

DESIGNING EXECUTIVE AGENCIES FOR CONGRESSIONAL INFLUENCE

BRIAN D. FEINSTEIN*

Those seeking to restore Congress's place as a co-equal branch should consider the architecture of the administrative state. Despite increased scholarly attention concerning both the design of executive agencies and Congress's role in governance, the impact of institutional features on executive agencies' susceptibility to congressional attention is largely unknown. Leveraging original data on committee oversight hearings, this Article explores the connections between various agency design features and congressional oversight activity. The Article finds that (1) agencies with leaders that are subject to Senate confirmation receive greater attention from congressional overseers; (2) no relationship is apparent between an agency's creation by statute or executive order and the later salience of that agency to congressional overseers; and (3) independent agencies appear more independent of congressional as well as presidential control, contrary to a conventional wisdom that they tend to reflect Congress's preferences. Through greater attention to agency design, Congress can create future executive agencies and retrofit existing agencies to increase its influence in policymaking.

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* Harry A. Bigelow Fellow & Lecturer in Law, University of Chicago Law School. I am grateful to Jacob Gersen, Matthew Stephenson, and participants in the Harvard Law School Public Law Workshop for their helpful comments.

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INTRODUCTION

Can agency design influence the degree of control that Congress exercises over the administrative state? With sustained challenges to the creation and, now, the continued existence of the Consumer Financial Protection Bureau (CFPB) during the past several years, questions concerning the relationship between agency design and political accountability are more salient than ever. In *PHH Corp. v. Consumer Financial Protection Bureau*,¹—which, as of this Article’s publication, is ongoing²—the parties dispute, *inter alia*, whether the design of the CFPB violates the Constitution because it makes that agency impervious to congressional, as well as presidential, control.³ Contestation over the agency’s design, however, far predates this litigation; the agency’s unique mix of design features has been a persistent source of controversy since its creation.⁴

1. 839 F.3d 1 (D.C. Cir. 2016).

2. See Order, *PHH Corp. v. CFPB*, No. 15-1177, (D.C. Cir. Feb. 16, 2017), ECF No. 1661681 (order scheduling argument before the *en banc* court for May 24, 2017).

3. See Opening Brief for Petitioners at 36, 61–63, *PHH Corp.*, 839 F.3d 1 (D.C. Cir. 2016) (No. 15-1177), 2015 WL 8530553; Brief for Respondent CFPB at 34–35, 74–76, *PHH Corp.*, 839 F.3d 1 (D.C. Cir. 2016) (No. 15-1177), 2015 WL 7887925. Although the court declined to weigh in on this debate, the panel decision in *PHH Corp.* may not be the last word in this case. See *PHH Corp.*, 839 F.3d at 55 (“congressional aggrandizement is not a *necessary* feature of a separation of powers violation in this context.”) (emphasis added); see also *PHH Corp.*, No. 15-1177, (D.C. Cir. Nov. 23, 2016), ECF No. 1647585 (order permitting a response and a reply to the agency’s petition for rehearing *en banc*).

4. See, e.g., 156 CONG. REC. S2774 (daily ed. Apr. 29, 2010) (statement of Sen. Richard Shelby) (expressing concern over the potential scope, authority, and power of the CFPB); Bernie Becker et al., *Overnight Money: Defund, Delay, Defang*, THE HILL (May 3, 2011, 11:06 PM), <http://thehill.com/policy/finance/90227-overnight-money-defund-delay-defang> (describing efforts by House Republicans to alter the structure of the Consumer Financial Protection Bureau (CFPB), including an effort to replace the director position with a bipartisan commission); Victoria McGrane & Deborah Solomon, *With New Power, GOP Takes on Consumer Agency*, WALL ST. J. (last updated Nov. 23, 2010), <https://www.wsj.com/articles/SB10001424052748703559504575631082414598868> (reporting on Republican lawmakers’

At first glance, it may seem surprising that institutional design issues figure so prominently in debates over the creation of the CFPB—perhaps the most consequential new agency in a generation.⁵ After all, the agency’s regulatory jurisdiction, rulemaking powers, and personnel decisions all may appear more closely connected to policy outcomes. However, as a growing chorus of administrative law scholars have shown, administrative structures play a significant role in enabling political control and, consequently, in determining policy outcomes.⁶

calls to investigate activities related to the establishment of the Bureau). These design features include: the agency’s 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; and its access to an independent funding source, apart from the congressional appropriations process. See Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1011, 124 Stat. 1376, 1964 (codified at 12 U.S.C. § 5491 (2012)) (stating its director’s employment terms); *id.* §§ 1011, 1012(c)(2)(A) (preventing the Federal Reserve from “interven[ing] in any matter or proceeding”); *id.* § 1012(c)(2)(B) (prohibiting the Federal Reserve from involvement in Bureau personnel decisions); *id.* § 1012(c)(2)(C) (prohibiting the Federal Reserve from reorganizing the agency’s structure); *id.* § 1017(a) (requiring that the Federal Reserve transfer any “reasonably necessary” funds that the Bureau requests).

5. Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 18 (2010) (describing the CFPB as “the most important federal agency created in decades”).

6. One strand of this scholarship focuses on how the design of administrative procedures incentivizes agencies to remain faithful to congressional preferences. See Matthew 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 McCubbins, Noll & Weingast, *Structure and Process*] (identifying APA, 5 U.S.C. §§ 551–559, 701–706 (2012), as an *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, 65 (1995) [hereinafter Bawn, *Political Control*]; David Epstein & Sharyn O’Halloran, *Administrative Procedures, Information, and Agency Discretion*, 38 AM. J. POL. SCI. 697 (1994) [hereinafter Epstein & O’Halloran, *Administrative Procedures*]; Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987) [hereinafter McCubbins, Noll & Weingast, *Procedures as Instruments*]; Mathew McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984) [hereinafter McCubbins & Schwartz, *Congressional Oversight Overlooked*]; see generally Arthur Lupia & Mathew McCubbins, *Designing Bureaucratic Accountability*, 57 L. & CONTEMP. PROB. 91 (1994) (providing examples of administrative procedures that Congress can manipulate to further its goals).

A second strand emphasizes how the relative control of the President and Congress over agency personnel decisions impacts agencies’ responsiveness to those branches’

This Article empirically analyzes the extent to which various institutional design features are associated with a particular form of political control: congressional oversight hearings. 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 congressional oversight potentially amplified if Congress were to design agencies to maximize the agencies' responsiveness to congressional monitoring. Part II situates the project of determining which agency design features promote or hinder congressional oversight within an extant literature on designing institutions for political control. 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*

The importance of a well-functioning legislature to a republican government is difficult to overstate. 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 in James Madison's famous phrase, allows “ambition . . . to counteract ambition.”⁸ Madison intended this system—which political scientist Richard Neustadt later characterized as “separated institutions sharing power”⁹—to serve as a bulwark against tyranny,

potential preferences concerning the distribution of government funds. *See, e.g.*, Christopher R. Berry & Jacob Gersen, *Agency Design and Distributive Politics*, 126 YALE L.J. 1002 (2017); Barkow, *supra* note 5; Daniel E. Ho, *Congressional Agency Control: The Impact of Statutory Partisan Requirements on Regulation* (Stanford Law Sch., Working Paper No. 73, Feb 12, 2007); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994).

7. 1 WILLIAM BLACKSTONE, BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 114 (1765).

8. THE FEDERALIST NO. 51 (James Madison).

9. RICHARD NEUSTADT, PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP 33 (1960); *see also* M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1147–52 (2000) (describing Neustadt's characterization as the consensus view).

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, deeper congressional involvement *ex ante* in new policy proposals encourages pre-enactment cost-benefit analyses, and greater attention to oversight *ex post* decreases the likelihood of major policy failures.¹¹ The involvement of a collective legislature in the policymaking process also promotes deliberation, facilitates the participation of diverse groups, and encourages transparency in policymaking, all of which lead to better reasoned and more democratic policy outcomes.¹² Public debate and contestation between Congress and the executive branch also 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 the founders intended for Congress to play, congressional capacity—i.e., Capitol Hill’s relative influence over the nation’s legal landscape—is waning.¹⁴ The past several Congresses have seen a marked drop in laws enacted, a decreased willingness by the Senate to consider presidential nominees, and a record number of cloture votes per session.¹⁵

10. THE FEDERALIST NO. 51 (James Madison); *accord* *Mistretta v. United States*, 488 U.S. 361, 381 (1989) (stating that constitutionally mandated co-equal branches provide “security against tyranny—the accumulation of excessive authority in a single Branch”).

11. See Sarah A. Binder et al., *Assessing the 100th Congress, Anticipating the 111th*, MENDING THE BROKEN BRANCH, Jan. 2009, https://www.brookings.edu/wp-content/uploads/2016/06/0108_broken_branch_binder_mann.pdf.

12. See generally JAMES FISHKIN, *WHEN THE PEOPLE SPEAK: DELIBERATIVE DEMOCRACY AND PUBLIC CONSULTATION* (2009) (discussing the benefits of deliberation in policymaking); Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1102 (2005) (discussing the relative value of diversity among decisionmaking bodies and diversity within them); 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, 630 (2009) (arguing that the Office of Legal Counsel should publish legal policies to ensure long-term transparency).

13. See Josh Chafetz, *Congress’s Constitution*, 160 U. PA. 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) (arguing that Congress has ceded its role as a co-equal branch of government).

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

With Congress's role in policymaking on the decline, the executive branch has stepped in.¹⁶ Since the New Deal era, presidents increasingly have been willing to set policy via executive order.¹⁷ The creation of the White House Office of Management and Budget in the 1970s and the empowerment, beginning in the 1980s and 1990s, of its Office of Information and Regulatory Affairs to reject proposed regulations based on cost-benefit analysis further bolstered presidential control.¹⁸

The trend toward "presidential administration" continued during the Obama administration.¹⁹ During one twelve-month period in 2011, for instance, President Obama announced forty-five executive actions under his administration's "We Can't Wait" initiative.²⁰ Most significantly, after a Senate filibuster blocked an up-or-down vote on the DREAM Act, 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 Obama implemented a policy in 2012 to do just that.²¹

16. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2311 (2001) ("The 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 Unilateral Action*, 15 J.L. ECON. & ORG. 132, 133 (1999) ("Sometimes they do it through proclamations or executive agreements or national security directives. But whatever vehicles they may choose, the end result is that presidents can and do make new law—and thus shift the existing status quo—without the explicit consent of Congress.").

18. See Kagan, *supra* note 16, at 2275–81, 2285–90 (explaining that President Reagan implemented systematic review of agency rulemaking and President Clinton implemented a system to resolve disputes discovered through that systematic review).

19. See generally Josh Blackman, *Presidential Maladministration* 3 (S. Tex. Coll. of Law Hous., Working Paper, Dec. 20, 2016), <https://poseidon01.ssrn.com/delivery.php?ID=697001127126074115116120075121083074103024036044086003100075101125125090023125088029110032053022109049003120008079106100068112116083094022086114069111116116031104060017067021023093125113105027012068094023020093122030006067025111114086084116069121009&EXT=pdf>.

20. See Kenneth S. Lowanda & Sidney M. Milkis, "We Can't Wait": Barack Obama, *Partisan Polarization and the Administrative Presidency*, 12 FORUM 3, 9 (2014).

21. DREAM Act of 2010, S. 3962, 111th Cong. (2010); see 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> ("Effective immediately, young immigrants who arrived in the U.S. illegally before they turned 16 will be allowed to apply for work permits as long as they have no criminal history and meet other criteria.").

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. Cf. Barack Obama, President of the United States, State of the Union Address (Feb. 12, 2013), in 159 CONG. REC. H443-02,

Further, even when Congress does legislate, executive branch actors often are involved intimately in the drafting process. This executive involvement raises the prospect of “agency self-dealing,” whereby an agency works behind-the-scenes to draft an ambiguous statute, then enjoys judicial deference concerning the agency’s later reasonable construction of that statute.²²

Although firm conclusions regarding the balance of power among the branches during the Trump administration would be premature as of this writing, President Donald Trump’s statements on the campaign trail suggest that he is extremely unlikely to voluntarily cede to Congressional powers accumulated by his predecessors.²³

C. The Remedial Effects of Oversight

In light of the substantial delegation of policymaking authority from the Legislative to the Executive Branch, and given Congress’s unwillingness to challenge the White House’s growing role, congressional oversight of agency action is one of the most powerful tools that Congress has to exercise some measure of control over administrative policymaking.²⁴ An

H445 (“But if Congress won’t act soon . . . I will . . . prepare our communities for the consequences of climate change.”).

As such, it conveys a lack of patience with traditional notions of legislative supremacy that hold Congress to be the nation’s lawmaker. See 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.”). In some instances, President Obama has gone further still, not even providing an opportunity for Congress to act before announcing unilateral executive action. See Lowanda & Milkis, *supra* note 20, at 3, 15 (discussing how President Obama promoted the exercise of “‘prosecutorial discretion’ on certain immigrants who came to the United States prior to the age of 16” in response to news that Senator Marco Rubio “was preparing a bill to give visas to young immigrants”).

22. See Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. (forthcoming 2017); see also *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (providing that “if the statute is silent or ambiguous” a court will defer to an agency’s interpretation if that interpretation is “based on a permissible construction of the statute”).

23. See generally Chris Opfer, *Will Trump Stand in the Way of Regulatory Reform?*, BLOOMBERG BNA (Nov. 15, 2016), <https://www.bna.com/trump-stand-regulatory-n57982082786/>.

24. See, e.g., Josh Blackman, *Gridlock*, 130 HARV. L. REV. 241, 242 (2016) (describing Congress’s failure to “grapple with . . . foundational issues” inherent in health-care and immigration policy, thus punting these issues to the executive branch and, ultimately, to the courts); Michael J. Gerhardt, *Why Gridlock Matters*, 88 NOTRE DAME L. REV. 2107, 2107–08 (2013) (describing “praise for gridlock” from prominent political observers); Brian D.

empirical examination of the consequences of congressional oversight reveals that bureaucratic issues discussed in committee hearings are 19.7% less likely to reoccur than are similar bureaucratic issues that are not subject to hearings.²⁵ This 21.6% reduction in the recurrence of bureaucratic “infractions” following congressional attention is statistically significant, holds true when controlling for a battery of potentially relevant factors, and is robust to various model specifications. Accordingly, the effect demonstrates that committee oversight hearings can be a remarkably effective means of channeling administrative action toward Congress’s preferences.²⁶

In a climate of heightened legislative gridlock and governance-by-executive-action, congressional oversight holds great potential as a means of control over the administrative state. This demonstrated promise of oversight is encouraging to those that believe Congress ought to get off the sidelines and reclaim 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 answers 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.²⁷ Past scholarship can be divided into three subtypes: theoretical work, qualitative case studies, and quantitative analyses.

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

25. See Brian D. Feinstein, *Congress in the Administrative State*, 95 WASH. U. L. REV. (forthcoming, 2018).

26. See *id.* Oversight also offers Congress a second, indirect means of impacting policy. See Douglas Kriner & Eric Schickler, *Investigating the President: Committee Probes and Presidential Approval, 1953–2006* 12–13 (Aug. 1, 2011) (unpublished manuscript), <https://poseidon01.ssrn.com/delivery.php?ID=265092002101090112001082107109124111032052061006004009102125091120089008099021067010048045127041107100023070077005122010112087117052036065085111092126001068013027111007044036118023091005123103104096073001027005112070004028070015104025094030031117118092&EX T=pdf> (demonstrating that increases in the number of high-profile oversight hearings are correlated with decreased public support for the President).

27. These studies notwithstanding, the amount of attention that public administration

A. Theoretical Work

Positive political theorists have explored how the design of administrative procedures can encourage agencies to remain faithful to congressional preferences.²⁸ Much of this literature is not specific about what constitutes an administrative procedure, process, or structure, leading to claims that may be unfalsifiable.²⁹ Others writing in this area focus on the APA as an *ex ante* means of ensuring that agencies are politically responsive to affected interest groups.³⁰ The fact that the APA provides a procedural floor for virtually all agency rulemakings, however, stymies empirical tests of the supposed “deck-stacking” consequences of these procedural defaults.³¹ In

scholarship has devoted to connections between agency design and congressional influence has not been commensurate with the subject’s importance.

28. See, e.g., Bawn, *Political Control*, *supra* note 6; Epstein & O’Halloran, *Administrative Procedures*, *supra* note 6; McCubbins, Noll & Weingast, *Structure and Process*, *supra* note 6, at 431–32; McCubbins, Noll & Weingast, *Procedures as Instruments*, *supra* note 6, at 243–44; McCubbins & Schwartz, *Congressional Oversight Overlooked*, *supra* note 6, at 173. See generally Lupia & McCubbins, *Designing Bureaucratic Accountability*, *supra* note 6 (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.

29. See Glen O. Robinson, *Commentary on “Administrative Arrangements and the Political Control of Agencies”*: *Political Uses of Structure and Process*, 75 VA. L. REV. 483, 487 (1989) (claiming that the “generic terms” in Matthew McCubbins, Roger Noll, and Barry Weingast’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, *Political Control*, *supra* note 6, at 63–64 (providing greater specificity regarding the administrative procedures that Congress may use to slant agency decisions toward the enacting coalitions’ current preferences or the prospective preferences of favored interest groups). Bawn cites the criteria for selecting outside participants in agency decisionmaking, 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.* at 63.

30. 5 U.S.C. §§ 551–559 (2012); 5 U.S.C. §§ 701–706 (2012); see McCubbins, Noll & Weingast, *Structure and Process*, *supra* note 6, at 442; McCubbins, Noll & Weingast, *Procedures as Instruments*, *supra* note 6, at 262.

31. JEFFREY S. LUBBERS, *A GUIDE TO FEDERAL AGENCY RULEMAKING* 6 (2006). *But see* APA, 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 to agency adjudications. See *Wong Yang Sung v. McGrath*, 339 U.S. 33, 51–53 (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).

other words, the relative lack of variation in rulemaking procedures below what the APA requires makes quantitative analysis of its effects challenging.³²

Of course, administrative procedures are one of many agency features that Congress may vary.³³ 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 the agency's policy domain.³⁴ As with administrative procedures, Congress selects 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.³⁵

B. Qualitative Studies

Numerous case studies have examined the institutional features of particular agencies, probing the interaction between institutional design and responsiveness to political principals.³⁶ Unlike much of the work in the other two literatures discussed in this Section, these single-agency studies seek to determine the extent to which agencies with various design features

32. *But see* APA, 5 U.S.C. § 551(1) (enumerating which agencies are exempt from APA coverage).

33. *See generally* Kathleen Bawn, *Choosing Strategies to Control the Bureaucracy: Statutory Constraints, Oversight, and the Committee System*, 13 J.L. ECON. & ORG., 101 (1997).

34. *See id.*

35. *But see* Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93, 95 (1992) (arguing, in a narrative essay, that Congress's decision to charge an agency with regulating one or multiple industries will have policy consequences).

36. Berry & Gersen, *supra* note 6, at 1006 n.8 (providing a list of these case studies concerning the institutional design and political responsiveness of particular agencies, e.g., the FTC, National Labor Relations Board (NLRB), Federal Energy Regulatory Commission, IRS, United States Army Corps of Engineers, Interstate Commerce Commission, Forest Service, EPA, Federal Reserve, and Equal Employment Opportunity Commission (EEOC)).

are responsive to Congress or the President, or whether agency action varies with the political composition of the elected branches.³⁷ Since scholarship situated within this literature focuses exclusively on one particular agency, however, the lack of variation in design features studied prevents these authors from offering inferences concerning the relative role of particular design features on outcomes.³⁸

C. Quantitative Studies

A third group of scholars has undertaken empirical studies of institutional design, examining how the political climate at the time of an agency's creation is associated with different agency design features.³⁹ With this methodological framework, these studies examine what political features *at the time of the agency's creation*—e.g., the presence of divided versus unified government—influence agency design. These studies 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 article on agency design features and distributive politics stands apart from these three strands of the literature on institutional design and agency responsiveness.⁴⁰ Berry and Gersen test whether a host of agency characteristics are correlated with

37. See *id.*; see also David M. Hedge & Renée 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 four agencies cut back on their regulatory activities following the Republicans regaining control of Congress in 1995).

38. See Berry & Gersen, *supra* note 6, at 1006–07 (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”).

39. See, e.g., DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* (1999) [hereinafter EPSTEIN & O'HALLORAN, *DELEGATING POWERS*]; DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE* (2008) [hereinafter LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS*]; DAVID E. LEWIS, *PRESIDENTS AND THE POLITICS OF AGENCY DESIGN: POLITICAL INSULATION IN THE UNITED STATES GOVERNMENT BUREAUCRACY, 1946–1997* (2003) [hereinafter LEWIS, *PRESIDENTS AND THE POLITICS OF AGENCY DESIGN*]; 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).

40. See Berry & Gersen, *supra* note 6.

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.⁴¹ 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.⁴²

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. 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.⁴³ This variation is necessary to make inferences regarding the possible associations between design features and outcomes. Departing from most prior empirical work—except for Berry and Gersen⁴⁴—this study utilizes two outcome-based measures—House and Senate oversight activity—to examine the correlations between various agency characteristics and actual outputs.⁴⁵

The design features included in this Article are not exhaustive, but are representations of what 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

41. *Id.* at 1018.

42. *Id.* at 1028–33. More specifically, they find that (1) 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 (2) 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.

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

44. In some respects, Berry and Gersen's article 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, and congressional oversight hearings in this Article. Then, both articles empirically test hypothesized correlations between these dependent variables and the presence or absence of various agency design features.

45. *But see* Berry & Gersen, *supra* note 6, at 1018 (employing federal spending as a dependent variable common to all studied agencies).

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 genesis.⁴⁶ 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,⁴⁷ this Article examines the connection between congressional oversight levels and whether an agency was created via congressional or executive action.⁴⁸ Following their theory, this Article hypothesizes that Congress will devote greater attention to agencies 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.⁴⁹ Senators also understand the vital

46. 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).

47. *Id.* at 604–05.

48. 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*, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN: ADMINISTRATIVE AGENCY INSULATION DATA SET, 2003 (Nov. 27, 2007), http://dvn.iq.harvard.edu/dvn/faces/study/StudyPage.xhtml?globalId=hdl:1902.1/10129&studyListingIndex=0_d1de20ebf2b96353b798a93359b8.

49. See, e.g., PETER W. RODMAN & HENRY KISSINGER, *PRESIDENTIAL COMMAND: POWER, LEADERSHIP, AND THE MAKING OF FOREIGN POLICY FROM RICHARD NIXON TO GEORGE W. BUSH* 145 (2009) (providing a warning to incoming presidents); STEVEN F. HAYWARD, *THE AGE OF REAGAN: THE CONSERVATIVE COUNTERREVOLUTION 1980–1989*

role that appointees play in setting policy and therefore bargain aggressively with the president over personnel.⁵⁰ 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.⁵¹ 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.

B. "Independent" Agencies

Are independent agencies "independent" of political influence or merely free from presidential control?⁵² Many of the design features of

252 (2009) (postulating that the replacement of key foreign policy staff enabled Reagan's policies to be enacted more effectively); Scott C. James, *The Evolution of the Presidency: Between the Promise and the Fear*, in THE EXECUTIVE BRANCH 3, 27 (Joel D. Aberbach & Mark A. Peterson eds., 2005) (arguing that, beginning with Franklin Roosevelt, presidents have centralized personnel decisions).

50. See Calvert, McCubbins & Weingast, *supra* note 46, at 606–07.

51. 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).

52. 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., 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). Some authors provide other definitions. See, e.g., Jacob E. Gersen, *Designing Agencies*, RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 333, 333–34 (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

independent agencies appear aimed at insulating agency decisionmakers 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 could conceivably shield independent agencies from political pressure.⁵³

The notion that these institutional design features help insulate independent agencies from presidential politics is widely accepted among scholars.⁵⁴ The extent to which independent agencies are shielded 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.⁵⁵ 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.⁵⁶

existing cabinet department as the relevant measure of independence).

53. See Terry M. Moe, *Political Control and the Power of the Agent*, 22 J.L. ECON. & ORG. 1, 4 (2006) (asserting that Congress can “compensate for the agencies’ information advantages” through agency design). *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).

54. See, e.g., EPSTEIN & O’HALLORAN, *DELEGATING POWERS*, *supra* note 39, at 154–62 (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); Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 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”); Kagan, *supra* note 16, at 2271 (noting that limitations on the President’s removal powers serve to “insulate the administrative state from the President”); B. Dan Wood & John Bohte, *Political Transaction Costs and the Politics of Administrative Design*, 66 J. POL. 176, 199 (2004) (“Specifically, when there is high executive-legislative conflict,” Congress creates independent agencies to “constrain the president and future legislative coalitions.”).

55. 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 those decisionmakers from politics”).

56. 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) (2012) (removal provision for

Furthermore, a strand of case law casts a skeptical eye toward the argument that certain common features of independent agencies serve to pull agency decisionmakers toward congressional preferences. In *Humphrey's Executor v. United States*,⁵⁷ 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.⁵⁸ In *Morrison v. Olson*,⁵⁹ 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.”⁶⁰ In addition, recent law review commentary concerning the establishment of the CFPB 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.⁶¹

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

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. 714, 729 (1986) (stating that removal provisions “are very broad and, as interpreted by Congress, could sustain removal . . . for any number of actual or perceived transgressions . . .”).

57. 295 U.S. 602 (1935).

58. *Id.* at 624 (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 Enter. Fund v. Pub. Co. Accountability Oversight Bd.*, 561 U.S. 477, 492 (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. 1, 132 (1976) (disallowing congressional appointment of Federal Election Commissioners without the president's nomination).

59. 487 U.S. 654 (1988).

60. *Id.* at 686.

61. *Administrative Law—Agency Design—Dodd-Frank Act Creates the Consumer Financial Protection Bureau—Dodd-Frank Act*, Pub. L. No. 111-203, 124 Stat. 1376 (2010), 124 HARV. L. REV. 2123, 2125 (2011).

presidential preferences and toward Congress.⁶² According to Steven Calabresi and Saikrishna Prakash, when institutional designers isolate agencies from the President, Congress fills the power vacuum.⁶³ Case studies concerning the Equal Employment Opportunity Commission, FTC, and Nuclear Regulatory Commission provide support for this assertion, showing that these “independent” agencies are remarkably attuned to congressional preferences.⁶⁴ The Supreme Court adopted this view in *FCC v. Fox Television Stations*,⁶⁵ 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.”⁶⁶

62. See, e.g., LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS*, *supra* note 39; Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984) [hereinafter Strauss, *The Place of Agencies*].

63. Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 582–83 (1994) (“There is no such thing in Washington as a politically ‘independent’ agency.”).

64. See Hedge & Johnson, *supra* note 37, at 340, 342, 344 (determining that the EEOC and Nuclear Regulatory Commission decreased their regulatory requirements following the transfer of congressional power to deregulation-favoring Republicans in 1995); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983) (describing how the FTC seriously considered the political preferences of those congressional subcommittees with jurisdiction over the agency).

65. 556 U.S. 502 (2009).

66. *Id.* at 523. 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 63, at 583 (“Absent presidential control, congressional oversight and appropriations powers become the only concern for the officers of the allegedly ‘independent’ agencies.”); cf. *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 951 (1983) (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 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); Seymour Scher, *Conditions for Legislative Control*, 25 J. POL. SCI. 526, 533–34 (1963) (noting that legislators “who have established mutually rewarding relationships with agency people tend to be reluctant to . . . engag[e] in a close review of that

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 congressional oversight hearings and two common features of independent agencies: fixed terms for appointees and statutory mandates on appointee qualifications.⁶⁷ A hypothetical finding that agencies with these characteristics are subject to greater congressional attention than those agencies over which the President's authority is less restricted would suggest that independent agencies are not 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 independent agencies are truly independent, with their design features effectively limiting some forms of congressional as well as presidential influence. Hypotheses 3 and 4 test these claims.

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

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.

67. See, e.g., Post-Katrina Emergency Management Reform Act of 2006, Pub. L. No. 109-295, § 611(11), 6 U.S.C. §§ 313(c)(2)(A)–(B) (2012) (noting, for example, that the FEMA administrator must possess both “a demonstrated ability in and knowledge of emergency management and homeland security” and have at least “five years of executive leadership and management experience”); 49 U.S.C. §§ 701(b)(1)–(2) (2012) (requiring that the members of the Surface Transportation Board “be individuals with professional standing and demonstrated knowledge in the fields of transportation or transportation regulation, and . . . an individual with professional or business experience (including agriculture) in the private sector”); 15 U.S.C. §§ 7211(e)(1)–(2) (2012) (“Two members, and only 2 members, of the [Public Accounting Oversight Board] shall be or have been certified public accountants”); 42 U.S.C. § 2286(b)(1) (2012) (“The [Defense Nuclear Facilities Safety Board] shall be composed of five members . . . who are respected experts in the field of nuclear safety”); Barkow, *supra* note 5, at 47–48 (noting that other executive branch subunits place restrictions on leaders' concurrent employment and investments or post-public service employment).

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.⁶⁸ According to Aaron Wildavsky's "two presidencies" thesis, Congress is more likely to defer to the President's judgment in the realm of foreign affairs.⁶⁹ Although this theory is not without its critics, it retains significant currency among many scholars.⁷⁰ Therefore, one might expect lower oversight activity concerning foreign policy issues. Hypothesis 5 captures this logic.

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

68. 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.

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

70. Compare WILLIAM G. HOWELL & JON C. PEVEHOUSE, *WHILE DANGERS GATHER: CONGRESSIONAL CHECKS ON PRESIDENTIAL WAR POWERS* (2007), and 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), with LOUIS FISHER, *PRESIDENTIAL WAR POWER* (1995) (offering at least qualified support for the theory), and JOANNE GOWA, *BALLOTS AND BULLETS: THE ELUSIVE DEMOCRATIC PEACE* (1999), 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).

IV. CONNECTING AGENCY DESIGN TO CONGRESSIONAL ATTENTION

A. Research Design

These hypotheses are tested using the previously-described agency infractions and oversight hearings datasets.⁷¹ 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 from the 102nd Congress to the 109th Congress (1991–2006) for each infraction.

Next, the Article operationalizes the agency design hypotheses as independent variables. To determine whether an agency can be considered a congressional or executive creation, the Article examines whether the agency came into being via a specific statute or some other means.⁷² Following David Lewis's lead, this Article considers an agency to be created by legislation only if a statute explicitly mandated that a new organizational unit be created.⁷³ Lewis provides this data for agencies created between 1946 and 1997 in a publicly available online database.⁷⁴ For all other years, this Article examines government publications to determine the method by which each included agency was established.⁷⁵

71. 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 toward 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.

72. 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.

73. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN, *supra* note 39. 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 48.

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

75. See generally JOINT COMMITTEE ON PRINTING, U.S. CONGRESS, CONGRESSIONAL DIRECTORY, S. PUB. 114–1 (2016); A HISTORICAL GUIDE TO THE U.S. GOVERNMENT

To identify whether each agency's head is subject to Senate confirmation, this Article consults *The Plum Book*, a directory of individuals holding policy positions in the federal government.⁷⁶ 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.⁷⁷ Data on whether agencies have a foreign policy focus were derived in part from the Lewis dataset.⁷⁸ For those agencies not included in the Lewis dataset, this Article makes subjective determinations of whether the agency deals primarily with defense, foreign affairs, or international development.⁷⁹

Table 1 reports summary statistics for the independent variable values associated with these agencies, as well as other potentially relevant characteristics.⁸⁰

(George T. Kurian et al. eds., 1998); NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, OFFICE OF THE FEDERAL REGISTER, UNITED STATES GOVERNMENT MANUAL (2015).

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

77. 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 the NLRB, 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., CONG. RESEARCH SERV., RL34744, *PRESIDENTIAL APPOINTMENTS TO FULL-TIME POSITIONS ON REGULATORY AND OTHER COLLEGIAL BOARDS AND COMMISSIONS, 109TH CONGRESS 34* (2008). Therefore, this Article classifies the NLRB as requiring partisan balance.

78. See Lewis, *Replication data for: Presidents and the Politics of Agency Design*, *supra* note 74.

79. See Lewis, *Administrative Agency Insulation Data Set Code Book*, *supra* note 48 (providing this three-pronged definition of "foreign affairs").

80. 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 48, and by the Author. Agencies may be assigned to multiple categories.

Table 1: Agency Characteristics

	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

B. Findings

Having established the unit of analysis and all variables, this Article now turns 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.⁸¹ This model also includes committee and Congress-level fixed

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

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

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_i are a set of binary regressors corresponding to each Congress

effects terms.⁸²

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

1. whether the agency was created via statutory enactment (Hypothesis 1: “Congress-created”);
2. 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);
3. whether its leadership serves for a fixed term (Hypothesis 3: “Fixed Term”);

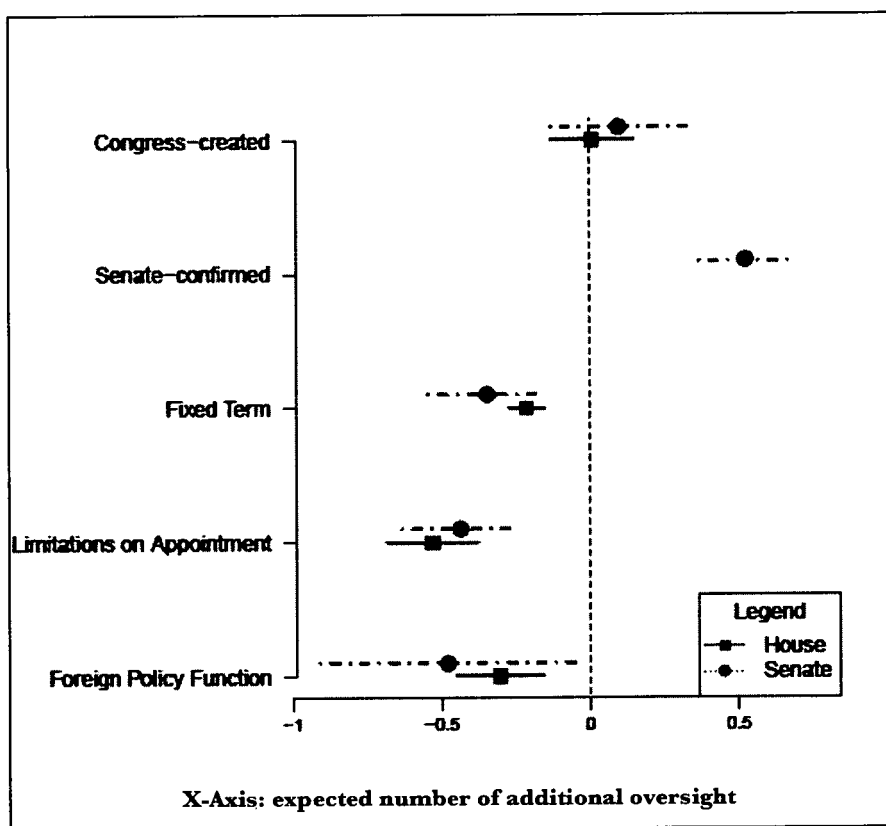
(except one, T_i) during the period under study (the 102nd–109th Congresses, 1991–2006); δ_2 through δ_i are the coefficient estimates for the binary time/Congress regressors; and, μ_i is the error term.

82. 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, *Administrative Procedures*, *supra* note 6, at 712 (explaining that, in 1991, “Congress [reduced] the president’s discretion . . . by extracting promises from President Bush that the upcoming North American Free Trade Agreement would not result in environmental degradation and would include retraining grants for labor”); DAVID R. MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946–2002* (1991); James, *supra* note 49. 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 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.

4. whether there are limits placed on whom the President may appoint to lead the agency (Hypothesis 4: "Limitations on Appointment"); and
5. whether the agency performs a foreign policy-focused function (Hypothesis 5: "Foreign Policy Function").

Tables 2 and 3 contain supplemental information concerning these relationships, including estimates of full, multivariate models for both the House and Senate.

Figure 1: Agency Characteristics & Congressional Oversight



For ease of interpretation, Table 2 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 2: Agency Characteristics & House Oversight

	Model 1	Model 2	Model 13	Model 4	Model 15
Congress-created (Hypothesis 1)	0.01 -0.071				-0.046 -0.055
Senate-Confirmed (Hypothesis 2)	<i>N/A</i>				
Fixed Term (Hypothesis 3)		-0.212 *** -0.03			-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 3 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 3: Agency Characteristics & Senate Oversight

	Model 6	Model 7	Model 8	Model 9	Model 10	Model 11
Congress-created (Hypothesis 1)	0.098 -0.117					-0.07 -0.078
Senate-Confirmed (Hypothesis 2)		0.525 *** -0.08				0.552 *** -0.082
Fixed Term (Hypothesis 3)			-0.346 *** -0.101			0.096 -0.107
Limitations on Appointment (Hypothesis 4)				-0.436 *** -0.1		-0.359 *** -0.1
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 2 and 3 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.⁸³

Second, the Senate engages in more frequent oversight of agencies whose leaders are Senate-confirmed appointees. In developing Hypothesis 2 (“Senate-confirmed”), this Article notes the Senate’s role in confirming certain agency heads may provide the Senate with greater influence over those agencies. Consequently, this Article theorizes that 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 2 and 3 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 2 and 3 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

83. See Kathleen Bawn, *Choosing Strategies to Control the Bureaucracy: Statutory Constraints, Oversight, and the Committee System*, 13 J.L. ECON. & ORG., 101 (1997) (“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, *Congressional Oversight Overlooked*, *supra* note 6, at 166 (noting that congressionally-created administrative procedures can serve as a partial substitute for direct congressional monitoring of the administrative state by empowering interest groups to participate in policymaking processes and providing remedies to these groups when agencies pursue policies that they oppose).

credit-claim on foreign policy issues, or some other reason, Congress appears relatively less interested in overseeing agencies in this area.

C. Next Steps

These five hypotheses 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, 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 Office of Information of Regulatory Affairs cost-benefit analyses,⁸⁴ the presence of multi-member boards or commissions,⁸⁵ statutory partisan balance requirements for these multi-member entities,⁸⁶ an agency's ratio of civil servants-to-appointees,⁸⁷ and the extent to which an agency's workforce is unionized.⁸⁸

84. See Barkow, *supra* note 5, at 26.

85. See Bressman & Thompson, *supra* note 52, 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 54, at 468–69 (noting that it typically takes presidents nine or ten months to replace a majority of commission members).

86. See Breger & Edles, *supra* note 52, 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).

87. See LEWIS, THE POLITICS OF PRESIDENTIAL APPOINTMENTS, *supra* note 39, at 97–98 (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).

88. Public sector unions may either insulate the administrative state from presidential leadership in general or enable a president to lock-in current agency preferences. See Jowei

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 inspector general offices?⁸⁹ One also could test whether provisions granting specified congressional committees a veto over certain agency actions—which endure in the wake of *Immigration & Naturalization Service v. Chadha*⁹⁰—are effective mechanisms for enhancing congressional control.⁹¹ Whether these measures facilitate greater congressional oversight represents a promising area for future research.

CONCLUSION

Congress plays a dual role in the administrative state: it acts as watchmaker, establishing agencies, granting them authority, and designing their structures *ex ante*, and later acts as watchman, monitoring agencies' use of delegated authority *ex post*. This Article shows that Congress's performance of its watchmaker role affects its later ability to serve as watchman.

This Article's findings have several implications for the design of administrative agencies to facilitate congressional control. First, 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.⁹² 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.⁹³

Chen & Tim Johnson, *Federal Employee Unionization and Presidential Control of the Bureaucracy: Estimating and Explaining Ideological Change in Executive Agencies*, 27 J. THEORETICAL POL. 151 (2015) (testing the latter theory); Moe, *supra* note 53 (explaining the former theory).

89. See Inspector General Act of 1978, Pub. L. No. 110-409, 122 Stat. 4302 (codified in 5 U.S.C. app. 3 (2012)).

90. 462 U.S. 919 (1983).

91. *Id.* at 954–55; see FISHER, *supra* note 70 (noting the persistence of both formal committee veto provisions inserted into statutes and informal understandings, with veto-like effects, between committees and agencies).

92. See Chafetz, *supra* note 13, at 764–67.

93. The solution, however, ought not to be to reduce the number of positions requiring

Second, 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.⁹⁴ This result provides tentative support for the idea that Congress may delegate broad powers to the executive at the agency design stage, while retaining influence in agency decisionmaking.⁹⁵

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.⁹⁶ Legislators that expect that creating institutions with these features will enable Congress to exert greater control over these agencies should think twice; fixed terms and qualification requirements truly are indicia of agency independence, not greater congressional control.

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 legislators can tailor the structure of congressional and administrative institutions to alter the role that Congress plays in administration. In an era of greater presidential

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 13, at 767.

94. See Calvert, McCubbins & Weingast, *supra* note 46, at 604.

95. 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. Murray J. Horn & Kenneth A. Shepsle, *Commentary on 'Administrative Arrangements and the Political Control of Agencies': Administrative Process and Organizational Form as Legislative Responses to Agency Costs*, 75 VA. L. REV. 499, 503 (1989) (describing the problem of coalitional drift).

96. Compare *Morrison v. Olson*, 487 U.S. 654, 660 (1988), and *Humphrey's Ex'r v. United States*, 295 U.S. 602, 624 (1935) (offering the former perspective), with *FCC v. Fox Television Stations*, 556 U.S. 502, 523 (2009), and LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS*, *supra* note 39, and Calabresi & Prakash, *supra* note 63, at 582–83, and Strauss, *The Place of Agencies*, *supra* note 62 (discussing the latter view that independent agencies feel the pull of congressional control).

control over administration, oversight holds promise as a means of re-equilibrating the balance of power between the White House and Capitol Hill. For those that endeavor to enhance congressional capacity to direct administrative agencies, this Article offers a blueprint.

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