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## PAVED IN GOOD INTENTIONS: THE VENERABLE AIMS AND UNIQUE VULNERABILITIES OF PURPORTEDLY INDEPENDENT COMMITTEES

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*Myriad federal statutes limit the number of persons on an executive-appointed board, commission, or committee of one or another political party to allow such commissions to operate independently of the President. Unfortunately, these statutes rely on judicially unenforceable norms that are subject to manipulation. Moreover, these statutes presume that minority representation only comes from the major party that loses the presidential election; they simply do not account for a third party, despite the fact that popular support for a third party is at its highest recorded level. This Essay seeks to simultaneously address both problems by suggesting reforms to the legislation governing committee structure. To do so, the Essay first reviews the generic structure of these statutes and details their aforementioned vulnerabilities and their implications for democratic ideals of representation. Thereafter, the Essay offers a novel solution, reinventing committee size and composition to ensure proper representation of the country's views, prevent manipulation, and allow for a third party's views to be heard if such a party were to blossom.*

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## INTRODUCTION

Prior to the Twelfth Amendment's ratification in 1804, electors for the Electoral College cast two votes for President; the person who would receive the most votes would be named President, the runner-up named Vice President.

The presidential election of 1796, the first contested presidential election, ended in such a manner. Fearing a de facto monarchy or lifetime appointment, President George Washington decided not to run for a third term of office.<sup>1</sup> Then-Vice President John Adams ran alongside then-South Carolina Governor Thomas Pinckney as the Federalist Party's candidates, while then-Secretary of State Thomas Jefferson and then-Senator Aaron Burr ran as Democratic-Republicans.<sup>2</sup> Adams ascended to the Presidency while Jefferson inherited Adams's old office; the two highest posts were to be held by persons of different parties with starkly different beliefs.<sup>3</sup>

<sup>1</sup> See, e.g., George Washington's Farewell Address, George Washington's Mount Vernon, <https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/george-washingtons-farewell-address/> [<https://perma.cc/X9CC-FARC>] (last visited July 30, 2019) (“Washington feared that if he were to die while in office, Americans would view the presidency as a lifetime appointment.”).

<sup>2</sup> Peter Onuf, Thomas Jefferson: Campaigns and Elections, Miller Ctr., <https://miller-center.org/president/jefferson/campaigns-and-elections> [<https://perma.cc/XS7T-HRXS>] (last visited July 30, 2019).

<sup>3</sup> *Id.*

This election is far from the only instance in which a minority opinion was guaranteed a voice; within the last decade, politicians have deliberately sought to appoint—and in fact have appointed—those in different political camps.<sup>4</sup> More recent nominations had better success of achieving bipartisan cooperation than did “Jefferson [who]—although vice president—did little to inhibit, and in fact encouraged, the growing Republican opposition to the Adams administration.”<sup>5</sup> Currently, myriad federal statutes limit the number of persons of the same political party who can serve on an executive-appointed board, commission, or committee,<sup>6</sup> thereby guaranteeing future iterations of Jefferson’s accidental vice presidency—albeit on a smaller scale—and guarding against “a tyranny of the majority over minority interests.”<sup>7</sup>

But the laudable goals of those statutory guarantees are imperiled for two divergent reasons. First, these statutes simply limit the maximum number of persons affiliated with one political party or with the President’s party who can serve on a committee.<sup>8</sup> They accordingly rely on a series of norms to ensure that the minority view is indeed put forward, allowing a President to subvert these goals with simple maneuvering. Second, and somewhat orthogonally, the political

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<sup>4</sup> See, e.g., Ross Cohen, *Why Did President Obama Appoint a Republican to Head the FBI?*, HuffPost (June 28, 2017, 3:26 PM), [https://www.huffpost.com/entry/why-did-president-obama-appoint-a-republican-to-head\\_b\\_5949ae52e4b0710bea889a4d](https://www.huffpost.com/entry/why-did-president-obama-appoint-a-republican-to-head_b_5949ae52e4b0710bea889a4d) [<https://perma.cc/U5RC-MVM9>] (“President Obama liked to be bipartisan as often as he could. He either appointed, or tried to appoint, an unusually high number of Republicans in his administration (e.g. Chuck Hagel, Bob Gates, Judd Gregg, Jon Huntsman, Ray LaHood, Ben Bernanke, David Petraeus, Robert McDonald, John McHugh, Michael Donley, etc.)”); Toby Harnden, *Barack Obama to Appoint Republicans to Key Cabinet Roles*, Telegraph (Nov. 12, 2008, 6:55 PM), <https://www.telegraph.co.uk/news/worldnews/barackobama/3448362/Barack-Obama-to-appoint-Republicans-to-key-cabinet-roles.html> [<https://perma.cc/AZ2X-RYY4>] (“Obama is planning to appoint Republicans to key positions in his cabinet as part of a new bipartisan approach in Washington.”).

<sup>5</sup> Onuf, *supra* note 2.

<sup>6</sup> See, e.g., 15 U.S.C. § 78d(a) (2012) (establishing the Securities and Exchange Commission and requiring that “[n]ot more than three of such commissioners shall be members of the same political party”); 52 U.S.C. § 30106(a)(1) (2012) (establishing the Federal Election Commission and stating that “[n]o more than 3 members of the Commission appointed under this paragraph may be affiliated with the same political party”).

<sup>7</sup> *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 64 (1975).

<sup>8</sup> See, e.g., *supra* note 6 (listing examples of committees that limit the number of persons serving on a commission in one political party); 15 U.S.C. § 7107 (2012) (holding that of the 15-person Interagency Committee on Women’s Business Enterprise, “4 shall be . . . members of the same political party as the President” and “4 shall . . . not be members of the same political party as the President”).

landscape in the United States is changing, with increased polarization and, relatedly, renewed interest in third parties.<sup>9</sup>

Recognizing these changes, this Essay reviews the generic structure of statutes creating purportedly independent committees<sup>10</sup> and discusses its aforementioned vulnerabilities. Thereafter, the Essay offers a novel solution, reinventing committee size and composition to prevent manipulation and ensure proper representation of the country's views, including those of third parties.

### I. THE PROBLEM

Congress created myriad executive departments to carry out its various statutory mandates. The President directly controls these departments, which serve at the President's pleasure. Congress has also created a number of so-called "independent agencies" to neutrally carry out congressional directives independent of the President and related partisan politics, which are often controlled by a committee or commission.<sup>11</sup>

If the goal of these agencies is to implement statutory directives without direct allegiance to the President, one wonders: *how is this independence to be created and enforced?* To ensure the independence of judges, Article III guarantees life tenure and stable salary.<sup>12</sup> Judges are thus not subject to political whims because they cannot be professionally penalized for their judicial acts.<sup>13</sup>

However, life tenure is a poor approach for staffing administrative agencies. Unlike courts, agencies are designed to possess and apply technical expertise reflecting the current state of knowledge in a given

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<sup>9</sup> More extreme views can give rise to increased demand for a third political party that either encompasses the extreme view or occupies an increasingly-barren middle ground.

<sup>10</sup> This Essay's conclusions regarding committee structure do not apply to proposals reimagining the Supreme Court's appointment process. See, e.g., Josh Lederman, Inside Pete Buttigieg's Plan to Overhaul the Supreme Court, NBC News (June 3, 2019, 6:03 AM), <https://www.nbcnews.com/politics/2020-election/inside-pete-buttigieg-s-plan-overhaul-supreme-court-n1012491> [<https://perma.cc/4C6G-6ZDT>]. That process has far different considerations and deserves individualized analysis.

<sup>11</sup> See, e.g., Marshall J. Breger & Gary J. Edles, Established by Practice: The Theory and Operation of Independent Federal Agencies, 52 Admin. L. Rev. 1111 (2000).

<sup>12</sup> U.S. Const. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior . . .").

<sup>13</sup> However, judges are directed to abide by a code of conduct. Code of Conduct for U.S. Judges Canon 2(B) (U.S. Jud. Conf. 2019) ("A judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment.").

field.<sup>14</sup> Given the need for dynamic growth and adaptation, life tenure would hinder rather than further the overall goals of administrative agencies.

Recognizing this, Congress instead adopted a “light” version of life tenure: agency chairs may only be terminated “for cause,” barring their firing simply based on policy decisions.<sup>15</sup> In addition to for-cause termination, independent agencies also feature a bipartisan requirement, which ensures a seat at the table for those who purportedly disagree with the President. For example, the Federal Communications Commission’s enabling statute provides: “The maximum number of commissioners who may be members of the same political party shall be a number equal to the least number of commissioners which constitutes a majority of the full membership of the Commission.”<sup>16</sup>

Thus, unlike judges, commissioners of independent agencies retain a level of democratic accountability: because they are not tenured for life, commissioners have an interest in remaining in the good graces of their respective political parties to ensure future employment. Relatedly, such agencies are not structured to effectuate pure winner-take-all majoritarian will; instead they are designed to represent a broader spectrum of political views. With these features, such agencies are effectively “independent” of the Executive while remaining accountable to and representative of the public.

While much ink has been spilled discussing the President’s ability to terminate independent commissioners,<sup>17</sup> little has been said about the bipartisanship requirement. This is unsurprising, as the requirement is an unusually straightforward mechanism that may not prompt academic inquiry. But despite its seemingly unambiguous command, the bipartisanship mechanism requires further analysis, as it can neither

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<sup>14</sup> See, e.g., *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 342 (2014) (Breyer, J., concurring in part and dissenting in part); *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (“Judges are not experts in the field, and are not part of either political branch of the Government.”).

<sup>15</sup> See Breger & Edles, *supra* note 11, at 1138; see also *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010) (invalidating dual-layer for-cause removal protection as inconsistent with the executive power of the President); *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 631–32 (1935) (upholding constitutionality of for-cause removal protection for Federal Trade Commission commissioner).

<sup>16</sup> 47 U.S.C. § 154(b)(5) (2012).

<sup>17</sup> See, e.g., Aziz Z. Huq, *Removal as a Political Question*, 65 *Stan. L. Rev.* 1 (2013).

ensure broader democratic accountability nor prevent majoritarian control. This is so for two independent but closely interrelated reasons.<sup>18</sup>

The first reason is what we call the “enforceability problem.” The bipartisanship requirement creates a limitation on the number of “members of the same political party” as the President.<sup>19</sup> But these statutes provide no guidance to determine whether this requirement has been met in a litigated case; party affiliation could be defined by voter registration, previous presidential vote, previous congressional vote, or any number of other litmus tests. Furthermore, such indicia of partisan alliance—voter registration, latest political vote or donation, etc.—are volitional and thus subject to manipulation.

Additionally, the text of these statutes appears to permit a President to appoint a simple majority of commissioners from her own party and thereafter appoint additional commissioners whose views closely align with hers but identify as independents or members of a non-dominant party. Many Americans do not identify with a political party<sup>20</sup> and, in fact, Presidents have on many occasions appointed self-declared “independents” as agency heads.<sup>21</sup> In sum, the bipartisanship requirement provides inadequate guidance to courts and permits significant gamesmanship.

As a matter of practice, the statutory requirement is executed by a norm overlay in which each political party is entitled to an equal number of seats on an independent commission to be selected by members of the Senate.<sup>22</sup> The President then appoints the chair, supplying the vote to create a simple majority. But no law compels the President to nominate

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<sup>18</sup> A more fundamental problem persists: whether political party affiliation is an adequate proxy for policy preferences. Accepting today’s political system, this Essay does not directly challenge this assumption but seeks to shore up protections against manipulation on the basis of this assumption. Moreover, solutions which attempt to address the “proxy problem” would likely prove infeasible. See *infra* Subsection II.A.1.

<sup>19</sup> See, e.g., 47 U.S.C. § 154(b)(5) (2012).

<sup>20</sup> See Jeffrey M. Jones, *Americans Continue to Embrace Political Independence*, Gallup (Jan. 7, 2019), <https://news.gallup.com/poll/245801/americans-continue-embrace-political-independence.aspx> [<https://perma.cc/QSR5-2XXD>].

<sup>21</sup> See Mary Jo White, Chair, U.S. Sec. & Exch. Comm’n, *The Importance of Independence*, 14th Annual A.A. Sommer, Jr. Corporate Securities and Financial Law Lecture at Fordham Law School (Oct. 3, 2013) (transcript available at <https://www.sec.gov/news/speech/-spch100113mjw> [<https://perma.cc/GPU6-XG9D>]) (chair of an agency self-identifying as an “Independent”).

<sup>22</sup> See, e.g., Floyd Norris, *Independent Agencies, Sometimes in Name Only*, N.Y. Times (Aug. 8, 2013), <https://www.nytimes.com/2013/08/09/business/independent-agencies-sometimes-in-name-only.html> [<https://perma.cc/F3HY-WSW4>].

those in the minority. And as is well documented, in recent years, there have been “pervasive[] . . . breaches in ethical norms, especially at the highest levels of government. These breaches threaten to undermine public trust not only in particular officials but also in the integrity of bedrock governmental institutions,”<sup>23</sup> including the independent agencies at issue here.<sup>24</sup> Thus, a judicially enforceable legal structure may be required to preserve minority representation in independent agencies. Such a framework should provide clear guidance about how partisan affiliation should be defined and provide safeguards against gamesmanship by manipulation of the confirmation process.

The second reason is what we will call the “underinclusiveness problem.” That is, while independent agencies are designed to represent a broader spectrum of political views than the President and executive departments, these commissions in fact represent the views of the two dominant political parties and, moreover, only the views of Senate

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<sup>23</sup> Preet Bharara et al., Nat’l Task Force on Rule of L. & Democracy, *Proposals for Reform 4* (2018), [https://www.brennancenter.org/sites/default/files/publications/TaskForceReport\\_2018\\_09\\_.pdf](https://www.brennancenter.org/sites/default/files/publications/TaskForceReport_2018_09_.pdf) [<https://perma.cc/8JKR-TLRN>]. And, indeed, it appears to be the case that “one breach of norms begat another.” Brian Beutler, *Republicans Think Capitol Hill’s Rules Are for Suckers*, *New Republic* (Jan. 9, 2017), <https://newrepublic.com/article/139707/republicans-think-capitol-hills-rules-suckers> [<https://perma.cc/CM9N-8SVG>]. The ways in which norms have been broken are extensive and varied, but exemplars can be found in the judiciary, e.g., Noah Feldman, *Opinion, Don’t Pack the Supreme Court, Democrats. You’d Live to Regret It.*, *Bloomberg* (Mar. 28, 2019, 11:59 AM), <https://www.bloomberg.com/opinion/articles/2019-03-28/supreme-court-packing-would-backfire-on-democrats> [<https://perma.cc/5FRC-EEHW>] (referring to the failed nomination of Judge Merrick Garland to the Supreme Court as “br[e]ak[ing] the existing norms of judicial appointment”); *Five Ways the White House and Senate Have Broken the Judicial Confirmation Process*, *Am. Const. Soc’y: In Brief* (Oct. 15, 2018), <https://www.acslaw.org/inbrief/broken-process-an-unprecedented-senate-judicial-nomination-hearing/> [<https://perma.cc/X4AF-ZZ5X>] (listing five ways in which the Trump Administration and Republican Senate have undermined norms in the judicial confirmation process: lacking advice from home-state senators on appointments, the undermining of the blue slip process, diminishing the importance of ratings from the American Bar Association, insufficient vetting, and significantly cutting hearings for appointees to answer potentially hostile questions). However, we do not feel that enshrining this norm in law is the optimal way to solve the enforceability problem.

<sup>24</sup> Cf. David Dayen, *Chuck Schumer Neglected to Name a Democratic Commissioner for the SEC. Now It’s Open Season for Wall Street, Bank Lawyers Crow*, *Intercept* (Mar. 28, 2019, 2:37 PM), <https://theintercept.com/2019/03/28/sec-democratic-commissioner-chuck-schumer/> [<https://perma.cc/AMR9-QG8L>] (“When the Republican nominee, former chief counsel for the Senate Banking Committee Elad Roisman, sailed through the Senate to confirmation in September, it effectively orphaned Lee, giving the Trump administration incentive to slow-walk her nomination, and giving Senate Majority Leader Mitch McConnell incentive in the future to prevent her from getting a floor vote. This freezes out one of the SEC’s seats, giving Republicans an indefinite 3-1 advantage.”).

leaders. Because the minority-viewpoint requirement is a mere bipartisanship requirement, the statutory framework is underinclusive insofar as it ignores the broader spectrum of views not encapsulated in the two dominant political parties as reflected in the Senate. While forced bipartisanship may serve as a counterbalance to the whims of any administration, agency commissions should not simply replicate the political preference of the Senate; they should instead reflect a broader spectrum of the country's political preferences for how the laws should be executed. Moreover, broadening the spectrum of views represented in independent committees will become essential should third parties gain national support that is significant, yet insufficient to secure representation in the legislative branch.<sup>25</sup>

## II. THE SOLUTION

The purpose of this Essay is not solely to highlight “independent” committees’ flaws; it also offers remediation.<sup>26</sup> It must be said at the outset, though, that no solution is perfect; this Essay does not purport to have the silver bullet. Rather, the goal is to identify laudable principles that could guide legislatures in fashioning a system far superior to the current structure.

### *A. Committee Composition*

There exist two potential options to ensure that independent committees include views other than those of the dominant political party. One option eliminates all partisan affiliation requirements and simply requires a super-majority of senators (60) to consent to a given appointment. Unfortunately, this option likely fails to address concerns identified *supra*, particularly the “underinclusiveness” problem. A second option reimagines the committee structure altogether, modifying both its size and its political composition. While this is the better overall option, there are many potential variations on how one could redesign the

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<sup>25</sup> Those that would argue that third parties ought not be represented on commissions lest they gain a foothold in Congress fail to see that structural problems with first-past-the-post voting and head-to-head matchups create institutional barriers to entry that commissions can bypass. Commissions should not replicate Congress’s problems.

<sup>26</sup> Cf. President Theodore Roosevelt, *The Man in the Arena: Citizenship in a Republic*, Address at the Sorbonne, Paris (Apr. 23, 1910), in *Theodore Roosevelt: Letters and Speeches* 778, 781–82 (Louis Auchincloss ed., 2004) (“It is not the critic who counts . . . . The credit belongs to the man who is actually in the arena . . . .”).

committee. Unfortunately, potential features aimed at addressing one flaw would introduce or exacerbate another, thereby undermining the very purpose of the redesign. Thus, this Essay offers a “Goldilocks” solution, an ideal solution that minimizes the harms laid out without implicating others.

*1. Option One: Super-Majority Senate Approval*

One solution is simple: require that appointees receive a supermajority of Senate votes to ensure a broader set of viewpoints represented on the committee. Because this would theoretically take non-majoritarian views into account, this approach should allow for a broader spectrum of appointees without a need for formal partisan allocation, thereby solving the “proxy problem.”

While seemingly elegant, this is an imperfect solution. First, if supermajority consent is the only qualification, there would be no safeguard in the event that one party controls sixty seats in the Senate and the White House, something that has occurred within the last decade.<sup>27</sup> Second, in today’s hyper-partisan political reality, if the party in the White House does not also control sixty seats in the Senate, there is a good chance that no nominees are ever passed. This approach could therefore freeze the status quo at arbitrary points in time—when the President’s party does not also hold a supermajority in the Senate.

Further, the supermajority solution is inadequate to address the underinclusiveness problem; it would, at most, reflect the political preferences of a supermajority of senators and simply create committees of mini-Senate replicas and would arguably do nothing to tolerate, let alone encourage, third-party recognition. Thus, supermajority approval, while nice in theory, fails to adequately address the aforementioned concerns.

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<sup>27</sup> Gary Price & Tim Norbeck, A Look Back at How The President Was Able to Sign Obamacare into Law Four Years Ago, *Forbes* (Mar. 26, 2014, 1:27 PM), <https://www.forbes.com/sites/physiciansfoundation/2014/03/26/a-look-back-at-how-the-president-was-able-to-sign-obamacare-into-law-four-years-ago/> [<https://perma.cc/KX3C-R5KE>] (“Now the Democrats had a safe majority in the House and a filibuster-proof supermajority of 60 in the Senate.”).

*2. Option Two: Reimagining the Committee Size, Structure*

Because the supermajority protection would not achieve its desired aims, independent committees must be recreated to accommodate two important political realities today: increasing support for a third party in American politics<sup>28</sup> and a growing schism between the national popular vote and the Electoral College.<sup>29</sup> Therefore, the committee should be restructured to represent the electorate's political preferences by apportioning the committee's seats based on a given party's national support. To realize this aim, the committee's size must also be tied to the number of viable parties, with viability based on the percentage of support the party receives at a national level.

This solution minimizes the deficiencies above, providing meaningful definition of the minority views to be represented and broadening the spectrum of represented views. What's more, this proposal has the added benefit that it will not change the composition of committees today, but provides an adaptable framework to accommodate changes once the landscape indeed shifts.

To be sure, this approach will not lessen the import of political parties as a key source of power. This answer is not perfect, but it is at worst the same as the status quo in which high-ranking members of the dominant political parties select nominees; however, it provides greater upside potential in the event that non-dominant parties generate sufficient support to receive seats on a commission.

*B. Party Viability*

If committees are to incorporate minority viewpoints so as to remain independent, any political party that receives the support of a substantial portion of the electorate should get its policy position(s) represented.

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<sup>28</sup> Lee Drutman, *How Much Longer Can the Two-Party System Hold?*, Vox (Sept. 17, 2018, 2:40 PM), <https://www.vox.com/polyarchy/2018/9/17/17870478/two-party-system-electoral-reform> [<https://perma.cc/D7G8-P2X2>] (noting that demand for a third party sits at "68 percent . . . the highest in at least 25 years").

<sup>29</sup> See, e.g., Daniel Ura, *Coalition to Change Electoral College Votes Grows Closer to 270-Vote Mark*, United Press Int'l. (June 13, 2019, 6:25 AM), [https://www.upi.com/Top\\_News/US/2019/06/13/Coalition-to-change-Electoral-College-votes-grows-closer-to-270-vote-mark/6361560294210/](https://www.upi.com/Top_News/US/2019/06/13/Coalition-to-change-Electoral-College-votes-grows-closer-to-270-vote-mark/6361560294210/) (noting that two of the five instances in which a candidate won the popular vote but lost the Electoral College occurred recently and that such results have spurred increased demand to bypass the Electoral College by way of the National Popular Vote Interstate Compact).

Three questions are bound in that assertion: how does one measure support, how much support is sufficient to entitle a party to representation, and how does partisan affiliation translate into commissioner selection?

### *1. Measuring Support*

To measure support, it would be easy to tabulate the percentage of representatives, senators, governors, or other officeholders affiliated with a party. The more egalitarian metric, however, is the percentage of votes that party's candidate received in the presidential election. Because of structural biases against third-party candidates, such candidates rarely make it through the legislative electoral process; limiting representation to parties that have obtained elected positions therefore perpetuates these biases and ignores the political preferences of many Americans. Moreover, aligning committee representation to the national popular vote would incentivize would-be third-party voters to come to the polls rather than stay home for sake of defeatism.

More fundamentally, the presidential election represents a voter's view of how the law should be executed. Preference in a presidential election should therefore better reflect voters' preferences for the actions of independent committees than would votes for federal legislative or state executive offices.

### *2. Viability Threshold*

The appropriate threshold percentage to entitle a party to a commissioner is a complicated question. If the viability threshold is too high, this enterprise will be for naught because independent committees will remain de facto bipartisan. However, setting the threshold too low risks introducing fringe viewpoints that have failed to gain significant support and do not represent the views of most Americans.<sup>30</sup> Because determining the threshold will involve this intricate balancing, the legislature should determine what level is appropriate.

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<sup>30</sup> One may argue that this whole proposal risks substituting nonpartisan moderate commissioners for third-party extremists. However, that argument depends on a series of assumptions about the nature of the two dominant political parties in the coming decades and about the type of third party that may emerge and, ultimately, garner substantial public support. More importantly, refusing a potential ideological extremist a seat at the table, we feel, would be a far greater evil than undermining democratic principles of representation.

While it may be counterintuitive to believe that members of Congress would have any willingness to embrace a system that could introduce nonmajor parties into the federal government, it is actually in the best interest of congressional members to endorse this proposal. As discussed *supra*, the bipartisan committee structure as it exists, implemented by a series of norms, is susceptible to manipulation and gamesmanship across several axes. By addressing the “enforceability problem,” this proposal actually furthers the interests of the majority parties, especially in the short term when there is no viable third-party contender.

### *3. From Support to Representation*

Any party over the determined threshold is entitled to representation on these independent commissions. But, as discussed *supra*, most indicia of partisan affiliation are subject to manipulation, and relying on an informal process is an inadequate safeguard in a political climate of rapidly deteriorating norms. Therefore, this approach should include a meaningful reasonability standard: a nominee shall be considered a member of a party if there is a reasonable demonstration of affiliation with that party’s belief over time. Such a standard allows for flexibility but empowers a judge to invalidate an appointment when pretext and abuse are present.<sup>31</sup>

#### *C. Committee Size*

If the legislature decides who must have a seat at the table to remain independent, a subsequent question is: how big should the table be? The committee’s size should be directly tied to the threshold percentage of a political party such that political representation is proportional on the committee.

Consider a committee that has a fixed size of five seats. If the viability threshold is set at 5%, a party with 6% support is guaranteed one slot, while the other two parties—totaling 94% support—would have to split four seats among them. Leaving committee size and party viability untethered to one another could distort political representation on the committee, undermining the very purpose of this restructuring. Put simply, there would be a significant difference between a party’s popular

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<sup>31</sup> A more straightforward standard may theoretically be beneficial, but may be a constitutionally dubious encroachment of the President’s appointment power.

support and the representation it wields on a committee.<sup>32</sup> Therefore,  $N$ , the number of people on the committee, is in some way inversely proportional to  $T$ , the threshold amount:

$$N \approx \frac{1}{T}$$

In real terms, as  $T$  gets smaller,  $N$  will get larger, and vice versa.

#### *D. The Upshot*

The logical conclusion from these observations—that committees' composition should be proportional to popular political support and that committee size must be tied to the number of viabilities—is twofold. First, the threshold for party viability must be high enough to prevent creating a massive committee but low enough that substantial third parties are not foreclosed representation. Second, the President's party is no longer guaranteed a majority.

##### *1. Reasonable Thresholds*

The math spells out the need for reasonable bounds on thresholds. On one hand,  $T$  has a maximum for including a third party at 33.33%: if it were set any higher, a third party would not be mathematically eligible for representation. And if  $T$  is set near that mark, third parties will likely be foreclosed representation until they are of equal size and force as the two dominant parties—not exactly an ideal solution to nurture the growth of third parties.

On the other hand, if  $T$  is 5%, the committee will be ~20 persons large, a far cry from where most stand today.<sup>33</sup> Even assuming that 5% national

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<sup>32</sup> Admittedly, no solution will be perfect. Even today's five-person commissions hold an imbalance; five-person committees in a country that is split 50.1%–49.9% would consist of three and two members of each respective party, a 60-40 split resulting in representation disproportionate by 19.8%. Perfection, however, cannot be the enemy of progress.

<sup>33</sup> See generally Christopher M. Davis & Michael Greene, Cong. Res. Serv., *Presidential Appointee Positions Requiring Senate Confirmation and Committees Handling Nominations* 13, 33–34, 48 (2017), <https://fas.org/sgp/crs/misc/RL30959.pdf> [<https://perma.cc/7XKS-KAMT>] (noting that only a handful of commissions or boards have over 20 members, including the National Institute of Building Sciences' Board of Directors (21 members), the National Science Board (24), National Museum and Library Services Board (20), National Science Foundation (24), National Council on the Arts (25), and the National Council on the Humanities (27)).

support would be a desirable viability threshold, this is simply impracticable. In a government that boasts “hundreds of federal agencies and commissions,”<sup>34</sup> filling so many seats with genuine experts that can adequately represent the interests of the populace is at best unlikely, requiring tens of thousands of families to uproot their lives, move to Washington, and likely cut their income. And even if this were possible, it is doubtful that the government would allocate the funds necessary to pay these new commissions and even a barebones staff.

Even if we could identify the right individuals and staffers, and even if legislatures budgeted for their salaries, there is no guarantee that they would be approved in time to do the job.<sup>35</sup> Adding more to the Senate’s workload without commensurate changes to the Senate rules to expedite voting would mean many of the seats would remain open indefinitely,<sup>36</sup> defeating the very purpose of a larger committee. And, finally, supersized committees would likely be unable to function efficiently and would almost certainly be subject to the same deadlock that plagues the Senate. Therefore, a large committee may simply not be possible.

In sum,  $T$  is likely best set between 10 and 25% to accommodate yet another “Goldilocks” problem. Setting  $T$  at 20% provides an easy, viable solution for two chief reasons: first, the math is simply more practicable—creating a five-person commission—and thus the solution is more digestible to those suffering from arithmophobia.<sup>37</sup> Second, 20% is simply a reasonable middle ground in the boundaries laid out above—until a third party is thriving and a fourth party begins its ascent, at least.

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<sup>34</sup> Our Government: Federal Agencies & Commissions, White House, <https://www.white-house.gov/about-the-white-house/federal-agencies-commissions/> [https://perma.cc/5B9P-42-YS] (last visited July 30, 2019).

<sup>35</sup> The Senate, the “world’s greatest deliberative body,” The Idea of the Senate, U.S. Senate, [https://www.senate.gov/artandhistory/history/idea\\_of\\_the\\_senate/1842Clay.htm](https://www.senate.gov/artandhistory/history/idea_of_the_senate/1842Clay.htm) [https://perma.cc/GL6F-NUA3] (last visited July 30, 2019) (internal quotation marks omitted), does not meet every day; their votes are lumbering, and there are already “approximately between 1,200 and 1,400 [executive branch] positions” that require the Senate’s advice and consent. Maeve P. Carey, Cong. Res. Serv., Presidential Appointments, the Senate’s Confirmation Process, and Changes Made in the 112th Congress 7 (2012), <https://fas.org/sgp/crs/misc/R41872.pdf> [https://perma.cc/7HLA-CQ5R].

<sup>36</sup> Not to mention the current administration’s penchant for leaving positions open. Cf. Amanda Becker, Trump Says Acting Cabinet Members Give Him ‘More Flexibility,’ Reuters (Jan. 6, 2019, 11:51 AM), <https://www.reuters.com/article/us-usa-trump-cabinet/trump-says-acting-cabinet-members-give-him-more-flexibility-idUSKCN1P00IG> [https://perma.cc/77-Y8-92HS] (reporting that President Trump appreciates that non-confirmed acting department heads afford him “more flexibility,” though without explanation).

<sup>37</sup> A fear of math, common for those in law and politics.

## 2. *The President's Party Is Not Guaranteed a Majority*

Necessarily, the President's party would no longer be guaranteed the commission's majority. Indeed, if the President's party does not represent the majority opinion, this guarantee undermines fair representation. To this point, a study conducted by National Public Radio estimates that, because of the Electoral College's peculiarities and because forty-eight states demand that the majority of the state popular vote receives 100% of its Electoral College votes, one could win the Presidency with approximately 23% of the national popular vote.<sup>38</sup> While unlikely, the winner of the Electoral College lost the popular vote twice in the last five presidential elections.<sup>39</sup> Therefore, to maintain genuine representation, the President's party cannot automatically be granted a majority representation on an odd-numbered committee. Acknowledging that this is inconsistent with any theory of a unitary executive and could be seen as undermining the President's role in executing the laws of the United States, it should be stressed that this proposal applies only to independent committees. Accepting that such committees should in fact operate independent of the day-to-day machinations of the executive branch, proportional representation rather than presidential control should be the preferable structure.

### *E. Limiting Principles: Simple Majority*

To ensure that this proposal does not result in *less* diversified commissions, a party's representation should be capped at a simple majority. Leaving a committee to be purely representative could create a tyranny of the majority: if one party *dominates* the popular vote, the entire committee would then be members of that party. Skeptics could argue that in the biggest electoral landslide in recent history, Ronald Reagan trounced Walter Mondale. Reagan won forty-nine states but only won 58% of the vote.<sup>40</sup>

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<sup>38</sup> Danielle Kurtzleben, How to Win The Presidency with 23 Percent of The Popular Vote, NPR (Nov. 2, 2016, 6:00 AM), <https://www.npr.org/2016/11/02/500112248/how-to-win-the-presidency-with-27-percent-of-the-popular-vote> [https://perma.cc/3TLN-T8D6].

<sup>39</sup> Tara Law, These Presidents Won the Electoral College — But Not the Popular Vote, Time (May 15, 2019), <https://time.com/5579161/presidents-elected-electoral-college/> [https://perma.cc/WRT7-GD77].

<sup>40</sup> See Presidential Elections 1972–2008, Voting America: United States Politics, 1840–2008, <https://dsl.richmond.edu/voting/preselections.html> [https://perma.cc/Q8ZG-J6WG] (last visited July 30, 2019).

Nevertheless, for fear of this hypothetical, and to ensure independent commissions retain moderating forces, this rejiggered committee caps one party's representation to a simple majority. In the event of such a landslide victory, the excess seats would simply be distributed amongst the minority parties *pro rata*.<sup>41</sup>

#### CONCLUSION

The United States political system has in recent years undergone significant transformation and is on the verge of an even greater sea change. Whether it takes years or decades for the waves to crest is yet to be seen, though continued discord with the two-party system and further norm-breaking suggests we may see white caps on the earlier side of this spectrum. We must therefore (metaphorically) batten down the hatches and solidify the foundations of our institutions while allowing for the flexibility of change. Understandably, pushes for such reform, where forwarded, have focused on institutions such as the Supreme Court.<sup>42</sup> But the administrative state, arguably “the president’s most effective tool for exercising power in domestic affairs,”<sup>43</sup> cannot be overlooked. This Essay charts such a path, explaining the pitfalls of the current structure vis-a-vis undercurrents of norm-breaking and third-party demand. More than that, however, we hope it inspires deeper thinking about adopting analogous structural changes across the government.

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<sup>41</sup> As it currently stands, committees often share terms that extend beyond a President’s term—another mechanism to encourage bipartisan cooperation. To match committees to presidential votes, the commissioners’ terms would necessarily need to be adjusted to match the President’s term.

<sup>42</sup> See, e.g., Burgess Everett & Marianne Levine, 2020 Dems Warm to Expanding Supreme Court, *Politico* (Mar. 18, 2019, 5:04 AM), <https://www.politico.com/story/2019/03/18/2020-democrats-supreme-court-1223625> [<https://perma.cc/QJ6F-5TEB>].

<sup>43</sup> M. Anthony Mills, Deconstructing the Administrative State, *RealClearPolicy* (June 29, 2017), [https://www.realclearpolicy.com/articles/2017/06/29/deconstructing\\_the\\_administrative\\_state\\_110284.html](https://www.realclearpolicy.com/articles/2017/06/29/deconstructing_the_administrative_state_110284.html) [<https://perma.cc/4XM2-R3T5>].