rules and Homeland Security,” *CQ Weekly*, September 14, 2002, 2368–2369; Mary Dalrymple, “Homeland Security Department Another Victory for Administration,” *CQ Weekly*, November 16, 2002, 3002–3007.

19. For an overview see Brian Friel, “Labor Pains,” *Government Executive Magazine*, October 1, 2002, on-line edition.

20. “Government Employees Union Charges Bush Wants ‘Political Patronage’ Leeway in Creating Homeland Security Department,” *BNN White House Bulletin*, August 28, 2002, on-line edition.

21. Tanya N. Ballard, “Lieberman Pledges to Fight for Federal Workers,” *Government Executive Magazine*, March 11, 2003, on-line edition.

22. For details on the Bush Administration’s management agenda see *Budget of the United States Government FY 2003* (Washington, D.C.: U.S. Government Printing Office).

23. James C. Benton, “Pressure to Secure the Skies,” *CQ Weekly*, September 22, 2001, 2215; Adriel Bettelheim, “Workers’ Rights Issues Looming Over Homeland Security Debate,” *CQ Weekly*, September 7, 2002, 2294–2297.

24. Christopher Lee, and Vernon Loeb, “Pentagon Assails Work Rules: Senate Panel to Hear Rumsfeld Request for Freedom from Civil Service Laws,” *Washington Post*, June 4, 2003, A25, on-line edition. NASA has made similar requests. Tanya N. Ballard, “NASA Chief Defends Personnel Flexibility for Management Plan,” *Government Executive Magazine*, July 18, 2002, on-line edition.

25. See Dalrymple, “Homeland Security Department Another Victory,” 3005.

26. *Ibid.*

27. See Joseph Kahn, “Cheney Refuses to Release Energy Task Force Records,” *New York Times*, August 4, 2001, A10, for details on the GAO–Cheney dispute. See Alison Mitchell, “Letter to Ridge Is Latest Jab in Fight over Balance of Powers,” *New York Times*, March 5, 2002, A8, for details on Ridge’s refusal to testify formally before Congress.

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28. He also announced his intention to protect computer systems from attack and stockpile vaccines to protect the nation from biological weapons. See James Bennet, "Clinton Tells of Anti-Terrorism Plans," *New York Times*, May 23, 1998, A12.

29. U.S. Commission on National Security/21st Century, 2001, *Road Map for National Security: Imperative for Change*, available on-line at www.nssg.gov.

30. Chuck McCutcheon, "Panels Urge New Strategy on Terrorism," *CQ Weekly*, December 16, 2000, 2866.

31. Ibid.

32. Chuck McCutcheon, "Members Welcome Bush's Plan for Strengthening Counterterrorism and Urge More Concrete Action," *CQ Weekly*, May 12, 2001, 1098.

33. Ibid.

34. See "Homeland Security Department."

35. Adriel Bettelheim and Chuck McCutcheon, "Lawmakers Struggle to Define New Office of Homeland Security without Appearing Confrontational," *CQ Weekly*, October 13, 2001, 2406.

36. Chuck McCutcheon, "Defining Homeland Security," *CQ Weekly* September 29, 2001, 2252-2254.

37. Brody Mullins, "Dems Push for Homeland Defense Agency, Despite Bush's Protests," *Government Executive Magazine*, October 25, 2001, on-line edition.

38. Elisabeth Bumiller, and David E. Sanger, "The President, as Terror Inquiry Swirls, Seeks Cabinet Post on Security," *New York Times*, June 6, 2002, A1.

39. Ibid.

40. Bettelheim, "Work Rules Throw Wrench in Homeland Security Bill."

41. Mary Dalrymple, "Senate's Lengthy Homeland Security Debate Will Be a Power Struggle," *CQ Monitor News*, August 30, 2002, on-line edition.

42. Joseph J. Schatz, "Has Congress Given Bush Too Free a Spending Hand?" *CQ Weekly*, April 12, 2003, 859; Adriel Bettelheim, "Homeland Security's Big Hurdle: Ceding Power to the White House," *CQ Weekly*, July 27, 2002, 2028.

43. Martin Kady, II, "Lawmakers Try to Balance Security and the Public's Right to Know," *CQ Weekly*, September 14, 2002, 2370.

44. "Homeland Security Department."

45. The House bill gave Bush what he wanted concerning personnel and management. The bill would have allowed the secretary to transfer up to 2 percent of appropriated funds between accounts for two years. The Senate bill preserved civil service and union protections and made no provision for funds transfers. For a comparison of the two bills see "Homeland Security Provisions Compared," *CQ Weekly*, July 27, 2002, 2029.

46. "Homeland Security Department"; "Portman Reiterates that Bush Would Veto Homeland Security Bill that Lacks Flexibility," *BNN White House Bulletin*, October 1, 2002, on-line edition.

47. Some attribute Max Cleland's, D-Ga., defeat in the 2002 elections to the homeland security issue. See Dalrymple, "Homeland Security Department Another Victory," 3007.

48. The president said that the homeland security bill was "the single most important item of unfinished business" after the election. "Homeland Security"; see also Keith Koffler, "White House Urges Quick Approval of Homeland Bill," *Government Executive Magazine*, November 7, 2002, on-line edition.

49. Henry B. Hogue, *Homeland Security: Components and Management Positions in the New Department* (Washington, D.C.: Congressional Research Service, 2003).

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50. Dalrymple, "Homeland Security Department Another Victory," 3002–3003.

51. *Ibid.*, 3003.

52. Schatz, "Has Congress Given Bush Too Free a Spending Hand?"

53. "Nuances Run Deep in Homeland Bill," *CQ Weekly*, November 16, 2002, 3004.

54. Schatz, "Has Congress Given Bush Too Free a Spending Hand?"

55. I refer specifically to the Transportation Security Administration (2001), the National Nuclear Security Administration (1999), proposed legislation to create a department of the environment (1990), and the enactment of legislation elevating the Veterans Administration to cabinet status (1989). For Transportation Security Administration, see James C. Benton, "Senate-Passed Aviation Security Bill Declared a No-Go by House GOP," *CQ Weekly*, October 13, 2001, 2402; James C. Benton, "Bush Wants Joint Federal-Private Effort to Increase Airport Security," *CQ Weekly*, September 29, 2001, 2266–2267. For details on the National Nuclear Security Administration see Lewis, *Presidents and the Politics of Agency Design*. For details on the department of the environment proposals see *Congress and the Nation*, vol. 8, 1989–1992 (Washington, D.C.: CQ Press, 1990), 498; and see Paul Light, *Forging Legislation* (New York: Norton, 1992) for details about the Department of Veterans Affairs.

56. Lewis, *Presidents and the Politics of Agency Design*.

57. *Congress and the Nation*, 498.

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