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Designing Executive Agencies for Congressional Control

Brian D. Feinstein

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DESIGNING EXECUTIVE AGENCIES FOR CONGRESSIONAL CONTROL

Brian D. Feinstein

THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

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DESIGNING EXECUTIVE AGENCIES FOR CONGRESSIONAL CONTROL

Brian D. Feinstein*
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* Harry A. Bigelow Fellow & Lecturer in Law, University of Chicago Law School; J.D., Harvard Law School, 2012; Ph.D., Government, Harvard University, 2009. Email: bfeinstein@uchicago.edu. I am grateful to Jacob Gersen, Matthew Stephenson, and participants in the Harvard Law School Public Law Workshop for helpful comments.

In an era of intractable legislative gridlock and unabashed governance-by-executive-order, congressional oversight holds promise as a means of buttressing Congress's role in the policymaking process, and thus helping to restore the legislature's place as a co-equal branch. Despite the demonstrated effectiveness of congressional oversight (when it occurs) little is known regarding whether legislators can design administrative agencies so as to strengthen ties between these agencies and their political principals in Congress. Leveraging data on agency characteristics, agency-subcommittee relationships, and congressional oversight, this article explores the connections between various agency design features and congressional oversight levels. The article finds that (i) agencies with leaders that are confirmed by the Senate receive greater attention from congressional overseers; (ii) independent agencies appear to be more independent of congressional as well as presidential control, contrary to a conventional wisdom that they tend to reflect Congress's preferences; and (iii) subcommittee jurisdictional fragmentation or redundancy is associated with greater oversight. Through greater attention to agency design, Congress can create future executive agencies and retrofit existing agencies to optimize congressional control of these agencies in the future. Thus, legislators desiring to reverse their branch's declining influence over the administrative state should devote their attention to the careful design of bureaucratic institutions.

INTRODUCTION

Can agency structures influence levels of congressional control over the administrative state? This question is not merely academic. Debates over the creation of the Consumer Financial Protection Bureau several years ago called attention to the relationship between agency design and political accountability. The agency's unique mix of design features has been a persistent source of controversy since its proposal.¹ Indeed, much of the

¹ See, e.g., Bernie Becker, *Defund, Delay, Defang*, THE HILL, May 3, 2011 (available at <http://thehill.com/blogs/on-the-money/banking-financial-institutions/159097-overnight-money-defund-delay-defang>); Victoria McGrane & Deborah Solomon, *With New Power, GOP Takes On Consumer Agency*, WALL ST. JOURNAL, Nov. 23, 2010.

These design features of the Consumer Financial Protection Bureau

public criticism of the agency has focused on its institutional design.²

At first glance, it may be surprising that institutional design issues figured so prominently in debates over what may be the most consequential new agency created in a generation.³ After all, the agency's regulatory jurisdiction, rulemaking powers, and personnel decisions all may appear more closely connected to policy outcomes. As a growing chorus of administrative law scholars has shown, however, administrative structures play a significant role in enabling political control, and, consequently, in determining policy outcomes.⁴ For instance, Christopher Berry and Jacob Gersen empirically determine that the extent to which the President or Congress controls agency personnel decisions is associated with the degree to which agencies are responsive to those bodies' potential preferences concerning the distribution of government funds.⁵ Writing from a different

include its leadership by a single director, with a fixed term and for-cause removal protection; the relative lack of control mechanisms available to its nominal parent agency, the Federal Reserve Board; and its access to an independent funding source, apart from the congressional appropriations process. *See* Dodd-Frank Act § 1011, 124 Stat. at 1964 (stating its director's employment terms); *Id.* § 1012(c)(2)(A), 124 Stat. at 1965 (preventing the Federal Reserve from "interven[ing] in any matter or proceeding"); *id.* § 1012(c)(2)(B), 124 Stat. at 1966 (prohibiting the Federal Reserve from involvement in Bureau personnel decisions); *id.* § 1012(c)(2)(C), 124 Stat. at 1966 (disallowing the Federal Reserve from reorganizing the agency's structure); *Id.* § 1017(a), 124 Stat. at 1975-76 (requiring that the Federal Reserve transfer any "reasonably necessary" funds that the Bureau requests).

² *See, e.g.*, 156 CONG. REC. S2774 (daily ed. Apr. 29, 2010) (statement of Sen. Richard Shelby).

³ Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEXAS L. REV. 15, 18 (2010).

⁴ *See, e.g.*, Christopher R. Berry & Jacob Gersen, *Agency Design and Distributive Politics*, Working Paper (2010); Barkow, *supra* note __; Daniel E. Ho, *Congressional Agency Control: The Impact of Statutory Partisan Requirements on Regulation* (AM. LAW & ECON. ASS'N, Working Paper No. 73, 2007); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994).

⁵ Berry & Gersen, *supra* note __, at 12-13. In some respects, Berry and Gersen's research serves as a template for this article, in that both their research and this article identify and collect data on a specific outcome-

perspective, Mathew McCubbins, Roger Noll, and Barry Weingast theorize that the design of administrative procedures can encourage agencies to remain faithful to congressional preferences.⁶

Of course, administrative procedures are just one of many agency features that Congress can vary, and the distribution of government monies is one of many possible outcomes that agency design may influence. Institutional designers in Congress also have control over an array of more basic features in agency creation, such as whether an agency is headed by a commission or single individual; whether appointees require Senate confirmation; and the size, scope, and exclusivity of their policy domains. As with administrative procedures, Congress chooses these institutional design features as part of the background framework in which agencies operate. As such, they are potential *ex ante* mechanisms for congressional control.

This article empirically analyzes the extent to which various institutional design features are associated with oversight attention. The article proceeds in four parts. Part I discusses Congress's diminished policymaking authority vis-à-vis the executive branch and argues that legislators' renewed attention to oversight of administrative agencies would reverse this downward trend—with the benefits of oversight amplified were Congress to design agencies so as to maximize the agencies' responsiveness to congressional monitoring. Part II provides an overview of the extant literature of political control over executive agencies, situating the project of determining which agency design features promote or hinder

based measure – monetary outlays in Berry and Gersen, congressional oversight hearings here – and empirically test hypothesized correlations between these respective dependent variables and the presence or absence of various agency design features.

⁶ See Mathew McCubbins, Roger Noll, & Barry Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989) [hereinafter McNollgast, *Structure and Process*] (identifying the APA, 5 U.S.C. §§ 551–559, 701–706, as *ex ante* means of ensuring that agencies are politically responsive to affected interest groups). See also Kathleen Bawn, *Political Control Versus Expertise: Congressional Choices about Administrative Procedures*, 89 AM. POL. SCI. REV. 62 (1995); Epstein & O'Halloran, *supra* note __; McNollgast, *Procedures as Instruments*, *supra* note __; McCubbins & Schwartz, *supra* note __, at 173. See generally Arthur Lupia & Mathew McCubbins, *Designing Bureaucratic Accountability*, 57 LAW & CONTEMP. PROBLEMS 91 (1994) (providing examples of administrative procedures that Congress can manipulate to further its goals).

congressional oversight in a larger literature on institutional design. Parts III and IV, respectively, present and test a set of hypotheses concerning agency features that may be correlated with oversight activity.

I. THE UNFULFILLED PROMISE OF CONGRESSIONAL GOVERNMENT

A. The Need for Congress as a Co-Equal Branch

It is difficult to overstate the importance of a well-functioning Congress to American democracy. William Blackstone warned that the “total union” of legislative and executive functions “would be productive of tyranny,” whereas the “total disjunction of them for the present, would in the end produce the same effects, by [eventually] causing that union against which it seems to provide.”⁷ Recognizing both the dangers of unified control of the federal government and the inherent instability of completely distinct legislative and executive functions, the founders devised a system of co-equal branches, which allows “[a]mbition . . . to counteract ambition.”⁸ This system, which political scientist Richard Neustadt characterized as “separated institutions sharing power,”⁹ serves as a bulwark against tyranny, providing an “auxiliary precaution[.]” that “oblige[s] . . . [the federal government] to control itself.”¹⁰

Beyond keeping potential tyrants in-check, a co-equal Congress provides many other good-government benefits. For instance, a group of Brookings Institution scholars argues that deeper congressional involvement *ex ante* in new policy proposals would encourage pre-enactment cost-benefit analyses and that greater attention to oversight *ex post* could decrease the likelihood of major policy failures.¹¹ The involvement of a

⁷ 2 WILLIAM BLACKSTONE, COMMENTARIES 149 (1765).

⁸ The Federalist No. 51 (James Madison).

⁹ RICHARD NEUSTADT, PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP 42 (1964); *see also* M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1147–52 (2000).

¹⁰ The Federalist No. 51 (James Madison).

¹¹ *See* Sarah A. Binder, Thomas E. Mann, Norman J. Ornstein & Molly Reynolds, *Assessing the 100th Congress, Anticipating the 111th*, BROOKINGS INSTITUTION (Jan. 8, 2009), http://www.brookings.edu/papers/2009/0108_broken_branch_binder_mann.aspx.

collective legislature in the policymaking process promotes deliberation, facilitates the participation of diverse groups, and encourages transparency in policymaking—all of which lead to better reasoned and more democratically reflective policy outcomes.¹² Further, public debate and contestation between Congress and the executive branch can perform a truth-revealing function, akin to adversarial proceedings in court.¹³

B. Congress’s Shirking Role in Governance

Despite the vital role that Congress was designed to play, congressional capacity—i.e., Congress’s relative influence over the nation’s legal landscape—is waning.¹⁴ Over the past several Congresses, there has been a marked drop in laws enacted, a decreased willingness of the Senate to consider presidential nominees, and record numbers of cloture votes per session.¹⁵

With Congress’s role in policymaking on the decline,¹⁶ the executive branch has stepped in. Since the New Deal era, presidents have been increasingly willing to set policy via executive order.¹⁷ The creation

¹² See generally JAMES FISHKIN, *WHEN THE PEOPLE SPEAK: DELIBERATIVE DEMOCRACY AND PUBLIC CONSULTATION* (2009) (on the benefits of deliberation in policymaking); Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099 (2005) (on first- and second-order diversity); Sudha Setty, *No More Secret Laws: How Transparency of Executive Branch Legal Policy Doesn’t Let the Terrorists Win*, 57 U. KAN. L. REV. 579 (2009) (on transparency).

¹³ See Josh Chafetz, *Congress’s Constitution*, 160 U. Penn. L. Rev. 715, 771 (2012).

¹⁴ See THOMAS MANN & NORMAN ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* 97 (2006).

¹⁵ See Michael J. Teter, *Gridlock, Legislative Supremacy, and the Problem of Arbitrary Inaction*, 88 NOTRE DAME L. REV. 2217, 2218-19 (2013).

¹⁶ See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2311 (2001) (“[T]he possibility of significant legislative accomplishment . . . has grown dim in an era of divided government with high polarization . . .”).

¹⁷ See Terry M. Moe & William G. Howell, *The Presidential Power of*

of the White House Office of Management & Budget in the 1970s and the empowerment, beginning in the 1980s and 1990s, of its Office of Information & Regulatory Affairs to reject proposed regulations based on cost-benefit analysis further bolstered presidential control.¹⁸

The trend toward “presidential administration” has continued unabashedly during the Obama administration. During one twelve-month period in 2011 and, President Obama announced forty-five executive actions under his administration’s “We Can’t Wait” initiative.¹⁹ For instance, after a Senate filibuster blocked an up-or-down vote on the DREAM Act,²⁰ which, *inter alia*, would have authorized the issuance of work visas to certain undocumented immigrants who arrived in the United States before age sixteen, President Barack Obama implemented a policy in 2012 to do just that.²¹

The very title of the “We Can’t Wait” initiative implies that, while Congress *ought to* act, the President will act where Congress has not done so. As such, it conveys a lack of patience with traditional notions of legislative supremacy that hold Congress to be the nation’s lawmaker.²² In some instances, however, President Obama has gone still further, not even providing an opportunity for Congress to act before announcing unilateral executive action.²³

Unilateral Action, 15 J.L. ECON. & ORG. 132, 133 (1999).

¹⁸ See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2275-81, 2285-90 (2001).

¹⁹ See Kenneth S. Lowanda and Sidney M. Milkis, “*We Can’t Wait*”: Barack Obama, Partisan Polarization and the Administrative Presidency, 12 THE FORUM 3, 9 (2014).

²⁰ DREAM Act of 2010, S. 3962, 111th Cong. (2010).

²¹ Christi Parsons & Kathleen Hennessey, *Thwarted by Congress, Obama to Stop Deporting Young Illegal Immigrants*, L.A. TIMES (June 15, 2012), <http://articles.latimes.com/2012/jun/15/news/la-pn-thwarted-by-congress-obama-will-stop-deporting-young-illegal-immigrants-20120615>.

²² Cf. Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 293 (1989) (“Violations of the [legislative] supremacy principal are particularly serious because they impair the basic social norm of democratic self-government.”).

²³ See *id.* at 6 (“The Obama administration . . . occasionally resorted to unilateral action as a *first* resort in bringing about non-incremental policy

Moreover, recent developments suggest that even greater centralization of policymaking authority in the executive branch is on the horizon. Eric Posner points to the “normaliz[ation]” Federal Reserve’s sustained, post-financial crisis policy of purchasing bonds to stimulate economic growth, which is an “overtly fiscal aspect[] of central bank activity.”²⁴ Because the “power to tax and spend is at the core of sovereign power,” a regulatory agency’s gradual intrusion into the core of Congress’s authority may be a harbinger of even greater diminution of Congress’s role in governance in the future.²⁵

C. The Promise of Oversight in Restoring Congress’s Role

In light of the substantial delegation of policymaking authority from the legislative to the executive branch²⁶ and taking as a given Congress’s unwillingness to overcome legislative gridlock to reassert its primacy,²⁷ congressional oversight of agency action is perhaps the most powerful tool that Congress has to exercise some measure of control over administrative policy.²⁸ An empirical examination of the consequences of congressional oversight reveals that bureaucratic issues that are the subject of committee hearings are 22 percent less likely to reoccur than are similar bureaucratic issues that are not subject to hearings.²⁹ This 22 percent reduction in the

change.”) (emphasis in original).

²⁴ Eric Posner, “The Next Stage in Administrative Centralization: Fiscal Policy.” *Available on-line at* <http://ericposner.com/the-next-stage-in-administrative-centralization-fiscal-policy> (Aug. 29, 2016).

²⁵ *Id.*

²⁶ *See supra* at ____.

²⁷ *See* Michael J. Gerhardt, *Why Gridlock Matters*, 88 NOTRE DAME L. REV. 2107, 2107-08 (2013) (describing “praise for gridlock” from prominent political observers).

²⁸ *See* Brian D. Feinstein, *Congressional Government Rebooted: Randomized Committee Assignments and Legislative Capacity*, 7 HARV. L. & POL’Y REV. 139, 159 (2013).

²⁹ *See* Brian D. Feinstein, OVERSIGHT, DESPITE THE ODDS: ASSESSING CONGRESSIONAL COMMITTEE HEARINGS AS A MEANS OF CONTROL OVER THE FEDERAL BUREAUCRACY 18 (2009) (unpublished Ph.D. dissertation, Harvard University) (on file with Pusey Library, Harvard University).

recurrence of bureaucratic “infractions” following congressional attention – which is statistically significant, holds true when controlling for a battery of potentially relevant factors, and is robust to various model specifications – demonstrates that committee oversight hearings can be a remarkably effective means of channeling administrative action towards Congress’s preferences.³⁰ Further, oversight thus offers Congress a second, indirect means of impacting policy; Douglas Kriner and Eric Schickler demonstrate increases in the number of high-profile oversight hearings are correlated with decreased public support for the President.³¹

In a climate of heightened legislative gridlock and a turn toward government-by-executive-action, oversight holds great potential as a means of congressional control over the administrative state. This demonstrated promise of oversight is encouraging to those that believe that Congress ought to get off the sidelines and re-take its central place in governance. Yet, despite oversight’s demonstrated effectiveness – and even greater *potential* effectiveness – little is known about how Congress can optimize the effectiveness of the oversight that it conducts. Namely, can Congress design executive agencies in a manner that maximizes these agencies’ responsiveness to congressional overseers? This article seeks to answer this question.

II. PAST SCHOLARSHIP ON POLITICAL CONTROL OF THE BUREAUCRACY

This article is situated within a literature on optimizing agency design to encourage incentive-compatibility between administrative agencies and the political branches.³² This past scholarship can be divided into three subgenres. First, positive political theorists have explored how the design of administrative procedures can encourage agencies to remain faithful to congressional preferences.³³ Much of this literature is vague

³⁰ *See id.*

³¹ *See* Douglas Kriner & Eric Schickler, *Investigating the President: Committee Probes and Presidential Approval, 1953–2006*, at 12–17 (2011) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1900886.

³² These studies notwithstanding, I will argue that the amount of attention that public administration scholarship has devoted to connections between agency design and congressional influence has not been commensurate with the subject’s importance.

³³ *See, e.g.*, Kathleen Bawn, *Political Control Versus Expertise:*

about what specifically constitutes an administrative procedure, process or structure, leading to claims that may be unfalsifiable.³⁴ Others writing in this area focus on the Administrative Procedure Act (APA) of 1946³⁵ as an *ex ante* means of ensuring that agencies are politically responsive to affected interest groups.³⁶ The fact that the APA provides a procedural floor for virtually all agency rulemakings,³⁷ however, stymies empirical

Congressional Choices about Administrative Procedures, 89 AM. POL. SCI. REV. 62 (1995); David Epstein and Sharyn O'Halloran, *Administrative Procedures, Information, and Agency Discretion*, 38 AM. J. POL. SCI. 697 (1994); Mathew 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 (1989) [hereinafter McNollgast, *Structure and Process*]; McNollgast, *Procedures as Instrument*, *supra* note 10; Mathew McCubbins and Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 173 (1984). *See generally* Arthur Lupia and Mathew McCubbins, *Designing Bureaucratic Accountability*, 57 L. & CONTEMP. PROBLEMS 91 (1994) (providing examples of administrative procedures that Congress can manipulate to further its goals). These studies conceptualize “congressional preferences” as the preferences either of the enacting legislative coalition or the current Congress.

³⁴ *See* Robinson, *supra* note 10, at 487 (claiming that the “generic terms” in McNollgast’s model, e.g., “‘process’ and ‘structure’ ... can cover a wide range of procedural and organizational variation,” making them “not very helpful in focusing our search for corroborative evidence”). *But see* Bawn, *supra* note, at 62 (providing greater specificity regarding the administrative procedures that Congress may use to slant agency decisions towards the enacting coalitions’ current preferences or the prospective preferences of favored interests groups). Bawn cites the criteria for selecting outside participants in agency decision-making; the rules governing the timing of agency decisions; and the method by which outside parties may challenge agency decisions as examples of administrative procedures that Congress can manipulate to privilege certain groups in the administrative process. *Id.*

³⁵ 5 U.S.C. §§ 551–559, 701–706 (2000 & Supp. IV 2004).

³⁶ *See* McNollgast, *Structure and Process*, *supra* note 13; McNollgast, *Procedures as Instruments*, *supra* note 10.

³⁷ JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 6 (2006). *But see* 5 U.S.C. §§ 551(1) (listing agencies that are exempted from APA coverage). Also note that the APA’s procedural floor does not extend

tests of the supposed “deck-stacking” consequences of these procedural defaults. In other words, the relative lack of variation in rulemaking procedures below what the APA requires makes quantitative analysis of its effects challenging.³⁸

Of course, administrative procedures are just one of many agency features that Congress may vary. Institutional designers in Congress also have control over an array of more basic features in agency creation, e.g., whether an agency is headed by a commission or single individual; whether appointees require Senate confirmation; and the size, scope, and exclusivity of their policy domains. As with administrative procedures, Congress chooses these institutional design features as part of the background framework in which agencies operate. As such, they are potential *ex ante* mechanisms for congressional control. It is reasonable to assume, therefore, that congressional designers, interested in structuring agencies to be responsive to the enacting coalition, future Congresses, or favored interest groups may devote attention to agency design issues as well as administrative procedures. Despite the theoretical importance of agency design features to *ex ante* congressional control, however, the formal theoretical literature has largely ignored these fundamental design features, instead focusing on administrative procedures.³⁹

Second, numerous case studies have examined the institutional features of particular agencies, probing the interaction between institutional design and responsiveness to political principals.⁴⁰ Unlike much of the work in the other two sub-literatures discussed in this section, authors of

to agency adjudications. *See Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950) (holding that, although the APA provides the default rules for adjudications, the APA does not apply in cases where another statute explicitly mandates procedures that satisfy the Due Process Clause, even if these procedures fall below what the APA would otherwise have required).

³⁸ *But see* 5 U.S.C. §§ 551(1) (listing agencies that are exempted from APA coverage).

³⁹ *But see* Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J. L. ECON. & ORG. 93 (1992) (arguing, in a narrative essay, that Congress’s decision to charge an agency with regulating one or multiple industries will have policy consequences).

⁴⁰ *See* Berry and Gersen, *supra* note 5 (providing a list of these case studies concerning the institutional design and political responsiveness of particular agencies, e.g., the FTC, NLRB, FERC, IRS, Army Corps of Engineers, ICC, Forest Service, EPA, Federal Reserve, and EEOC).

these single agency studies seek to determine the extent to which agencies with various design features are responsive to Congress or the President,⁴¹ or whether agency action varies with the political composition of the elected branches.⁴² Since scholarship situated within this literature focuses exclusively on one particular agency, the lack of variation in design features studied prevents these authors from offering inferences concerning the relative role of particular design features on outcomes.⁴³

Third, a set of authors has undertaken empirical studies of institutional design.⁴⁴ Scholarship in this vein often examines how the political climate at the time of an agency's creation is associated with different agency design features. Various features of the political climate (e.g., divided government) are operationalized as independent variables, with a particular agency design feature being the dependent variable. With this methodological framework, these studies examine what political factors influence agency design. They do not address how, if at all, agency design features impact the ongoing, post-enactment relationship between agencies and their political principals.

Christopher Berry and Jacob Gersen's work on agency design

⁴¹ *See id.*

⁴² *See* David M. Hedge and Renee J. Johnson, *The Plot that Failed: The Republican Revolution and Congressional Control of the Bureaucracy*, 12 J. PUB. ADMIN. RES. & THEORY 333 (2002) (finding that two agencies cut back on their regulatory activities following the Republicans regaining control of Congress in 1995).

⁴³ *See* Berry and Gersen, *supra* note 5 (noting that “studies of individual agencies ... are largely incapable of identifying the role of agency design on responsiveness ... [because (1)] the relevant institutional features almost never vary within a single agency ... [and (2)] most policy outputs—where one would look to see evidence of political control—are not readily comparable across agencies”).

⁴⁴ *See, e.g.*, DAVID EPSTEIN AND SHARYN O'HALLORAN, *DELEGATING POWERS* (1999); DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE* (2008); DAVID E. LEWIS, *PRESIDENTS AND THE POLITICS OF AGENCY DESIGN* (2003). *See also* Craig W. Thomas, *Reorganizing Public Organizations: Alternatives, Objectives, and Evidence*, 3 J. PUB. ADMIN. RES. & THEORY 457, 457 (1993) (noting that “empirical studies of the effects of specific reorganizations always have lagged well behind the theoretical claims” in the public administration literature).

features and distributive politics stands apart from these three strands of the literature on institutional design and agency responsiveness.⁴⁵ Berry and Gersen test whether a host of agency characteristics are correlated with agency responsiveness to Congress and the President. These authors marshal data on federal spending by agency and congressional district to determine whether agencies with specific structural features tend to disperse more funds to districts represented by majority party members or the President’s co-partisans than do agencies without those features.⁴⁶ They find that the extent to which the President or Congress controls agency personnel decisions is associated with the degree to which agencies are responsive to those bodies’ potential preferences.⁴⁷ In some respects, Berry and Gersen’s work serves as a template for this article, in that both articles seek to determine how agency design features affect outcomes. Specifically, both articles identify and collect data on a specific outcome-based measure – monetary outlays in Berry and Gersen, congressional oversight hearings in this article – and empirically test hypothesized correlations between these dependent variables and the presence or absence of various agency design features.

This article contributes to the existing literature on agency design and political responsiveness by empirically analyzing how various institutional design features are associated with a cognizable outcome: congressional oversight activity. This article differs from much of the formal theoretical literature in that it moves beyond theoretical claims regarding “administrative procedures” or vaguely defined agency characteristics to quantitatively examine specific design features. The study’s large sample encompasses all bureaus in existence during the 1987-2004 period, allowing for significant variation in the design features under study.⁴⁸ This variation is necessary to make inferences regarding the

⁴⁵ Berry and Gersen, *supra* note 5.

⁴⁶ *Id.*

⁴⁷ *Id.* at 12-13. More specifically, they find that (i) the advantage that members of the President’s party have in receiving federal funds to their districts is positively correlated with the agency’s proportion of political appointees; and (ii) the advantage that members of the majority party have in receiving federal funds is positively correlated with the agency’s proportion of Senate-confirmed appointees. *Id.* They also comment on the connections between outlays and other design features, including for-cause removal and agency governance by a multi-member board. *Id.* at 16-17.

⁴⁸ These years correspond to the 100th through 108th Congresses.

possible associations between design features and outcomes. Departing from most prior empirical work – with the exception of Berry & Gersen – I utilize two outcome-based measures, House and Senate oversight activity, to examine the correlations between various agency characteristics and actual outputs.⁴⁹

The design features included in this article are not exhaustive, but rather represent what I believe should be an early step in a larger research agenda probing the relationship between the institutional design of administrative agencies and congressional oversight. Such explorations are worthwhile, because, as Part II demonstrates, oversight enables Congress to retain some measure of control over delegated powers. Thus, greater attention to agency design may provide a window into how to optimize congressional influence over the administrative state.

III. HYPOTHESES

A. Congress's Initial Involvement in Agency Creation

According to Randall Calvert, Mathew McCubbins, and Barry Weingast, whether an agency is more responsive to Congress or the President depends primarily on the relative involvement of each branch in the agency's initial design.⁵⁰ As a test of these authors' positive claim that *ex ante* design decisions are the central means by which the political branches can exercise influence over agency policy outcomes,⁵¹ I examine the connection between congressional oversight levels and whether an agency was created via congressional or executive action.⁵² Following their theory, I hypothesize that Congress will devote greater attention to agencies

⁴⁹ *But see* Berry and Gersen, *supra* note 5 (employing federal spending as a dependent variable common to all studied agencies).

⁵⁰ Randall L. Calvert, Mathew D. McCubbins, & Barry R. Weingast, *A Theory of Political Control and Agency Discretion*, 33 AM. J. POL. SCI. 588, 604 (1989).

⁵¹ *Id.* at 604-05.

⁵² Although most agencies are established via statute, a nontrivial number are created via executive order, reorganization plan, or departmental order. See David E. Lewis, *Administrative Agency Insulation Data Set Code Book*, available at IQSS Dataverse Network, http://dvn.iq.harvard.edu/dvn/faces/study/StudyPage.xhtml?globalId=hdl:1902.1/10129&studyListingIndex=0_d1de20ebf2b96353b798a93359b8.

that are statutory creations, since Congress may have a greater ability to influence these agencies.

Hypothesis 1: Congress devotes greater attention to overseeing agencies that were created via statute.

Extending this logic, Congress may devote greater attention to agencies that are headed by Senate-confirmed appointees, since the Senate confirmation process provides another means to promote agency responsiveness to congressional interests. The adage “personnel is policy” has long been used in Washington to describe the importance for a new President to appoint political loyalists.⁵³ Senators also understand the vital role that appointees play in setting policy, and therefore bargain aggressively with the President over personnel.⁵⁴ The Senate’s advice and consent function in considering thousands of nominees annually may enable the chamber to play an outsized role in influencing agencies whose leaders must receive Senate approval.⁵⁵ It follows that the Senate’s greater ability to influence agencies headed by Senate-confirmed appointees may make oversight attention to these agencies more productive and rewarding for senators. Thus, I hypothesize that the Senate will devote greater oversight attention to agencies that are headed by Senate-confirmed appointees.

Hypothesis 2: The Senate more frequently oversees agencies whose leaders are Senate-confirmed appointees.

⁵³ See, e.g., PETER W. RODMAN & HENRY KISSINGER, *PRESIDENTIAL COMMAND* 145 (2009); STEVEN F. HAYWARD, *THE AGE OF REAGAN* 252 (2009); JOEL D. ABERBACH & MARK A. PETERSON, EDs., *THE EXECUTIVE BRANCH* 27 (2005).

⁵⁴ See Calvert, McCubbins, & Weingast, *supra* note ____.

⁵⁵ See Nolan McCarty & Rose Razaghian, *Advice and Consent: Senate Responses to Executive Branch Nominations, 1885-1996*, 43 AM. J. POL. SCI. 1122, 1142 (1999) (noting that the Senate’s role in the appointments process “give[s] it a privileged position in bureaucratic politics”); 143 CONG. REC. D2 (daily ed. Jan. 7, 1997) (reporting that the Senate considered over 3,800 nominees to civilian positions in the executive branch during the 104th Congress).

B. “Independent” Agencies

Are independent agencies “independent” of political influence, or merely free from presidential control?⁵⁶ Many of the design features of independent agencies appear aimed at insulating agency decision-makers from *all* outside sources of political influence. Features such as the lack of any one actor exercising complete control over appointment decisions, the presence of for-cause removal provisions, fixed term lengths that span multiple congressional or presidential election cycles, and expertise requirements that prospective appointees must meet all conceivably could shield independent agencies from political pressure emanating from any outside source.⁵⁷

The notion that these institutional design measures at least partially insulate independent agencies from presidential politics is widely accepted among scholars.⁵⁸ The extent to which independent agencies are shielded

⁵⁶ The term “independent agency” may have different meanings for different observers. The most commonly accepted definition of agency independence is that the President may only remove the agency head for just cause. *See, e.g.*, Berry & Gersen, *supra* note __; Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 610 (2010); Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1138 (2000). For other definitions, see Jacob E. Gersen, *Designing Agencies*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 333 (Daniel A. Farber & Anne Joseph O’Connell, eds., 2010) (employing a totality-of-the-circumstances test, with an agency’s placement along an “independent-to-executive-dominated scale” involving a multi-factor assessment); B. Dan Wood & Richard W. Waterman, *The Dynamics of Political Control of the Bureaucracy*, 85 AM. POL. SCI. REV. 801 (1991) (considering whether an agency was established outside of an existing cabinet department as the relevant measure of independence).

⁵⁷ *See* Terry M. Moe, *Political Control and the Power of the Agent*, 22 J.L. ECON. & ORG. 1 (2006). *But cf.* Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent*, 15 CARDOZO L. REV. 273, 274-75 (1993) (arguing that the attitudes of the relevant political actors may be more important than these more concrete factors in determining the degree of presidential control).

⁵⁸ *See, e.g.*, Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV.

from congressional influence, however, is less clear. One perspective holds that the design features common to independent agencies make these entities autonomous from political actors in general – including, presumably, Congress.⁵⁹ For instance, consider for-cause removal provisions, which not only restrict the President’s ability to dismiss senior agency leaders, but also prevent members of Congress from pressuring the President to do so.⁶⁰ Furthermore, a strand of case law casts a skeptical eye

459, 464 (2008) (“when members of Congress fear the administrative influence of the current President on policies post-enactment, they are more likely to create independent commissions”); B. Dan Wood & John Bohte, *Political Transaction Costs and the Politics of Administrative Design*, 66 J. POL. 176, 199 (2004) (asserting that “when there is high executive-legislative conflict,” Congress creates independent agencies to “constrain the president and future legislative coalitions”); Kagan, *supra* note __, at 2271 (noting that limitations on the President’s removal powers serve to “insulate the administrative state from the President”); DAVID EPSTEIN & SHARYN O’HALLORAN, *DELEGATING POWERS* 154-62 (1999) (finding that Congress is less likely to create agencies under presidential control during periods of divided government, and suggesting that Congress believes that creating independent agencies could limit the power that an opposition-party President may wield).

⁵⁹ See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2376–77 (2006) (noting that independent agencies were intended “as means to limit the sphere over which partisan political power could exert control”); Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 259–60 (adding the independent agencies are “designed to isolate ... decisionmakers from politics”).

⁶⁰ For-cause removal provisions typically allow dismissal only for “inefficiency, neglect of duty, or malfeasance in office.” See, e.g., 42 U.S.C. § 5841(e) (2006) (removal provision for members of the Nuclear Regulatory Commission). Thus, agency policymakers may take lawful actions that conflict with other political actors’ preferences, without fear of being removed from office. See Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 609 (1989). It is important to note, however, that the Supreme Court has not defined what constitutes “good cause” reasons for removal, creating a degree of uncertainty in the doctrine. See *Bowsher v. Synar*, 478 U.S. at 729 (stating that removal provisions are “very broad and, as interpreted by Congress, could sustain removal ... for any number of actual or perceived transgressions”).

towards the argument that certain common features of independent agencies serve to pull agency decision-makers towards congressional preferences. In *Humphrey's Executor*, the Supreme Court accepted on its face congressional arguments that fixed terms for some agency officials are needed for bureaucratic efficacy – and not for the purposes of congressional aggrandizement at the President's expense.⁶¹ More recently, in *Morrison v. Olson*, the Court rejected the view that a congressionally-created removal protection provision – restricting the Attorney General's ability to remove the independent counsel – constituted a congressional attempt “to gain a role in the removal of executive officials.”⁶² In addition, recent law review commentary concerning the establishment of the Consumer Financial Protection Bureau reflects the view that the establishment of fixed terms for the agency's director – another feature of independent agencies – will insulate that agency not only from the White House, but also from Congress.⁶³

An opposing perspective contends that design features common to independent agencies do not insulate these entities from political influence in general, but rather serve to move agency decisions away from presidential preferences and towards Congress.⁶⁴ According to Steven

⁶¹ *Humphrey's Ex'r v. U.S.*, 295 U.S. 602, 624 (1935) (noting that “legislative reports ... clearly reflect the view that a fixed term was necessary to the effective and fair administration of the law”). The Court's willingness to allow institutional designers to insulate agency personnel from the President, however, has its limits. *See* *Free Enterprise Fund v. Public Company Accountability Oversight Board*, 130 S.Ct. 3138 (2010) (prohibiting “dual for-cause limitations on the removal” of Board members, in a situation where members of the Board and of its supervising entity both enjoyed for-cause removal protections); *Buckley v. Valeo*, 424 U.S. at 121 (disallowing congressional appointment of Federal Election Commissioners).

⁶² *Morrison v. Olson*, 487 U.S. 654, 657 (1988).

⁶³ *Administrative Law – Agency Design – Dodd-Frank Act Creates the Consumer Financial Protection Bureau*, 124 HARV. L. REV. 2123, 2125 (2011).

⁶⁴ *See, e.g.*, DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE* (2008); Peter L. Strauss, *The Place of Agencies: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984) [hereinafter Strauss, *The Place of Agencies*]. *See also* Anne Joseph O'Connell, *Qualifications: Law*

Calabresi and Saikrishna Prakash, when institutional designers isolate agencies from the President, Congress fills the power vacuum.⁶⁵ Case studies concerning the Equal Employment Opportunity Commission, Federal Trade Commission, and Nuclear Regulatory Commission provide support for this assertion, showing that these “independent” agencies are remarkably attune to congressional preferences.⁶⁶ The Supreme Court in *FCC v. Fox Television Stations* put the matter most bluntly, concluding: “independent agencies are sheltered not from politics, but from the President, and ... their freedom from presidential oversight (and protection) has simply been replaced by increased subservience to congressional direction.”⁶⁷

and Practice of Selecting Agency Leaders, Working Paper (2011) (detailing congressionally-imposed qualifications requirements for certain executive branch officials, the presence of which may empower Congress at the President’s expense).

⁶⁵ Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 582-83 (“There is no such thing in Washington as a politically ‘independent’ agency.”).

⁶⁶ See Hedge & Johnson, *supra* note __ (determining that the EEOC and NRC decreased their regulatory requirements following the transfer of congressional power to deregulation-favoring Republicans in 1995); Weingast & Moran, *supra* note __ (describing how the FTC seriously considered the political preferences of those congressional subcommittees with jurisdiction over the agency).

⁶⁷ Fed. Commc’ns Comm’n v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1815 (2009). Why is it that independent agencies could be considered subject to greater congressional, rather than presidential, control? First, with the President exercising comparatively less control over independent agencies than executive departments, the relative balance of power between the White House and Congress for influence may simply shift in the latter’s favor. See Calabresi & Prakash, *supra* note __, at 583 (“[A]bsent presidential control, congressional oversight and appropriations powers become the only concern for the officers of the allegedly ‘independent’ agencies”). Cf. Chadha, 462 U.S. at 951 (providing a “hydraulic pressure” rationale for why one institution would gain relative power if restrictions are placed on a competing institution’s ability to exert influence). Second, independent agencies may be more susceptible to interest group capture than executive departments, and these deeper ties to interest groups, in turn, link independent agencies more closely with Congress. See Herbert Kaufman, *Emerging Conflicts in the Doctrines of*

These two perspectives provide competing views on the extent to which independent agencies are subservient to Congress. To assess these perspectives, I examine the connections between two common features of independent agencies – fixed terms for appointees and statutory mandates on appointee qualifications⁶⁸ – and congressional oversight activity. A hypothetical finding that agencies with these characteristics are subject to greater congressional attention than are those agencies over which the President’s authority is less restricted would suggest that independent agencies may not be truly independent. Instead, this hypothetical finding would suggest that these entities may more accurately be considered congressionally-controlled agencies – or, at least, agencies over which Congress exercises relatively more power. A contrary or null finding – either that these agencies are subject to *less* attention from congressional overseers than are executive departments, or that one cannot draw any conclusions with sufficient certainty – would suggest that perhaps independent agencies are truly independent, with their design features effectively limiting some forms of congressional as well as presidential

Public Administration, 50 AM. POL. SCI. REV. 1057, 1063 (1956); *see also* Steven G. Calabresi & Nicholas Terrell, *The Fatally Flawed Theory of the Unbundled Executive*, 93 MINN. L. REV. 1696, 1701-02 (2009) (describing interest group capture of congressional committees); Scher, *supra* note __, at 533-34 (noting that legislators “who have established mutually rewarding relationships with agency people tend to be reluctant to ... engage in a close review of that agency’s affairs”). If independent agencies are in fact more likely to be captured, then this subcommittee-agency-interest group nexus will likely be stronger – and, thus, the potential for congressional influence higher – for independent agencies than executive departments.

⁶⁸ Appointee qualification requirements often relate to potential appointees’ professional training or background. *See, e.g.*, the Post-Katrina Emergency Management Reform Act of 2006, Pub. L. No. 109-295, §611(11) (2006), 6 U.S.C. § 313(c)(2) (requiring that the FEMA administrator possess both “a demonstrated ability in and knowledge of emergency management and homeland security” and at least “five years of executive leadership and management experience”); 49 U.S.C. §§ 701(b)(1)-(2) (2006); 15 U.S.C. §§7211(e)(1)-(2) (2006); and 42 U.S.C. § 2286(b)(1) (2006) (requiring that members of, respectively, the Surface Transportation Board, Public Company Accounting Oversight Board, and Defense Nuclear Facilities Safety Board possess expertise in their relevant areas); Barkow, *supra* note __, at 47-48 (noting that other executive branch subunits place restrictions on leaders’ concurrent employment and investments or post-public service employment).

influence. Hypotheses 7 and 8 test these claims.

Hypothesis 3: Agencies with fixed terms for appointees receive greater oversight attention from Congress.

Hypothesis 4: Agencies with statutory mandates regarding appointee qualifications receive greater oversight attention.

C. Foreign Policy Function

Perhaps the most obvious agency feature that may be correlated with oversight levels is the agency's subject matter.⁶⁹ According to Aaron Wildavsky's well-known "two presidencies" thesis, Congress is more likely to defer to the President's judgment in the realm of foreign affairs.⁷⁰ Although this theory is not without its critics, it retains significant currency among many scholars.⁷¹ Therefore, one might expect lower oversight activity in concerning foreign policy issues. Hypothesis 5 captures this logic.

Hypothesis 5: Congress devotes less attention to agencies that are focused on foreign policy issues.

IV. CONNECTING AGENCY DESIGN TO CONGRESSIONAL ATTENTION

⁶⁹ Of course, an agency's function is not a "design feature" in the same sense as the other features discussed in this article. Still, this factor is included as a potentially important control variable.

⁷⁰ Aaron Wildavsky, *The Two Presidencies*, 4 TRANS-ACTION 7 (1966).

⁷¹ Compare WILLIAM G. HOWELL & JON PEVEHOUSE, WHILE DANGERS GATHER: CONGRESSIONAL CHECKS ON PRESIDENTIAL WAR POWERS (2007); David Karol, *Divided Government and U.S. Trade Policy: Much Ado about Nothing*, 54 INT'L ORG. 825 (2000) (questioning the validity of Wildavsky's thesis) and Brandice Canes-Wrone, William G. Howell, & David E. Lewis, *Toward a Broader Understanding of Presidential Power: A Reevaluation of the Two Presidencies Thesis*, 70 J. POL. 1 (2008); JOANNE GOWA, BALLOTS AND BULLETS: THE ELUSIVE DEMOCRATIC PEACE (1998); LOUIS FISHER, PRESIDENTIAL WAR POWER (1995) (all offering at least qualified support for the theory).

These hypotheses are tested using the previously-described agency infractions and oversight hearings datasets.⁷² The unit of analysis is the individual infraction. The dependent variable is an event count of the number of oversight hearings held by committees and subcommittees between the 102nd and 109th Congresses (1991-2006) for each infraction.

Next, I operationalize the agency design hypotheses as independent variables. To determine whether an agency can be considered a congressional or executive creation, I examined whether the agency came into being via a specific statute or some other means.⁷³ Following political scientist David Lewis's lead, I considered an agency to be created by legislation only if a statute explicitly mandated that a new organizational unit be created.⁷⁴ Lewis provides these data for agencies created between 1946 and 1997 in a publicly available online database.⁷⁵ For all other years,

⁷² Before proceeding to test these hypotheses, it is important to note that agency design features are not randomly assigned, leading to a potential endogeneity concern. Rather, members of Congress may design administrative institutions with a deliberate eye towards making certain agencies relatively more responsive to current and future Congresses, and other agencies relatively more responsive to current and future presidents. The extent to which Congress engages in strategic institutional design of this sort is not known, but could be explored in future research. Even if one believes that such behavior occurs with any regularity, however, the analysis in this article is still valuable, as it offers insights into the degree to which such efforts are successful.

⁷³ "Agencies" are defined to include independent agencies, commissions, and all organizational units located one level below executive departments. Due to difficulties obtaining data, subunits within the Executive Office of the President are excluded from the analysis.

⁷⁴ DAVID E. LEWIS, *PRESIDENTS AND THE POLITICS OF AGENCY DESIGN* (2003). All other methods of agency establishment – e.g., executive order, reorganization plan, departmental order, or, in a few instances, congressional delegation of authority to create a new unit (without requiring that the executive branch create the new unit) – were considered executive-driven. See Lewis, *Administrative Agency Insulation Data Set Code Book*, *supra* note ____.

⁷⁵ David E. Lewis, *Replication data for: Presidents and the Politics of Agency Design: Administrative Insulation Data Set, 2003*, available at IQSS Dataverse Network, http://dvn.iq.harvard.edu/dvn/faces/study/StudyPage.xhtml?globalId=hdl:1902.1/10129&studyListingIndex=0_d1de20ebf2b96353b798a93359b8.

I examined government publications to determine the method by which each included agency was established.⁷⁶

To identify whether each agency's head is subject to Senate confirmation, I consulted *The Plum Book*, a directory of individuals holding policy positions in the federal government.⁷⁷ Information on whether an agency's leaders have fixed terms or the existence of any limitations on whom the President may appoint to these positions – e.g., partisan balance or experiential requirements – also were obtained from this source.⁷⁸ Data on whether agencies have a foreign policy focus were derived in part from the Lewis dataset.⁷⁹ For those agencies not included in the Lewis dataset, I made subjective determinations of whether the agency deals primarily with defense, foreign affairs, or international development.⁸⁰

Table 3 reports summary statistics for the independent variable values associated with these agencies, as well as other potentially relevant characteristics.⁸¹

⁷⁶ These publications include the UNITED STATES GOVERNMENT MANUAL and CONGRESSIONAL DIRECTORY serials, as well as GEORGE T. KURIAN, ET AL., EDS., *A HISTORICAL GUIDE TO THE U.S. GOVERNMENT* (1988).

⁷⁷ GOVERNMENT PRINTING OFFICE, *THE PLUM BOOK: UNITED STATES GOVERNMENT POLICY AND SUPPORTING POSITIONS* (2008).

⁷⁸ Appointments that the President does not control are included in this category as well. Also note that despite the fact that party balance is not required for National Labor Relations Board, by tradition no more than three of the Board's maximum five members have been from the same political party. See Henry Hogue, et al., *Presidential Appointments to Full-Time Positions on Regulatory and Other Collegial Boards and Commissions, 109th Congress*, CRS REP. FOR CONGRESS, November 14, 2008. Therefore, I classify the NLRB as requiring partisan balance.

⁷⁹ Lewis, *Replication data for: Presidents and the Politics of Agency Design*, supra note __.

⁸⁰ See Lewis, *Administrative Agency Insulation Data Set Code Book*, supra note __ (providing this three-pronged definition of “foreign affairs”).

⁸¹ The “agency function” classifications reported in the table are based on categories described in AAGE R. CLAUSEN, *HOW CONGRESSMEN DECIDE: A POLICY FOCUS* (1973), as updated by Lewis, *Administrative Agency Insulation Data Set Code Book*, supra note __, and by the author. Agencies may be assigned to multiple categories.

<u>Table 3: Agency Characteristics</u>	
	Total
<i>Basic Characteristics</i>	
Number of agencies included	271
Created via statutory enactment	202
<i>Agency Function</i>	
Foreign affairs	53
Social welfare	107
Fiscal, tax or monetary	34
Regulatory	61
Law enforcement	24
<i>Agency Leadership</i>	
Headed by Senate-confirmed appointee	174
Leader serves for fixed term	37
Limits on President's appointment powers	42

Having established the unit of analysis and all variables, I now turn to estimating a set of Poisson regression models to determine the correlations between these explanatory variables and the number of oversight hearings to which each agency was subject. Poisson regression is appropriate for event-count dependent variables, as here, that are not over-dispersed.⁸² This model also includes committee- and Congress-level fixed

⁸² Poisson regression is a generalized linear regression model using the Poisson distribution. The model takes the following functional form:

$$Y_i = \beta_0 + \beta_1 X_{1,i} + \dots + \beta_k X_{k,i} + \gamma_2 E_2 + \dots + \gamma_n E_n + \delta_2 T_2 + \dots + \delta_t T_t + \mu_i$$

where Y_i is the dependent variable, with i being each infraction included in the database; β_1 through β_k are the coefficient estimates for each of the X_k explanatory variables listed above, E_2 through E_n are a set of binary regressors representing each full committee in the dataset (except one, E_1); γ_2 through γ_n are the coefficient estimates for each full committee binary regressors; T_2 through T_t are a set of binary regressors corresponding to each Congress (except one, T_1) during the period under study (the 102nd-109th Congresses, 1991-2006); δ_2 through δ_t are the coefficient estimates for the binary time/Congress regressors; and μ_i is the error term.

effects terms.⁸³

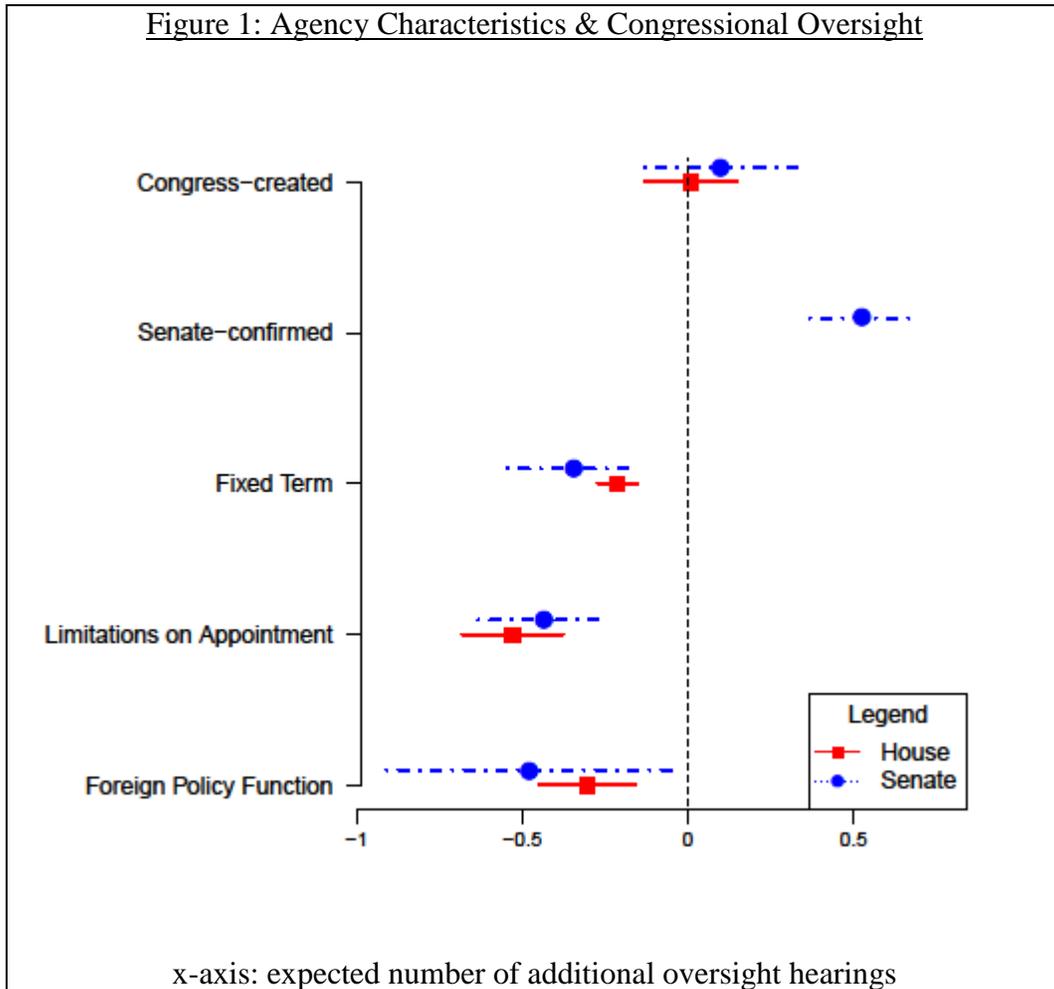
Figure 1 reports the results of regression models examining the bivariate relationships between congressional subcommittee oversight and five agency characteristics:

- whether the agency was created via statutory enactment (Hypothesis 1: “Congress-created”);
- whether the Senate plays an advice-and-consent role in the appointment of the agency’s leadership (Hypothesis 2: “Senate-confirmed” – estimated for the Senate only);
- whether its leadership serves for a fixed term (Hypothesis 3: “Fixed Term”);
- whether there are limits placed on whom the President may appoint to lead the agency (Hypothesis 4: “Limitations on Appointment”); and

⁸³ To see why fixed effects are appropriate, consider that there are undoubtedly many other factors, varying either across Congresses or time-invariantly across committees, that affect congressional oversight activity. Macro-level explanatory variables that are thought to influence oversight levels include the presence of divided or unified government; presidential approval levels; majority party size and ideological cohesion; the passage of major laws delegating authority to agencies; and the overall size of the administrative state. *See, e.g.,* EPSTEIN & O’HALLORAN, *supra* note __; MAYHEW, *DIVIDED WE GOVERN*, *supra* note __; ABERBACH, *supra* note __. In addition, agency behavior, exogenous events, and subcommittee and committee characteristics are likely to affect oversight levels. For instance, subcommittees with expansive jurisdictions, energetic leaders, or those that are nested within certain parent committees may tend to engage in oversight more frequently. *See supra* Part II (detailing the connections between subcommittee political preferences, the larger macro-partisan environment, and subcommittee oversight). The inclusion of fixed effects for each Congress during the 1991-2006 period (except for one, the baseline category) allows one to control for unobservable or unmeasurable variables that are unique to a given period, e.g., the partisan composition of the political branches, the President’s popularity, etc.). Likewise, the inclusion of fixed effects for each committee (again, except for one) serves to control for unobservable or unmeasurable covariates that may change over time, but not over subunits, and that may be linked to the frequency with which agencies are overseen. The results of this model are robust to a variety of alternative specifications, including the exclusion of either or both of these fixed effects terms, as well as the substitution of random- or mixed-effects terms in their place.

- whether the agency performs a foreign policy-focused function (Hypothesis 5: “Foreign Policy Function”).

Tables 1 and 2 contain supplemental information concerning these relationships, including estimates of full, multivariate models for both the House and Senate.



For ease of interpretation, Table 1 reports the results of regression models examining the bivariate relationships between House subcommittee oversight and five agency characteristics: whether the agency was created via statutory enactment (Model 1); whether its leadership serves for a fixed term (Model 2); whether there are limits placed on whom the President may appoint to lead the agency (Model 3); and whether the agency performs a foreign policy-focused function (Model 4). Model 5 reports the results of a full, multivariate model.

Table 1: Agency Characteristics & House Oversight

	Model 1	Model 2	Model 13	Model 4	Model 15
Congress-created (Hypothesis 1)	0.010 (0.071)				-0.046 (0.055)
Senate-Confirmed (Hypothesis 2)	N/A				
Fixed Term (Hypothesis 3)		-0.212 *** (0.030)			-0.305 *** (0.079)
Limitations on Appointment (Hypothesis 4)			-0.529 *** (0.077)		-0.133 † (0.069)
Foreign Policy Function (Hypothesis 5)				-0.304 *** (0.075)	-0.118 (0.076)

Coefficients and robust standard errors (in parentheses) generated with a generalized estimating equation (GEE) for Poisson regression. All models include committee- and Congress-level fixed effects. *** signifies $p < 0.001$, ** $p < 0.01$, * $p < 0.05$, † $p < 0.10$. Dependent variable: number of House oversight hearings held; unit of analysis: agency infractions, by topic and year (1991-2006). Parameter estimates for the intercepts omitted. All models contain 11,050 observations.

Table 2 reports the results of a similar analysis for the Senate, examining the relationship between agency characteristics and Senate oversight levels. This table also reports the connection between Senate oversight levels and whether the Senate plays an advice-and-consent role in the appointment of an agency's leadership (Model 7).

Table 2: Agency Characteristics & Senate Oversight

	Model 6	Model 7	Model 8	Model 9	Model 10	Model 11
Congress-created (Hypothesis 1)	0.098 (0.117)					-0.070 (0.078)
Senate-Confirmed (Hypothesis 2)		0.525 *** (0.080)				0.552 *** (0.082)
Fixed Term (Hypothesis 3)			-0.346 *** (0.101)			0.096 (0.107)
Limitations on Appointment (Hypothesis 4)				-0.436 *** (0.100)		-0.359 *** (0.100)
Foreign Policy Function (Hypothesis 5)					-0.479 * (0.219)	-0.543 *** (0.104)

Coefficients and robust standard errors (in parentheses) generated with a GEE for Poisson regression. All models include committee- and Congress-level fixed effects. *** signifies $p < 0.001$, ** $p < 0.01$, * $p < 0.05$, † $p < 0.10$. Dependent variable: number of Senate oversight hearings; unit of analysis: agency infractions, by topic and year (1991-2006). Parameter estimates for the intercepts omitted. All models contain 11,050 observations.

The results reported in Figure 1 and in Tables 1 and 2 suggest mixed support for these hypotheses. First, the null results associated with Hypothesis 1 (“Congress-created”) suggest a lack of connection between an agency’s genesis via statute and the amount of attention that Congress devotes to overseeing that agency. On the one hand, Congress does not seem to design executive agencies such that future Congresses will consider oversight of these agencies to be more worthwhile. On the other hand, neither does it appear that *ex ante* involvement in the design of administrative institutions serves as a substitute for *ex post* oversight as alternative means of controlling the administrative state, as some scholars have theorized.⁸⁴

⁸⁴ See Bawn, *Choosing Strategies*, *supra* note __, at 101 (“Plans to engage in *ex post* oversight make the benefits of statutory control less compelling, and vice-versa. In this sense, statutory control and oversight can be viewed as ‘substitutes’ in the ‘production’ of a controlled bureaucracy.”). Cf. McCubbins & Schwartz, *supra* note __, at 166 (noting that, by empowering interest groups to participate in policymaking processes and providing remedies to these groups when agencies pursue policies that they oppose, congressionally-created administrative procedures can serve as a partial substitute for direct congressional monitoring of the administrative state).

Second, the Senate engages in more frequent oversight of agencies whose leaders are Senate-confirmed appointees. In developing Hypothesis 2 (“Senate-confirmed”), I noted that body’s role in confirming certain agency heads may provide the Senate with greater influence over those agencies. Consequently, I theorized, the Senate will find oversight hearings concerning these agencies to be more effective, and therefore devote greater attention to them. The positive, statistically significant coefficient estimates reported in Figure 1 and in Tables 1 and 2 support this hypothesis.

Third, agencies with two characteristics commonly associated with independence – fixed terms and qualification requirements for appointees – receive less oversight attention. The notion that these design features not only restrict presidential control over agencies, but also congressional control, seems logical. Any political principal is likely to have more limited potential rewards or punishments to offer an appointee with a fixed term in office. Likewise, constraints placed on appointee qualifications restrict the pool of potential replacements for a given agency head. If Congress and an agency head are aware of the fact that the agency head is relatively less replaceable, that knowledge may diminish the potential benefits to Congress of overseeing that agency. This reduced attention to oversight empowers agency leaders as autonomous actors. In this way, independent agencies may be said to be more independent of congressional – as well as presidential – control than are executive agencies.

Finally, the coefficient estimates in Tables 1 and 2 report a statistically significant relationship between oversight activity and whether an agency has a foreign policy focus, in accordance with Hypothesis 5. This relative lack of oversight attention to foreign policy-focused agencies provides some empirical support for Wildavsky’s two presidencies thesis. Whether based on traditional norms of deference to the President in the realm of foreign affairs, a relative lack of opportunities for reelection-oriented legislators to credit-claim on foreign policy issues, or some other reason, Congress appears relatively less interested in overseeing agencies in this area.

CONCLUSION

These findings have obvious implications for the design of administrative agencies to facilitate congressional control. For instance, the null finding concerning the relationship between oversight and an agency’s creation at the hands of Congress or the President casts doubt on a received wisdom that the Congress-agency connection will be strongest for those agencies created via statutory enactment.⁸⁵ This result provides tentative

⁸⁵ See Calvert, McCubbins, and Weingast, *supra* note ___, at 604.

support for the idea that Congress may delegate broad powers to the executive at the agency design stage, while retaining influence in agency decision-making.⁸⁶ In addition, the finding that the Senate more vigorously monitors agencies that are headed by Senate-confirmed appointees has important implications for ongoing policy debates. Recent years have seen a number of prominent recess appointments, as presidents bypass the Senate’s advice and consent role due to perceived obstructionism in that chamber.⁸⁷ Senators would be well-advised to resist such efforts, not only because such appointments eviscerate the Senate’s Article II § 2 role at the time of the appointment, but also because recess appointments may discourage congressional involvement in the agency in the future.⁸⁸ Finally, the findings that Congress is less likely to oversee agencies headed by leaders with fixed terms and qualification requirements – two features that are common in and important to independent agencies – offer insights into an ongoing discussion among jurists and scholars concerning whether these independent agencies may be considered untethered from both presidential or congressional control, or whether they simply feel the pull of Capitol Hill more than that of the White House.⁸⁹

Of course, the five hypotheses offered herein do not begin to exhaust the list of agency design features that may be examined. As such, this article is intended as a first-cut of a potential future research agenda,

⁸⁶ Perhaps the long intervals between the establishment of new agencies by statute and the current period, which allow for considerable “coalitional drift” between the enacting legislative coalition and the current Congress, weaken the connection between an agency’s establishment via statute and current congressional attention. Cf. Horn & Shepsle, *supra* note __ (defining “coalitional drift”),

⁸⁷ See Chafetz, *supra* note __, at 764-67.

⁸⁸ The solution, however, ought not be to reduce the number of positions requiring Senate confirmation, as a 2011 bill – which passed the Senate 79-20! – proposed to do. Presidential Appointment Efficiency and Streamlining Act of 2011, S. 679, 112th Cong. (proposing an end to the requirement of Senate confirmation for over 200 appointed positions); accord Chafetz, *supra* note __, at 767.

⁸⁹ Compare *Morrison*, 487 U.S. at 657; *Humphrey’s Ex’r*, 295 U.S. at 624 (offering the former perspective); and *Fox Television Stations*, 129 S. Ct. at 1815; LEWIS, THE POLITICS OF PRESIDENTIAL APPOINTMENTS, *supra* note __; Calabresi & Prakash, *supra* note __, at 582-83; Strauss, *The Place of Agencies*, *supra* note __ (for the latter view).

with numerous possibilities for extensions. Scholarly understanding of the role that Congress plays in administration could be enhanced by taking a page from the rich literature on agency design and presidential control over administration, and examining whether design features intended to increase presidential influence also result in a corresponding weakening of congressional monitoring. For instance, one could explore the extent to which the following features – all of which are thought to influence the degree of presidential control over agencies – also impact congressional control: exemptions from OIRA cost-benefit analyses;⁹⁰ the presence of multi-member boards or commissions;⁹¹ statutory partisan balance requirements for these multi-member entities;⁹² an agency’s ratio of civil servants-to-appointees;⁹³ and the extent to which an agency’s workforce is unionized.⁹⁴

⁹⁰ See Barkow, *supra* note __, at 26.

⁹¹ See Bressman & Thompson, *supra* note __, at 610 (theorizing that multi-member agencies are less susceptible to presidential influence, because the presence of staggered terms reduces the potential influence of the current president, who typically cannot immediately replace all board members). See also Devins & Lewis, *supra* note __, at 468-69 (noting that it typically takes presidents nine or ten months to replace a majority of commission members).

⁹² See Breger & Edles, *supra* note __, at 1139 (noting that party balance is required for some – but not all – multi-member entities). Partisan balance requirements may provide an additional degree of distance between these entities and the White House. *But see* Timothy P. Nokken & Brian R. Sala, *Confirmation Dynamics: A Model of Presidential Appointments to Independent Agencies*, 12 J. THEORETICAL POL. 91, 95 (2000) (providing examples of Republican presidents appointing conservative Democrats, and Democratic presidents appointing liberal Republicans to commissions with partisan quotas).

⁹³ See LEWIS, THE POLITICS OF PRESIDENTIAL APPOINTMENTS, *supra* note __, at 98 (stating that a larger proportion of appointees may strengthen presidential control); Pablo T. Spiller & Santiago Urbiztondo, *Political Appointees vs. Career Civil Servants: A Multiple Principals Theory of Political Bureaucracies*, 10 EUR. J. POL. ECON. 465 (1994) (positing that an agency designed with a greater mix of civil servants will be more responsive to the legislature, since both civil servants and legislators have longer-term political horizons).

⁹⁴ Public sector unions may either insulate the administrative state from

Beyond importing concepts from the literature on presidential control of administration into the congressional context, one could examine the efficacy of statutory provisions that Congress includes in agencies' organic statutes for the purpose of enhancing congressional *ex post* control over these agencies. For instance, how useful was Congress's establishment of inspectors general offices?⁹⁵ One also could test whether provisions granting specified congressional committees a veto over certain agency actions – which endure in the wake of *Chadha* – are effective mechanisms for enhancing congressional control.⁹⁶

Additional work on designing administrative institutions to enhance congressional control over the administrative state could have real-world value. This article suggests that the Congress-centric design of administrative institutions could serve as a partial corrective for the large-scale transfer of policymaking authority from the legislative branch to the executive in recent decades,⁹⁷ by encouraging congressional *ex post* review of agency actions. This article, however, is limited to examining only a small sample of the much larger population of structural decisions that institutional designers may consider. Empirical studies of those agency design features that may facilitate congressional oversight represent a promising area for future research.

Although examining connections between various agency design features and congressional oversight is a descriptive project, the implications of this work are prescriptive. This article shows that it is possible to tailor the structure of congressional and administrative institutions to alter the role that Congress plays in administration. In an era of greater presidential control over administration, oversight holds promise as a means of re-equilibrating the balance of power between the White House and Capitol Hill. If one cares about enhancing congressional capacity to direct administrative agencies, this article encourages one to devote attention to the institutional design of these entities.

presidential leadership in general or enable a president to lock-in current agency preferences. See Chen & Johnson, *supra* note __ (testing the latter theory); Moe, *supra* note __ (explaining the former theory).

⁹⁵ See Inspector General Act of 1978, as amended, 5 U.S.C. App. 3.

⁹⁶ See Fisher, *supra* note __ (noting the persistence of both formal committee veto provisions inserted into statutes and informal understandings, with veto-like effects, between committees and agencies).

⁹⁷ See generally THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* (1979).

