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Insulating Agencies: Avoiding Capture Through Institutional Design

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INSULATING AGENCIES:
AVOIDING CAPTURE THROUGH INSTITUTIONAL DESIGN

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So-called independent agencies are created for a reason, and often that reason is a concern with agency capture. Agency designers hope that a more insulated agency will better protect the general public interest against interest group pressure. But the conventional approach to independent agencies in administrative law largely ignores why agencies are insulated. Instead, discussions about independent agencies in administrative law have focused on three features that have defined independent agencies: whether their heads are removable at will or for cause by the President, whether they must submit regulations to the President's Office of Information and Regulatory Affairs for cost-benefit analysis, and whether the agencies have a multi-member structure or a single head at the top.

But these traditional metrics for an independent agency are not the only, or necessarily even the most effective, ways in which insulation from interest groups and partisan pressure can be achieved. In fact, under modern conditions of political oversight, other design elements and mechanisms are often just as important if the goal is to create an agency that is best suited to achieve a long-term public interest mission free from capture. This is particularly true of agencies tasked with protecting the general public in the face of one-sided and intense political pressure. This kind of lopsided pressure can be seen in a range of areas, including banking, criminal justice, and consumer protection.

The goal of this Article is to move the conversation about insulation beyond the traditional hallmarks of independence and identify overlooked elements of agency design, deemed "equalizing factors," that are particularly well-suited to addressing the problem of capture. The Article identifies five such equalizing factors that have received little or no attention in the legal literature on independent agencies, but that are critically important to insulation against one-sided interest group dominance. The Article then compares the importance of traditional and equalizing factors in the context of consumer protection, an area with the kind of one-sided interest group pressure that is a breeding ground for capture. The creation this year of the Bureau of Consumer Financial Protection, the most significant new federal agency created in decades, showcases both the continuing danger of capture and the critical importance of institutional design in policing it.

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INSULATING AGENCIES:
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Table of Contents

INSULATING AGENCIES: AVOIDING CAPTURE THROUGH INSTITUTIONAL DESIGN

INTRODUCTION

According to the existing legal literature and case law, the defining hallmark of an independent agency is that it is headed by someone who cannot be removed at will by the President but instead can be removed only for good cause.[1] This one design feature has spawned countless law review articles about the meaning of separation of powers, the nature of the unitary executive, and the constitutional pedigree of the New Deal and the explosion of agencies with this attribute.[2] The Supreme Court and lower courts have considered the removal question at length, with the latest chapter coming last Term when the Court held that it was unconstitutional for Congress to place "dual for-cause limitations on the removal" of members of the Public Company Accounting Oversight Board (PCAOB) by vesting the removal power in the Securities and Exchange Commission (SEC), whose members themselves cannot be removed by the President except for cause.[3] The Court divided five-to-four, and produced more than 100 pages on the subject.

The obsessive focus on removal as the touchstone of independence is curious because insulation from the President is often not the dominant reason why policymakers seek to create independent agencies in the first place. Rather, the goal of insulation is frequently to allow an agency to protect the diffuse interest of the general public or a vulnerable segment of the public that, because of collective action problems, is often outgunned in the political process by special interests. The insulated agency, its designers hope, will better resist short-term partisan pressures and instead place more emphasis on empirical facts that will serve the public interest in the long

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[1] *See*, *e.g.*, Lisa Schultz Bressman and Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 610 (2010) (noting that "what gives agencies their independence or what otherwise distinguishes them from their executive-branch counterparts" is that "the President lacks authority to remove their heads from office except for cause"); Marshall J. Breger and Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111, 1138 (2000) ("The critical element of independence is the protection – conferred explicitly by statute or reasonably implied – against removal except 'for cause.'"); Jacob E. Gersen, Designing Agencies: Public Choice in Public Law, in RESEARCH HANDBOOK ON PUBLIC LAW AND PUBLIC CHOICE 7 (Daniel A. Farber & Joseph O'Connell eds., forthcoming 2010) ("Independence is a term of art in public law, referring to agencies headed by officials that the President may not remove without cause.").

[2] For a sampling of this vast literature, see Richard J. Pierce, Jr., *Saving the Unitary Executive from Those Who Would Distort and Abuse It: A Review of* The Unitary Executive, By Steven G. Calabresi and Christopher S. Yoo, 12 U. PA. J. CONSTL L. 593 (2010); STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH (2008); Harold J. Krent, *From a Unitary to a Unilateral Presidency*, 88 B.U. L. REV. 523 (2008); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994).

[3] Free Enterprise Fund v. Public Company Accounting Oversight Bd., slip op. at 5, 10.

term. Put another way, the creation of an independent agency is often motivated by a concern with agency capture.[4]

What the conventional discussion of administrative law and agency design has overlooked is that the traditional metrics for an independent agency are not the only, or necessarily even the most effective, way in which insulation from interest groups and partisan pressure can be achieved. In fact, under modern conditions of political oversight, other design elements and mechanisms are often just as important to an agency's ability to achieve its long-term mission relatively free from capture. This is particularly true of agencies tasked with protecting the interests of politically powerless groups, including the dispersed general public, where the political pressure to rule for more powerful, organized interests will be intense and one-sided.[5]

The goal of this Article is to move the conversation about insulation beyond the traditional independent agency structure of a bipartisan commission with for-cause removal and address overlooked elements of agency design that are particularly well-suited to addressing the problem of capture when interest group pressure lines up on one side of an issue. This kind of lopsided pressure can be seen in a range of areas, including banking, criminal justice, and consumer protection.[6] Recent major events, from the failure of banking agencies to guard against lending abuses to the Minerals Mining Services lack of oversight of off-shore drilling that led to the British Petroleum disaster, make clear that addressing capture remains an urgent need. The brightest prospect for doing so lies in intelligent agency design that moves beyond the simple focus on presidential removal decisions and other traditional features of agency independence.

The Article begins in Part I by identifying the main reasons why policymakers seek to create an independent agency in the first place and explains that a concern with agency capture has been a driving force. Part II then explores various institutional design mechanisms that could help achieve the multiple goals independence may be designed to serve, with a particular focus on using design to mitigate capture. Part II considers the traditional factors associated with independence, such as removal, but then goes beyond those mechanisms to address additional design features that have largely gone under the radar of administrative law scholarship. These

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[4] MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 3 (2nd ed. 1971) (defining capture).

[5] This Article focuses on the question of one-sided interest group pressure. Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1285 (2006) (explaining that "the more one-sided that information, support, and guidance, the more likely that agencies will act favorably toward the dominant interest group"). If there are powerful interests on different sides of an issue (for example, labor versus management, competing industry groups fighting over antitrust policy), different design strategies may come into play.

[6] Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715 (2005) (describing one-sided pressures toward harsher punishments in criminal justice); *infra* Part III (analyzing interest group dynamics in consumer regulation); JEFFREY WORSHAM, OTHER PEOPLE'S MONEY: POLICY CHANGE, CONGRESS AND BANK REGULATION 83 (1997) (noting that organized interests "reign supreme" in banking).

latter factors, deemed "equalizing factors," are more robust checks against agency capture. Part III illustrates the limits of the traditional factors and the promise of the equalizing factors in the context of consumer regulation, with a particular focus on the newly created Bureau of Consumer Financial Protection, the most important agency created in decades. Consumer regulation is an area where capture is a significant threat because the public interest is pitted against one-sided powerful interest group pressure. Part III shows how the traditional design characteristics associated with independent agencies do little to create the insulation consumer protection agencies need to achieve long-term public interest goals at the expense of powerful interests. Although equalizing insulators can only go so far in helping these agencies achieve their missions in light of the political pressures they face, they are critical supplements to the traditional factors if the agency is to have any chance at resisting the forces of capture. Part IV concludes.

I. WHY INSULATION

"From the perspective of institutional design," as Jacob Gersen recently noted, "the optimal bureaucratic structure depends on the ends to be achieved."[7] This is a critical point to keep in mind in thinking about independent agencies and their design, as one cannot begin to think about what makes an agency independent without thinking about that of which the agency is supposed to be independent.

The main aim in creating an independent agency is to immunize it, to some extent, from political pressure.[8] But that, in turn, begs the question of why political pressure would be bad. After all, one person's political pressure is another person's democratic accountability. What policymakers who seek insulation want to avoid are particular pitfalls of politicization, such as excessive presidential interference or pressures that prioritize narrow short-term interests at the expense of long-term public welfare. This Part explores the different goals of insulation and the particular political pitfalls it seeks to avoid.

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[7] Gersen, *supra* note __ at 7.

[8] Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2376 (2006) ("These institutions were conceived as means to limit the sphere over which partisan political power could exert control."); Marshall J. Breger and Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1113 (2000) ("They are 'independent' of the political will exemplified by the executive branch, yet they are also multi-member organizations, a fact that tends toward accommodation of diverse or extreme views through the compromise inherent in the process of collegial decisionmaking."); Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limit of Institutional Design*, 88 B.U. L. REV. 459, 463 (2008) ("Independent agencies are preferred to executive agencies because long commissioner tenure, staggered terms, and political insulation are intended to facilitate a non-political environment where regulatory experts can apply their knowledge to complex policy problems."); Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L. J. 257, 259-60 (noting that the characteristics of independent agencies are "designed to isolate those decisionmakers from politics").

A. Expertise

The classic explanation for agency independence is the need for expert decisionmaking.[9] New Deal architect and administrative law scholar James Landis succinctly put it as follows: "With the rise of regulation, the need for expertness became dominant."[10] The idea is that an agency could be created that would be insulated from short-term political pressures so that it could adopt public policies based on expertise that would yield better public policy over the long term.[11] Thus, the New Dealers hoped to create apolitical agencies that would be guided by information and not politics. Of course it is impossible to remove politics and political judgments from agencies, particularly given the discretionary authority afforded to them. But it is possible to make politics *relatively* less pronounced and expertise *relatively* more of a basis for decisionmaking.[12]

B. Non-Partisan Decisionmaking Insulated from Capture

Related to the goal of expertise is a desire to insulate agency decisions from the sort of political horse-trading that is anathema to impartial decision-making.[13] In this sense, expertise and non-partisanship can be seen as two sides of the same coin. The Progressive reformers who

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[9] *See, e.g.*, Humphrey's Ex'r v. United States, 295 U.S. 602, 625 (1935) ("Thus, the language of the act, the legislative reports, and the general purposes of the legislation as reflected by the debates, all combine to demonstrate the congressional intent to create a body of experts…."); Devins & Lewis, *supra* note __, at 463 ("Commission expertise is the traditional, 'good government' justification for Congress's choice to create independent agencies."); Bressman & Thompson, *supra* note __, at 612 ("Independence was traditionally justified, particularly during the New Deal era, as promoting expertise.").

[10] JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 23 (1938).

[11] Gersen, supra note __, at 348; Bressman & Thompson, *supra* note __, at 613.

[12] Devins & Lewis, *supra* note __, at 491 ("[P]olitical polarization strengthens the institutional design of independent agencies - both with respect to the willingness of opposition-party commissioners to check the President and the willingness of the opposition party in the Senate to use the confirmation power to push for commissioners who will not simply rubberstamp the President's decisions."); Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 953 (finding independent agencies do not engage in midnight rulemaking as a President is about to leave office as executive agencies do); Daniel E. Ho, *Congressional Agency Control: The Impact of Statutory Partisan Requirements on Regulation* 35 (Stanford Law School Working Paper, 2007), *available at* http://dho.stanford.edu/research/partisan.pdf (concluding partisan balance requirements for independent agency commissioners "has the largest and most robust explanatory power over votes compared to presidential affiliation"); David E. Lewis, *The Adverse Consequences of the Politics of Agency Design for Presidential Management in the United States: The Relative Durability of Insulated Agencies*, 34 British Journal of Political Science 377, 379 (2004) (finding that agencies insulated from presidential control are more durable than other agencies). *But cf.*, Keith S. Brown & Adam Candeub, *Independent Agencies and the Unitary Executive: An Empirical Critique* 29 (Michigan State University College of Law Legal Studies Research Paper Series, Paper No. 06-04, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1100125 (concluding "idiosyncratic commissioner effects can dwarf the effects of party affiliation– suggesting commissioner's own ambitions, desires to placate particular constituencies, or peculiar political loyalties above and beyond party–drive voting).

[13] *See Humphrey's*, 295 U.S. at 625; Cushman, *supra* note 15, at 189-90.

pushed for additional independent agencies in the early 1900s wanted both to eliminate partisan politics and to replace it with non-partisan expertise.[14] "The Progressives had an abiding faith in regulation, expertness, and the capacity of American government to make rational decisions provided experts in the administrative agencies could remain free from partisan political considerations."[15]

But non-partisanship can also be seen as a separate justification that aims for balanced decisionmaking whether or not it is driven by technical expertise.[16] Indeed, one can see the desire for unbiased decisionmaking as a separate, central concern in the development of independent agencies. Robert Cushman points out in his seminal work on the creation of the first modern independent agency, the Interstate Commerce Commission in 1887, that the impetus behind it was a desire to avoid "one-sided partisan control."[17] The Federal Trade Commission's creation in 1914 was similarly prompted by a desire to avoid "partisan and pressure-controlled" antitrust enforcement.[18] The Banking of Act of 1935, which establishes the modern structure of the Federal Reserve, aimed to give the agency more insulation so that it would serve the "general public interest" and not "special interests."[19]

To achieve non-partisan decisionmaking, one must avoid undue industry influence or capture.[20] Unfortunately, as Richard Stewart has

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[14] STEVEN J. DINER, A VERY DIFFERENT AGE: AMERICANS OF THE PROGRESSIVE ERA 201 (1998); Breger & Edles, *supra* note __, at 1131; RICHARD ABRAMS, THE ISSUE OF FEDERAL REGULATION IN THE PROGRESSIVE ERA 50 (1963).

[15] MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 23 (1977).

[16] *Compare* Miller, *supra* note 2, at 79-83 (separating the justification of expertise from the justification of insulation from political pressure) *and* Bressman & Thompson, *supra* note 3, at 612-14 (identifying the promotion of expertise as a separate justification from the inhibition of narrow political interests), *with* Brown & Candeub, *supra* note 15, at 32 (combining the expertise and non-partisan justifications into a single professional/objective claim) *and* William H. Hardie III, *The Independent Agency After* Bowsher v. Synar – *Alive and Kicking*, 40 VAND. L. REV. 903, 915-17 (1987) (subsuming the expertise justification under the broader goal of "apolitical" rulemaking).

[17] ROBERT E. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 61 (1972) (noting that the independence of the Interstate Commerce Commission "if it meant anything, appears to have meant bipartisanship, as a guarantee of impartiality" and pointing out that "independence of one-sided partisan control was a matter of great moment"); Humphey's Ex'r v. United States, 295 U.S. 602, 624 (1935) (explaining that the Federal Trade Commission was to be "non-partisan" and "from the very nature of its duties, act with entire impartiality").

[18] CUSHMAN *supra* note __, at 189.

[19] H.R. Rep. No. 74-742, at 1, 16 (1935).

[20] Capture, for the purposes of agency design, may be defined as responsiveness to the desires of the industry or groups being regulated. ROGER G. NOLL, REFORMING REGULATION 99-101 (1971) (explaining that this happens most often when an agency assigns undue weight to the interests of the regulated interests as against those of the public); Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 Colum. L. Rev. 1, 10 (1998) (defining agency capture, in the context of a more robust theory of public choice, as successful rent-seeking by special interests). For helpful overviews of capture, see George J. Stigler, *The Theory of Economic Regulation*, 2 BELL. J. ECON. & MGMT. SCI. 3 (1971), PAUL

observed, "[i]t has become widely accepted, not only by public interest lawyers, but by academic critics, legislators, judges, and even by some agency members, that the comparative overrepresentation of regulated or client interests in the process of agency decision results in a persistent policy bias in favor of these interests."[21]

This bias operates for a few central reasons. First, regulated industries are well-financed and well-organized, especially when compared to the general public and public interest groups.[22] Industry groups are thus better positioned to monitor agencies closely and challenge any and all agency decisions that will negatively affect them.[23] All else being equal, agencies would prefer not to become mired in legal challenges, so they may seek to work with, rather than against, these organized interests. Although there are some important and influential groups that seek to represent the public interest, these interest groups do not have the funding or resources of industries. Thus, they often cannot monitor and challenge all the potentially negative rules and orders from an agency or marshal the same resources as industry representatives when they do bring a challenge.[24]

Second, agency capture is further exacerbated by the fact that industry groups are also well positioned to contribute to political campaigns and to lobby, which in turn gives them influence with the agency's legislative overseers on the relevant oversight committee.[25] For example, Arthur Levitt, the chair of the SEC from 1993-2001, describes the SEC

J. QUIRK, INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES (1981); Richard B. Stewart, T*he Reformation of Administrative Law*, 88 HARV. L. REV. 1667 (1975); Bagley & Revesz, *supra* note __, at 1260. For helpful overviews of agency capture literature, see Michael E. Levine & Jennifer Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167 (1990) and B. DAN WOOD & RICHARD W. WATERMAN, BUREAUCRATIC DYNAMICS: THE ROLE OF BUREAUCRACY IN A DEMOCRACY 18 (1994).

[21] *See* Stewart, *supra* note __, at 1713.

[22] Bagley & Revesz, *supra* note __, at 1284-85.

[23] Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 464 (1999); Staff of S. Comm. On Government Affairs, 96th Cong., Principle Recommendations and Findings of the Study on Federal Regulation 25 (Comm. Print. 1979); Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADM. RESEARCH & THEORY 245, 250-252 (1998); Wendy E. Wagner et al., Air Toxics in the Board Room: An Empirical Study of EPA's Hazardous Air Pollutant Rules (Nov. 13, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1531243; Croley, *supra* note __, at 126-42 (summarizing studies showing that regulated interests participate to a much greater extent than public interest groups); Bagley & Revesz, *supra* note __, at 1298 ("industry will have an advantage in monitoring agencies and in setting off [fire] alarms when its interests are threatened").

[24] Seidenfeld, *supra* note __, at 464 ("A regulated entity frequently is a large corporation with resources to appeal agency decisions at every level."); Scott R. Furlong & Cornelius M. Kerwin, *Interest Group Participation in Rulemaking: A Decade of Change*, 15 J. PUB. ADMIN. RES. & THEORY 353, 361 (2005)

[25] Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 777-79, 788-92 (1983); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Political Review?*, 101 YALE L.J. 31, 42 (1991).

during his tenure as being constantly threatened with budget cuts by the SEC's congressional overseers if it pursued aggressive regulations.[26]

Third, capture operates because of the revolving-door phenomenon: the heads of agencies often anticipate entering or returning to employment with the regulated industry once their government service terminates.[27] As a result, they do not want to make enemies within the industry by regulating with what the industry will view as a heavy hand.

A fourth factor that helps give regulated entities disproportionate influence over agencies is their information advantage. For an agency to regulate an industry effectively, it needs to know how the industry works and what it is capable of doing. But that information is often in the exclusive control of the regulated entity.[28]

These dynamics can be seen operating across a range of agencies. Even if an agency has a promising beginning of "vigorous and independent regulation," it "often becomes closely identified with and dependent upon the industry it is charged with regulating."[29] To be sure, it is sometimes hard to identify when an agency decision is the product of undue interest group pressure as opposed to an exercise of the agency's independent judgment.[30] But the difficulty in assessing *ex post* when a decision is the result of capture is all the more reason why policymakers often hope to create *ex ante* structural checks on capture by designing the agency to better it protect it from one-sided political pressure.

Politics cannot be removed from agency decisionmaking, so of course one can never hope to avoid all hints of capture. But as with expertise, the question is whether one can achieve *some* insulation from interest group pressure.[31] The goal of many independent agency designers has been to create this extra buffer against interest group pressures that might harm relatively weaker political interests, including the collective public interest of the general electorate or a vulnerable subgroup.[32]

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[26] ARTHUR LEVITT, TAKE ON THE STREET 123, 132 (2002)

[27] KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 342 (1986).

[28] Stewart, *supra* note __, at 1714; Seidenfeld, *supra* note __, at 464.

[29] Merrill, *supra* note __, at 1060 (citing the work of MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 79-94 (1955)).

[30] Statement of Nicholas Bagley 4-6, Protecting the Public Interest: Understanding the Threat of Agency Capture, Before the Senate Subcommittee on Administrative Oversight and the Courts, Aug. 3, 2010.

[31] *See* Cristina M. Rodriguez, *Constraint Through Delegation: The Case of Executive Control Over Immigration Policy*, 59 DUKE L.J. 1787, 1826 (2010) ("[T]hough complete insulation from political control may be unattainable . . . the structure of an independent agency at least enables tensions between political actors to keep politically motivated decisionmaking at bay."); Lewis, supra note __, at 396 ("Agencies that are insulated from presidential control are more durable than other agencies.").

[32] Rui J. P. De Figueiredo Jr., *Electoral Competition, Political Uncertainty, and Policy Insulation*, 96 AM. POL. SCI. REV. 321, 331 (2002) (arguing that groups that are electorially

C. Stability

A related goal of agency independence is to insulate the agency from future political changes in either Congress or the presidency.[33] This can be done either to cement in place current congressional policy preferences, or to allow the agency to make an initial policy decision that is not subject to wide fluctuations over time.[34]

Stability has been a driving motivator since the creation of the earliest independent agencies. When the FTC was created, for instance, the Senate Committee Report emphasized the need "for an administrative board . . . which would have precedent and traditions and a continuous policy and would be free from the effect of such changing incumbency."[35] The Federal Reserve was also created with stability in mind, to insulate monetary policy from the changing whims of Presidents who serve four-year terms.[36] After initially creating a Board of Governors to serve ten-year terms, Congress extended term lengths to fourteen years in 1935.[37] The need for long-term stability in monetary policy explains why not just the Fed, but most financial regulatory agencies were designed with independence as the framework.[38]

Stability is related to the goal of preventing capture because it aims to keep an agency free from unwanted political forces even as the enacting coalition fades from power. It is insufficient to insulate an agency from one-sided interest group pressures only as long as the designers stay in power. A policymaker concerned with the agency's long-term success must

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weak are the most likely to insulate their preferred policies by designing independent agencies).

[33] Gersen, *supra* note __, at 347-348; Bressman & Thompson, *supra* note __, at 613-614.

[34] Mathew D. McCubbins, Roger Noll and Barry Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 444 (1989) (arguing that enacting coalitions can mirror ex ante agreements and stack the deck to limit undesirable policy drift while allowing policy changes that would be acceptable); Terry Moe, *The Politics of Bureaucratic Structure*, *in* CAN THE GOVERNMENT GOVERN? 267, 284-85 (J.E. Chubb and P.E. Peterson eds., 1989) (arguing that institutional choices made in the first instance are much more durable than subsequent structural choices); David Lewis, *The Adverse Consequences of the Politics of Agency Design for Presidential Management in the United States: The Relative Durability of Insulated Agencies*, 34 BRITISH J. POL.SCI. 377, 381 (2004) (noting that when members of Congress "worry about losing power, they remove agencies from political control by fixed terms for appointees, party balancing requirements, independence, specific statutes and other means"); *id.* at 400 ("In insulated agencies the impact of changing administrations is muted so that policies have less variance and variance occurs around an ideal point set by the enacting Congress or the current Congress.").

[35] 51 Cong. Rec. 10376 (1914).

[36] Devins & Lewis, *supra* note __, at 465-466.

[37] *Id.* at 466 & n.39.

[38] Gersen, *supra* note __, at 348 (noting that the need for long-term stability explains central bank independence in the United States and elsewhere); Bressman & Thompson, *supra* note __, at 608; Marc Quintyn & Michael W. Taylor, *Regulatory and Supervisory Independence and Financial Stability* 10 (IMF, Working Paper No. 02/46), *available at* http://ssrn.com/abstract=879439.

create insulating measures that will work even as the presidency and Congress undergo shifts in party leadership.

D. Less Presidential Control, More Congressional Power

The creation of the first independent agencies were not motivated by a desire to decrease executive control or to buttress legislative power,[39] but subsequent agencies have been created with these interests in mind.[40] David Epstein and Sharyn O'Halloran examined the agencies created between 1947 and 1990 and found that Congress uses independent agencies more often during divided government than in unified government,[41] a result consistent with the idea that Congress uses independent agencies at least in part to keep power away from a President of the opposite party.[42]

Although historically this has not always been the driving force in agency creation, much of the criticism of "independent agencies" has focused on the question of what these agencies mean to the presidential/congressional relationship. Scholars concerned with maintaining the power of the unitary executive have made much of the fact that independent agencies shift power from the President to Congress.[43] Justices who endorse a formal view of the separation of powers have similarly honed in on this aspect of independent agencies. A recent opinion by Justice Scalia captures this concern. He noted "independent agencies are sheltered not from politics but from the President, and it has often been observed that their freedom from presidential oversight (and protection) has simply been replaced by increased subservience to congressional direction."[44]

Importantly, as Part II will discuss in greater detail, insulation agencies from presidential oversight may also protect them from capture because interest groups can exert pressure on the president to rein in agencies. But focusing solely on presidential authority over agencies is an incomplete inquiry if the goal is to reduce capture because it will ultimately do little to protect agencies if interest groups use congressional pressure or the pressure of other agencies to achieve the same ends.

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[39] CUSHMAN, *supra* note __, at 60-61; Breger & Edles, *supra* note __, at 1130.

[40] B. Dan Wood & John Bohte, *Political Transaction Costs and the Politics of Administrative Design*, 66 J. POL. 176, 199 (2004) (arguing that "when there is high executive-legislative conflict," enacting coalitions design independent agencies to "constrain the president and future legislative coalitions").

[41] DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS 154-162 (1999).

[42] *See* Lewis, *supra* note __, at 383 ("If a president's influence is diminished but Congress's is not, insulated agencies will produce policy outputs systematically closer to the ideal of the congressional median than other agencies."); Devins & Lewis, *supra* note __, at 464 ("When members of Congress fear the administrative influence of the current President on policies post-enactment, they are more likely .to create independent commissions to implement their policies").

[43] *See, e.g.,* Steven Calabresi & Sai Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 583 (1994).

[44] FCC v. Fox Television Stations, Inc., 129 S.Ct. 1800, 1815 (2009).

II. AGENCY DESIGN AND CAPTURE

Given the varied goals of insulation, different design elements may be better suited for some goals and not others. Certainly, whether an agency head is removable at will or for cause is only one way in which to insulate agencies. This Part considers a range of design choices that can serve insulating functions and explains their relationship to the different goals of independence.

This is not intended to be an exhaustive list of mechanisms that could insulate an agency. There are, in particular, three notable means of insulating agencies against capture that will not be covered here. First, this section will not address the use of substantive legal standards to constrain the power of interest groups. Obviously, if Congress itself takes a position on what must be done in clear terms, no amount of interest group pressure can override that substantive standard unless the statute is repealed or supplemented. Second, and relatedly, judicial review helps to police the original substantive framework of the statute, so it, too, can be a line of defense against capture to the extent that the original substantive standard itself has those aims.[45] Third, procedural mechanisms can help equalize the playing field by, for example, giving the public notice of agency policy changes and standing to challenge agencies decisions in court.

All three of those mechanisms are important, but because they have been discussed at length elsewhere in the legal and political science literature, this Part will not rehash what we already know about these features. Instead, the focus here is on two different categories of structural elements. First, Section A takes a fresh look at the design features that have been considered the hallmarks of the "independent" agency and considers them with a particular question in mind: how well do they address the problem of capture.

Second, Section B turns to design features that have been largely ignored in the cases and legal literature on independent agencies,[46] but that can be effective tools in the battle against agency capture. Because these features can be helpful to agencies charged with protecting a diffuse public interest against one-sided interest group pressure, the Article refers to them as "equalizing" insulators. They include the agency's funding source; restrictions on agency personnel both in terms of initial hiring requirements and limits on subsequent employment; the rulemaking and enforcement relationships between the agency and other agencies, including state agencies; and political tools to make the agency's public interest mission more salient.

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[45] Merrill, *supra* note __, at 1043 (noting that federal judges began to police the administrative state for instances of agency capture in the 1960s).

[46] While legal scholarship has ignored most of these features, political scientists have recognized the value of some of them, such as funding and appointments. But even this literature has ignored some key elements, such as the role of state law enforcement and the power of information generation.

A. The Traditional Lodestars

Three features have long characterized independent agencies: removal protection for its members; freedom from oversight by the President's Office of Information and Regulatory Affairs; and a multi-member design.

1. *For-Cause versus At-Will Removal Provisions*.

Whether an agency head should be removable at will or serve a term of years and be removable only for cause before his or her term expires is, as noted, the insulation design feature that is most often used to demarcate an agency "independent."[47] If this is the definition of independence, independent regulatory agencies abound across a wide range of policy fields. They include the Federal Trade Commission,[48] the Consumer Product Safety Commission,[49] the Federal Energy Regulatory Commission,[50] the Federal Communications Commission,[51] and the Nuclear Regulatory Commission.[52] The heads of these agencies can be removed only for good cause, which typically means "inefficiency, neglect of duty, or malfeasance in office."[53] Though the issue has not been decided by the Supreme Court, most commentators agree that it is not good cause for removal if an agency performs a lawful regulatory agency action that the President disagrees with as a matter of policy.[54] Consequently, the President cannot control independent regulatory agency policymaking with the threat of removal.[55]

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[47] *See supra* note __ and accompanying text.

[48] Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (2006).

[49] Consumer Product Safety Act, 15 U.S.C. §§ 2053-2083 (2006).

[50] 42 U.S.C. §§ 7171-7178 (2006).

[51] 47 U.S.C. § 154 (2006).

[52] 42 U.S.C. §§ 5841-5853 (2006).

[53] 42 U.S.C. 5841(e) (2006). This limitation on Presidential removal power has been upheld by the Supreme Court. *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 626–32 (1935). However, the Court has never defined these terms. *See* Bowsher v. Synar, 478 U.S. 714, 729 (1986) ("These terms are very broad and, as interpreted by Congress, could sustain removal . . . for any number of actual or perceived transgressions . . .").

[54] *See, e.g.*, Peter M. Shane, *Independent Rulemaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 597, 609 (1989). For the alternate view, see Lessig & Sunstein, *supra* note __, at 110–11.

[55] Mistretta v. United States, 488 U.S. 361, 410–11 (1989) ([L]imitation on the President's removal power . . . is specifically crafted to prevent the President from exercising 'coercive influence' over independent agencies.") (citations omitted); *see also* DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN 47 (2003); Levinson & Pildes, *supra* note __, at 2376 ("These institutions were conceived as means to limit the sphere over which partisan political power could exert control."); Thomas O. Sargentich, *The Emphasis on the Presidency in U.S. Public Law: An Essay Critiquing Presidential Administration*, 59 ADMIN. L. REV. 1, 8 (2007) (noting possibility of termination is ex ante deterrent to agency heads' willingness to negotiate strongly with White House).

Empirical studies on when Congress opts for good cause provisions support the view that this design feature seems largely aimed at stopping presidential pressure in particular and not necessarily at preventing interest group or partisan influence in general. The independent model of good cause removal is typically selected during divided government when Congress is controlled by a different party than the President.[56] Thus, Congress is interested in making the sure that the minority party in the legislature does not exert greater influence over the agency through presidential power.[57] When Congress and the President are controlled by the same party, Congress is more likely to delegate authority to an executive agency whose head is removable at will by the President.[58]

But this does not mean that current party politics is the only explanation for removal restrictions. Even if Congress is controlled by the same party as the current President, it may prefer a for-cause removal provision if the need for stability in policy is relatively great. This concern, for instance, was the driving force behind the removal of the Secretary of Treasury and the Comptroller General from the Federal Reserve Board in 1935.[59] Similarly, Congress may agree with the current President's policies but worry that the short-term preferences of future administrations could undermine the long-term goals of law.[60]

The President, too, may support the creation of an independent agency in the name of stability and helping the agency to avoid future partisan pressure from the opposite party.[61] For example, as part of his

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[56] LEWIS, *supra* note 8, at 58–60; David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 983–85 (1999) (finding increased Congressional-Executive conflict leads to decreased delegation of executive authority).

[57] Levinson & Pildes, *supra* note __, at 2358 ("When Congress confronts a President who disagrees with its policy objectives, in other words, it directs its delegations to the executive branch actors most insulated from presidential control, and perhaps also most susceptible to congressional control.").

[58] David Epstein & Sharyn O'Halloran, *Divided Government and the Design of Administrative Procedures: A Formal Model and Empirical Test*, 58 J. POL. 373, 391 (1996) (finding "under unified government Congress is more inclined to increase the president's discretionary authority, and the president will certainly not be averse to accepting it").

[59] During hearings, the banking lobby argued that because Congress was concentrating "greater power than ever before," in the Federal Reserve Board, it should enjoy "absolute independence" from political considerations through elimination of the Secretary of the Treasury and the Comptroller of the Currency positions on the Board. *Banking Act of 1935: Hearings before the H. Comm. on Banking and Currency*, 74th Cong. 514–15 (1935) (statement of D. J. Needham, General Counsel, American Bankers Association).

[60] *See* Devins & Lewis, *supra* note __, at 465 ("Members of Congress worry not only about the current President but also about the impact of future Presidents on agency policy and implementation."); Bressman & Thompson, *supra* note __, at 613–14 ("When continuity was an end unto itself, as was the case with monetary policy, agency independence was a means.").

[61] Devins & Lewis, *supra* note __, at 468 (noting Congress and Presidents can "lock in" a set of policies by creating independent regulatory agencies with sympathetic appointees); *see also* Bressman & Thompson, *supra* note __, at 636 ("The President may have trouble resisting the short-term pressures in deference to other interests and thus may seek an independent regulator for fortitude."); Verkuil, *supra* note __, at 965 n.116 (pointing out

economic recovery plan, President Obama proposed the Consumer Financial Protection Agency as an independent regulatory agency with broad authority over consumer financial services and lending statutes.[62]

A concern with long-term stability helps explain why most financial agencies, including the Board of Governors of the Federal Reserve System,[63] the Securities and Exchange Commission,[64] and the Commodity Futures Trading Commission,[65] have heads removable only for cause. Though the President and these agencies share a common long-term goal of economic growth, achieving that goal often requires politically unpopular actions in the short-term.[66]

Giving agency officials tenure for a term of years can also foster expertise, as agency heads gain wisdom from their experience on the job.[67] The terms must be sufficiently long to allow agency heads to gain the relevant experience. And in the case of multi-member agencies, the terms of the members must be staggered so that institutional expertise can accumulate without gaps.[68]

Removal can also help serve the goal of reducing capture. To the extent powerful groups operate to influence the President, they can also influence agencies by virtue of the President's threat to remove agency officials if they do not serve those interests. A removal restriction undoubtedly gives an agency head greater confidence to challenge presidential pressure.

But one must be careful not to overstate the functional difference between at-will and for-cause removal and thus the effect of removal

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President Carter's rejection of a proposal that would have shifted responsibility for nuclear power safety away from the Nuclear Regulatory Commission and to the Department of Energy).

[62] DEP'T OF TREASURY, A NEW FOUNDATION: REBUILDING FINANCIAL SUPERVISION AND REGULATION, 58 (2009), *available at* http://www.financialstability.gov/docs/regs/FinalReport_web.pdf (recommending CFPA "be structured to promote its independence and accountability"); *see also* Jackie Calmes & Sewell Chan, *Obama Pressing for Protections Against Lenders*, N.Y. TIMES, Jan. 19, 2010, at B1 (describing President Obama's efforts to persuade Congress to create CFPA as independent agency).

[63] 12 U.S.C. § 242 (2006).

[64] Though there is no explicit removal provision that governs the SEC, the Supreme Court recently accepted the argument that its commissioners are subject to removal only for "inefficiency, neglect of duty, or malfeasance in office." Free Enterprise Fund v. Public Company Accounting Oversight Bd., slip op. at 5.

[65] As with the SEC, there is no procedure for removal of CFTC Commissioners in the enabling legislation. 7 U.S.C. § 2(a)(2) (2006).

[66] Bressman & Thompson, *supra* note __, at 603.

[67] *See* S. REP. NO. 63-597, at 10-11 (1914) (noting that the seven-year terms of FTC commissioners would "give them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience").

[68] *See* Humphrey's Ex'r v. U.S., 295 U.S. 602, 625 (1935) (noting Congress's intent to create an expert body, whose members gain expertise through experience).

protections on capture. For starters, even at-will agency heads have greater protection than their formal status suggests because, as Paul Verkuil puts it, "removal is a doomsday machine" that is politically costly for presidents.[69] On the flipside, just because agency officials have for-cause job protection does not mean they are immune from political pressure. Presidents seem to be able to remove them without litigating the question of good cause because officials typically accept voluntarily a presidential request for their resignation or otherwise fail to challenge their removal.[70] Even without a presidential request to leave, the average presidential appointee is likely to leave his or her position after about two years, giving the President authority to fill the vacancy.[71]

More fundamentally, agency officials with for-cause protection who are members of the same party as the President typically want to fall in line with the President's agenda. This could be for substantive policy reasons. Reed Hundt, a former chairman of the FCC, explained that "naturally I, and any agency head, preferred the White House to approve of my agenda. Few are successful in any endeavor without learning the value of partnership."[72] Or, as discussed in greater detail below, it could be for their own career advancement.[73] Regardless of the reason, presidential acceptance is likely to matter to agency heads even without the threat of removal hanging over them.

This is not to say that removal restrictions do not matter. Rather, it emphasizes the need to look beyond removal if the goal is to create the strongest barrier possible against capture.

2. *Oversight by the Office of Information and Regulatory Affairs.*

Threats of removal are not the only way Presidents control agency heads. Presidents also aim to steer agency policy through the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget. One of OIRA's main functions is to coordinate administration policy across agencies,[74] so if OIRA discovers an outlier position, it will

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[69] Verkuil, *supra* note __, at 957. *See also* CALABRESI & YOO, supra note __, at 414 (noting that the removal of U.S. Attorneys by President George W. Bush was politically costly); Pierce, *supra* note __, at 607-610 (describing the political costs to removing at-will agency officials).

[70] Breger & Edles, *supra* note __, at 1150; Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 955 (1980); Pierce, supra note __, at 604-605.

[71] Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 919 n.23 (2009).

[72] REED E. HUNDT, YOU SAY YOU WANT A REVOLUTION: A STORY OF INFORMATION AGE POLITICS 13 (2000).

[73] *See infra* Part II.B.2.

[74] U.S. Gov't Accountability Office, Report to the Chairman, Committee on Oversight and Government Reform, House of Representatives, Federal Rulemaking: Improvements Needed to Monitoring and Evaluation of Rules Development as Well as to the Transparency of OMB Regulatory Reviews 8 (April 2009) (GAO OMB Study) (noting that OIRA is

inevitably seek to pressure the agency to fall in line with the larger administration position. Another key OIRA function involves its review of proposed regulations. Every President since Ronald Reagan has used OIRA to require agencies under OIRA's jurisdiction to justify their proposed regulations using cost-benefit analysis.[75] OIRA also requires all agencies (executive and independent) to submit an agenda of all regulations it has under development or review.[76] Finally, in addition to OIRA's oversight of regulations, it also reviews legislation and congressional testimony proposed by covered agencies.[77] Presidential appointees control OMB and OIRA, so channeling regulations through OIRA is an effective way for the President to monitor their compliance with his or her overall agenda and to pressure the agency to make changes if necessary.[78]

Empirical evidence confirms OIRA's influence on agency policy. A recent Government Accountability Office (GAO) report, for example, found that OIRA review prompted significant or material changes to eight of 12 agency rules being considered.[79]

A key question of agency design is thus whether the agency must submit regulations for OIRA review. It is an open constitutional question whether the President could require traditional independent agencies (defined for these purposes as an agency whose head is removable for cause) to submit cost-benefit analyses of proposed regulations to OIRA for review or if Congress has the power to prevent such review.[80] But ever

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responsible for making sure that "decisions made by one agency do not conflict with the policies or actions taken or planned by another agency").

[75] Exec. Order No. 12,291 § 2(b), 46 Fed. Reg. 13,193 (Feb. 19, 1981); Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993); Exec. Order No. 13,422, 72 Fed. Reg. 2,763 (Jan. 18, 2007); Exec. Order No. 13,497 74 Fed. Reg. 6,113 (Jan. 30, 2009).

[76] Exec. Order No. 12,866 § 4, 58 Fed. Reg. 51,735, 51,738 (Sept. 30, 1993) ("For the purposes of this subsection, the term 'agency' or 'agencies' shall also include those considered to be independent regulatory agencies . . . . Each agency shall prepare an agenda of all regulations under development or review, at a time and in a manner specified by the Administrator of OIRA.").

[77] Breger & Edles, *supra* note __, at 1151.

[78] Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2338 (2001) (pointing that OIRA is guided by the "policy orientation of the President").

[79] GAO OMB Study, supra note __, at 30. An earlier GAO study determined that OIRA significantly impacted 25 of the 85 rules studied "by suggesting changes that revised the scope, impact, or costs and benefits of the rules, returning the rules for reconsideration by the agency, or, in one case, requesting that the agency withdraw the rule from review." GEN. ACCOUNTING OFFICE, GAO-03-929, RULEMAKING: OMB'S ROLE IN REVIEWS OF AGENCIES' DRAFT RULES AND THE TRANSPARENCY OF THOSE REVIEWS 5 (2003).

[80] *See*, *e.g.*, Memorandum from the Dep't of Justice, Office of Legal Counsel to David Stockman, Director, Office of Management and Budget, 7 (Feb. 12, 1981), *reprinted in Role of OMB in Regulation: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 97th Cong. 158 (1981); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 596 (1984); Peter Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis,* 57 GEO. WASH. L. REV. 596**,** 611 (1989); Lessig & Sunstein, *supra* note __, at 112; Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 29-32 (1995); Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulations? Deeper and Wider Cost-Benefit Analysis*, 150 U.

since OIRA started engaging in extensive oversight of agency regulations, presidents have avoided this constitutional confrontation by making the political choice to exempt independent agencies that are defined in the Paperwork Reduction Act from having to submit cost-benefit analysis of their rules to OIRA.[81]

Thus, right now the key marker of whether an agency must submit cost-benefit studies of proposed rules to OIRA is whether the agency is listed in the Paperwork Reduction Act as an independent agency. Notably, not all agencies with heads who are removable for cause are exempt from OIRA review under this definition. For example, the head of the Social Security Administration (SSA) is removable for cause.[82] Despite this fact, the Act creating the Social Security Administration states that it shall be "an independent agency in the executive branch"[83] and it is not among the agencies listed in the Paperwork Reduction Act.[84] The SSA, in turn, has complied with executive orders on regulatory review, including the appointment of a regulatory policy officer when President George W. Bush's executive order required it.[85] Relatedly, even though the Federal Emergency Management Agency has been characterized as an "independent agency in the Executive Branch,"[86] its head lacks removal protection and it is subject to presidential oversight.[87]

In thinking about whether Congress should list an agency among the independent regulatory agencies in the Paperwork Reduction Act to exempt it from OIRA review, it is important to return to the goals of insulation.[88]

PA. L. REV. 1489, 1534–35 (2002); Richard L. Revesz & Michael Livermore, Institute for Policy Integrity, New York University School of Law, Memorandum 5 (Feb. 13, 2009) filed in response to Memorandum from the President of January 30, 2009 concerning Regulatory Review, published at 74 Fed. Reg. 5977 (Feb. 3, 2009), *available at* http://www.reginfo.gov/public/jsp/EO/fedRegReview/Revesz_Livermore.pdf.

[81] *See*, *e.g.*, Exec. Order No. 12,044 § 6(b)(5), 43 Fed. Reg. at 12,664; Executive Order 12866 §3 (including all agencies within its ambit except those "considered to be independent regulatory agencies, as defined in 44 U.S.C. § 3502(10)"). 44 U.S.C. § 3502 has since been amended so that independent regulatory agencies are now defined in § 3502(5).

[82] 42 U.S.C. § 902(a)(3).

[83] 42 U.S.C. § 901.

[84] 44 U.S.C. § 3502(5). Though the Act's definition of "independent regulatory agencies" includes a catch-all for "any other similar agency designated by statute as a Federal independent regulatory agency or commission," *id.,* no court has interpreted this definition to include the Social Security Administration.

[85] Agency Regulatory Policy Officers (as of June 19, 2008), *available at* http://georgewbush-whitehouse.archives.gov/omb/inforeg/regpol/agency_reg_policy_officers.pdf. For President Bush's requirement that Regulatory Policy Officers be used, see Exec. Order No. 13,422, 72 Fed. Reg. 2763, 2764 (Jan. 23, 2007).

[86] *See* notes following 15 U.S.C. § 2202 (transfer of functions).

[87] *See*, *e.g.*, Interim Final Rule, 66 Fed. Reg. 15968 (noting that a FEMA rule has been reviewed by OMB for compliance with 12866); 6 U.S.C. § 313.

[88] Note that if one's goals were different – say, increasing democratic accountability – the analysis would change. For example, because the President represents a national constituency, subjecting agency rules to OIRA review may increase democratic

Obviously, if the goal of insulation is to limit presidential control, OIRA review should be avoided.

If the goal of insulation is to enable decisions to be made on expert information, the analysis is more complicated because OIRA review can cut both ways. On the one hand, OIRA review helps the President coordinate policies across the Executive branch, which can rationalize government decisionmaking overall and include the input of other expert agencies that are dealing with the same topic.[89] In addition, requiring an agency to submit a cost-benefit analysis of a proposed regulation to OIRA can have potentially positive disciplining effects because OIRA brings a fresh set of eyes to the issue and its own set of expertise at economic analysis.[90] Cass Sunstein and Rick Pildes, for example, believe "strong policy reasons favor including the independents within some degree of presidential authority."[91] They argue that OIRA review can "diminish some of the characteristic pathologies of modern regulation–myopia, interest group pressure, draconian responses to sensationalist anecdotes, poor priority setting, and simple confusion."[92] Although there is some delay with OIRA review, in recent years the process has been relatively expeditious, taking less than a month of additional time.[93]

On the other hand, the agency has subject-matter expertise that can get lost in OIRA review. For example, Thomas McGarity points out that OIRA lacks the technical expertise necessary to adequately review many agency actions.[94] The relationship between expertise and OIRA is thus a complicated one.[95]

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accountability. Kagan, *supra* note __, at 2335 (arguing that the president's national constituency causes him to consider the interests of the general public rather than parochial interests). *But see* Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 457–63 (2010) (arguing voters do not select Presidents based on policy platforms, administrative procedures obscure Presidential control and decrease accountability, and agencies receive conflicting advice from White House officials rather than national perspectives). But the point of the Article is to think about these design elements as they relate to the specific end goals of insulation, which by their nature cut against increased accountability.

[89] Bagley & Revesz, supra note __, at 1264; Rodriguez, *supra* note __, at 1837 (pointing out in the context of immigration that "some White House scrutiny and coordination may well be warranted, given both the political nature of the agency's mandate and the sprawl of the immigration bureaucracy across the executive branch").

[90] Strauss, *supra* note __, at 594 (pointing out that better policy can result from getting the President's broader perspective on policy); Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 873 (2003) ("White House review appears to be at least partially technocratic and at any rate not *ad hoc*.").

[91] Pildes & Sunstein, *supra* note __, at 28.

[92] *Id.* at 4. The concern about excessive costs of regulation motivated a 2002 proposal by the Center for Regulatory Effectiveness to impose OIRA review on independent agencies. CENTER FOR REGULATORY EFFECTIVENESS, A BLUEPRINT FOR THE OMB REVIEW OF INDEPENDENT AGENCY REGULATIONS 3 (2002).

[93] *See* OMB Watch, *OIRA's Role in the Obama Administration Examined*, *available at* http://www.ombwatch.org/node/10115.

[94] THOMAS O. MCGARITY, REINVENTING RATIONALITY 281 (1981). *See also* Steinzor & Shapiro, note __, at 204-205; Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the*

If the goal of insulation is to further non-partisan decisionmaking that is not captured by a particular interest and to encourage stability, the case for OIRA review weakens. Consider first the relationship between OIRA review and a desire to insulate an agency from biased decisionmaking, particular bias in favor a politically powerful regulated entity. Some have argued as a matter of theory that presidential oversight via OIRA review is needed to curb the capture of independent agencies.[96] But Nicholas Bagley and Richard Revesz have persuasively shown the "the assumption that agencies will be routinely plagued by regulatory capture, but that OIRA will never be, is not very plausible."[97]

On the contrary, OIRA review is likely to add to the problem of capture by industry. As Bagley and Revesz effectively demonstrate, agencies are more likely to under-regulate than over-regulate because industry groups are far more likely than public interest groups to have organization and resources to capture agencies.[98] Yet OIRA is poorly positioned to check the problem of under-regulation. Just the opposite, OIRA itself is prone to be captured by the very same industry forces because "the President will be particularly attentive to those groups that can provide him with the resources, support, or votes to win elections or promote his political agenda."[99] And because the OIRA review process is less transparent than agency process, it is that much easier for industry groups to influence OIRA without being checked.[100] This is not just a matter of theory; empirical evidence confirms OIRA's strong deregulatory bias and

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Administrative State: A Critical Look at the Practice of Presidential Control, 104 Mich. L. Rev. 47, 97 (2006).

[95] Bagley & Revesz, *supra* note __, at 1312-1313 (explaining the complexity of answering the question of when centralized review in OIRA makes sense).

[96] *See*, *e.g.*, BERNSTEIN, *supra* note __, at 291-297 (arguing that independent agencies "have proved to be more susceptible to private pressures, to manipulation for private purposes, and to administrative and public apathy than other types of government agencies"); Lessig & Sunstein, *supra* note __, at 96 ("an independent agency is highly likely to fall victim to factional capture"); John O. McGinnis, *Presidential Review as Constitutional Restoration*, 51 DUKE L.J. 901, 905, 913 n.45 (2001) (arguing that OIRA review is even more justified for independent regulatory agencies than executive agencies because "at the margin independent agencies are even more likely to be dominated by special interests than are agencies whose heads are not insulated from presidential removal" and offering his view that "the pressure for special interest regulation is greater than for special interest deregulation"); Cass R. Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407, 426-28, 439-440 (1990). (arguing that independent agencies have been "highly susceptible to the political pressure of well-organized private groups"). *Cf.* Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1080-81 (1986) (assuming that the fact that "regulation tends to favor narrow, well-organized groups at the expense of the general public" means that OIRA review is needed to check against overregulation).

[97] Bagley & Revesz, *supra* note 47, at 1306, 1308.

[98] *Id.* at 1287-1290 (using theory and empirical evidence to refute the claim that agencies will be captured by public interest groups seeking more regulation).

[99] *Id.* at 1305; *id.* at 1306 (pointing out that industry groups will have the same incentives to "bid for regulatory outputs" at OIRA as they do at agencies).

[100] *Id.* at 1309-1310.

sympathy for industry views.[101] Thus, Bagley and Revesz conclude that "solidifying the President's already substantial control over the administrative state may have the perverse result of amplifying the power of those groups that are in a position to exert undue influence on the President while doing nothing to minimize industry group influence at the administrative level."[102]

This is all the more likely when the agency at issue has been set up to be relatively insulated from interest group pressures. That is because any insulation of the agency will be lost if interest groups can achieve their desired policies once the agency's rules reach the level of presidential review.

Thus, for agencies charged with regulating in an area where there is no powerful interest in favor of regulation to counterbalance the deregulatory forces that line up on one side – the problem this Article seeks to address – OIRA review is likely to exacerbate agency bias, not neutralize it.[103] And although many urge OIRA to take a more aggressive role in policing agency inaction,[104] thus theoretically serving as an additional check on an agency that is not regulating enough to protect an interest, policing agency inaction will always be more difficult than supervising agencies' affirmative acts.[105] For example, even after OIRA committed itself to making greater use of prompt letters "to a regulator, that a rulemaking be initiated or completed, that information relevant to a regulatory program be disclosed to the public, or that a piece of research or analysis relevant to rulemaking be conducted,"[106] very few were actually sent.[107]

More fundamentally, OIRA will rarely pay much heed to interests that are unorganized and lack power in the political process. These groups are unlikely to have the resources to participate actively in the OIRA process.[108] And even when they do, OIRA may opt to intervene in areas

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[101] *See e.g.*, *id*, at 1306-1307 (summarizing empirical evidence that "OIRA was a 'conduit' for industry views").

[102] *Id.* at 1312. *See also* Verkuil, *supra* note __, at 950-951("Powerful private lobbies, increasingly frustrated in obtaining preferential access to administrators, can be expected to use White House political advisors to achieve equivalent clout.").

[103] OIRA may well be needed in other circumstances where the risks of overregulation are present, as Bagley and Revesz concede as well. Bagley & Revesz, supra note __, at 1283.

[104] *See* Revesz & Livermore, *supra* note 46, at 1-3; Hahn & Sunstein, *supra* note 46, at 1521-1524.

[105] *See* Revesz & Livermore, supra note __, at 174 ("Because of the structure of regulatory review, there is currently ample opportunity for affected interests to bog down the regulatory process….").

[106] John D. Graham, *Saving Lives Through Administrative Law and Economics,* 157 U. PA. L. REV. 395, 460 (2008) (citations omitted); GEN. ACCOUNTING OFFICE, GAO-03-929, RULEMAKING: OMB'S ROLE IN REVIEWS OF AGENCIES' DRAFT RULES AND THE TRANSPARENCY OF THOSE REVIEWS 48 (2003).

[107] Bagley & Revesz, *supra* note __, at 1306 (noting that prompt letters are ineffective in instigating agency action).

[108] Bagley & Revesz, supra note __, at 1306-1307 (discussing empirical studies showing a relative lack of public interest participation in OIRA review process).

where more powerful groups take an interest to help the president get reelected.[109]

And of course, a president with a deregulatory, pro-business agenda is hardly likely to use OIRA to prompt more regulations. While a president with that ideological outlook is likely to influence independent agencies as well through his appointments and other means,[110] the independent agency will nevertheless be relatively more insulated from industry pressure, so keeping its decisions away from OIRA will, on net, produce less of a deregulatory bias.

In the same vein, OIRA review undermines the goal of stability because the more susceptible an agency is to presidential oversight, the more likely the agency's policies will shift as new administrations take power. Dramatic shifts hinder business planning and create legal uncertainty, thus undermining the stability of policy.

Having said all this, it is important to reiterate that even if a president is restricted from removing agency officials and cannot exercise review through OIRA, he or she will undoubtedly still exercise informal pressures that may be just as powerful. For example, even though agencies are not required to submit to OIRA regulatory review, some do on a voluntary basis to stay in the President's good graces and ensure access to resources such as coordination with other agencies, office space, and legal services.[111] Elena Kagan has similarly observed that President's achieve influence through personal ties, sanctions, and institutional incentives.[112]

One recent study found that during the Bush I and Clinton administrations, nineteen White House offices (including OIRA) were involved in EPA rulemaking to some degree.[113] Vice President Cheney exercised considerable influence on agency decisions by contacting lower-ranked agency officials directly.[114] Some believe these informal contacts further the White House's agenda even more than OIRA review.[115] Thus, any attempt at curbing industry influence the President must seek to address these more subtle mechanisms of influence.

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[109] Strauss, *supra* note 39, at 664–65; *see also* MCGARITY, *supra* note 39, at 288. This concern initially caused a legal debate as to whether OIRA review was constitutional even as applied to executive agencies. David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1110 (2008).

[110] *See infra* __.

[111] Strauss, *supra* note __, at 593-594, 663.

[112] Kagan, *supra* note __, at 2376.

[113] Lisa Schultz Bressman & Michael P. Vanderbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 68 (2006).

[114] Jo Becker & Martin Gellman, *Leaving No Tracks,* WASH. POST, June 27, 2007, at A1.

[115] Pierce, *supra* note __, at 600 ("Largely invisible ad hoc White House jawboning is now, and always has been, far more important in its impact on agency policy decisions.").

3. *Single Agency Head versus Multi-Member Commission.*

It is often remarked that independent agencies are characterized not only by their for-cause removal protections, but also by the fact that they are typically multi-member bodies.[116] Thus another traditional question of agency design is whether to opt for a single agency head or to use have a commission or board structure with a number of voting members.

This question of institutional design is a bedrock inquiry that is reflected in our Constitution. The unitary executive model of Article II was selected for efficiency and accountability.[117] But a single head also means less deliberation and debate. A multi-member agency, in contrast, "tends toward accommodation of diverse or extreme views through the compromise inherent in the process of collegial decisionmaking."[118] And having only one person at the apex can also mean that the agency is more easily captured.[119]

Presidents may have relatively less direct influence over multi-member agencies, if only because these agencies have members who serve staggered terms,[120] meaning that Presidents typically cannot appoint a full slate of officers immediately upon taking office.[121]

It is important, however, not to understate the President's power over independent multi-member commissions. Dating to the Presidency of Warren Harding, Presidents have been able to obtain majorities for their party on independent commissions within 13-14 months after taking office from a prior President of a different party.[122] Recently, the process has slowed, taking an average of 20 months for Presidents Clinton and George W. Bush to obtain a majority for their respective parties.[123] Once the

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[116] Bressman & Thompson, *supra* note 3, at 610.

[117] Lessig & Sunstein, *supra* note __, at 93 ("The framers believed that unitariness advanced the interests of coordination, accountability, and efficiency in the execution of the laws."); THE FEDERALIST No. 74 (Alexander Hamilton).

[118] Breger & Edles, *supra* note __, at 1113.

[119] CUSHMAN, *supra* note __, at 153 (noting that it "seem[s] easier to protect a board from political control than to protect a single appointed official").

[120] Bressman & Thompson, at 610.

[121] Devins & Lewis, *supra* note __, at 472.

[122] Devins & Lewis, *supra* note __, at 470. New presidents who are of the same party as the previous president obtain a majority for their party much more quickly, within one to two months. *Id.*

[123] Devins & Lewis, *supra* note __, at 472. It takes a bit longer (about one more month) for presidents to appoint absolute majorities of commissioners (for example, appointing three out of five commissioners, regardless of party) but this is less relevant because party polarization means that once a President has a majority of party votes, the agency tends to follow the president's lead. Devins & Lewis, *supra* note __, at 469-70, 472-473, 492. *See infra* ___.

President has a majority of members of his or her party, the commissions fall in line with the President's priorities and positions.[124]

The President's influence can take place even more quickly than that because he or she often has the power to demote the chair of independent commissions and appoint a new one.[125] The chair in many cases has significant authority over the agency's budget and personnel decisions, and often has a large influence over the agency's day-to-day decisionmaking as well.[126] In many agencies, the chair has the right to appoint staff directly[127] and is the public voice of the agency.[128] These

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[124] For a more detailed model of how elected officials change the policies of multimember agencies depending on the sequence and timing of open seats on the agency, see Susan K. Snyder & Barry R. Weingast, *The American System of Shared Powers: The President, Congress, and the NLRB*, 16 J.L. ECON. & ORG. 269 (2000). That independent agencies ultimately fall in line with presidential priorities because of party loyalty shows the wisdom of Daryl Levinson and Rick Pildes's plea to administrative law scholars to spend more time focusing on party affiliation rather than formal structural separation of powers. Levinson & Pildes, *supra* note __, at 2364.

[125] Verkuil, *supra* note __, at 955 & n.75 (noting that the President appoints the chairman of the FTC, FCC, SEC, and NLRB). Typically, when a President demotes the chair, the chair opts to resign and not serve the remainder of his or her term, thus giving the President a new appointment as well. Daniel E. Ho, *Measuring Agency Preferences: Experts, Voting, and the Power of Chairs*, 59 DEPAUL L. REV. 333, 338 (2010). The President's power to select the chair is not true for all independent agencies. The chair of the Federal Reserve Board, for instance, has a fixed tenure of four years. 12 USC § 242.

[126] *See*, *e.g*., Reorg. Plan No. 4 of 1961, 26 Fed. Reg. 6191 (1961), *reprinted in* 74 Stat. 837 (1961) (Federal Trade Commission); Reorg. Plan No. 6 of 1961, 26 Fed. Reg. 7541 (1961), *reprinted in* 75 Stat. 838 (1961) (Federal Home Loan Bank Board); Reorg. Plan No. 8 of 1950, 15 Fed. Reg. 3175 (1950), *reprinted in* 64 Stat. 1264 (1950) (Federal Trade Commission); Reorg. Plan No. 9 of 1950, 15 Fed. Reg. 3175 (1950), *reprinted in* 64 Stat. 1265 (1950) (Federal Power Commission); Reorg. Plan No. 10 of 1950, 15 Fed. Reg. 3175 (1950), *reprinted in* 64 Stat. 1265 (1950) (Securities and Exchange Commission); *See also* Breger & Edles, supra note ____ at 1165 (". . . most chairman are essentially the agencies' chief executive and administrative officers. They appoint and supervise the staff, distribute business among the agency's personnel and administrative units, and control the preparation of the agency's budget and the expenditure of funds."); Verkuil, *supra* note __, at 958. In 1971, Miles Kirkpatrick, then chairman of the Federal Trade Commission, described his position as follows: "I should make clear that in the management of the Commission's day-to-day affairs, there are no collegial decisions. Management of the Commission, save for the appointment of top policy making positions and policy decisions having to do with the allocation of major resources, is placed squarely on the Chairman. In my experience, matters having to do with the management of the Commission's staff are not the subject of debate among the Commissioners." DAVID M. WELBORN, GOVERNANCE OF FEDERAL REGULATORY AGENCIES 31 (1977) (quoting Miles W. Kirkpatrick, *Dinner Address*, 40 ANTITRUST L. J. 332 (1971)). With respect to the allocation of funds among various projects, however, the commission as a whole generally decides. WELBORN, *supra* note ___ at 22 ("In the Civil Aeronautics Board, Federal Power Commission, Federal Trade Commission, and Securities and Exchange Commission, authority is reserved to revise or approve budget estimates at to allocate appropriated funds among 'major programs and purposes.' In the Interstate Commerce Commission, budget authority is phrased somewhat differently but to the same effect"); Breger & Edles, *supra* note ___ at 1173-74 ("Many statutes affirmatively accord the agency as a whole the right to approve the annual budget. . . the chairman's unitary authority often does not extend beyond the preparation or drafting of budget documents. . ."); *See, e.g.*, 15 U.S.C. § 41 (FTC statute reserving the right to approve the agency's budget to the commission).

[127] Breger & Edles, *supra* note ____, at 1173 note 317 (describing the differences in hiring power of the chairman at various agencies, and noting that FCC Chairman Reed Hundt hired 200 staff members during his four years in office).

powers allow the chair to exercise significant control over the agenda's agenda.[129]

In the case of multi-member agencies, another design question of import is whether the members should be relatively balanced among political parties. Most independent commissions require that no more than a bare majority of the members may come from the same political party.[130] For example, the Federal Deposit Insurance Corporation (FDIC) is a five-member board, and its authorizing statute provides that no more than three members may be of the same political party.[131] The Federal Trade Commission is also governed by a five-member body, and its authorizing statute similarly insists that no more than three of its commissioners can be members of the same political party.[132] The National Credit Union Administration (NCUA) follows this same model. Of the three members of its board, only two may be members of the same party.[133]

There are, however, some multi-member bodies that lack a bipartisanship requirement, including the National Labor Relations Board and Federal Mine Safety and Health Review Commission.[134] The Federal Reserve Board of Governors also lacks a requirement that it be politically balanced.[135] Even in those independent agencies that have less formal requirements on the balance of members, there exists political pressure for continuity in patterns of membership.[136]

Appointees who are of the opposite party as the President who appoints them tend to be "ideological partisans committed to the agenda of the opposition party."[137] And appointees who are of the same party as the President who appoints them are equally committed to the President's party and therefore his agenda. Thus, these agencies ultimately shift as presidential power shifts. While one might think this divergence undercuts

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[128] Ho, *supra* note __, at 360.

[129] Glen O. Robinson, *Independent Agencies: Form and Substance in Executive Prerogative*, 1988 Duke L.J. 238, 245 n.24; Ho, supra note __, at 338.

[130] Breger & Edles, *supra* note __, at 1139.

[131] 12 U.S.C. § 1812(a)(2).

[132] 15 U.S.C § 41.

[133] 12 U.S.C. § 1752a(b)(1).

[134] Breger & Edles, *supra* note __, at 1139. The original proposal for the Consumer Financial Protection Agency lacked a requirement of partisan balance. Consumer Financial Protection Agency Act of 2009, H.R. 3126, 111th Cong. § 112 (2009).

[135] The legislation creating the Board of Governors does state, however, that, in "selecting the members of the Board, not more than one of whom shall be selected from any one Federal Reserve district, the President shall have due regard to a fair representation of the financial, agricultural, industrial, and commercial interests, and geographical divisions of the country." 12 U.S.C. § 241.

[136] *See* WILLIAM L. CARY, POLITICS AND THE REGULATORY AGENCIES 61-62 (1967) (describing pressure on President Johnson to maintain balance between consumer- and industry-minded commissioners at the Federal Power Commission).

[137] Devins & Lewis, *supra* note __, at 461.

the goals of having independent agencies, there are reasons to believe that having a mix of ideologies on agencies facilitates the aims of insulation.

A partisan-balance requirement can help achieve two goals of insulation: it can avoid extremely partisan decisions and help facilitate more stable agency policy. As a wealth of empirical research demonstrates, a group comprised solely of ideologically like-minded people tends toward extreme decisionmaking.[138] Liberals and conservatives alike become more liberal and conservative, respectively, when they deliberate only with like-minded people. Thus, as Cass Sunstein has observed, "[a]n independent agency that is all Democratic, or all Republican, might polarize toward an extreme position, likely more extreme than that of the median Democrat or Republican, and possibly more extreme than that of any member standing alone."[139] This kind of polarization could mean wide fluctuations in policy as presidential administrations change.[140] Thus, the designers of the ICC – which became the template for later independent agencies[141] -- insisted on partisan balance (with not more than three of the five members permitted to come from the same political party) based on a desire create "impartiality, or at least neutrality."[142] Indeed, Robert Cushman notes that this neutrality "was looked upon as more important than expertness."[143] Put another way, a commission of five members all of the same party would be even more polarized than one in which a bare majority is of the same party.

A multi-member commission that is politically balanced is beneficial for another reason. As noted above, one of the concerns with

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[138] *See*, *e.g.*, David Schkade, *et al*., *What Happened on Deliberation Day?*, 95 CAL. L. REV. 915 (2007) (discussing the results of an experiment that shows that liberals and conservatives become more liberal and conservative, respectively, as a result of deliberation amongst like-minded people); Cass R. Sunstein, *et al*., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301 (2004) (discussing data that shows that unified groups of three Democrat-appointed or Republican-appointed judges are far more likely to vote in a "liberal" or "conservative" manner, respectively, than Democrat-appointed or Republican-appointed judges who are part of a divided bench); Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 74 (2000) ("In brief, group polarization means that members of a deliberating group predictably move toward a more extreme point in the direction indicated by the members' predeliberation tendencies.").

[139] Sunstein, *supra* note 34, at 103.

[140] One might wonder why the Federal Reserve Board of Governors lacks a partisan balance requirement if it is so central to stability. But the Board of Governors seems to be checked by other measures. First, the members serve long terms of 14 years, thereby increasing stability. In addition, they have perhaps the most powerful agency positions in the country because of their authority to set monetary policy. Monetary policy cannot fluctuate in an extreme manner as administrations change because of the deleterious effect it would have on the economy. It is therefore unsurprising that even without a requirement that the Board be politically balanced, it is one of the most stable agencies in government and the most independent.

[141] *See* CUSHMAN, *supra* note __, at 188 ("A controlling force moving legislative leaders to create the independent Federal Trade Commission was the model of the Interstate Commerce Commission.").

[142] CUSHMAN, *supra* note __, at 63

[143] CUSHMAN, *supra* note __, at 63

agencies that regulate powerful, wealthy industries is that those industries tend to dominate the agency's agenda because they have greater resources to monitor what the agency is doing. But when an agency is composed of members of different parties, it has a built-in monitoring system for interests on both sides because that type of body is more likely to produce a dissent if the agency goes too far in one direction.[144] That dissent, in turn, serves as a "fire alarm" that alerts Congress and the public at large that the agency's decision might merit closer scrutiny.[145]

B. The Equalizing Insulators

While the traditional hallmarks of agency independence serve important insulating functions, they have shortcomings. In particular, these metrics do not offer much help to an agency that must protect politically disadvantaged groups, including the general public, against powerful interests that my capture the agency. To be sure, not having the traditional hallmarks of independence can make things worse for these agencies because anything that increases their political accountability necessarily increases the ability of powerful political forces to control them. Thus, presidential oversight in the form of removal or OIRA review can limit an agency's ability to protect a politically weak and unorganized group. But while these features may be necessary for independence, they are insufficient if the goal is to create a buffer against one-sided interest group pressure and capture.

This section therefore considers other design features that are more closely targeted to creating a buffer against partisan pressures but that have been largely ignored in the literature on independent agencies.

1. *Agency Funding Sources.*

If you want to locate power in Washington (and just about anyplace else), you must follow the money. This holds true for agency authority as well. Agencies cannot survive without resources, so the source of their funding is a critical, though largely overlooked,[146] key to their power.[147] If

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[144] A recent empirical study of the Federal Communications Commission (FCC), for example, found that partisanship accounts for roughly 75 percent of the FCC's non-unanimous decisions. Daniel E. Ho, *Congressional Agency Control: The Impact of Statutory Partisan Requirements on Regulation* 35 (Feb. 12, 2007), *available at* http://dho.stanford.edu/research/partisan.pdf.

[145] Matthew D. McCubbins & Thomas Schwartz, 28 AM. J. POL. SCIENCE 165, 166 (1984); Hugo Hopenhayn & Susanne Lohmann, *Fire Alarm Signals and the Political Oversight of Regulatory Agencies*, 12 J. L. ECON. & ORG. 196, 197-198 (1996). *Cf.* David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 747-51 (2009) (noting that the "expression of competing viewpoints" enhances a court's monitoring function).

[146] Steven A. Ramirez, *Depoliticizing Financial Regulation*, 41 WM. & MARY L. REV. 503, 517 (2000) (noting with "surprise[e] that most proposals for regulatory reform have not focused on" agency financing).

[147] REZA STEINZOR & SIDNEY SHAPIRO, THE PEOPLE'S AGENTS AND THE BATTLE TO PROTECT THE AMERICAN PUBLIC: SPECIAL INTERESTS, GOVERNMENT, AND THREATS TO HEALTH, SAFETY, AND THE ENVIRONMENT 65 (2010) (pointing out that four regulatory agency

agencies must rely on the Office of Management and Budget for budget requests, the President has a huge lever of power over the agency, whether or not the head of the agency is removable at will.[148] Similarly, if Congress provides the agency's funding at its discretion, partisan considerations will certainly play a role in the agency's decisionmaking.[149]

To be sure, the power of the purse is one of the key ways in which democratic accountability is served.[150] But if the purpose of insulation is to curb political pressures in favor of powerful regulated interests, then to some extent accountability has to be sacrificed or tempered. And giving agencies some control over their funding is a way to do so while still allowing political actors to oversee an agency's substantive agenda.

One way to limit political control through budgetary oversight is to allow agencies to submit budget proposals to Congress without having to go through OMB and thus the President.[151] Congress has done this, for example, with the Consumer Product Safety Commission.[152] Alternatively, Congress can allow agencies to submit their budget requests concurrently to OMB and Congress, which eliminates the president's ability to change

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– the Consumer Product Safety Commission, the Environmental Protection Agency, the Occupational Safety and Health Administration, and the National Highway Transportation and Safety Administration – have not received significant budget increases, adjusted for inflation, since 1980); Daniel P. Carpenter, *Adaptive Signal Processing, Hierarchy, and Budgetary Control in Federal Regulation*, 90 AM. POL. SCI. REV. 283, 298(studying the FCC and FDA and finding that elected officials exercise authority over agencies through the budget through its signaling effects not because of resource constraints)

148 Haoran Lu, *Presidential Influence on Independent Commissions: A Case of FTC Staffing Levels*, 28 Presidential Studies Quarterly 51 (Winter 1998) ("presidents do use budget, specifically staff level, to influence independent agencies"); Michael E. Milakovich & George J. Gordon, Public Administration in America 373 (10th ed. 2009) (describing President Reagan's use of the budget to control agencies).

149 RICHARD F. FENNO, JR., THE POWER OF THE PURSE: APPROPRIATIONS POLITICS IN CONGRESS 291 (1966) ("Once the [Appropriations] Committee's ability to hurt it is recognized, the most obvious way for the agency to ensure a favorable kind of relationship with Congress is simply to do . . . what the Committee tells it to do."); Randall L. Calvert et al., *A Theory of Political Control and Agency Discretion*, 33 AM. J. POL. SCI. 588, 605 (1989) (noting that Congress's budgeting power "may have aspects of both active and latent control"); Bruce Yandle, *Regulators, Legislators, and Budget Manipulation*, 56 PUB. CHOICE 167, 179 (1988) ("[B]udget manipulation is the most effective sanction available to Congress."); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 792 (1983) ("The statistical evidence implies that the FTC is remarkably sensitive to changes . . . in its budget."); B. Dan Wood & Richard W. Waterman, *The Dynamics of Political Control of the Bureaucracy*, 85 AM. POL. SCI. REV. 801, 822 (1991) ("The EPA's hazardous waste enforcement program illustrates the importance of . . . budgeting to political control.").

150 J. Gregory Sidak, *The President's Power of the Purse*, 1989 DUKE L. J. 1162, 1164 ("The most plausible purpose of the appropriations clause is to encourage efficiency in the production of public goods by the federal government and to impose fiscal accountability on both Congress and the President."); Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1356 (1988) ("All funds belonging to the United States . . . are public monies, subject to public control and accountability.").

151 Breger & Edles, *supra* note __, at 1152; Verkuil, *supra* note __, at 963.

152 15 USC § 2076(k).

agency policy before Congress sees the agency's original proposal.[153] These mechanisms bypass one political pressure point – the President – but still allow political influence to operate through Congress's budgetary control. Thus, if the goal of insulating an agency is simply to shift presidential authority to Congress, this mechanism effectively does so. But if the goals of independence include shielding the agency from partisan pressure and creating a more stable policymaking space that does not change as majorities change in the House and Senate, then this method falls short. Interest groups can put pressure on Members of Congress to exercise control over an agency through the budget, which Congress has done. The CPSC, despite its bypass of OMB, has not received a budget increase since 1980.[154]

A more powerful alternative is to provide agencies with an independent funding source, such as by requiring regulated interests to pay mandatory fees to the agency. For example, the Federal Reserve is authorized to levy assessments against member banks to fund its operating budget.[155] So, too, is the Office of Thrift Supervision,[156] the Office of the Comptroller of the Currency,[157] and the Public Company Accounting Oversight Board.[158] The Food and Drug Administration receives fees from the pharmaceutical industry.[159] With independent funding, the agency is insulated from Congress as well as the President.[160]

Providing independent funding is not, by itself, a guarantee of independence. In the case of banking regulators, it has had the opposite effect because of the ability of the regulated industries to opt out of one agency's jurisdiction and switch to another.[161] Stark illustrations of this

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[153] Lewis, *supra* note __, at 389 and n.41 (noting that the Commodity Futures Trading Commission and Federal Aviation Administration submit budget requests to OMB and Congress contemporaneously).

[154] STEINZOR & SHAPIRO, supra note __, at 65.

[155] 12 U.S.C. § 243.

[156] 12 U.S.C. § 1467.

[157] 12 U.S.C. § 482.

[158] 15 U.S.C. § 7211(f)(5).

[159] Testimony of Sidney A. Shapiro at 8, Hearing on Protecting the Public Interest: Understanding the Threat of Agency Capture, Before the Subcommittee on Administrative Oversight and the Courts of the Senate Committee on the Judiciary, Aug. 3, 2010 (noting that the only reason the FDA has seen an increase in its budget as compared to other major regulatory agencies is its independent funding from the pharmaceutical industry).

[160] Yandle, *supra* note __, at 179 ("[B]udget manipulation is the most effective sanction available to Congress."); Joel Seligman, *Self-Funding for the Securities and Exchange Commission*, 28 NOVA L. REV. 233, 256 (2004) ("An independent budgetary process would be more effective in adjusting the size of the SEC staff to the Agency's regulatory needs during the good times, which ironically are when the SEC is more vulnerable to a lack of budgetary support."). *See also* Lewis, *supra* note __, at 390 n.42 (noting that this might make the agency ultimately more vulnerable to termination if Congress views the agency costs as greater than termination costs); Sharon Tennyson, *Analyzing the Role for a Consumer Financial Protection Agency* 13 (Networks Fin. Inst. at Indiana State Univ., 2009-PB-13 December 2009), *available at* http://ssrn.com/abstract=1525603.

[161] Ramirez, *supra* note __, at 534 ("When a regulated industry has the ability to choose their regulator, a giant channel towards capture is opened.").

dynamic come from the experience of the Office of Thrift Supervision and the Office of the Comptroller of the Currency. The OTS has jurisdiction over national thrifts[162] and the OCC has jurisdiction over national banks.[163] States regulate state thrifts and banks. But banks and thrifts have a great deal of flexibility in determining who they wish they to be chartered, and it has little effect on their business plans.[164] As a result, financial entities can shop around for which regulator they prefer. This created an unhealthy (from the public's perspective) competition between the OTS and OCC to attract regulated entities to charter with them to gain their operating fees.[165] How did these agencies compete for the "business" of the regulated entities? They agreed to use their regulatory authority to preempt state consumer protection laws that would otherwise govern the activities of banks and thrifts.[166]

Thus, the lesson with respect to funding independence – as it is with all elements of agency design – is that no one particular feature can be viewed in isolation. It is critical to assess the overall structure of the agency. This is true of all the goals of insulation, but particularly important if the goal is insulation from partisan and interest group pressures. Any cracks in the agency structure will be exploited by these powerful interests, so attention must be paid to every design feature.

2. *Employment Restrictions*.

Although the traditional focus on the relationship between personnel and independence has focused on how agency officials are removed, the requirements for appointment are just as critical to an agency's ability to

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[162] 12 U.S.C. § 1464.

[163] 12 U.S.C. § 481.

[164] *See* Carl Felsenfeld & Genci Bilali, *Is There a Dual Banking System?*, 2 J. BUS. ENTREPRENEURSHIP & L. 30, 53-58 (2008) ("American banking history has proven that when one regulator fails to provide banks with the right conditions, banks will find other opportunities elsewhere, mainly by switching to another charter."); Geoffrey P. Miller, *The Future of the Dual Banking System*, 53 BROOK. L. REV. 1, 1 (1987) (observing that "a depository institution dissatisfied with its regulator can, for a nominal expense, convert from federal to state charter or vice versa"); Daniel Schwarcz, *Regulating Insurance Sales or Selling Insurance Regulation?: Against Regulatory Competition in Insurance*, 94 MINN. L. REV. 1707, 1722 n.61 (2010) ("Banks that charter at the federal level have some degree of choice among multiple regulatory bodies."); Kenneth E. Scott, *The Dual Banking System: A Model of Competition in Regulation*, 30 STAN. L. REV. 1, 8-13 (1977) (noting how "regulatory diversity in effect allows new banks to choose the set of laws and administrators under which they will operate"); Editorial, *Regulator Shopping*, N.Y. TIMES, May 21, 2009, at A34 (noting that, prior to the recent financial crisis, "firms switched at will among various overseers, in search of the loosest rules and laxest regulators"). *But see* Henry N. Butler & Jonathan R. Macey, *The Myth of Competition in the Dual Banking System*, 73 CORNELL L. REV. 677, 683-93 (1988) (arguing that "assumptions about competitive interaction in the dual banking system are false").

[165] Oren Bar-Gill & Elizabeth Warren, Making Credit Safer, 157 U. PA. L. REV. 1, 81-83, 93-94 (2008).

[166] Editorial, *Regulator Shopping*, N.Y. TIMES, May 21, 2009, at A34 (noting the regulatory "race to the bottom" resulting from firms searching for the "loosest rules and laxest regulators").

serve the goals of independence – indeed, arguably more so. Especially in recent decades, individuals selected to head agencies are picked based on partisanship, not expertise.[167] Given the modern vetting process and party partisanship that produces extreme party loyalty, Presidents typically can predict with great accuracy how an appointee will decide issues of importance to the administration.[168] As a result, tenure protection becomes less important because the need for removal never arises unless the vetting process fails or the appointee goes through a fundamental shift in position.[169] That shift is all the more unlikely because defying the president and the party would diminish or destroy the prospect of future appointments and influence.[170]

Even if appointees in charge of an agency are not focused on their future within the government, they may be thinking about their prospects in the private sector when their term at the agency expires. Because the most likely private sector job on the horizon would be with the very industry the agency regulates, an agency head's independence may be compromised. Put another way, a concern with post-agency employment may make these officials reluctant to impose regulations that an industry views as too aggressive or obtrusive. It may dim an official's job prospects or make that job more difficult if the official has to live with the rules upon leaving the agency.[171]

The effect of the revolving door is often cited as one of the reasons why the SEC failed to protect consumers by addressing pressing problems in the trading industry. For example, although late trading and market timing were widespread and well known, the SEC did not act to regulate the practices and stepped in only after the New York Attorney General (AG) brought an enforcement action under state law. Similarly, it was the New

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[167] Breger & Edles, *supra* note __, at 1140 (citing Senate Government Operations Committee report that found partisan politics driving the appointment process to an "alarming" extent and expertise and competence coming in as "only secondary considerations"); Devins & Lewis, *supra* note __, at 481-483 (pointing out that beginning with President Reagan, "ideological loyalty has become a hallmark of presidential appointments").

[168] Devins & Lewis, *supra* note __, at 461 ("party identity is an especially good proxy for commissioner ideology"); Kagan, *supra* note __, at 2277 (explaining how President Clinton "staff[ed] the agencies with officials remarkable for their personal loyalty and ideological commitment" who would adhere to the President's "policy agenda even in the face of competing bureaucratic pressures").

[169] Pierce, *supra* note __, at 603 (noting that because executive branch officials are typically selected because of "agreement with the President on policy issues related to their areas of responsibility, long-time loyalty to the President's political party, and/or personal loyalty to the President," "Presidents rarely need to resort to explicit or implicit threats to remove an officer to persuade the officer to act in accordance with the President's policy preferences").

[170] Robinson, *supra* note __, at 245-246.

[171] JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 16 (1990) (noting that agency officials may take into account "social and business relations and the prospects of further career opportunities in the private sector"); Jonathan R. Macey & Geoffrey P. Miller, *Reflections on Professional Responsibility in a Regulatory State*, 63 Geo. Wash. L. Rev. 1105, 1117 (1995) (same).

York AG who led the fight to stop investment firm bankers from influencing the reports of firm analysts. Experts on SEC practice have noted that the SEC did not initially address these problems because of a prevailing view among SEC officials that, given the "rapidly revolving door between the SEC and private legal practice," "unless an issue has become high profile, it is best not to rock the boat."[172] The SEC became overpopulated with members who "identified with the market participants they were ostensibly regulating."[173] These pressures may have led the agency to adopt an overly lax view of its enforcement and regulatory functions.[174]

What can be done about these pressures? First consider the problem of partisan appointments. One way to create greater independence is to specify qualifications for appointees so that the pool of potential candidates from which the President picks is more limited and he cannot select solely on the basis of partisan leanings. For example, because food and drug regulation is a highly technical subject, presidents are more limited in whom they select to head the Food and Drug Administration as a practical matter because they are looking for scientific expertise as well as party affiliation.[175] As a result, the FDA is relatively more independent than other executive agencies, with its heads often advocating for drug regulation regardless of the position of their appointing president.[176]

Although most statutes fail to specify qualifications for appointees, there are exceptions.[177] For instance, at least two members of the three-member Surface Transportation Board must have a professional background in transportation.[178] The PCAOB consists of five members, two of which must be certified public accountants.[179] The members of the Defense Nuclear Facilities Safety Board must be "respected experts in the field of nuclear safety."[180] The Consumer Product Safety Act provides that a person cannot hold the office of a commissioner if he or she is "in the employ of, or holding any official relation to, any person engaged in selling or manufacturing consumer products" or owns "stock or bonds of substantial value in a person so engaged" or "is in any other manner pecuniarily

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[172] John C. Coffee, Jr., *A Course of Inaction*, LEGAL AFFAIRS 46 (Apr. 2004).

[173] Jonathan R. Macey, *State-Federal Relations Post-Eliot Spitzer*, 70 BROOK. L. REV. 117, 128 (2004).

[174] Rachel E. Barkow, *The Prosecutor as Regulatory Agency*, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT (Anthony Barkow & Rachel Barkow, eds., NYU Press forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1428934.

[175] C. Frederick Beckner, III, Note, *The FDA's War on Drugs*, 82 Geo. L.J. 529, 542 (1993).

[176] *Id.* This is not to say, of course, that the FDA does not suffer from capture problems. *See*, *e.g.*, Gardiner Harris, *Regulation Redefined: The F.D.A. Shifts Focus; At F.D.A., Strong Drug Ties and Less Monitoring*, NY TIMES, Dec. 6, 2004, at A1.

[177] Breger & Edles, *supra* note __, at 1139.

[178] 49 U.S.C. § 701(b)(1)-(2).

[179] 15 U.S.C. § 7211(e)(1)-(2).

[180] 42 U.S.C. § 2286(b)(1).

interested in such a person."[181] In addition, CPSC commissioners are also barred from "engaging in any other business, vocation, or employment."[182]

Requiring appointees to possess certain qualifications can help limit partisan decisionmaking, and it also facilitates expert decisionmaking because individuals are hired not with an eye toward having them become experts on the job, but with the idea that they will join the agency with the relevant skill set. But for this to work, the agency must present itself as an attractive place for an expert to work. This is possible either by the agency's independence *qua* independence[183] or by making commissioner compensation competitive with that of the industry from which the expert is drawn.[184]

Even if appointees are selected for particular qualifications, there is still a question of whether post-agency employment incentives will influence their decisionmaking while at the agency. This revolving-door problem has been noticed by many good government scholars, [185] and the solution is relatively simply: place meaningful limits on the ability of agency heads to work for regulated industries after their service with the agency comes to an end. [186] Many agency officials are subject to such limits to create greater insulation from partisan bias. For example, legislation creating the PCAOB charges it with "establish[ing] ethics rules and standards of conduct for Board members and staff, including a bar on practice before the Board (and the [SEC], with respect to Board-related matters) for 1 year for former members of the Board, and an appropriate period (not to exceed 1 year) for former staff of the Board."[187] The Federal Board of Governors also imposes post-employment restrictions on its members, making them "ineligible during the time they are in office and for two years thereafter to hold any office, position, or employment in any

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[181] 15 U.S.C. § 2053(c).

[182] *Id.*

[183] HENRY J. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES 153-54 (1962) (noting that experts would be unlikely to be attracted to an agency if their decisions were constantly second-guessed by politicians and their assistants). *But see* Miller, *supra* note __, at 80-81 (questioning the theory that independent agencies offer greater challenge and responsibility).

[184] Bressman & Thompson, *supra* note 3, at 613 & n.64 (noting that Public Company Accounting Oversight Board members are paid more than SEC commissioners in an attempt to attract highly qualified personnel).

[185] *See, e.g.*, Rafael Gely & Asghar Zardkoohi, *Measuring the Effects of Post-Government-Employment Restrictions*, 3 Am. L. & Econ. Rev. 288, 290-92 (2001) (describing attempts to limit this behavior).

[186] Joseph I. Hochman, *Post-Employment Lobbying Restrictions on the Legislative Branch of Government: A Minimalist Approach to Regulating Ethics in Government*, 65 Wash. L. Rev. 883, 902 (1990) (supporting a one-year ban on lobbying employment after leaving government work); *see also* Gely & Zardkoohi, *supra* note __, at 300 ("[O]ur results show that the changes in post-government employment restrictions implemented at the beginning of the Clinton administration may have reduced the benefits law-firm clients derived from this increased access.").

[187] 15 U.S.C. § 7211(g)(3).

member bank."[188] Members of the Board of the Farm Credit Administration are also ineligible to work for "any institution of the Farm Credit System" while they are in office and for two years thereafter.[189]

Appointments and post-employment restrictions are no panacea. Even when the list of appointees is narrowed by expertise, the President is likely to find individuals who share his or her vision for the agency. And post-employment restrictions for a year or two after leaving government service might temper officials' incentives not to anger the industry in which they might work, but they will hardly eliminate them. But, every little bit helps when it comes to protecting against capture. Moreover, enacting these kinds of limits might help to express the value of independence and thereby help to influence the culture of the agency.

3. *The Role of Other Agencies in Setting Regulatory Policy*.

The typical discussion of agency independence considers the relationship between the federal agency and its government overseers: the President and Congress. But agencies can face pressure and receive support from other governmental actors. In particular, agencies can share substantive regulatory responsibilities with other federal agencies and with state governmental entities, and these shared responsibilities can either foster or frustrate the goals of insulation.

a. *Regulation by Other Federal Agencies.* One of the first decisions for political designers is how much responsibility to give a single agency as opposed to splitting functions among agencies. Expertise concerns may dictate giving one actor the ability to balance a variety of complementary or competing concerns,[190] or those same concerns might suggest splitting functions among specialists.

From the perspective of avoiding capture, it may be helpful to have agencies with broad jurisdictions to make them more likely to resist pressure from any one interest group.[191] However, a key danger to avoid is giving a single agency conflicting responsibilities that require the agency to further the goals of industry at the same time that it is responsible for a general public interest mission. In that scenario, there is a significant risk that industry pressure and a focus on short-term economic concerns that are easily monitored will trump the long-term effects on the public that are

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[188] 12 U.S.C. § 242. This restriction does "not apply to a member who has served the full term for which he was appointed." *Id.*

[189] 12 U.S.C. § 2242.

[190] For a discussion of the types of policy problems that cannot be addressed through the simple aggregation of agency efforts and merit centralized coordination, see J.B. Ruhl & James Salzman, *Climate Change, Dead Zones, and Massive Problems in the Administrative State*, 98 CAL. L. REV. 59, 83–92 (2010).

[191] Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93, 99 (1992).

harder to assess.[192] Eric Biber has demonstrated, for example, how these competing pressures pushed the Forest Service to prioritize timber production at the expense of the agency's other mission of conservation.[193] This same conflict led Congress to decouple the development and safety missions of the Atomic Energy Commission and place each within separate agencies, the former going to the Department of Energy and the latter residing with the Nuclear Energy Regulatory Commission.[194]

Even if a single agency does not have internal competing goals, conflict can emerge from the agency's relationship with a separate agency that is looking out for a different interest.[195] To assess the relationship between agencies and the effect on capture, it is necessary to distinguish the different types of agencies, in terms of institutional design, that might be sharing authority.

Consider first the dynamics if the shared authority is between an agency that has been designed to be an insulated agency along the lines discussed in this Article and an executive agency with a head that answers to the President. If the executive agency has the authority to veto or dictate the insulated agency's policies,[196] the other design features of the insulated agency are meaningless because the insulated agency answers to a political entity that shares none of its insulating features.

If the relationship between the two agencies is less hierarchical, and the insulated agency and executive agency must consult one another[197] or monitor each other's proceedings to avoid conflicting policies,[198] without a clear line of authority that will break a tie, the insulated agency may still find that its power is diminished because the executive agency can sound

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[192] Eric Biber, *Too Many Things To Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1, 7 (2009) (noting that agencies "will have systemic incentives to privilege certain goals over others – specifically, to privilege goals that are easily measured over conflicting goals that are difficult to measure."): Bagley, *supra* note __, at 8 ("Because the agency must prioritize one task at the expense of the other, industry group pressure can easily cement an agency's preference for the task that favors industry.").

[193] Biber, *supra* note __, at 17-30. Biber discusses other reasons for the primacy of timber production at the agency.

[194] Biber, *supra* note __, at 33.

[195] For a thorough discussion of the various interagency relationships Congress has proscribed see generally, Cornelius P. Cotter & J. Malcolm Smith, *Administrative Responsibility: Congressional Prescription of Interagency Relationships*, 10 W. POL. Q. 765 (1957).

[196] Eric Biber refers to this model as "'agency as regulator' of another agency." Biber, *supra* note __, at 6. An example is the Secretary of Energy's ability to "propose rules, regulations, and statements of policy" in areas that fall under the jurisdiction of the Federal Energy Regulatory Commission, a traditional independent agency located within the Department of Energy. Department of Energy Reorganization Act of 1977, 42 U.S.C. §§ 7171, 7173 (2006). FERC must act upon the proposals within the Secretary's time limits.

[197] Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1799 n.275 (2007) (listing six statutes containing a consultation requirement).

[198] J.R. DeShazo and Jody Freeman refer to this model as "agency as lobbyist." J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217 (2005).

fire alarms to interested groups early in the insulated agency's regulatory decisionmaking process that allow interest groups to mobilize and attempt to block the insulated agency's actions (through congressional overrides or court challenges).[199] Of course interest groups could do this even in the absence of executive agency consultation requirements, but if a statute requires an insulated agency to contact an executive agency early in its decisionmaking process – which is often the case when consultation requirements are imposed – that gives the interest group that much more advance notice to mount its attack. To be sure, a monitoring role can facilitate decisionmaking in the public interest if the monitor is more responsive to the public interest than the monitored agency that has been captured.[200] But the effects are likely to cut against the public interest if a politically sensitive agency is charged with monitoring one with equalizing insulators that help promote the public interest.

Similarly, whether multiple agencies limit or buttress the power of the President depends on what the single agency alternative looks like. If power would otherwise reside in an insulated agency alone, the President gains power when an executive agency takes on a partnership role. But if power would otherwise reside in an executive agency, Congress may prefer to inject multiple agencies into the decisionmaking process to limit presidential control. David Epstein and Sharyn O'Halloran have found that "Congress does play agencies off against each other more under divided government, despite the reductions in efficiency and centralized control that this might entail."[201] By increasing the costs of coordination to the President, Congress may be able to insulate certain policy decisions from Presidential control.

Now consider the effects if the agencies sharing rulemaking authority are both independent in the traditional sense, but one of them has been insulated using some or all of the equalizing mechanisms discussed in this Article and the other has not. If the traditionally independent agency has veto authority over the insulated agency, it will undermine those insulating mechanisms. The effect may not be as pronounced as when an executive agency has veto power, but it will nevertheless undercut the insulated agency's ability to resist partisan pressure and create less stable policies because, as noted above, traditionally independent agencies shift policies with changes in presidential administrations.

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[199] *Cf.* Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 214 (2006) ("[U]sing multiple agents may also provide for monitoring and reporting of agent behavior by competing agents themselves.").

[200] DeShazo & Freeman, supra note __, at 2221-2222 (discussing role of fish and wildlife agencies as monitors of FERC); Iver P. Cooper, *The FDA, the BATF, and Liquor Labeling: A Case Study of Interagency Jurisdictional Conflict*, 34 FOOD DRUG COSM. L.J. 370, 374–75 (1979) (describing Food and Drug Administration's initiative to regulate alcohol ingredient labeling after the Bureau of Alcohol, Tobacco, and Firearms proved unwilling to regulate the industry).

[201] DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS 159–60 (1999) (finding the number of agencies per unit of delegated discretion to be 58.89 under divided government and 29.55 under unified government).

A consultation or veto requirement that gives either executive or traditionally independent agencies more power over an insulated agency with equalizing factors may, however, serve a different goal of insulation, namely expertise. Consultation may bring more experts into the process and improve decisionmaking by presenting competing viewpoints.[202]

Thus, an assessment of inter-agency relationship on insulation will depend on which of the sometimes competing goals of insulation the policymakers are seeking to further and on the particular agency structures of the respective agencies. Consultation might improve decisionmaking, but at the risk of increasing the odds of capture.

If authority is shared between two or more agencies that have been designed to be maximally insulated, the effect is harder to predict. On the one hand, shared responsibility may create a healthy competition between the two agencies,[203] and it will be harder to capture two agencies instead of one.[204] On the other hand, multiple authority may undercut the goals of both agencies. That is because these agencies may be charged with serving somewhat different politically vulnerable populations and they may undermine each other by engaging in costly and time-consuming turf battles.[205]

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[202] Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CAL. L. REV. 1665, 1676 (2006) ("Redundant institutional design may increase diversity in viewpoints if workers identify primarily with their own agency."); *See* Louis J. Sirico, Jr., *Agencies in Conflict: Overlapping Agencies and the Legitimacy of the Administrative Process*, 33 VAND. L. REV. 101, 125-27 (1980) (noting conflicting agency views force an agency to confront and refute the evidence and positions taken by the opposing agency); c*f.*, Nancy Staudt, *Redundant Tax and Spending Programs*, 100 NW. U. L. REV. 1197, 1227–28 (2006) (discussing the benefits of redundancy in the context of Congressional committee jurisdiction)..

[203] *See* Andrew B. Whitford, *Adapting Agencies: Competition, Imitation, and Punishment in the Design of Bureaucratic Performance*, *in* POLITICS, POLICY, AND ORGANIZATIONS 160, 164 (George A. Krause & Kenneth J. Meier eds., 2003) ("Agencies will respond to comparison, competition, and information revelation because of the real world implications of failure); O'Connell, *supra* note __, at 1677("Competition may encourage redundant entities to work harder and more creatively, generating a race to the top in performance; competition may also motivate one entity to correct mistakes made by another entity."); Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 213 (2006) ("The threat of jurisdictional loss is a sanction for the failure to produce desirable informational expertise."); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within,*115 YALE L. J. 2314, 2325 (2006) (noting benefits of competition).

[204] O'Connell, *supra* note __, at 1677 (arguing it is difficult for any one agency to capture a multiagency process and that collective action problems prevent interest group cooperation).

[205] Timothy M. Hammonds, *It Is Time to Designate a Single Food Safety Agency*, 59 FOOD AND DRUG L.J. 427, 427–428 (2004) (arguing overlapping jurisdiction leads to ineffective food safety crisis response and imposes high administrative costs); J.B. Ruhl & James Salzman, *Climate Change, Dead Zones, and Massive Problems in the Administrative State*, 98 CAL. L. REV. 59, 71 (2010) ("The transaction costs of strong coordination, the differing internal incentives of each agency, the loss of autonomy, and other collective action challenges often overwhelm ambitions towards coordination."); John C. Coffee, Jr., *Competition Versus Consolidation: The Significance of Organizational Structure in Financial Securities Regulation*, 50 BUS. LAW. 447, 464–66 (1995) (chronicling the interagency conflict over jurisdiction between two traditionally independent agencies, the

b. *Regulation by States.* Federal agencies may share regulatory authority not only with each other, but with states. For purposes of this section, the question is what role state law should play in regulation to foster the goals of regulation. (The role of states as enforcers of federal law is taken up in the next section.) Thus, the question is really one of preemption. When should an insulated agency's interpretation of federal law be the exclusive regulatory regime and when should it co-exist with state law? The question of when agencies should preempt state law is obviously a complicated topic that goes beyond the scope of this Article. But it is important to flag the relationship between state law and the goals of insulated agencies and particularly the aim of reducing capture.

If the concern is that a federal agency will be captured by one-sided industry interests at the expense of the general public, there is value in making federal regulations a floor and allowing states to enact laws that are even more protective of the public. This is true even if the federal agency is an insulated one, because no amount of insulation will ever be foolproof. As a result, having states might provide a critical check against the dangerous combination of a captured agency and federal preemption. An example of this phenomenon is the aggressive preemption of state predatory lending and consumer protection laws by the Office of the Comptroller of the Currency and the Office of Thrift Supervision.[206] The OCC and OTS then largely ignored consumer protection laws.[207] Thus, the federal government stepped in at the behest of industry to prevent states from taking action against lending abuses, which, in turn, contributed to the economic crisis. If states were permitted to play a greater role, some of the damage would have been mitigated.[208]

To be sure, the value of state law as a check against capture must be weighed against the need for uniformity in an area. But in engaging in that calculus, it is important to note that states might be more sensitive to the public interest, either because of ballot initiatives that give consumers a more direct voice or because a state is particularly harmed by an industry interest (for example, by pollution) and so stands in a good position to vindicate a more general public interest.

SEC and the Commodity Futures Trading Commission). *See also* Whitford, *supra* note __, at 164 (observing that "competition . . .reveals information by allowing comparison" which may help interest groups and partisan overseers).

[206] Arthur E. Wilmarth, Jr., *Comptroller Dugan Is Wrong About the Causes of the Finacial Crisis and the Scope of Federal Preemption*, FINREG 21, Nov. 2, 2009.

[207] Bar-Gill & Warren, *supra* note __, at 90-95.

[208] National Consumer Law Center, Preemption and Regulatory Reform: Restore the States' Traditional Role as 'First Responder', Sept. 2009, at 6-10, 15 (finding that "[p]reemption has played a role in every major consumer protection failure in recent years"); Anne Milgram & Rachel E. Barkow, *Keeping Consumer Cops on the Beat*, POLITICO, May 13, 2010, available at http://www.politico.com/news/stories/0510/37148.html (pointing out that federal preemption stopped states "in their tracks, often just as they were pursuing some of the worst perpetrators" and citing studies showing financial institutions subject to state consumer laws had lower default rates).

Thus, in all these scenarios, if the goal is insulation from partisan pressures to protect interest group dominance, it is critically important to pay attention to the relationship with other agencies. No matter how careful one might be in creating an insulated agency that is maximally immune from partisan pressures, those protections will be for naught if the insulated agency must answer to another agency that does not have those same protections. For that other agency – whether executive or independent in the traditional sense – will be able to put pressure on the insulated agency.

4. *The Role of Other Agencies as Enforcers*.

Another important question of agency design is whether the agency will have exclusive enforcement power under its authorizing statute or whether other actors will also be permitted to enforce the statute. That is, even if a single agency has the sole power to set the governing regulations for the industry under a statute, it is still possible to have multiple agencies with the authority to enforce those rules or the underlying statute itself. As with shared rulemaking authority, shared enforcement responsibility can help achieve some of the goals of agency independence and hinder others, and again it depends critically on which agencies are sharing authority and the nature of that relationship.

a. *Federal Enforcers.* Start again with the relationship between agencies that were designed to be insulated from partisan pressures and other federal agencies. Most independent agencies have independent civil litigation authority outside of Supreme Court practice.[209] If the insulated agency's enforcement authority is merely shared with the other agency, but the other agency does not have the ability to veto the insulated agency's enforcement decisions, this structure does not formally undercut the insulated agency's authority to bring actions to protect the beneficiaries of the regulation. Rather, this structure puts more cops on the beat to ensure that an agency's rules or a statute's requirements are taken seriously.[210] And "[r]edundancy or overlap can prevent capture of agencies because an interest group must incur greater costs to capture several agencies instead of just one."[211] If anything, one would think that the agency that is not insulated from pressure will be unlikely to bring an enforcement action where the

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[209] Devins & Lewis, *supra* note __, at 488; Neal Devins, *Unitariness and Independence: Solicitor General Control Over Independent Agency Litigation*, 82 CAL. L. REV. 255 (1994). Some agencies, such as the Federal Communications Commission and Nuclear Regulatory Commission have authority under the Hobbs Act to intervene in any proceeding, including one before the Supreme Court, that involves the question of whether one of its orders should be enjoined. 28 U.S.C. § 2323. This authority is significant because if the agency must be represented by the Solicitor General in the Supreme Court, the Administration can put forth its own views on policy instead of the views of the agency. *See*, *e.g.*, Bressman & Thompson, *supra* note __, at 645 ("The Solicitor General sometimes has taken positions on securities cases that diverge from the SEC view.").

[210] *See* Michael A. Perino, *Fraud and Federalism: Preempting Private State Securities Fraud Causes of Action*, 50 STAN. L. REV. 273, 331 (1998) (suggesting concurrent enforcement of certain types of securities regulation); Jennifer J. Johnson, *Private Placements: A Regulatory Black Hole*, 35 DEL. J. CORP. L. 151, 195 (arguing that federal regulators like the SEC do not have sufficient resources to fill regulatory gaps on their own).

[211] Gersen, *supra* note __, at 352.

insulated agency has not because the non-insulated agency is more likely to side with the regulated industry.

But enforcement overlap can have potential costs in terms of the zeal of the insulated agency's enforcement agenda. Unless the insulated agency is given primary responsibility, there is the risk that it will not be as zealous because it is of the view that the other agency will take the lead or pick up any slack.[212] When only one agency has responsibility for enforcement, it is more likely to be diligent in pursuing that task because it knows it will be accountable for any failures.[213] It is all too easy for agencies to point fingers at each other with no one ultimately accountable. Indeed, that scenario is eerily similar to the lead-up to the recent financial crisis, with each overlapping regulatory agency essentially casting blame on others. To remedy this risk, the insulated agency should be designated as the primary enforcer to ensure greater accountability and to increase the incentives for the responsible agency to take action.

A designated primary law enforcer also serves the expertise function of insulation because enforcement actions have a policymaking component. It is impossible to bring actions against every law violator, so ultimately priorities need to be made. In addition, if regulatory standards are vague or uncertain, the decision whether to bring an enforcement action in the face of an ambiguity also involves a substantive policy judgment. To the extent that these questions arise, there is the same risk of inconsistent standards discussed above. Having a designated enforcer addresses this problem because the agency with primary enforcement authority can be vested with the power to stop actions by other agencies that it views as inconsistent with the statute's objectives.

b. *State Enforcers*. As with shared regulatory authority, shared enforcement authority can also exist with state actors, typically the state attorney general.[214] Allowing state AGs to bring enforcement actions can be a very effective check against capture. These are elected posts in most states, and although state AGs can and do become beholden to powerful interests, they often win elections by appealing to broad consumer interests and bringing suits against fraudulent practices. In addition, the fifty state AGs will undoubtedly represent different parties, so even if an administration is in power that is partial to business interests, there is likely an AG of the opposite party who is more sympathetic to consumer claims.[215]

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[212] *See* O'Connell, *supra* note __, at 1680; Gersen, *supra* note __ at 351; JOHN BREHM AND SCOTT GATES, WORKING, SHIRKING, AND SABOTAGE: BUREAUCRATIC RESPONSE TO A DEMOCRATIC PUBLIC (1997).

[213] *Cf.* Rachael Rawlins & Robert Paterson, *Sustainable Buildings and Communities: Climate Change and the Case for Federal Standards*, 19 Cornell J.L. & Pub. Pol'y 335, 354 (2010) ("Relying on discretionary local regulation risks the free-rider problem and the tragedy of the commons.").

[214] Margaret H. Lemos, State Enforcement of Federal Law, at 7-8 (listing examples of shared enforcement regimes) (draft on file with author).

[215] Colin Provost, *State Attorneys General, Entrepreneurship, and Consumer Protection in the New Federalism*, 33 PUBLIUS 37, 51 (Spring 2003) (observing that AGs from more

For example, during the 1980s when the federal government leaned heavily toward deregulation, state enforcement surged.[216]

There are numerous examples of state-initiated enforcement actions filling a void left by federal enforcers. These include Eliot Spitzer's more aggressive enforcement of securities violations as compared to the SEC,[217] as well as a host of multistate consumer protection efforts, ranging from suits against the tobacco industry to prescription drug marketing programs.[218] More recently, states joined forces to pursue fraud charges against various subprime lenders, including Household, Ameriquest, and Countrywide.[219] State AGs would have pursued fraudulently lending practices even further, but the federal regulators preempted them from going after lenders who affiliated with national banks and thrifts.[220] In some cases, however, the federal enforcers embrace the state model and change their own views of an issue.[221] Even when the examples involves states suing under state law, the same beneficial effect would hold true when states sue

State AGs can also serve a valuable equalizing function by bringing enforcement actions when a federal agency shares the state's outlook on regulation but lacks the resources to police all infractions.[222] When Congress vests shared enforcement responsibility with state AGs, it often remarks on the increased resources AGs bring.[223] Federal regulators often recognize this as well. Former Federal Reserve Chairman Alan Greenspan has acknowledged that federal regulators need the resources of state AGs to

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liberal states bring more consumer protection actions than those from more conservative states).

[216] Cornell W. Clayton, *Law, Politics, and the New Federalism: State Attorneys General as National Policymakers*, 56 Rev. Pol. 525, 538 (1994); Andrew I. Gavil, *Reconstructing the Jurisdictional Foundation of Antitrust Federalism*, 61 Geo. Wash. L. Rev. 657, 661-662 (1993).

[217] Rachel E. Barkow, *The Prosecutor as Regulatory Agency* in PROSECUTORS IN THE BOARD ROOM (Anthony Barkow and Rachel Barkow, eds.) (2011).

[218] Lemos, supra note __, at 18.

[219] Tierney, supra note __, at 8-11

[220] Robert Berner & Brian Grow, *They Warned Us: The Watchdogs Who Saw the Subprime Disaster Coming – and How They Were Thwarted by the Banks and Washington*, Business Week, Oct. 20, 2008; Wilmarth, supra note __.

[221] Barkow, supra note __, at __; Lemos, supra note __, at 25 (noting that the FTC changed its policy on restitution in light of state actions seeking monetary remedies).

[222] *See*, *e.g.*, Robert M. Langer, *Point: State Attorney's General Should Have Broad Powers To Enforce A Federal Telemarketing Law*, 5 ANTITRUST 36, 36 (1991) ("[T]he sheer number of actions the FTC can bring in any year is insignificant compared to the nature and scope of consumer protection problems plaguing consumers and honest businesses in the United States."); *Hearing on HR 4040 Before the Subcomm. On Commerce, Trade, and Consumer Protection of the H. Comm. Of Energy and Commerce*, 110th Cong. (2007) available at 2007 WL 3306882 (F.D.C.H.) (testimony of Rachel Weintraub, Consumer Federation of America) (arguing that state AGE enforcement "will be a critical tool that will help buttress the CPSC's limited enforcement capabilities, help consumers to obtain redress for harms they have suffered, and deter wrongful conduct").

[223] Lemos, supra note __, at 9-10 n.55 (collecting sources).

effectively police the lending industry for abuses.[224] The FTC also has a long, if not consistent, history of working together with states to address consumer fraud.[225]

Critically, state AG enforcement checks against a particular federal failing: underenforcement, not overenforcement, of the law. If one is concerned with agency capture by powerful interests, that is precisely the threat to be avoided. Thus if the goal of insulation is about something else – say, congressional aggrandizement – then the relationship between state AGs and federal agencies might yield a different conclusion. Similarly, if one is more concerned with other values, such as uniformity, again the calculus might be different.

But if the concern is capture, then AG involvement makes sense because a multiple enforcer model with an insulated agency and state AGs is likely to be more effective than a multiple enforcer model involving only federal agencies because the federal agencies are all likely to fall in line with the president's priority at some point in his or her term in office.

5. Political Tools.

Agencies are political creatures; even if one Congress sets an agency up in a way that maximizes its insulation from political pressures, another Congress may disagree and pass legislation that undermines it. That is the nature of our governmental structure, and this Article does not attempt to do the impossible by taking the politics out of agency design or operation. On the contrary, to help an agency charged with protecting relatively powerless interests requires one to be particularly attentive to the political environment in which they operate and give the agency tools that help it negotiate that landscape as effectively as possible.

Although much of this is situational, this section discusses some general principles that can fortify agencies against lopsided partisan pressures in the agencies' efforts to achieve long-term public interest goals.

a. *Information*. One of the most powerful weapons policymakers can give agencies is the ability to generate and disseminate information. If an agency is charged with resisting short-term partisan pressures in the name of long-term public interest, then assuming the agency is faithfully pursuing that task, large numbers of voters stand to gain if the agency is allowed to operate without undue influence from elected officials that may be more focused on special interests. This mass of voters may lack political power, however, for two main reasons. First, is the classic collective action

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[224] Jane Wardell, Greenspan Defends Subprime Market, Oct. 3, 2007, available at www.washingtonpost.com/wp-dyn/content/article/2007/10/02/AR2007100200784.html.

[225] Testimony of James E. Tierney, Director of the National State Attorney General Program, Columbia Law School, Consumer Credit and Debt: The Role of the Federal Trade Commission, Subcomittee on Commerce, Trade and Consumer Protection, U.S. House of Representatives Committee on Energy and Commerce, March 24, 2009 at 7-8.

problem.[226] The general public lacks the organization to fight for its own benefit. Second, the public may have no idea that there is even an issue worth fighting for because it lacks the resources to monitor agencies and government operations and therefore loses out to the organized interests that constantly keep tabs on government action to steer government policy in the direction the interest groups prefer.[227]

Giving the agency the power to generate and disseminate information can go a long way to addressing both of these issues. Most obviously, the power to provide information can remedy the public's information disadvantage vis-à-vis industry. The agency must make the public aware of pending issues so that industry is not the only one who knows about it. That is not enough, however. The key is to give the agency the authority to study and publicize data that will be of interest to the public and help energize it to overcome collective action problems and rally behind the agency.[228] The precise content of that information is going to be subject matter specific. For example, to achieve long-term criminal justice policies that benefit the public requires data about recidivism, the effectiveness of incarceration and rehabilitative programs, and, critically, the costs of different policies.[229] In the area of consumer protection policy, identifying dangerous products and services is a key means for generating public support for regulation that industry may oppose. The point here is not to identify all the salient information that can help agencies in different areas. Rather, the aim is to highlight how important information is to an agency's mission. Once key information gets highlighted in the popular press, the mass of voters may take sufficient interest in how it is handled that they will register their approval or disapproval at the ballot box.

The question for agency design, then, is how to imbed information generation and dissemination into an agency's structure. One way is to create a research arm in the agency to produce reports and studies and ensure that it is adequately funded.[230] If getting information from industry is likely to be a problem, the agency can be given a subpoena or inspection power so that it has access to the materials it needs to study an issue.

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[226] MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 11-22 (1971).

[227] Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADM. RESEARCH & THEORY 245, 257 (1998) (noting that "business groups – whether they are corporations or trade associations – utilize much more sophisticated monitoring techniques than the smaller advocacy groups do").

[228] *Cf.* Christopher S. Elmendorf, *Representation Reinforcement Through Advisory Commissions: The Case of Election Law*, 80 NYU L. REV. 1336, 1388 (2005) (noting that legislatures often accede to districting commission recommendations and positing that "the prospect of public outcry seems to be an important part of the story").

[229] Barkow, *supra* note __, at 806-812 (discussing importance of fiscal costs in helping agencies influence sentencing policy).

[230] *Id.* at 1412 (noting that it is important to give agencies the capacity to communicate reform proposals with an adequate budget and research capabilities).

Another structural feature that promotes information dissemination is to give the agency the authority to provide testimony at oversight hearings and in public without having to obtain preclearance from political actors who may censor the agency's positions. Unless Congress specifies otherwise, the default rule for agencies is that they must pre-clear testimony and written responses to congressional inquiries with OMB.[231] To avoid the possibility that interest groups will pressure OMB to keep the lid on testimony damaging to their interests, it would be preferable to allow agencies to speak directly to Congress without having to seek approval.

b. Political Benefactors. Another crucial ingredient for an agency facing an army of powerful interest groups on one side of an issue is to have a powerful political ally on the side of the agency.[232] Now, one might think this is impossible because the very situation hypothesized is one in which all the interest groups are favoring one side of an issue. But political power comes from sources other than interest groups. There may be particular legislators who care about the issue and the public's interest and have electoral security because of their positions in other areas. Or, if the agency presents politically saleable information, a policy entrepreneur might take up the cause of public crusader in the hopes of winning enough votes as a consumer champion or sensible reformer. In addition, the head of the agency may himself or herself have a base of authority because of prior public service or outreach.

The question becomes how to hardwire these connections into the very design of an agency, instead of relying on the fortuity that these links will emerge because of the particular actors involved.

Although this is a difficult task, a few avenues are promising and relate to some of the equalizing measures already discussed. One possibility is to require the agency head to have policymaking experience in the subject matter. A specific requirement of policymaking experience – as opposed to advocacy or field work – should increase the number of candidates with congressional experience, which in turn might give the agency head greater political capital. This is no guarantee, of course, because political capital often fades with electoral turnover.[233] But it may prove helpful in at least some circumstances.

Second, it is important for agencies to give politicians information that can help them mobilize voter support. Agencies should obtain

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[231] Lewis, *supra* note __, at 40 (citing OMB Circular A-11 (1996)).

[232] Barkow, *supra* note __ , at 800-804 (noting the importance of political ties to the success of sentencing commissions); Gerken, *supra* note __, at 192 ("[T]he empirical work on independence suggests that the reform commissions that have proved most successful in persuading the public to back a reform proposal have been able to harness the skills of those elites in the service of reform.").

[233] The experience of Mike Pertschuck at the FTC is an illustration of the limits. Pertshuck was a high-level staffer on Capitol Hill who went on to head the FTC. But by the time Pertschuk assumed the helm of the agency, the composition in Congress changed and the leading consumer advocates who could provide him with political assistance had left office.

information about what proposals are politically viable by sounding out interested groups and using pilot projects to test public reaction. For example, Heather Gerken notes that the United Kingdom's Electoral Commission succeeded in part because it "use[d] pilot projects and opinion research to test the political waters before committing to a particular reform proposal."[234] Similarly, the Minnesota Sentencing Commission succeeded in getting its reform agenda passed in large measure because it sought feedback from interest groups. And all of the most successful sentencing commissions have used fiscal impact statements to achieve reforms because legislators are able to support proposals that they can tout as money savers.

A third option is to give designated legislators a sense of ownership in the agency's mission so that they are more likely to support it. States have done this by making legislators voting or ex officio members of commissions. Separation of powers limitations may eliminate this option at the federal level, so admittedly less effective alternatives must be sought. There is a natural link between members of Congress who serve on oversight committees and agencies, but unfortunately these relationships are tainted because committees themselves are captured by special interests. Thus, if the goal is to insulate the agency from partisan pressures, committee oversight hardly fits the bill.

But one can mitigate those concerns somewhat by placing the agency within the jurisdiction of an oversight committee that is more likely to favor a broad public interest than industry interests. For example, in the House, placing a consumer financial protection agency under the jurisdiction of the Banking Committee will yield different results than placing oversight responsibilities with the Subcommittee on Commerce, Trade and Consumer Protection. The latter is far more likely to be attuned to consumer interests than the former. Again, this protection will only go so far because all members of Congress will be concerned with powerful groups that can marshal money and votes. But the goal of design is to put the agency in as favorable position as possible given the political environment in which all agencies must operate.

A fourth option is to enlist other agencies that have been fulfilling their public service mission to play a greater role in the target agency's process. As noted above, one must be careful with this approach not to give an agency that is itself captured by interests too much oversight over an insulated agency. But as J.R. DeShazo and Jody Freeman effectively demonstrate, "interagency lobbying" can in some cases "give voice to a set of interests that might balance or neutralize the influence of private – and usually well-financed and industry-dominated – groups."[235]

c. Public Advocates. Another way to get political support for an agency's position is to build within the agency's structure a formal position of public advocate that is charged with representing the public's interest

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[234] Heather K. Gerken, *The Double-Edged Sword of Independence: Innoculating Electoral Reform Commissions Against Everyday Politics*, 6 ELECTION L. J. 184, 191 (2007).

[235] DeShazo & Freeman, *supra* note __, at 2231.

before the agency. Two examples of this model show both the potential pitfalls and promise of this avenue of agency design.

The Federal Reserve Board of Directors provides an illustration of the shortcomings of this model when the selection of the representative is too tied up with industry interests, and the advocate lacks sufficient focus on the general public interest. Class B and Class C directors on the Board are charged with representing the public.[236] In practice, however, these directors have been more representative of industry for several reasons. First, the legislation stating that they should represent "consumers" also states that they should be selected with "consideration to the interests of agriculture, commerce, industry, services, [and] labor."[237]

Second, and more importantly, banks play a major role in the selection process. Class B directors are elected by the same banks that elect Class A directors.[238] Class C directors are appointed by the Board of Governors.[239] As a result, the Class B and Class C directors generally have strong ties to regulated industries as opposed to consumers.[240] Class C directors generally appear little different from their Class B counterparts.[241]

Third, regardless of affiliation, it is unlikely that the Class B and Class C directors are able to conduct sufficient oversight over state member banks. Given the significant responsibilities that each of these directors appears to have apart from their position at the Fed, it is unlikely that any of them have sufficient time, staff, or energy for supplemental oversight that is sufficient to protect consumers.

There are, then, at least two larger lessons to draw from the experience of public advocates at the Federal Reserve. First, the selection process for a consumer representative is critically important. Because anyone is a consumer – even high-powered financiers – it is important to have processes and selection criteria that target people who have a greater interest in consumer welfare than in any particular industry in which they participate. The selection, moreover, should not be made by the industry being regulated. Second, no consumer representative can succeed without sufficient resources to look for agency transgressions. Representing consumers cannot be a part-time job. It is a full-time task that requires

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[236] 12 U.S.C. § 302.

[237] *Id.*

[238] 12 U.S.C. § 304.

[239] 12 U.S.C. § 305.

[240] For example, in Boston, the Class B representatives are affiliated with The Kraft Group, MassMutual Life Insurance Company, and BJ's Wholesale Club. http://www.bos.frb.org/about/officers.htm#directors.

[241] Generally, the positions are filled with Presidents and CEOs of small- and medium-sized companies. One Class C director of the Federal Reserve Bank of Chicago, and the current chair, is the chairman of Madison Dearborn Partners, which specializes in management buyout and special equity investing and manages over $10 billion of committed capital and portfolio investments. http://www.chicagofed.org/about_the_fed/board_of_directors_canning_john.cfm.

sufficient staffing and funding to allow consumer representatives to properly monitor agency actions and to challenge those actions where appropriate.

A more successful deployment of the public advocate model is found in the many states that have created public utility consumer advocates to give consumers a greater role in the ratemaking processes of state utilities.[242] In some jurisdictions, such as Arizona, this consumer representative is directly appointed by the governor.[243] In other jurisdictions, such as the District of Columbia, there is an independent agency with a head appointed by the mayor and confirmed by the city council.[244] Other states have a special division within the attorney general's office charged with representing consumers in ratemaking proceedings.

Studies have found that participation by a consumer advocate leads to lower rates,[245] which suggests that these advocates can make a difference in substantive agency policy. The most consumer-friendly outcomes occur when the advocate is an independent entity in the bureaucracy.[246]

III. CASE STUDIES IN INSULATION AGAINST CAPTURE

The best way to illustrate the limits of the traditional hallmarks of independence and the importance of equalizing insulators is to describe a real-world agency facing precisely the kind of uphill political battle that insulation is supposed to help fight. This Part considers a prototypical example of one-sided interest group pressure opposing the general public interest: consumer protection. Section A discusses the doomed effort to create a robust Consumer Products Safety Commission (CPSC) using the traditional features of independence and mostly ignoring equalizing insulators. Section B then turns to the most recently created agency charged with protecting consumer interests: the Bureau of Consumer Financial Protection. In light of the experience of the CPSC and what we know about agency design in an environment of one-sided interest group dominance, section B analyzes how the Bureau is likely to fare and what could have improved its chances at resisting capture.

A. The Consumer Products Safety Commission

Agencies charged with protecting consumers have a difficult task because the industries they are charged with regulating typically are far more powerful and well-financed than the consumer interests they are

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[242] Darryl Stein, Perilous Proxies: Issues of Scale for Consumer Representation in Agency Proceedings, __ NYU Annual Survey __ (forthcoming 2011).

[243] ARIZ. REV. STAT. ANN. § 40-462 (2009).

[244] D.C. CODE § 34-804(b) (2009).

[245] *See*, *e.g.*, Stephen Littlechild, *Stipulated Settlements, the Consumer Advocate, and Utility Regulation in Florida,* 35 J. REGULATORY ECON. 96 (2009); Robert N. Mayer, Cathleen D. Zick and John R. Burton, *Consumer Representation and Local Telephone Rates*, 23 J. OF CONSUMER AFFAIRS 267, 279 (1989).

[246] Mayer et al., *supra* note __, at 281.

charged with protecting.[247] Though some public interest advocacy groups,[248] such as Public Citizen, have had some success representing consumer interests, they are no match for the resources and political clout of the industries that oppose consumer protection laws.[249] As a result, consumer protection agencies tend to be less likely to worry about satisfying consumer groups than the more powerful regulated industries. This, in turn, creates the ideal breeding ground for agency capture.[250]

The experience of the CPSC provides a prime illustration of how even a structurally independent agency by traditional measures can be captured. The CPSC was created in 1972 to "protect the public against unreasonable risks of injury associated with consumer products."[251] At the time it was established, the CPSC was charged with enforcing statutes that were previously administered by other agencies and was also vested with new powers as well.[252] The CPSC can research and investigate the safety of consumer products, test consumer products, develop testing methods and devices, and train others in product safety research, investigation, and testing.[253] To carry out its mandate, CPSC can regulate safety standards[254] or ban products if a safety standard would be infeasible,[255] Additionally CPSC can seek judicial orders of seizure and condemnation for "imminently hazardous" products[256] as well as orders mandating public notification of

[247] Raj Date, Regulator Unbound: Solving an Old Problem at a New Regulatory Agency 2-5 (July 2, 2009), *available at* http://www.cambridgewinter.org/Cambridge_Winter/Regulator_Unbound_files/regulator%20 unbound%20070209.pdf.

[248] As Peter Schuck notes, public interest organizations can be defined as those that "purport[] to represent very broad, diffuse, non-commercial interests which traditionally have received little explicit or direct representation in the processes by which agencies, courts, and legislatures make public policy." Peter Schuck, *Public Interest Groups and the Policy Process*, 37 PUB. ADMIN. REV. 132, 133 (1977).

[249] PETER SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 162 (2009) ("[T]he parties with adequate resources and organization to make themselves effectively heard within the administrative process are far more likely to be antiregulatory voices of big business than even well-known public interest groups such as the Sierra Club or the Natural Resources Defense Council."); Jason Webb Yackee & Susan Webb Yackee, *A Bias Toward Business? Assessing Interest Group Influence on U.S. Bureaucracy*, 68 J. OF POL. 128, 128-129 (2006) ("[B]usiness interests enjoy disproportionate influence over rulemaking outputs despite the supposedly equalizing effects of notice and comment procedures.").

[250] See generally Statement of Rachel E. Barkow, "The Proposed Consumer Financial Protection Agency: Implications for Consumers and the FTC," Before the House Subcommittee on Commerce, Trade, and Consumer Protection, July 8, 2009.

[251] 15 U.S.C. § 2051(b)(1).

[252] Robert S. Adler, *From "Model Agency" to Basket Case – Can the Consumer Product Safety Commission Be Redeemed?*, 41 ADMIN. L. REV. 61, 63 (1989).

[253] 15 U.S.C. § 2054(b) (2006).

[254] Standards can be for performance or labeling and must be "reasonably necessary to prevent or reduce an unreasonable risk of injury." 15 U.S.C. § 2056(a) (2006).

[255] 15. U.S.C. § 2057 (2006).

[256] 15 U.S.C. § 2061(a) (2006.

hazards, recalls, repairs, reimbursements, or replacements.[257] The CPSC was heralded as the "most powerful Federal regulatory agency ever created."[258]

When the agency was initially proposed, there was a debate about whether it should be an executive agency or a traditional independent commission. President Nixon originally proposed housing the new consumer agency within the Department of Health, Education, and Welfare.[259] Consumer groups and their proponents in Congress, however, worried that placing the agency under executive control would undercut consumer interests because they doubted President Nixon's commitment to protecting consumers at the expense of powerful business interests.[260] The consumer advocates won this particular battle, and the CPSC "generally parallels" the structure of other traditional independent regulatory agencies.[261] There are five commissioners who are appointed by the President with the advice and consent of the Senate who serve staggered, seven-year terms.[262] The President chooses the Chairman from the commissioners with the advice and consent of the Senate. The commissioners can be removed only "for neglect of duty or malfeasance in office but for no other cause."[263] There is no requirement of partisan balance among the Commission, but the President is required to consider candidates who posses a "background and expertise in areas related to consumer products and protection of the public from risks to safety."[264] CPSC is defined as an independent regulatory agency in the Paperwork Reduction Act,[265] which exempts it from OIRA review of its regulations but not from the regulatory planning process.[266] Thus, the CPSC checks all the boxes of traditional independent design.

Despite these traditional indicators of independence, the CPSC has fallen far short of its statutory mandate. The major reason is that the CPSC

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[257] 15 U.S.C. § 2064 (2006).

[258] Teresa M. Schwartz, *The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade*, 51 GEO. WASH. L. REV. 32, 43-44 (1982) (quoting Swit, *An Overview of Public Law 92-573*¸Proceedings of the Briefing Conference on the Consumer Product Safety Act 7 (1973) (sponsored by the Product Safety Letter, Inc.)).

[259] Moe, supra note __, at 290.

[260] Moe, supra note __, at 290-91; Devins and Lewis, supra note __, at 465.

[261] Antonin Scalia & Frank Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 UCLA L. REV. 899, 904 (1973).

[262] 15 U.S.C. § 2053(b) (2006).

[263] 15 U.S.C.S. § 2053(a) (2010). Congress reduced the number of commissioners to three in 1993 by refusing to authorize funding for a full five-member commission. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-803, CONSUMER SAFETY: BETTER INFORMATION AND PLANNING WOULD STRENGTHEN CPSC'S OVERSIGHT OF IMPORTED PRODUCTS 1–2 (2009). The Consumer Product Safety Improvements Act of 2008 returned the Commission to a five-member body.

[264] 15 U.S.C. § 2053(a) (2006).

[265] 44 U.S.C. § 3502(5) (2006).

[266] Exec. Order No. 12,866 § 4, 58 Fed. Reg. 51,735, 51,738 (Sept. 30, 1993).

has been chronically underfunded and understaffed.[267] The CPSC budget, adjusted for inflation, decreased 60% from 1975 to 1990 and staffing decreased by 41%.[268] As a result, the CPSC has been no match for the industry participants it is charged with regulating.

Product manufacturers have used their resource advantage on all fronts, including by capitalizing on various procedural rules in the Consumer Product Safety Act (CPSA) that were aimed at protecting consumers. Section 7 of the CPSA created what was known as the offeror process, which required the CPSC to solicit and utilize people from outside the agency to draft its safety standards. The CPSC would put out a notice in the Federal Register describing the need for some standard and inviting people to propose or offer to develop a standard. After the offeror submitted its proposal, the CPSC could adopt or revise it and then seek comments on the resulting standard. In theory, offerors could be consumer groups, standard-setting organizations, other agencies, or industry groups. In reality, the process was dominated by industry. Because submitting a proposal was resource-intensive, consumer groups and standards organizations found the process too burdensome; the process was "affordable only to industry groups with an economic stake in the outcome."[269] Industry representatives did not just dominate the drafting stage, they often controlled the outcomes. Industry representatives brought successful challenges to most of the CPSC's rules in court.[270] Ultimately, Congress viewed the offeror process as a failure and abolished it.

Section 10 of the CPSA, which was designed to give consumers a greater say with the agency, suffered a similar fate. Section 10 established a process whereby interested persons could petition the agency to issue rules and the CPSC would have to respond to those requests with reasons within 120 days and face de novo judicial review.[271] This framework was enacted with the intent to allow the public to "overturn bureaucratic inertia."[272] In fact, however, the process itself impeded the agency from fulfilling its mandate because the CPSC was overrun with petitions, including many from industry participants who had economic incentives to get the agency to pass particular standards.[273] Section 10's 120-day deadline and requirement of judicial review were therefore also ultimately revoked in 1981.[274]

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[267] Schwartz, *supra* note 12, at 44.

[268] U.S. Gen. Accounting Office, GAO/HRD-92-37R, Information on CPSC 7–8 (1992).

[269] *Id.* at 63-64.

[270] *Id.* at 66.

[271] Consumer Product Safety Act, Pub. L. No. 92-573, § 10, 86 Stat. 1207, 1217 (1972).

[272] 118 CONG. REC. 21,854 (1978) (remarks of Sen. Magnuson).

[273] Schwartz, *supra* note __, at 52–53 (noting CPSC commitment to review each petition led to backlog that prevented CPSC from meeting 120-day deadline).

[274] Consumer Product Safety Amendments of 1981, Pub. L. No. 97-35, § 1210, 95 Stat. 703, 721.

These consumer protection mechanisms thus fell far short of their goals, and a more robust equalizing mechanism that could have helped the agency never got off the ground. The bipartisan study group that recommended the creation of the CPSC had also endorsed the creation of a Consumer Safety Advocate who would be appointed by the President and be charged with representing consumers in the CPSC's decisionmaking process to defend consumer safety against "exploitation, excess or neglect."[275] But Congress rejected the suggestion, thus eliminating a possible avenue for generating more political support for the agency's efforts.[276] To be sure, the consumer advocate would have faced a difficult task in trying to generate support for this under-resourced agency. But having a permanent position in the agency looking out for consumer interests might have at least raised the public profile of the agency, thus paving the way for some politicians to take on the mantle of rejuvenating the agency.

Another shortcoming of the original CPSA was that it preempted state product safety requirements. States were forbidden from establishing or continuing requirements "unless such requirements [were] identical to the requirements of the Federal standard."[277] The statute allowed states to apply for exemptions if the state proposed a requirement imposing "a higher level of performance than the Federal standard," but a state could do so only if there were "compelling local conditions" and if doing so would not "unduly burden interstate commerce."[278] These two provisions were "probably inherently contradictory;" only one state applied for an exemption and none were granted.[279] Critically, along with hampering the development of state product safety standards, states were not authorized to enforce CPSC standards.[280] Taken together, these provisions allowed dangerous products to remain on the market long after state attorneys general had identified them.[281] Even after a product recall or ban on a product, the understaffed and

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[275] NATIONAL COMMISSION ON PRODUCT SAFETY, FINAL REPORT PRESENTED TO THE PRESIDENT AND CONGRESS 115 (1970)

[276] Scalia and Goodman, *supra* note __, at 951-952 ("[T]he elimination of the consumer-advocate proposal of the original NCPS bill is highly significant, since it was specifically designed to insure that these 'extra-agency' initiatives would be taken for the benefit of the consumer.")

[277] Consumer Product Safety Act, Pub. L. No. 92-573, § 26, 86 Stat. 1207, 1227 (1972).

[278] *Id.*

[279] Dennis B. Wilson, *What You Can't Have Can't Hurt You! The Real Safety Objective of the Firearms Safety Act and Consumer Protection Act*, 53 CLEV. ST. L. REV. 225, 260–61 & n. 179 (2006).

[280] Consumer Product Safety Act, Pub. L. No. 92-573, § 29(a), 86 Stat. 1207, 1230 (1972). The CPSC was only authorized to accept assistance from the states in the form of data collection, investigation, and educational programs if the state authority was already engaged in those activities and compensated in advance. States could also be commissioned as CPSC officers to aid in investigations and inspections. *Id.*

[281] *Enhancing the Safety of Our Toys: Lead Paint, the Consumer Product Safety Commission, and Toy Safety Standards: Hearing Before Subcomm. of the S. Comm. on Appropriations*, 110th Cong. 6–8 (2007) (statement of Lisa Madigan, Attorney General, State of Illinois) (describing serious injuries children suffered during six year effort to obtain CPSC recall of Magnetix toys).

underfunded CPSC could not effectively monitor implementation to ensure the product was no longer available to consumers.[282]

Congress sought to address some of these shortcomings with the Consumer Product Safety Improvement Act of 2008, which allows for a more cooperative relationship between the CPSC and state attorneys general. The CPSIA of 2008 left the preemption provisions in place but significantly changed the relationship between the CPSC and the state attorneys general when it comes to enforcement. State attorneys general still cannot seek civil penalties, but they can now bring actions to enjoin the sale of products that violate CPSC regulations after providing CPSC with 30 days notice.[283] They can also bring actions to protect their citizens from "substantial product hazards" after notifying the Commission of a determination that immediate action is necessary.[284] With this reform, the CPSC now treats state attorneys general as "partners," according to current CPSC Chairman Inez Tenenbaum.[285] Because it is so recent, it remains to be seen how this one equalizing change will address the CPSC's historical shortcomings.[286]

What we do know is that the experience of the CPSC before the 2008 legislative changes provides a cautionary tale both of the limits of the traditional markers of independence and of how even well-intended provisions can cut against the ultimate success of a statute. The CPSC on paper looks like a textbook independent agency, yet is widely-regarded as one of the least politically independent and influential agencies in government.[287] In its first five years, the CPSC issued only one regulation–for swimming pools–and only seven after ten years.[288] OMB considered recommending that President Carter abolish the CPSC and ultimately did advise President Reagan to do so, though Congress refused.[289] Procedural rights aimed at benefitting consumers and creating better policy became hijacked by well-financed and well-organized industry representatives. Thus, "virtually every authorization hearing and appropriation hearing" for

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[282] *Id.* at 8–9 (describing finding Magnetix toys on Illinois shelves more than 14 months after recall).

[283] 15 U.S.C.S. § 2073(b)(1) (2010).

[284] 15 U.S.C.S. § 2073(b)(2)(C) (2010).

[285] Transcript, *Sen. Richard J. Durbin Holds a Hearing on the Consumer Product Safety Commission Budget*, CQ TRANSCRIPTIONS (Apr. 14, 2010).

[286] No state attorney general has used these new enforcement powers. *See* Hal Stratton, *How Will State Attorneys General Enforce Federal Consumer Law? Vermont Legal Action Provides Clues*, WASHINGTON LEGAL FOUNDATION LEGAL BACKGROUNDER, June 18, 2010, at 1,

[287] Criticism of the CPSC has centered on the very design features that aimed to make it make it an independent commission keyed to the needs of average consumers. Adler, *supra* note __, at 71.

[288] Robert S. Adler, *From "Model Agency" to Basket Case – Can the Consumer Product Safety Commission Be Redeemed?*, 41 ADMIN. L. REV. 61, 70 (1989); Teresa M. Schwartz, *The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade*, 51 GEO. WASH. L. REV. 32, 61 & n. 206 (1982).

[289] *Id.* at 74 n.82.

the CPSC has included a debate over proposed structural changes to the CPSC.[290] Proposed structural changes, however, have focused largely on the traditional design elements of independence, such as moving from five commissioners to a single administrator[291] and placing the CPSC within an executive branch agency.[292] As discussed above, these changes are unlikely to do much to improve the fate of the CPSC. More promising is the CPSIA's inclusion of state AGs as enforcement partners.[293] But even that is only one step toward equalizing the enormous power imbalance between disperse consumer interests and the highly-organized, fully-funded lobbying of products manufacturers.

B. The Bureau of Consumer Financial Protection

Despite its shortcomings, the CPSC was the inspiration for the recent creation of an agency charged with regulating financial products to protect consumer interests.[294] Professor Elizabeth Warren advocated for the creation of such an agency in 2007, and the financial meltdown that followed provided the political impetus to turn the idea into reality. In 2010, Congress created the Bureau of Consumer Financial Protection (Bureau), an agency tasked with making sure that "consumers are provided with timely and understandable information to make responsible decisions about financial transactions and with protecting consumers "from unfair, deceptive, or abuse actors or practices."[295]

The institutional framework for the Bureau was a hotly contested issue from the beginning. And because capture was an obvious concern, many of the issues discussed in Part II were expressly debated as industry groups fought to avoid powerful equalizing measures.

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[290] *Id.* at 83 n.126.

[291] A 1987 GAO study examined whether a single administrator rather than five commissioners should head the CPSC, as was the case with seven of the eight other health and safety agencies. It noted that commissioners tended to vote with the Chairman and a single administrator would save money and regulate more efficiently. GENERAL ACCOUNTING OFFICE, GAO/HRD-87-47, CONSUMER PRODUCT SAFETY COMMISSION: ADMINISTRATIVE STRUCTURE COULD BENEFIT FROM CHANGE 5 (1987). All former CPSC Chairpersons recommended a change to a single administrator structure. *Id.* at 6.

[292] *See* Adler, *supra* note __, at 91–92; GENERAL ACCOUNTING OFFICE, GAO/HRD-87-47, CONSUMER PRODUCT SAFETY COMMISSION: ADMINISTRATIVE STRUCTURE COULD BENEFIT FROM CHANGE 7–9 (1987).

[293] The recognition that CPSC's dependence on the Department of Justice and its own small staff was rendering it ineffective was a major impetus for the CPSIA of 2008. "The mere fact that the States have this authority gives a local hammer to the CPSC that they do not have right now. Right now, what we have to do is rely on the Justice Department or we have to rely on CPSC employees to turn around and try to enforce those out in the various States . . . It is hurting enforcement." 154 CONG. REC. S1505 (daily ed. Mar. 4, 2008) (statement of Sen. Pryor).

[294] *See Elizabeth* Warren, *Unsafe at Any Rate*, DEMOCRACY, Summer 2007, at 8, 16 (proposing a "Financial Product Safety Commission" modeled on the CPSC).

[295] § 1021(b)

A foundational involved whether a new agency responsible for consumer protection should be created or whether an existing agency could be given new authority. The Obama Administration initially proposed the creation of a free-standing commission whose members would have removal protection,[296] and consumer advocates embraced this model as well.[297] Consumer groups wanted a new agency to protect consumer interests because the existing banking regulators with consumer protection responsibilities largely ignored them and focused instead on their duties to ensure the safety and soundness of financial institutions.[298] The House agreed that a new agency was required and approved a bill that would create a free-standing agency.[299]

But the financial services sector vehemently opposed the establishment of any new agency. In their view, consumer protection could not be divorced from safety and soundness concerns, thus they proposed giving consumer protection responsibilities to an existing banking regulator.[300] Opposition to a new agency by these powerful interests (which included the Mortgage Bankers Association,[301] the CEOs of at least six major financial firms[302]), plus the resistance of congressional

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[296] *See, e.g.*, *Hearing on Creating a Consumer Financial Protection Agency, Panel 1 Before the Sen. Comm. on Banking, Housing, and Urban Affairs*, 111th Cong. 13 (2009) (statement of Michael S. Barr, Assistant Sec'y of the Treasury for Fin. Inst.) ("We just experienced what it's like … to have massive failure in the system, in which bank supervisors do safety and soundness and also do consumer protection."); *Hearing on The Proposed Consumer Financial Protection Agency: Implications for Consumers and the FTC Before the H. Comm. on Energy and Commerce, Subcomm. on Commerce, Trade, and Consumer Protection*, 111th Cong. 6 (2009) (statement of Michael S. Barr, Assistant Sec'y of the Treasury for Fin. Inst.) ("A new agency with a focused mission, comprehensive jurisdiction, and broad authorities is also the only way to ensure consumers and providers high and consistent standards and a level playing field across the whole marketplace without regard to the form of a product – or the type of its provider.").

[297] *See, e.g.*, Americans for Financial Reform, *CFPA One-Pager* (2009), *available at* http://ourfinancialsecurity.org/2009/01/cfpa-one-pager/ ("AFR supports creating a stand-alone CFPA that eliminates the conflicts of interest inherent in the existing banking agencies and brings a stronger and streamlined focus on consumer protections.").

[298] Christopher L. Peterson, Federalism and Predatory Lending: Unmasking the Deregulatory Agenda, 78 Temp. L. Rev. 1, 73 (2005) (observing that "[t]he primary mission and long-standing cultural focus of federal depository institution regulators has been monitoring the safety and soundness of their institutions, rather than consumer protection").

[299] The Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. §4101 *et seq.* (2009).

[300] Some existing regulators also entered the debate, with a commissioner of the FTC arguing that the FTC should be given new financial oversight responsibilities with the FTC because it already had the infrastructure and experience to address consumer issues. J. Thomas Rosch, Commissioner, Fed. Trade Comm'n, Managing Irrationality: Some Observations on Behavioral Economics and the Creation of the Consumer Financial Protection Agency, Remarks at the Conference on the Regulation of Consumer Financial Products (Jan. 6, 2010) http://www.ftc.gov/speeches/rosch/100106financial-products.pdf.

[301] *See Hearing on Perspectives on the Consumer Financial Protection Agency Before the H. Comm. on Financial Services*, 111th Cong. 6-7 (2009) (statement of Mortgage Bankers Association).

[302] *See* Davis, *supra* note 5 (arguing for consumer protection "enforced by prudential regulators and not a new government agency").

Republicans[303] and the current Chairman of the FDIC[304] ultimately pushed the Administration to give up on a free-standing agency to get the legislation passed in the Senate.

After debating whether to place the agency within Treasury or the Federal Reserve, the Dodd-Frank Wall Street Reform and Consumer Protection Act established the Bureau within the Federal Reserve System.[305] The risk with this structure is that "historical inertia" within the Fed on consumer issues might plague the new division.[306] But it really depends on how integrated the Bureau will be within the overall Fed culture. The Bureau will be headed by a single director who serves a five-year term and is removable by the President only for cause,[307] so he or she will have formal independence from the Fed's hierarchy.

But, as Part II explained, it is not just the agency's place in an organization hierarchy that matters. Indeed, for precisely that reason, other aspects of the agency attracted controversy. Debate also revolved around whether the new entity would have independent rulemaking authority or if it would be merely an enforcement body that policed rules enacted by existing banking regulators. Consumer advocates insisted on independent rulemaking authority,[308] with industry groups vehemently opposed.[309] The U.S. Chamber of Commerce started a campaign to "Stop the CFPA" and released a counterproposal that explicitly reserved rulemaking authority for federal banking regulators, who would collectively sit on a "Consumer Financial Protection Council."[310]

The final legislation struck a compromise between these two views. The Bureau has independent and exclusive rulemaking authority under the statute for federal consumer financial law and is to be treated as the sole

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[303] Sewell Chan, *Dodd Proposes Giving Fed the Task of Consumer Protection*, N.Y. TIMES, March 2, 2010, at B2 ("[A]dvocates, mindful of fierce Republican opposition to a stand-alone agency, have said that they are less concerned about where the entity is housed than the scope of its authority and the independence of its leadership and budget.").

[304] *Hearing on Federal Regulator Perspectives on Financial Regulatory Reform Proposals Before the H. Comm. on Financial Services,* 111th Cong. 8 (2009) (statement of Sheila Bair, Chairman, Fed. Deposit Ins. Corp.) ("Separating consumer protection examination and supervision from [risk supervision] could undermine the effectiveness of both….").

[305] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, H.R. 4173 (2010).

[306] Biber, supra note __, at 17.

[307] § 1011(c).

[308] Shahien Nasiripour, *Fight for the CFPA is 'A Dispute Between Families and Banks,' Says Elizabeth Warren*, THE HUFFINGTON POST, March 3, 2010, http://www.huffingtonpost.com/2010/03/03/fight-for-the-cfpa-is-a-d_n_483707.html.

[309] *See* Kuhnhenn, *supra* note 25 ("Business and banking groups also were cool to the idea of a consumer financial protection agency … that had independent rule writing power.")

[310] *See* U.S. Chamber of Commerce, Consumer Financial Protection Council, https://www.uschamber.com/assets/ccmc/cfpc.pdf.

agency interpreting the Act for purposes of judicial deference.[311] The Board of Governors of the Federal Reserve has no approval or review authority.[312] But the Bureau must consult prudential regulators during the rulemaking process and publish any applicable objections those prudential regulators may have.[313]

Most critically, all Bureau regulations are subject to review by a Financial Stability Oversight Council, which may reject any regulation on safety and soundness concerns with a two-thirds vote.[314] This Financial Stability Oversight Council is similar to the council proposed by the Chamber of Commerce.[315] The voting members consist of the Secretary of the Treasury, the Chairman of the Board of Governors, the Comptroller of the Currency, the Director of the Bureau, the Chairman of the Securities and Exchange Commission, the Chairperson of the Federal Deposit Insurance Corporation, the Chairperson of the CFTC, the Director of the Federal Housing Finance Agency, the Chairman of the National Credit Union Administration (NCUA), and an independent member appointed by the President and confirmed by the Senate who has insurance expertise. Most of its members have a long history of favoring the industries they are charged with regulating, making the threat of veto a real one. One analysis of the Council (that included all of its members except the chair of the NCUA), found that it would have vetoed an attempt by the Bureau to regulate non-traditional mortgages.[316] In addition, even if the Council does not have sufficient votes to veto the Bureau, any single member of this Council may stay the Bureau's regulations for up to 90 days.[317] Thus, the Bureau's design includes precisely the kind of involvement by other agencies that can undermine the Bureau's own structural protections.

Another hotly contested issue involved preemption and the relationship of the Bureau to state AGs. The financial services industry fought hard to ensure that state consumer laws would remain preempted under any new legislation or agency framework.[318] They argued that uniformity of regulatory laws is critical because the alternative, patchwork system would not function effectively and would impose enormous

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[311] *Id.* § 1022(b)(1), (4).

[312] § 1012(c)(3).

[313] *Id.* § 1022(b)(2)(B)-(C).

[314] *Id.* § 1023(c)(3) (A).

[315] *Compare id.* (proposing council of federal banking regulators and representatives from state banking and consumer regulators), *with* H.R. 4173 §111(b) (including a substantially similar group of regulators on the "Financial Stability Oversight Council") *and* H.R. 4173 §1023 (providing procedures for FSOC review and veto of CFPB regulations).

[316] Date, *supra* note __, at 7.

[317] 1023(c)(1).

[318] *See Testimony of Edward L. Yingling On Behalf of the American Bankers Association Before the Sen. Comm. on Banking, Housing and Urban Affairs*, 111th Cong. 12-13 (2009) (statement of Edward L. Yingling, President and CEO, American Bankers Association).

compliance costs.[319] They further alleged that innovation in financial products would decline without preemption because products would have be tested in each state, thus raising costs.[320]

The Treasury Department and some consumer advocates pushed instead for floor preemption that would allow states to enact more consumer friendly regulations adjusted to local conditions.[321] Consumer interests touted the states as laboratories of regulatory experimentation, and argued that states could check the possible capture of a federal agency by industry.[322]

Congress largely agreed, preempting state law only to the extent it is "inconsistent" with the Dodd/Frank Act. And the Act clarifies that a state law is not inconsistent if it provides consumers with greater protection than the federal law.[323] Thus, the law goes some distance to avoiding the kind of preemption by the OCC and OTS that precipitated the current fiscal crisis.

Legislators took up the related question of who should have the power to enforce consumer protection regulations promulgated by the Bureau. State AGs urged Congress to permit them to bring enforcement actions both individually and through multi-state efforts.[324] In its initial white paper, the Department of Treasury also supported concurrent enforcement "subject to appropriate arrangements with prudential supervisors."[325] It also supported the idea that the consumer agency should help to coordinate information sharing between the states.[326] The House

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[319] *E.g. id.* at 13; *Hearing on Perspectives on the Consumer Financial Protection Agency Before the H. Comm. on Financial Services*, 111th Cong. 5-6 (2009) (statement of Mortgage Bankers Association) (noting preemption encourages competition).

[320] *Testimony of Edward L. Yingling On Behalf of the American Bankers Association Before the Sen. Comm. on Banking, Housing and Urban Affairs*, 111th Cong. 13 (2009); *see also* Suzanne Kapner & Tom Braithwaite, *US Consumer Protection Proposals Attacked*, FINANCIAL TIMES, Mar. 18, 2010 (quoting, among others, John Dugan, the Comptroller of the Currency).

[321] U.S. Department of the Treasury, Financial Regulatory Reform: A New Foundation 61 (2009), *available at* http://www.financialstability.gov/docs/regs/FinalReport_web.pdf; *Hearing on "Consumer Financial Protections in Financial Services: Past Problems, Future Solutions" Before the U.S. Sen. Comm. on Banking, Housing, and Urban Affairs*, 111th Cong. 25 (2009) (statement of Patricia A. McCoy, University of Connecticut School of Law) ("A federal floor would preserve the states' ability to protect their citizens.").

[322] *Id.*

[323] § 1041(a) (2).

[324] *Cf.* Letter from 23 State Attorneys General to Sen. Christopher Dodd, Sen. Richard Shelby, Rep. Barney Frank, and Rep. Spencer Bachus, *available at* http://www.iowa.gov/government/ag/latest_news/releases/aug_2009/CFPA_sign_on_letter.pdf (noting that a federal agency will necessarily be faced with limited resources, a common contributor to agency capture). *But see* Bar-Gill & Warren, *supra* note 27, at 99 n. 325 ("It is not clear that diffuse authority is less prone to regulatory capture than concentrated authority.").

[325] U.S. Department of the Treasury, Financial Regulatory Reform: A New Foundation 61 (2009), *available at* http://www.financialstability.gov/docs/regs/FinalReport_web.pdf

[326] *Id.*

agreed and made state AGs enforcement partners, giving AGs the option to sue individually or in multi-state litigation. The Senate agreed that state AGs could enforce Bureau regulations, but the Act ultimately passed eliminated the ability of state AGs to bring multi-state actions.[327] States must provide the Bureau with notice before bringing any action (unless it is an emergency),[328] and the Bureau retains the right to intervene in any state-initiated action, so the federal agency was well positioned to ensure that its views were known to the court if it disagreed with the AG's position in the case.[329]

The Bureau has primary enforcement responsibility vis-à-vis other federal agencies that may be authorized to bring federal consumer finance actions. Other federal agencies can recommend that the Bureau bring an enforcement action, and if the Bureau opts not to initiate an enforcement proceeding after 120-days, the requesting agency may itself bring such a proceeding on its own.[330]

Thus, the enforcement plan ultimately adopted is a mixed success for consumer interests. Allowing state AGs and other federal agencies to sue helps to check against inaction by the Bureau. But multi-state litigation has been critical to the success of AGs, particularly in the area of financial abuses,[331] so disallowing that form of enforcement may prove particularly damaging to state enforcement efforts.

Consumers scored additional significant victories. They successfully obtained an independent source of funding for the agency apart from the usual budget approval process. Senator Dodd pushed this through because he wanted to insulate the agency from the political pressures that go along with budgetary oversight.[332] The Bureau's funding is to be provided by the Board of Governors of the Federal Reserve in an "amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau under Federal consumer financial law" but capped between 10 and 12 percent of the total operating budget of the Federal Reserve.[333] Thus, industry fees fund the Federal Reserve, which in turn funds the Bureau. But the Bureau's jurisdiction is not optional, so the Bureau need not make any effort to attract fee-paying entities.

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[327] § 1042(a)(1) (specifying that a state AG or his or her equivalent may bring actions only in federal or state courts located within the state); *id.* §1042(a)(2)(B).

[328] *Id.* § 1042(b)(1).

[329] *Id.* § 1042(b)(2). The Bureau can also remove the action to federal court and has a right to appeal to the same extent as if it were a party. *Id.*

[330] 1025(c).

[331] Testimony of Lisa Madigan, Illinois Attorney General, The Causes and Current State of the Financial Crisis, Financial Crisis Inquiry Commission, at 4-6, Jan. 14, 2010 (describing multi-state enforcement actions).

[332] Robert G. Kaiser, *The CFPA: How a crusade to protect consumers lost its steam*, WASH POST G01, Jan. 31, 2010.

[333] *Id.* § 1017(a). The total cap on the budget slowly increased from 10 percent in FY 2011, to 11 percent in FY 2012, to the permanent rate of 12 percent beginning in FY 2013. *Id.* § 1017(a)(2)(A).

In addition, the Act gives the Bureau and its director some tools to generate political support. The Director and Bureau officers need not get testimony or legislative recommendations pre-approved by the Board of Governors or any other agency. Thus, the agency has a direct pipeline to Congress, voters, and the media to express concern over issues.[334]

The Bureau also has the capacity to generate information that may ultimately prove helpful in the political debate. The Act creates a specific unit in the Bureau responsible for researching, among other things, consumer financial products that pose risks to consumers and "consumer awareness and understanding of costs, risks, and benefits" of financial products and services.[335] To assist the Bureau in monitoring for risks to consumers, the Act gives it authority to gather information from examination reports provided to prudential regulators and to require regulated firms to respond to Bureau requests for additional information.[336] Although the Bureau must keep proprietary and customer identification information confidential, it is authorized to make public information in an aggregate form.[337] This function can help the Bureau flag industry abuses and garner public support for regulation if it is otherwise facing resistance from the Council, Congress, or the President.

The Bureau also possesses independent civil litigation authority, so it can bring its own actions in federal court without having to go through the Attorney General and the Department of Justice.[338] The Bureau further has jurisdiction to represent itself before the Supreme Court and need not cede control over an appeal to the Solicitor General.[339]

The Act seemingly seeks to address consumer interests in other ways, though some of these seem structurally unlikely to influence a Director who is otherwise more concerned with banking interests. The prime example of this is the Act's creation of a Consumer Advisory Board to "advise and consult with the Bureau" on consumer finance laws and emerging consumer financial products, services, and trends.[340] The Director appoints the members of the Board and is charge with selecting individuals with expertise in consumer protection, community development, fair lending, and institutions that serve underserved communities.[341] Six members of this body must be selected from recommendations of the regional Federal Reserve Bank Presidents, but the Act does not specify the total number of member. This body is to meet at least twice a year, but it

[334] §1012 (c)(4).

[335] § 1013 (b)(1).

[336] 1022 (c)(4)(B).

[337] 1022(c)(3)(B).

[338] §1054(b).

[339] §1054(e).

[340] §1014 (a).

[341] §1014 (b).

holds no legal authority over the Director, so it is entirely up to the Director how much weight to place on recommendations from this body.

It remains to be seen how this mix of traditional and some equalizing insulators will play out for the Bureau, but it is promising that at least some attention was paid to non-traditional hallmarks of independence in the agency's design.

IV. CONCLUSION

The goal of this Article has been to think about agency independence from the perspective of what independence is trying to accomplish. If the goal of insulation is to obtain long-term rational policy decisions that benefit the public at large and do not reflexively yield to interest group demands, more sophisticated agency design mechanisms should be considered than those typically associated with independent agencies. Removal, OIRA review, and the multi-member commission structure are not irrelevant to capture, but they are hardly enough to insulate an agency from one-sided political pressures.

Of course, no agency can be completely immunized from such pressure. Agencies will remain political bodies regardless of their design. But even if a complete barrier against politics is not possible (nor desirable), buffers can be put in place to reduce unwarranted political pressure that can harm the public interest.

This Article identified some of the most effective, but under-appreciated tools to achieve that end. Unlike removal restrictions, these are not features that spark core constitutional debates about the separation of powers. But they are mechanisms that matter in the real world of agency design, and if the goal in creating agencies is to promote good government, they should no longer be ignored.