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Gregory Elinson is a Climenko Fellow at Harvard Law School. His research explores the political economy of law and legal institutions, with a focus on how political parties shape both constitutional and administrative law. His work has been published in *Law and Social Inquiry* and *Studies in American Political Development*. Before joining the Climenko program, he was an associate in Kirkland & Ellis's Chicago office, where his practice focused on commercial and appellate litigation, and clerked for Judge David Barron of the U.S. Court of Appeals for the First Circuit and Judge Gary Feinerman of the U.S. District Court for the Northern District of Illinois. He holds a J.D. from Stanford Law School, a Ph.D. in Political Science from the University of California, Berkeley, and a B.A. from Harvard College.

The Merits of Faction

Constitutional law scholars have long worried that the president's expanding purview and capacity have outstripped Congress's ability to keep up. At the same time, divided government—where the president must share political power with a Congress controlled by the opposing party—is increasingly common. These parallel trends suggest that much of the conventional thinking about the separation of powers is wrong. Under divided government, we are taught, Congress is more likely to clash with the president, as partisan interests—more so than institutional ones—motivate lawmakers to defend their institutional turf. If true, increasing polarization—the widening gap between the two parties—should reinforce and intensify this dynamic. But pitting a legislative majority of one party against a president of the opposing party has yet to yield a sustained defense of legislative prerogatives. In fact, quite the opposite. Why?

Upending both old- and new-school theories of the separation of powers, this Article argues that intraparty fragmentation—within-party ideological disagreement—is central to assessing the presidency's threat to congressional authority. Analyzing the impeachments of Presidents Donald Trump and Bill Clinton, together with signature efforts to reform the nation's immigration, healthcare, and social security laws, it challenges the conventional wisdom that greater internal coherence within parties accompanies increased polarization between them. Attending to intraparty fragmentation makes clear that unified and divided government are fundamentally incomplete heuristics for analyzing the interbranch competition at the core of the separation of powers. Despite concerns that unified government undermines the Constitution's delicate balance between the legislature and executive, intraparty fragmentation often prevents Congress from ratifying the president's agenda. And despite the alleged promise of divided government, fragmented majorities are likely to struggle to limit executive power. As a result, the procedural tools party leaders deploy to manage intraparty fragmentation—and those that dissenters use to fight back—must be treated as critical parts of the “small-c” constitution. The Article concludes by proposing reforms designed to preserve James Madison's celebrated insight that individual ambition motivates the behavior of even the most enlightened elected officials, while discarding the fiction that those ambitions will induce them to defend the branch they serve.