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Legislative Gridlock and Executive Unilateralism: A Comparative Look at the Interplays between Legislative Process and Policy Governance

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I. Introduction

The deepening of partisan polarization in recent years has turned the U.S. Congress into a hostile battlefield. The legislative process is increasingly filled with various kinds of confrontations, obstructions, and delays, many of which have partisan motivations. The complex and lengthy lawmaking routes in the decentralized and super-majoritarian U.S. Congress were rough and tumble from the beginning. But intensified partisan conflicts in the new millennium have further aggravated stalemates in the legislative process. “Legislative gridlock” is now a very familiar expression.

On the other hand, however, in the same period, American people have witnessed a line of important policies newly adopted or substantially changed. For example, there were some significant turns in fiscal, energy, environmental, immigration, and health-care policies, just to name a few. Characteristically, these policies were largely driven by the U.S. Administration, while the inactive and even lethargic Congress seemed to concede the driver’s seat. As these cases attest, the executive branch of the U.S. government has occasionally managed to make major policy progresses, thereby keeping its active and leading role in policy governance.

Whereas polarized partisan conflicts, attrition warfare, and stalemate form a vicious circle in the legislative process, administrative activism and occasional substantive breakthroughs characterize policy areas. The co-presence of these two contrasting sides of the contemporary American government is a puzzle that this paper aims to tackle. The main research question is: How the U.S. Administration takes policy activism and keeps a leading role in policy initiatives when political polarization deepens and partisan fights intensify in the legislative process. In other words, how does the U.S. Administration achieve significant policy makings or policy changes despite the sharp partisan polarization and intense political conflicts that seemingly bog down the legislative process?

Answers to this main question are expected to bring about some comparative implications. In some other countries such as South Korea, gridlock situations in the legislative process typically coincide with similarly helpless inter-branch stalemate and overall governance crisis. The Korean President and administrative agencies would surely try to take their own initiatives toward certain policy goals, but those unilateral attempts typically invite unfavorable and even hostile responses from the legislative branch. New policy introduction or important policy change is hard to get if those situations of inter-branch confrontations

continue. Why does the South Korean case feature these kinds of political and policy pictures that are gloomier and more troublesome than in the U.S.? Both countries share important similarities: separation-of-power principle, presidential system, first-past-the-post single-member districts for legislators, largely two-party system, legislative processes equipped with supermajoritarian devices, and frequent emergence of divided government. Especially, the two countries are similarly experiencing serious partisan polarization. Despite these similarities, the U.S. is characteristic of occasional policy changes (even innovations) led by the active and unilateral executive branch, while the South Korean government significantly lags in generating such positive scenarios. How can we explain this relative difference? Addressing the foregoing main research question might uncover some clue.

The following Section II will establish a theoretical reasoning that partisan polarization motivates the President and administrative actors to bypass the legislative process and unilaterally resort to executive tools to pursue their policy agenda. Section III will then take up the empirical case of U.S. nuclear energy policy to support this theoretical reasoning: U.S. Presidents and the Administrations in recent years have indeed relied on executive policy instruments in order to bypass Congress and promote nuclear energy programs. A single case is sure not to allow a bold generalization. But, as the later discussion will elaborate, U.S. nuclear energy policy can be a “critical” case with a potential to produce comparative theoretical implications.

Section IV will discuss a couple of implications drawn from the theoretical and empirical stories in the preceding sections. The first subsection (IV-1) will raise an issue about the ironic interplays between the legislative process featuring polarized partisan conflicts and the policy areas propelled by the unilateral executive side. The second subsection (IV-2) will then comparatively overview the South Korean case where partisan polarization, unlike in the U.S., bogs down the whole policy governance system—needless to say about the legislative process. This contrast between the Korean and U.S. cases will be explained in terms of strategic thinking and political calculations in the parts of legislators and the Presidents.

II. Theoretical Reasoning: Beyond Legislative Processes onto Administrative Realms

There is little disagreement on the rising trend of intense partisan conflicts and party polarization in the U.S. (Bond and Fleisher 2000, Jacobson 2013, Smith and Gamm 2013, Aldrich et al 2013, Koger 2013, McCarty 2007, Mann and Ornstein 2006, Brownstein 2007). Party polarization has grown widely across the board in American politics, but it is especially visible in the legislative stage. There have been historical trends of growing partisan confrontation, party polarization, and hostility in the legislative process. Party votes and party unity scores have consistently climbed up in the Senate and the House alike, and the inter-party distances measured by each party’s issue positions have been enlarged. Amidst this trend of party polarization, party leaders in both sides have competed to utilize “unorthodox” legislative procedures as strategic moves for partisan interests (Sinclair 2007). Congress is today much more hostile internally and also in its relationship with the President than in the

so-called “Textbook” era; filibusters have become a near routine and are no longer a big news for newspaper headlines.

Taking for granted a rise of party polarization, academic circles have accumulated piles of studies on it. Popular questions have been: how to define polarization, whether polarization is confined to the political elite or reflects a fundamental ideological shift in the American society, and what factors cause partisan polarization among politicians and, if any, in the American electorate. In sharp contrast to the heavy academic works on these questions, the effects of polarization on policy governance have received relatively scant scholarly attention despite the subject’s journalistic popularity: “Relatively less attention, however, has been paid to how this breakdown in bipartisanship has affected public policy and the routine functioning of our national government” (McCarty 2007, 223). Relatively overlooked, the question of what kind of consequences party polarization has brought to the American polity is failing to generate a scholarly consensus. Roughly speaking, two opposing views are contesting each other: the “gridlock” school versus the “moderation” school.

In the “gridlock” school side, a list of observers charge party polarization with aggravating legislative inefficiency and overly deepening policy stalemate (Binder 2001, Bond and Fleisher 2000, Hacker 2004, Dodd and Schraufnagel 2013, Hacker and Pierson 2005). Party polarization makes it a tougher task to earn compromises and build the legislative coalitions needed for making new policies. In this view, gridlock is inevitable, especially when polarization is combined with supermajority rules. The supermajority hurdles are particularly noteworthy. Party polarization might even effectively promote lawmaking in a purely majoritarian process, with any side enjoying a majority of seats destined to prevail all the way and minority parties destined to lose all the time. But the U.S. lawmaking process is antithetical to pure majority rules. It requires a supermajority backing and is, hence, essentially driven by the preferences of those *pivotal* actors whose support is necessary in order to overcome obstructions such as filibusters and vetoes. Even the majority party with a fair margin is typically unable to push its agenda at their will.

The “gridlock” argument may seem convincing in view of all kinds of horror stories about policy confusion and failure in the context of polarized partisan fights. For example, Hacker says that polarization impedes the passage of many policies designed to alleviate social risks (2004). McCarty also agrees that “polarization-produced gridlock forestalls the creation of new legislative enactments” (2007, 244). The “gridlock” thesis, however, shows only a part of the whole picture. There occur policy breakthroughs from time to time. True, gridlock may better describe the U.S. legislative realm in most cases; but the American government has occasionally passed or changed major policies. Without those occasional successes, the American polity would have not been so adaptive and resilient in the rapidly changing contemporary environments. Examples abound. U.S economic policy has taken a shift toward a more balanced neo-Keynesian stance in the wake of global financial crisis. There have been a series of reforms in regulatory policy. The U.S. government has successfully expanded its free trade stance. Welfare policy and immigration policy experienced substantive upgrades, too, though maybe far from satisfactory to the eye of reformers. Healthcare policy was fundamentally overhauled despite a continuing controversy

over how to effectively implement the reform package.

The incompleteness or partiality of the “gridlock” thesis may give some credential to the opposite views taken by the “moderation” school. According to them, party polarization does not necessarily generate policymaking difficulties, let alone a grave gridlock crisis. Some even argue that party polarization and ensuing partisan conflicts may better serve diverse interests and facilitate coordination in legislative processes and policy governance (Mayhew 1991, Fiorina 1992, Levin and Landy 2001). Their reasoning mostly relies on a Downsian logic: Partisan polarization eventually produces moderate politics and middle-of-the-road policy outcomes, since each party tries to appeal to the median voter and wants to avoid blame for policy stalemate. Adopting a strategy of “centrist defecting” is the best option for each party locked up in a polarized warfare (Downs 1957). Levin and Landy (2001) and Mayhew (2001) examine the years under President Clinton and find that polarized partisan confrontation eventually induced moderate centrist coordination in policymaking. Of course, the “moderation” subscribers do not believe that centrist convergence comes automatically. Facilitative leadership by party leaders is a crucial catalyst to promote moderation in political as well as policy arenas, as President Clinton nicely exemplified this.

Plausible as it is to some degree, the “moderation” argument is also incomplete at best. Centrist convergence may be probable with a symmetrical one-peak distribution of voter preferences, but is less likely with an asymmetrical distribution or in a polarized two-peak condition. Situations in American politics since the 1990s just do not allow us to assume a symmetrical one-peak distribution: Polarization in party competition has deepened a schism between Democratic and Republican supporters. “Second civil war,” “culture war” — these expressions are certainly an exaggeration, but their popularity and wide acceptance in the media and the American public alike suggest that both Washington and the American society have indeed become polarized to a noticeable and significant extent (Brownstein 2007, Hunter 1991). Also, except for several aforementioned examples, the usual reality of policy governance is far from moderation and centrist convergence. To the contrary, most of policy areas seem to be characteristic of excessive tension, and stalemate so much so that governance crisis has become a familiar notion today even in the American political system.

While each of the “gridlock” or “moderation” school offers only an incomplete partial account, there is a more serious problem in common. The gridlock-or-moderation dichotomy narrowly confines our perspective onto the legislative side only, and provides a simplistic picture featuring legislators and the President interplaying with each other only through the legislative process. It misses a broader range of actors and institutions (e.g., bureaucrats) playing more complexly in legislative *and* non-legislative arenas. There is no denying that the legislative process is the most important playing ground for politicians. American people are accustomed to the alleged centrality of Congress and the importance of legislation as a keystone tool of policy governance. Theories of congressional delegation and oversight mostly assume the upper hand of Congress vis-à-vis the administrative branch (Fiorina 1977, McCubbins and Page 1987, McCubbins and Schwartz 1987). But the substantial non-legislative policymaking authorities the President and administrative agencies boldly and liberally wield demonstrate how misguided a narrow look at legislative fields as the sole

stage of policy governance is. Legislators, the President, and administrative officials do not always stay in the legislative process. They are very creative in finding various kinds of non-legislative realms in order to pursue their policy goals. Even members of Congress often resort to such non-legislative measures as investigative hearings or public speeches or caseworks. Ginsberg and Shefter (1990) coined the term, R.I.P., to refer to rampant revelations, investigations, and prosecutions that politicians including members of Congress are tempted to rely on as a tactic for policy—as well as partisan—motivations. Problems in legislative, administrative, and judicial dimensions are all mixed up. Therefore, we need to take a broader macro look at legislative and non-legislative fields alike. As McCarty says, “Contemporary debates about executive and judicial power often fail to recognize that much of the problem lies in the legislative weakness wrought by polarization and partisanship” (McCarty 2007, 247).

In the presidential side, the top politician can use non-legislative direct actions such as executive orders or presidential proclamations. Legislative haggling amidst polarized partisan conflicts motivates the President to evade legislative headaches. He would want to go alone unilaterally, bypassing legislative procedures and instead resorting to presidential direct actions. “[Polarization] is likely to weaken Congress vis-à-vis the other branches of government. Polarization provides presidents with the incentive and an excuse for circumventing Congress and governing by executive order” (McCarty 2007, 224). A single-minded consideration of the legislative process exaggerates a possibility of gridlock or moderation as a result of party polarization. Not opting for gridlock or moderation either, the President may go alone unilaterally and avoid engaging in interactions with his congressional counterparts. He has motivations and actual powers to bypass legislative routines and instead utilize presidential direct actions (Cooper 2002, Mayer 2001, Howell 2003). The President’s unilateral strategies, while allowing him to achieve his policy goals, prevent either policy gridlock or moderate coordination.

How, then, does the President pursue his policy objectives without facing a broad scope of conflict in Congress and without relying on legislative mechanisms? There are several ways available. First of all, the President can avoid making new legislations and instead can resort to existing broad legislations as a legal basis for his policy initiatives. For example, the President may push and justify his particular climate change policy on the basis of the comprehensive Environmental Policy Act and the similarly comprehensive Energy Policy Act, both of which were passed several years earlier, instead of trying to pass a new legislation. Opponents would protest, of course, but the shrewd President knows how to broadly interpret an existing law to find an adequate legal ground for his decision and would determinedly insist his legitimacy.

The President also has a powerful tool of executive orders: “The modern Presidency has embraced the executive order as a way to further policy goals in defiance of, or unilaterally from, Congressional action” (Flanagan 2011, 2). Executive orders, Flanagan continues, are “attractive to Presidents because as opposed to working with Congress they are quicker to move forward, receive less public scrutiny and attention, and can be altered later to suit a changing situation” (Flanagan 2011, 2). Presidential proclamations are another measure

available to the President: they “can be used for simply advancing goals rhetorically or signaling a shift in policy” and “can refocus the party line, bring attention to pressing issues, and pacify interested constituents by showing concern” (Flanagan 2011, 5). Moreover, the President sometimes makes the best of signing statements: they are “a last resort attempt to ignore or alter a law from Congress. When the President signs a law he can attach a statement that he reserves the right to direct the bureaucracy to implement the law as he sees fit. At times this can include a directive to ignore parts of the law that conflict with administrative policy” (Flanagan 2011, 5).

Executive unilateralism is not exclusive to the President. Bureaucrats significantly shape the daily life of citizens through a myriad of regulatory decisions and orders. They do so, often under the President’s directions and against the Congress’ preferences: “The Presidency started implementing laws from Congress in such a dramatic way that the final outcome may bear little resemblance to what the political powers in Congress would dictate” (Flanagan 2011, 7). Administrative agencies can lead policies through regulatory review, rules, and orders, often on pure bureaucratic basis with no direction or approval of representative institutions including the Presidency. Administrative bureaucrats—less representative and less accountable—pursue their own agenda and interests and often come to claim bigger roles. Effects of polarization in the legislative process can naturally and easily spill over onto administrative agencies, and their non-legislative policymaking in the form of regulatory decisions can critically change policies. Ferejohn talks about this independent power of implementing bureaucrats: “whether or not Congress chooses to impose such requirements on rule making, agencies will evolve procedures that reflect the level of conflict and uncertainty in their environments” (Ferejohn 1987, 446). If bureaucrats activate their policymaking capacity when partisan polarization thwarts or delays legislative production, they can lead policy governance and evade either gridlock or legislative moderation.

Given the Administration’s frequent bypassing of Congress and its resorting to executive tools in situations of party polarization, a question comes to mind: Would members of Congress not notice and challenge the administration’s unilateral policymaking, or would they just condone it? They would be surely aware of it; complaints from the congressional side about being ignored by the President or administrative agencies are not rare. U.S. Congress has a large size of staff and expert groups working for the institution or individual members, and they must be capable enough to detect unilateral administrative actions. Vigilant mass media and interest groups also are never hesitant to inform the public and lawmakers of what they think are administration’s errant unilateral actions. It is therefore reasonable to posit that well-informed legislators, for their own sake, passively acquiesce to the administration’s unilateral actions. Unable to lead by themselves but unwilling to take blame for policy gridlock, either, lawmakers acquiescently but strategically allow the Administration to make unilateral actions and take policy initiatives. That way, clever lawmakers know, they would earn several benefits: (1) they shirk the responsibility of making difficult policy decisions; (2) they avoid antagonizing those whose interests may be at stake; (3) they evade blames for policy failure or gridlock; (4) and they can claim a political credit by criticizing ex post facto whatever the alleged mistakes the administrative side commits in

making policy decisions.

Being shrewd strategic rent-seeking actors, members of Congress have institutionalized various instruments to control executive actors in the stage of policy implementation—e.g., the Congressional Review Act (1996), informal arrangements between administrative agencies and relevant committees, needless to say about oversight hearings and investigations. Moreover, Congress has kept enacting hundreds of legislations containing provisions of “legislative veto,” even after the *INS v. Chadha* decision by the Supreme Court (1983) declared it unconstitutional. The dual presence (some may call it collusion) of legislative inaction in the side of acquiescent, condoning, and, actually, shrewdly-controlling members of Congress and administrative activism by the unilaterally-behaving executive branch may be controversial democratically. But somehow it can work together and manage to facilitate policy governance.

The next Section III examines an empirical case to illuminate the theoretical reasoning developed in this section. The core idea is, to summarize, that partisan polarization makes it more difficult for the fragmented and supermajoritarian Congress to reach a conclusion and pass major policies, and that this congressional situation of stalemate and inaction is likely to encourage the administrative side (both the President and the bureaucracy) to resort to unilateral policymaking over the tacitly acquiescing—though often rhetorically defying—members of Congress.

III. Case in Point: “Nuclear Renaissance” through Executive Unilateralism

Nuclear power policy, referring to civilian use of nuclear technology for energy, is the case to test the foregoing theoretical reasoning. Why the nuclear power case? Its relative convenience for observation is noteworthy. Nuclear power policy is partially economic and partially social, partially ideological and partially political, and partially technological and partially cultural. Having this complex and comprehensive character, the case has a comparative advantage in showing the interplays between legislative and administrative realms, between expertise and public opinion, and between representative and non-representative elements.

In particular, the nuclear energy policy field features a co-presence of the administration’s historical activism and the Congress’s seemingly intense interest. Thus it offers a test case for assessing how the two branches interact with each other and which side may eventually prevail—or at least take initiatives more actively—in policy governance. On one hand, the U.S. government exclusively led the initial launching of nuclear energy programs in the post-WWII era and still today plays an extensive and intervening role. There are lengthy regulatory requirements for the construction and operation of nuclear reactors, for the conversion, enrichment and fabrication of nuclear fuel, for the mining and milling of raw materials, and for the R&D and global spread of nuclear technology. Moreover, nuclear power generation calls for huge costs; if the government is unwilling to provide direct subsidies, loan guarantees or tax credits, the civilian industry would not venture into such a

capital-intensive project. Overall, the government has been unequivocally the main engine for nuclear energy. This is why administrative players (the President and bureaucrats alike) may be motivated and even feel obliged to bypass the difficult polarized congressional routes and instead resort to convenient executive tools in order to pursue its nuclear policy goals.

But on the other hand, nuclear power policy also attracts Congress' partisan attention. Nuclear power is an "easy" issue with high public salience and social concern and thus often generates intense party competition; legislators, who are typically keen to and nervous about such an "easy" partisan issue, are least likely to passively acquiesce to the administration's unilateral policymaking. They, a logic goes, would attempt to be active and engaging so much so that administrative players might hardly dare to go unilaterally. So, if the theoretical reasoning offered in the previous section is supported even in this "least-likely" case, we can rather boldly acknowledge its generalizing power and conclude that party polarization prompts the administration's policy activism and heightens its institutional status vis-à-vis the inactive—even lethargic—Congress.

When we retrospectively glance over the sixty-plus years of U.S. civilian nuclear energy program, indeed, it has been driven largely at the behest of the government. Probably due to its national security-related importance and its immense financial burden, the government initially monopolized its development and regulation, and later provided huge financial incentives to the participating industry. After a government-sponsored dazzling takeoff up to the 1970s, nuclear energy began a steady decline in the aftermath of the Three Mile Island (1979). The Chernobyl accident (1986) further fanned public fear of nuclear catastrophe and dampened any effort to realize an earlier hope for "nuclear paradise." Then, a turn of tide came. In the 2000's, reflecting the growing global concern about climate change, people re-discovered a value of nuclear power as "clean" energy. President George W. Bush and the pro-nuclear circles pleaded for a "nuclear renaissance" as a two-way measure to cope with global warming and lessen the U.S.'s dependence on foreign oil. Bush's successor, President Obama, followed suit. His Energy Secretary Steven Chu in 2010 called for Congress to give priority to nuclear power, and the Obama Administration repeatedly affirmed loan guarantees for nuclear plants. Of course, occasional accidents such as the 2011 Fukushima catastrophe and ever-growing financial burdens are not allowing for a premature dream for nuclear renaissance. Nevertheless, the Obama Administration still appears to have no other option but reviving nuclear power as an important part of its comprehensive energy and environmental plans.

While the administration has been the main skipper, Congress has been rhetorically and politically nosy in the legislative process but basically inactive and incapable in producing policies. Congressional enactments were rare, especially in recent years. This situation in the congressional side can be explained in terms of the overly broad scope of conflict. In the beginning, until the 1970's, the U.S. nuclear power case was characteristic of a tight "iron triangle" consisting of the small numbers of legislators, bureaucrats, and industrialists. In Congress, a single joint committee (Joint Committee on Atomic Energy) took charge of all the issues related to nuclear power. Then, starting from the 1970's, fierce challenges began to arise to the nuclear power "iron triangle"; and the scope of conflict—i.e., the number of

actors engaged—on nuclear power issues dramatically expanded. This historical transformation was facilitated by the growing public concern. Deviating from a low-salience non-controversial status in early years, nuclear energy policy has since the 1970s witnessed soaring public awareness and concern as a result of such historical occurrences as the 1973 oil crisis, the 1979 Three Mile Island accident, and the 1986 Chernobyl disaster. As part of this breakdown of the nuclear power “iron triangle,” the Joint Committee on Atomic Energy was dissolved in 1977. There followed a radical expansion of jurisdictional boundaries; Congress dispersed jurisdictional authority over nuclear power to several committees in both chambers. In the wake of this upheaval, the nuclear energy policy circle experienced a transformation into a wide-open “issue network” featuring turf-feuding congressional committees, competing administrative agencies, and various interest groups including vociferous citizen groups.

There must have been many factors behind this radical expansion of the scope of conflict. Especially, partisan fights seem to have crucially mattered. With each party fiercely competing to appeal to American voters with respect to the increasingly salient and controversial issue of nuclear power, Democratic and Republican lawmakers alike must have felt pressured to jump onto the issue in every opportunity available. They would want to take actions in every stage of the legislative process—sponsoring bills, claiming committee jurisdiction, taking positions in committee deliberation, making remarks during floor debate, and submitting amendments. In fact, there have been enormous activities of these sorts by an exceptionally large number of congressional members from both parties on the issues of nuclear energy. Party competition—in a polarized form in particular—has worked behind all this excessive broadening of the scope of conflict.

The congressional scene overcrowded by clamorous partisan lawmakers, however, opened a door to confusion, inefficiency, and inaction. As overly many members sounded all sorts of contradictory voices, Congress became unable to reach conclusions and produce legislations in due time. Concomitant with a dramatic broadening of the scope of conflict, nuclear power programs entered a plummeting down cycle. Signs of trouble had begun to emerge already in the 1970s, but it was in the 1980s that the downfall of nuclear power became so striking that even nuclear industrial officials publicly admitted it and desperately struggled to seek a way out of the dead end (Campbell 1988, Morone and Woodhouse 1989, Komanoff 1991). No new nuclear power plants have been ordered until recently, and there have been more than a hundred cancellations of nuclear plants that had previously been licensed to build (Nealey 1990). The rosy scenario about nuclear power shattered badly.

The decline of U.S. nuclear power policy is certainly not a result of political situations alone. A combination of factors has dampened civilian nuclear power programs: for example, unexpected reactor-related accidents, tireless opposition by anti-nuclear groups, slow pace of technological developments, inefficient management of the industry, and drop in the demand for electricity—all these factors were unfavorable to nuclear power programs. But a dramatic broadening of the scope of conflict also must share at least a partial responsibility. The presence of too many players in the legislative process intensified partisan conflicts and aggravated confusion with respect to which direction nuclear power policy should take.

Policy progress is hard to come with too many legislators overcrowded in an excessively expanded scope of conflict—as hard as in an overly narrow one.

After a long stagnation, nuclear power programs finally received a new push under the George W. Bush presidency. His May 2001 Energy Policy, calling for streamlining of the regulatory and licensing process, warmed up the idea of “nuclear renaissance” (Boyd 2010, 11). The Nuclear Power 2010 Program was launched in 2002 as an effort for construction of new nuclear power plants. Bush’s successor, Obama, despite their fundamental differences, had a similarly favorable attitude toward nuclear energy and inherited a vision of nuclear renaissance. As an example of Obama’s pro-nuclear stance, his Energy Secretary Steven Chu appointed mostly pro-nuclear members to the Blue Ribbon Commission on America’s Nuclear Future, which was tasked with making recommendations on a solution to managing the U.S. spent fuel and high-level radioactive waste (Boyd 2010, 11). In the Fiscal Year 2011 budget request, DOE proposed \$36 billion in federal loan guarantees for the nuclear industry on top of \$18.5 billion already budgeted for a total of \$54.5 billion (Clayton, 2010).

Overall, it is clear that “nuclear energy forms a crucial component of President Obama’s climate action plan” (Huffington Post, July 11, 2013). In Feb. 2014, Peter Lyons, DOE’s assistant secretary, reiterated the administration’s endorsement of nuclear power plants as essential to carbon reduction goals (Kraner 2014). In Feb. 2014, the nation’s first new nuclear reactors in more than 30 years got the federal government’s loan guarantees (U.S. News & World Report, Feb. 21, 2014). “[DOE Secretary] Moniz said the Vogtle project was not only a major milestone in the Administration’s commitment to jumpstart the US nuclear power industry, it is also an important part of our all-of-the-above approach to American energy as we move toward a low-carbon energy future” (The Washington Post, Feb. 21, 2014).

Why do the President and his administration try to push nuclear power programs while Congress is bogged down in confusion and stalemate as a consequence of polarized party confrontation which in turn excessively broadened the scope of conflict? There is a mix of economic, environmental, and strategic reasons. Once built, nuclear plants can produce electricity at relatively low and stable rates. But nuclear power in the construction stage is much more costly than natural gas or oil. Economic merit thus covers only a part of the story. Nuclear power is emission-free and may be effective against climate change. But many environmentalists oppose nuclear power for its vulnerability to accidents; so environmental merit also provides at best a partial account. What appear more important are nuclear power’s values in terms of strategic energy independence from foreign countries and its potential linkage to nuclear weapon arsenal and global influence (Huffington Post, July 11, 2013).

A combination of these merits must have motivated actors in the executive branch including the President to push nuclear power policy. Those executive actors have done so even at the risk of antagonizing legislators by bypassing them and going alone with executive policy tools. Obama’s executive unilateralism has taken several forms. Above all, like his predecessors, Obama refrained from resorting to new legislations. The past sixty-odd years have witnessed the passages of only several major legislations related to nuclear energy: Atomic Energy Act of 1954, Energy Reorganization Act of 1974, Uranium Mill Tailings

Radiation Control Act of 1978, Nuclear Waste Policy Act of 1982, Low-Level Radioactive Waste Policy Amendments Act of 1985, Energy Policy Act of 1992, and Energy Policy Act of 2005. In the Obama era, a major nuclear legislation has yet to come.

Following his predecessors, President Obama has resorted to broad interpretations of existing comprehensive laws. For instance, Obama said, “we need comprehensive energy and climate legislation to create a system of incentives to make clean energy profitable” (The White House press release, Feb. 16, 2010). The Energy Policy Act of 2005 authorized DOE to issue loan guarantees for the nuclear industry, and Obama did not miss this opportunity. Moreover, Obama relied on his “plan to use executive powers to address climate change” (The Washington Post June 23, 2013). “Obama can undertake all of these policies without congressional input” (The Washington Post June 23, 2013). In a similar vein, the U.S. government relies on the implementing and regulatory decisions of DOE and NRC in order to boost nuclear energy; the main policy means are funding, loan guarantees, licensing, and advanced researches, all of which solely belong to administrative authority and do not require congressional endorsements. Loan guarantees are a convenient tool because they are not government appropriations and are therefore not controversial in Congress. In short, actors in the administrative side seeking nuclear revival have mostly resorted to convenient administrative mechanisms and have tried hard to avoid active congressional involvement.

Obama has been especially skillful in discouraging congressional involvement: his pro-nuclear stance may be above all a political strategy to adopt a Republican idea, woo them with their own pet project, and thus pre-empt their active and critical (re)actions. In February 2010 “Obama told reporter that his embrace of nuclear power is part of an effort to adopt some Republican ideas on energy, adding that he remains an eternal optimist about bipartisanship” (Sheppard 2010). His effort for unilateral actions was actually successful in quieting congressional challenges. There was little strong opposition from Congress: “Support for nuclear is not a Republican issue alone. . . In fact, several of the proposed new reactors are in districts or near district represented by Democrats and are strongly supported by them” (Boyd 2010, 11). Even though liberal Democrats are not quite fond of nuclear power itself, they refrain from launching all-out attacks. Given the generally favorable public opinions, and fully aware that they themselves are unable to collectively find a better alternative, members of Congress probably think that passively acquiescing to the Administration’s initiatives is the best strategy (Boyd 2010, 12).

Obama’s cautious, indirect “stealth” approach is conducive to the lack of strong congressional challenges. Not he, but his secretaries and high-ranking officials played a main role of taking concrete actions to affirm governmental support for nuclear energy programs and preach the importance of nuclear power as “clean” energy. For example, Obama himself did not specifically mention nuclear power in his 2014 State of the Union Address he delivered in front of congressional members; then, less than a couple of weeks later, his DOE assistant secretary, Peter Lyons, clarified in a conference the Obama Administration’s support for nuclear power (Forbes 2/12/2014). Following Lyons’ remarks, the DOE on Feb. 19, 2014, approved \$6.5 billion in loan guarantees for the Vogtle nuclear project in Georgia. DOE secretary Ernest Moniz also repeated the Administration’s pro-nuclear stance, saying that “the

President wants to make clear that he sees nuclear energy as part of his carbon-free portfolio” (Nature 2/20/2014). Obama shrewdly borrowed the mouths of other government officials to send a positive signal to nuclear power programs; that way, he could avoid congressional jungle warfare and legislative gridlock.

As another example to indicate the administration’s unilateral tendency of bypassing the legislative process, the U.S. Administrations including that of Obama have refrained from using tax policy as an incentive. It is because tax policy attracts high public attention and therefore would definitely provoke congressional involvement and would cause policy tension and stalemate. Instead, federal financial incentives for nuclear power mostly took a form of the R&D support which would not be politically controversial and could hardly be a partisan issue. In contrast to nuclear power, federal energy incentives for oil, natural gas, and coal were largely through tax policy (NEI White Paper 2011).

Obama’s penchant for unilateral actions may be attributable to various factors including personal capability. But, more fundamentally, polarized political climate must have mattered. No matter how Congress-friendly a President might be, he would not want to struggle in vain through the legislative process filled with partisan-motivated obstructions, delays and stalemate. The following observation by a journalist is suggestive in this regard:

“During the 2012 campaign, . . . [sympathetic voters in focus groups] wondered why Obama lacked whatever LBJ had. Why couldn’t Obama make the machinery work better? Why couldn’t he cajole and threaten and sweet talk and bully the Congress into action the way Johnson had? Obama is a far different person than Johnson. He is cool, cerebral and detached. Johnson was the earthy, insecure political seducer. Still, it is questionable whether even LBJ could be LBJ in today’s polarized political climate. Could he really have found a way to bring tea party Republicans to the bargaining table with any more success than has Obama? Even some who have studied Johnson’s presidency wonder” (Balz 2014).

IV. Some Implications

1. Executive Unilateralism, a Blow to Democracy?

As the preceding section illustrated, the Obama and Bush Administrations and their predecessors have relied on various executive policy tools in leading nuclear energy programs. Notably, they preferred using executive orders, presidential proclamations, regulatory reviews, financial incentives, and broad interpretations of existing legislations. New legislations, which require painstaking efforts through the lengthy lawmaking process, have been rare. Given the fragmented structure of Congress operating according to supermajority rules, it is no surprise that the Presidents and administrative actors would want to bypass the frustrating legislative routes and resort to convenient executive policy measures.

It may seem to be an irony if partisan polarization, a sign of political intensity and activism in the representative process, undermines the keystone representative institution

(Congress) and bolsters the administrative state. As we saw in the preceding sections, polarized party confrontation in the legislative process tends to generate legislative inaction and gridlock and prompt unilateral policy activism by the administration. The upshot is a tilting of institutional balance throughout policy areas in favor of the administrative side. This irony may be a warning signal to American democracy, a primary principle of which is institutional checks and balance. Here we need to remember a historical ghost: In an extreme case, President Nixon, in the hope to avert legislative gridlock without moderating his position, resorted to executive dominance and institutional imperialism to the point of incurring the Watergate crime. Nixon's legal breach may be too extreme to be generalized, but, as the nuclear energy case exemplifies, administrative activism along with inactiveness of Congress characterizes many policy areas in the U.S.

Ironic as it is, however, executive unilateralism evades a simplistic judgment. It really may not be something to be cursed blindly. From a democratic standpoint of view, it seems to deserve harsh criticisms. But if we prioritize policy governance, we may take a bit more sympathetic view. The U.S. Presidents and administrations have often managed to earn policy progresses through unilateral policy tools, as the nuclear energy case attests. Without those active efforts by the executive side to promote policy goals through non-legislative policy measures, there would have been dismally few achievements in policy areas. Democratic principles of fair representation and institutional balance are surely important, but values for policy governance such as efficiency, effectiveness, and innovativeness are equally important for the society as a whole.

The legislative and executive branches are mutually-supporting—though tacit—strategic partners for policy governance. If one side has limitations in producing concrete policy results, the other side is supposed to come forward and fill the vacuum through whatever means politically available. U.S. members of Congress, aware of their institution's limitations in making policy progresses, have acquiesced to the executive branch's policy unilateralism. Executive actors, in turn, have not challenged various measures of congressional oversight; In particular, they have not outright objected to provisions of legislative vetoes even after the 1983 Supreme Court decision (*INS v. Chadha*) declared them unconstitutional. The U.S. legislative and executive branches have strategically worked together for policy governance. They are “stealth” partners in the sense that their mutually-supporting functions are not explicit and not even clearly intended. Executive unilateralism in policy areas, in short, needs to be understood and evaluated in tandem with legislative gridlock; Fuller understanding of policy governance requires a far-sighted look into both legislative and executive situations.

2. Why Is the South Korean Case Different from the U.S. Case?

Comparatively speaking, the U.S. with a long tradition of institutional balance provides a “least-likely” case for the main theoretical reasoning offered in Section II. The U.S. boasts of the influential Congress and the delicate checks and balance system that, at first glance, are incompatible with executive unilateralism driving policy governance. By contrast, South Korea seems to have favorable conditions for executive unilateralism. For example, strong

administrative apparatus, the President's dominating clout over administrative agencies, and lack of the legislature's political and institutional leverage in controlling or managing administrative policymaking—these conditions in South Korean politics can rather easily invite the Administration's unilateral policy activism in the face of legislative inaction and passivity. In other words, in South Korea with lingering executive supremacy, partisan polarization seems most likely to motivate executive actors to bypass the legislative process and unilaterally lead overall policy governance.

But, against these expectations, the U.S. case shows policy progresses led by the unilateral President and administrative agencies whereas the South Korean policy fields feature overall inter-branch deadlock and chronic governance crisis. In relative terms, South Korea is today suffering a more severe and more persistent governance crisis. Gridlock is not confined to the legislative process alone; but it also characterizes the relationship between the legislative and executive branches, and policy governance is overall in shambles. The occasional efforts by the President and administrative agencies to go alone unilaterally toward certain policy goals typically instigate vehement outcries from their legislative counterparts. The ensuing inter-branch conflicts tend to grow so intensive and extensive that the whole policymaking system often gets paralyzed. Of course, this portrayal is a crude generalization. Not every single case shows such a gloomy picture. But, still, roughly speaking, few in South Korea today would deny the serious governance crisis chronically bogging down the overall policy system.

What does this counter-intuitive difference between the two countries mean? Both share important similarities: separation-of-power principle, presidential system, first-past-the-post single-member districts for legislators, largely two-party system, supermajoritarian legislative processes, and frequent emergence of divided government. The two countries are, moreover, experiencing partisan polarization alike. Despite these similarities, the U.S. is characteristic of occasional policy changes (sometimes even innovative progresses) largely led by the active and unilateral executive side, while the South Korean government trapped in overall governance stalemate fails to demonstrate similar feat.

This contrast can be explained in terms of strategic thinking and political calculations (or lack thereof) in the parts of legislators and executive actors. As theorized in Section II, U.S. members of Congress willingly—though tacitly or even unwittingly—acquiesce to the executive branch's policy unilateralism for their own benefits. They can shirk the responsibility of making difficult policy decisions, and thus can avoid antagonizing those whose interests are at stake. Members of Congress can also evade blames for policy failure or gridlock. Moreover, they can claim political credits by criticizing *ex post facto* all the alleged mistakes the administrative side commits in making policy decisions. This kind of self-interested strategic thinking and political calculations motivates legislators to condone executive unilateralism in policy areas, though they may pretend to sound some rhetorical concerns and complaints about their branch's belittlement. As a consequence of these strategic and self-interested motivations by legislators, the U.S. administration has been able to shrewdly resort to executive policy tools and strategically garner major achievements in the policy areas that it deems important.

By contrast, the South Korean political landscape shows no space for strategic thinking and rational calculations. Korean politicians have acted as nervous followers of partisan or factional discipline. This collectivist atmosphere has prevented politicians' individual-level strategic thinking and rational choice from being put into action. All the major political activities being driven by partisan or factional motivations, total war-like across-the-board confrontations have stiffened *both* the legislative process *and* legislative-executive relations. This kind of full-scale warfare leaves little room for legislators' strategic acquiescence or executive counterparts' strategic policy unilateralism. The absence of tacit strategic arrangements (needless to say about explicit agreements) between the legislative and executive branches is unfortunate. It has been a natural recipe for confrontational and confusing inter-branch interactions and overall chronic gridlock in policy governance. Persistence (in fact, aggravation) of governance crisis in South Korea is calling for learning a comparative lesson from the U.S. case: Politicians need to prioritize strategic thinking and rational calculations ahead of partisan group mentality for the ultimate goal of policy governance.

Bibliography

- Aldrich, John H., Brittany N. Perry, and David W. Rohde. 2013. "Richard Fenno's Theory of Congressional Committees and the Partisan Polarization of the House." in Lawrence C. Dodd and Bruce I. Oppenheimer. Eds. *Congress Reconsidered*. 10th Edition. CQ Press.
- Balz, Dan. 2014. "Obama and LBJ: Measuring the Current President against the Past One's Legacy." *The Washington Post*. April 13.
- Baumgartner, Frank R., and Bryan D. Jones. 1993. *Agendas and Instability in American Politics*. Chicago: The University of Chicago Press.
- _____. 1991. "Agenda Dynamics and Policy Subsystems." *Journal of Politics*. 53, 4.
- Binder, Sarah A. 2001. "Congress, the Executive, and the Production of Public Policy: United We Govern?" in Lawrence C. Dodd and Bruce I. Oppenheimer. eds. *Congress Reconsidered*. 7th edition. Washington, D.C.: CQ Press.
- Bond, Jon R., and Richard Fleisher. eds. 2000. *Polarized Politics: Congress and the President in a Partisan Era*. Washington, D.C.: CQ Press.
- Boyd, Michele. 2010. *Is There a Nuclear Revival in the United States?* Report for the Heinrich Boll Stiftung North America.
- Brownstein, Ronald. 2007. *The Second Civil War: How Extreme Partisanship Has Paralyzed Washington and Polarized America*. N.Y.: The Penguin Press.
- Campbell, John. 1988. *Collapse of an Industry: Nuclear Power and the Contradictions of U.S. Policy*. Ithaca, N.Y.: Cornell University Press.
- Cooper, Phillip J. 2002. *By Order of the President: the Use and Abuse of Executive Direct Action*. Lawrence, KS: University Press of Kansas.
- Clayton, Mark. 2010. "Obama's Nuclear Power Policy: A Study in Contradictions?" *The Christian Science Monitor*. Feb. 4.
- Dodd, Lawrence C., and Scot Schraufnagel. 2013. "Party Polarization and Policy Productivity in Congress: From Harding to Obama." in Lawrence C. Dodd and Bruce I. Oppenheimer. Eds.

- Congress Reconsidered*. 10th Edition. CQ Press.
- Downs, Anthony. 1957. *An Economic Theory of Democracy*. N.Y.: Harper & Row.
- Ferejohn, John A. 1987. "The Structure of Agency Decision Processes." in Mathew D. McCubbins, and Terry Sullivan. Eds. *Congress: Structure and Policy*. Cambridge, UK: Cambridge University Press.
- Fiorina, Morris P. 1977. *Congress; Keystone of the Washington Establishment*. New Haven, CT: Yale University Press.
- _____. 1992. *Divided Government*. N.Y.: Macmillan.
- Flanagan, Sean. 2011. "The Administrative Power of the President: Environment Policy from Clinton to Obama." *The Fellows Review 2010-2011*. Center for the Study of the Presidency & Congress. www.thepresidency.org.
- Foreman, Christopher H. 1988. *Signals from the Hill: Congressional Oversight and the Challenge of Social Regulation*. New Haven: Yale University Press.
- Ginsberg, Benjamin, and Martin Shefter. 1990. *Politics by Other Means: The Declining Importance of Elections in America*. N.Y.: Basic Books.
- Hacker, Jacob S. 2004. "Privatizing Risk without Privatizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States." *American Political Science Review*. 98, 2.
- Hacker, Jacob S., and Paul Pierson. 2005. *Off Center: The Republican Revolution and the Erosion of American Democracy*. Yale University Press.
- Harris, Richard A. 1989. "A Decade of Reform." In Richard A. Harris and Sidney M. Milkis. Eds. *Remaking American Politics*. Boulder, Colorado: Westview Press.
- Heclo, Hugh. 1978. "Issue Networks and the Executive Establishment." In Anthony King. Ed. *The New American Political System*. Washington, D.C.: American Enterprise Institute.
- Howell, William G. 2003. *Power without Persuasion: the Politics of Direct Presidential Action*. Princeton, NJ: Princeton University Press.
- Hunter, James Davison. 1991. *Culture Wars: The Struggle to Define America*. N.Y.: Basic Books.
- Jacobson, Gary C. 2013. "Partisanship, Money, and Competition: Elections and the Transformation of Congress since the 1970s." in Lawrence C. Dodd and Bruce I. Oppenheimer. Eds. *Congress Reconsidered*. 10th Edition. CQ Press.
- Jones, Bryan D., Frank R. Baumgartner, and Jeffrey C. Talbert. 1993. "The Destruction of Issue Monopolies in Congress." *American Political Science Review*. 87, 3.
- King, David C. 1994. "The Nature of Congressional Committee Jurisdictions." *American Political Science Review*. 88, 1.
- Koger, Gregory. 2013. "Filibustering and Parties in the Modern Senate." in Lawrence C. Dodd and Bruce I. Oppenheimer. Eds. *Congress Reconsidered*. 10th Edition. CQ Press.
- Komanoff, Charles. 1991. "10 Blows that Stopped Nuclear Power." *The Electricity Journal*. Jan./Feb.
- Krancor, Michael. 2014. "Obama Energy Official: Nuclear Plants Essential to Our Carbon Reduction Goals." *The Forbes*. Feb. 12.
- Levin, Martin A., and Marc K. Landy. 2001. "Durability and Change." in Martin A. Levin, Marc K. Landy, and Martin Shapiro. eds. *Seeking the Center: Politics and Policymaking at the New Century*. Washington, D.C.: Georgetown University Press.
- Lowi, Theodore J. 1990. "Distribution, Regulation, Redistribution: The Function of Government." In Pietro S. Nivola, and David H. Rosenbloom. Eds. *Classic Readings in American Politics*. 2nd edition. N.Y.: St. Martin's Press.
- Mann, Thomas E., and Norman J. Ornstein. 2006. *The Broken Branch: How Congress Is Failing America and How to Get It Back on Track*. Oxford University Press.

- Mayer, Kenneth R. 2001. *With the Stroke of a Pen: Executive Orders and Presidential Power*. Princeton, NJ: Princeton University Press.
- Mayhew, David R. 1991. *Divided We Govern: Party Control, Lawmaking, and Investigation, 1946~1990*. New Haven, CT: Yale University Press.
- _____. 2001. "Much Huffing and Puffing, Little Change." in Martin A. Levin, Marc K. Landy, and Martin Shapiro. eds. *Seeking the Center: Politics and Policymaking at the New Century*. Washington, D.C.: Georgetown University Press.
- McCarty, Nolan. 2007. "The Policy Effects of Political Polarization." in Paul Pierson and Theda Skocpol. *The Transformation of American Politics*. Princeton University Press.
- McCubbins, Mathew D., and Talbot Page. 1987. "A Theory of Congressional Delegation." in Mathew D. McCubbins, and Terry Sullivan. Eds. *Congress: Structure and Policy*. Cambridge, UK: Cambridge University Press.
- McCubbins, Mathew D., and Thomas Schwartz. 1987. "Congressional Oversight Overlooked: Police Patrols versus Fire Alarms." in Mathew D. McCubbins, and Terry Sullivan. Eds. *Congress: Structure and Policy*. Cambridge, UK: Cambridge University Press.
- Morone, Joseph G., and Edward J. Woodhouse. 1989. *The Demise of Nuclear Energy?* New Haven, CT: Yale University Press.
- Nealey, Stanley M. 1990. *Nuclear Power Development: Prospects in the 1990s*. Columbus, Ohio: Battelle Press.
- Ripley, Randall B., and Grace A. Franklin. 1987. *Congress, the Bureaucracy, and Public Policy*. 4th edition. Pacific Grove, CA: Brooks/Cole Publishing.
- Salisbury, Robert H. 1990. "The Paradox of Interest Groups in Washington—More Groups, Less Clout." In Anthony King. Ed. *The New American Political System*. 2nd edition. Washington, D.C.: The AEI Press.
- Schattschneider, E. E. 1960. *The Semi-Sovereign People*. N.Y.: Holt, Rinehart, and Winston.
- Sheppard, Kate. 2010. "GOP: Obama "Anti-Nuclear"." *Mother Jones*. Feb. 9.
- Sinclair, Barbara. 2007. *Unorthodox Lawmaking: New Legislative Processes in the U.S. Congress*. 3rd Edition. CQ Press.
- Smith, Steven S., and Gerald Gamm. 2013. "The Dynamics of Party Government in Congress." in Lawrence C. Dodd and Bruce I. Oppenheimer. Eds. *Congress Reconsidered*. 10th Edition. CQ Press.
- Somsel, Joseph. 2012. "Obama's War on Nuclear Power." www.americanthinker.com
- Uslaner, Eric M. 1989. *Shale Barrel Politics: Energy and Legislative Leadership*. Stanford, CA: Stanford University Press.

The current *mos Americanus* favors the unilateralist method. Most courts purport to follow interest analysis; and interest analysts ponder, as the statisticians did, the territorial reach of rules. Yet, at the same time, our courts harken back to Savigny whenever they cite the Second Restatement and talk about the "most significant relationship." The results they reach, however, tend to accord with Aldricus' prescription. In other words, our judicial opinions are internally inconsistent, because the various approaches they use simply do not jibe.