Qualifications: Law and Practice of Selecting Agency Leaders

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January 3, 2011

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Workshop participants: This paper is part of a larger project on the loyalty and competence of federal agency officials. Much of the larger project involves joint work with George Krause, a political scientist, at the University of Pittsburgh. The co-authored work is more technical in nature. This paper, by contrast, is mainly a descriptive account of the law and practice of agency staffing in recent administrations, with implications for agency performance. I recently decided to split the paper into two—here is a draft of the first one. I look forward to your feedback.

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* This research was supported by the National Science Foundation, the Hellman Family Faculty Fund, the Berkeley Law Fund, and the University of California, Berkeley, Committee on Research. I am grateful to Daniel Farber, Jerry Mashaw, Cass Sunstein, the Junior Faculty Working Group at Berkeley Law, participants at the Harvard Law School’s Constitutions and Consequences Conference, and participants in faculty workshops at Duke University School of Law, Harvard Law School, and University of Pennsylvania Law School for feedback on this project. Dena Chen, Jenny Rosloff, Nicole Schwartzberg, Megan Watts, and John Yow provided outstanding research assistance.
In August 2005, Hurricane Katrina and its aftermath, initially a creation of nature but eventually also of the state, brought massive death, suffering, and destruction to the Gulf Coast region, particularly to New Orleans. The Federal Emergency Management Agency had the lead response role in the disaster. At its head was Michael Brown. When Brown was chosen for the top post, the previous leader, Joe M. Allbaugh, who had run President George W. Bush’s 2000 campaign, announced that “the President couldn’t have chosen a better man to help . . . prepare and protect the nation.”

Brown’s qualifications? He was a Republican and a 30-year friend of Allbaugh, and that friendship helped him get selected first as General Counsel and then as Deputy Administrator of FEMA after the 2000 election. But that was essentially his only emergency experience. Prior to the election, according to his FEMA biography, Brown claimed to have served “as an assistant city manager with emergency services oversight.” An investigation by TIME magazine revealed, however, that he was an “assistant to the city manager.” The head of public relations for the city in question explained: “The assistant is more like an intern. Department heads did not report to him.” To be sure, he did know about horses, having served as a commissioner of the International Arabian Horse Association.

In response to Brown’s seeming lack of relevant experience, Congress mandated in post-Katrina legislation that the FEMA “Administrator shall be appointed from among individuals who have . . . a demonstrated ability in and knowledge of emergency management and homeland security; and . . . not less than 5 years of executive leadership and management experience in the public or private sector.” The requirement, which rankled the President and proponents of executive power, was likely not necessary for a shift in appointments strategy. After Brown was pushed out, Bush politically needed someone the public could trust. Homeland Secretary Michael Chertoff approached several individuals, who declined. In the end, Bush nominated R. David Paulison, a Democrat, who had risen over three decades from firefighter to fire chief in Miami and then had taken charge of the U.S. Fire Administration in 2001.

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1 Daren Fonda & Rita Healy, How Reliable Is Brown’s Resume?, TIME, Sept. 8, 2005. The In a quirk of the 2003 Act that created the Department of Homeland Security, Brown did not have to be confirmed when he was promoted from Deputy Administrator to Administrator.

2 Elisabeth Bumiller, Casualty of Firestorm: Outrage, Bush and FEMA Chief, N.Y. Times, Sept. 10, 2005. Months after Katrina, Michael Brown’s tarnished reputation was partially restored, as the Secretary of Homeland Security Michael Chertoff, a more experienced political appointee, faced additional attacks.

3 Fonda & Healy, supra note __.

4 Bumiller, supra note __.


6 President’s Statement on H.R. 5441, the “Department of Homeland Security Appropriations Act, 2007” (Oct. 4, 2006) (“[The Post-Katrina Act] vests in the President authority to appoint the Administrator [of FEMA], by and with the advice and consent of the Senate, but purports to limit the qualifications of the pool of persons from whom the President may select the appointee in a manner that rules out a large portion of those persons best qualified by experience and knowledge to fill the office. The executive branch shall construe [this legislation] in a manner consistent with the Appointments Clause of the Constitution.”). It is not clear the language is that limiting. Indeed, Brown may have met the new statutory language at the time of his selection.


8 Spencer S. Hsu, Acting Director of FEMA Nominated To Be Its New Chief, Wash. Post, April 7, 2006.
Introduction

The nation’s capital is packed with bureaucrats—and some political appointees. The official federal civilian workforce contains around 2.6 million employees, staffing fifteen cabinet departments and a slew of other agencies from the Environmental Protection Agency to the Federal Trade Commission. There are another approximately twelve million individuals serving in the military or in the “unofficial” federal workforce, comprised primarily of government contractors and recipients of government grants. Despite public beliefs, almost all of these official and unofficial workers are selected on some form of merit. Political appointees—in full-time Senate-confirmed positions, selected senior executive service slots, or other jobs—number only about three thousand.

As a percentage of the federal government workforce, official or unofficial, the layer of political staff is therefore remarkably thin. As compared to other countries, however, the layer is unusually thick; by some measures, American appointees outnumber any other developed country’s political staff by a factor of over ten to one. Whether thin or thick, political appointees in federal agencies play a critical role in governance. That role has two important dimensions. First, the agencies they run develop and enforce policy decisions, including those with substantial economic or social effects. Second, the appointed leadership of agencies permits politicization of the bureaucracy and, consequently, provides a potentially key defense of the bureaucracy’s legitimacy.

Take each dimension in turn. It is almost banal to note the wide scope of the federal administrative state. From the seemingly trivial to critical matters, agencies shape public policy. By some measures, they do more lawmaking and judging than Congress and the courts, respectively. They sign off on important rulemakings and direct agency guidance documents, policy statements, and enforcement actions. In recent months, the Center for Medicaid and Medicare Services has enacted a regulation that would allow the government to reimburse doctors who counsel patients on end-of-life care, a topic that was excised from

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11 David E. Lewis, The Politics of Presidential Appointments: Political Control and Bureaucratic Performance 20, 22, 56 (2008). This total does not include foreign service and military officers who go through the Senate confirmation process when they are promoted. That promotion process is typically not political.
12 See Lewis, supra note __, at 3 (noting that France, Germany, and Britain each have between 100 and 200 political appointees); see also Delmer D. Dunn, Politics and Administration at the Top: Lessons from Down Under 10, 74 (1997) (tracking increased politicization of bureaucratic appointments in Australia, though noting that the scope is still dwarfed by the American system). Cf. Hans-Ulrich Derlien, The Politicization of Bureaucracies in Historical and Comparative Perspective, in Agenda for Excellence 2: Administering the State 149, 154 (B. Guy Peters & Bert A. Rockman eds., 1996) (“From a bird’s eye view, the U.S. practice of having political appointees far down the administrative hierarchy is not so completely different from the European practice of party-politicizing the executive bureaucracy.”).
13 In 2007, agencies issued 2926 rules, of which 61 rules were major, having at least a $100 million or other considerable adverse effect on the economy. By contrast, Congress pushed through 138 public laws. In a similar period, agencies presided over 939,000 adjudications while Article III and bankruptcy judges conducted only approximately 95,000 trials and other adversarial proceedings. Anne Joseph O’Connell, Vacant Offices: Delays in Staffing Top Agency Positions, 82 S. Cal. L. Rev. 913, 936 (2009).
the health care legislation because of the controversy over “death panels.” The EPA has set
a timetable for cutting back greenhouse gas emissions from power plants, announcing that it
plans to issue proposed rules this July and final regulations in May 2012. And financial
agencies have been scrambling to complete at least 200 regulations prescribed by the Dodd-
Frank Wall Street Reform and Consumer Protection Act. Appointees thus possess
significant authority over a range of policy areas, including public health, the environment,
and finance, to name just a few.

This authority over public policy—the first dimension of the role agencies play in
governance—has important implications. These implications form the basis of the second
dimension. The authority provides a mechanism for politicizing the federal bureaucracy.
Through agency appointments, presidents can implement particular policy agendas. On the
front end, presidents (and, to some extent, the Senate through the confirmation process) can
select individuals who share their policy preferences or who will follow their directives. On
the back end, presidents can remove for any reason most appointees in cabinet departments
and executive agencies, such as the EPA, and can typically fire for cause the others, who
mostly lead independent regulatory commissions, such as the FTC. And, during their tenure,
the White House and Congress can press appointees to do their bidding.

At the same time, the authority wielded by appointees provides potential legitimacy
to the vast federal bureaucracy. Public trust of agencies rests, in part, on their accountability
to the two elected branches, the executive and the legislature. Accountability of agencies to
the president and Congress takes various forms—congressional delegation and presidential
directives, centralized regulatory review in the Executive Office of the President and under
the Congressional Review Act, informational demands from the White House and
congressional committees, for instance. Appointees are generally on the front lines in these
processes. In addition, the selection and removal of appointees by the president, along with
Senate approval required for top-level appointments, are some of the most direct
mechanisms for agency leaders to “represent” the public. Indeed, on a major view of
agency deference, political accountability of agencies (and appointees) justifies relatively
weak judicial review of many agency actions.

Despite the substantial power of agency leaders and the consequences of that
authority for governance, administrative law doctrine and scholarship overlook appointees.

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16 Edward Wyatt, A Scale-Back Is Possible in Financial Overhaul Law, N.Y. Times, Nov. 3, 2010; Industry &
Financial Markets Association, Regulatory Action Database, available at
http://www.sifma.org/members/dodd-frank.aspx (totaling rulemakings required of CFTC, FDIC, FRB,
FSOC, and SEC).
17 Cf. Jerry L. Mashaw, Lecture, Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the
Administrative State, 70 Fordham L. Rev. 17, 21 (2001) (noting agency “connections to the electorate” but
emphasizing that agencies cannot rely too heavily on those connections for legitimacy of their actions).
18 See generally Anne Joseph O’Connell, Political Cycles of Rulemaking: An Empirical Portrait of the Modern
accountability to Congress and the president).
19 Public participation in notice and comment rulemaking is another direct mechanism.
note __, at 980-81. To be certain, political accountability of agencies is not the only way to justify deference
to agency action. The primary other justification rests on agency expertise. See Skidmore v. Swift, 323 U.S. 134,
137-38 (1944).
Some attention is paid to who can select agency leaders and who can remove them (and for what reasons). But essentially no attention is devoted to the people who are actually selected.\(^{21}\) Even in discussions about the politicization of agencies, as David Barron and I have separately noted, public law scholars have generally ignored agency personnel.\(^{22}\) Legal scholars are more likely to dissect mechanisms such as Office of Management and Budget review of rulemakings.\(^{23}\) But such centralized devices arguably are not as effective as staffing decisions for controlling the bureaucracy.\(^{24}\) Even outside the politicization context, appointees are important to administrative law—for example, to understanding agency performance and legitimacy.

Barron posits that “the legal issues presented by staffing practices are neither as interesting nor substantial as those posed by presidential efforts to override autonomous agency judgments.”\(^{25}\) In my work on vacancies in appointed agency positions, I have tried to undermine this perception.\(^{26}\) Although I shift focus here from empty offices to filled ones, the connected projects have a similar objective: to demonstrate the importance and complexity of legal and policy issues surrounding agency staffing, within and beyond the politicization context. As with my research on leadership vacancies, this project relies on extensive new data, here about agency officials who served in executive agencies at some point in the past five completed administrations.

The paper is the first of a two-part series. It starts by providing fundamental context on agency staffing at the highest levels. It focuses on constraints arising from law and practice. At first glance, de jure requirements appear minimal. The Appointments Clause governs the selection process, limiting who can hire such leaders, but the Constitution does not much narrow who can be hired. Nevertheless, there are a significant number of statutory requirements for various appointed positions in the administrative state, ranging from demographic characteristics to prior experience. In addition to these legal constraints, the first section looks at White House and Senate practices surrounding political appointments, which also circumscribe the individuals who serve in those positions. In short, it shows how administrative law casebooks and scholarship overemphasize the minimal constitutional constraints on agency appointments and underemphasize statutory mandates and institutional traditions.

From these constraints and practices, the next section sketches classic “types” of agency officials—careerists plucked out of the civil service for plum political jobs, former congressional staffers transplanted into the executive branch, individuals with no federal experience who have either worked for a president when he was a governor or who have spent their entire careers in related private sector employment placed in federal government

\(^{21}\) By contrast, legal scholars have dissected the backgrounds of federal judges, linked those backgrounds with voting behavior, and compared the qualifications and performance of appointed and elected judges. See, e.g., Cass R. Sunstein et al., Are Judges Political?: An Empirical Analysis of the Federal Judiciary (2006); Stephen J. Choi et al., Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary, J. L., Econ. & Org. (forthcoming).

\(^{22}\) David J. Barron, Foreword: From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization, 76 Geo. Wash. L. Rev. 1095, 1104 (2008); O’Connell, supra note __, at 921.

\(^{23}\) Barron, supra note __, at __.

\(^{24}\) Barron, supra note __, at 922 (drawing heavily on Terry M. Moe, The Politicized Presidency, in The New Direction in American Politics 235 (John E. Chubb & Paul E. Peterson eds., 1985)).

\(^{25}\) Barron, supra note __, at 1104.

\(^{26}\) O’Connell, supra note __, at 922, 974-84.
service, to name a few. The types draw on three important qualifications—issue expertise and management skills, political acumen and connections, and loyalty. The first is often reified, though management skills tend to get short shrift, the second is generally undervalued, and the third is typically vilified. The section aims to show how all three potentially provide helpful skills or legitimacy in running federal agencies.

The rest of the paper is devoted to a detailed examination of political leaders from the past five completed administrations, from President Carter to President George W. Bush. In short, was FEMA’s Michael Brown, described at the start, typical? Drawing from an extensive new database I have constructed on approximately 850 agency leaders from 1977 to 2009, it begins by describing the backgrounds of recent appointees. It then looks at how the “types” of appointees described in the previous section vary by agency and by administration. In short, it provides needed but previously missing information about the men and women who have served in critical agency roles over a 32-year period.

The second paper takes off where this one ends—by examining how various types of agency officials influence performance, considering if this is how we want the top layer of the administrative state to be chosen, and suggesting several proposals for improving the process and results of agency appointments, at the front end in selection, and at the back end in training and other incentives. In other words, the first paper largely examines the current law and practice of agency appointments, using a novel database of agency leaders, and the second paper considers the consequences for that law and practice on agency performance and proposes changes to both.

I. Constraints on Agency Appointments

The selection process for top agency leaders appears at first glance straightforward: the president nominates and the Senate confirms individuals for high-level positions in the administrative state. Some of those individuals, such as cabinet secretaries and administrators of executive agencies, serve entirely at the pleasure of the president; others, such as many independent regulatory commissioners, can be fired only for cause. This standard account is what administrative law casebooks detail. It sets up the constitutional framework of appointments, but it provides only the narrowest view on how agency leaders get selected (and removed) because it misses considerable complexities, primarily from statutory constraints as well as from White House and Senate personnel practices. This part examines these complexities, focusing first on de jure and then on de facto constraints on the appointments process.

A definitional note is in order. Top agency leaders are not the only political appointees in the federal bureaucracy, and political appointees are not the only individuals outside of the civil service. Approximately half of the official civilian federal workforce is not hired under traditional merit-based rules. But only some of those workers qualify as non-merit, or political, employees. The political slots include Senate-confirmed presidential

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27 U.S. Const. art II, § 2, cl. 2.
29 See generally O’Connell, supra note __, at 923-27 (laying out personnel systems in the administrative state).
30 Lewis, supra note __, at 21.
31 The following sub-groups are not considered political appointments: career employees for the Senior Executive Service (which comprise 90 percent of the SES), Schedule A employees (which cover particular occupations such as attorneys where examinations are not feasible), Schedule B employees (which include positions where examinations cannot be used to compare applicants, typically in new agencies), and non-
appointments (mostly full-time policy positions but some part-time advisory jobs, approximately 1100 in total); positions by presidential appointment alone, including White House staff (about 300); at most ten percent of the Senior Executive Service (no more than about 800); and Schedule C jobs (confidential or policy-determining positions, about 1600). When you exclude U.S. Marshals, U.S. Attorneys, Ambassadors, non-policy positions, and part-time advisory positions, there are approximately three thousand political appointees. This paper focuses on full-time Senate-confirmed appointees in policy positions.

A. Legal Requirements

1. Constitutional Mandates

Except for members of Congress, the Constitution imposes more restrictions on who can choose agency leaders than on who can be chosen. These restrictions on the choosers turn on what kind of position is at issue. Because full-time Senate-confirmed appointees in policy positions, the target of this paper, exercise[e] significant authority pursuant to the laws of the United States,” they are “officers” under the Constitution. The Constitution splits officers into two categories: principal and inferior. The distinction between the two categories "is far from clear, and the Framers provided little guidance into where it should be drawn.” The difference currently rests on a direction and supervision test. In other words, inferior officers are “officers whose work is directed and supervised at
some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.”

The difference governs how particular officers can be selected. The Appointments Clause specifies that the president, with Senate confirmation, appoints principal officers and that Congress, if it so chooses, can require by law that the “President alone,” a “Court[.] of Law”, or a “Head[.] of a Department” select inferior officers. The only specified alternative to these procedures in the Constitution is the Recess Appointments Clause, which gives the president the “power to fill up all vacancies that may happen during the Recess of the Senate, by granting commissions, which shall expire at the end of their next session.” To be clear, the appointment mechanism often does not determine the type of officer, even assuming the particular mechanism is constitutional. If Congress has not chosen one of the three alternatives, for instance, all of which would require the Senate to give up its role in the appointments process, inferior officers will be Senate-confirmed appointees. Thus, the Senate-confirmed appointees at the center of this paper are a combination of principal and inferior officers.

Although the Constitution sets age, citizenship, and residency requirements for the President, Vice-President, Representatives, and Senators, it does not establish similar mandates for executive officers (or judges). The only constitutional restrictions on agency leaders involve members of Congress. The Ineligibility Clause (also termed the Emoluments Clause) bars members of Congress “during the Time for which [they were] elected,” from serving in “any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time.” In light of these constitutional mandates for members of Congress, we focus on another alternative to the traditional appointments process, though not specified in the Constitution or in statute—that of using “high-level White House staff to shape important decisions.”

appointed by the President with the Senate’s consent. In particular, we noted that ‘[t]he power to remove officers’ at will and without cause ‘is a powerful tool for control’ of an inferior.” (citations removed).


39 U.S. Const. art II, § 2, cl. 2.

40 U.S. Const. art II, § 2, cl. 3. This is considerable debate about the scope of the Recess Appointments Clause. See Patrick Hein, Comment, In Defense of Broad Recess Appointment Power: The Effectiveness of Political Counterweights, 96 Cal. L. Rev. 235, 238-40 (2008) (synthesizing debates over whether the Clause applies only to vacancies that began during a recess or to any vacancies that exist during a recess and over whether the Clause covers only intersession recesses or also breaks within a particular session).

41 U.S. Const. art II, § 1, cl. 5 (“No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty five years, and been fourteen Years a resident within the United States.”). There is another alternative to the traditional appointments process, though not specified in the Constitution or in statute—that of using “high-level White House staff to shape important decisions.” See O’Connell, supra note __, at 930-31 (discussing the use of policy advisors or “czars”).

42 U.S. Const. amend. 12 (“But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.”).

43 U.S. Const. art I, § 2, cl. 2 (“No person shall be a Representative who shall not have attained to the age of twenty five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.”).

44 U.S. Const. art I, § 3, cl. 3 (“No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.”).

45 U.S. Const. art. I, § 6, cl. 2.
of this bar, for example, Congress had to cut the salary for the Secretary of State before former Senator Hillary Clinton could join President Obama’s cabinet.\textsuperscript{46} The Incompatibility Clause excludes current members of Congress from also “holding any Office under the United States.”\textsuperscript{47} That bar does not apply to Article III judges, allowing, for example, John Marshall to serve for a time as both Chief Justice and Secretary of State.\textsuperscript{48}

2. Statutory Mandates

There may be few constitutional imperatives on who can be picked to fill top agency positions, but there are many statutory instructions. William Howell and David Lewis found that over 70 agencies established by legislation between 1946 and 1995 (40 percent of agencies created by legislation in that period) had restrictions placed on who could serve in leadership positions. By contrast, only twenty agencies created unilaterally by the White House (8 percent of all such agencies) had similar mandates.\textsuperscript{49} Statutory restrictions can also come after creation of the agency—for example, the new requirements imposed on the head of FEMA after Hurricane Katrina.\textsuperscript{50} Despite the prevalence of statutory mandates, especially on the more major agencies created by Congress, administrative law casebooks and scholars have generally ignored them.\textsuperscript{51}

The restrictions cover a broad range of affirmative attributes—including demographic characteristics, party affiliation, expertise, and experience—as well as of conflicts of interest and other bars.\textsuperscript{52} This section covers each of these categories. Some are general requirements for all agencies; most are targeted at specific positions. On rare occasions, the statute will contain an explicit waiver provision.\textsuperscript{53} Congress has also passed legislation in specific instances waiving particular requirements.\textsuperscript{54} In this brief survey of statutory requirements, I focus on those mandates that apply to top agency positions, though

\textsuperscript{46} O’Connell, supra note __, at 928. Some commentators find this practice unconstitutional. [Add cite].
\textsuperscript{47} U.S. Const. art. I, § 6, cl. 2.
\textsuperscript{48} O’Connell, supra note __, at 928-29.
\textsuperscript{49} Howell & Lewis, Agencies by Presidential Design, 64 J. Pol. 1095, 1098-99 (2002).
\textsuperscript{50} Restrictions are not always increasing over the life of an agency. For example, the Under Secretary for Health at the Veterans Affairs Department used to have to be a “doctor of medicine” with “demonstrated ability in the medical profession, in health-care administration and policy formulation, and in health care fiscal management.” The Veterans Health Programs Improvement Act of 2004 eliminated the degree requirement, and made the ability requirement easier to meet by requiring only one of the three areas. Pub. Law No. 108-422, 118 Stat. 2379; 38 U.S.C. § 305(a).
\textsuperscript{51} But see Hanah Volokh, Appointments Clauses: Statutory Qualifications for Federal Officers, 10 U. Pa. J. Const. L. 745 (2008); [add other cites].
\textsuperscript{52} I analyze their legality in the second paper in this project.
\textsuperscript{53} The Chairman of the Joint Chiefs of Staff is supposed to have previously served as Vice Chairman of the JCS, Chief of Staff for one of the services, or commander of a unified or specified combatant command. But the president “may waive” those requirements if he “determines such action is necessary in the public interest.” 10 U.S.C. §152. Similar experience and waiver provisions exist for the following positions: Vice Chairman of the JCS (10 U.S.C. § 154), the Commandant of the Marine Corps (10 U.S.C. § 5043), Chief of Staff of the Air Force (10 U.S.C. § 8033), the Chief of Staff of the Army (10 U.S.C. § 3033), and the Chief of Naval Operations (10 U.S.C. § 5033). Many of the restrictions (but not the age restriction for one member) imposed on the Board of Directors for the Corporation for National and Community Service are qualified by the phrase “[t]o the maximum extent practicable.” 42 U.S.C. § 12651a; see infra note __.
\textsuperscript{54} See Henry B. Hogue, Statutory Qualifications for Executive Branch Positions, CRS Report No. RL33886 (Jan. 22, 2008), at 12-13 (describing legislation waiving requirements for the following appointments: George Marshall as Secretary of Defense, James Busey and Thomas Richards as FAA Administrator, Richard Truly as NASA Administrator, and Charlene Barshefsky as U.S. Trade Representative).
sometimes note restrictions on lower-level political jobs. Three caveats should be noted. First, the survey provides a snapshot of existing requirements. It does not investigate why restrictions are adopted. Second, the survey does not consider limits on agency staffing imposed in funding legislation. Third, the survey considers restrictions by category but positions with qualifications often have restrictions from more than one category.

a. Demographic Restrictions

The most widely applicable demographic statute concerns employment of family members within the same agency. Under the Federal Anti-Nepotism Statute, a “public official may not appoint . . . to a civilian position in the agency in which he is serving or over which he exercises jurisdiction or control any individual who is a relative.” Most other demographic requirements apply to particular agencies. Although non-citizens cannot be elected to the White House or Congress or be employed in the civil service, they can serve in some appointed positions in the administrative state. Some offices are explicitly barred, however. The head of the Federal Aviation Administration, the head of the Office of Federal Housing Enterprise Oversight, the director of the Office of Thrift Supervision, commissioners of the Federal Communications Commission and the Nuclear Regulatory Commission, board members of the Farm Credit Administration and the Defense Nuclear Facilities Safety Board, and the Under Secretary of Commerce for Intellectual Property (who is also the Director of the Patent and Trademark Office), for example, must be citizens.

55 Presumably, Congress imposes more restrictions during divided government or in areas where it wants to have more control. Cf. Hugh Heclo, The In-and-Outer System: A Critical Assessment, in The In-and-Outers (G. Calvin Mackenzie, ed. 1987), at 195, 202-03 (arguing that qualification requirements are established after the White House and Congress struggle over how a position should be filled and citing the creation of technical background requirements in soil conservation after President Reagan appointed a Republican farmer and friend to head the Soil and Conservation Service); Howell & Lewis, supra note __ (arguing that Congress uses qualification requirements to constrain the White House).

56 See, for example, Pub. Law No. 110-161, Division D, § 705 (barring payment to officers and employees in the Treasury Department unless they meet particular citizenship or nationality requirements).

57 For example, the Commissioners of the Commodity Futures Trading Commission must meet two of the categories below (expertise and partisan balance requirements). 7 U.S.C. § 2. The Undersecretary for Health for the Department of Veterans Affairs must satisfy three of the categories of restrictions described below (ability, experience, and apolitical mandates). 38 U.S.C. § 305. The Directors of the Federal Agricultural Mortgage Corporation must meet four of the categories (conflict of interest, representation, partisan, and experience restrictions). 12 U.S.C. § 2279aa-2. For the aggregation of restrictions for some of the positions described here, see Hogue, supra note __.

58 5 U.S.C. § 3110. Thus, it seems that the president cannot appoint a relative for an Executive Branch position. Similarly, a head of a department cannot name a relative to an inferior office in the same agency.

59 Although there is no general statutory provision covering all agencies, citizenship requirements (or limited permissible nationalities) appear to be a somewhat common restriction—sometimes imposed through appropriations acts. See supra note __.


62 12 U.S.C. § 1462a(c)(1)

63 47 U.S.C. § 154

64 42 U.S.C. § 5841(a)(1).


Some positions are tied to geographic regions. For instance, seven of the nine Senate-confirmed directors of the Tennessee Valley Authority have to be “legal resident[s] of the service area of the Corporation.”68 The three of five Senate-confirmed directors of the Securities Investor Protection Board, a government corporation, who are “representative of different aspects of [] the securities industry” cannot all be from the “same geographical area of the United States.”69 In addition, almost all U.S. Attorneys and U.S. Marshals have to “reside in the district for which [they are] appointed.”70

Unlike for elected legislative and executive positions, there is no general minimum age requirement for agency leaders. But at least one Senate-confirmed position has an age requirement. For the Corporation for National and Community Service, an independent federal agency run by a Board of Directors and Chief Executive Officer, one board member has to be between 16 and 25 years old.71 Other mandates are tied to gender or minority status. The Senate-confirmed Director of the Department of Labor’s Women’s Bureau, established in 1920, must be a woman.72 The majority of Senate-confirmed members of the National Council on Disability are required to have disabilities and the Council “shall be broadly representative of minority and other individuals and groups.”73 Some positions are reserved for members of Indian tribes.74 Although not mandatory, in making appointments, which must be confirmed by the Senate, to the National Council on the Arts and the National Council on the Humanities, the president “shall give due regard to equitable representation of women, minorities, and individuals who are involved with the” arts and humanities, respectively.75

b. Party Affiliation Restrictions

While demographic restrictions are relatively rare, excepting family connections and citizenship requirements, statutory mandates concerning party affiliation are much more common. Some of these mandates require the president to ignore party affiliation. Inspectors General across the federal government, who must be confirmed by the Senate,

69 15 U.S.C. § 78ccc. There are other examples, as well. The ten Senate-confirmed members of the National Museum and Library Services Board must reflect “various geographic regions of the United States”; specifically, no more than three members can be from the same state at any given time. 20 U.S.C. § 9105. All members of the Metropolitan Washington Airport Authority’s Board of Directors, appointed by the president, D.C. mayor or Virginia or Maryland governor, “must reside within the Washington Standard Metropolitan Statistical Area, except that [one] member . . . must be a registered voter of a State other than Maryland, Virginia, or the District of Columbia.” 49 U.S.C. § 49106.
70 28 U.S.C. §§ 545(a), 561(i) (some exceptions are made, including the District of D.C. and the Southern District of New York, where appointees can live within a set distance).
71 42 U.S.C. § 12651a. This member must also have “served in a school-based or community-based service-learning program” or been a “participant or a supervisor in a program.” Id.
72 29 U.S.C. § 12. This requirement is likely unconstitutional. See Donald J. Kochan, The Unconstitutionality of Class-Based Statutory Limitations on Presidential Nominations: Can a Man Head the Women’s Bureau at the Department of Labor?, 37 Loyola U. Chi. L.J. 43, 44 (2005). In any event, no man has ever been selected for this position.
74 7 U.S.C. § 209bb-1 (requiring member of Northern Great Plains Regional Authority to be a “member of an Indian tribe, who shall be a chairperson of an Indian tribe in the region or a designee of such a chairperson”); 20 U.S.C. § 4412 (mandating that majority of voting members of Board of Trustees of Institute of American Indian and Alaska Native Culture and Arts Development are Indians); 25 U.S.C. § 2702 (specifying at least two members of the National Indian Gaming Commission must be “enrolled members of any Indian tribe”).
are to be selected “without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations.” Likewise, the Under Secretaries for Health and Benefits at the Veterans Affairs Department, high-level Senate-confirmed positions, must be chosen “without regard to political affiliation or activity.”

Many, but not all, independent regulatory commissions and boards—including the Consumer Products Safety Commission, the Federal Communications Commission, the FTC, the Securities and Exchange Commission, to name just a few—require that no more than a bare majority of top positions be given to individuals from the president’s party. In the SEC’s case, the order of appointments should alternate between the two parties “as nearly as may be practicable.” Other statutes do not specify party affiliation for positions but do require a particular combination of interests. For example, the president shall select the Board of Governors for the Federal Reserve, as a group, subject to Senate confirmation, with “due regard” for a “fair representation of the financial, agricultural, industrial and commercial interests, and geographical divisions of the country.” Some statutes mandate both particular partisan affiliations and interest representation. The three-member Senate-confirmed board of the National Credit Union Administration, for instance, cannot have more than two members from the same political party and must, as a whole, be “broadly representative of the public interest.”

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76 Paul C. Light, Monitoring Government 3 (1993); see, e.g., 22 U.S.C. § 3929 (State Department IG); 50 U.S.C. § 403q (CIA IG).
77 38 U.S.C. §§ 305, 306. Political affiliation is supposed to play no role in the selection of the Archivist of the United States (the head of the National Archives and Record Administration) and the Director of Operational Test and Evaluation in the Department of Defense. 44 U.S.C. § 2103(a); 10 U.S.C. § 139(a)(1).
78 For example, the NLRB does not have partisan limits on its composition. 29 U.S.C. § 153(a).
82 15 U.S.C. § 78(d). Also, the statute requires that “in making appointments members of different political parties shall be appointed alternatively as nearly as may be practicable.” Id.
83 Others include the Commodities Future Trading Commission, 7 U.S.C. § 4(a); the Defense Nuclear Facilities Safety Board, 42 U.S.C. § 2286(b)(1); the Election Assistance Commission, 42 U.S.C. § 15323(b); the Equal Employment Opportunity Commission, 42 U.S.C. § 2000e-4(a); the Board of Directors for the Export-Import Bank, 12 U.S.C. § 635a(c)(2); the Farm Credit Administration, 12 U.S.C. § 2242(a); the Board of Directors for the Federal Deposit Insurance Corporation, 12 U.S.C. § 1812(1); the Federal Energy Regulatory Commission, 42 U.S.C. § 7171(b)(1); the Federal Housing Finance Board, 12 U.S.C. § 1422a(b); the Federal Labor Relations Authority, 5 U.S.C. § 7104(a); the Federal Maritime Commission, 46 U.S.C. § 301(b); the Merit Systems Protection Board, 5 U.S.C. § 1201; the National Credit Union Administration, 12 U.S.C. § 1752a(b); the National Mediation Board, 45 U.S.C. § 154; the National Transportation Safety Board, 49 U.S.C. § 1111(b); the Nuclear Regulatory Commission, 42 U.S.C. § 5841(b)(2); the Postal Regulatory Commission, 39 U.S.C. § 502(a); and the Board of Governors for the Postal Service, 39 U.S.C. § 202. A handful of commissions, such as the Federal Election Commission, 2 U.S.C. § 437c(a)(1), and the International Trade Commission, have an even number of leaders, with governing statutes requiring that the leaders be drawn evenly from the two political parties.
84 15 U.S.C. § 78(d). Also, the statute requires that “in making appointments members of different political parties shall be appointed alternatively as nearly as may be practicable.” Id.
c. Expertise and Experience Restrictions

Perhaps most relevant to the authority delegated to them, certain positions must be filled by individuals with specific expertise or experience. Some Senate-confirmed positions include both types of requirements. All agency Chief Financial Officers, for instance, must “possess demonstrated ability in general management of, and knowledge of and extensive practical experience in financial management practices in large governmental or business entities.” The post-Katrina legislation imposes both knowledge and experience requirements on the FEMA Administrator position. The Director of the Fish and Wildlife Service “by reason of scientific education and experience” has to be “knowledgeable in the principles of fisheries and wildlife management.”

Each member of the president’s Council of Economic Advisers is required to be “as a result of his training, experience, and attainments, . . . exceptionally qualified to analyze and interpret economic developments [and] to appraise programs and activities of the government.”

Most mandates, however, incorporate either expertise or experience restrictions. Sometimes the choice is left to the president. For example, the Director and Deputy Director of National Intelligence, positions created in 2004, must “have, by training or experience, an appreciation of military intelligence activities and requirements.” The Under Secretary of Agriculture for Food Safety must have “specialized training or significant experience in food safety or public health programs.”

87 To be certain, expertise and experience may overlap. I place knowledge or training requirements under expertise and employment under experience. Sometimes, statutory requirements do not specify either category. See 22 U.S.C. § 2651a (various State Department officers must have “substantial professional qualifications” in particular fields); 22 U.S.C. § 6203 (members of Broadcasting Board of Governors must be “distinguished in the fields of mass communications, print, broadcast media, or foreign affairs”); 26 U.S.C. § 7803 (the Commissioner of the Internal Revenue Service must have a “demonstrated ability in management”); 42 U.S.C. § 7132 (the Undersecretary for Nuclear Security at the Department of Energy must have “extensive background in national security, organizational management, and appropriate technical fields” and be “well qualified to manage the nuclear weapons, nonproliferation, and materials disposition programs of the National Nuclear Security Administration”).

89 6 U.S.C. § 313(c)(2).
90 16 U.S.C. § 742b(b).
91 30 U.S.C. § 1. There are other examples. The leader of the Government Printing Office, called the Public Printer, “must be a practical printer and versed in the art of bookbinding.” 44 U.S.C. § 301. The Director of the Bureau of Transportation Statistics must have “training and experience in the compilation and analysis of transportation statistics.” 49 U.S.C. § 111. Members of the National Safety Transportation Board must have “technical qualification, professional standing, and demonstrated knowledge” in accident reconstruction or safety issues. 49 U.S.C. §1111. Members of the president’s Council on Environmental Policy must have “training, experience, and attainments” that make them “exceptionally well qualified” to perform their functions. 42 U.S.C. § 4342. Members of the Chemical Safety and Hazard Investigation Board must be appointed “on the basis of technical qualification, professional standing, and demonstrated knowledge” in related fields. 42 U.S.C. § 7412. Members of the National Commission on Libraries and Information Science must include five “professional librarians or information specialists”; the remaining members are required to have “special competence in or knowledge of the needs of our society for library and information services.” 20 U.S.C. § 1505. One member must have knowledge of library technology and one member must have knowledge of library needs of the elderly. Id.
Safety and Health Review Commission are required to have “training, education, or experience” that qualifies them to carry out the agency’s functions.95

On some occasions, Congress has enacted specific expertise requirements for Senate-confirmed positions. The Solicitor General, for instance, must be “learned in the law.”96 Leaders of the Consumer Product Safety Commission must have “background and expertise in areas related to consumer products and protection of the public from risks to safety.”97 Members of the Defense Nuclear Facilities Safety Board have to be “experts in the field of nuclear safety with a demonstrated competence and knowledge relevant to the independent investigative and oversight functions of the Board.”98 These expertise mandates can be quite general.99

On other occasions, Congress has mandated that other Senate-confirmed positions be filled by individuals with specific experience or employment. For example, the Director of the Transportation Security Administration has to have “experience in a field directly related to transportation or security.”100 The Surgeon General is required to be a member of the Regular Corps of the Public Health Service.101 The Director of the Patent and Trademark Office must have “experience in patent or trademark law.”102 The Director of the National Park Service must have “substantial experience and demonstrated competence in land management and natural or cultural resource conservation.”103 The Director of the Bureau of Land Management has to have “a broad background and substantial experience in public land and natural resource management.”104


96 28 U.S.C. § 505. The paper focuses on positions that still exist, but there is a noteworthy historical example. The War Claims Act of 1948 established the War Claims Commission, requiring that at least two of the Commission’s three members be “members of the bar, to be appointed by the President, by and with the advice and consent of the Senate.” The Commission is the subject of a classic administration law case, Weiner v. United States, on whether the president could remove the Commissioners at will, where Congress had not included a provision restricting his removal authority. Weiner v. United States, 357 U.S. 349 (1958). The Court concluded that the president did not have such plenary power. The Court states the qualification requirement but does not address its implications for separation of powers principles.


101 42 U.S.C. § 205. The Surgeon General does not, however, have to be a physician. See id. [add cite to Strauss]

102 35 U.S.C. § 3. The Deputy Director, who is selected by the Department of Commerce, also must meet this requirement.


104 43 U.S.C. § 1731. Many of the political positions in the Defense Department, some of which require Senate confirmation and some of which do not, have experience restrictions. The Under Secretary of Defense for Acquisition, Technology, and Logistics, for example, must have “an extensive management background in the private sector.” 10 U.S.C. § 133. The Deputy Under Secretary of Defense for Logistics and Material Readiness is required to have “an extensive background in the sustainment of major weapons systems and combat support equipment.” 10 U.S.C. § 133b. The Chief of the Army Reserve has to “have had 10 years of commissioned service in the Army Reserve.” 10 U.S.C. § 3038. Similar provisions exist for the other military services, 10 U.S.C. §§ 5143 (Navy), 5144 (Marine Corps), 8038 (Air Force), and for the Coast Guard (14 U.S.C.
At times, statutory requirements work to establish a particular balance of top officials’ backgrounds in an agency.\(^{105}\) The Director of the National Security Agency, for example, must be a military officer, with at least a three-star rank; the agency’s Deputy Director, by contrast, must be a technically experienced civilian.\(^{106}\) Two members of the Surface Transportation Board are required to have “knowledge in the fields of transportation or transportation regulation”; the remaining member must have “professional or business experience” (including agriculture) in the private sector.\(^{107}\) Sometimes, the relevant statute does not impose numerical requirements but sets a general balance mandate. For instance, the president must select Commissioners for the CFTC, with “demonstrated knowledge in futures trading or its regulation, or the production, merchandising, processing or distribution of one of more of the commodities or other goods [covered by the Commission]” and “seek to ensure that the demonstrated knowledge of the Commissioners is balanced with respect to such areas.”\(^{108}\)

d. Bars from Service

Finally, some statutes rule out potential individuals for high-level positions because of perceived conflicts of interest or concerns.\(^{109}\) Many of these prohibitions are within the

\(^{105}\) There are also two additional examples that do not involve Senate-confirmed officials in executive branch agencies or independent regulatory commissions. First, two of the five members of the Securities and Exchange Commission’s Public Company Accounting Oversight Board, established in the Sarbanes-Oxley Act, have to be current or past certified public accountants; none of the other three members can be an accountant. 15 U.S.C. § 7211. The Supreme Court recently heard oral arguments over the constitutionality of the appointment and removal provisions of the Board. The experience requirements were not challenged and have not received any attention, as far as I can tell. Second, no more than three of the commissioners of the United States Sentencing Commission, an independent agency in the Judicial Branch, may be judges. 28 U.S.C. § 991a. The constitutionality of the Sentencing Commission was at issue in Mistretta v. United States, 488 U.S. 361 (1989). The Court examined the composition (as well as the location in the judicial branch) of the Commission. It determined that the duties it imposed on the judges selected for the Commission did not interfere with those judges’ work as judges. It did not address whether the experience requirement (phrased incorrectly as a floor) was improper aggrandizement and encroachment by Congress.

\(^{106}\) Similarly, the Administrator of the Federal Aviation Administration must be a civilian (and have “experience in a field directly related to aviation”); whereas, the Deputy Administrator may be an active military officer. 47 U.S.C. § 106.


\(^{109}\) Conflict of interest prohibitions have a long history. Examining early statutes, Jerry Mashaw notes: Treasury Department officials were forbidden from engaging in “the business of trade or commerce.” Customs officials could not own ships; collectors of duties on spirits could not buy or sell liquor; and Indian agents...
immediate control of the potential appointee; simple divestment or retirement can make the bar disappear. Leaders of the Federal Communications Commission, for instance, cannot have a financial interest in a business related to the agency’s work. The Administrator and Deputy Administrator of the National Aeronautics and Space Administration and the Administrator of the Federal Aviation Administration must be civilians.

For others, in the Defense Department, the passage of time eliminates the bar. The Secretary of Defense cannot have served as a military officer in the past ten years. The Secretaries of the Army, Navy, and Air Force face a five-year bar. Some of these bars, however, are permanent. For example, foreign lobbyists, even if no longer working in that field, cannot be appointed as the United States Trade Representative. Directors of the Federal Agricultural Mortgage Corporation cannot have ever been “officers or directors of any financial institutions or entities.”Anyone “convicted of a felony or gaming offense” cannot be appointed to the National Indian Gaming Commission.

B. Institutional Practices

In addition to the limited constitutional constraints and more expansive statutory mandates, less formal White House and Senate practices may effectively shape which individuals are selected for top agency positions. These practices, particularly on the White House side, have changed considerably over time. Initially, presidents primarily chose officials based on their character and standing in the community to “help to engender respect for the new national government.” This resulted in field appointees being “residents of the state and often the locality in which they would serve.” Character, however, also often meant “adherence to Federalist doctrines.”

Early on, presidents did not get to fill many appointed positions as officials did not traditionally resign at the end of the previous administration. President Jackson instituted rotation in offices, arguing that the spoils system was pro-democratic, compared to the earlier traditions that treated those positions as property rights. Once offices began to
rotate with shifts in control of the White House, presidents gained little independent power over appointments; their reliance on state parties for support made them beholden to their party’s interests.  

By contrast, in recent decades, presidents have had substantial authority over top-level agency positions.  

They have, of course, used that authority differently. President Carter desired to appoint “the best person in the country . . . for each position.”  

In light of this objective, he established a Talent Inventory Process, which, for each top job, identified the necessary qualifications and asked a network of several hundred people for recommendations.  

Carter, however, soon became frustrated with this approach. By contrast, President Reagan pursued individuals who were not seeking government positions, and indeed often opposed the agency’s mission. In addition, Regan tried to choose individuals loyal first to him, and not to agency clients or interest groups.  

Reagan’s successor, President George H.W. Bush, is the only recent president to have served as a top-level political appointee in the Executive Branch (as Director of the Central Intelligence Agency under President Ford from 1975 to 1977). He cared more about agency performance than his predecessor. He removed a significant number of Reagan appointees, replacing approximately 65 percent of them.  

President Clinton had a rather chaotic approach to appointments—starting off with a very centralized process and then cutting back on the White House personnel office as part of his government reform efforts. This resulted in considerable delays in filling positions. President George W. Bush also had similar delays, likely due to the delay in the outcome of the 2000 election. Bush apparently picked appointees he felt would carry about his policies and would carry them out with great skill. Although President Obama

124 [add cite]
125 This paper focuses on approximately the last three decades. For information on earlier appointments practices, see Richard F. Fenno, Jr., The President’s Cabinet: An Analysis in the Period from Wilson to Eisenhower 56-58 (1959); Mann, supra note __, at 68-85 (Truman to Kennedy); Weko, supra note __ (Truman to Clinton).
126 Joel Havemann, Carter is Taking Pains in Picking His Plums, Nat. Journal, Nov. 20, 1976, at 1650.
127 Id. at 1650-51. This talent search was not unique. President Kennedy used a similar process, though he expressly looked for competence, political skills, and similar views to his own. Id. at 1653-54; see also Dom Bonafede, The White House Personnel Office from Roosevelt to Reagan, in The In-and-Outers, supra note __, at 30, 36 (Kennedy: “All I want to know: is he able? And will he go along with the program?”).
128 Hugh Heclo, A Government of Strangers 94 (1977) (“The handling of personnel appointments, trying to get the right person in the right position at the right time is a very, very difficult question.”).
129 Bennett, supra note __, at 80; Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2277, 2246 (2001); see also Lewis, supra note __, at 54-55 (quoting Reagan staffer Lyn Nofizer as saying “As far as I am concerned, anyone who supported Reagan is competent”).
133 See O’Connell, supra note __, at 956.
134 He also initially confronted a less friendly Senate than Clinton did.
135 See Lewis, supra note __, at 54.
started out with a seemingly highly efficient appointments process, it slowed down considerably by the end of his first year in office.\(^{136}\)

One central (and varying) element of White House practice is the level of deference to cabinet secretaries in naming lower-level positions in their departments, including positions appointed by the president and confirmed by the Senate. At one extreme was President Eisenhower, who mostly let his cabinet secretaries make such choices.\(^{137}\) President Carter started his administration with a similar norm.\(^{138}\) But by the mid-term election, he had clawed back more control.\(^{139}\) By contrast, President Reagan asserted strong control over many presidential appointments from the start of his administration.\(^{140}\) Likewise, President George W. Bush, with Vice President Cheney, oversaw key appointments.\(^{141}\) Often, the level of deference is agency-specific, dependent on the strength of the cabinet secretary and on presidential preferences.\(^{142}\) For example, Secretary of State Clinton apparently negotiated for considerable authority in filling even top-level political slots in her department.\(^{143}\)

Senate traditions have been more stable than White House practices for top-level appointments in recent decades. Most notably, as with Supreme Court nominations, the Senate almost never rejects a cabinet nomination.\(^{144}\) This deference appears to extend to the leadership of independent regulatory commissions as well. As a 1976 report for the Senate Committee of Commerce explained: “Unless there was evidence of aberrant behavior in the nominee’s background or a potential conflict of interest, confirmation [to the Federal Communications Commission and Federal Trade Commission] was more or less assured.”\(^{145}\)

\(^{136}\) O’Connell, supra note __, at 915-16, 958; Anne Joseph O’Connell, Waiting for Leadership: President Obama’s Record in Staffing Key Agency Positions and How to Improve the Appointments Process, Center for American Progress (April 2010) [add specific figures].
\(^{137}\) Joel D. Aberbach, The Executive Branch in Red and Blue, in A Republic Divided, supra note __, at 157, 162-63.
\(^{138}\) Joel Havemann, Carter is Taking Pains in Picking His Plums, Nat. Journal, Nov. 20, 1976, at 1653 (Carter); Rudalevige, supra note __, at 50; [add cites and examples]
\(^{139}\) President Nixon also followed the same path. Havemann, supra note __, at 1654. Nixon’s personnel advisor, Harry Fleming, actually initially sent letters to every name in Who’s Who asking for recommendations for government positions. Bonafede, supra note __, at 40. It was not a successful strategy, producing an “avalanche of paper of dubious quality.” James P. Pfiffner, Nine Enemies and One Ingrate: Political Appointments during Presidential Transitions, in The In-and-Outers, supra note __, at 60, 69.
\(^{140}\) Rudalevige, supra note __, at 50; Joel D. Aberbach, The Executive Branch in Red and Blue, in A Republic Divided, supra note __, at 157, 164.
\(^{141}\) See Barton Gellman & Jo Becker, A Different Understanding with the President, Wash. Post, June 24, 2007, at A1 (detailing how Cheney made lists of nominees “round the kitchen table of his townhouse in McLean”); [add other cites]
\(^{142}\) [add cite, interview with Shalala]
\(^{143}\) [add cite]
\(^{144}\) See Michael J. Gerhardt, The Federal Appointments Process 164 (2000) (listing the following rejections: Robert Taney (Jackson’s nominee for Secretary of Treasury), Caleb Cushing (Tyler’s nominee for Secretary of Treasury), Charles Beecher Warren (Coolidge’s nominee for Attorney General), Lewis Strauss (Eisenhower’s nominee for Secretary of Commerce), and John Tower (Bush 41’s nominee for Secretary of Defense); see also Michael J. Gerhardt, The Federal Appointments Process 279 (2000) Mark Seidenfeld, A Big Picture Approach to Presidential Influence on Agency Policy-Making, 80 Iowa L. Rev. 1, 39 (1994). Instead of refusing to confirm a nominee, the Senate can push the president or the nominee to withdraw the nomination. Gerhardt, The Federal Appointments Process, supra, at 166.
Of course, not acting on a nomination or withdrawing a nomination has the same effect as rejecting a nomination. Think, for example, of Zoe Baird, Lani Guinier, and Bernard Kerick. According to one study, between 1981 and 1992, the Senate did not confirm 22 percent of nominations to boards and commissions such as the FTC, 11 percent of nominations to independent agencies such as the EPA, and 9 percent of nominations to cabinet departments. In addition, as with judicial nominations, the Senate can be a contentious partner in the appointments process, even when the nominations go through. For instance, William Gould, President Clinton’s choice to head the National Labor Relations Board, squeaked through the Senate in 1994 on a 58-38 vote.

The Senate has been less deferential to White House selections for lower-level positions than for agency heads, which still require confirmation because Congress has not chosen an alternative appointments process. Overall, however, the Senate typically approves agency nominations. Surprisingly, for a non-negligible number of appointments, it appears that the Senate does not conduct a hearing before confirming them.

In sum, the constitutional story of appointments is too narrow, suggesting a relatively simple process for top agency positions. Rather, the combination of statutory and institutional constraints has made the staffing of high-level agency jobs a complex endeavor. Before the president names someone to a position, the White House must determine the position’s needs (including any statutory mandates), solicit and assess potential nominees, and then make a final selection. Before the Senate deliberates on and confirms that nominee, the relevant committee(s) and staff will investigate that nominee and likely hold a hearing. The next part turns to what characteristics might matter to the White House and the Senate; the following part considers actual selections within these legal and political constraints, in other words, describing the agency leaders who have served under at least one of the past five presidents.

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150 See id. Most confirmation hearings are not prolonged affairs covered by national media (for instance, like the confirmation hearing for Hillary Clinton for Secretary of State). Often, one hearing will cover multiple appointments in an agency. Even if a hearing does not include multiple appointees, the Senate frequently batches appointments for voting purposes. See, e.g., Daniel E. Ho, Congressional Agency Control: The Impact of Statutory Partisan Requirements on Regulation 27–29 (Feb. 12, 2007) (unpublished manuscript, on file with author) (noting the grouping of confirmation votes for independent regulatory commissioners).
II. Types of Agency Appointments

While the Constitution, statutes, and institutional practices discussed in the previous part largely shape the limits on agency appointments, other factors drive the core. This section takes on those factors, including the desire for issue expertise and management skills, political acumen, and patronage. It starts by comparing what presidents (mostly through their personnel office) likely seek in making leadership selections (and the Senate cares about in confirming them) and what proponents of the social good might desire. At first glance, their goals may seem at odds, but many overlap. It then examines how three of these goals—technical and managerial competence, political skills, and loyalty—create some classic “types” of agency officials, depending on whether each is met, from the former civil servant to a former elected official (or staff member to such an official) to a former private sector leader. It concludes by suggesting how to measure each of these factors empirically. Those suggestions are then taken up in the final section of the paper in examining actual agency officials selected in recent administrations.

A. Dimensions of Qualifications

In comparing the practices of recent presidents in the preceding part, I make some broad statements that readers may take too far. President Carter obsessed about subject matter expertise. President Reagan had only a loyalist litmus test. And so forth. Presidents, of course, care about several items in selecting agency leaders, not merely expertise or loyalty. But scholars and commentators of the presidency often stress political factors. These factors include shared policy preferences with the president, past campaign work or financial contributions, pressure from the president’s party, and pressure from interest groups.151 Most of this work is largely anecdotal. But David Lewis’s recent interesting work on President Obama’s choices systematically examines whether and how presidents reward campaign workers and other supporters with political positions.152

These political desires of the White House are typically contrasted with what the public good demands. That demand, according to most public administration scholars and commentators, is a desire for technical competence. Under this view, presidents should select agency leaders purely on some measure of merit related to the agency’s mission. In this set-up between crass politics and the public good, the goals of the appointments process are at odds. As Woodrow Wilson’s classic nineteenth century article, “The Study of Administration” explains, politicians presumably will reward loyalty and politics in bureaucracy at the cost of competence.153

In other work with George Krause, I am exploring empirically whether this classic tradeoff between loyalty and competence, broadly defined, exists in practice. For purposes of this paper, however, the perceived trade-off is a starting point to a wider discussion about what presidents should realistically care about in selecting agency leaders. Because presidents presumably want the bureaucracy to function to achieve particular policy objectives, which

themselves might advance political or nonpolitical objectives, their selection criteria may not differ as much from the criteria of someone who believes the bureaucracy should advance some measure of social welfare.

Presidents realistically seek appointees with qualifications along three dimensions: subject-matter and managerial competence, political skills, and loyalty. The variable pool of potential appointees, on the supply side, and pressures from the Senate, interest groups, and others, on the demand side, require some dimensions to be weighted more heavily than others in particular circumstances. The next subsection generates several appointee “types” from these situations, but before doing so it seems important to take each dimension in turn.

First, all else equal, presidents should prefer appointees who have expertise or experience in areas under the agency’s jurisdiction and who can manage organizations effectively to officials who lack those attributes. Issue related background often gets more attention than managerial skills, perhaps because it is tied to a particular agency. For example, last April, President Obama nominated Dr. Donald M. Berwick to head the Center for Medicaid and Medicare Services. Much was made of his expertise as a pediatrician who ran the Institute of Healthcare Improvement, a non-government organization in Cambridge, Massachusetts. The New York Times story announcing Obama’s plans called Berwick “an iconoclastic scholar of health policy” in its opening line. There was no mention of management skills until the second half of the article. The Institute of Healthcare Improvement lists $60 million in assets, including investments, in its 2009 financial statement on-line, about one-quarter was paid out for salaries. By contrast, CMMS has about 4,400 employees and pays out $800 billion a year for health care expenses.

Both policy knowledge and management skills contribute to this dimension of technocratic competence. Policy knowledge helps appointees make informed decisions. Management skills assist appointees in running an agency, providing leadership within the agency and to outside constituencies. CMMS is just one of many examples. Take one more. It is not enough to know an incredible amount about aeronautical engineering to be Administrator or Deputy Administrator of NASA. Those officials have to manage approximately a dozen or so other political appointees and close to 20,000 nonpolitical

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154 Bennett, supra note __, at 19 (noting that management capabilities, prior government experience and academic achievement, among other factors, are relevant criteria); Richard F. Fenno, Jr., The President’s Cabinet: An Analysis in the Period from Wilson to Eisenhower 68 (1959) (listing specialized talents, among other items, as an important characteristic); Mann, supra note __, at 3-4, 245-62 (listing ability to comprehend complicated programs, executive skills but doubting important causal connections between particular traits (such as occupational background) and job performance); Paul C. Light. When Worlds Collide: The Political-Career Nexus, in The In-and-Outers (G. Calvin Mackenzie, ed. 1987), at 156, 165 (listing substantive knowledge of relevant policies, management skills, and interpersonal skills, among others, as needed preparation); Joel D. Aberbach, The Executive Branch in Red and Blue, in A Republic Divided, supra note __, at 157, 161 (listing education, experience, expertise, and organizational skills, among others, as key requirements); see also Committee on Commerce, Appointments to the Regulatory Agencies: The Federal Communications Commission and the Federal Trade Commission (1949-1974), at 419 (1976) (for independent regulatory commissioners, listing independence, sensitivity to consumer and minority needs, concrete interest from past experience in agency’s work, personal integrity, and in some circumstances specific knowledge and previous agency experience as important qualities).

155 When Republican Senators refused to confirm him because of their disagreement with the health care legislation that was enacted, President Obama installed him in the position in a recess appointment. [add cite]

156 Robert Pear, Obama Chooses Health Policy Scholar as the Director for Medicare and Medicaid, N.Y. Times, March 27, 2010.
employees, oversee a budget of approximately $18 billion, and run an agency the public follows for space exploration.\textsuperscript{157}

Second, all else equal, presidents should prefer appointees who are politically skilled to those who lack such acumen.\textsuperscript{158} Those who care about the public good often should have a similar preference. Agencies operate within a highly political setting. Their work is assigned to them by Congress and the White House, and both institutions, among others, oversee their output. Agency leaders therefore need to know something about politics.\textsuperscript{159} Political skills should not be conflated with party affiliation or loyalty to the president. Rather, knowledge about congressional committees, congressional appropriations, congressional oversight, White House regulatory review, White House coordination and budgeting proposals, and interest groups make officials more skilled at dealing with Congress, the White House, interest groups, and the media—in other words, with their agency’s overseers. In addition, political connections matter not only to officials’ competence in performing their duties but also can help provide those officials and their agencies with democratic legitimacy. To be certain, not all political connections constitute qualifications, and not all political positions should be filled with officials with such connections.

Finally, all else equal, presidents should prefer appointees who are loyal, usually to them but sometimes to the party or particular interest groups.\textsuperscript{160} While this dimension as a descriptive matter is uncontested, many would challenge its desirability. Although the second paper takes this issue up in more detail, the latter issue is more complex than it might appear initially. In short, loyalists may foster agency effectiveness and democratic accountability.\textsuperscript{161} As to effectiveness, loyalists may bring in new ideas and fresh connections with certain

\textsuperscript{157} [add cites]

\textsuperscript{158} See Bennett, supra note __, at 19 (noting that political or legal experience is a relevant criterion); Heclo, supra note __, at 238 (“Political support, coordination, sensitivity, endurance, commitment—these seem to be the most important requisites for political executives who hope to have a serious chance of exercising leadership in the Washington bureaucracy”); Mann, supra note __, at 3-4, 245-62 (listing strength against hostile overseers as a minimal qualification); Light, supra note __, at 156, 165 (listing congressional relations skills and familiarity with Washington politics as needed preparation); Aberbach, supra note __, at 157, 161 (listing political skills as a key requirement); cf. Mann, supra note __, at 40 (noting from 1945 to 1961 that many appointees in the Justice Department and GSA had prior political experience but that despite its importance to individual members of Congress many appointees in the Veterans Affairs Administration had career civil service backgrounds). Norms may work against this component in particular circumstances. For example, former Attorney General Alberto Gonzales and President George W. Bush could have admitted that they sought to replace U.S. Attorneys with more politically loyal supporters. Replacing U.S. Attorneys on political grounds might break custom but is not illegal. Presumably, the Bush Administration did not want to suffer the repercussions of such an admission and argued instead that the replacements were for performance reasons. See, e.g., David Johnson, A U.S. Attorney Was Removed without Cause, Official Says, N.Y. Times, Feb. 7, 2007.

\textsuperscript{159} See Baryl A. Radin, The Accountable Juggler 83-84 (2002). This is an argument about political appointees, not career civil servants. The latter should not be selected on the basis of political loyalty. The previous administration appears to have crossed that line in particular agencies. Cf. Amy Goldstein & Dan Eggen, Immigration Judges Often Picked Based on GOP Ties, Wash. Post, June 11, 2007, at A1.

\textsuperscript{160} See Bennett, supra note __, at 19 (stating that close connection to the president and loyalty are relevant criteria); Fenno, Jr., supra note __, at 68 (1959) (noting personal loyalty as an important characteristic); supra note __.

relevant outside groups, forcing needed change and improving agency performance. Furthermore, appointees with particular preferences may help ameliorate inefficiencies created by our separated powers system in particular contexts. Nolan McCarty, a political scientist, explains: “[T]he executive chooses an agent whose preferences diverge too much from those of the legislature. The legislature then responds by reducing the resources available to the agency. Thus, if the executive desires higher budgets than does the legislature, agency preferences are too extreme and budgets are too low compared to the set of efficient outcomes.” Thus, if the White House and Congress are controlled by the same party, it might be better, as a matter of effectiveness, for the President to nominate someone with preferences closer to that party than someone with more experience but with preferences further away. In addition, loyalists may foster agency legitimacy, if that legitimacy is seen to derive, at least in part, from political accountability. My project, particularly in this paper, does not defend the loyalty dimension as a normative matter. Rather, it focuses on actual selections by presidents. Because political loyalty is often a critical factor in those selections, it cannot be ignored.

To be certain, these dimensions do not capture every desired quality in an agency leader, from the president’s or public’s perspective. Hugh Heclo, an expert on agency appointments, declared: “Political support, coordination, sensitivity, endurance, commitment—these seem to be the most important requisites for political executives who hope to have a serious chance of exercising leadership in the Washington bureaucracy.” To some degree, these criteria come from the three dimensions discussed but to another degree, they also speak to a person’s character. Nevertheless, these three dimensions capture many classic (and some surprising) “types” of appointees selected in recent administrations.

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165 See also Mann, supra note __, at 3-4, 245-62 (listing integrity as a minimal qualification).
B. Types of Appointees

These three dimensions of qualifications create various “types” of agency officials—a former civil servant in a plum political job, a former congressional staffer in the executive branch, an individual with no federal experience who has either worked for a president when he was a governor or who has spent her entire career in related private sector employment, to name a few. These types come from varying emphasis on each dimension.

Table 1 provides a simplified overview, with each dimension being restricted to take either a high or low realization.

Table 1

<table>
<thead>
<tr>
<th>High Loyalty</th>
<th>High Political Skills</th>
<th>Low Political Skills</th>
</tr>
</thead>
<tbody>
<tr>
<td>High Issue &amp; Management Skills</td>
<td>“Golden Ticket” Appointee</td>
<td>“Former State Agency Head” Appointee</td>
</tr>
<tr>
<td>Low Issue &amp; Management Skills</td>
<td>“Classic Political Loyalist” Appointee</td>
<td>“Friend of President” Appointee</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Low Loyalty</th>
<th>High Political Skills</th>
<th>Low Political Skills</th>
</tr>
</thead>
<tbody>
<tr>
<td>High Issue &amp; Management Skills</td>
<td>“Former Agency Leader” or “Opposing Party” Appointee</td>
<td>“Private Technocrat” Appointee</td>
</tr>
<tr>
<td>Low Issue &amp; Management Skills</td>
<td>“Former Member of Congress Not on Relevant Committee” Appointee</td>
<td>“Disaster” Appointee</td>
</tr>
</tbody>
</table>

The names of the types are meant to be primarily suggestive, not definitional. The top left box represents leaders who excel on all three dimensions. Because trade-offs are often necessary in any choice, such leaders are presumably rare. At the other extreme, in the bottom right box, are officials who do not excel on any dimension. Because the political attractiveness and viability of such officials is low, those leaders are also probably atypical.

The boxes in between seem more plausible. A leader of a federal agency who headed the equivalent department at the state level when the president was governor likely is loyal to the president, knows a lot about the issues, and can manage a large public organization but may lack skills in dealing with federal politics. Many recent presidents served as a state governor, creating a pool of such potential appointees. Likewise, an old friend of the president is similarly loyal but may lack both issue and management skills as well as political acumen at the national level. Some of these friends or loyalists do have necessary political skills, however, making them classic political loyalist officials.

If loyalty to the president is low, other types of leaders are possible. A former senior careerist in an agency should have considerable issue and management skills and should understand federal bureaucratic politics. Former members or staff of Congress, who should have considerable political skills, likely fall somewhere between the high and low distinctions.
on the issue and management skill dimension. Many, if assigned to a relevant committee, may have the requisite issue knowledge but not possess management skills for a large agency. But if that committee experience is missing, such elected officials and staff members may provide only political skills. A pure technocrat or private sector leader, assuming sufficient management experience, likely lacks acumen about the agency’s political environment.

Examples are relatively easy to generate. Table 2 provides them from the last administration for each category of Table 1. These assignments to “types” are anecdotal. The final section in this part discusses how each of the three dimensions can be measured (at the time of nomination) in the newly constructed database.

### Table 2

<table>
<thead>
<tr>
<th>High Loyalty</th>
<th>High Political Skills</th>
<th>Low Political Skills</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>High Issue &amp; Management Skills</strong></td>
<td>Colin Powell (Secretary of State)</td>
<td>Rod Paige (Secretary of Education)</td>
</tr>
<tr>
<td><strong>Low Issue &amp; Management Skills</strong></td>
<td>Steven Preston (Secretary of Housing and Urban Development)</td>
<td>Donald Evans (Secretary of Commerce)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Low Loyalty</th>
<th>High Political Skills</th>
<th>Low Political Skills</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>High Issue &amp; Management Skills</strong></td>
<td>Norman Mineta (Secretary of Transportation)</td>
<td>Henry Paulson (Secretary of Treasury)</td>
</tr>
<tr>
<td><strong>Low Issue &amp; Management Skills</strong></td>
<td>Spencer Abraham (Secretary of Energy)</td>
<td>Michael Brown (Head of FEMA)</td>
</tr>
</tbody>
</table>

### C. Measuring Qualifications and Types

To define each of these three dimensions of qualifications empirically, some nuance of each dimension will of course be lost. Such an exercise assumes, as well, that empirical definitions are feasible with available information. Data availability thus further limits the complexity of each dimension that can be measured. Nevertheless, these definitions, if sufficiently realistic, allow comparison across appointees in a systematic fashion. This section proposes various metrics for each dimension available in the database I have constructed. All of these metrics derive from information at the time of nomination—in other words, they are ex ante measures of the various dimensions. The second paper of this project examines several connections between these ex ante measures and ex post performance.

To start, for issue expertise and managerial skills, there are several plausible measures, which draw on an appointee’s education and employment experience. Reflexively, we might think that more education and more federal government experience are better than less for the first dimension. Nevertheless, the quantity of either may be too blunt a metric. Start with
education. Studies show little connection between education and performance. That research analyzes, however, education level, not the field of study. It seems that education specific to the agency position—aeronautics or engineering for the Administrator of NASA, for example—would be helpful for issue expertise. In addition, education specific to public management (for example, a Masters in Public Administration) may be useful for managerial skills in a public agency.

As for employment background, most commentators view federal government experience as valuable for top agency jobs, but some question its relevance for the highest positions. Again, for all positions, the subject of that government experience may matter more than the duration. For instance, two years as a scientist at the Food and Drug Administration may be more relevant for a senior position in the Department of Health and Human Services than ten years at a civil servant at the Defense Department. To be certain, any government experience may help in understanding the issues of an agency position. In addition, any government leadership position provides critical managerial skills in the administrative state. Private sector and non-federal government experience too can be important, for both issue and managerial skills. Appointees have more varied work experience than career federal employees.

This paper uses the following specific measures for the first dimension: education level, issue relatedness of education, managerial relatedness of education, issue relatedness of the previous four jobs, managerial relatedness of the previous four jobs, civil service experience, appointed executive branch experience, state or local agency experience, and years of prior agency service.

For political skills, there are also several plausible measures, which use demographic and employment information. Commentators often speak of “within the beltway” politics in describing agency decisions. Living in the Washington, D.C. area provides more exposure to federal politics, in many ways. The Washington Post has a federal page. Agency moves—whether personnel-based or substance-based—receive more attention than elsewhere in the country. That prior exposure may help officials navigate the complex political environment. It seems more relevant than studying political science or earning a public policy degree, though those educational activities could conceivably contribute to political skills as well.

In addition, there are some positions that build political skills. Any position that deals with agency decisions in a fundamental way would likely qualify. In the executive branch, appointed officials in agencies and White house staff members, if sufficiently senior, develop relevant political acumen. Likewise, in the legislative branch, members of Congress and congressional staff members pick up related political knowledge. In interest groups that lobby agencies or Congress, employees can gain similar tools. Certain elected positions outside of the federal context might also provide needed political sophistication. For example, governors, state legislators, mayors, or city council members might learn valuable skills.

This paper employs the following particular measures for the second dimension: residence in the Washington, D.C. area in the preceding decade, appointed executive branch

166 See Mann, supra note __, at 250.
167 See Stanley et al., supra note __, at 81.
168 Testing Pendleton’s Premise: Do Political Appointees Make Worse Bureaucrats?, 69 J. Pol. 1073, ____ (2007); cf. Ferrara & Ross, supra note __, at 9 (career workers have more experience in government).
experience, White House staff experience, elected congressional service, congressional staff service, and elected experience at the state or local level.

Finally, for loyalty, there are multiple possible measures, which depend on demographic, employment, and campaign connections. Generally, loyalty is reduced to shared policy preferences between the appointee and the president. If we could get at specific policy preferences of appointees at the time of nomination, such preferences might be compelling. But if the only measure of policy preferences is party affiliation, we are left with very little information as almost all executive agency appointees are the same party as their nominating president. We may gain some additional insight if appointees previously worked for a national party organization, such as the RNC or DNC.

There are, however, other ways to capture loyalty to the president. Since the 1980 election cycle, public records document campaign contributions over certain amounts. Senate biographical forms and news articles record, to varying degrees, other campaign support, including endorsements, advice or other work before the election and transition team participation. Other connections may exist between an appointee and the nominating president. For example, they may share educational or employment experiences or the appointee may have worked for the president as governor.

This paper relies on the following identified measures for the third dimension: matching party affiliation with the president, campaign contributions to the president, work on the president’s campaign or transition, shared educational institutions with the president, work for the president when governor, and national party experience for the president’s party.

The next part turns to a comprehensive survey of recent appointees under the past five completed administrations.

### III. Actual Agency Appointments: President Carter to President George W. Bush

After Hurricane Katrina, FEMA leader Michael Brown quickly came under fire for his lack of emergency management experience. But Brown was not the only appointee selected by President George W. Bush who took a beating in the press. Time magazine asked a few weeks later: “How Many More Mike Browns Are Out There?” It selected three other possibilities—Scott Gottlieb (Deputy Commissioner for Medical and Scientific Affairs at the Food and Drug Administration), David Safavian (Chief Procurement Officer at the Defense Department), and Julie Myers (nominee for head of Immigration and Customs Enforcement at the Department of Homeland Security). The media, of course, like to find examples of appointees with low issue and managerial skills. Although there was speculation that

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169 The Senate Committee on Homeland Security and Governmental Affairs determined that Brown “lacked the leadership skills that were needed for his critical position.” Hogue, supra note __ at 1.

170 Karen Tumulty et al., How Many More Mike Browns are Out There?, Time, Sept. 25, 2005, at __. See also Sheryl Gay, Bush Friends, Loyal and Texan, Remain a Force, N.Y. Times, Feb. 21, 2007, at __ (commenting on the (lack of) qualifications of some appointees in the Bush Administration). Similarly, the backgrounds of several individuals considered for U.S. Attorney spots showed no meaningful prosecutorial experience or geographical ties to the relevant district; many had, however, close connections to the Bush Administration. See Amy Goldstein & Dan Eggen, Prosecutor Posts Go to Bush Insiders, Wash. Post, Apr. 1, 2007, at A1; Scott Shane, Political Resume, Not Court, Stood Out for a Contender, N.Y. Times, Apr. 14, 2007, at __.

171 Indeed, the press has attacked officials in previous Administrations. Reagan’s pick for Energy Secretary, James Edward, was a dentist, whose reported background in energy consisted only of where gasoline goes in a car. Anthony J. Bennett, The American President’s Cabinet: From Kennedy to Bush 17 (1996). Clinton used
President Bush’s appointees were significantly different than previous presidents, only systematic comparison across recent administration can help support or undermine that speculation and can help determine overall what types of appointees are being selected for important agency positions.

Using a new database of all officials in important policy positions in executive agencies from 1977 to 2009, described in more detail in the Appendix, this first section summarizes certain characteristics—demographic, party affiliation and political connections, expertise and experience, and conflicts of interest and other statutory bars—of recent appointees, by administration, position level, and agency. Although there is some work in political science and public administration on agency leaders, none of those studies


First, there are some important historical studies. William Henry Smith collected biographies of cabinet officials from President Washington to President Coolidge. William Henry Smith, History of the Cabinet of the United States of America (1925). David Stanley, Dean Mann, and Jameson Doig compared top officials from the New Deal to early in the Johnson Administration, examining their geographic representation, religion, education, age, party and political activities and experience, previous and subsequent employment, and tenure. David T. Stanley et al., Men Who Govern: A Biographical Profile of Federal Political Executives (1967). Building on that data, Mann analyzed assistant secretaries and other second tier officials from 1945 to 1961, looking at similar characteristics, in more detail. Dean E. Mann (with Jameson W. Doig), The Assistant Secretaries: Problems and Processes of Appointment (1965). Second, there are studies of more recent appointees. The National Academy of Public Administration surveyed close to 1300 political appointees who served in over 1500 positions between 1964 and 1984. The In-and-Outers (G. Calvin Mackenzie, ed. 1987), at xiv. Many scholars have examined these survey responses. Linda Fisher compared them to information on earlier appointees (1933-1965) on a range of dimensions, including gender, race, age, educational level, geographic origin, partisanship, occupation and experience, tenure, and post-employment. [add cite] Carl Brauer used them to focus on tenure in office and post-government employment. Carl Brauer, Tenure, Turnover, and Postgovernment Employment Trends of Presidential Appointees, in The In-and-Outers (G. Calvin Mackenzie, ed. 1987), at 174. Using different data, Anthony Bennett has examined cabinet officials from President Kennedy to President George H.W. Bush, providing information on tenure, geography, and occupational backgrounds. Anthony J. Bennett, The American President's Cabinet: From Kennedy to Bush (1996). Joel Aberbach and Bert Rockman interviewed top civil servants and sub-cabinet political appointees under Presidents Nixon, Reagan, and George H.W. Bush and then analyzed a wide range of demographic and experience information (including the prestige of educational institutions). Joel D. Aberbach & Bert A. Rockman, In the Web of Politics: Three Decades of the U.S. Federal Executive (2000). Kevin Parsneau wrote his Ph.D. dissertation on sub-cabinet appointments from President Kennedy to President Clinton, having collected his own data. Kevin Parsneau, Presidents and Subcabinet Nominations: A President-Centered Account of the Nomination and Confirmation of Executive Officers (2007). On a much more detailed level, Richard Waterman has tried to measure the quality of ambassadorial appointments under Presidents George H.W. Bush and Clinton. [add cite]. The most comprehensive collection of data on recent appointees is the Independent Regulatory Commissioner database, constructed by David Nixon, which covers all appointments to fifteen federal independent regulatory agencies from 1887 to 2000. The Independent Regulatory Commissioner Database, http://www2.hawaii.edu/~dnixon/IRC/. Little systematic work exists on appointees chosen under President George W. Bush. In 2004-2005, the Annenberg Institutions of Democracy surveyed political officials from the Clinton and Bush 43 Administrations (along with career officials and the general public). See Appendix, in a Republic Divided (__, ed. __), at __. David Lewis analyzes appointees from Bush’s second term and the start of President Obama’s administration to test whether the most political individuals are placed in lower profile agencies and agencies less important to the president. David E. Lewis, Patronage Appointments in the Modern Presidency: Evidence from a Survey of Federal Executives (working paper 2009); Gabriel Horton & David E. Lewis, Turkey Farms, Patronage, and Obama Administration Appointments (working paper 2009). In some related work, instead of looking at who fills political positions, Colin Campbell and David Lewis have independently analyzed how political positions have been distributed among agencies.
includes all appointees who have served in important executive agency positions across a series of recent administrations. After summarizing recent appointees’ primary characteristics, the next section examines the prevalence of classic “types” described in the previous part, by administration, position level, and agency. The final section draws some overall conclusions about executive agency appointments and suggests some possible connections between appointee characteristics and agency performance, which are taken up the follow-on paper.

A. An Overview of Recent Appointees

A few preliminary comments are in order. This examination of recent appointees, which tracks the breakdown of statutory requirements in Section I.A.2, is descriptive, looking at the variation among officials, mostly by administration but also by position level and by agency type. In other words, it is not a predictive enterprise, looking at where and when we might expect to see particular characteristics. I am pursuing several predictive projects in separate research, with George Krause, including how presidents strategically make appointments to executive agencies and independent regulatory commissions given organizational and political environments. The examination also is not a formally analytical effort. As a precursor to our predictive projects, Krause and I are using hierarchical generalized latent trait analysis to develop measures of loyalty and competence for recent appointees.

1. Demographic Characteristics

This section briefly describes some of the basic demographic attributes of recent appointees. The only relevant statutory restriction on some of the positions included in the

Colin Campbell, The Complex Organization of the Executive Branch: The Legacies of Competing Approaches to Administration, in The Executive Branch (Joel D. Aberbach & Mark A. Peterson, eds. 2005), at 243 (finding high ratios of senate-confirmed political positions to career SES jobs in the Justice and Treasury Departments, and high numbers of non-career SES jobs in the Education, Homeland Security, Housing and Urban Development, and Labor Departments); Lewis, supra note __, at ___ (add conclusions).

The closest is work by Parsneau, Nixon, and Lewis, supra note __. Parsneau takes a random subset of all sub-cabinet appointments from 1961 to 2000, which does not permit comparison of appointments to a particular position and does not include officials in the last completed administration. Nixon has data only on regulatory commissioners, who can only be removed for cause. Neither has campaign contribution information. Lewis compares only the second term of President George W. Bush and the first six months of President Obama. See also infra note ___ (work with Krause).

For instance, scholars have suggested that initial appointees are more likely to be intensely committed partisan loyalists, nominated in return for work performed on the campaign whereas later appointees are typically more experienced. On the other hand, the Median Voter Theorem implies that presidents who face re-election should nominate more centrist appointees in the first term and more political appointees in the second term. David Lewis has a large predictive project on where and when you expect to see more political positions. Lewis, supra note __, at 98-108 (assuming that presidents care about policy outcomes and competency and that agencies have their own views about policy that can be changed by adding more political appointees and competency that is lowered by adding more political appointees).

See, e.g., George A. Krause & Anne Joseph O’Connell, A Measurement Model of Loyalty and Competence for Presidential Appointees in U.S. Government Agencies, 1977-2005: A Hierarchical Generalized Latent Trait Analysis (working paper 2009). These projects, of course, present particular complexities. As Heclo wisely explains: “Most political appointees are neither complete accidents nor the property of particular patrons but the result of a variety of known and unknown compromises in the selection process. . . . Selection creates the initial network of debts and credits a new appointee brings with him, but it is a tentative network. Agencies, like the appointees themselves, can change quickly.” Heclo, supra note __, at 99.

Krause & O’Connell, supra note __.
database used here requires officials to be citizens. Citizenship, however, is the only demographic characteristic with essentially no variation—by administration, position level, or agency. Every appointee in the database appears to have been a U.S. citizen, though there is insufficient public information to classify two potential exceptions. Although there are no statutory mandates on geography, age, gender, or race for the positions covered by the database, recent appointees do vary on those dimensions. Table 3 shows, by administration, the percentage of appointees who had resided in the Washington, D.C. area at some point in the decade before their nomination, the average age at the time of nomination, the percentage of female appointees, and the percentage of non-white or Hispanic appointees.

Table 3

<table>
<thead>
<tr>
<th></th>
<th>Carter</th>
<th>Reagan</th>
<th>Bush 41</th>
<th>Clinton</th>
<th>Bush 43</th>
</tr>
</thead>
<tbody>
<tr>
<td>% DC in Past Decade (total obs)</td>
<td>63 (118)</td>
<td>76 (218)</td>
<td>77 (124)</td>
<td>69 (179)</td>
<td>77 (207)</td>
</tr>
<tr>
<td>Average Age, Years (total obs)</td>
<td>49.4 (117)</td>
<td>49.3 (218)</td>
<td>50.6 (123)</td>
<td>51.2 (170)</td>
<td>52.1 (188)</td>
</tr>
<tr>
<td>% Female (total obs)</td>
<td>9 (118)</td>
<td>8 (218)</td>
<td>19 (124)</td>
<td>23 (179)</td>
<td>16 (207)</td>
</tr>
<tr>
<td>% Non-White (total obs)</td>
<td>13 (115)</td>
<td>8 (216)</td>
<td>9 (124)</td>
<td>20 (179)</td>
<td>12 (207)</td>
</tr>
</tbody>
</table>

More of the agency officials under Republican presidents had lived in the Washington, D.C. area in the decade preceding their nomination than appointees who served in Democratic administrations. There were more appointees of color in Democratic administrations and more women in top positions in later administrations. Table 4 breaks down the same characteristics by position level. Heads of cabinet departments and free-standing agencies, such as the EPA, are high-level positions; all other positions described in the Appendix, including heads of agencies within a cabinet department (for instance, the head of the FDA) are classified as low-level positions. Table 5 examines the attributes in three sets of agencies: inner cabinet departments (Defense, State, and Treasury), other cabinet departments, and other agencies.
Table 4

<table>
<thead>
<tr>
<th></th>
<th>High-Level</th>
<th>Low-Level</th>
</tr>
</thead>
<tbody>
<tr>
<td>% DC in Past Decade</td>
<td>71</td>
<td>74</td>
</tr>
<tr>
<td>Average Age, Years</td>
<td>53.5</td>
<td>49.4</td>
</tr>
<tr>
<td>% Female</td>
<td>14</td>
<td>16</td>
</tr>
<tr>
<td>% Non-White</td>
<td>16</td>
<td>11</td>
</tr>
</tbody>
</table>

Table 5

<table>
<thead>
<tr>
<th></th>
<th>Inner Cabinet</th>
<th>Other Cabinet</th>
<th>Other Agencies</th>
</tr>
</thead>
<tbody>
<tr>
<td>% DC in Past Decade</td>
<td>81</td>
<td>67</td>
<td>82</td>
</tr>
<tr>
<td>Average Age, Years</td>
<td>52.7</td>
<td>49.5</td>
<td>50.9</td>
</tr>
<tr>
<td>% Female</td>
<td>6</td>
<td>19</td>
<td>16</td>
</tr>
<tr>
<td>% Non-White</td>
<td>5</td>
<td>16</td>
<td>11</td>
</tr>
</tbody>
</table>

While women were slightly less likely to be in the highest positions, minorities were more often placed in the most visible positions. Interestingly, both women and minorities were more likely to serve outside of the inner cabinet departments. Treasury, Defense, and State departments jobs also had older officials, on average.

2. Party Affiliation and Political Connections

This section briefly describes some of the political characteristics of recent appointees. None of the positions included in the database, which is limited to executive agencies, had any statutory restrictions concerning party affiliation. Though commonly used, party affiliation is a relatively weak proxy of political preferences or political loyalty. Campaign contributions, campaign work, or national party experience are likely stronger measures. Elected experience also suggests political connections. Table 6 shows the percentage of appointees with the same party affiliation as their nominating president, the percentage of appointees who contributed to their nominating president before they were nominated,\(^{177}\) the average amount contributed (if there was a contribution), the percentage of appointees who worked for the national party of their nominating president, and the

\(^{177}\) The FEC’s contribution files start with the 1979-1980 election cycle, so this figure can be calculated for only a small subset of the Carter appointees in the database.
percentage of appointees who had been previously elected at the federal, state, or local level, by administration.

### Table 6

<table>
<thead>
<tr>
<th></th>
<th>Carter</th>
<th>Reagan</th>
<th>Bush 41</th>
<th>Clinton</th>
<th>Bush 43</th>
</tr>
</thead>
<tbody>
<tr>
<td>% Same Party</td>
<td>88</td>
<td>96</td>
<td>94</td>
<td>92</td>
<td>94</td>
</tr>
<tr>
<td>(total obs)</td>
<td>(103)</td>
<td>(202)</td>
<td>(114)</td>
<td>(169)</td>
<td>(184)</td>
</tr>
<tr>
<td>% Campaign</td>
<td>5</td>
<td>8</td>
<td>18</td>
<td>30</td>
<td>51</td>
</tr>
<tr>
<td>Contributions</td>
<td>(43)</td>
<td>(218)</td>
<td>(124)</td>
<td>(179)</td>
<td>(207)</td>
</tr>
<tr>
<td>(total obs)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Average</td>
<td>$625</td>
<td>$1029</td>
<td>$1415</td>
<td>$956</td>
<td>$1715</td>
</tr>
<tr>
<td>Campaign</td>
<td>(2)</td>
<td>(17)</td>
<td>(22)</td>
<td>(53)</td>
<td>(105)</td>
</tr>
<tr>
<td>Contribution</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(total obs)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>% Same</td>
<td>8</td>
<td>14</td>
<td>15</td>
<td>7</td>
<td>14</td>
</tr>
<tr>
<td>National Party</td>
<td>(118)</td>
<td>(218)</td>
<td>(124)</td>
<td>(179)</td>
<td>(206)</td>
</tr>
<tr>
<td>Experience</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(total obs)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>% Elected</td>
<td>11</td>
<td>12</td>
<td>14</td>
<td>12</td>
<td>15</td>
</tr>
<tr>
<td>Experience</td>
<td>(118)</td>
<td>(218)</td>
<td>(124)</td>
<td>(179)</td>
<td>(207)</td>
</tr>
<tr>
<td>(total obs)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Most appointees were from the same political party as their nominating president. The percentage contributing before nomination has increased over the past five administrations, though the average amount contributed was higher for Republican presidents than Democratic presidents. More appointees under Republican administrations had national party experience (as a delegate or in a leadership capacity) than those who served under Democrats. The share of appointees with prior elected experience was relatively even, though was somewhat higher for the two Bush administrations. Table 7 breaks down the same characteristics by position level: high-level and low-level. Table 8 examines the attributes in three sets of agencies: inner cabinet departments, other cabinet departments, and other agencies.

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178 Other studies, mostly based on surveys, have found similar results. See Joel D. Aberbach, The Executive Branch in Red and Blue, in A Republic Divided, supra note __, at 157, 165; [add cites].
Table 7

<table>
<thead>
<tr>
<th></th>
<th>High-Level</th>
<th>Low-Level</th>
</tr>
</thead>
<tbody>
<tr>
<td>% Same Party</td>
<td>95</td>
<td>93</td>
</tr>
<tr>
<td>% Campaign Contributions</td>
<td>35</td>
<td>22</td>
</tr>
<tr>
<td>Average Campaign Contribution</td>
<td>$1485</td>
<td>$1366</td>
</tr>
<tr>
<td>% Same National Party Experience</td>
<td>24</td>
<td>8</td>
</tr>
<tr>
<td>% Elected Experience</td>
<td>32</td>
<td>6</td>
</tr>
</tbody>
</table>

Table 8

<table>
<thead>
<tr>
<th></th>
<th>Inner Cabinet</th>
<th>Other Cabinet</th>
<th>Other Agencies</th>
</tr>
</thead>
<tbody>
<tr>
<td>% Same Party</td>
<td>90</td>
<td>95</td>
<td>93</td>
</tr>
<tr>
<td>% Campaign Contributions</td>
<td>27</td>
<td>24</td>
<td>30</td>
</tr>
<tr>
<td>Average Campaign Contribution</td>
<td>$1443</td>
<td>$1332</td>
<td>$1581</td>
</tr>
<tr>
<td>% Same National Party Experience</td>
<td>6</td>
<td>14</td>
<td>13</td>
</tr>
<tr>
<td>% Elected Experience</td>
<td>9</td>
<td>14</td>
<td>14</td>
</tr>
</tbody>
</table>

Presidents do name some officials from the other party, presumably to cultivate an appearance of bi-partisanship, at least in limited circumstances. The percentage of opposite party or independent appointees is slightly higher in Democratic administrations. The other political attributes divide in interesting ways. In the database, higher-level officials were more likely than lower-level leaders to have given money to their nominating president,

179 See G. Calvin Mackenzie, The Politics of Presidential Appointments 23-24 (1981). Some scholars have noted that those cross-party nominations often are to agencies that are not critical to the president’s policy agenda. For example, the sole Democrat to serve in President George W. Bush’s cabinet, Norman Mineta, was placed in the Transportation Department. But this does not seem clear in the results presented. Cf. Andrew Rudalevige, Managing the President’s Program: Presidential Leadership and Legislative Policy Formulation 39 (2002) (discussing Inner Cabinet including State, Defense, Justice, and Treasury).
to have worked for a national party organization of the same party of the president, and have elected experience.

These results are highly aggregated. For example, many appointees, particularly in the most recent administrations, contributed money to the nominating president, but a considerable number did not. More detailed work is needed. Some specific positions, for example, have a much lower share of appointees who shared the same party affiliation with the president and a lower portion who had given money to the president, no matter the administration.

3. Expertise and Experience

This section briefly describes the expertise and experience of recent appointees. Typically, past studies have focused on the education level and amount of prior government experience. Those two dimensions, however, are very rough proxies for expertise and experience. Appointee knowledge of particular issues—from the private or public sector—is another perspective. Less thought of but arguably as important are appointee management skills, especially for government organizations.\(^{180}\)

Table 9 displays, by administration, the average level of education,\(^ {181}\) the number of issue-related degrees, the number of management-related degrees, the average number of the four pre-appointment jobs related to the issues covered by the agency position, the average number of the four pre-appointment jobs with federal management experience, the average number of years of service in the agency prior to nomination, the percentage of appointees with any appointed agency experience, and the percentage of appointees with prior state or local bureaucratic experience.


\(^{181}\) Education level is coded as follow: 0 if no college degree, 1 if undergraduate degree only, 2 if one masters degree (including MPP and MBA degrees), 3 if more than one masters degree but no terminal degree, 4 if one terminal degree (and possibly one or more masters degrees), and 5 if two terminal degrees (and possibly one or more masters degrees).
Although appointees under Presidents Reagan and George H.W. Bush had less education than the other administrations, appointees in the past five administrations were well educated.\textsuperscript{182} They may have been book smart, but agency leaders did not, on average, have that much experience they were assigned to lead. Half of them had never served full-time in the agency. The average number of years of prior agency experience (with those with no service counted as having zero years) is also small, especially compared to senior civil servants. In addition, a majority had not worked in any state or local agencies. Interestingly, appointees under Republican presidents were more likely to have had a prior federal appointment and less likely to have non-federal agency experience than appointees under Democratic presidents. Over all administrations, appointees had more issue related education and experience than management related background.

\textsuperscript{182} See also Mann, supra note __, at 19-20 (over half of 800 appointees had a graduate degree, most in law); Stanley et al., supra note __, at 17 (education levels rising from the Roosevelt Administration to the Johnson Administration).
Table 10 summarizes the same characteristics by position level, and Table 11 looks at the attributes in three sets of agencies: inner cabinet departments, other cabinet departments, and other agencies.

Table 10

<table>
<thead>
<tr>
<th></th>
<th>High-Level</th>
<th>Low-Level</th>
</tr>
</thead>
<tbody>
<tr>
<td>Education Level</td>
<td>2.8</td>
<td>2.9</td>
</tr>
<tr>
<td># of Degrees—Issue</td>
<td>0.4</td>
<td>0.7</td>
</tr>
<tr>
<td># of Degrees—Management</td>
<td>0.2</td>
<td>0.2</td>
</tr>
<tr>
<td># of Past 4 Jobs—Issue</td>
<td>1.8</td>
<td>2.7</td>
</tr>
<tr>
<td># of Past 4 Jobs—Management</td>
<td>0.6</td>
<td>0.5</td>
</tr>
<tr>
<td>Prior Years in Agency</td>
<td>1.4</td>
<td>4.0</td>
</tr>
<tr>
<td>% with any Executive Appointed Experience</td>
<td>60</td>
<td>65</td>
</tr>
<tr>
<td>% with State/Local Agency Experience</td>
<td>41</td>
<td>30</td>
</tr>
</tbody>
</table>
Table 11

<table>
<thead>
<tr>
<th></th>
<th>Inner Cabinet</th>
<th>Other Cabinet</th>
<th>Other Agencies</th>
</tr>
</thead>
<tbody>
<tr>
<td>Education Level</td>
<td>3.1</td>
<td>2.9</td>
<td>2.6</td>
</tr>
<tr>
<td># of Degrees—Issue</td>
<td>0.7</td>
<td>0.6</td>
<td>0.5</td>
</tr>
<tr>
<td># of Degrees—Management</td>
<td>0.2</td>
<td>0.2</td>
<td>0.2</td>
</tr>
<tr>
<td># of Past 4 Jobs—Issue</td>
<td>2.7</td>
<td>2.5</td>
<td>2.0</td>
</tr>
<tr>
<td># of Past 4 Jobs—Management</td>
<td>0.6</td>
<td>0.5</td>
<td>0.7</td>
</tr>
<tr>
<td>Prior Years in Agency</td>
<td>5.7</td>
<td>2.2</td>
<td>3.7</td>
</tr>
<tr>
<td>% with any Executive Appointed Experience</td>
<td>74</td>
<td>59</td>
<td>61</td>
</tr>
<tr>
<td>% with State/Local Agency Experience</td>
<td>16</td>
<td>41</td>
<td>34</td>
</tr>
</tbody>
</table>

The highest-level appointees had fewer recent jobs in the same issue area, fewer prior years in the agency, and more experience, on average, in state or local agencies. But appointees in the inner cabinet had more prior years in the agency, more experience in federal appointments, more recent issue-related experience, and less experience at the state or local level than appointees at other agencies.

Approximately twelve percent of the positions in the database have statutory mandates concerning expertise or experience. They include: the Under Secretary of Agriculture for Food Safety; the Assistant Secretary of Education for Educational Research and Improvement; the Under Secretary of Commerce for Intellectual Property and Director of the PTO; the Under Secretary of Defense for Acquisitions, Technology, and Logistics; the Attorney General;\textsuperscript{183} the Solicitor General; the Administrator of the FAA; the Commissioner of the Internal Revenue Service; the Administrator and Deputy Administrator of the U.S. Agency for International Development; and the Administrator of the Small Business Administration. All of the expertise or experience mandates seem to have been met by the

\textsuperscript{183} Although the “learned in the law” mandate appeared in early legislation, it seems to never have been incorporated into the U.S. Code.
appointees in the database. Table 12 shows the metrics displaced in Tables 9-11, on positions with and without such mandates.

### Table 12

<table>
<thead>
<tr>
<th></th>
<th>Mandate</th>
<th>None</th>
</tr>
</thead>
<tbody>
<tr>
<td>Education Level</td>
<td>2.9</td>
<td>2.9</td>
</tr>
<tr>
<td># of Degrees—Issue</td>
<td>0.9</td>
<td>0.6</td>
</tr>
<tr>
<td># of Degrees—Management</td>
<td>0.2</td>
<td>0.2</td>
</tr>
<tr>
<td># of Past 4 Jobs—Issue</td>
<td>2.6</td>
<td>2.5</td>
</tr>
<tr>
<td># of Past 4 Jobs—Management</td>
<td>0.5</td>
<td>0.5</td>
</tr>
<tr>
<td>Prior Years in Agency</td>
<td>3.1</td>
<td>3.3</td>
</tr>
<tr>
<td>% with any Executive Appointed Experience</td>
<td>56</td>
<td>64</td>
</tr>
<tr>
<td>% with State/Local Agency Experience</td>
<td>29</td>
<td>34</td>
</tr>
</tbody>
</table>

Interestingly, Table 12 suggests there is little difference on any of the dimensions discussed above between these positions and other positions, or even that positions with statutory mandates get slightly less experiences appointees. At first glance, this is surprising. Do qualifications requirements not matter? It could be that the qualifications requirements lead to more educated and experienced appointees than would have been selected without such mandates. In addition, qualifications requirements can be de jure and de facto. For instance, the Director of the NIH in the past five administrations always had a medical degree, although this is not a statutory requirement. To the extent that norms or historical practices influence selection of officials for positions without statutory mandates, there may be little difference between those jobs and positions with statutory mandates. Finally, the comparisons here may be too aggregated—comparisons could be done within a particular agency, for example.

### 4. Conflict of Interest and Other Bars

This final section quickly examines any conflicts of interest and other bars on agency service. Other than the permanent ban on former lobbyists for foreign countries serving at United States Trade Representative, the only positions in the database with statutory bars are
in the Defense Department, FAA, and NASA. Unlike other statutory mandates, which seem to have been followed, these bars are not always followed. When they are not, for example, the appointment of former foreign adviser Charlene Barshefsky as USTR and Rear Admiral Richard Truly as head of NASA, Congress had waived the statutory requirements by legislation. Though no position requires military experience, Table 13 shows the percentage of appointees with military experience and the percentage of appointees with military experience relevant to the issues their positions confront (e.g., any military experience is relevant for the Secretary of Navy), by administration.

Table 13

<table>
<thead>
<tr>
<th>% Military Experience</th>
<th>Carter</th>
<th>Reagan</th>
<th>Bush 41</th>
<th>Clinton</th>
<th>Bush 43</th>
</tr>
</thead>
<tbody>
<tr>
<td>% Issue Military Experience</td>
<td>52</td>
<td>49</td>
<td>33</td>
<td>22</td>
<td>16</td>
</tr>
<tr>
<td>(total obs)</td>
<td>(118)</td>
<td>(218)</td>
<td>(123)</td>
<td>(179)</td>
<td>(206)</td>
</tr>
</tbody>
</table>

It appears that fewer appointees have had relevant military experience over time, which tracks military participation by elites.

B. Types of Appointees

The previous section generally examined characteristics of recent appointees—including issue and managerial skills, political skills, and loyalty—in isolation. This section explores how the characteristics fit together, by administration, position level, and agency.

As predicted, golden ticket appointees, who excel on all three dimensions, seem hard to find. I counted in the database of over 800 appointees, by administration, the number of appointees with at least one masters or terminal degree, with at least two of four prior jobs related to issues addressed by the government position, with some prior federal government management experience, with at least two years in the agency, and with campaign contribution to the nominating president and previous DC residence in the past decade or prior elected experience. There were no such appointees under Presidents Carter and Reagan. There were two under President George H.W. Bush, three under President Clinton, and 22 under President George W. Bush.

[Most of section to come in later draft]

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184 The Secretary of Defense cannot have served as a military officer in the past ten years; the Secretaries of the Army, Navy, and Air Force confront a five-year bar. The FAA and NASA Administrators must be civilians. See supra notes __-__.

185 Hogue, supra note __, at 12. Truly and other military officers, who had legislative waivers, did retire from the military before starting in positions with civilian status mandates.

186 [add cites]
To get an initial sense of the tradeoffs among the dimensions, I calculated correlations between the duration of the appointee’s prior agency experience, the number of elected positions the appointee had held, and the appointee’s donations to the nominating president. Table 14 displays the correlations, by administration. Table 15 shows them by position level. And Table 16 gives them by agency type.

**Table 14**

<table>
<thead>
<tr>
<th></th>
<th>Carter</th>
<th>Reagan</th>
<th>Bush 41</th>
<th>Clinton</th>
<th>Bush 43</th>
</tr>
</thead>
<tbody>
<tr>
<td>Money, Elected Experience</td>
<td>0.07</td>
<td>-0.03</td>
<td>0.01</td>
<td>-0.10</td>
<td>0.00</td>
</tr>
<tr>
<td>Money, Agency Duration</td>
<td>-0.09</td>
<td>-0.07</td>
<td>-0.15</td>
<td>-0.11</td>
<td>-0.04</td>
</tr>
<tr>
<td>Elected Experience, Agency Duration</td>
<td>-0.13</td>
<td>-0.08</td>
<td>-0.12</td>
<td>-0.14</td>
<td>-0.13</td>
</tr>
</tbody>
</table>

**Table 15**

<table>
<thead>
<tr>
<th></th>
<th>High-Level</th>
<th>Low-Level</th>
</tr>
</thead>
<tbody>
<tr>
<td>Money, Elected Experience</td>
<td>-0.13</td>
<td>0.06</td>
</tr>
<tr>
<td>Money, Agency Duration</td>
<td>-0.08</td>
<td>-0.00</td>
</tr>
<tr>
<td>Elected Experience, Agency Duration</td>
<td>-0.14</td>
<td>-0.06</td>
</tr>
</tbody>
</table>

**Table 16**

<table>
<thead>
<tr>
<th></th>
<th>Inner Cabinet</th>
<th>Other Cabinet</th>
<th>Other Agencies</th>
</tr>
</thead>
<tbody>
<tr>
<td>Money, Elected Experience</td>
<td>0.12</td>
<td>-0.03</td>
<td>-0.04</td>
</tr>
<tr>
<td>Money, Agency Duration</td>
<td>-0.08</td>
<td>0.00</td>
<td>-0.10</td>
</tr>
<tr>
<td>Elected Experience, Agency Duration</td>
<td>-0.11</td>
<td>-0.13</td>
<td>-0.11</td>
</tr>
</tbody>
</table>
The most variation occurs in the correlation between the measures chosen for issue competence and political skills. None of the distinctions—administration, position level, or agency type—shifts the sign of the relationship between the measures picked for political skills and loyalty. Interestingly, the measures are always negatively correlated.

C. Qualifications as Ex Ante Qualities and Ex Post Performance

Because of space, this paper is focused on the current law and practice of agency appointments. The work here, however, raises some natural questions. Most important, the connection between types of agency leaders at the time of nomination and their performance at the agency after they start needs to be explored. Ideally, we could turn to some straightforward, uncontroversial measure, but none exists. Instead, proxies need to be developed for the performance of agency leaders, which incorporate both expertise and accountability concerns that underlie the legitimacy of the administrative state. If such connections exist, and the next paper argues that they do, we can discuss more informatively whether the current practice of agency appointments described here is desirable. The next paper takes up this task as well, offering several ideas for improving the process and results of agency appointments, at the front end in selection, and at the back end in training and other incentives.

IV. Conclusion

We tend to treat each federal agency as an “it” instead of a “they.” But in each agency are several or several dozen Senate-confirmed political appointees, along with non-confirmed political officials and many more careerists. This two-part project aims to examine the very top layer of the “they.” What constraints govern their selection? Who gets selected? Are they qualified? What can be done to improve their quality? Are such proposals desirable, legal, and feasible? By learning more about the people, we can learn more about these critical institutions as well.

Appendix

I have constructed a large biographical dataset on Senate-confirmed officials in executive agencies, from the start of President Carter’s administration through the end of President George W. Bush’s administration (1977-2009). Specifically, I have collected information on all Senate-confirmed leaders from January 1977 to January 2009 in the following subset of offices: all Cabinet Secretaries and Deputy Secretaries; Administrators and Deputy Administrators of major executive agencies; and all Senate-confirmed

189 John H. Trattner, The 2000 Prune Book: How to Succeed in Washington’s Top Jobs (2000). These positions include: Central Intelligence Agency (Director, Deputy Director); Environmental Protection Agency (Administrator, Deputy Administrator); General Services Administration (Administrator); National Aeronautics and Space Administration (Administrator, Deputy Administrator); Small Business Administration (Administrator, Deputy Administrator); Social Security Administration (Commissioner, Deputy Commissioner); U.S. Agency for International Development (Administrator, Deputy Administrator); U.S.
positions (and any connected deputy positions that require Senate confirmation) listed in a non-partisan think-tank guide to important policy positions in federal agencies. In total, I have gathered data on approximately 846 appointees; not all of these appointees are unique, however.

For each appointee, the database contains the following information: age, gender, race/ethnicity, religion, marital status, children, education, party affiliation, campaign contributions prior to nomination, any prior political or fundraising work for the president, residence prior to government service, experience prior to appointment (including prior federal government legislative, executive, or judicial experience and experience within the same agency, state or local government experience, and military experience), nomination date, confirmation date, tenure (start and end dates), official and unofficial reasons for departure, and a series of post-employment positions. This dataset has advantages over surveys of former appointees, which often rely on officials to provide information. Here, all information has been obtained from public sources.

Information Agency (Administrator); Office of Management and Budget (Director); and U.S. Trade Representative.

These positions include: Department of Agriculture (Under Secretary for Food, Nutrition, and Consumer Services, Under Secretary for Food Safety); Department of Commerce (Under Secretary for Export Administration, Assistant Secretary for Trade Development/Trade Promotion and Director of Foreign Commercial Service, Director of NIST, Director of Census, Under Secretary for Oceans and Director of NOAA, Under Secretary for Intellectual Property and Director of PTO); Department of Defense (Secretary for Army, Secretary for Air Force, Secretary for Navy, Under Secretary for Acquisition, Technology and Logistics, Director of Defense Research and Engineering, Assistant Secretary for Command, Control, Communications & Intelligence, Comptroller); Department of Education (Assistant Secretary for Elementary and Secondary Education, Assistant Secretary for Post Secondary Education, Assistant Secretary for Special Education and Rehabilitative Services, Assistant Secretary for Vocational and Adult Education, Assistant Secretary for Educational Research and Improvement); Department of Energy (Assistant Secretary for Environmental Management); Department of Health and Human Services (Administrator of FDA, Director of NIH, Administrator of Health Care Financing Administration (now Center for Medicare and Medicaid Services), Assistant Secretary for Children and Families); Department of Homeland Security (Administrator of FEMA); Department of Housing and Urban Development (Assistant Secretary for Housing and Federal Housing Commissioner); Department of Justice (Solicitor General, AAG for Antitrust, Administrator of DEA); Department of Labor (Assistant Secretary for Occupational Safety and Health, Assistant Secretary for Pension and Welfare Benefits, Assistant Secretary for Employment and Training); Department of State (Under Secretary for Political Affairs, Under Secretary for Arms Control and International Security Affairs); Department of Transportation (Administrator of NHTSA, Administrator of FAA); Department of Treasury (Commissioner of IRS, Assistant Secretary for Economic Policy, Assistant Secretary for Tax Policy, Assistant Secretary for Financial Markets, Assistant Secretary for Financial Institutions). For agencies that were closed during the period of the data (for instance, the U.S. Information Agency), I have the individuals who served up until that point.

An individual who served as an Assistant Secretary in the Treasury Department and later as Deputy Director of the Office of Management and Budget between 1977 and 2009 has two observations.