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Renfrow, Patty Dale

THE ESTABLISHMENT OF THE NEW REGULATORY AGENCIES: INDEPENDENT COMMISSION VERSUS EXECUTIVE DEPARTMENT AGENCIES

Rice University

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The Establishment of the New Regulatory Agencies:
Independent Commission versus Executive Department Agencies.

by

Patty D. Renfrow

A THESIS SUBMITTED
IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS FOR THE DEGREE

DOCTOR OF PHILOSOPHY

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MAY, 1982
THE ESTABLISHMENT OF THE NEW REGULATORY AGENCIES:
INDEPENDENT COMMISSION VERSUS EXECUTIVE DEPARTMENT
AGENCIES

Patty D. Renfrow

The central research question addressed in this study is: why does Congress select an independent commission to administer some regulatory programs while for others it chooses a departmental agency? Systematic research on this question is notably absent despite the emphasis given organizational arrangements by executive branch reform efforts, specifically those proposed by the Brownlow Committee in 1937 and the Ash Council in 1971. The regulatory literature simply suggests that the commission form of organization is superior to alternative arrangements because it provides a greater degree of fairness, impartiality, expertise, and continuity of policy. This study argues that the belief in the superiority of the commission form of organization constitutes essentially a formal rationale for the choice of a commission and that it is instead political forces which lead to not only the creation of new agencies, but to their organizational arrangements as well. Moreover, this study offers three alternative explanations for the choice of an independent regulatory commission: legislative-executive rivalry, the disruption of traditional clientele ties, and partisan differences between the White House and Capitol Hill.

Seven cases were selected for examination, four independent commissions: the FERC, the CFTC, the NRC, and the CPSC, and three departmental agencies: the OSHA, the FGIS, and the MSHA. In order to determine the relative strength of the three factors, the arguments of congressmen, administration officials, and interest group spokesmen were examined as they appeared in such sources as the Congressional Record, congressional commit-
tee hearings and reports, and various other government documents. For each of the seven agencies, the factors were then categorized as either strong, moderate, or weak.

The research demonstrated that the choice of organizational arrangements is a complex decision; no single explanation emerged. Legislative-executive rivalry and the disruption of traditional clientele ties distinguished relatively well between the two types of regulatory agencies and both factors were either strong or moderate for all but one of the four commissions. Partisan differences, however, failed to distinguish between the commissions and agencies. It was moderately significant in six of the seven cases.

The study demonstrates that political factors are indeed influential in Congress' choice of organizational arrangements for regulatory agencies. Yet the examination of congressional debates on the seven agencies also revealed that many members of Congress appear to believe in the superiority of the commission form of organization. Thus, the findings of this study do not supplant the traditional explanations for the establishment of an independent regulatory commission, but point to the importance of recognizing additional explanations which may supplement traditional ones. Organizational arrangements are not neutral and the struggle among congressmen, executive branch officials, and various interest groups over the type of regulatory agency to be established clearly attest to this fact.
# CONTENTS

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>CHAPTER ONE</td>
<td>1</td>
</tr>
<tr>
<td>CHAPTER TWO</td>
<td>17</td>
</tr>
<tr>
<td>CHAPTER THREE</td>
<td>35</td>
</tr>
<tr>
<td>CHAPTER FOUR</td>
<td>53</td>
</tr>
<tr>
<td>CHAPTER FIVE</td>
<td>69</td>
</tr>
<tr>
<td>CHAPTER SIX</td>
<td>85</td>
</tr>
<tr>
<td>CHAPTER SEVEN</td>
<td>104</td>
</tr>
<tr>
<td>CHAPTER EIGHT</td>
<td>122</td>
</tr>
<tr>
<td>CHAPTER NINE</td>
<td>140</td>
</tr>
<tr>
<td>CHAPTER TEN</td>
<td>155</td>
</tr>
<tr>
<td>BIBLIOGRAPHY</td>
<td>180</td>
</tr>
</tbody>
</table>
CHAPTER ONE

Introduction

Since the creation of the Interstate Commerce Commission in 1887, the regulation of private economic behavior has become an enduring feature of the American economy. Essentially, regulation involves government control, direction, or limitation of private economic behavior; the ultimate effect is to limit the discretion of action of the regulated persons, groups, or organizations. -1- Although the President, the courts, and those subject to regulation have helped to shape the development of regulatory administration, it is Congress which is at the center of this array of contending forces. -2- Acts of Congress are required to establish both programs of government regulation and the agencies which administer such programs.

The majority of regulatory functions are performed by two types of regulatory bodies: the independent regulatory commission and the executive department regulatory agency or bureau. The independent commissions are multimember commissions composed of an odd number of bipartisan commissioners who serve staggered terms and are appointed by the President. Commissioners may be removed by the President only for the reasons of inefficiency, neglect of duty, or malfeasance in office. These regulatory commissions are independent in that they are not located within any of the executive departments of the federal government. They are also somewhat

free from presidential control and direction. In contrast, the executive department regulatory agency is headed by a single administrator who is appointed by the President and serves at his pleasure. These regulatory agencies are located within executive departments. Although Congress has assigned some regulatory tasks to independent agencies, the preference of Congress is for either the independent commission or the departmental agency. -3- In short, the major structural options for a regulatory body are the independent regulatory commission and the executive department regulatory agency or bureau.

Since the first federal regulatory agency was established nearly a century ago, regulatory programs have grown steadily in number, scope, and impact. -4- To date, Congress has created twelve independent regulatory commissions and almost twice as many executive department regulatory agencies, twenty-three to be exact. The growth and multiplication of these regulatory organizations, particularly the independent commissions, have been somewhat haphazard. The first major regulatory agencies were created in the latter part of the nineteenth century and the early part of the twentieth century, while a second wave of regulatory programs and agencies were established during the New Deal. Finally, the late 1960s and early 1970s witnessed a new surge of regulatory policies and agencies.

While economic regulation remains a major function of the federal government, the programs and agencies continue to be the subject of intense debate among scholars, politicians, regulated interests, and other organized

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groups outside of government. "Regulatory failure" is a prominent theme today, but the term has no agreed upon definition. In principle, all regulatory agencies can be (and have been) variously criticized for distorting the positive benefits of price competition, subsidizing inefficient producers, restricting competition, impeding technological progress, being captured by the regulated, fostering administrative delays and backlogs, lacking universal standards for regulation, and simply exercising poor judgment. -5- But surprisingly, the executive department regulatory agencies have largely escaped this barrage of criticism. It is in fact the independent regulatory commissions that have been the subject of much of this criticism. Indeed, they have encountered more and sharper criticism from all sources than have the department regulatory agencies. -6-

Problems of regulatory performance have been attributed to three major causes: the political environment of the regulatory agency, the statutory basis of regulation, and the organizational arrangements of the regulatory agencies. As measured by official emphasis and efforts to bring about improvements, the argument that performance deficiencies are due to the organizational arrangements has been the most important of the three. -7-

Indeed, five presidentially-appointed commissions, from the Brownlow Committee in 1937 to the Ash Council in 1971, have basically argued that the problems of regulatory policy and procedure could be remedied through structural reform of the independent commissions. The independent commissions

run counter to one of the basic tenets of the orthodox theory of administration, that of single-headed agencies. Structural reform of the independent regulatory commissions has generally included the replacement of the collegial executive with a single administrator and the replacement of independent status with location within an executive department. Thus, the basic intent of the executive reform proposals has been to make the independent commissions more like the departmental regulatory agencies.

Despite the rather severe criticism of the independent regulatory commissions, they have persisted. Although overall Congress has established more executive department regulatory agencies than independent commissions to administer regulatory programs, Congress remains a strong supporter of the independent commissions as a device for regulatory administration. Congress, or at least a majority thereof, is much more committed to the independent regulatory commissions than is the executive branch.

Research Questions

Since or about the time of the final presidential study of executive organization in 1971, Congress has established eight major new regulatory agencies: four independent regulatory commissions and four executive department regulatory agencies. Yet if the legislative branch has followed any consistent principle in choosing between the independent commission and the departmental agency, Congress has failed to disclose just what that principle is. -8- That leads to the central research question of this study: Why does Congress select an independent commission for some regulatory pro-

grams while for others Congress chooses an executive department agency? Given the similarities between regulatory functions of both types of agencies, it seems pertinent to ask why different organizational patterns were employed in different cases. -9- Are there perhaps systematic differences between the two choices by Congress?

These questions are significant for two reasons. First, much of the regulatory reform literature argues that the structure of a regulatory agency affects its performance. -10- In particular, critics of the independent commissions argue that their "independence" permits their capture by the regulated industries and that the plural executive impedes accountability. Such arguments are not entirely without merit for many organization theorists have suggested a relationship between an organization's structure and its outputs, although generally such theories are vague as to how such influence occurs and under what conditions. Although most of the evidence for this argument is qualitative, a recent study has provided empirical support for the relationship between a regulatory agency's organizational arrangements and its environment and decision making processes, both also thought to be linked to performance. -11-

Second, because official efforts to reform the regulatory agencies have primarily focused on structural reform, it is indeed likely that future reform efforts will emphasize similar concerns. (Thus, before such reforms are proposed and/or implemented, we first need to understand why Congress selects one type of organizational arrangement over another for regulatory adminis-

tration.) Indeed, that such reforms have fallen on deaf ears may reflect some misconception regarding the reasons behind Congress' choice of an independent commission.

A major assumption of this study is that given a regulatory program which requires an agency to administer it, Congress will choose in most cases an executive department regulatory agency rather than an independent regulatory commission. Past behavior indicates that for most regulatory programs, Congress has been perfectly willing to allow regulatory agencies to operate within the purview of the President by locating them within executive departments. -12- However, Congress has established fewer independent regulatory commissions to perform regulatory functions. Thus, the selection of an independent commission by Congress is more unusual and given the harsh criticism towards the independent commissions, therefore more interesting to examine.

A number of reasons for the establishment of independent regulatory commissions have been advanced in the literature on regulatory agencies. Five of the most common ones include the judicial element in regulation, the rule-making aspect of regulation, the need for expertise in the administration of regulatory programs, the need for fairness and impartiality, and the need for continuity of policy. -13- With respect to the first explanation, Congress has argued that the judicial function of regulation should be performed by independent and impartial individuals which the commission form of organization provides. Thus, when the quasi-judicial element in any regulatory program is of primary importance, Congress may select an independent commission instead of a departmental agency.

-12- Peter Woll, op. cit., pp. 53-54.
Similarly, some regulatory tasks involve important rule-making authority, so Congress may be influenced to establish an independent commission if it believes that the rule-making function is critical. According to Congress, the plural leadership and diversity of viewpoints which the commission provides is deemed more suitable for rule-making than is the single administrator of the executive department regulatory agency.

A third reason for the establishment of an independent regulatory commission is that many of the tasks of regulation are extremely complicated and highly technical. Problems of the regulatory industry may only be understood through constant study and attention to industry developments and this continuous attention allows the achievement of expertise by commission members. Congress believes that such experts, who are free of the normal political pressures which prevail in executive departments, will better serve regulatory administration.

Fourth, because such decisions often have far reaching economic consequences, the element of fairness is considered critical to ensure effective regulatory policies. Group decision making, which is afforded by the multi-member commission, is believed to provide a greater measure of impartiality than would be provided by a single administrator.

Finally, it is believed that the independent status of the commissions provides greater continuity of regulatory policy because the commissioners serve fixed, staggered terms of office. Thus, the commissions are less affected by the changes in presidential administrations than are the executive department agency administrators who serve at the pleasure of the president. Indeed, regulatory policies are to be based on "facts," not on political considerations. Thus, proponents of the independent commission argue that the commission form of organization is superior because it ensures expertise,
impartiality, and continuity of regulatory policy, all important elements for regulation which involves both quasi-judicial and quasi-legislative functions.

These traditional arguments for the creation of independent regulatory commissions surely have some merit; certainly during congressional debates over the organizational arrangements of a proposed regulatory agency, the belief in the superiority of the commission form of organization is heard again and again. Yet none of the above arguments in themselves go very far toward explaining why Congress selects a particular organizational arrangement for regulatory administration. In fact, the major problem with such traditional explanations is that they fail to distinguish between Congress' choice of an independent commission and the choice of a departmental agency. If the quasi-judicial and quasi-legislative functions are so critical to regulatory administration and if the commission form of organization is so superior, then why has not Congress established independent commissions to administer all regulatory programs? Why has Congress established only twelve independent regulatory commissions and almost twice as many departmental regulatory agencies? In effect, why has Congress created independent commissions to administer some regulatory programs and executive department agencies for others?

The literature on regulatory structure does not explicitly address this question and so the development of additional or alternative explanations becomes even more difficult. However, Peter Woll makes a very cogent argument that it is political forces which not only lead to the creation of new agencies, but to their organizational arrangements as well. -14- With that point in mind, I will suggest that while congressmen may argue that the

-14- Peter Woll, op. cit., p. 72.
commission form of organization is highly suitable for regulatory administration, such an argument constitutes essentially a formal rationale for the choice of an independent commission. I will propose instead that the choice of an independent commission is the result of three political factors: legislative-executive rivalry, the disruption of traditional clientele ties, and partisan differences between Congress and the White House.

Legislative-executive rivalry over control of the regulatory agencies, the first factor, is a major explanation for the establishment by Congress of independent commissions rather than executive department agencies. -15- A certain degree of antagonism exists between the two branches and this hostility is manifested in the battle over control of the regulatory commissions. Indeed, for many years the President and Congress have waged a continuing struggle about which, if either, should exercise active control, but with neither side consistently wanting to do so itself.

Members of Congress consider the independent commissions as "arms of Congress" and indeed in constitutional theory the commissions are seen as extensions of the legislative branch. They speak to and take directions only from Congress. -16- Thus, Congress tends to regard the independent regulatory commissions as its own agencies over which it jealously exercises legislative oversight. Although the commissions are to some extent independent of Congress, they are even more independent of the executive branch. In fact, the position of the independent commissions with respect to the President is somewhat ill-defined. However, Congress deliberately created the independent commission to be free of executive authority, thus independence

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has consisted primarily of freedom from presidential control. -17-

Although in theory the independent regulatory commissions act for and are responsible to Congress, modern Presidents have not accepted this theory without reservation. -18- They have attempted to exert authority over regulatory policy formulation through their appointment powers. Both Cushman and Kohlmeier cite numerous examples of such attempts to influence regulatory policy by Republican and Democratic Presidents alike. -19- Not surprisingly, Congress is extremely wary of presidential influence into an area Congress considers its own domain. Thus, the appeal for independence is often heard in congressional attempts to prevent presidential intervention in the regulatory process of independent commissions. In short, a major explanation for Congress' selection of an independent commission to administer a regulatory program is the rivalry between Capitol Hill and the White House.

A second explanation for the establishment of an independent regulatory commission involves the role of relevant interest groups. Both Congress and the regulated groups recognize the ties between certain executive departments and/or other agencies and organized interest groups. Such ties may allow the regulated to more easily influence regulatory policy such that the policies pursued by the departmental regulatory agency are more advantageous to the regulated interests. Thus, the second factor influencing Congress to select an independent commission as opposed to a departmental regulatory agency is an attempt by Congress to free the agency or to ensure its

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freedom from traditional clientele ties. -20- Supporters of the independent commission have long argued that "independence" makes the commissions immune from the very industries that they regulate. -21-

The third and final factor which may influence Congress to create an independent regulatory commission instead of a departmental agency is partisan differences between Congress and the President. Although there exists a normal level of antagonism between the two branches of government, such antagonism increases markedly when Congress and the White House are controlled by opposing parties, especially given the different perspectives toward economic regulation by the Democrats and Republicans. So when the President represents a different political party, congressional prerogatives concerning the independent regulatory commissions are even more fiercely guarded.

When Congress created the first regulatory commissions, it designated them "independent" in order that their regulatory functions be located outside the range of partisan control. -22- Multiple membership composed of an odd number of bipartisan commissioners was viewed as further provision against partisan influence over regulatory policies. Thus, the external location of the independent commission and its internal structure are believed to insulate the regulatory agencies from partisan control to the maximum extent possible. -23- Congress then may establish an independent regulatory commission

-22- Cushman, op. cit., p. 688.
to perform certain regulatory functions rather than an executive department regulatory agency because Congress considers the probability of partisan influence from the executive branch to be less likely.

**Research Design**

While the regulatory literature is replete with case studies of particular regulatory agencies (many of which examine the origins of the agency), none explicitly address the question of why Congress selects a particular organizational structure over another. Because of the lack of systematic research attempting to specify the causes of organizational arrangements as well as determine which, if any, of the above influences on organizational choice operate in reality, this research is to some extent exploratory. While the primary purpose is to determine whether or not the factors outlined above influence the organizational structure of regulatory agencies, the research method selected should not preclude the discovery of additional or alternative factors.

Eight cases were initially selected for examination: four independent regulatory commissions and four executive department regulatory agencies. However, the absence of information on one of the departmental agencies, the Economic Regulatory Administration (ERA) in the Department of Energy, necessitated reducing the sample size to seven. The cases were chosen for two reasons. First, focusing only on those regulatory commissions and agencies established during the last decade supports my argument that the selection of an independent commission instead of a departmental agency is a critical choice by Congress. Despite over thirty years of reform proposals (which culminated with the Ash Council Report in 1971) urging elimination of the independent regulatory commissions, they have not only persisted, but
increased as well. Clearly, Congress continues to view the independent commission as a viable form of organization for regulatory administration.

Second, the seven cases (four commissions and three departmental agencies) appear to strike a good balance between the ability to provide richness of detail and the ability to develop generalizations concerning the influences on organizational arrangements. As it happens, the cases (plus the ERA) represent the total number of regulatory commissions and agencies established by Congress during the 1970s. The four independent commissions include the Federal Energy Regulatory Commission, the Commodity Futures Trading Commission, the Nuclear Regulatory Commission, and the Consumer Product Safety Commission. The three departmental agencies include the Mine Safety and Health Administration, the Federal Grain Inspection Service, and the Occupational Safety and Health Administration.

I should note that the three departmental agencies will be treated as control cases. My examination of them is to determine whether or not the three factors which I have suggested influence Congress to select an independent commission are in fact exclusive to the commission. I want to know if the three factors distinguish between the two organizational arrangements. While at this point I have not offered explanations for Congress' choice of a departmental agency, I anticipate that the critical examination of the three agencies may yield some explanations for the choice of a departmental regulatory agency. Should this be the case, these explanations will be discussed at the end of this study.

In order to determine the relative strength or importance of the three factors: legislative-executive rivalry, the disruption of traditional clientele ties, and partisan differences between Congress and the Presidency, the arguments of congressmen, administration officials, and interest group
ated in official government documents will be carefully utinized. The primary emphasis will be on the statements s they make the final decision regarding the organizational regulatory agencies. Sources will include the Congressional onal committee reports and hearings, and various other gov-

eful reading and examination of these documents, I will as to the relative strength of the three factors which will strong, moderate, or weak. For example, if a number of atedly state that "independence" is necessary to prevent the executive branch, the factor, legislative-executive onsidered strong or moderate, depending of course on what appear to be involved. I do not intend to argue that any ctor explains the creation of an independent commission, that Congress may be influenced to establish a commission nination of these factors. In fact, these three factors are esusive and may overlap. For example, the difference ve-executive rivalry and partisan differences between the White House is clearly a difference of degree. And the n partisan differences and the disruption or clientele ties to precisely determine in cases where the two political par ing the executive branch and the other controlling the legis resent the interests of opposing interest groups.

the research method is less rigorous that I would like. The ct lend themselves to statistical tests, and to conduct such ossly misleading. Thus, the conclusions I will make from l be judgments, but informed judgments based upon deep
immersion into the official government documents. In addition, the nature of the data and the sample size will not permit me to accept or reject either the traditional explanation for the independent commission or any one or all of the three explanations that I have proposed. In effect, the research method is not amenable to hypothesis testing in the strict sense of the term. However, I do believe that this research will permit me to determine, with some measure of confidence, the degree of importance or unimportance of a particular explanation and why this should be the case.

Although the research method is more qualitative than statistically precise, I will try to maintain a certain level of reliability and validity. To increase the reliability of the results, I will simply attempt to be as objective as possible in the hope that a second researcher examining the same documents would arrive at similar conclusions. Also, I will rely on the official written record and attempt to examine all parts where the organizational structure of the regulatory agency is debated.

With respect to the validity of my conclusions, I have made a very critical, but necessary, assumption—that the statements appearing in the written record are indeed an accurate reflection of the attitudes of congressmen, administration officials, and interest group representatives. I will suggest, however, that if a bias exists in the documents as to the significance of the three factors which may influence Congress to establish an independent commission, the bias is one of understatement. Certainly the most plausible and least costly explanation a congressman might give for such a choice is the one traditionally advanced in support of the independent

-24- While interviews, for example, would provide a more direct examination of congressional attitudes, such data would still be subject to the same problem of validity.
commission form of organization—that the independent commission is superior because it provides expertise, fairness, and continuity of policy. While some congressmen may in fact adhere to such a belief, I have suggested that other factors are also influential in the choice of an independent commission over a departmental agency. The research questions of this study are important and simply because the factors may be more difficult to "get at" should not deter insightful attempts to provide answers to these questions.

Organizational arrangements are not neutral. They are believed to have significant consequences for an organization's environment, its decision making processes, as well as its outputs. While this study does not address the consequences of a regulatory agency's structure on its performance, this research takes an initial step in examining why Congress chooses one particular structure over another for the administration of various regulatory programs. As stated previously, the literature on the question of Congress' choice of organizational arrangements for regulatory agencies is indeed sparse. Nevertheless, the following chapter will examine that regulatory literature which implicitly, if not explicitly, relates to the research question of this study.

CHAPTER TWO

Literature Review

A major distinction has been made in the regulatory literature between the independent regulatory commissions and the regulatory agencies located within executive departments. -1- The executive department regulatory agencies have received scant attention from scholars. In contrast, the independent commissions have received a great deal of attention from scholars, politicians, and reformers; interestingly, most of this attention has been highly critical. Research on the independent regulatory commissions, the primary focus of this study, may be classified according to three major approaches: historical, behavioral, and reformist. It is only the latter, the executive reform literature, which has explicitly addressed the relationship between the structure of the regulatory body and its performance, thus primary attention will be given to this literature. However, the executive reform literature has failed to address in any systematic fashion the question of why Congress selects one type of organizational structure for one regulatory program and a different type for a similar regulatory program.

**Historical Literature**

Using an historical approach, Robert E. Cushman presented the definitive legislative history of the early independent regulatory commissions in 1941. -2- Drawing on his research undertaken during his service on the Presi-
dent's Committee on Administrative Management, Cushman's *The Independent Regulatory Commissions* describes in rich detail the early independent commissions of the Progressive and New Deal eras, their historical background, their internal organization and procedures, their relations with both the legislative and executive branches, and the problems resulting from their independence. Cushman's study represents the most thorough and comprehensive investigation of the independent regulatory commissions and their constitutional position in American politics.

Writing over a decade later, Marver Bernstein, in *Regulating Business By Independent Commission* 1955, also presents a legislative history of the regulatory commissions from 1887 through the 1940s. While Cushman wrote at a time when the independent regulatory commissions exercised key government control of private economic activity, Bernstein argues that by 1955 the independent commissions had declined in importance and that more and more regulatory functions were being carried out by executive department regulatory agencies. Bernstein goes on to critically evaluate the role of the independent regulatory commissions and appraises the commission as an agent of government regulation at the national level. He argues that in fact the independent commissions have not been satisfactory instruments of government regulation of business.

Bernstein seeks to present a more realistic concept of the process of government regulation. Viewing regulation as a highly political process, he argues that the regulatory process can be better understood by the historical pattern followed by the independent commissions from birth to decay. Although Bernstein recognizes that there are naturally elements unique to

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each commission, he argues that the history of each reveals a general pattern of evolution which is characteristic of all. This life-cycle theory of the regulatory process of the commission includes four stages: gestation, youth, maturity, and old age. The nature of the regulation and the commission's relationships with the regulated industries vary according to the stage of the commission. Although there is little empirical support for Bernstein's theory, it is an insightful attempt to help students of the regulatory process to understand the performance of particular regulatory commissions, that is, why some commissions appear to vigorously pursue regulation in the public interest while others appear to pursue policies seemingly more advantageous to the regulated interests.

A final notable historical work is James E. Anderson's *Emergence of the Modern Regulatory State* 1962. Anderson's study deals less with the independent regulatory commissions, per se, and focuses primarily upon the development of the role of the national government in the regulation of private economic activity. Anderson offers a rich description of the environmental and ideological factors affecting the move for regulation, the conflict over the government's authority to regulate private business, the purposes of regulation, and the choice of the independent commission as the appropriate device for national regulation. While these early studies point to the importance of political factors in the establishment of the first independent commissions, none has explicitly addressed the question of why Congress selects the independent commission instead of an executive department agency to administer a regulatory program.

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Behavioral Literature

The behavioral studies of the independent regulatory commissions essentially argue that regulation by independent commission has been ineffective because the commissions have pursued policies more favorable to the interests of the regulated than to the interests of a broader public. Although these studies do not directly relate to the choice of organizational structure, they do suggest, among other factors, that the environment of the regulatory commission (as distinct from the environment of the departmental regulatory agency because of the commission's "independence") permits the regulated industry to excessively control the decisions of the regulatory commission.

5 In effect, "independence" alienates the commission from potential sources of political support, particularly the President, and facilitates maximum responsiveness by the commission to the demands of the regulated industry. Several of the prominent behavioral studies are discussed here.

Perhaps the most widely recognized theory of regulatory agency behavior is the "capture theory" developed by Samuel P. Huntington. 6 Through an examination of the first independent regulatory commission, the Interstate Commerce Commission, from its early beginnings through the first half of the twentieth century, Huntington charges that the ICC suffered from a crisis, an administrative decline. According to Huntington, the decline of the Interstate Commerce Commission is due to the failure of the commission to develop support among the new transportation interests such as the airlines, truckers, and water carriers which emerged in the twentieth century. He

finds instead that the Interstate Commerce Commission tied itself to the railroads and promoted their interests while systematically excluding nonrailroad interests from the regulatory benefits of the ICC. Huntington concludes that the railroads have effectively "captured" the Interstate Commerce Commission such that its legislative intent has been subverted. Yet he points out that capture has not occurred solely as the result of the behavior of the railroad interests, but is also the effect of the commission's attempt to nurture political support from the regulated industry. Thus according to Huntington, capture of a regulatory commission by the regulated is a natural consequence of each actor pursuing its own interests.

Despite the general acceptance of the capture theory by politicians and scholars and the ease with which the term is used in the regulatory literature, Huntington's thesis has not escaped criticism. One of the most comprehensive examinations of the capture theory is offered by Charles Morgan, a former economist for the Interstate Commerce Commission. -7- Morgan argues that the ICC has not consciously cultivated political support from the railroads and the the Interstate Commerce Commission has not subverted its legislative mandate, but has in fact regulated in the public interest. Morgan's conclusions from his examination of the ICC contrast markedly with those drawn by Huntington indicating that what he sees as a general trend of agency behavior, Morgan views as problematic.

Perhaps the most fundamental criticism to be leveled against the 'capture theory is the assumption of a universal standard by which to judge agency behavior. Huntington uses the criterion of the "public interest," but

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he fails to provide any definition of this term. Thus, "capture" remains an ambiguous concept subject to varying interpretations, perhaps depending ultimately on whether or not the analyst agrees with the regulatory commission's decisions.

George J. Stigler, a conservative economist, and Gabriel Kolko, a leftist historian, present an alternative theory of regulatory agency behavior (although each reaches the same conclusions by somewhat different routes) which argues that the failures of regulation can be explained by the nature of the enabling legislation. According to Stigler and Kolko, favorable regulatory policies for the regulated industry result not from agency capture as Huntington maintains, but from the enabling legislation itself which is biased toward the regulated interests. Stigler and Kolko argue that the enabling legislation inherently favors the regulated industry because its representatives have influenced elected officials to pass favorable legislation. Thus according to Stigler and Kolko, when a small group of regulated firms have a great interest in regulatory activities while the general public is only marginally or peripherally interested or affected, it is inevitable that the information, concern, and political clout of the regulated will be effectively communicated through the political process. Since public concern over regulatory behavior is so occasional, it is then not surprising that regulatory policies benefit those having the greatest stake in such policies, i.e., the regulated.

Finally, Theodore J. Lowi and Louis Jaffe offer yet another theory of...

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regulatory agency behavior which also focuses on the nature of the enabling legislation, but which draws different conclusions about this legislation than those of Stigler and Kolko. -10- The critical aspect of a regulatory commission's legislative mandate, according to Lowi and Jaffe, is whether the legislation is vague or specific with respect to the agencies' functions. They find that most regulatory statutes lack any meaningful or precise policy guidelines. For example, congressional directives to the regulatory commission often include such ambiguous phrases as "to regulate in the public interest." Lowi and Jaffe argue that in the absence of a clear legislative mandate to interfere with management and lacking the political resources and adequate coercive authority, it is not surprising that regulatory commissions seek an accommodation with their clientele. -11- Thus, according to Lowi and Jaffe, regulatory policies favoring the regulated industries occur as a result of vague legislative mandates and not because of any bias toward the regulated in the enabling legislation as Stigler and Kolko maintain.

In sum, these three theories of regulatory behavior emphasize different factors to account for the failure of regulatory commissions to perform effectively. Huntington focuses on agency capture as a natural result of the agency and the regulated pursuing their own interests. Stigler and Kolko recognize the regulatory bias toward the regulated, but argue that it occurs as a result of the enabling legislation which is itself biased toward the regulated industries. Lowi and Jaffe also concede regulatory favoritism to the regulated, but attribute it to the lack of specific policy guidelines to the

regulatory commission from Congress. Despite the different focus of each of these authors, their analyses contain a common theme: independent regulatory commissions have failed as instruments of government regulation; they have so closely aligned themselves with the very industries they are charged with regulating that it has become extremely difficult for the regulatory commissions to pursue fair and effective regulatory policies.

Reform Literature

While the behavioral literature on the independent regulatory commissions suggests that the failures of regulation are primarily the result of agency capture, the executive reform literature argues that the poor performance of the regulatory commissions is largely due to their organizational structure. The executive reform literature on independent regulatory commissions began in 1937 with the publication of the Brownlow Report prepared by President Roosevelt's Committee on Administrative Management. This government study of executive branch organization was followed by four subsequent studies: the First and Second Hoover Commission Reports (more formally known as The Commission on Organization of The Executive Branch of the Government, The Independent Regulatory Commissions, 1949, and The Commission on Organization of The Executive Branch of The Government, Legal Services and Procedure, 1955, respectively); The Landis Report on Regulatory Agencies to The President-Elect, 1960; and finally The Ash Council Report, formally entitled The President's Advisory Council on Executive Organization, A New Regulatory Framework: Report on Selected Independent Regulatory Agencies, 1971.

All five of these studies surveyed the independent regulatory commissions, analyzed their strengths and weaknesses, and prescribed reforms to
improve the effectiveness of the commissions. -12- The focus of these government studies is primarily structural; emphasis is on internal structure and external organization, i.e., the location of the commissions in the broad government establishment. The persistent theme of this executive reform literature is that the structure of the independent regulatory commission is the culprit for the ineffectiveness of government regulation by independent commission. Although each study is generally critical of the commissions, each produced a distinctive analysis and set of recommendations.

The Brownlow Committee report is the first in a long line of executive reform studies which reflect varying degrees of hostility toward the independent regulatory commissions. The Brownlow Committee in fact launched a broadside attack against the independent commissions. -13- The Committee charged that the independent regulatory commissions constitute a "headless fourth branch of government, a haphazard deposit of irresponsible agencies and uncoordinated powers responsible to neither the President or Congress." -14- According to the Committee, constitutional law requires that the President be responsible for the exercise of policy determining functions vested in the administrative agencies. -15- So in order to increase presidential direction, control, and coordination of regulatory policy—the major goal of the Brownlow Committee—the Committee proposed that the independent regula-


tory commissions be abolished and their administrative and regulatory functions be transferred to single-headed agencies within the executive departments. Within these departments, the Brownlow Committee recommended that regulatory functions be divided between an administrative section and a judicial section to further improve the regulatory process.

The Brownlow Committee report attracted widespread criticism. Critics charged that the report was almost hysterical in its condemnation of regulation by independent commission. Merle Fainsod, whose criticisms were particularly insightful, recognized that the recommendations for structural reorganization were naive in their assumption that the problems of the independent regulatory commissions could be alleviated or ameliorated by mere organizational change. -16- In effect, Fainsod argued that the problem of transforming the commissions into more effective regulatory agencies goes far deeper than the problem of their relationship to the President; other factors such as competent personnel and adequate financial support affect regulatory effectiveness as well as the independent commissions' relationships with Congress and the courts. Finally, Congress did not respond favorably to the recommendations of the Brownlow Committee report. Congress defeated the proposal to place the regulatory programs of the independent commissions within executive departments because it feared that such a move would give too much power to the President. -17-

The First Hoover Commission and its Task Force on Independent Regulatory Commissions issued a report which was quite modest in scope com-

pared to its predecessor, the Brownlow Committee Report. The First Hoover Commission found the independent regulatory commissions to be useful, desirable, and proper government mechanisms and found no major problems of political irresponsibility or lack of policy control due to the independent nature of the commissions. -18- According to the Hoover Commission, the problems of ineffective performance were mainly the result of unqualified commissioners, inadequate authority to direct commission activities, and insufficient delegation to staff. Thus, the focus of this second government study was on internal administration and procedure of the independent commissions. Its primary recommendation was to strengthen the position of the chairman by vesting in it greater administrative authority and to increase the competence of staff members and their salaries, as well as to encourage greater delegation of minor matters to staff personnel. While the First Hoover Commission recognized the problems posed by the plural executive of the commissions, it did not go so far as to propose replacing them with a single administrator to head the independent commissions.

The Second Hoover Commission and its Task Force on Legal Services and Procedure reflected a strong preoccupation with internal procedures and little concern with presidential responsibility and the place of the independent commissions in the overall government framework. -19- The Task Force sought to reform the administrative process of the regulatory commissions by

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further judicializing it. -20- The Commission argued that the administrative or policy making function should conform to judicial procedures as much as possible. Specifically, it proposed an internal structural reorganization, the creation of an administrative court including four sections for labor, taxes, trade, and immigration. The report of the Second Hoover Commission was criticized for being overly legalistic while ignoring political and administrative factors affecting government regulation. Although the two Hoover Commission reports were not nearly so radical as the Brownlow Committee report, that is to say they did not go so far as to condemn government regulation by independent commission, the Hoover Commissions were still generally critical of the independent regulatory commissions.

The focus of the fourth major government study, the Landis report, contrasted markedly with its two predecessors. James Landis, former Dean of the Harvard Law School and a former member or chairman of several regulatory commissions, did not focus on procedural reform of the independent commissions; instead he emphasized increased administrative efficiency, greater coordination of regulatory policies, and improved regulatory personnel. -21- In order to improve the administrative process of the regulatory commissions, Landis argued that better qualified commissioners were required. According to Landis, the key to improving regulatory performance is the selection and retention of qualified personnel. -22-

Surprisingly, Landis found little difference between the relationship of the President to the independent commissions and his relationship with execu-

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-20- Norman C. Thomas, op. cit., p. 1039.
-22- The Landis Report, op. cit., p. 66.
tive department regulatory agencies. According to Landis, through budgetary and appointment powers, the President can exercise effective control over both types of regulatory agencies. However, to stimulate policy formulation and to gear it more effectively to the President, Landis recommended the establishment within the Executive Office of the President several offices for coordination and development of regulatory policy in the areas of transportation, communication, energy, and one office for general oversight of the regulatory agencies. However Congress, jealous of its authority over the regulatory agencies, charged that the executive branch planned to create a White House "czar" and establish a direct chain of political command over the regulatory agencies. -23- Otherwise, reaction to the Landis report was generally favorable. -24- However, Landis did not address some of the more controversial aspects of the independent regulatory commissions, i.e., their plural executive and their independent status.

The Ash Council, however, did address itself to the questions of a single versus plural executive and departmental versus independent status. Inadequacies in the regulatory structure of the independent commissions, charged the Ash Council, have adversely affected the implementation of congressional mandates, the management of executive branch functions, the interests of the public generally, and the ability of the regulated industries to operate their businesses profitably or to plan future actions with reasonable assurance of what regulatory policy will be. -25- Thus, like the Brownlow Committee, the Ash Council was hostile to the independent commission as an institutional

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-24- Norman C. Thomas, op. cit., p. 1042.
form for regulatory administration.

The major causes of the failures of regulation by independent com-
mission, according to the Ash Council, are two organizational characteristics: independent status within the government establishment and the collegial executive. Although Congress conceived of the independent regulatory com-
missions as independent of presidential control, the Ash Council found not only are the commissions independent of the executive branch, but they are also nearly as independent from Congress itself. Unfortunately, continued the report, Congress has continued to preserve the independence of the regu-
ulatory commissions, but has not exercised any systematic oversight of the activities of the commissions. Thus, the fifth government study charged that the independent regulatory commissions are not sufficiently accountable for their actions to either the President or the Congress because of their inde-
pendence and their remoteness in practice from the constitutional branches of government. -26- In particular the independence of presidential authority, stated the report, impeded the development of rational, coherent national regulatory policy.

In addition, the collegial head of the independent regulatory com-
missions is ineffective for the administration of government regulation according to the Ash Council. It found that the collegial executive results in multiple direction, splintered management, and shared indecisions. Plural leadership further increases the unaccountability of the independent commissions. In short, the Ash Council maintained that inherent deficiencies in the commis-
sion form of organization prevent the independent regulatory commissions from responding effectively to changes in industry structure, technology, eco-

-26- ibid., p. 4.
nomic trends, and public needs. -27-

The major recommendation offered by the Ash Council is the replacement of the plural executive with a single administrator directly responsible to the President, thereby eliminating the independent commissions and effectively transforming them into executive department regulatory agencies. Such a structural alteration, according to the report, will assure coordination of regulatory policy with national policy goals, will enhance leadership, improve management efficiency of regulatory functions, and improve accountability to both Congress and the executive branch. -28- Single headed agencies directly responsible to the President would thus cure the problems resulting from both the collegial leadership and the independent status of the independent regulatory commissions.

Of the five government studies of the independent commissions, the report prepared by the Ash Council precipitated the greatest amount of informed discussion among reformers and scholars. -29- In the most comprehensive examination of the Ash Council proposals Roger Noll argues that by considering only organizational structure, the Ash report understates the seriousness and complexities of the failures of government regulation. -30- Noll's criticisms are reminiscent of those made by Merle Fainsod with respect to the Brownlow Committee report three decades earlier. The Ash Council proposals gravely exaggerate the expectations of structural change, argued Noll, who stressed that the problems of regulation run much deeper—to the heart

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-27- Ibid.
-28- Ibid., p. 5.
-30- Roger Noll, Reforming Regulation, op. cit., p. 2.
of the regulatory process itself—than the Ash Council report implies.

Another major criticism of the Ash Council report by Noll is its lack of factual or analytical evidence to support its arguments. For example, the collegial executive is said to result in splintered management, yet there is no evidence to suggest that regulatory administration by single headed agencies is more effective. In fact, David Welborn makes a compelling argument that the chairmen of the independent regulatory commissions exercise substantial influence over the regulatory process and that there is integration, not fragmentation, around the chairmanship. -31- According to Welborn, the working arrangements of the commissions can be described as collegial only in a very general sense. Welborn's analysis suggests that the organizational structure of the commissions with respect to their leadership is in practice not unlike that of the executive department regulatory agencies. If the performance of the independent commissions is inadequate, then perhaps it is due to something other than the plural executive.

The Ash Council also charges that the independent regulatory commissions are not sufficiently accountable to the President and implies that there is no problem of accountability with the departmental regulatory agencies. Yet again, the Ash Council provides no factual or empirical basis for this claim. Though nominally "independent," the commissions are not entirely free from presidential direction as the Ash Council seems to suggest. The President can exercise a fair amount of influence through budgetary and appointment powers. Welborn argues that because commission chairmen have considerable control over regulatory activities, the President, through these appointed Chairmen, is able to influence the regulatory commissions at least

-31- David M. Welborn, op. cit.
on major policy matters. Welborn maintains that the location of the independent regulatory commissions is not a significant barrier to effective presidential control. The critical variable is not organizational structure then, but the degree and techniques of presidential control. Welborn concludes that the independent regulatory commissions are not nearly as independent as generally assumed.

Finally, the Ash Council report like the four previous studies of executive branch organization fails to critically examine the departmental regulatory agencies. The five studies emphasize the structural differences between the independent regulatory commissions and the executive department regulatory agencies, but focus only on the former. Critical examination of both types of regulatory bodies is surely necessary if one is to determine more conclusively the relationship of organizational structure to the performance of regulatory commissions and agencies. While it is indeed probable that the organizational arrangements of regulatory agencies do affect policy outputs, the executive reform literature fails to provide empirical evidence to support such an argument. This literature leaves one with two basic observations about the executive branch's attitude toward the independent regulatory commissions. First, the structure of the regulatory commissions and agencies is considered to be a critical factor to their effectiveness and second, the performance of the independent regulatory commissions has been quite unsatisfactory. Thus, the conclusion that the organizational arrangements of the independent commissions are the primary cause of the ineffectiveness of government regulation by independent commission. Because of the importance given the structural characteristics of the regulatory agencies by the executive reform literature (and to some extent implicit in the historical and behavioral literature), a more accurate understanding of the reasons behind
Congress' choice of organizational structure for regulatory agencies is surely warranted.

Congress has repeatedly resisted efforts by the executive branch to reform the regulatory commissions. Moreover, congressional support for the independent commission as a device for regulatory administration is indicated by the continued use of the old and well-established independent regulatory commissions as well as the creation of four new ones in the last decade. Again, this finding leads to the central research question of this study: why does Congress establish an independent commission for some regulatory programs and an executive department agency for others? In effect, what determines the choice of a particular organizational structure? To reiterate, the central argument of this study is that such decisions are primarily the result of political forces. I will argue that the choice by Congress for an independent commission instead of an executive department agency is influenced by three factors: legislative-executive rivalry, the disruption of traditional clientele ties, and partisan differences between Congress and the White House. The following seven chapters will illustrate the reasons and motivations behind Congress' choice of organizational structure for the four independent commissions and the three departmental agencies.
CHAPTER THREE

The Federal Energy Regulatory Commission

The Federal Energy Regulatory Commission (FERC) has the authority to set prices and regulations for natural gas, oil, and electricity. The commission is composed of five members who serve staggered, four year terms and are appointed by the President with the advice and consent of the Senate. The Department of Energy Organization Act, which Congress passed in 1977, created the commission to replace the Federal Power Commission (FPC) which was abolished by the act. -1- The FERC is an independent regulatory agency located within the Department of Energy (DOE). Its location is unusual; it is in fact the only commission to be located within an executive department. However, despite its location within the Department of Energy, the commission is not a departmental regulatory agency. The FERC has a separate budget from the other bureaus within the department and the commission also has complete freedom with respect to the hiring of personnel. Moreover, the Secretary of Energy does not have the authority to review or change the decisions of the FERC. The Secretary is in effect like any other individual or party who intervenes in the decision making process of the energy regulatory commission. Thus, for all practical purposes the FERC is like any other independent regulatory commission.

Included in President Carter's proposal to create a new executive department of energy was the inclusion of a provision to create the Energy

Regulatory Administration (ERA). This new departmental regulatory agency was to replace the Federal Power Commission and was to be headed by a single administrator appointed by and directly responsible to the President. According to the Carter proposal, the ERA was to be directly under the authority of the Secretary of Energy who was also to have the ultimate price setting authority. Also included in the Carter plan was the creation of a Board of Hearings and Appeals consisting of three presidential appointees confirmed by the Senate. The Board was to be primarily responsible for actions which directly established rates and charges under the Natural Gas Act and the Federal Power Act, including the wellhead pricing of natural gas, wholesale electric rates, and pipeline transmission charges, as well as issuing certificates of public convenience and necessity for pipeline routes. According to the Carter administration, the Board was to provide the independent, quasi-judicial structural framework necessary to ensure the integrity of the regulatory process.

President Carter believed that this reorganization would help bring fragmented energy policies into an organizational structure capable of both developing and implementing an overall national energy plan. With respect to the proposed new departmental regulatory agency, the Energy Regulatory Administration, the Carter administration argued that this agency would be more accountable to the political process and thus more responsive to the needs and demands of the public than would the FERC, an independent commission. James B. Schlesinger, President Carter's chief energy advisor, and

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soon to be the new Secretary of Energy, argued before the House Government Operations Committee that it would be extremely difficult for the federal government to develop and implement a rational and coherent national energy policy if the DOE did not have the power to deal comprehensively with pricing, allocation, and emergency shortage management of essential fuels and energy sources. -4- In short, the Carter administration maintained that energy regulatory functions should be located within the new executive department energy regulatory agency in order to ensure that energy price regulatory policies were consistent with energy conservation and resource development goals.

House Action

The administration's energy organization bill was introduced by Chairman Jack Brooks (D TX) of the House Committee on Government Operations. On May 16, 1977, the bill, as amended, was reported out of committee by a vote of 37 ayes to 2 nays. -5- Despite a number of amendments, the energy organization bill reported by the Government Operations committee was essentially the administration's bill. The committee bill permitted, as President Carter requested, the Secretary of Energy to set oil and natural gas prices. However, those functions and authorities of the FPC not specifically transferred to the Secretary of Energy such as the setting of wholesale electric rates in interstate commerce, the setting of pipeline transportation rates, and the direct issuance of certificates of public convenience and

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necessity for pipelines were to be vested in the new Federal Energy Regulatory Commission. -6- In short, the committee version of the energy organization bill was very much in line with the Carter administration's request.

In hearings before a subcommittee of the House Committee on Government Operations, representatives of energy-related industries, public utility associations, and government officials presented their positions on the Carter administration's energy reorganization bill. Industry reaction was mixed, but public utility associations overwhelmingly rejected the Carter proposal and supported either the retention of the FPC as it was or the transfer of its energy regulatory authorities to a new independent, collegial commission.

Alex Radin, spokesman for the American Public Power Association (APPA), argued that if the energy pricing and regulatory powers of the FPC were placed in an executive department agency, such functions in effect would be "captured" by the executive branch. -7- Two former FPC chairmen, Joseph C. Swindler and Lee C. White, also opposed the Carter proposal and feared that if it was adopted by the Congress, energy regulatory decisions would be subject to political pressures from the executive Department of Energy. However, the current FPC chairman, Richard L. Dunham, in testimony before the subcommittee, endorsed the inclusion of the FPC within the new DOE. He argued that energy regulatory decisions would be more accountable to the political process and therefore more responsive to the needs and demands of the American public if such decisions were made within an executive department regulatory agency instead of in an independent regulatory com-

-6- Ibid., p. 8.
mission. -8-

Congressman Brooks was the most prominent supporter of the committee bill and the administration's energy organization plan. On June 2, 1977, during House debate on the energy reorganization bill, Brooks argued the merits of the bill on the floor:

We must establish within the DOE a single individual who shall have the authority to meet crises and to contend with monopolistic forces in a rapid and concise manner and one which will rationalize policy objectives in broad areas of concern. Giving the Secretary of Energy the ability to issue rules and regulations of general applicability is designed to enable the Secretary to harmonize particular energy issues with overall national energy policy objectives. -9-

Responding to criticisms that the bill created an "energy czar," Chairman Brooks argued that the committee bill would not centralize excessive power in the hands of the Secretary of Energy, but would, in effect, create a balanced office. -10- Moreover, Brooks expressed concern over the alternative to the proposed executive department regulatory agency, that of the independent commission, and questioned the ability of a collegial body to perform energy regulatory functions satisfactorily. -11- Siding with Brooks was Congressman Don Fuqua (D FL), also a member of the Government Operations Committee, who argued that no doubt the committee bill gave the Secretary of Energy broad grants of authority, but that such powers were necessary to deal with the enormous energy problems. -12-

Although Congressman Brooks was a critical supporter of the Carter administration's proposal to create a new energy regulatory agency, many members of Congress had serious reservations about the Carter plan as well.

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-8- Ibid., p. 55.
-9- The Congressional Record, June 2, 1977, p. 5310.
-10- The Congressional Quarterly Almanac, op. cit., p. 615.
-11- The Congressional Record, op. cit.
-12- The Congressional Quarterly Almanac, op. cit.
as the committee version of the Carter proposal. The critical area of disagreement between the Carter administration and the Congress concerned the assignment of the authority to set prices and regulations for natural gas, oil, and electricity. Should such power be vested in the Secretary of Energy or in an independent commission such as the FERC? Debate on the energy reorganization bill, as reported by the Government Operations Committee, lasted two days with the first day of debate totaling eight hours. Throughout the debate on the House floor, one theme dominated: Did the bill give too much power to the head of the proposed energy department? -13- Specifically, the most controversial aspect was the transfer of price setting authority from the Federal Power Commission to the Secretary of Energy.

In the supplemental views of the committee report on the energy organization bill, representatives John E. Moss (D CA), Anthony Moffett (D MA), Andrew Maguire (D NJ), and Clarence J. Brown (R OH) argued that the bill was flawed because it proceeded upon the assumption that government structure can be divorced from the substance of federal energy regulation. -14- Recognizing that the energy organization bill transferred broad authority to regulate portions of the economy from various independent regulatory agencies, particularly the FPC, to an executive agency, these four opponents of the bill stated:

Of the gravest concern to us is the fact that only the authorities and not the protective structure of these independent agencies are being transferred to an executive department....The authorities to be transferred to the Secretary...from the Federal Power Commission constitute some of the broadest delegations of legislative authority ever granted to government agencies. Under the Natural Gas Act,...the FPC sets the all-important well-head price of natural gas on the basis of a section of the law which requires merely that prices be 'just and reasonable'....This vests substantial discretion

-13- ibid.
in whatever agency administers this law. Traditionally such broad delegations of Congress' legislative power over important parts of the economy have only been made to independent, collegial commissions...because the structure of these agencies strongly militates against abuse of discretion....While an independent Federal Energy Regulatory Commission is established by this bill, its jurisdiction is limited. -15-

The prevailing attitude among many congressmen was that the energy organization bill was placing inordinate energy regulatory powers in the Secretary of Energy, a political appointee. In fact, during House debate, the comments from a number of congressmen indicated a fear that the Carter administration's proposal and the Government Operations committee version of that proposal would allow the executive branch to establish and implement energy regulatory policy thereby bypassing the legislative branch. Congress, not surprisingly, was worried about the possible loss of influence to the executive branch over energy regulatory policy and viewed the Carter proposal as an attempt to usurp congressional authority in this area. As Congressman Erlenborn (R IL) stated during the House debate:

    economic -regulatory] decisions were put in independent agencies more responsive to and responsible to the Congress than to the executive branch. We have always felt that the regulatory agencies were creatures of the Congress; that we should maintain oversight of their exercise of the authority that we have given them, and that they were to be kept free—free—of the influence of the executive branch. -16-

Congressman Moss reiterated Erlenborn's view and argued that a cabinet officer, no matter of what administration, should not be allowed to issue rules of general applicability or to set the wellhead price of natural gas. -17- Congressman Brown stated that the critical question to ask during the debate was whether Congress wanted a Secretary of Energy exercising powers

-15- Ibid.
-16- The Congressional Record, op.cit., pp. 5294-5.
-17- Ibid., p. 5309.
in an arbitrary way, presumably based on the policy that the Congress would enact, or did Congress want it done by a collegial body. -18- Many members of Congress believed that the powers vested in the Federal Power Commission, an independent, collegial body, bipartisan in its composition, well insulated from the politics of the moment, would come into the hands of a single individual, the Secretary of the Department of Energy should the Carter plan be adopted by Congress. Finally, Congressman Conyers (D Mich) argued that the administration's bill would swallow up the energy regulatory agencies into a super-agency, the DOE. -19- Numerous comments during the floor debate indicate Congress' concern about the possibility of interference by the executive branch in the regulatory process. Congressman Moss commented during debate that:

Many of us on both sides of the aisle are deeply concerned by the transfer to the Secretary of Energy of authorities which have been traditionally vested in independent regulatory agencies. Of particular concern to us is the transfer to the executive of authorities under the Federal Power and Natural Gas Acts to issue rules of general applicability and to set the wellhead price of natural gas. -20-

Congressman Erlenborn, also noting the historical tradition of vesting regulatory power in independent regulatory agencies rather than in the President or politically appointed executives, stated:

We are really talking about government structure here. It is not Dr. Schlesinger that we are talking about. It is whether or not this type of decision making properly belongs in the executive branch, or were we right when we created the FPC to insulate these decisions from political considerations. -21-

Erlenborn again expressed the concern of many congressman to keep the

-18-  ibid., p. 5313.
-19-  ibid., p. 5308.
-20-  The Congressional Record, op. cit., p. 5309.
-21-  ibid., p. 5293.
energy regulatory functions and authorities out of the political process and free of the influence of the President or the current Secretary of Energy. Finally, Congressman Conyers stated in reference to the Carter administration's proposal:

What may happen here today, if we are not careful, is that we are taking these independent authorities, wisely created by congressional enactment and, in this sweeping super reorganization, placing them fully within the ambit of an executive department. -22-

In addition, Conyers stated;

Had the executive branch come to us in the first instance and asked us to take from the congressional authority the power to set prices and put it in the executive branch that...we would have reacted negatively. -23-

As Congressman Armstrong (R CO) aptly summarized the final day of debate:

I believe there are a substantial number of us in this body who share my belief that it would be far better to retain the concept of an independent commission...rather than vest regulatory authority in the DOE where it would be subject to a degree of political pressure.... -24-

Debate on the issue of the power of the Secretary of Energy climaxed with an amendment offered by Congressman Moss which, like the committee bill, established within the DOE a five-member agency, unlike the committee bill, however, the Moss amendment gave the FERC the authority to set energy prices and to issue rules of general applicability as previously issued by the FPC. -25- Essentially, the Moss amendment, which was cosponsored by Congressman Clarence Brown (R OH), would transfer intact into the Department of Energy the FPC's key powers, and cut the Secretary of Energy out

-22- ibid., p. 5306.
-23- ibid., p. 5315.
-24- The Congressional Record, June 3, 1977, p. 5405.
-25- Congressional Quarterly Almanac, op. cit.
of the picture.

But, opponents of the Moss-Brown amendment had different views concerning the role of the Secretary of Energy. Congressman Fuqua argued:

I think that a Secretary of Energy can be accountable to this Congress, because we have spelled it out in this bill. I think he will be much more accountable than any independent body we have running around demonstrating its so-called independence. -26-

Congressman Levitas (D GA) also reiterated Congressman Fuqua's opinion and stated that the independent regulatory commissions are not accountable to anybody and that the new energy department would be accountable, through oversight and other means, to the Congress. -27- Moreover, Levitas argued:

I think the people of America are looking to the Congress to develop a comprehensive energy policy and to establish a single focal point of administration of that policy in the Department of Energy. If we do not give the Secretary of this department the overall responsibility for the energy policies and implementation of them in this country, then we shall have not succeeded. And what the Moss-Brown of Ohio amendment will do is again fragment that responsibility and make it impossible for a comprehensive national policy to be brought about. -28-

Finally, Congressman Brooks fought to leave the Secretary of Energy in charge and argued not only against the Moss-Brown amendment to vest pricing authority in the FERC, but also against the independent commissions in general. Brooks expressed the view that the independent commission was not the most appropriate organization for regulatory administration, that "a collegial body is not equipped by temperament or structure to make long range policy or to meet energy needs. The regulation of national policy and general authority cannot effectively be handled by a commission." -29- Despite

-26- The Congressional Record, June 2, 1977, p. 5314.
-27- ibid.
-28- ibid., p. 5313.
-29- ibid., p. 5296.
the arguments against the Moss-Brown amendment, the proponents of the amendment prevailed and the Moss amendment was adopted on a roll call vote of 236-119: Republicans (R) 108-10, Democrats (D) 128-109. -30- The House subsequently passed the Energy Reorganization Act by a roll call vote of 310-20: R 95-16, D 215-4. -31-

Senate Action

In the Senate, the Carter administration's energy organization bill was referred to the Committee on Governmental Affairs. The committee report, filed May 4, 1977, endorsed the creation of the Cabinet-level Department of Energy basically along the lines requested by President Carter, but did not concur with the administration's proposal to place price setting authority within the Secretary of the Department. -32- The committee gave long and careful consideration to how the Department of Energy should exercise its extensive powers to set prices and make other important regulatory decisions. As in the House, the major area of contention between the President and the Senate was over who should have the power to set prices for oil and natural gas. Despite White House opposition, the Governmental Affairs committee insisted on placing the price setting authority in a bipartisan Energy Regulatory Board rather than with the Secretary.

The board was to be composed of three members appointed by the President for staggered four-year terms subject to Senate confirmation and removable only for cause. According to the Senate bill, it would have primary authority over all major direct pricing actions, including natural gas

-30- The Congressional Quarterly Almanac, op. cit., p. 84-H.
-31- Ibid., p. 86-H.
wellhead pricing, wholesale electric rates, pipeline transmission rates, as well as crude oil and oil products pricing. -33- While the Secretary of Energy could propose a pricing certification to the board and set a reasonable deadline for board action, it would be the responsibility of the Energy Regulatory Board to hold hearings and then issue a decision. Such decisions would be final, although the president could veto them within ten days. The Secretary, however, could not overrule the decisions of the board.

The Governmental Affairs committee maintained that the bill created a carefully constructed balance of power between the Secretary of Energy and the Energy Regulatory Board. -34- Because the Senate committee recognized the need for assuring that important economic regulatory decisions would be consistent with the nation’s overall energy policies, it placed the board within the Department of Energy to assure coordination of the board’s economic regulatory activities with national policy planning and implementation. Although located within the DOE, the committee believed that their bill ensured that sensitive pricing decisions would be well insulated from direct control by the secretary. Finally, the board would provide careful and impartial consideration of regulatory decisions, thereby ensuring the integrity of the regulatory process.

As in the House, the Senate Committee on Governmental Affairs held extensive hearings on the Department of Energy Organization Act in which spokesmen from energy-related industries, public utility associations, and government officials testified. Four major energy trade associations: the American Gas Association (AGA), the Interstate Natural Gas Association (INGA),

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-33- The Congressional Record, May 18, 1977, p. 7917.
the American Petroleum Institute (API), and the National Coal Association (NCA) gave primary attention to the issue of the proposed inclusion of federal energy regulatory programs into the Department of Energy. -35- Opinions on the issue were mixed; the AGA endorsed the transfer of regulatory authorities to the Secretary of Energy while the INGA and the NCA opposed the elimination of the FPC on the grounds that the transfer would politicize rulemaking within the regulatory agency.

The majority of public utility associations, including the American Public Gas Association (APGA) and the American Public Power Association (APPA), also opposed the abolition of the FPC and the transfer of regulatory powers to the Energy Secretary. -36- These groups argued that regulatory authorities should remain in an independent, collegial agency where regulatory decisions would be less susceptible to political pressures.

Finally, the Senate committee also heard testimony from various FPC officials. The majority, including two former FPC chairmen and two former FPC attorneys, opposed the Carter proposal and supported the retention of energy regulatory authorities in an independent commission. -37- Again, the general attitude was that regulatory policies would be more impartially developed if done by a group of independent officials.

The bill, as reported by the Chairman of the Governmental Affairs Committee, Abraham Ribicoff (D CN), was rushed through the Senate with less than even a full day's debate. Majority Leader Robert C Byrd (D WV), Minority Leader Howard Baker (R TN), the ranking minority member of the

-36- Hearings Before the Committee on Governmental Affairs on the Department of Energy Organization Act, op. cit., p. 220.
-37- ibid., p. 12.
Governmental Affairs committee, Charles Percy (R IL), and the chairman of that committee, Abraham Ribicoff urged senators to consider the urgency for final passage and to complete action on the energy organization bill immediately. As Majority Leader Byrd stated during the floor debate that "the American people question whether we (the Congress) are capable of passing energy legislation. We have before us (the Senate) the first real test...."

A few senators, however, were not pleased at the calls for quick action on the bill. A remark by Senator Schmitt (R NM) reflected the attitude of some senators: "I think we have all been done a disservice, the country has been done a disservice, by too rapid discussion of this bill." -39- Senator Percy responded to this criticism by arguing that the rights of all interests had been protected in the energy organization bill and that many of the points that were not discussed during floor debate were given thorough consideration in the committee debates. -40- Not only was Senate floor debate limited, it was in fact much less substantive than the House consideration. Debate focused primarily on seventeen amendments (of which fourteen passed by voice vote) that addressed relatively small issues. -41- With few exceptions, the major controversies and issues of the energy organization bill passed the Senate without floor consideration.

**Conference Action**

Conference action was necessary to reconcile the differences between the House and Senate versions of the energy organization bill. To reiterate,

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-38- The Congressional Record, op. cit., p. 7834.
-40- Ibid., p. 7918.
-41- Ibid.
the House version called for the creation of an independent, collegial commission, the Federal Energy Regulatory Commission. The FERC would have sole power to set prices for the sale of natural gas and electricity while the Secretary would be excluded from such regulatory decisions. Moreover, the House bill did not provide for presidential veto of commission decisions. In contrast to the House bill, the Senate version of the energy organization bill called for the establishment of an independent, three-member Energy Regulatory Board. The Secretary of Energy could propose prices and set deadlines for board action, but could not overrule the board. The most controversial issue facing the conferees was the question of how to balance authority over pricing and regulation of natural gas, oil, and electricity between the new Department of Energy's Secretary and an independent regulatory agency which both the House and the Senate insisted on creating within the DOE. 

The solution arrived at by the conference committee was simply to combine the two approaches. Conferees agreed to create a five-member Federal Energy Regulatory Commission within the Department of Energy. The FERC was granted the authority to set natural gas, oil, and electricity prices. The Secretary of Energy was given the power to propose rules for commission actions, to intervene in commission proceedings, and to set reasonable time limits for commission decisions. The decisions of the FERC, however, were to be considered final and not subject to review or change by the Secretary.

Conclusion

To conclude, legislative-executive rivalry is clearly a major reason for

-42- Congressional Quarterly Almanac, op. cit., p. 616.
the congressional decision to create an independent commission, the FERC, to regulate energy prices. Neither house of Congress accepted President Carter's proposal to create an executive department regulatory agency, the Energy Regulatory Administration, which was to be headed by a single administrator appointed by the president. Moreover, both the House and the Senate rejected the Carter administration's request to grant the Secretary of Energy the power to set prices and regulations for natural gas, oil, and electricity. Congress insisted that such authority would be shielded better from political pressures—specifically those from the executive branch—if vested in an independent commission rather than in a single individual serving at the pleasure of the president. The overwhelming weight of remarks during congressional debate addressed the possibility that the President would be more easily able to interfere in the energy regulatory process if such regulations were administered by an independent commission. The establishment of an independent commission to regulate energy instead of a departmental agency demonstrates that Congress was not going to yield any power over the regulatory agencies to the executive branch.

While the disruption of clientele ties is not significant in the congressional decision to create an independent commission to administer energy regulatory programs, partisan differences is moderately significant. At the time of the establishment of the Federal Energy Regulatory Commission, Democrats controlled both Congress and the White House. Thus, in principle, partisan differences between the executive and legislative branches is inapplicable. However, it is not unlikely that individual Republican congressmen opposed the creation of a departmental agency more so than did their Democratic counterparts.

At first glance, it appears that Republicans and Democrats alike sup-
ported the establishment of the FERC. Roll call votes in both the House and the Senate reveal that political party affiliation was not a major aspect of the energy organization bill. The final votes were House, 310-20: R 95-16, D 215-4 and Senate, 74-10: R 23-9, D 51-1, respectively. 

Moreover, the comment from one Republican congressman, Erlenborn, seemed to reflect the attitude of many Republicans:

We are not talking about Democrat against Republican or conservative against liberal or Jimmy Carter against some other president....But we are establishing a structure for the government for some considerable time....So I am not talking about whether it is this administration or some other. I hope I would feel the same—and I am sure that I would feel the same—if it were a Republican administration at the present time. 

As this statement indicates, Republican congressmen were quick to point out that their opposition to placing the energy regulatory functions within the office of the Secretary of Energy were not motivated by partisan considerations. However, the roll call vote on the Moss amendment, which stripped the Secretary of major pricing and regulatory authority and vested such authorities in an independent, collegial commission, indicates that Republicans were certainly more in favor of this amendment than were Democrats. The vote on the Moss amendment was 236-119: R 108-10 and D 128-109. 

While Democrats were fairly evenly split on the issue, Republicans clearly favored prohibiting the Secretary from exercising regulatory authorities. Thus, the roll call vote on the Moss amendment, which was a critical amendment to the Energy Organization Act, indicates that partisan differences between Republican congressmen and a Democratic administration may have had a relatively strong role in the creation of an independent

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-43- The Congressional Quarterly Almanac, op. cit., pp. 86-H and 23-S.
-44- The Congressional Record, June 2, 1977, p. 5295.
-45- The Congressional Quarterly Almanac, op. cit., p. 84-H.
commission to regulate energy pricing instead of an executive department agency.
CHAPTER FOUR

The Commodity Futures Trading Commission

The Commodity Futures Trading Commission (CFTC) was established in 1974 by congressional passage of the Commodity Futures Trading Commission Act. -1- The act amended the Commodity Exchange Act of 1936 to strengthen and expand federal regulation of the nation's $400 billion commodity futures trading industry. The Commodity Futures Trading Commission is composed of five members who are appointed by the President and confirmed by the Senate. Commissioners serve staggered five-year terms and no more than three members may belong to the same political party.

The CFTC has jurisdiction over all commodities traded on the nation's exchanges; in effect the commission regulates futures trading on ten exchanges, and trading in more than forty commodity options and gold and silver leverage contracts. Both agricultural and nonagricultural commodities as diverse as lumber, oats, sugar, livestock, metals, wheat, foreign currencies, coffee, and soybeans are routinely monitored by the CFTC. The Commission has the authority to seek injunctions against trading abuses and to intervene directly to protect traders against market manipulations or other emergencies. -2-

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House Action

As early as August, 1973, the House Committee on Agriculture began

exploring the possibility of creating legislation to strengthen and expand federal regulation of commodity futures trading. After almost a year's deliberation, on March 6, 1974 the Agriculture committee reported its version of the Commodity Futures Trading Commission Act. The major difference between the committee bill and the bill signed into law by President Ford concerned the status of the new regulatory agency.

The bill proposed by the Committee on Agriculture recommended the establishment within the Department of Agriculture (USDA) a semi-independent regulatory agency to be entitled the Commodity Futures Trading Commission. Essentially the CFTC would replace the Commodity Exchange Authority of the Department of Agriculture which currently regulated futures trading. All employees of the CEA would be absorbed by the new commission. The CFTC was to be composed of five members, including the Secretary of Agriculture and four public members, any of whom could be nominated by the President as chairman subject to Senate confirmation. Although semi-independent, the commission was to have its own legal staff, independent budget, and administrative law judges.

The Agriculture committee bill represented a comprehensive revision of futures trading legislation. Essentially the bill completely overhauled the 1936 Commodity Exchange Act which had established the Commodity Exchange Authority. A regulatory agency within the Department of Agriculture and directly under its Secretary, the CEA's major objective was to protect the price and hedging services of the commodity futures markets.

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-4- ibid., p. 39.
-5- ibid., p. 36.
This regulatory agency attempted to maintain fair trading practices and competitive pricing on commodity exchanges, and to prevent price manipulation, cheating, fraud, and other abusive acts and practices in commodity transactions. While the CEA had jurisdiction over the establishment of trading and position limits, the suspension or revocation of contract market designations, and issuing cease and desist orders, the Secretary of Agriculture had the authority to designate these contract markets, to promulgate regulations, and to issue complaints.

Not only did the committee bill replace the Commodity Exchange Authority with the Commodity Futures Trading Commission and vest many of the powers previously reserved to the Secretary of Agriculture under the Commodity Exchange Act to the new commission, the bill also strengthened and expanded federal regulation of commodity futures trading. Broad new regulatory powers were to be granted to the CFTC including the authority to regulate all commodities traded in futures markets. The CFTC was to have the power to seek injunctions to prevent anyone from violating the act or the commission's regulations and to impose monetary penalties on violators, the power to handle customer reparation proceedings, special emergency authority to intervene in markets and direct their activities in "market emergency" cases, and the authority to oversee the establishment of voluntary futures associations to regulate the practices of their members. -6-

The Committee on Agriculture cited four major reasons for the necessity of a comprehensive revision of the Commodity Exchange Act. -7- First, the early 1970s witnessed a mushrooming of public interest in commodities

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-6- The Congressional Quarterly Almanac, op. cit., p. 217.
trading and speculation. Trading in regulated commodity futures in such commodities as barley, butter, corn, cottonseed, eggs, livestock, oats, peanuts, rice, wheat, and wool had nearly doubled in the four years since 1969. Second, trading in non-regulated futures such as apples, coffee, lumber, metals, and sugar had quadrupled since 1969. The situation was such that at one moment traders were trading a regulated contract on a regulated market while at the next moment traders were trading a non-regulated contract at the same exchange or at an unregulated exchange. Third, the Commodity Exchange Authority lacked the administrative resources to effectively regulate futures trading. The volume of futures trading had risen in dramatic contrast to the level of the CEA's ability to cope with the magnitude of regulatory needs. While futures trading doubled from 1969 to 1973, the number of CEA employees declined during that same period. The CEA also suffered from inadequate funding. Not only was the CEA administratively unequipped to function effectively, it was also hampered by limited legislative authority under the existing law. Fourth, difficulties had arisen in the reliance on self-regulation which was followed by the exchanges since their inception and encouraged by Congress. The Agriculture committee believed that the self-regulatory practices of the exchanges could not serve the public interest without proper federal supervisory authority. These four factors indicated to the committee the compelling need to overhaul the regulation of commodity futures trading. But the question remained: What sort of agency to establish?

While the committee recognized the opinion of some persons that the Secretary of Agriculture should have jurisdiction over the regulation of futures markets, the position of the Agriculture committee was that since regulation was being strengthened and extended to cover all potential futures
contracts (not simply agricultural commodities), an independent regulatory agency was called for. It was envisioned by the Agriculture committee that the new commission would have the independence required to operate effectively, but at the same time its location within the Department of Agriculture would enable it to utilize existing physical facilities and maintain a close working relationship with other agencies of the Department. Thus the CFTC would be able to retain the futures market expertise developed within the executive department.

The Department of Agriculture and the Ford Administration were generally in support of the commodity futures trading bill as reported by the Committee on Agriculture. A spokesman for the USDA, Assistant Secretary Clayton Yeutter, argued before the House committee that while the Agriculture department supported the commission concept, the department believed the new agency should be located within the executive department. Moreover, the Department of Agriculture opposed provisions of the bill which permitted the CFTC the authority to have its own General Counsel and legal staff, independent budget, and administrative law judges. According to Yeutter, such services were readily available within the Agriculture department, and the CFTC would be sufficiently independent due to the direct grant of regulatory authority to it and the fact that the Secretary could not abolish the commission or diminish its powers by secretarial action. Naturally, the Department of Agriculture had a vested interest in ensuring that the department did not lose all of its control over the regulation of futures trading.

In addition, President Ford also opposed granting the commission com-
plete independence. -10- While the President favored the expansion of federal regulation of commodity futures trading, an independent agency, according to Ford, would erode necessary executive control and direction over such regulatory activity.

On April 11, 1974 Chairman of the Committee on Agriculture, W.R. Poage (D TX) brought the commodity futures trading bill to the House floor for debate. Debate appeared to be divided between two issues: whether such regulation should be expanded or whether the market place should be left alone, and the type of agency to regulate such activities. The former received more attention during debate than did the latter issue.

During debate, Chairman Poage argued for the necessity of the futures trading legislation:

Futures trading is growing by leaps and bounds....The industry is approaching twice the size of the securities industry which last year amounted to some $300 billion. Because of the way the present law is written, futures trading in several exchanges are simply unregulated by either federal or state law, and the volume of trading in these nonregulated futures has nearly quadrupled the last five years....Regulation by the exchanges is also not working as well as it should....This bill seeks to answer legitimate problems where the present law is deficient....To remedy the defects of inadequate regulation, HR13113 -the Commodity Futures Trading Commission Act as reported by the committee- establishes an independent commission. -11-

The ranking minority member of the Committee on Agriculture, William C. Wampler (R VA) also argued for member support of the bill. He stated that "this bill is designed to reform and strengthen the laws which provide for federal regulation of the nation's half-trillion-dollar annual commodity futures trading industry." -12- Congressman Mayne (R Iowa) also rose in support of the bill and pointed to the poor performance of the CEA as a

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-10- The Congressional Quarterly Almanac, op. cit., p. 215.
-11- The Congressional Record, April 11, 1974, pp. 10736-10737.
-12- ibid., p. 10738.
reason for this legislation. He stated:

Currently futures markets suffer from a lack of public confidence in the present regulatory scheme. The present regulatory activities of the Commodity Exchange Authority are inadequate to police the 400 billion dollar futures trading industry. -13-

George E. Brown Jr. (D CA) also supported the futures trading legisla-
tion and argued that it would help not only consumers, but farmers and the entire futures trading industry. -14- Under existing law with so many nonregulated commodities, naked options trading and pyramid schemes flour-
ished. Inadequate policing resulted in huge losses for many customers.

However, not all congressmen accepted the arguments presented by members of the Agriculture Committee and other colleagues. Congressman Robert Price (R TX) argued against passage of the bill:

The bill seeks to correct the mischievous assumption that futures mar-
kets are responsible for wild price gyrations. But I submit to you, that instead of providing for stability in the market place by allowing the forces of supply and demand to function freely, we may very well be creating a climate for even wider price fluctuations....Bureaucratic intervention will be substituted for free market prices....As now written, HR13113 could destroy the futures industry in this country. This bill gives sweeping government control over nearly every aspect of futures trading. -15-

Congressman Price's opinion was echoed by Congressman Steven Symms (R Idaho) who stated:

I think we have a beautiful example of a free market working now; but we are going to turn the decision making for delivery points, for example, for deliveries of certain products, we are going to turn it over to the bureaucrats. We are not going to allow the economies of the situation to decide anymore....When we examine this legislation, we are taking another step down the road toward allowing the government and the bureaucrats to make the market decisions which should be made in the market place by individuals. -16-

-13- ibid., p. 10739.
-14- ibid., p. 10740.
-16- ibid., p. 10744.
Thus, a large portion of congressional debate on the commodity futures trading commission bill centered on the issue of expanding the regulation of commodity futures trading or allowing the market place to operate without additional government control. Despite some strong objections to the bill, the prevailing consensus among congressmen was in favor of the legislation.

Only a very small portion of congressional debate addressed the status (independent v. nonindependent) of the new regulatory agency. Congressman Smith (D Iowa) argued the case for the proposed CFTC:

The bill which we are now proposing assumes that we cannot anticipate and specifically legislate against every conceivable abuse which could arise and that the best way to handle the situation is to have a competent regulatory agency with the resources available to exercise surveillance over the markets to the extent needed to assure that those who need to hedge will be able to do so at a reasonable cost. -17-

His opinion was supported by most committee members. However, there were a few agriculture committee members who argued that the bill did not go far enough in granting independence to the proposed CFTC. Congressman Brock Adams (D WN) argued that to create a more effective and more powerful regulatory agency (the whole purpose of the bill), the proposed commission should be completely independent of the Department of Agriculture. During debate, Adams argued:

I believe that an independent regulatory agency like the Securities Exchange Commission would be more powerful and more free to oversee the exchange markets properly because the Department of Agriculture has always been dominated by producing rather than consuming interests. -18-

Not content with merely voicing his displeasure at the proposed status of the CFTC, Congressman B.F. Sisk (D CA) proposed an amendment to the commodity futures trading bill which simply provided for a full-time commis-

-17- ibid., p. 10751.
-18- ibid., p. 10741.
sion to administer the duties, obligations, and responsibilities placed on the CFTC by the new legislation. Sisk stated that he preferred a much more independent commission without a Department Secretary as part of that commission, arguing that what was needed was a commission that could operate without being totally dictated to by the Secretary of Agriculture, a political appointee. -19-

For Congressman Sisk, the amendment was a compromise because it gave as much prestige and expertise to the four public members (in the hope that they would act on behalf of the interests of the consumer, producer, trader, etc.), but left the Secretary of Agriculture as a commission member. However, the intent of the amendment was to limit the power or influence of the Secretary. Congressman Bergland (D MA) also expressed concern about the provision of part-time commissioners. During debate, he stressed the importance of placing the commissioners on a full-time basis arguing that the commissioners should be free from any political or economic pressure that might otherwise be placed upon them be persons who could bring that pressure to bear. -20- Clearly, Congressmen Sisk and Bergland were worried that the executive branch, through the Secretary of Agriculture, a political appointee, could exert influence over the regulatory decisions of the new commission. Such influence of course could hinder congressional direction and control over the regulatory agency.

Yet the Chairman of the Agriculture committee, Congressman Poage, along with several other congressmen, voiced his opposition to the Sisk amendment. Poage believed that the Secretary of Agriculture should be a member of the commission since agricultural commodities comprised ninety

-19- ibid., p. 10760.
-20- ibid., p. 10762.
percent of the futures trading industry. According to Poage, the Secretary, along with four public members, would provide the fine balance of all interests affected by futures trading regulation. -21-

The Department of Agriculture also opposed the Sisk amendment. According to Assistant Secretary Yeutter:

It would be a mistake for the Congress to further proliferate the independent regulatory agencies by setting up a new bureaucracy with costly new demands....Such commissions tend to become unresponsive to the views of the public, the position of the administration, or the will of the Congress. As long as the Secretary of Agriculture is a member, and he, of course, could not operate effectively on a commission where the other members serve full-time, there will be someone who is in tune with the views of the public, the executive branch, and the Congress. -22-

According to Yeutter, the organization proposed in the Agriculture committee's bill (the CFTC) was quite sound.

Although the Sisk amendment failed, the vote was quite close, 158 to 179. -23- The vote on this amendment as well as the views expressed during debate by Congressmen Sisk and Bergland are the only indication that legislative-executive rivalry may be operating here. Clearly, a large number of congressmen were concerned about the new regulatory agency's independence from the executive branch. Following the vote on the Sisk amendment, the House passed the Commodity Futures Trading Commission Act by a vote of 281 to 43 with 108 members not voting. -24-

**Senate Action**

The Senate Committee on Agriculture and Forestry, to which the House bill was referred, viewed the nature of the new commission as one of the

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-21- Ibid.
-22- Ibid.
-23- Ibid., p. 10763.
-24- The Congressional Quarterly Almanac, op. cit., p. 38-H.
most basic issues to be resolved. -25- The question before the committee was: Should the commission be a full-time, independent commission similar in structure and status to the Securities and Exchange Commission or should the new commission be a quasi-independent, part-time commission as provided for in the House bill? It was the opinion of the Committee on Agriculture and Forestry that the proposed regulatory agency should be a full-time, independent regulatory commission.

Within the committee, some members felt that there was an inherent conflict between the role and mission of the Department of Agriculture and the regulation of commodity futures trading. -26- One of the main functions of the Agriculture department was to provide price and income protection for farmers, but the Senate committee argued that it was not the function of the commodity markets to have an impact on farm prices. According to the committee, the proper regulatory function of an agency which regulates futures trading was to assure that the market was free of manipulation and other practices which prevented the market from being a true reflection of supply and demand; thus the agency which regulated futures trading should have a neutral role on commodity prices. -27- The committee did not want the new regulatory agency to be dominated by any particular interest group and felt that if the proposed CFTC was located within the Department of Agriculture and had the Secretary as one of its commissioners, the likelihood of domination by agricultural interests over the regulatory decisions of the

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-25- U.S. Congress, Senate, Committee on Agriculture and Forestry, Report of the Committee on Agriculture and Forestry on the Commodity Futures Trading Commission Act, 1974, 93rd Congress, 2nd Session, p. 20.
-27- Ibid., p. 22.
commission would be quite high. The committee argued the need for a commission that had broad knowledge of all aspects of the industry to be regulated, as well as a commission that was responsive to both the needs of farmers and consumers. The Committee on Agriculture and Forestry conducted eight days of hearings and heard testimony from approximately 58 witnesses and the overwhelming weight of testimony was in favor of a full-time, independent commission to regulate the trading of commodity futures.

Not only did the Senate committee amend the House bill such that a full-time, independent commission was established, in addition the committee adopted a amendment which required the President, in making appointments, to seek to establish a balanced commission that would include, but not be limited to, persons of demonstrated knowledge in futures trading and its regulation and persons of demonstrated knowledge in the production, merchandising, processing, or distribution of commodities or other goods and services.

The intent of this amendment was to further ensure that the new agency was not dominated by any one interest group. The Agriculture and Forestry Committee, therefore, voted unanimously to amend the House bill so that a full-time independent regulatory commission was created to regulate commodity futures trading.

Senator Talmadge (D GA), Chairman of the Committee on Agriculture and Forestry, introduced the bill on the Senate floor. Debate on the bill was limited to two hours and most of that time was taken up by senators merely expressing their support for the proposed legislation. During Sen-

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28. Ibid.
29. Ibid., pp. 20-21.
30. Ibid., p. 22.
ate debate, several senators expressed their concern over keeping the new regulatory agency free of dominance by any particular interest group. Senator Cranston (D CA) argued the need for a full-time, independent regulatory commission in order to eliminate any possible conflict between the Department of Agriculture's role as a protector of farm prices and the commodity market's impartial role. -32- Senator Taft (R OH) also reiterated Cranston's point and argued that given the possible conflict of interest between the regulation of commodity futures trading and agricultural interests of the Department of Agriculture, an independent commission was much preferable to the retention of regulatory authority within the USDA. -33- But perhaps Senator Clark best summarized this argument. During debate he argued:

Not only will the bill -as amended by the Senate]- provide the strong, informed, effective regulation of the commodity exchanges so necessary, but it will put to rest one of the problems which has plagued the Commodity Exchange Authority—its placement in the Department of Agriculture. Indeed, for a regulatory function to be placed in a Department which has such a major involvement with many of the commodities traded is a completely untenable situation. Neither has the cause of impartial and effective regulation been served, nor has the Commodity Exchange Authority the ability to deal with the exchanges and their functions with any real authority. -34-

The Senate passed the Commodity Futures Trading Commission Act, as amended by the Senate, by a voice vote. The differences between the House and Senate bills were resolved by a conference committee which adopted the Senate's provision for a full-time, independent regulatory commission. The House passed the conference report by a vote of 377-4 while the Senate adopted the report by a voice vote. -35-

**Conclusion**

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-32- The Congressional Record, op. cit., p. 30466.
-33- ibid., p. 30467.
-34- ibid., p. 30463.
-35- The Congressional Quarterly Almanac, op. cit., p. 134-H.
An examination of congressional debates and committee reports indicates that the choice of an independent commission to regulate commodity futures trading was influenced primarily by the second factor, to free the new agency from traditional clientele ties. Legislative-executive rivalry and partisan differences between the President and Congress appear to play only a minor role.

Clearly, the most prominent argument expressed by congressmen during debates and committee deliberations was the need to ensure that the new regulatory agency did not become a captive of the very industries that it was supposed to regulate, those interests which had such strong support within the Department of Agriculture. Again and again, congressmen stressed the importance of separating the function of regulating the trading of commodity futures from the function of promoting commodity futures. These arguments consumed a vast amount of the small time set for debate.

If the Senate chose to establish an independent commission to regulate commodity futures trading instead of an executive department agency because of legislative-executive rivalry, there is no indication of it in congressional debates or committee reports. Although the status of the new regulatory agency was a critical issue, there were no references to a fear of executive influence over the decisions of the proposed agency. Certainly then, this factor is not an explicit motivation for the establishment of the CFTC. However, given the two quite different organizational approaches offered by the Congress and the White House, congressional-executive rivalry may be an implicit factor.

Both the Ford administration and Congress recognized the advantages which would accrue to each by the particular organizational structure they proposed. The White House recommended a commission located within the
executive department of Agriculture. However, Congress had the final say and elected to establish a full-time, independent commission to regulate commodity futures trading.

It may be expected that Democrats would be more likely to favor an independent commission to regulate the trading of commodity futures given the fact that a Republican occupied the White House. Examination of various roll-call votes does lend some support for this argument. In the House, the final vote on the Commodity Futures Trading Commission Act (which created a semi-independent commission located within the Department of Agriculture) was 281-43: R 115-35 and D 166-8. According to this vote, Democrats were not concerned about the placement of the new regulatory agency within an executive department headed by a political appointee. Although more Republicans than Democrats opposed the bill, Republican opposition was more against the expansion of regulation than against the creation of the commission per se.

However, the vote on the Sisk amendment, which created a full-time independent commission and thus gave it greater autonomy from the Department of Agriculture and its Secretary, was 158-179: R 21-135 and D 137-44. From this vote, it is evident that Democrats overwhelmingly favored a more independent commission to regulate commodity futures trading than did Republicans. So despite comments during debate that the commodity futures trading bill had widespread bipartisan support, at least on the issue of the nature of the proposed regulatory agency, Democrats may have preferred a more autonomous regulatory agency because they feared the influence of the Republican administration over the regulatory decisions of the CFTC. Per-

-36- The Congressional Quarterly Almanac, op. cit., p. 38-H.
-37- ibid.
haps the final vote on the bill reflects Democratic acceptance of the pressing need of more effective regulation of commodity futures trading.

In the Senate, a voice vote decided the passage of the commodity futures trading commission bill making the determination of the presence of partisan considerations much more difficult. However, during Senate debate on the bill, there was no mention by any senators—Republican or Democrat—of the fear of influence by a Republican administration over the new regulatory agency. Indeed, within the Senate Committee on Agriculture and Forestry, the bill was unanimously reported to the Senate indicating that both parties favored the legislation. Moreover, during debate Senator Dole (R KS) argued that the bill as amended by the Agriculture and Forestry committee was a true, nonpartisan effort of the members. -38-

-38- The Congressional Record, op. cit., p. 30467.
CHAPTER FIVE

The Nuclear Regulatory Commission

The Nuclear Regulatory Commission (NRC) was created by the Energy Reorganization Act of 1974 which reorganized and consolidated certain energy-related functions of the federal government to promote more efficient management of such functions.  -1- The act was designed to provide the organizational base for a well-managed, centrally directed attack on energy problems in order to make the nation less dependent on foreign countries and more self-sufficient in energy for the future. In this sweeping reorganization of the government's energy research structure, the Atomic Energy Commission (AEC) was abolished and the Energy Research and Development Administration (ERDA) and the Nuclear Regulatory Commission were established. The NRC is composed of five members who are appointed by the President and confirmed by the Senate. Commissioners serve staggered, five-year terms and no more than three may belong to the same political party.

The act transferred the safety, licensing, and regulatory powers of the AEC to the NRC and mandated three offices within the new commission: the Office of Nuclear Reactor Regulation, the Office of Nuclear Material Safety and Safeguards, and the Office of Nuclear Regulatory Research. -2- The Office of Nuclear Reactor Regulation licenses nuclear reactors used to generate power, used for test purposes, and used for research. The Office

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of Nuclear Material Safety and Safeguards is responsible for ensuring that public health and safety, national security, and environmental factors are considered in the licensing and regulation of nuclear facilities. Finally, the Office of Nuclear Regulatory Research is responsible for conducting research on nuclear energy materials and facilities. Essentially, the responsibility of the NRC is to protect the public and the environment against nuclear health and safety risks associated with the use of nuclear materials and facilities.

The Energy Research and Development Administration is responsible for conducting and coordinating programs of research and development on all energy resources and utilization processes including nuclear energy, fossil fuel, solar energy, and geothermal energy. The ERDA received the energy research and development functions previously administered by the AEC, the Department of the Interior, the National Science Foundation, and the Environmental Protection Agency. From the AEC were transferred the nuclear energy development, production, and operational functions; from the Interior Department were transferred the fossil fuel research and development from the Office of Coal Research and the Bureau of the Mines; from the NSF were transferred solar heating and cooling development and geothermal power development; and from the EPA were transferred the research on alternative automobile power systems and emission.

**House Action**

In June 1973, as part of a general administration reorganization plan, President Nixon submitted to the Congress an energy reorganization proposal which would create a new energy agency, the Energy Research and Development Administration, and a new energy regulatory agency, the Nuclear
Energy Commission. As in the final energy organization bill to pass the Congress, ERDA was to exercise central responsibility for policy planning, management, support and conduct of research and development programs and projects involving all energy sources including nuclear, solar, tidal, wind, hydrogen, and geothermal. The new ERDA, according to the Nixon plan, was to acquire the Office of Coal Research, the energy research centers from the Department of the Interior, and all functions of the Atomic Energy Commission except those relating to safety, licensing, and regulation. These functions were to be assigned to a Nuclear Energy Commission which would be simply a renamed AEC, still multiheaded but smaller in size and devoted exclusively to regulatory activities.

In the House, the Energy Reorganization Act was referred to the Committee on Government Operations. The Committee also recognized the need to reorganize the energy research, development, and regulatory functions of the federal government. According to the committee, the bill would bring together separate, uncoordinated, and fragmented energy functions to give comprehensive and systematic direction to solving the nation's energy problems. The committee's version of the energy reorganization bill was very much in keeping with President Nixon's proposal regarding the agency to regulate the nuclear power industry. The committee bill would rename the AEC as the Nuclear Energy Commission which would continue the same membership although in a smaller organization. The bill designated the present members of the AEC as members of the new NEC without the need for Sen-

-4- Ibid.
-5- Ibid., p. 4.
ate confirmation of present AEC commissioners.

Essentially, the Government Operation committee's bill transferred the existing structure of the AEC to the Nuclear Energy Commission. The present organization of the regulatory side of the AEC included a single Director who supervised and reported to the Commission on all licensing and other regulatory activities. The NEC would continue to perform the safety, licensing, and regulatory functions of the AEC which it carried out under the Atomic Energy Act of 1954.

Again, like the Nixon proposal, the committee bill created an Energy Research and Development Administration to administer the non-regulatory functions of the AEC and the designated energy research and development functions transferred from other federal agencies such as the Department of the Interior and the Environmental Protection Agency.

According to the Government Operations committee, there had been a growing criticism of the mixture of developmental and regulatory functions within the AEC. -6- The AEC had the responsibility of not only developing and encouraging the use of nuclear energy, but regulating, licensing, and ensuring the safe operation of that power as well posing a basic conflict of interest. During hearings held on the energy reorganization bill, this problem was referred to again and again. The Committee on Government Operations held three days of hearings in which approximately twenty witnesses testified, of which the overwhelming majority were in favor of the proposed legislation. -7- The energy reorganization bill was endorsed by such diverse groups as the Edison Electric Institute, the National Rural Electric Cooperative Association, and the American Coal Association. Prominent individuals

-6- ibid.
-7- ibid., p. 7.
such as Dixy Lee Ray, Chairman of the Atomic Energy Commission; Roy L. Ash, Director of the Office of Management and Budget; and John A. Love, Director of the Energy Policy Office in the Executive Office of the President also supported the energy legislation.

Dixy Lee Ray stated before a subcommittee of the Government Operations Committee that the separation of the AEC’s operating and regulatory functions was a question that was almost two decades old and that during most of that time there had been general agreement that when the nuclear industry reached maturity, the commission’s regulatory functions should be vested in an independent regulatory agency thereby removing the potential for conflict. -8- Love also stressed this point and argued that a separate regulatory commission was necessary to provide expertise among commission members in nuclear matters and to ensure the orderly and environmentally safe development (as opposed to simply the development) of nuclear power. -9- And finally, William O. Doub, a commissioner of the AEC, argued before the subcommittee that an independent regulatory commission, devoted exclusively to the regulation of nuclear power, was necessary to ensure that its decisions were not controlled or excessively influenced by those it regulated or those who petitioned it for requested actions. -10- Thus, the testimony during congressional hearings indicates that the prevailing attitude, at least among regulators, was that an independent regulatory agency was necessary if the nuclear power industry was going to be efficiently and impartially reg-

ulated.

The committee bill, by separating the two functions and vesting regulatory responsibility within the new NEC, accepted this argument. Effective regulation, it seemed, required such a separation of regulatory from developmental activities. On December 7, 1973, the committee unanimously reported the energy reorganization bill to the House where it was introduced by Congressman Chet Holifield (D CA), Chairman of the Committee on Government Operations.

During congressional debate on the Energy Reorganization Act, primary attention was given to the new Energy Research and Development Administration—its structure and functions. Eleven amendments were offered to Title I of the act which outlined the ERDA. In contrast, Title II, which delineated the NEC, was not subject to any amendments or any substantial debate. Perhaps the lack of debate on the proposed NEC is explained by the fact that no new major regulatory authorities were being transferred to the NEC; the NEC simply retained the existing regulatory authority and objectives of the AEC. The Energy Reorganization Act was basically just that—a reorganization bill.

During House debate, many congressmen stressed that it had long been widely recognized that there was a basic conflict of interest between the AEC's promotional and regulatory functions. According to Congressman Frank Horton (R NY), the reason for this dual responsibility was that there had not been sufficient expertise to handle both development and licensing separately, but that the time had now come to separate the two authorities. -7- In addition, as Congressman Brown (R OH) pointed out, the reorganization

-7- The Congressional Record, December 19, 1973, p. 42573.
would end charges that the regulators of nuclear energy were inappropriately
biased toward promotion of the nuclear energy industry. -8- Similar com-
ments were heard throughout the debate. Congressman Orval Hansen (R
Idaho) argued:

The rapid growth of the nuclear power industry in recent years has
placed increased demands on the regulatory program -of the AEC]. The time
has now come when the scope and magnitude of the regulatory functions
require the undivided attention of one agency. The proposal to provide for a
separate Nuclear Energy Commission is a logical step in the evolution of the
Government's role in controlling nuclear development and its use. -9-

Congressman Craig Hosmer (R CA) charged that the separation of pro-
mutual and regulatory authorities of the AEC, as provided by the commit-
tee's bill, would enable the NEC to concentrate fully and exclusively on its
licensing and regulatory responsibilities with more efficient and effective
results. -10- Congressman Jonathan Bingham (D NY) had long been concerned
with the possible conflict of interest within the AEC and had proposed legis-
lation to separate the developmental and regulatory authorities of the AEC
in 1969. During debate he argued:

These contradictory roles led in many cases to less stringent safety
standards, for example, than many experts thought wise, for fear that more
stringent standards would discourage the development of such things as
nuclear power plants. I am gratified that the legislation before us today
finally recognizes the merit of my proposal, and separates the development
of nuclear power from the promotion of its use. -15-

Clearly, it was apparent that the majority of congressmen believed that
the separation of regulatory authority from developmental authority would
further more efficient, effective, and impartial regulation of the nuclear
power industry. As Congressman Donald Fraser stated: "these functions

-8- ibid., p. 42597.
-9- ibid., p. 42597.
-10- ibid., p. 42574.
ought to be split if the public interest is going to be served." -16- The final vote on the energy reorganization bill was 355-22: R 167-4 and D 188-21. -13- As passed by the House, the Energy Reorganization Act was almost identical to the bill reported out by the Committee on Government Operations and to the reorganization plan proposed by the Nixon administration.

**Senate Action**

In the Senate, as in the House, the energy reorganization bill was referred to the Committee on Government Operations. As reported by the committee, the Senate bill was substantially different from the reorganization plan proposed by the Nixon administration (and subsequently supported by the Ford administration) and the companion measure which passed the House in December. -18- The Senate committee also recognized that it had become necessary to separate the AEC's functions of regulating and developing nuclear power, but while the House bill simply renamed the Atomic Energy Commission and retained the AEC's existing structure, the Senate bill first abolished the AEC and then created a totally new independent regulatory commission, the Nuclear Safety and Licensing Commission (NSLC). -19- The abolition and transfer procedure would allow Senate confirmation on all appointments to the new commission (consistent with other federal regulatory agencies), including present AEC commissioners who were selected by the President to serve on the NSLC. The House bill would have permitted AEC commissioners automatically to become NSLC members. The AEC was the

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-16- [Ibid.], p. 42604.
-13- The Congressional Quarterly Almanac, op. cit., p. 162-H.
only federal regulatory commission on which neither bipartisanship nor fair representation of interests was required. The committee bill wanted to ensure both technical competence and political balance among the new commission members.

The committee believed that the new name of the commission reflected its single purpose—that of regulating the nuclear power industry and that such an exclusive responsibility should promote more closely supervised regulation of the burgeoning industry. The safety, licensing, and regulatory powers of the AEC were transferred to the new Nuclear Safety and Licensing Commission and the bill also extended the licensing authority of the commission beyond the provisions of the Atomic Energy Act to cover certain ERDA demonstration reactors and high-level radio-active waste storage facilities when their purpose would lead to commercial use.

In addition, the bill revised the internal organization of the new regulatory commission (the existing structure of the AEC was not simply retained) to provide for three coequal Directors, each with direct and independent access to the NSLC and each responsible for separate operations relating to nuclear reactor safety, nuclear materials security, and nuclear safety research, respectively. -20- With respect to the two latter functions, the bill established an Office of Nuclear Safety Research to give the regulators an inhouse research capability independent of federal policies and programs which encouraged the development of nuclear power and a Bureau of Nuclear Materials Security responsible for safeguarding against sabotage and theft.

The committee found that the regulatory side of the AEC was significantly weaker compared to the resources of the developmental side. The

-20- ibid., p. 9.
Regulatory Division of the AEC had been organized such that a single Director of Regulation supervised three directorates—for regulations, licensing, and inspection. The Government Operations committee argued that this arrangement was not conducive to effective regulation of the rapidly growing nuclear power industry, and the reorganization plan would guarantee that the new commission would have the strength and autonomy to carry out the difficult safety, health, and environmental responsibilities. Finally, the Senate bill, unlike the House bill, ensured the provision of technical reports to parties of licensing or rulemaking proceedings, including citizen intervenor groups, and the response to good-faith requests for relevant new studies.

In short, under the new regulatory organization, the NSLC would have a bipartisan, technically qualified commission, which would directly supervise a balanced three-part regulatory organization. The high-level position of Director of Regulation was eliminated, to allow the heads of the three key programs—safety, safeguards, and research—direct access to the commission and a freer interplay of regulatory proposals and priorities at the commission level than was possible under the AEC. The revised organization was intended to give balance to the new commission so that no single regulatory area was stressed to the detriment of another.

The Committee on Government Operations held seven days of hearings during which approximately forty-five witnesses testified, most of whom had testified before the House hearings held previously. Roy Ash argued before the committee that the nuclear power industry warranted an independent agency to adequately regulate it and that the separation of regulatory from promotional functions made sound managerial sense. -21- John W. Simpson,

-21- U.S. Congress, Senate, Committee on Government Operations, Hearings Before the Committee on Government Operations on the Energy
President of the Power Systems Company of the Westinghouse Corporation, summed up the feeling of those representing the nuclear power industry when he argued that the creation of a separate commission to regulate nuclear energy would remove the conflict of interest between the regulation and promotion of nuclear power and thereby would better protect the public interest. -22- In addition, during the hearings on the energy reorganization bill, environmental and citizen intervenor groups, although generally in favor of the reorganization plan, expressed serious concern about the importance of adequate regulatory authority of the new commission and informational access for parties to commission proceedings.

The Energy Reorganization Act of 1974 was subject to two days of debate in the Senate where the bill was managed by Senator Abraham Ribicoff (D CN). In the Senate, much like in the House, the major area of concern or controversy in the energy reorganization bill was not the proposed NSLC, but the functions of the ERDA. By vesting the nuclear development function of the AEC into the ERDA, there was a fear among senators that the bill might create a nuclear dominance in the development of an overall energy research and development policy and program. To correct for this possible misbalance, the Senate committee included specific language in the bill which required that no one energy technology be given undue priority in ERDA, separate programs for energy conservation, environment, and safety were provided, and no energy program could receive less than seven percent of ERDA's annual appropriations. During the Senate debate, this fear of nuclear dominance in the ERDA was expressed. To alleviate this potential problem, the Senate adopted an amendment proposed by Senator Henry M.

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Ibid., p. 137.
Jackson (D WN) which provided for a $1.3 billion authorization for non-nuclear energy research and development in 1976. Thirteen additional amendments pertaining to the ERDA were adopted by the Senate.

During debate, Senator Ribicoff argued that the bill would meet two urgent energy needs of the nation:

First, it consolidates the federal government's fragmented and uncoordinated energy research and development functions into a new Energy Research and Development Administration, the ERDA. The mission of this new independent executive agency will be to develop the energy technologies necessary to give us the capability to attain energy self-sufficiency by as early as 1984.

Second, it upgrades the regulation of our most developed and also our most dangerous alternative source of energy—nuclear power—through the establishment of a Nuclear Safety and Licensing Commission, the NSLC. The mission of this new independent regulatory agency will be to protect the nation's health and environment by ensuring the safety and the security of the nuclear industry and of the weapons-grade and other radioactive materials that are part of its fuel cycle. -23-

Moreover, Senator Ribicoff argued the case for the separation of the AEC's promotional and regulatory functions.

As a result of the heavy federal emphasis on commercial nuclear power, the development of the nuclear power industry has been managed by the same agency responsible for regulating it. While this arrangement may have been necessary in the infancy of the atomic era after WWII, it is clearly not in the public interest to continue this special arrangement now that the industry is well on its way to becoming among the largest and most hazardous in the nation. In fact, it is difficult now to determine in the organizational scheme of the AEC where the commission ends and the industry begins. The result has been growing criticism of the safety of nuclear power reactors, and reluctant acknowledgement by the AEC of the inadequacy of its present system for safeguarding nuclear materials from theft and subsequent manufacture into atomic bombs. -24-

Senator Metcalf also expressed a similar opinion when he stated that it was generally recognized that the regulatory decisions of the AEC, by the very nature of its administrative-industry oriented system, have been biased

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-23- The Congressional Record, August 13, 1974, p. 28128.
-24- Ibid., p. 28129.
in favor of nuclear promotion, rather than safety and restraint. -25-

Not content with the reorganization bill as it stood, several amendments pertaining to the proposed NSLC were adopted by the Senate. Senator Metcalf proposed two amendments. The first amendment provided that exemptions under the Freedom of Information Act relating to trade secrets and inter- and intra-agency memoranda would not apply with respect to nuclear safety systems under NSLC jurisdiction. According to Metcalf, the purpose of the amendment was to open the activities of the NSLC, to the maximum extent possible, with regard to issues involving the safety and health of the public, while preserving the legitimate commercial interests of private business firms. -26- The second amendment proposed by Senator Metcalf insured that ERDA, as well as NSLC, would be required to make available relevant studies and reports to good-faith requests made by any party to a licensing or rulemaking proceeding. These changes were in response to the demands of consumer and environmental groups who had testified at the committee hearings. Senator Charles Percy (R IL) also proposed an amendment which made explicit the clear assignment of administrative responsibility to the Chairman of the Nuclear Safety and Licensing Commission.

Of those amendments proposed and adopted, however, the most controversial was the amendment offered by Senator Edward M. Kennedy (D Mass) which authorized the payment of legal and technical expert costs of public interest intervenors in nuclear licensing proceedings. The intent of the amendment was to ensure public participation in the nuclear licensing and rulemaking process by providing for public financing of citizen intervenor groups which were unable to pay their own legal and technical costs.

-25- Ibid., p. 28011.
-26- The Congressional Record, August 15, 1974, p. 28591.
According to Kennedy, the amendment (which was endorsed by such groups as the Consumer Federation of America and Environmental Action) was in the interests of safety and environmental protection, and moreover it was in the interest of the orderly development of nuclear power in meeting the energy needs of the nation. -27- The Senate passed the Energy Reorganization Act of 1974 by a voice vote on August 15, 1974.

A conference committee was convened to work out the differences between the House and Senate reorganization bills. Basically, conferees adopted the Senate's version of the Energy Reorganization Act except they substituted the name Nuclear Regulatory Commission for the proposed name of the Nuclear Safety and Licensing Commission. -28- Thus, the conference committee abolished the Atomic Energy Commission and transferred its regulatory powers to the new NRC, which would have three co-equal administrative units for regulation, safety and safeguards, and research. The House adopted the conference report on October 10, 1974 by a vote of 372-1, and on the following day the Senate passed the conference report on the energy reorganization bill by a voice vote. -29-

Conclusion

This account of the Energy Reorganization Act of 1974 indicates that the major reason Congress chose to establish an independent commission to regulate the nuclear power industry was to free the new agency from the old clientele ties of the AEC. Legislative-executive rivalry and partisan differences between Congress and the White House were not significant in the

-29- The Congressional Quarterly Almanac, op. cit., p. 134-H.
congressional decision to create the Nuclear Regulatory Commission.

Clearly the comments from congressmen, the regulators, and various interest groups reveal that there was widespread agreement that the regulation of nuclear energy could not be fairly administered in an agency which was also responsible for promoting and encouraging the development and use of nuclear power. Again and again, the comments from participants in this legislative process point to the concern that regulation had long been biased in favor of the interests of the nuclear power industry and that insufficient attention had been paid to the concerns of consumer and environmental groups. As Senator Ribicoff stated during the debate: it was difficult to determine in the organizational scheme of the Atomic Energy Commission where the commission ended and the industry began. Indeed, it had become hard to distinguish between the regulators and the regulated. By separating the AEC's promotional functions from its regulatory functions and vesting the latter in an independent commission, Congress believed that future regulation would be more effective, that is to say, it would be both efficient and impartial.

With respect to the remaining two factors, congressional- executive rivalry and partisan differences between the Congress and the White House, neither figure at all in the congressional decision to create the Nuclear Regulatory Commission. Certainly there is no mention or reference to a fear of executive influence into the regulatory process of the new commission. Similarly, there is no indication from the few recorded votes on the energy reorganization legislation that partisan considerations are at all present. In the House, final passage of the bill was by an overwhelming majority,

-30- The Congressional Record, August 13, 1974, p. 28128.
355-22: R 167-4 and D 188-21. No amendments were offered to that part of the energy reorganization bill which concerned creation of the new regulatory commission, thereby preventing any further determination of partisan considerations. In the Senate a similar situation existed. Final passage of the bill, as well as all amendments pertaining to the proposed NSLC, were adopted by voice votes.

-31- The Congressional Quarterly Almanac, op. cit., p. 162-H.
CHAPTER SIX

The Consumer Product Safety Commission

The Consumer Product Safety Commission (CPSC) was established October 27, 1972 by the Consumer Product Safety Act of 1972. It was the first independent regulatory commission to be created by Congress since the New Deal. With the passage of this legislation, the federal government assumed a major role in protecting consumers against unreasonable risks of injury and death from the use or exposure to consumer products.

Like all independent regulatory commissions, the CPSC is multi-headed with five members who are appointed by the President and confirmed by the Senate. Commissioners serve overlapping seven-year terms and no more than three members may belong to the same political party.

The major responsibilities of the Consumer Product Safety Commission include the collection and dissemination of information on consumer product related injuries, the establishment of mandatory safety standards to prevent or reduce unreasonable risk of injury or death associated with consumer products, the banning of products in cases where standards are not feasible, and the authority to obtain equitable relief in the courts to protect the public from products which pose imminent hazards to health and safety. The CPSC was given jurisdiction over consumer products which were unregulated in 1972 such as architectural glass, color television sets, infant furniture,

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ladders, power tools, rotary lawnmowers, protective headgear, etc. In addition to these new regulatory authorities, the authorities of the Food and Drug Administration (FDA), the Department of Health, Education and Welfare (HEW), and the Commerce Department under the Federal Hazardous Substances Act, the Poison Prevention Packaging Act, and the Flammable Fabrics Act were transferred to the CPSC. Thus, the Consumer Product Safety Act consolidated in an independent regulatory commission existing federal safety programs and numerous categories of nonregulated products.

Comprehensive federal legislation to cover the full spectrum of consumer products and an independent agency to regulate hazardous products were the major recommendations of the National Commission on Product Safety. This seven-member, bipartisan panel was established by Congress in 1967 to conduct a thorough investigation of the scope and adequacy of existing laws which protect consumers against unreasonable risks of injuries associated with consumer products and to make recommendations concerning the federal government's proper role in securing the consumer's right to safety.

After an intensive two-year study, the commission issued a report in July, 1970 which stated their finding that over 20 million Americans were injured each year in accidents associated with the use or exposure to consumer products, thus the substantial need for comprehensive federal legislation.

The commission argued that existing consumer protection laws were grossly inadequate; they were limited to only a very small number of products confronting the consumer each day. Most existing federal consumer

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safety laws were enacted on a piecemeal basis in response to particular tragedies. Such legislation included the National Traffic and Motor Vehicle Safety Act of 1966, the Gas Pipeline Safety Act of 1968, the Flammable Fabrics Amendments of 1967, the Radiation Control for Health and Safety Act of 1968, the Child Prevention and Toy Safety Act of 1969, and the Poison Prevention Packaging Act of 1970. Not only were very few products regulated, the administration of existing consumer safety regulations was quite poor. Overlapping jurisdictions among agencies, inadequate funding and staffing, unnecessary procedural obstacles, limited investigative powers, and inappropriate sanctions hindered effective regulation. 

Rather than recommend to the Congress the need for individual legislation to cover specific products currently unregulated, the commission urged Congress to abandon its case-by-case approach and consolidate in a single independent agency sufficient authority to regulate the full range of products used by consumers. The National Commission on Product Safety was unanimous on all its major recommendations.

Like the national commission, the Nixon administration also recommended the establishment of omnibus consumer product safety authority in the federal government. However, the administration did not concur with the commission on the type of agency to administer such powers. Whereas the commission recommended the creation of an independent regulatory commission, President Nixon proposed to vest such regulatory authority within the executive department of Health, Education and Welfare. The Nixon administration's plan intended to build upon the activities, personnel, and existing facilities of the Food and Drug Administration and to reorganize the

-4- ibid.
FDA so that it might assume the additional responsibilities proposed by the legislation. -5- This reorganized FDA was to be called the Consumer Safety Administration.

Senate Action

Within the Senate, three committees had jurisdiction over the consumer product safety bill. It was first referred to the Committee on Commerce which reported the bill on April 13, 1972. Like the National Commission, the committee argued that in order to protect the safety and health of the consumer, comprehensive federal legislation was required to replace the current piecemeal consumer protection laws which were both inadequate and inconsistent. -6- In addition and perhaps more importantly, the Commerce Committee agreed with the National Commission on Product Safety on the type of agency to administer such programs and proposed the establishment of an independent commission to regulate the safety of consumer products.

As reported by the committee, the consumer product safety bill created an independent agency to be named the Consumer Safety Agency with the authority to regulate the safety and efficacy of food, drugs, and consumer products. -7- The new agency was to be directed by an administrator appointed by the President and confirmed by the Senate for a five year term. The administrator was to be the coordinator of the agency and responsible for all enforcement. The committee bill also established within the new agency a Commission of Food and Nutrition, a Commission of Drugs, and a Commission of Product Safety. Each commissioner was to be

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-5- The Congressional Record, September 20, 1972, p. 31381.
-7- Ibid.
appointed by the President to serve at his pleasure with the advice and consent of the Senate. Commissioners were to be responsible for the regulatory functions indicated by their respective titles.

The consumer product safety bill also transferred the functions of the Secretary of HEW administered through the FDA to the new Consumer Safety Agency. In effect, this provision would abolish the FDA. The bill also repealed specific consumer protection legislation such as the Federal Hazardous Substances Act, the Flammable Fabrics Act, the Poison Prevention Packaging Act, etc. Regulations promulgated under these authorities were to be administered by the Commissioner of Product Safety until amended or superceded by the new authorities granted by the committee bill.

The Commerce Committee was adamant that the administration of consumer product safety programs be vested in an independent regulatory commission. In his opening statement before the hearings of the Commerce Committee on the consumer product safety bill, Senator Frank Moss (D Utah) argued that because of their location within the Department of HEW, consumer protection programs had suffered from a chronic lack of independence from both political and economic pressures which diluted the effectiveness of product safety laws. -8- The committee believed that an independent agency would have greater public visibility than an executive department regulatory agency and that it would be able to secure a higher level of funding than an agency in an executive department which often had to compete with other equally or more visible programs. In addition, the committee believed that an independent agency would be in a better position to resist pressures from

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the regulated, pressures which often caused the regulators to identify with the regulated industry. An independent commission would help to ensure that the decisions arrived at by the regulators would be less influenced by both political pressures and pressures from business. According to Senator Moss, the time had come for Congress to establish a comprehensive consumer product safety program with full authority to prevent product safety hazards—no matter what the product or what the hazard—by setting safety standards and banning products. -9-

During the eight days of hearings held by the Commerce Committee, it was evident that the overwhelming majority of representatives from consumer organizations concurred with the committee's proposal to establish an independent commission to regulate consumer product safety programs. Don Willner, President of the Consumer Federation of America argued before the committee that American consumers needed an agency concerned exclusively with the safety of consumer products and that an independent regulatory commission would have greater visibility and public accountability than would an agency located within an executive department such as HEW. -10- Moreover, according to Willner, an independent commission would be less susceptible to industry pressure unlike the Food and Drug Administration which in his view had been the best friend of regulated industry. -11- Willner's opinions were reiterated by numerous spokesmen for other consumer groups. Governor Howard Pyle, President of the National Safety Council and David A. Swankin, Director of the Washington office of Consumers Union, both testified before the Commerce Committee that an independent commission would be far more

-9- ibid., p. 2.
-10- ibid., p. 186.
-11- ibid.
likely than an executive department regulatory agency to pursue vigorous product safety protection for American consumers. -12- These witnesses recognized that an independent commission with its plural leadership and location outside of an executive department would provide the integrity necessary to the regulatory process.

Reaction by industry and business to the proposed consumer product safety legislation was more mixed. However, in general industry witnesses supported the Nixon administration's bill because of its greater reliance on voluntary standards for product safety and they also favored the retention of authority within HEW. Philip H. Stevens, Chairman of the Safety Commission of the Industrial Designer Society of America testified that the most outstanding feature of the consumer product safety bill was the concept of an independent commission which he argued would minimize political influence, a necessary condition of effective and impartial regulation. -13- But the testimony of Eugene A. Keeney, President of the American Retail Federation was perhaps more typical. Keeney argued that the establishment of a new federal agency would not solve the problems which had plagued the administration of consumer protection programs. -14- According to Keeney, these problems could be alleviated by greater oversight and pressure from Congress, business, and the consumer. Keeney and the Federation much preferred that Congress locate the new consumer product safety programs within the Department of HEW.

The Nixon administration's consumer product safety proposal was presented during the Commerce Committee's hearings by Secretary of HEW,

-12- ibid., p. 212 and p. 225.
-13- ibid., p. 247.
-14- ibid., p. 309.
Elliot L. Richardson. According to Richardson, consumer product safety programs could be most effectively and efficiently administered in HEW which had similar and complementary programs, supporting facilities, and a high degree of visibility. Richardson outlined the advantages of locating the new programs within HEW. -15- First, HEW had an extensive field enforcement staff engaged in product regulation, as well as medical and technical experts in the area, and scientific testing laboratories. Thus according to the administration, it would be more economical and efficient to expand this staff to meet the new workload proposed by the legislation. Second, centralizing the various federal consumer safety programs into HEW would give consumer protection efforts a single direction and thus a more coordinated and therefore enhanced enforcement. Third, the administration's proposal would consolidate and simplify government structure rather than proliferating the number of government agencies.

Within the Commerce Committee, a small number of Senators favored the Nixon plan. According to Senator Norris Cotton (R NH), the new independent Consumer Safety Agency was a further fragmentation of federal regulatory activities and another Republican, Ted Stevens (Alaska), argued that such programs should not be divorced from the regulatory functions already vested in HEW. -16- Cotton proposed an amendment to the committee bill to eliminate the new agency and grant the new product safety authority to the Secretary of HEW. However, there was little support for the amendment and it was defeated by a 4-11 roll-call vote. -17- The Commerce Committee subsequently passed the consumer product safety bill by a 17-1 vote and

-15- Ibid., p. 100.
-17- Ibid., p. 41.
reported the bill on April 13, 1972. -18- Under a unanimous consent agree-
ment of the Senate, the consumer product safety bill was referred to the
Committee on Government Operations and the Committee on Labor and Pub-
lic Welfare.

During hearings held by these two committees, the sentiments of indus-
try and consumer organization spokesmen on the consumer product safety bill
were very much in keeping with those expressed by their counterparts before
the Commerce Committee. Martha Robinson, Information Director of the
Consumer Federation of America, testified before the Labor and Public Wel-
fare Committee that comprehensive product safety laws should be regulated
by an independent commission. -19- According to Robinson, there was an
absence of specific accountability in the current system whereby the limited
product safety functions of FDA were vested in the head of an agency
bureau. Her feeling was that an independent structure, as proposed by the
National Commission on Product Safety and the Senate Commerce Commit-
tee, would lessen the possibility for political interference in the agency's
activities. Moreover, Robinson charged that the FDA was very much a cap-
tive of the food and drug industries it was authorized to regulate; thus
another reason for an independent agency. -20- Also, Judy Jackson, spokes-
man for the Public Interest Research Group, argued before the Government
Operations Committee that the new consumer product safety agency must be
independent in order for the regulation of consumer products to be both
impartial and effective. -21-

-18- Ibid., p. 42.
-19- U.S. Congress, Senate, Committee on Labor and Public Welfare, Hear-
ings Before the Committee on Labor and Public Welfare on the Con-
-20- Ibid., p. 196.
-21- U.S. Congress, Senate, Committee on Government Operations, Hearings
In contrast to views favoring the creation of an independent commission to regulate consumer product safety were the opinions of J. Edward Day, Special Counsel to the Consumer Electronics Group of the Electronic Industries Association, and C. Joseph Stetler, President of the Pharmaceutical Manufacturers Association, who both opposed the transfer of FDA regulatory authority to an independent agency. In short, during the hearings held on the consumer product safety bill by all three Senate committees: Commerce, Government Operations, and Labor and Public Welfare, testimony revealed the differences of opinion among the various participants. Industry and business organizations along with the Nixon administration were generally against the establishment of an independent commission or agency to regulate the new consumer protection program whereas the National Commission on Product Safety, the Commerce and Labor and Public Welfare Committees, and consumer organizations strongly supported the creation of an independent consumer protection agency.

The Labor and Public Welfare Committee unanimously reported an amended version of the Commerce Committee's bill on June 5, 1972. The major amendments by the committee included changing the name from the Consumer Safety Agency to the Food, Drug, and Consumer Product Agency and extending the authority of the new agency to include the protection of the consumer against adulteration, misbranding, and illegal distribution of food, drugs, cosmetics, and other medical devices, as well as against

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The Committee on Government Operations failed three times to obtain a quorum by the Senate deadline and therefore forfeited its right to act on the consumer product safety bill.
injury resulting from the use of consumer products. -24-

The committee was very much in agreement with the findings of the National Commission and the Commerce Committee that the regulation of consumer products required an independent agency to administer such programs. Moreover, according to the Labor and Public Welfare Committee, FDA was not able to achieve optimum results due to its organizational structure, that is to say its location within a larger agency, HEW. -25- The failures of FDA, charged the committee, were due to its lack of clear-cut responsibility for accomplishing its mission; the FDA simply did not have the independent authority to pursue vigorous consumer protection regulation. Like the Commerce Committee and the National Commission, the Labor and Public Welfare Committee recognized the very strong case for an independent consumer protection agency.

During Senate debate, primary attention was given to the status of the proposed consumer protection agency. There was general agreement among senators on the need for strengthened federal authority to protect the consumer against unsafe foods, drugs, and consumer products. There was less consensus, however, on the organizational structure to carry out this new mission.

According to Senator Ribicoff (D CN), an independent agency should be established because that was the best way to assure that the programs entrusted to the agency would be carried out in the manner Congress intended and that if the agency remained part of HEW, the regulatory decisions of the administrator could be overruled by political appointees within

-24- Ibid., p. 6.
-25- Ibid., p. 3.
the executive department. -26- Ribicoff's opinions had the support of the majority of senators.

Senator Cotton, however, was one of the few exceptions. He opposed the establishment of an independent agency and offered an amendment to delete provisions of the bill granting regulatory authority to the new independent agency and to substitute a provision vesting that power within the Department of HEW. Neither Cotton, nor Senator Peter Dominick (R CO) bought the argument that an independent agency would regulate consumer protection programs more effectively than an agency within the Department of HEW. Dominick argued that a Consumer Safety Administration within HEW would accomplish the objectives of the independent agency proposed in the bill, that is the objectives of strengthening and consolidating consumer protection regulatory authority and increasing visibility and accountability.

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But Senator Moss charged:

We can cite many many gaps in the administration of the laws —such as the Flammable Fabrics Act and the Poison Prevention Packaging Act! under the Department of HEW. To compound these errors by including additional authority in this agency would be a bungling disaster and an insult to the American people.

I think it would be the greatest mistake we could make to just put it —the proposed agency! in HEW along with the other many, many divisions and bureaus that are administered in that conglomerate department. -28-

In addition, Senator Montoya (D NM) argued that the new regulatory authorities should be vested in an independent agency because of the cozy relationship between the FDA and the food and drug industry. According to Montoya:

-27- Ibid., p. 21872.
-28- Ibid., p. 21867.
It has become: 'Good Old Joe,' and 'Good Old Chuck,' instead of a regulator and regulated relationship. In the process, the public interest has become an unwelcome intruder in its own domain. -29-

Senator Cotton's amendment was rejected by the Senate by a 31-51 roll-call vote. -30-

Three additional amendments designed to relieve the agency of most of its enforcement powers were also defeated. Senator Edward J. Gurney (R Fla) offered two amendments, considered en bloc, that would give the Justice Department the responsibility for enforcement of regulations established by the new Food, Drug, and Consumer Product Safety Agency with the exception that the agency could seek temporary injunctions against products which posed an imminent threat to consumers. These two amendments were rejected by a 31-51 roll-call vote. -31- Finally, Senator Cotton offered another amendment which would delete provisions of the bill establishing criminal penalties for violations of regulations and standards established by the new agency. This amendment was defeated by a 39-41 roll-call vote. -32- The consumer product safety bill, as reported by the Commerce Committee and amended by the Committee on Labor and Public Welfare, subsequently passed the Senate by a roll-call vote of 69-10. -33-

**House Action**

In the House, the consumer product safety bill was referred to the Committee on Interstate and Foreign Commerce. The House committee also recognized the substantial need for more comprehensive federal legislation to

-29- ibid., p. 21869.
-30- ibid., p. 21872.
-31- ibid., p. 21889.
-32- ibid., p. 21890.
-33- ibid., p. 21903.
protect the consumer against unsafe consumer products. Accepting the recommendations of the National Commission on Product Safety, on June 20, 1972, the Committee on Interstate and Foreign Commerce reported by voice vote a bill to vest comprehensive authority to protect the public from hazardous products in an independent regulatory commission, to be named the Consumer Product Safety Commission. -34- The commission was to be composed of five members appointed by the President and confirmed by the Senate for seven-year terms. As in the final consumer product safety act, the commission was given the authority to collect and disseminate information on consumer product injuries, establish mandatory safety standards, and obtain equitable relief in the courts to protect the public from imminent hazards.

The House bill represented a compromise between the legislative recommendation of the National Commission on Product Safety and the Nixon administration's consumer agency proposal. According to the committee bill, the FDA would retain its authority to oversee food, drugs, and cosmetics, while the new Consumer Product Safety Commission would regulate standards for other consumer products.

The decision to create an independent commission to regulate consumer product safety reflected the committee's belief that an independent agency such as a reorganized FDA, instead of a departmental agency, could better perform the legislative and judicial functions established in the bill. The committee argued that a regulatory commission with its independent status and bipartisan commissioners with staggered and fixed terms would provide greater insulation from both political and economic pressures than would be

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likely in a cabinet-level department. -35- The establishment of an independent commission would also give the new agency increased public visibility which would further the pursuit of more vigorous consumer product safety regulation than had occurred in the past. In addition, the Committee noted that the FDA had been subject to widespread criticism concerning its regulatory activities and therefore it did not make good administrative sense to assign substantial new responsibilities to the FDA. Moreover and more generally, the committee argued that regulatory programs located within executive departments tended to suffer from a lack of adequate funding and staffing. -36- Thus, the committee believed that the case for an independent commission was quite persuasive.

However, not all committee members supported the bill's provision to establish an independent commission. Seven Republican members charged that although the independence from a cabinet department and the bipartisan membership of independent regulatory agencies theoretically guaranteed impartial regulation and decision making, such attributes in fact had resulted in chronic indecision and internal bickering. -37- According to these congressmen, the interest of the consumer would be better served by strengthening the Food and Drug Administration within HEW.

During the hearings held on the consumer product safety bill by the Subcommittee on Commerce and Finance, the sentiments of witnesses mirrored those expressed before the three Senate committees. -38- In fact,

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-35- Ibid., p. 25.
-36- Ibid.
-37- Ibid., p. 69.
many of the witnesses were identical. Those who appeared before the House
subcommittee supported the federal government's increased role in assuring
the safety of foods, drugs, and other consumer products. Less agreement
was evident among witnesses, however, on the organizational structure of the
new agency. The majority of congressmen and spokesmen for consumer
organizations favored the creation of an independent agency whereas the
Nixon administration and representatives from industry and business supported
an agency to be located within the Department of HEW.

During House debate, supporters of an independent commission to regu-
late the safety of consumer products cited the same reasons which had been
presented earlier during committee deliberations and hearings. For example,
Congressman Harrington (D MA) argued that in view of the overwhelming
public mandate for consumer product safety legislation, he felt that it was
necessary to give proper status to the new Consumer Product Safety Com-
mission in order to provide bipartisanship, accountability, and visibility. -39-
Furthermore, Congressman McCollister (R Neb) stated:

By placing the administration of consumer product safety in an indepen-
dent regulatory agency, vested with new authority, we are confident that the
intent of Congress will be carried out with cold neutrality and be insulated
from undue economic and political pressures—more than would be possible or
likely if the agency was a part of a Cabinet-level department, and with
more dedication to fairness and effectiveness than if the agency was a part
of, or if its authority was given to an already existing regulatory agency.
-40-

Finally, Congresswoman Sullivan referred to the less than satisfactory
performance of the Food and Drug Administration. She warned that the
FDA was not the proper place for the new regulatory program because the
FDA, through a series of administrative reorganizations, had been placed

-40- Ibid., p. 31383.
below many, many layers of bureaucratic supervision and policy direction—or interference. -41-

Yet several congressman argued that FDA should in fact be reorganized to accommodate the new regulatory authorities established by the bill. According to Congressman William Springer (R IL), the consumer product safety programs should be vested in the FDA in which, he argued, safety standard setting had been for some time and where it had received a high level of attention and concern. -42- Moreover, Congressman Devine (R OH) argued that a new independent commission would cost the taxpayers much more than if the consumer safety programs were located in existing agencies within HEW; strong sentiment against proliferating the number of independent agencies in the federal bureaucracy was evident among a few senators. -43-

Despite some opposition to the establishment of an independent commission to regulate consumer product safety, the House bill passed by a 319-50 roll-call vote. -44- Several amendments to the bill were adopted by the House, but none of these substantially changed the bill. More importantly, no congressman offered an amendment to place the new agency within HEW.

A conference committee was convened to work out the differences between the Senate and House bills. Essentially, conferees adopted the House bill which created a five-member independent regulatory commission and left the food and drug safety programs of the FDA intact. The House and Senate adopted the conference report by voice votes on October 13, 1972, and October 14, 1972, respectively.

-41- ibid., p. 31385.
-42- ibid., p. 31376.
-43- ibid., p. 31380.
-44- ibid., p. 31417.
Conclusion

This description of the establishment of the Consumer Product Safety Commission indicates that congressional-executive rivalry and freedom from traditional clientele ties are the major reasons Congress chose to create an independent commission, instead of a departmental agency, to regulate consumer product safety. During committee deliberations and floor debate, the comments from congressmen reveal concern about the possibility of interference from the executive branch into the regulatory process if the new agency was located within the Department of Health, Education, and Welfare. As Senator Ribicoff argued, an independent agency should be established because that was the best way to ensure that the regulatory decisions of the new consumer product safety agency were not controlled by political appointees of HEW. -45- Ribicoff's opinion seemed to have the support of the vast majority of both senators and congressmen.

Equally significant was the concern of congressmen, consumer organizations, and industry spokesmen (although the latter were probably less concerned) that the new agency should be independent in order to ensure its freedom from the traditional clientele ties of the FDA. Both congressmen and spokesmen for consumer groups had charged that the FDA was very much a captive of the food and drug industries which it was suppose to regulate. Because of this situation, an independent commission was advocated to alleviate the possibility of one particular group gaining such close access and control over agency decisions. An independent commission, according to these congressmen and interest groups, would provide both efficient and impartial regulation.

-45- The Congressional Record, June 21, 1972, p. 21848.
Partisan differences between the Congress and the White House appear to figure only marginally, if at all, in the congressional decision to create an independent commission to regulate the safety of consumer products. In the Senate, the final roll-call vote was 69-10: R 31-7 and D 38-3. Clearly, it is hard to conclude that partisan considerations were present in this vote. However, the amendment offered by Senator Cotton which would place the new consumer safety agency in the Department of HEW had strong support among Republicans. The amendment was defeated by a 31-51 vote: R 26-15 and D 6-36. Republicans, unlike Democrats, may have been less fearful of the possibility of interference by the Nixon administration into the regulatory activities of the new agency. Indeed, Republicans may have welcomed such interference.

In the House, there is no indication of the presence of partisan considerations. The final vote on the consumer product safety bill was 319-50: R 126-23 and D 193-27. In addition, during debate congressmen were quick to point out that the bill was not a partisan measure. Congressman Staggers (D WV) stated that the bill was in fact a bipartisan bill, cosponsored by both parties.

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The Congressional Record, September 20, 1972, p. 31378.
CHAPTER SEVEN

The Occupational Safety and Health Administration

The Occupational Safety and Health Administration (OSHA) was established as a regulatory agency within the Department of Labor by the Occupational Safety and Health Act of 1970. The act established a comprehensive on-the-job safety program for approximately 55 million industrial, farm, and construction workers employed by firms engaged in interstate commerce. The purpose of the legislation was to reduce the number and severity of work-related injuries and illnesses which had reached very high levels by 1970. The authority to set safety and health standards for the protection of workers was granted to the Secretary of Labor and a three member Occupational Safety and Health Review Commission was created to serve as an appeals board to handle disputes under the act. OSHA is directed by the assistant secretary of labor for occupational safety and health who is appointed by the President to serve at his pleasure and confirmed by the Senate.

The major responsibilities of the Occupational Safety and Health Administration include to encourage employers and employees to reduce hazards in the workplace, to establish "separate, but dependent responsibilities and rights" for employers and employees for the achievement of better safety and health conditions, to monitor job-related injuries and illnesses, to develop and enforce mandatory job safety and health standards, and to impose tempo-

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ary emergency standards when workers are in grave danger due to exposure to new toxic substances or hazards. -2-

Prior to passage of the Occupational Safety and Health Act in 1970, there was no comprehensive federal job safety program. Instead, Congress had enacted specific job safety and health legislation to deal with specific problems. As a result, federal programs designed to monitor occupational safety and health were uneven and simply inadequate. Not only was federal action inadequate, but the efforts of states as a whole as well as those of private industry were poor. These federal laws included the Walsh-Healey Act of 1936 which established certain safety criteria for workers on federal contracts, the Longshoremen's and Harbor Worker's Act amendment of 1958 which required employers to maintain safe working conditions, and the Mine Safety Act provisions of 1941, 1947, and 1952 which permitted federal safety inspections of mines. -3-

The idea for a comprehensive federal job safety bill originated during the Johnson administration and in 1968 President Johnson recommended to the Congress an occupational safety and health bill that would give the Secretary of Labor the authority to set and enforce federal standards. -4- The bill was vehemently opposed by conservative Democrats, Republicans, and business groups who feared such a concentration of authority within a Cabinet-level department so supportive of the interests of organized labor. The House Education and Labor Committee reported an occupational safety and health bill, but the bill curtailed the Secretary's authority to set safety stan-

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-2- ibid., pp. 387-388.
dards. However, the bill subsequently died in the Rules Committee. The Johnson bill also failed to be reported out of the Senate Committee on Labor and Public Welfare.

The following year, President Nixon proposed legislation to establish an independent board, to be named the National Occupational Safety and Health Board, with the responsibility for developing occupational safety and health standards. The board was to be composed of five members appointed by the President for staggered five-year terms. One member was to be designated as chairman by the President and at least three members were required to have expertise in the field of occupational safety and health. Although the board was to set standards, the Secretary of Labor was to have primary responsibility for enforcement of such standards and both he and the Secretary of HEW could participate in the setting of standards and could challenge those set by the board and offer alternatives. Safety matters were to be the concern of the Labor Secretary while the Secretary of HEW was to be concerned with matters of health.

The Nixon administration defended its proposal on the grounds that a board would provide a single focus for the problems of occupational safety and health and would avoid the jurisdictional problems between the Departments of Labor and HEW. In addition, the board would provide the expertise necessary to developing and promulgating national safety standards and be less subject to political interference.

**House Action**

In the House, the Committee on Education and Labor had jurisdiction over the occupational safety and health bill. The committee also recognized

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-5- *ibid.*, p. 169.
the need for comprehensive federal job safety and health legislation, but
adopted a different organizational approach to administer such a program
from the one proposed by the Nixon administration. The Education and
Labor Committee chose to give the Secretary of Labor the authority to set
safety standards (as well as modify or revoke them), enforce safety stan-
dards, prosecute violations before Labor Department hearing examiners, and
assess civil penalties and issue corrective orders. -6- Thus, the Education and
Labor Committee bill, also known as the Daniels bill after the subcommittee
Chairman Dominick V. Daniels (D NJ), established a regulatory program to be
administered in the Department of Labor.

The committee considered and rejected the administration's proposal to
vest the new regulatory program within an independent board. According to
the committee, a board would only fragment administrative responsibility
while a single appointee, whose primary function was to protect the legiti-
mate interests of the workers, would better ensure decision making account-
ability. -7-

However, the committee's decision to concentrate regulatory authority
in the Secretary of Labor was not acceptable to all members. In a minority
report, these members charged that the bill created a monopoly of functions
in the Labor Secretary, a monopoly which ignored the element of fairness to
those required to comply with the legislation. -8- Moreover, they argued that
the Labor Department had failed to satisfactorily enforce federal safety and
health regulations already in effect, such as the Walsh-Healey Act and the

-6- U.S. Congress, House, Committee on Education and Labor, Report of the
Committee on Education and Labor on the Occupational Safety and
-7- ibid., pp. 18-19.
-8- ibid., p. 47.
Longshoremen's and Harbor Worker's Compensation Act. Congressmen William D. Hathaway (D ME) and William A. Steiger (R Wis) proposed a bipartisan compromise measure which closely followed the Nixon administration's plan and established a five-member independent board to administer the job safety and health program. The board would, in effect, closely resemble an independent regulatory commission with members appointed by the President and confirmed by the Senate. In addition, the bill would establish a separate appeals commission to conduct hearings if an employer contested a violation and to issue orders and penalties to enforce the act. The substitute bill, however, was rejected by the committee.

Prior to the floor debate, however, the Select Subcommittee on Labor held thirteen days of hearings on the occupational safety and health issue. The hearings revealed the substantial need for federal job safety and health legislation, but disagreement arose on the type of agency or official to administer such programs. In general, organized labor supported the committee bill which gave the Secretary of Labor the authority to develop and promulgate safety standards while industry and business groups strongly opposed the committee bill and put their support behind the administration's proposal.

Testifying before the subcommittee, George P. Schultz, the Secretary of Labor, expressed his strong support for the Nixon administration's bill and argued that a multi-member board would provide the balance of expertise and points of view so essential to the development of fair and impartial regulations. -9- George L. Gorbell, spokesman for the Manufacturing Chemists

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Association, and William E. Naumann, spokesman for the Associated General Contractors of America, also endorsed the creation of a board to set job safety and health standards and thus lent their support to the Nixon plan.

Finally, J. Sharpe Queener, spokesman for the Chamber of Commerce of the U.S. (the principal voice of the American business community), argued that a five-man panel of experts, devoted exclusively to the subject of job safety and health, was in a better position than any currently established department to draw on the technical competence of both the Departments of Labor and HEW in making the objective determinations necessary to set standards. Thus, according to the Nixon administration and industry and business organizations, an independent board would guard against arbitrary action and would ensure the impartial development of job safety and health regulations.

But labor organizations strongly rejected the administration's bill and supported the bill reported by the Education and Labor Committee. The views of labor were aptly summarized and presented by Andrew J. Biemiller, spokesman for the AFL-CIO, in testimony before the House subcommittee. Biemiller argued that an independent board would not provide a single focus for attacking the safety and health problems of working Americans, but would in fact constitute another layer of bureaucracy, remote from the problems confronting workers each day. Labor organizations urged the committee to give the authority to develop, promulgate, and enforce job safety and health standards to the Secretary of Labor. According to Biemiller, the

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-10- ibid., p. 598 and p. 793.
-11- ibid., p. 655.
-12- ibid., p. 623.
Department of Labor, whose purpose was the protection of the interests of the workers, would be the proper place for the new federal responsibility. The Committee on Education and Labor adopted labor's suggestions and reported a bill which did indeed vest the comprehensive federal job safety and health program in the Secretary of Labor.

On the floor of the House, representatives considered not only the bill as reported by the Education and Labor Committee, but a substitute bill in the form of an amendment proposed by Congressmen Steiger and Robert L. F. Sikes (D FL). Essentially the battle between the two bills concerned the organizational structure for carrying out the occupational safety and health act. The question facing the House was: Did such regulatory authority belong in the Department of Labor as the Daniels bill provided or did it belong to an independent board as proposed by the substitute bill?

Carl D. Perkins (D KY), floor manager of the committee bill, argued that the bill would provide a congressionally recognized right for every individual worker to work in the safest and healthiest conditions that could be provided. -13- Supporters contended that only the administration of the law by the Secretary of Labor could give adequate protection to the working man. Congressman Annunzio (D IL) argued that the full responsibility for implementation of the occupational safety and health act should rest with the Secretary of Labor since he was responsible for the protection of the nation's workers if the legislation was to be at all meaningful. -14- Congressman Hathaway contended that the general public and labor in particular would have great difficulty in getting a five-man board to act whereas it would be much easier to exert pressure on a single individual such as the

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14- Ibid., p. 38389.
Secretary of Labor. -15- Finally, Congressman O’Hara argued that a board
would be more difficult to hold accountable for its decisions than would a
single individual. During debate he stated:

Under the Daniels bill, it is at least possible to fix responsibility and to
find out who it is that is supposed to set the standards and who it is that is
supposed to enforce them. If the program is not adequately implemented
and if not strictly enforced for the American people to be able to hold
accountable the responsible officials—in this case the President and his Sec-
retary of Labor—it will serve little purpose.

It is proposed that we substitute for that accountability which is the
most important part of this legislation, a faceless board, none of whom will
be known to the people, none of whom will be accountable to the people,
and behind whose skirts an entire administration will be trying to hide. -16-

While Perkins charged that immediate passage of the occupational
safety and health bill was crucial to the American worker, he and other
committee members recognized the fears of many representatives, primarily
Republicans, about certain provisions of the Daniels bill. In an attempt to
allay these fears, Perkins, with the support of a majority of the members of
the Education and Labor Committee, was prepared to offer a series of
amendments to the bill. One such amendment would have required a court
order to shut down a plant, rather than allow the Secretary of Labor to
close a plant as stipulated by the committee bill. Another amendment would
have charged the requirement that an employer provide a "safe and healthful
place to work" for a more limited requirement of "free from recognized haz-
ards." Although these amendments were carefully presented and outlined dur-
ing the debate, support for the Steiger-Sikes substitute remained strong.

Proponents of the substitute bill argued that giving sole authority to
the Secretary of Labor would run the risk of protecting the interests of
labor at the expense of business interests. An independent board of non-par-

-15- ibid., p. 38383.
-16- ibid., p. 38392.
tisan safety professionals with the power to set standards and a separate appeals commission with the power to adjudicate alleged violations would ensure both the worker's safety and maximum equity for the employer. According to Congressman Steiger, the structure of the substitute bill was based on the concept of the complete separation of functions. 

17- Congressman John Anderson (R IL) also stressed this point and argued that the division of responsibilities as provided for in the substitute bill was a more responsible and realistic approach to an equitable and effective job safety program. 18- According to Congressman Edwin Eshleman (R PA), the Daniels bill placed too much power in the hands of the Secretary of Labor—whether he was Republican or Democrat—and so he favored the creation of an independent board to set safety standards. 19- Finally, Congressman Erlenborn (R IL) stated:

The committee bill would make the Secretary of Labor the legislator, policeman, and prosecutor, the judge and jury. It violates, really, the very basic concepts of good executive branch enforcement....The Steiger-Sikes substitute would separate out the separate functions....I think that basing our structure of this legislation on the traditional separation of powers is a very wise thing to do. 20-

Before the Daniels bill came to a vote on the floor, the Steiger-Sikes substitute bill (in the nature of an amendment) was adopted by a roll-call vote of 220-173: R 154-17, SD 60-21, and ND 6-135. 21- Following the adoption of the amendment, the House voted to pass the amended version of the occupational safety and health bill by a roll-call vote of 384-5: R 168-2, SD 78-3, and ND 138-0. 22- So organized labor and the Democrats

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17- Ibid., p. 38374.
18- Ibid., p. 38368.
19- Ibid., p. 38380.
20- Ibid.
22- Ibid., p. 38724.
lost in the House, while business groups, Republicans, and southern Democrats believed they had scored a victory.

**Senate Action**

However, in the Senate a different scenario had taken place. The occupational safety and health bill was referred to the Senate Committee on Labor and Public Welfare which reported a bill on October 6, 1970. The Senate committee bill, which had the support of the majority of Democrats and organized labor, gave the Secretary of Labor the authority to both promulgate and enforce safety and health standards. -23- Although the committee bill vested the new regulatory program in the hands of the Secretary of Labor, the committee believed that it resolved many of the major differences between the Daniels bill and the Nixon plan by adopting a number of amendments to the committee bill proposed by the minority. These amendments, which were intended to gain Republican support, were almost identical to those Congressman Daniels had intended to propose had the House not first adopted the Steiger-Sikes substitute.

One amendment changed the requirement that employers provide "safe and healthful" working conditions to a more limited requirement that employers provide a workplace free from "recognized" hazards. -24- Essentially, the employer simply would have to correct hazards discovered on inspection and made the subject of an abatement order. The committee also adopted several amendments to assure that the Secretary of Labor would not arbitrarily use or abuse his authority to require the immediate withdrawal of workers

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-24- ibid., pp. 9-10.
from areas of imminent danger. One of these amendments provided that imminent danger orders could be issued by the Secretary only in cases where there was insufficient time to obtain a court order. However, the critical issue which remained unresolved by the committee was whether the Secretary of Labor should be given the power to promulgate and enforce safety standards or whether these functions should be separated and accorded to an independent board and an independent panel, respectively.

Senator Javits (R NY), who introduced the administration bill in the committee, suggested a compromise amendment which would give the Secretary of Labor the authority to promulgate standards and a three-man independent panel the authority to enforce job safety and health standards. However, the amendment was rejected by a 10-7 vote. With respect to the Javits proposal and the Nixon proposal which would have created both an independent board to determine safety and health standards and a three-man panel to enforce such standards, the committee believed that such organizational structures would diffuse responsibility and accountability thereby decreasing the program’s effectiveness. Thus, a majority of the Committee on Labor and Public Welfare agreed that in order to ensure both accountability and fair treatment of all parties affected by the act, the Secretary of Labor should be given the authority to set standards, inspect complaints, and prosecute and adjudicate violations.

During Hearings held by the Subcommittee on Labor, the advantages and disadvantages of the committee bill and the administration bill were discussed by witnesses and subcommittee members. Again, the general attitude

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-26- Ibid., p. 55.
of organized labor was that the Secretary of Labor should administer the occupational safety and health program while the preference of business was that an independent board should be in charge of the new program. Many of the witnesses who testified before the Senate subcommittee had also testified before the House Select Subcommittee on Labor. For example, Secretary of Labor George P. Schultz presented the merits of the Nixon proposal. Schultz argued that an independent Occupational Safety and Health Board to set safety and health standards, as opposed to a single individual, would provide expertise, fairness, and accountability. -28-

Andrew J. Biemiller, spokesman for the AFL-CIO, argued that the administration bill would in fact make it much more difficult to fix responsibility for regulatory decisions and that a group of five individuals would no more ensure impartiality than would a single individual such as the Secretary of Labor. -29- Organized labor still maintained that the interests of the worker would be adequately protected only if the occupational safety and health program was administered in the Department of Labor by the Secretary. The committee bill, as amended and reported by the Labor and Public Welfare Committee, essentially reflected the position of organized labor and vested the occupational safety and health program within the DOL.

During two days of floor debate, the Senate deliberated on two occupational safety and health bills, similar in their legislative intent and purpose, but quite different in their proposed organizational structures for government regulation. Senator Harrison Williams (D NJ) argued the merits of the com-

-29- ibid., pp. 387-407.
mittee bill during debate. In response to criticism that the committee bill placed excessive powers in the hands of the Secretary of Labor, Williams argued that in fact it was not an unusual or unfair mechanism to combine in a single agency the standard setting and enforcement functions; the committee bill merely reflected the position that the most effective regulation was one based upon the experience that came from enforcement. -30- He also emphasized that such organizational structures had for many years characterized most federal regulatory programs. But more importantly, Williams argued that the alarm caused by the provision granting the Labor Secretary both standard setting and enforcement power was exaggerated because the Secretary would be subject to the Administrative Procedure Act thereby ensuring due process to all parties affected by the legislation. -31-

In addition, Senator Williams charged that the Nixon administration bill and its creation of an independent board would involve a needless spread of bureaucracy; would result in an unnecessary delay of the program's enactment (since new agencies would have to wait for member appointment, confirmation, hiring of employees, etc.); would create an adversary system in the promulgation of standards with the Departments of Labor and HEW opposing industry advocates with a probable result of confusion, delay, and less effective regulation; and finally, would make it difficult to pinpoint administrative responsibility. -32- Senator Harris (D OK) summed up the feeling of the majority of Democrats when he argued that the administration bill would only result in unnecessary foot-dragging, evasion, and indecision. -33-

However, Republicans supported the Nixon administration bill which was

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-31- Ibid., p. 37339.
-32- Ibid., pp. 37339-37340.
-33- Ibid. p. 37346.
introduced on the floor as an amendment in the nature of a substitute bill by Senator Peter H. Dominick (R CO). During debate, he argued that the substitute bill provided a framework which embodied the necessary structural separation to ensure both strong regulation and due process. He criticized the committee bill charging that it would not provide the development and enforcement of strong standards nor fair treatment of both employers and employees. During debate he stated:

The committee bill does not balance the need for regulation with the requirements of fairness and due process. The concentration of authority for the promulgation of standards, the inspection and investigation of complaints, the prosecution of cases, and the adjudication of cases, totally in the hands of the Secretary of Labor is not a balanced approach. It is this structure, this procedural mechanism, which is objectionable to me, and I believe objectionable to many people around the country. It is objectionable because concentration of power gives rise to a great potential for abuse. A single man is easier to harass than an independent board or commission. Political pressure can be concentrated to achieve a particular point of view or course of action. The tradition of this nation has been to place safeguards on power whenever it is granted. One of the greatest safeguards has been the separation of powers....The separation of powers proposed in S4404 (the substitute bill) provides a structure which will achieve the goal of safe and healthful working conditions without raising the sceptre of abuse. -34-

Despite strong support among Republicans, southern Democrats, and business, the Dominick substitute bill was rejected by the Senate when a motion by Senator Williams to table the substitute bill carried by a roll-call vote of 41-39: R 7-27, SD 6-12, and ND 28-0. -35- Thus, the Senate was left to consider only the bill reported by the Labor and Public Welfare Committee.

The tabling motion left Republicans with no other option than to attempt to amend the committee bill. Senators William B. Saxbe (R OH) and Richard S. Schweiker (R PA) proposed an amendment designed to curtail

-34- ibid., p. 37336.
-35- ibid., p. 37347.
the powers of the Secretary of Labor by requiring the Department of Labor to go to a federal district judge and obtain a court order in all cases where it desired to order a plant closed. -36- Senator Williams, who opposed the amendment, argued that the committee bill required the Labor Secretary to get a court order to shut down a plant except in cases where there was an imminent danger to workers. -37- The amendment was rejected by a roll-call vote of 40-42: R 30-5, SD 10-5, and ND 0-32. -38- Although the committee bill remained intact, the votes on the Dominick substitute and the Saxbe amendment indicate that the Senate was fairly evenly split between the administration bill and the committee bill.

The key amendment to the committee bill, proposed by Senator Javits, established a three-member review commission to enforce job safety and health standards set by the Secretary of Labor. This amendment had been offered by Javits in the committee, but was rejected there. According to Senator Javits, his enforcement amendment would be a fair way to balance out the bill; it would give a greater sense of assurance to the business community than would the committee bill which gave the Secretary enforcement power. -39- Indeed, the amendment would provide the necessary compromise between the Democratic and Republican versions of the occupational safety and health legislation. Although Senator Williams and most Democrats opposed the amendment, Senator Javits made a strong case for its adoption. During debate he stated:

I feel very strongly that a great element of confidence will be restored in how this very new and very wide-reaching piece of legislation will be administered if the power to adjudicate violations is in the hands of an

-36- The Congressional Record, November 17, 1970, p. 37602.
-37- Ibid., p. 37604.
-38- Ibid., p. 37605.
autonomous body, more than one man, and more than in the Department of Labor itself. It seems a small price to pay for the confidence that will be inspired by the adoption of this amendment....It seems to me the least we can do in trying to make this bill palatable to the American people is to provide what is proposed in the amendment. No bill is worth a hoot unless it is palatable, because it cannot be enforced. –40–

The Javits amendment to the committee bill was adopted by a roll-call vote of 43-38: R 38-0, SD 11-5, and ND 0-33; the Senate then passed the amended committee bill by a vote of 83-3: R 35-1, SD 13-2, and ND 35-0. –41– Thus, the occupational safety and health bill adopted by the Senate provided a compromise by giving the Secretary of Labor standard setting authority and a three-member independent commission enforcement authority.

Conference Action

Conferees convened to reconcile the differences between the House and Senate occupational safety and health bills and issued a report on December 16, 1970. –42– The conference report followed the Senate version and gave the Secretary of Labor the authority to promulgate occupational safety and health standards and also required only an informal rule-making procedure for setting standards, a procedure which required a hearing only if one was requested. In contrast, the House bill had vested the standard setting authority in an independent board and had required a formal rule-making procedure. The conference report also called for the establishment of an Occupational Safety and Health Review Commission to hear appeals. On two other key issues, conferees followed the House version of occupational safety and health bills. Conferees adopted the House bill's provision to require the

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–40– ibid., p. 37610.
–41– ibid., p. 37613.
Secretary of Labor to obtain a court order to close down a plant; the Senate bill permitted the Secretary to issue an order to close a plant if an "imminent danger" threatened the lives of the workers. Finally, conferees adopted the House bill's provision to require work places to be free from "recognized hazards which are readily apparent and are causing or are likely to cause death or serious bodily harm." On December 16, 1970, the Senate adopted the conference report by a voice vote and a day later the House agreed to the report by a vote of 309-60: R 139-24, SD 39-36, and ND 131-0. —43—

Conclusion

Although an independent commission to administer the occupational safety and health program was not formally considered by Congress, an independent board, very similar to an independent commission, was considered. In effect, the choice facing Congress was independent commission or departmental agency. From the preceding narrative of the establishment of OSHA, it appears that legislative-executive rivalry is not significant, nor is the disruption of traditional clientele ties. In fact, the most significant factor is the solidification of clientele ties. Democrats in Congress argued that if the new occupational safety and health program was to be meaningful (i.e., effective), it should be located in the Labor Department which had the major responsibility of protecting the interests of the nation's workers. Republicans and conservative Democrats, however, charged that such a location would run the risk of protecting the interests of labor at the expense of business. In effect, by locating the occupational safety and health program within the DOL, Congress was strengthening or solidifying the ties between the new regulatory program and the clientele of the Labor Department, the

—43— The Congressional Quarterly Almanac, op. cit., p. 84-H.
nation's workers.

In addition, the selection of a departmental regulatory agency also indicates that Congress (or at least Democrats) had little fear of the influence over the new program by a Republican administration through the Secretary of Labor. Democrats apparently believed that the OSHA's location within the DOL would be sufficient to offset or resist any pressures by a Republican political appointee. Yet the occupational safety and health bill was certainly a partisan issue and this factor is moderately significant (the final bills in the House and Senate as well as the conference report were overwhelmingly approved by congressmen of both parties). The Nixon administration, Republicans in Congress, and business organizations supported an independent board to administer the occupational safety and health regulatory program, while Democrats and organized labor wanted to vest such regulatory authorities in the Secretary of Labor. A number of votes in both houses of Congress reflect the partisan battle. The Steiger-Sikes substitute bill which would have established an independent board to set safety and health standards was rejected by a vote of 220-172: R 154-17, SD 60-21, and ND 6-135. The motion to table the Dominick substitute bill which also would have established an independent board to set standards carried by a vote of 41-39: R 7-27, SD 6-12, and ND 28-0. Finally, the Javits amendment, which established a three-member review commission was adopted by a vote of 43-38: R 38-0, SD 11-5, and ND 0-33. Clearly the battle over OSHA was indeed a partisan one.
CHAPTER EIGHT

The Federal Grain Inspection Service

The Federal Grain Inspection Service (FGIS) was established in 1976 when Congress amended the Grain Inspection Act of 1916. The FGIS is a regulatory agency located within the Department of Agriculture and directed by a single administrator appointed by the President and confirmed by the Senate. The major responsibilities of the Federal Grain Inspection Service include the setting of standards for the quality and condition of grain and for accurate weighing and weight certification procedures, direct federal grain inspection at all export port locations, and the assessment of penalties, both civil and criminal, for violations of the act. -1-

Congressional attention was focused on the lucrative grain trade in 1975 when widespread illegalities in the inspection of grain were discovered. U.S. attorneys delivered numerous indictments for bribery of public officials and short-weighing of grain in the cities of Houston and New Orleans, and between August 1974 and April 1976, there were 78 indictments resulting in 59 convictions. -2- The grain inspection scandals threatened the credibility of the U.S. as the largest exporter of agricultural commodities in the world. Thus, the major purpose of the legislation was to restore integrity to the grain inspection system through stronger federal controls.

Both the House and the Senate Agriculture Committees requested the

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General Accounting Office (GAO) to investigate the U.S. grain marketing system. Under the existing grain inspection process, grain inspectors were licensed by the Administrator of the Agricultural Marketing Service (AMS) of the Department of Agriculture (USDA) but employed and paid by state agencies, grain trade associations, or private agencies, a widely dispersed group which numbered over one hundred. The GAO reported that this system lacked effective controls, procedures, and lines of authority; tolerated conflicts of interests between the grain inspection and merchandising operations; and had not been responsive to the limited supervision provided by the Agricultural Marketing Service. -3- The GAO report called for fundamental changes in the grain inspection system arguing that the weaknesses identified in the system had led to the extensive criminal abuses such as the intentional misgrading of grain, shortweighing, and using improperly inspected carriers. In order to restore confidence and provide greater uniformity and consistency in inspection procedures, the General Accounting Office recommended an all-federal grain inspection system to be implemented in three phases. -4- In phase one, Congress should provide the Department of Agriculture with authority to take over the inspection services immediately from those states or firms where serious problems have been disclosed and direct the USDA to intensify surveillance over on-going services provided by states, trade associations, and private agencies until phases two and three were implemented. In phase two, Congress should authorize and direct the USDA to assume responsibility at the earliest possible date for providing inspection services—sampling, grading, and weighing—and for issuing official


-4- The GAO Report, op. cit., p. X.
inspection certificates at all port elevators. Finally, in phase three, Congress should authorize and direct the Agriculture Department to extend the federal inspection system to the main inland terminals and direct the USDA to provide inspection services on a request basis and under contracting arrangements at minor inland terminals and country elevators, subject to departmental review and supervision.

The Department of Agriculture and the Ford administration had a different view of the measures required to strengthen and improve the grain inspection service. In the USDA's proposal, which was introduced in both the House and the Senate, the existing federal-state-private structure for grain inspection was basically retained. The administration bill simply gave the Secretary of Agriculture additional controls such as the opportunity to monitor officially inspected U.S. grain in foreign ports, the authority to require official inspection agencies to meet certain criteria to qualify for designation, and the authority to temporarily suspend the designation of an official inspection agency for specified causes and to perform original inspections on a temporary basis. -5-

Richard L. Feltner, Assistant Secretary of Marketing and Consumer Services, USDA, presented the administration's position before the House Agriculture Committee. Feltner argued that the irregularities discovered in the grain inspection system were primarily the result of the inherent conflict of interest in many of the private inspection agencies and the Agriculture Department's inability to adequately supervise and control their activities. -6-

Once the conflict of interest problem was removed and additional federal

-6- ibid., p. 49.
controls implemented, the Agriculture Department believed that the integrity and strength of the grain inspection system would be restored. The Department strongly urged that the grain inspection system continue to be in the hands of designated private and state agencies rather than placed totally in the hands of the federal government.

**House Action**

In the House, the committee on Agriculture had jurisdiction over the grain standards legislation. The committee considered a number of bills that had been introduced in Congress during 1975 and were designed to improve the nation's grain inspection system. These bills incorporated a wide variety of approaches to the grain inspection problem ranging from slight modification of the existing system to an all-federal grain inspection system as recommended in the GAO report.

However, the bill reported by the Agriculture Committee on March 25, 1976 rejected the recommendations of the General Accounting Office and called for essentially a continuation of the existing system yet with stronger federal supervision. Thus, the House committee bill was very much in keeping with the provisions of the Agriculture Department's proposed grain inspection legislation. While the committee bill did preclude private agencies from participating in the grain inspection and weighing process, it retained the use of state agencies on the grounds that many of these agencies were not only qualified but had in fact performed in an exemplary manner, and therefore should be made use of by the Secretary of Agriculture. The committee bill required that official grain inspection at export port locations be conducted either by federal personnel of the USDA or state agency personnel
under the Agriculture Secretary's supervision. The original draft of the grain standards bill by the Agriculture Committee's staff did not provide for an all-federal system, but during the fifteen days of markup sessions in November, 1975 after the committee was made aware of the scandals in New Orleans, the committee voted 22 to 10 to provide for direct federal inspection. However, in March, the committee did an about-face and voted 22 to 19 to allow either state or federal personnel to carry out grain inspection at export port locations. The committee bill also stipulated that the weighing of grain be brought under federal supervision (it was not regulated by the government under existing laws) and that state agency personnel would also be permitted to weigh grain, under USDA supervision. Finally, the House Agriculture Committee bill contained a strengthened conflict of interest provision to prevent businesses which had a financial interest in the storage or merchandising of grain from acting as official inspectors.

Not all committee members supported the final bill and minority views were filed by fourteen congressmen, most of whom supported the GAO's recommendation to implement an all-federal grain inspection system. Congressman John Melcher (D Mont) argued that the committee bill was totally inadequate and that it would not strengthen the nation's grain inspection and weighing system, nor would it restore confidence in American grain at home or abroad; according to Melcher, only an all federal system would do this.

Specifically, Melcher complained that the committee bill's conflict of interest provisions were too loose, the weighing provisions deficient, and the civil and criminal penalties inadequate. Moreover, Congressman Melcher sup-

-8- Ibid., p. 75.
ported the establishment of a separate agency to administer the new programs. Another minority view filed by ten congressmen, including Bob Bergland (D Minn), Charles Rose (D NC), John Breckinridge (D KY), Matthew F. McHugh (D NY), and Floyd Fithian (D Ind), reiterated the necessity for an all-federal system. It was the opinion of these committee members that state agencies, in addition to private agencies and firms, should also be excluded from the grain inspection and weighing process, otherwise they believed that the difficulties plaguing the grain industry would continue. -9-

In September, 1975, four days of hearings were held by the Agriculture Committee on the grain inspection legislation. Testimony was received from USDA spokesmen, several members of Congress, and representatives from major farm organizations, grain organizations, labor unions, private inspection agencies, licensed grain inspectors, and others. Those members of Congress testifying before the committee all supported a greatly increased federal presence in grain inspection and related activities, especially the inspection of grain for export. However, with respect to domestic grain inspection and weighing, there were strong differences of opinion among congressmen. Congressmen Neal Smith (D Iowa) and Albert H. Quie (D Minn) supported legislation which would require exported grain to be inspected only by federal personnel, but permit domestic grain to be inspected and graded by either federal or state agency personnel according to federal regulations. -10-

In contrast, Congressmen Edward Mezvinsky (D Iowa) and Bill Burlison (D MO) and Senator Dick Clark (D Iowa) argued for a fundamental overhaul of the structure of the grain inspection service and called for an all-federal

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-9- ibid., p. 81.
-10- Hearings Before the Committee on Agriculture on the Grain Standards Act, op. cit., pp. 22 and 82.
system for both export and domestic inspection. -11- Before the Agriculture Committee, Senator Clark argued the merits of his proposed legislation, which was also introduced in the House by Congressman Melcher. Senator Clark's bill would fully federalize U.S. grain inspection, taking it completely out of state and private hands (although inspection by federal personnel would be optional at interior markets). In addition, Senator Clark proposed the creation of a new Federal Grain Inspection Agency to be located within the Department of Agriculture with a presidential appointee as Administrator subject to Senate confirmation. The agency was to be given the sole statutory authority for grain inspection, grain standards, and grain weighing. According to Clark, grain inspection should not remain in the Department of Agriculture based on its past performance. During the hearings, he stated: "The revolving door arrangement between high grain company officials and the USDA seems to have taken its toll where grain inspection is concerned. The Department should have broken the present scandal years ago; it had clear evidence of serious problems in the grain trade at least as early as 1968." -12-

The testimony from representatives of farm organizations, grain organizations, and grain inspector associations generally opposed either an all-federal grain inspection system or a combined federal and state system. These groups, like the USDA, much preferred the existing grain inspection system over the proposed changes. The attitude of these organizations was that it was unnecessary to radically alter the present system to correct what they considered to be only a limited number of abuses. The comments of Robert L. Parker, Second Vice President of the Texas Grain and Feed Association,

-11- Ibid., pp. 33, 35, and 132.
-12- Ibid., p. 133.
were typical of those made by the spokesmen for these groups. During the House hearings he stated:

It does not make any difference whether the inspection and control is private, state, or federal; there are going to be some problems. People are people. Some do wrong. It doesn't make any difference where they work. They can go wrong working for the state government the same as they can go wrong working for private industry, labor unions, or the federal government. Our present system has good checks and balances which are needed to insure proper grading and weighing of grain. We need to maintain this checks and balance system. -13-

During House floor debate, the proposal to create a separate agency to regulate the grain industry (which was included in the bill introduced in the House by Congressman Melcher) was not a topic for discussion; in fact, the new agency was not mentioned at all. Instead, House debate centered on two approaches to the grain inspection problem: direct federal inspection and supervision or a combined federal-state inspection system. While some members thought the Agriculture Committee bill went too far in federalizing grain inspection, others were appalled that it did not go far enough. -14- For example, Congressman Henson Moore (R LA) proposed an amendment to allow grain exchanges, boards of trade, chambers of commerce, and local government organizations to continue inspecting grain if the Secretary of Agriculture found them qualified. The intent of the amendment was to limit the federalization of the grain system, however, the House rejected the amendment by a standing vote of 19 to 62. -15- In contrast, Congressman Tom Harkin (D Iowa) argued that the bill was far too weak and was in effect like "putting a bandaid on a gaping wound." -16- Similarly unsatisfied with the Agriculture Committee bill, Congressman Bergland proposed an amendment to

-14- The Congressional Quarterly Almanac, op. cit., p. 383.
-16- Ibid., p. 9236.
ban state agency employees from inspecting grain at export port locations and to require that it be done by federal employees only. The House also rejected this amendment by a vote of 112-183: R 10-88, SD 10-46, and ND 92-49. -17- Despite these reservations toward the committee bill, the House subsequently passed it by a vote of 246-33: R 73-17, SD 40-13, and ND 133-3. -18-

Senate Action

In the Senate, grain inspection legislation was referred to the Committee on Agriculture and Forestry. But while the committee was considering and drafting permanent legislation, in September, 1975, the Senate passed an emergency one-year bill sponsored by Senators Hubert Humphrey (D Minn), Robert Dole (R KS), and Herman Talmadge (D GA). This measure increased the penalty for bribing grain inspectors and strengthened the powers of the Secretary of Agriculture by giving him the authority to hire additional federal inspection personnel and to revoke the designation of official inspection agencies when they failed to comply with the Grain Standards Act. -19- The resolution was referred to the House Committee on Agriculture which took no positive action on it.

On April 9, 1976, the Committee on Agriculture and Forestry reported its version of a permanent grain inspection bill. Unlike the House, the Senate committee endorsed a unified, all-federal inspection system to strengthen and improve the existing one. According to the committee, this legislation would put the grain inspection system back on its mandated course—to promote and protect interstate and foreign commerce in grain and facilitate the

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-17- The Congressional Quarterly Almanac, op. cit., p. 36-H.
-18- Ibid.
marketing of farmers' grain. -20-

The principal provisions of the bill required direct federal inspection of all grain at both export elevators and major inland terminal elevators, federal weighing of all grain entering or leaving export elevators, registration of all major grain companies, and the establishment within the Department of Agriculture of a Federal Grain Inspection Agency to administer the grain inspection program and set penalties for violations. -21- Thus, the Senate committee bill incorporated the recommendations set forth in the GAO report, but also went a step further by proposing the creation of a new grain inspection agency. The committee bill required that the new agency be directed by a single administrator appointed by the President for a 10-year term, subject to Senate approval. Because the grain export industry was the largest single export source of income for the U.S. in terms of individual commodities and given the poor performance of the Agricultural Marketing Service in the supervision of grain inspection, the committee believed that a separate agency to administer the grain inspection program was definitely warranted. -22- The committee contended that a single administrator could be more easily held accountable to the Congress and to the public.

Minority views were filed by committee members Robert Dole, Milton Young (R N.C.), Carl Curtis (R Neb), Henry Bellmon (R OK), and Jesse Helms (R N.C.). These senators opposed the committee bill's approach of "federalizing everything," arguing that it would be far better to improve the existing federal supervisory role—thus strengthening the present federal-state-

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-21- Ibid., p. 3.
-22- Ibid., p. 8.
private partnership—rather than create a new federal monopoly. -23- In addition, they argued:

Past experience has shown that placing an individual on a federal payroll does not make him any more honest. The evidence clearly shows that the federal government failed in its role as supervisor of the nation's grain inspection service. It defies reason to now completely federalize the system and reward the past failure with total federal takeover. With only federal employees involved, a serious question arises as to who will catch the federal violators in the future. -24-

These five Republicans were also strongly opposed to the creation of a new federal agency to administer the grain inspection program. They argued that a separate agency would be duplicative and create needless overhead as well as require numerous additional support facilities. They much preferred the retention of the Agricultural Marketing Service which they believed offered the most efficient and economical means of carrying out the functions proposed under the new grain standards legislation.

Two subcommittees of the Committee on Agriculture and Forestry: the Subcommittee on Foreign Agricultural Policy and the Subcommittee on Agricultural Production, Marketing, and Stabilization of Prices held extensive hearings on the permanent grain standards legislation. As in the House hearings, these two subcommittees heard testimony from individual congressmen, USDA spokesmen, and representatives from major farm and grain organizations, grain inspection agencies, and from several licensed grain inspectors.

The Department of Agriculture strongly objected to the bill reported out of the Committee on Agriculture and Forestry. In a letter to Chairman Talmadge, the Acting Secretary of Agriculture, John A. Knebel, argued that the USDA supported the existing federal-state-private structure for grain

inspection (the Agriculture Department later switched its position to eliminate private inspection agencies from the grain inspection system). The extent of federal involvement proposed by the committee bill, according to Knebel, was unnecessary to restore confidence in the U.S. grain inspection system; increased federal supervision and harsher penalties would be sufficient. -24- In addition, the Department of Agriculture vehemently objected to the creation of a new, separate grain inspection agency. Knebel argued that the establishment of this agency would usurp the Department's management prerogatives to organize its program operations to maximize operating efficiencies and to administer its authorities at the least cost to the U.S. taxpayer. -25-

As in the House, farm and grain trade organizations also presented their arguments against the all-federal grain inspection system as proposed in the Senate committee bill. Alvin W. Donahoo, Executive Vice President of the Minneapolis Grain Exchange, testified that the current system of grain inspection, with its flexibility and provisions for federal appeal, had served the industry well at reasonable cost and that his association saw no need to greatly alter the basic system to the extent called for by the provisions of the committee bill. -26- Moreover, Donahoo stressed the association's opposition to the establishment of a Federal Grain Inspection Agency, which it regarded as an unnecessary addition to an already over-burdened federal bureaucracy.

-25- ibid.
-26- ibid., p. 83.
As in the House, Senate floor debate focused on the two main approaches to the grain inspection system: the all-federal system versus the federal-state system. But in the Senate, the proposed Federal Grain Inspection Agency, which was part of the all-federal approach, was subjected to debate. Senator Humphrey, floor manager of the grain inspection bill, opened the debate by calling for fundamental reform of the grain inspection system to ensure uniformity, national direction, and national responsibility. With respect to the proposed agency, Humphrey argued that the reason why the committee finally agreed on the need for a separate or autonomous administrator for grain inspection was because of the history of grain inspection activities within the Agricultural Marketing Service of the USDA; Humphrey charged that the AMS had been extremely derelict in the performance of its duties under the Grain Standards Act. -27- Moreover he stated:

What we have proposed in this bill would not add many new government officials. We are proposing a reorganization within the Agricultural Marketing Service. We are proposing an administrator for the purpose of grain inspection and weighing....I think that to do so (to leave the grain inspection program in the AMS) would be to fail to come to grips with what has been developed as a very serious problem of supervision and inspection. In the bill as written, this administrator will have many responsibilities. He will have responsibilities for terminal elevators. He will have responsibility for the export ports. He will have responsibility for recruitment and training, for supervision. He will have responsibility for the promulgation of regulations that will relate to the smaller elevators, where there are private inspectors as well as state inspectors.

I believe that we need an administrator who is independent, who is able to do his job without any political interference, who has a responsibility to the farmers, who has a responsibility to the export markets, who has a responsibility to our foreign customers, and, above all, who is accountable to Congress. -28-

Opponents of the all-federal grain inspection system, led by Senator Dole, argued simply that an all-federal system was unnecessary to strengthen

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-27- The Congressional Record, April 26, 1976, p. 11241.
-28- Ibid.
the existing system. With respect to the proposed agency, Senator Dole argued that a new agency would add complexity to the current coordination and decision making functions within the USDA as well as needless duplication of services already under the jurisdiction of the Agricultural Marketing Service, and that duplication inevitably resulted in needless overhead requiring additional manpower and expense. -29- During debate, Senator Curtis, also an opponent of the committee bill, stated that "we cannot, for every problem that arises, create a new agency and turn a new function over to the federal government." -30-

However, Senator Clark, a strong supporter of the all-federal grain inspection system and the proposed Federal Grain Inspection Agency, responded to such criticisms by arguing:

We are attempting to take forceful and meaningful steps to deal with a system ridden with scandal and incompetence. To do so, it is necessary to elevate the importance of this function so that it is a full-time responsibility of a high federal officer, one who has access to the Secretary and to the Attorney General, if necessary, and who, in turn, is accessible and responsible to Congress....This responsibility is far too great to be left to middle management in one of the vast bureaus of the USDA.

If we are serious about this effort to restore credibility to the U.S. grain trade, we need an agency with the kind of independence necessary to enforce the law in this very sensitive area. Mr. President, we have not had such enforcement in the past. That is clear. We need it badly, and we shall never get it if we delegate grain inspection to the depths of the bureaucracy, as AMS has done.... -31-

Moreover, Clark pointed to what he considered to be the strong influence of the grain industry within the USDA and then asked of his colleagues on the floor: "Are we to pay heed to the overwhelming preponderance of evidence by thoroughly overhauling our nation's scandal-ridden grain inspection system, or are we to bow to the pressures of the giant grain companies and

-29- ibid., p. 11240.
-30- ibid., p. 11221.
-31- ibid., p. 11241.
their allies by defeating or emasculating this legislation?"  -32-

Senators Clark and Humphrey and their supporters prevailed, despite strong objections among a number of senators to the committee bill. Two amendments proposed by Senator Dole, the first to reduce federal involvement in grain inspection by deleting the provision requiring federal inspection at inland terminals and the second to delete the provisions establishing a separate FGIA within the Department of Agriculture, were narrowly defeated by votes of 36-38: R 23-5, SD 9-5, and ND 4-28, and 34-39: R 28-0, SD 4-10, and ND 2-29, respectively.  -33- The Senate subsequently passed the grain inspection bill by a vote of 52-18: R 10-15, SD 11-3, and ND 31-0.  -34-

Conference Action

Conference action was necessary to reconcile the quite different approaches to the grain inspection problem in the House and Senate bills, but agreement on the grain inspection legislation appeared unreachable as conferees deadlocked during the summer of 1976. But as Congress' adjournment deadline drew closer, conferees scheduled a meeting in late September to discuss a "final" compromise, but again conferees were unable to arrive at an agreement.  -35- A day later, however, conferees accepted a compromise measure offered by Senator Clark. The provisions of this measure required direct federal inspection of grain at export port locations (as stipulated by the Senate bill), but with a grandfather clause permitting state agencies in existence as of July 1, 1976 to perform inspections at any new export loca-

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-32- ibid., p. 11226.
-33- The Congressional Quarterly Almanac, op. cit., p. 22-S.
-34- ibid.
-35- ibid., p. 385.
tions; required inspection agencies (either public or private) at inland locations to be designated for renewable 3-year periods (as provided by the House bill), but only if they met strict federal standards; required a conflict of interest rule prohibiting inspection agency officials and personnel from having a financial interest in any business involving grain storage, transportation, merchandising, or handling (as in the House bill); and the establishment of a new agency, to be called the Federal Grain Inspection Service, to administer the grain inspection and weighing program and establish agency policies, guidelines, and regulations (as provided by the Senate bill). -36-

Although few congressmen were completely satisfied with the conference report—in fact, Senator Clark, who was largely responsible for the compromise measure, voted against the report—both the House and the Senate on October 1, 1976 voted to adopt the report by roll-call votes of 65-307: R 36-95, SD 24-52, and ND 5-160, and 56-6: R 21-2, SD 9-2, and ND 2-2, respectively. -37-

Conclusion

It appears that the primary reason the Federal Grain Inspection Service was established by Congress was to provide a single focus for the regulation of the grain industry, and at the same time free the agency from the traditional clientele ties of the Department of Agriculture. Congress believed that an agency with a single mission was necessary to provide more stringent regulation. Moreover, Congress felt that the poor performance of the Agricultural Marketing Service in regulating the grain trade was due to the strong political pressures of the grain industry on that agency. Thus, by

-37- The Congressional Quarterly Almanac, op. cit., pp. 184-H and 95-S.
creating the FGIS, Congress was attempting to remove the federal grain inspection program from an agency which had been subject to considerable pressure from the grain industry. Interestingly, while Congress stressed that an independent agency would be better able to resist the pressures from departmental clientele and therefore be better able to provide more stringent enforcement of grain standards, Congress did not propose to create an independent commission to regulate the grain industry. Apparently, Congress did not feel the need to remove entirely the grain inspection program from the Department of Agriculture; rather Congress believed a new agency within the USDA would be sufficient to strengthen the federal regulation of grain.

Partisan factors were also moderately significant in the establishment of the FGIS. Grain industry interests were supported by Republicans who opposed an all-federal grain inspection system as well as a new agency, and Democrats supported the all-federal system and the new grain inspection agency. Republican opposition to the new agency was based largely on the grounds that it would add to the already overburdened federal bureaucracy. The partisan battle is evident in the vote on the Dole amendment which would delete the bill’s provision to establish a separate grain inspection agency. The vote was 34–39: R 28–0, SD 4–10, and ND 2–29. Although President Ford’s position on the grain inspection legislation had been in doubt throughout Congress’ deliberations on the bill, the President did sign the final bill. Yet despite the differences among Republicans and Democrats as to the appropriate system of grain inspection and the proper location of the regulatory agency, Democrats seemed quite content to establish a regulatory agency headed by a single administrator to be appointed by the President. Apparently, the Democratic Congress was not overly concerned with the possibility of excessive influence over the grain inspection program by the
Republican administration. Similarly, legislative-executive rivalry had no basis in the congressional decision to establish the Federal Grain Inspection Service.
The Mine Safety and Health Administration

The Mine Safety and Health Administration (MSHA) was established by the Federal Mine Safety and Health Amendments Act of 1977 which strengthened and consolidated various federal miner protection programs under a single, comprehensive law. -1- The MSHA is a regulatory agency located within the Department of Labor (DOL). The agency is directed by a single administrator, the assistant secretary of labor for mine safety and health, who is appointed by the President, to serve at his pleasure, subject to Senate confirmation. Major responsibilities of the Mine Safety and Health Administration include development and promulgation of mandatory safety and health standards, ensuring compliance with such standards, imposition of penalties for violation of standards, investigation of accidents, and cooperation with the states in developing mine safety and health programs. -2-

Passage of the Federal Mine Safety and Health Amendments Act of 1977 reflected Congress' increasing recognition that existing mine safety and health laws, or at least the enforcement and administration of them, were inadequate to properly protect miners. Numerous mining accidents occurred during the 1970s which Congress viewed as a signal for more federal action to help to prevent such disasters. Prior to the 1977 legislation, miners were protected by two separate statutes: the Federal Metal and Nonmetal Mine

Safety Act of 1966 which dealt primarily with miner safety and the Federal Coal Mine Health and Safety Act of 1969 which dealt with both safety and health. Standards under the metal and nonmetal act were, for the most part, advisory (failure to comply with such standards did not place an operator in violation of the act), while standards under the coal act were mandatory. Enforcement of both laws was the responsibility of the Secretary of the Interior. Initially these programs were administered by the Bureau of the Mines in the Department of the Interior (DOI), but in 1973, the Secretary of the Interior created the Mining Enforcement and Safety Administration (MESA) to administer the miner protection programs.

The Federal Mine Safety and Health Amendments Act of 1977 repealed the 1966 metal and nonmetal law and provided a single statute for both coal and noncoal (metal and nonmetal) mines in order to afford equal protection to all miners and a common regulatory program for all operators. The 1969 coal act was amended by the new legislation to provide mandatory time schedules for developing standards, to strengthen enforcement mechanisms, and to improve procedures for assessing and collecting civil penalties. All of the authorities of the Secretary of the Interior under the Coal Mine Safety and Health Act were transferred to the Secretary of Labor to develop, promulgate, and enforce safety and health standards. The Mine Safety and Health Administration was created to administer the programs under the 1977 legislation. Mine safety research programs under the 1969 act remained with MESA in the Department of the Interior while health research functions were assigned to the Department of Health, Education, and Welfare (HEW).

The Carter administration strongly supported the 1977 mine safety and health legislation. President Carter not only favored strengthening federal laws to protect the health and safety of miners, but he was also strongly
committed to the transfer of regulatory authority in this area from the Secretary of the Interior to the Secretary of Labor.

**Senate Action**

The Senate Committee on Human Resources had jurisdiction over the mine safety and health legislation, and on May 16, 1977, the committee unanimously reported its bill to the Senate. The basic approach taken by the committee bill was to combine protection of all miners under a single comprehensive law. The committee recognized that the procedures for developing and revising standards under both the metal and coal acts had resulted in long delays; the committee bill would provide a uniform procedure for promulgation of standards and would regulate the time for various steps of the standards-setting procedure. The Human Resources Committee believed that it was essential for there to be a common regulatory program for all operators and equal protection under the law for all miners. -3- The mine safety and health regulatory programs were to be transferred from the Department of the Interior to the Department of Labor and a new agency, the Mine Safety and Health Administration, was to be established to administer the new programs. Finally, the committee bill would establish a five-member Mine Safety and Health Review Commission to handle contested penalties set by the Secretary of Labor through MSHA.

Senator Harrison A. Williams (D NJ), Chairman of the Human Resources Committee, argued that the transfer of regulatory authority from the Department of the Interior to the Labor Department was a logical step because DOL's major responsibility was the safeguarding and protection of

the rights of the nation's workers. -4- Moreover, Williams charged that a basic conflict of interest existed within the Department of Interior as it sought to both promote the development and production of the mining industry and at the same time ensure the safety and health of the miner. According to the Human Resources Committee, the transfer of mine safety and health regulatory programs from the Interior Department to Labor would alleviate this problem and better ensure miner protection. The Committee also defended the establishment of the independent review board on the grounds that it would preserve due process and instill much more confidence in the new program. -5-

But in a minority report filed by Senator Orrin G. Hatch (R Utah), the alleged conflict of interest within the Interior Department was called into question. Hatch argued that there was in fact no compelling evidence which warranted the transfer of MESA to the Department of Labor and that such a transfer would create an administrative hodgepodge which could well have a deleterious overall effect on mine safety. -6-

The Human Resources Subcommittee on Labor held three days of hearings on the mine safety and health legislation. Testimony was received from spokesmen from the Departments of the Interior and Labor, representatives from miner organizations such as the United Mine Workers and the United Steelworkers, and representatives from mining industry associations such as the National Coal Association and the American Mining Congress. Secretary of the Interior, Cecil D. Andrus, testified before the Labor Subcommittee that his department was in full support of the Senate committee bill, which,

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-4 ibid., p. 5.  
-5- ibid., p. 47.  
-6- ibid., p. 190.
in his view, would greatly enhance both the interests of the miners as well as the operators. With respect to the transfer of regulatory authority from MESA to the Department of Labor, Andrus stated that he personally opposed the transfer, but as Secretary of the Interior he stood behind the Carter administration's position on the issue, which supported the transfer. -7-

A spokesman for the Department of Labor, Arnold Packer, Assistant Secretary for Policy, Evaluation, and Research, also testified in support of the Senate mine safety and health bill. According to Packer, the committee bill represented a landmark in addressing the problems of safety and health in the nation's mines by providing for a comprehensive safety and health law to cover all mines and stronger enforcement mechanisms. -8- Not surprisingly, Packer also endorsed the transfer of mine safety and health regulatory authority from the Department of the Interior to the Labor Department. He argued that it was highly appropriate for a safety and health program covering nearly 400,000 miners to be located within a department which already had a congressional mandate to improve the working conditions of the American worker. -9-

Organized labor was solidly behind the Senate committee bill, particularly the transfer of regulatory authority. Lloyd McBride, President-Elect of the United Steelworkers of America, a major noncoal mining union, stated:

The fact that mine safety efforts have had to compete with those interests within the Interior Department has had a damaging effect on the safety program. There is no way to escape the conflict of mission problem as long as MESA remains in the Interior. Safety and health is far too important a program to be forced to compete with production programs for attention within its own agency. MESA must be placed in the Department

-8- ibid., p. 386.
-9- ibid., p. 387.
of Labor. Only when it is in the Department of Labor will MESA be
divorced from the inappropriate competing and conflicting pressures. -10-

Another union spokesman, Steven Jacobson, Counsel for Mine Health and
Safety of the United Mine Workers, also testified that his organization
strongly supported the committee bill, especially the transfer of regulatory
authority. Before the subcommittee, Jacobson pointed out that at the United
Mine Workers Association's 47th Constitutional Convention in September 1976,
the entire rank and file delegation voted unanimously to adopt a resolution
providing for the transfer of MESA from the Department of the Interior to
the Department of Labor. -11-

Mining industry organizations generally feared that the new mine safety
and health regulatory programs would have a very crippling effect on their
industry. Such organizations were especially opposed to the transfer of regu-
laratory authority from MESA to the Labor Department. Before the Labor
Subcommittee, Ed Killian, President of the Gypsum Association, testified that
the argument that the Department of Interior was not fully dedicated to the
eforcement of mine safety legislation was totally unsupported by MESA's
record in this area; thus, Killian argued that these regulatory programs
should remain within the Interior Department. -12- Chairman of the National
Crushed Stone Association Safety and Health Committee, Newell T. Crolius,
also argued against the committee bill's provision to merge all mine safety
and health authority into a single statute. In addition, Crolius contended
that the transfer of regulatory authority from the DOI to the Labor Depart-
ment would prove counterproductive to the common safety and health

-10- ibid., p. 85.
-11- ibid., p. 114.
-12- ibid., p. 249.
improvement goal of the Congress, the Carter administration, the mining industry, and labor. -13-

As in the subcommittee hearings, Senate floor debate focused on the transfer of MESA to the Department of Labor; the provision to create an independent review commission was not the subject of debate at all. According to Senator Jacob Javits (R NY), the committee bill would:

strike a new balance in the longstanding antagonistic goals of maximizing production of energy and mineral resources on the one hand, and, on the other hand, affording the maximum safety and health protection for the workers who extract those resources in what all recognize is inherently a highly hazardous occupation....(and the bill would) bring about a balance in worker protection between coal miners and other miners who have been inadequately protected under the far less comprehensive and stringent provisions of the Federal Metal and Nonmetal Mine Safety Act of 1966. -14-

Moreover, Javits argued that the transfer of mine safety and health regulatory programs to the Department of Labor would better ensure that such programs were administered with the highest priority. Senator Donald Riegle (D Wis) also argued during debate that the DOL was the appropriate department for mine safety and health programs because it had the greatest expertise in dealing with the health and safety problems in all industries. -15-

Finally, Senator Williams stated:

We know that a department divided against itself has not done an effective job of bringing safety standards and safety enforcement to the miners of America. That is why we have had not only these tragic disasters which have received so much national attention but we still have continued carnage in our mines....

Now we have said that the way we should move is to bring this whole administrative effort to secure the health and safety of the miners to the department which has but one interest, the worker's benefit. That is the Department of Labor. -16-

-13- ibid., p. 229.
-14- The Congressional Record, June 20, 1977, p. 19926.
-16- ibid., p. 19952.
Although Senator Harrison Schmitt (R NM) favored the strengthening of federal mine safety and health laws, he strongly objected to the transfer of regulatory authority from the Department of Interior to Labor. During the debate, he stated:

I am convinced the Department of the Interior has done as effective and conscientious job of promoting mine safety and improving conditions for miners as was possible under existing law.... By contrast, the Labor Department's record in the health and safety field does not give one confidence that that department can be counted on to do an effective job or undertake the additional responsibility that MESA's transfer would entail. -17-

An amendment to strike the transfer provision of the committee bill was offered by Schmitt, but was rejected by the Senate by a vote of 25-28: R 19-14, SD 5-11, and ND 1-33. -18-

Another attempt was made to block the transfer of MESA to the Department of Labor by Senator Orrin Hatch who proposed a substitute bill which left MESA in the Interior Department as well as maintained separate statutes for coal and noncoal mine safety and health programs by leaving the coal act intact, but which amended the metal and nonmetal act to upgrade standards. Reiterating Schmitt's argument, Senator Hatch contended that there had not been made a compelling case as to why MESA should be transferred to the Department of Labor which he noted had taken much criticism for its poor administration of OSHA programs. In addition, Hatch argued:

It is time to lay to rest the erroneous argument that administration of the mine health and safety program by the Interior Department creates an inherent conflict of interest. The simple facts of life are that any agency administering an occupation health and safety program, will, if it is doing its job properly, always be criticized by both labor and management interests. -19-

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-17- ibid., p. 19947.
-18- The Congressional Quarterly Almanac, op. cit., p. 35-S.
In response to these criticisms of the committee bill, Senator Williams charged that the substitute bill proposed by Hatch turned its back on the need for comprehensive safety and health enforcement, applicable throughout the mining industry, and would instead continue the existing scheme which provided unequal protection for the nation's miners. -20- With respect to the substitute bill's deletion of the transfer provision, Williams reiterated the arguments presented during committee deliberations and subcommittee hearings:

The mine safety and health program has often suffered from a lack of direction within the Interior Department....There was a dichotomy of responsibility, and it showed up. The record reflects this. We have here (the committee bill) put mine safety and health where there is no such dual responsibility where the departmental responsibility runs solely to the health, welfare, and safety of the worker....The sponsors of this legislation firmly believe that the safety and health program will receive better overall guidance and direction in the Department of Labor, and that this will benefit the miners of our nation, and the mining industry. -21-

The Senate rejected the Hatch substitute bill by a vote of 30-36: R 24-12, SD 5-13, and ND 1-41.-22- The Senate subsequently passed the mine safety and health bill as reported by the Human Resources Committee (with minor amendments) by a vote of 78-18: R 20-16, SD 17-1, and ND 41-1.
-23- In short, the Senate bill reflected the conviction that mine safety and health programs properly belonged within the Department of Labor.

**House Action**

In the House, the mine safety and health bill was referred to the Education and Labor Committee. On May 13, 1977, the committee reported, by a 19 to 9 vote, a mine safety and health bill somewhat similar to the bill

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-20- *ibid.*, p. 20002.
-21- *ibid.*, p. 20004.
-23- *ibid.*
passed earlier by the Senate. The House committee bill would have amended the Federal Coal Mine Health and Safety Act of 1969 in order to bring metal and nonmetal miners under its jurisdiction (but unlike the Senate bill, would not strengthen and upgrade provisions of the 1969 act), would repeal the Metal and Nonmetal Mine Safety Act of 1966 and incorporate its provisions, and would transfer regulatory authority for mine safety and health from the Department of the Interior to the Department of Labor. Whereas the Senate bill would create an independent review commission to handle disputes under the mine safety and health act, the House bill simply vested this authority along with the authority to set standards in the Secretary of Labor.

According to the Education and Labor Committee, the transfer of mine safety and health programs, as well as the consolidation of all miner protection programs under one law, would allow the nation to better meet the dual objectives of increased production of mineral and energy resources, and protection of the nation's miners. -24- The committee also pointed to the conflict of interest within the Department of Interior as the primary reason for the transfer of regulatory authority, and argued that the placement of mine safety and health programs within the Labor Department would increase the speed of promulgation and the quality of health and safety standards issued.

-25-

Hearings held by the Subcommittee on Labor Standards on the mine safety and health bill were not as extensive as those held by the Senate subcommittee. In general, however, the positions presented before the Labor Standards Subcommittee were in keeping with those presented during Senate

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-25- ibid., p. 15.
hearings; mining industry organizations essentially were opposed to the bill, while organized labor fully supported it. -26-

On the floor of the House, debate focused on both the committee bill's provision to place coal and noncoal mining under a single statute and the provision to transfer the mine safety and health regulatory program from MESA to the Department of Labor. Chairman of the Education and Labor Subcommittee on Compensation, Health, and Safety, Joseph Gaydos (D PA) defended the provision to consolidate all mines under a single statute by arguing that as long as there were two separate mine safety and health laws which provided different enforcement standards and administration, miners would not be equally treated. -27- Congressman Ronald Sarasin (R CN), however, opposed a single statute and proposed a substitute bill which would upgrade standards for metal and nonmetal mines without repealing the 1966 legislation; thereby keeping separate statutes for coal and noncoal mines. Interestingly, the Sarasin substitute bill would not delete the transfer of MESA to the Department of Labor. The substitute failed by a vote of 151-188: R 92-23, SD 43-29, and ND 16-136. -28-

With respect to the transfer of regulatory authority, Carl Perkins (D KY), Chairman of the Education and Labor Committee, argued:

For all of its efficiency and capacity in dealing with major issues, the Department of the Interior just is not geared up to deal with the safety and health of workers. That is not a role assigned to the Department when it was created way back in the 19th century.

The Department of the Interior is the custodian of the nation's natural resources, whereas the Department of Labor is charged with administering and enforcing statutes designed to advance the public interest by promoting the welfare of the wage earners of the United States, improving their

-28- The Congressional Quarterly Almanac, op. cit., p. 116-H.
working conditions, and advancing the opportunities for profitable employment.

Clearly, the duty of overseeing federal interests in the health and safety of the nation's miners should be vested in the Secretary of Labor and in the Department he administers. -29-

Congressmen James L. Oberstar (D Minn) and Joseph Gaydos (D PA) argued in favor of the transfer of MESA to the DOL on the grounds that the Department of the Interior had failed to adequately administer the mine safety and health program because that department was principally concerned with the interests of mine operators and mineral production. -30- As in the Senate, the majority of Congressmen believed that a simple conflict of interest within the Interior Department had been primarily responsible for its poor administration of the mine safety and health program. Congressmen Lamar Gudger (D NC), however, was not among the majority on the transfer issue and proposed an amendment to delete (from the Sarasin substitute bill) the provision to transfer regulatory authority from MESA to the Department of Labor. According to Gudger, the Department of the Interior had discharged its mine safety and health responsibilities well and therefore he could see no justification for the transfer. -31- But Carl Perkins charged that MESA had not properly performed its mine safety and health duties. During debate he stated:

The problem here is that MESA commenced to hide behind the claim that it did not have authority, when it did have authority. The top echelons of Interior just did not want to use it....MESA is responsible for this transfer. It is because of its own dilatoriness insofar as inspections are concerned. We cannot afford to go any further with an agency that has not had sufficient departmental backing to enforce the stringent safety requirements that Congress voted. MESA must be transferred to the Labor Department. -32-

-29- The Congressional Record, July 14, 1977, p. 22977.
-30- Ibid., pp. 22881 and 23181.
-32- Ibid., p. 23182.
The Gudger amendment failed by a vote of 112-227: R 71-46, SD 29-42, and ND 12-139. -33- The House subsequently adopted the mine safety and health bill by a vote of 244-88: R 58-57, SD 43-27, and ND 143-4. -34-

Conference Action

House and Senate conferees convened to reconcile the differences between the mine safety and health bills that each had passed. The main differences between the two bills were that the Senate bill, while bringing metal and nonmetal mines under the 1969 coal act, had amended it to strengthen standard-setting and enforcement procedures while the House bill had simply left the coal act intact, but applied it to noncoal mines as well. The Senate bill had established an independent review commission, the Mine Safety and Health Review Commission, to handle disputes arising from the mine safety and health act, while the House bill had left that authority within the Department of Labor. Conferees adopted the Senate version on both these issues.

Conclusion

The question facing Congress when it decided to strengthen the mine safety and health program was whether to leave the program within the Department of Interior or transfer it to the Department of Labor. Thus, the choice was not independent commission or departmental agency, but one departmental agency over another. Legislative-executive rivalry is not significant in the decision to create a new departmental regulatory agency; certainly there were no references to this factor during committee deliberations and floor debate. Similarly, freedom from traditional clientele ties is not

-33- The Congressional Quarterly Almanac, op. cit., p. 116-H.
-34- Ibid.
significant, yet the solidification of clientele ties is. The majority of congressmen argued that a basic conflict of interest existed within the Department of the Interior between its responsibility to promote the development of the mining industry and its responsibility to ensure the safety and health of the miner. Moreover, Democrats charged that the close relationship between the DOI and the mining industry prevented the effective regulation of the nation's mines and that the mine safety and health program properly belonged in the Department of Labor which had as its major mission the protection of the interests of the nation's labor force. Although by transferring the mine safety and health program from the DOI to the DOL, Congress was disrupting the clientele ties between the DOI and the MESA, Congress' major goal was to place the new agency in a Department whose clientele would ensure more effective mine safety and health regulation. Thus, the major reason Congress selected a new departmental agency to administer the mine safety and health program was to solidify the clientele ties of the DOL with the new regulatory program.

Since both branches of government were controlled by Democrats, in principle partisan differences between the Congress and the White House is inapplicable. However, mine safety and health was definitely a partisan issue with congressional Republicans and conservative Democrats representing the interests of the mining industry and Democrats in Congress supporting the interests of the miners. Thus, Republicans opposed the transfer of the regulatory program from the MESA to the Department of Labor while Democrats strongly favored such a move. Numerous votes on the mine safety and health legislation indicate the partisan nature of the issue. The Senate rejected both the Schmitt amendment which would have deleted the transfer by a vote of 25-28: R 19-14, SD 5-11, and ND 1-33, as well as the Hatch
substitute bill which also would have prevented the transfer of regulatory authority by a vote of 30-36: R 24-12, SD 5-13, and ND 1-41. In the House, the Gudger amendment, which would have left the mine safety and health regulatory program within the Department of the Interior, was also rejected by a vote of 112-227: R 71-46, SD 29-42, and ND 12-139. By transferring the mine safety and health program to the Department of Labor, Democrats were the victors, however, the Mine Safety and Health Review Commission was also established as a concession to Republicans who feared that the transfer would place excessive powers in the hands of the Secretary of Labor. The final mine safety and health bills in both the House and Senate, as well as the conference report, received widespread bipartisan support. Thus, partisan differences is moderately significant in the congressional decision to create a new departmental MSHA.
CHAPTER TEN

Conclusion

At the beginning of this study, I posed the central research question: Why does Congress select an independent regulatory commission to administer some regulatory programs while for others Congress chooses an executive department regulatory agency or bureau? The major argument is that the choice of an independent commission can be explained best not by Congress' belief in the superiority of one organizational arrangement over another, but by three political factors: legislative-executive rivalry, partisan differences between the White House and the Congress, and the disruption of traditional clientele ties. The preceding seven chapters illustrate the reasons and motivations involved in Congress' choice of organizational structure for each of the regulatory agencies examined. The purpose of this final chapter is twofold. First, I will discuss the findings in order to determine whether or not the seven cases support the main argument. Are the independent regulatory commissions the consequence of the three factors and if so, to what degree? Are there systematic differences between the choices of independent commission and departmental agency? Alternatively, are such choices merely the result of idiosyncratic variables? Second, I will discuss the significance of the findings and their implications for regulatory reform. To address the first questions, I will now turn to an examination of the three factors.

Looking only at the four commissions, Table 1 presents the initial findings of the research.

As the table indicates, no single explanation for the creation of an
TABLE 1

<table>
<thead>
<tr>
<th>Agencies</th>
<th>Legislative-Executive Rivalry</th>
<th>Partisan Differences</th>
<th>Disruption of Clientele Ties</th>
</tr>
</thead>
<tbody>
<tr>
<td>FERC</td>
<td>strong</td>
<td>moderate</td>
<td>weak</td>
</tr>
<tr>
<td>CFTC</td>
<td>moderate</td>
<td>moderate</td>
<td>strong</td>
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<tr>
<td>NRC</td>
<td>weak</td>
<td>weak</td>
<td>strong</td>
</tr>
<tr>
<td>CPSC</td>
<td>strong</td>
<td>moderate</td>
<td>strong</td>
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</table>

An independent regulatory commission emerges, rather the significance of the three factors examined varies among the agencies. Clearly, the decision to create an independent commission instead of a departmental agency is a complex one. For example, in the case of the FERC, legislative-executive rivalry looms all important with partisan differences playing a moderate role, and the disruption of clientele ties having little, if any, significance. With respect to the CPSC, legislative-executive rivalry and the disruption of clientele ties are both very significant while partisan differences have a moderate effect. In contrast, the CFTC is explained primarily by the disruption of clientele ties with both partisan differences and legislative-executive rivalry playing a moderate role. Finally, the NRC is best explained by the disrup-
tion of clientele ties; neither legislative-executive rivalry nor partisan
differences are significant. In order that these findings be more clearly
illustrated, I will examine the three factors in turn.

Legislative-executive rivalry. Legislative-executive rivalry is a promi-
nent explanation for Congress' choice of an independent commission in the
cases of the FERC and the CPSC. With respect to the CFTC, the research
indicates that legislative-executive rivalry may be an implicit, rather than an
explicit, motivation. Finally, legislative-executive rivalry fails to help
explain the creation of an independent commission for the administration of
nuclear energy regulation.

In the case of the FERC, the majority of congressmen opposed vesting
energy regulatory authorities in the hands of the Secretary of Energy (the
Carter administration's proposal) because they feared that such a move would
give the executive branch ultimate control over energy regulatory policies,
particularly setting energy prices. During debate over the FERC, the pre-
vailing argument was that regulatory agencies were creatures of Congress
and that as such they should be kept free of executive branch influence.
Thus, most congressmen believed that energy regulatory authorities should not
be placed within the ambit of an executive department subject to political
pressures. This wariness among congressmen about the executive branch's
intentions with respect to regulatory agencies was evident in Congressman
Conyer's (D Mich) statement that "had the executive branch come to us (the
Congress) in the first place and asked to take from the congressional author-
ity the power to set energy prices and put it in the executive branch, Con-
gress would have reacted negatively."  -1-  Congressman John Moss (D CA)

argued simply that a cabinet officer, no matter of what administration, should not be allowed to issue rules of general applicability or specifically to set the wellhead price of natural gas. -2- According to Representative John Erlenborn (R IL), the major question before the House was government structure. He stated:

It is not Dr. James Schlesinger (the probable first Secretary of Energy) that we are talking about. It is whether or not this type of decision making properly belongs in the executive branch, or were we right when we created the FPC to insulate these decisions from political considerations. -3-

Finally, as Congressman Armstrong (R CO) aptly summarized during the final day of debate: "I believe there are a substantial number of us in this body who share my belief that it would be far better to retain the concept of an independent commission...rather than vest regulatory authority in the DOE where it would be subject to political pressure." -4-

Similar arguments were expressed during debate over the creation of the CPSC. According to Senator Ribicoff (D CN), an independent commission was preferable to a consumer product safety agency within the Department of HEW (the Nixon administration's proposal) where regulatory decisions could be overruled by political appointees of that executive department. -5-

Congressman McCollister (R Neb) argued:

By placing the administration of consumer product safety in an independent regulatory commission, vested with new authority, we are confident that the intent of Congress will be carried out with cold neutrality and be insulated from undue economic and political pressures—more than would be possible or likely if the agency was part of a cabinet-level department. -6-


-2- ibid., p. 5309.
-3- ibid., p. 5295.
-4- The Congressional Record, June 3, 1977, p. 5405.
-5- The Congressional Record, June 21, 1971, p. 21848.
-6- The Congressional Record, September 20, 1972, p. 31383.
With respect to both the FERC and the CPSC, the majority of congressmen expressed concern regarding the possibility of executive branch interference into regulatory activities which Congress considered primarily its prerogative.

In addition to the comments of congressmen during debate over the establishment of the FERC and the CPSC, the rivalry between the White House and the Congress over energy regulation and consumer product safety regulation is also reflected in the organizational proposals for these two new agencies. In the case of the FERC, the Carter administration proposed the creation of an executive department regulatory agency, the Energy Regulatory Administration, which was to be located in the Department of Energy. With respect to the CPSC, the Nixon administration recommended that the consumer product safety regulatory agency be located within the Department of HEW, thus favoring a departmental regulatory agency. In both instances, Congress rejected the President's proposal and chose instead to establish an independent commission for each regulatory program. Clearly, both Congress and the White House recognized the potential advantages and disadvantages of organizational location, i.e., that at least in principle, "independence" would give Congress a greater degree of control over the regulatory agency.

The CFTC provides a similar example. The Ford administration recommended that the agency to regulate commodity futures be located within the Department of Agriculture; specifically that the existing Commodity Exchange Authority be given expanded power over such programs. Again, Congress rejected the administration's proposal and chose instead to establish an independent commission to administer commodity futures trading regulation. During debate over the creation of the CFTC, congressmen made very few comments indicating a concern over the possibility of executive branch
interference with this regulatory program. However, Representatives Sisk (D CA) and Bergland (D MA) stressed the importance of an independent commission, as opposed to a departmental agency, to help prevent political pressures (from the executive branch) on the regulatory activities of the new agency. -7- Despite the paucity of congressional statements concerning the fear of executive branch interference into the commodity futures trading regulatory program, however, the differences between the Ford administration's and the Congress' proposals for the new regulatory agency may well indicate that the rivalry between the legislative and executive branches is an implicit motivation behind Congress' choice of an independent commission to administer commodity futures trading regulation.

Finally, legislative-executive rivalry was not influential in Congress' decision to establish an independent commission to administer nuclear energy regulatory programs. Both Congress and the White House supported the creation of the NRC (as an independent regulatory commission) which assumed the regulatory responsibilities of the Atomic Energy Commission. Essentially, the existing regulatory structure of the AEC was transferred intact to the NRC.

Partisan differences. Partisan differences between the Congress and the White House do contribute to Congress' choice of an independent commission in the cases of the FERC, the CFTC, and the CPSC. However, as compared to legislative-executive rivalry, partisan differences is a less prominent explanation. Again, the NRC does not follow the expected pattern; partisan differences are not influential in Congress' decision to establish an independent commission to administer nuclear power regulatory programs.

-7- The Congressional Record, April 11, 1974, pp. 10760-62.
With respect to the FERC, Democrats controlled both Congress and the
White House at the time this commission was established, so in principle,
this second factor is inapplicable to this particular case. In fact, during
debate over the establishment of the FERC, several Republican congressmen
emphasized that the creation of an independent commission for energy regu-
lation was not a partisan issue, but that it had widespread bipartisan support.
However, as the House vote on the Moss amendment to the administration's
energy organization bill illustrates, some disagreement existed between
Republicans on Capitol Hill and the Carter administration as to the appropri-
ate location of regulatory authority. In the House, the Moss amendment
(offered by Representative John Moss, a Democrat from California), which
would have stripped the Secretary of Energy of energy pricing regulatory
authority and placed that authority in an independent commission, was
adopted by a roll-call vote of 236-119: R 108-10 and D 128-109. -8- Thus,
while Democrats were fairly evenly split on the issue of the proper location
of energy regulatory authorities, Republicans were clearly opposed to vesting
regulatory authority in the Secretary of Energy, a Democratic political
appointee. Although Democrats appeared less concerned over the likelihood
of executive branch interference into federal energy regulatory programs, the
House ultimately chose to establish an independent commission to administer
energy regulation (as did the Senate) by a vote of 310-20: R 95-16 and D
215-4. -9-

Similar scenarios occur in the cases of the CFTC and the CPSC.
Democrats controlled Congress while Republicans controlled the executive
branch, during the Ford and Nixon administrations, respectively. With

-8- The Congressional Record, June 2, 1977, p. 17311.
respect to the CFTC, the Ford administration proposed the creation of a semi-independent regulatory commission to include among its members the Secretary of Agriculture; the House Agriculture Committee also endorsed this proposal. However, Congressman Sisk (D CA) proposed an amendment to the commodity trading bill that would have created a full-time, independent regulatory commission. Although the amendment failed by a vote of 158-179: R 21-135 and D 137-44, the vote indicates that Republicans were less supportive of the independent commission than were Democrats. -10- While the lack of enthusiasm on the part of House Republicans for the independent commission may be attributed to their general concern to stem the growth of the federal bureaucracy, it is also likely that their opposition to the independent commission reflected a singular lack of concern over the possibility of a Republican administration influencing the activities of the commodity futures trading program. In contrast, support among Democrats for the independent commission probably reflects their fear of Republican political appointees controlling or influencing the administration of commodity futures trading regulation were the new agency to be located within the Department of Agriculture. Although the Sisk amendment failed and the House passed a commodity futures trading bill, which would have created a part-time independent commission within the Agriculture Department, the Senate adopted a bill which would create a full-time independent commission; a conference committee later adopted the Senate version.

During debate over the establishment of the CPSC, the Nixon administration argued in support of its proposal to vest the new regulatory program within the Department of Health, Education, and Welfare while the Senate

-10- The Congressional Record, April 11, 1974, p. 10763.
favored placing consumer product safety regulatory programs in an independent commission. And in fact, the Senate ultimately adopted such a bill by a vote of 69-10: R 31:7 and D 38-3 which indicates bipartisan support for the creation of an independent consumer product safety commission.

-11- However, Republicans and Democrats did have a difference of opinion concerning the proper location of such regulatory authorities. In the Senate, Republican Norris Cotton (NH) offered an amendment to delete provisions of the consumer product safety bill which granted regulatory authority to a new, independent commission and to substitute a provision vesting that power within the Department of HEW, and ultimately within the hands of the Secretary of HEW. Although the amendment failed by a vote of 31-51: R 26-15 and D 6-36, the vote indicates that Democrats had the greater fear of possible executive branch influence into the regulatory activities of the CPSC.

-12-

The NRC again stands apart from the other three agencies. Like legislative-executive rivalry, partisan differences between the Congress and the White House also fails to explain Congress’ choice of an independent commission to administer nuclear energy regulatory programs. None of the votes on this legislation, either in the House or the Senate, reflects any partisan considerations. Indeed, the energy reorganization bill which transferred the regulatory authorities of the AEC to the NRC had overwhelming support among both Democrats and Republicans in Congress and the Nixon and Ford administrations.

In sum, for both the CFTC and the CPSC, Democrats were more supportive, than were Republicans, of independent commissions to administer

-12- Ibid., p. 21872.
these two regulatory programs. Clearly, Republicans in Congress believed that they had little to fear from the possibility of influence from the executive branch since it was controlled by Republicans. However, in the case of the FERC, when a Democrat occupied the White House, Republicans were more favorable disposed, than were Democrats, towards an independent commission. Thus, support for the independent commission among members of the two political parties varies according to which party is in control of the executive branch. As the research on these three regulatory commissions reveals, Republicans were more likely to support an independent commission when a Democrat occupied the White House and Democrats were more likely to exhibit such support when the Republicans controlled the executive branch. However, given the widespread bipartisan support for the creation of independent commissions in the cases of the FERC, the CFTC, and the CPSC, partisan differences, although influential, is less significant an explanation for Congress' choice of independent commissions than legislative-executive rivalry. In the final analysis, congressmen of the President's party have strongly backed the independent commission over the departmental agency for regulatory administration of energy, commodity futures trading, and consumer product safety.

Disruption of traditional clientele ties. The disruption of traditional clientele ties is the major explanation for Congress' choice of an independent commission in the cases of the NRC and the CFTC, and it is also influential, although to a lesser extent, in the case of the CPSC. Finally, as was not expected, the disruption of clientele ties fails to help explain the creation of the FERC.

Prior to the establishment of the NRC, the regulation of the nuclear power industry was administered by the Atomic Energy Commission which
had responsibility for both the regulation and promotion of nuclear energy. During debate over the establishment of the NRC, congressmen, as well as AEC regulators, argued that the dual functions of the AEC constituted a basic conflict of interest which resulted in the AEC's bias towards promotion, rather than regulation, of the nuclear power industry. According to Representative Brown (R OH), the energy reorganization bill, which separated the regulatory and developmental functions of nuclear energy, would end charges that the regulators of nuclear energy were inappropriately biased towards the promotion of the nuclear power industry. -13- During House debate, Congressman Bingham (D NY) argued that the contradictory roles of the AEC had led to less stringent safety standards than many experts thought wise for fear than more stringent standards would discourage the development of nuclear power plants. -14- In short, the majority of congressmen, in both the House and the Senate, believed that the Atomic Energy Commission had become far too responsive to the industry which the AEC was authorized by Congress to regulate. Thus, the major reason Congress chose to establish an independent commission to administer nuclear power regulatory programs was to free the new agency from the traditional clientele ties of the AEC. An independent commission, according to Congress, would disrupt the close relationship between regulators and the regulated nuclear power industry, thereby ensuring more effective regulation (i.e., more stringent safety standards).

Prior to the establishment of the CFTC in 1974, the Commodity Exchange Authority (CEA), located within the Department of Agriculture, administered the commodity futures trading regulatory program. The CEA had proven inadequate to the task of administering such programs and

-14- Ibid.
according to Congress, the CEA's poor performance was primarily a consequence of the strong ties between agricultural producing interests and the Agriculture Department in which the CEA was located. The commodity futures trading regulation bill passed by Congress created an independent commission to administer futures trading regulatory programs and also gave the new CFTC additional authorities over the futures trading industry. During debate, Senator Clark (D Iowa) stated:

Not only will the bill provide the strong, informed, effective regulation of the commodity exchanges so necessary, but it will put to rest one of the problems which has plagued the Commodity Exchange Authority—its placement in the Department of Agriculture. Indeed, for a regulatory function to be placed in a Department which has such a major involvement with many of the commodities traded is a completely untenable situation. -15-

In effect, as Senator Cranston (D CA) argued, an independent commission was vital to eliminate any possible conflict between the Agriculture Department's role as a protector of farm prices and the commodity market's impartial role. -16- Similar arguments during congressional debates indicate that Congress was primarily motivated to establish an independent commission to administer commodity futures trading regulation because Congress saw the need to disrupt the traditional clientele ties between agricultural producing interests and the CEA arising from its location within the USDA.

With respect to the CPSC, many of the regulatory responsibilities transferred to it were previously administered by the Food and Drug Administration (FDA) within the Department of Health, Education, and Welfare. While the Nixon administration proposed reorganizing the FDA so that it could effectively handle the additional authorities set forth in the new consumer product safety legislation, the majority of congressmen opposed vesting the

-16- Ibid., p. 30466.
new regulatory responsibilities in the FDA. According to members of Congress, the FDA's strong ties to the food and drug industries had diluted the effectiveness of existing product safety laws. In reference to the cozy relationship between the FDA and its regulated industries, Senator Montoya (D NM) stated: "It has become 'Good Old Joe,' and 'Good Old Chuck,' instead of a regulator and regulated relationship. In the process, the public interest has become an unwelcome intruder in its own domain." -17- Thus, the disruption of clientele ties between the food and drug industries and the FDA is a significant factor in Congress' decision to create an independent commission to administer consumer product safety programs.

Finally, the disruption of traditional clientele ties is not a significant explanation for Congress' decision to establish the FERC. Few, if any, comments by congressmen indicated a concern over the relationship between the FPC and the energy industries, which, in fact, supported the creation of a new independent commission to administer federal energy regulatory programs. Congress' support of the FERC, however, may indicate an attempt to preserve whatever relationship existed between the FPC and its regulated industries.

To reiterate, legislative-executive rivalry is a significant factor in the cases of the FERC, the CFTC, and the CPSC, but not the NRC. Partisan differences is moderately significant for the FERC, the CFTC, and the CPSC, but again not for the NRC. Finally, the disruption of traditional clientele ties is a major influence for the NRC, the CFTC, and the CPSC, but not for the FERC.

Until now the discussion has been confined to the four independent reg-

-17- The Congressional Record, June 21, 1971, p. 21869.
ulatory commissions. Turning to the three departmental regulatory agencies, how do the OSHA, the FGIS, and the MSHA fare against the three factors: legislative-executive rivalry, partisan differences between the White House and the Congress, and the disruption of traditional clientele ties? Table 2

<table>
<thead>
<tr>
<th>Agencies</th>
<th>Legislative-Executive Rivalry</th>
<th>Partisan Differences</th>
<th>Disruption of Clientele Ties</th>
<th>Solidification of Clientele Ties</th>
</tr>
</thead>
<tbody>
<tr>
<td>FERC</td>
<td>strong</td>
<td>moderate</td>
<td>weak</td>
<td>weak</td>
</tr>
<tr>
<td>CFTC</td>
<td>moderate</td>
<td>moderate</td>
<td>strong</td>
<td>weak</td>
</tr>
<tr>
<td>NRC</td>
<td>weak</td>
<td>weak</td>
<td>strong</td>
<td>weak</td>
</tr>
<tr>
<td>CPSC</td>
<td>strong</td>
<td>moderate</td>
<td>strong</td>
<td>weak</td>
</tr>
<tr>
<td>MSHA</td>
<td>weak</td>
<td>moderate</td>
<td>weak</td>
<td>strong</td>
</tr>
<tr>
<td>FGIS</td>
<td>weak</td>
<td>moderate</td>
<td>strong</td>
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</tr>
<tr>
<td>OSHA</td>
<td>weak</td>
<td>moderate</td>
<td>weak</td>
<td>strong</td>
</tr>
</tbody>
</table>

presents the findings of the research.

As the table indicates, a new factor, the solidification of traditional clientele ties, has been incorporated into the analysis. The three departmen-
tal agencies provide some interesting comparisons to the four commissions giving us further insight into the politics of organizational arrangements. In order to explain the findings, I will examine each factor in turn.

Legislative-executive rivalry. Legislative-executive rivalry is not a significant factor in either of the three departmental agencies. During the debates over the creation of the OSHA, the FGIS, and the MSHA, few statements by congressmen indicated a fear over the possibility of interference into these regulatory programs by the executive branch. Thus, it appears that when Congress creates a departmental regulatory agency, legislative-executive rivalry is not a motivation.

Partisan differences. In all three cases, the OSHA, the FGIS, and the MSHA, partisan differences is moderately significant. Thus, while partisan differences influence Congress to select an independent commission for the FERC, the CFTC, and the CPSC, partisan differences also influence Congress to create a departmental agency for the OSHA, the FGIS, and the MSHA.

With respect to the OSHA, Democrats in Congress and organized labor advocated vesting occupational safety and health within a Labor Department agency, thus effectively giving the Secretary of Labor regulatory authority. In contrast, the Nixon administration, Republicans and conservative Democrats in Congress, and business organizations supported the creation of an independent, five-member board to administer occupational safety and health regulations.

The votes on several of the occupational safety and health bills indicate the partisan nature of the issue. For example, in the House the vote on the Steiger-Sikes substitute bill (proposed by Representatives Steiger (R Wis) and
Sikes (D FL) was 220-173: R 154-17, SD 60-21, and ND 6-135. -18- The bill would have created the independent board to administer occupational safety and health programs. In the Senate, a similar bill proposed by Senator Dominick (R CO) was tabled by a vote of 41-39: R 7-27, SD 6-12, and ND 28-0. -19-

Not only was the battle along partisan lines, but it was also extremely close. In order to gain support among Republicans and conservative Democrats, Senator Javits (R NY) offered a compromise (as an amendment to the Labor and Public Welfare Committee bill which would have vested regulatory power in the Secretary of Labor) which would allow the Labor Secretary to develop safety standards, but would vest enforcement authority in an independent, three-member review commission. The Senate adopted the Javits amendment by a vote of 43-38: R 38-0, SD 11-5, and ND 0-33 and then passed the amended committee bill by a vote of 83-3: R 35-1, SD 13-2, and ND 35-0. -20- By selecting a departmental regulatory agency, Congress (or at least Democrats) exhibited little fear of the influence over the occupational safety and health program by a Republican administration through the Secretary of Labor. According to Democrats, the Department of Labor, which had as its primary mission the protection of the interests of the nation's workers, would more than offset or resist any influence by Republican political appointees.

Partisan differences between the Ford administration and a Democratic Congress were also influential in the decision to create a departmental agency to administer federal grain inspection programs. The Ford adminis-

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tration and congressional Republicans and conservative Democrats opposed not only stronger federal controls on the grain industry, but the new agency as well. The partisan battle is reflected in the vote on Senator Dole's (R KN) amendment to prevent the creation of the FGIS; the amendment failed by a vote of 34-39: R 28-0, SD 4-10, and ND 2-19. Yet despite the differences between Republicans and Democrats concerning federal regulation of the grain industry and the proper location of the regulatory agency, Democrats were apparently relatively unconcerned about the possibility of a Republican administration's influence on the new agency.

Although both the White House and Congress were controlled by Democrats when the MSHA was created, the battle over the appropriate location of the mine safety and health program was clearly a partisan one. Republicans in Congress, representing the interests of the mining industry, favored the retention of the mine safety and health program within the Department of the Interior. They were vehemently opposed to transferring the program to the Department of Labor, the Democrat's proposal. Several of the votes on the mine safety and health legislation indicate the partisan nature of the issue. In the Senate, Senator Schmitt's (R NM) amendment to prevent the transfer of the mine safety and health program from Interior to Labor was rejected as was a similar bill proposed by Senator Hatch (R UT). The votes were 25-28: R 19-14, SD 5-11, and ND 1-33 and 30-36: R 24-12, SD 5-13, and ND 1-14. In the House, an amendment offered by Congressman Gudger (D NC) to leave the regulatory program in the Department of the Interior met a similar fate; the vote was 112-227: R 71-46, SD 29-42, and

Disruption/solidification of clientele ties. The disruption of traditional clientele ties is the major explanation for Congress' choice of a departmental agency to administer federal grain inspection programs; however, the creation of departmental agencies to administer occupational and mine safety and health programs is explained primarily by Congress' attempt to solidify the ties between the Department of Labor and its clientele.

With respect to the FGIS, prior to its creation, the Agricultural Marketing Service (AMS) had responsibility for regulating the grain industry. According to the majority of congressmen, the AMS had been extremely ineffective in administering the grain inspection regulatory program and the poor performance of the AMS was the consequence not only of insufficient authority but its location within the Department of Agriculture which had a very close relationship with agricultural producing interests. As Senator Clark (D Iowa) stated: "the revolving door arrangement between high grain company officials and the USDA seems to have taken its toll where grain inspection is concerned." -24- Moreover, he argued:

If we are serious about this effort to restore credibility to the U.S. grain trade, we need an agency with the kind of independence necessary to enforce the law in this very sensitive area...we have not had such enforcement in the past. That is clear. We need it badly, and we shall never get it if we delegate grain inspection to the depths of the bureaucracy, as AMS had done....-25-

Surprisingly, while Congress argued that a new, "independent" agency was required in order to sever the close ties which existed between the grain inspection program and the Agriculture Department, Congress did not go so

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-23- ibid., p. 116-H.
-24- The Congressional Record, April 26, 1976, p. 11241.
-25- ibid.
far as to remove entirely the regulatory program from Agriculture. Congress did not select an independent commission, but instead created a new departmental regulatory agency within the Department of Agriculture. Apparently, Congress believed that a new agency with a single focus along with the additional federal authorities would provide more effective regulation of the grain industry.

As stated previously, the disruption of clientele ties is not at all influential in the cases of the OSHA and the MSHA. Turning to the OSHA, basically the issue before the Congress was: who was going to get greater control of the occupational safety and health program—organized labor through their close relationship to the Department of Labor or business groups through an "independent" board? Democrats in Congress argued that if the program was to be at all meaningful, it should be located within the Labor Department while Republicans and conservative Democrats charged that such a location would run the risk of protecting the interests of labor at the expense of business. -26- According to Democrats, only the Department of Labor could give proper protection to working people. Thus, by locating the new occupational safety and health program within the DOL, Congress was strengthening or solidifying the ties between the new regulatory program and the clientele of the Labor Department, the nation's workers.

The solidification of clientele ties is also the major factor in Congress' decision to create a new mine safety and health regulatory agency within the Department of Labor. But unlike the OSHA case, Congress did not consider an independent commission as a possible alternative to a departmental agency. In 1977, when Congress was significantly strengthening and expanding the

mine safety and health program, the question was: does the new program belong in the Mining Enforcement and Safety Administration (MESA), a regulatory agency located in the Department of Interior which had responsibility for the old program or did the new regulatory program belong in the Department of Labor? In effect, the choice was one departmental agency over another.

Both the Carter administration and Democrats in Congress argued that the mine safety and health program properly belonged in the Labor Department. Moreover, Democrats charged that the close relationship between the Department of the Interior and the mining industry prevented the effective regulation of the nation's mines. The majority of congressmen argued that a basic conflict of interest existed within the Interior Department between its responsibility to promote the development and production of the mining industry and its responsibility to ensure the safety and health of the miner. According to Senator Williams (D NJ):

We know that a department (Interior) divided against itself has not done an effective job of bringing safety standards and safety enforcement to the miners of America....Now we have said that the way we should move is to bring this whole administrative effort to secure the safety and health of the miners to the department which has but one interest, the worker's benefit. That is the Department of Labor. -27-

Thus, in order for mine safety and health regulation to be at all effective, the program should be located in the Labor Department. The transfer of the mine safety and health program from the Department of the Interior to Labor reflects Congress' attempt to solidify the ties between Labor's clientele and the new regulatory agency, thereby disrupting the traditional clientele ties of the Interior Department and the mine safety and health pro-

-27- The Congressional Record, June 20, 1977, p. 19942.
gram. Again, Congress did not choose an independent commission to free the new agency from clientele pressures. On the contrary, Congress placed it within a department whose mission and clientele would better ensure stronger mine safety and health standards.

To sum up, Congress' choice of organizational arrangements for regulatory agencies is a complex decision. As the preceding discussion and Table 2 demonstrate, a variety of factors in varying combinations and degrees contribute to such decisions. Legislative-executive rivalry does distinguish between the independent commission and the departmental agency except in the case of the NRC. The disruption of traditional clientele ties also distinguishes between the two types of regulatory bodies with the exception of the FGIS which is also explained by this factor. While partisan differences exist in all seven cases (of course, relaxed somewhat for the FERC and the MSHA), this factor influences Congress to establish an independent commission in the cases of the FERC, the CFTC, and the CPSC, but not for the FGIS, the OSHA, or the MSHA. In the latter two cases, Congress created departmental regulatory agencies to ensure that such agencies were responsive to the interests of the Labor Department's clientele, the nation's workers.

Clearly, the preceding discussion indicates that political factors are indeed influential in Congress' choice of organizational arrangements for regulatory agencies. Yet, the examination of congressional debates on the seven agencies also reveals many of the traditional explanations for the independent commissions. The advantages of professional expertise, fairness, and continuity of regulatory policy appear time and again throughout the debates. Thus, the findings of this study do not supplant the traditional explanations, but point to the importance of recognizing additional explanations which supple-

ment traditional ones.

Some caveats are in order. First, the conclusions of this study are limited by the size of the sample. More conclusive findings might be gained from an examination of additional regulatory agencies. Second, the conclusions may be limited to the previous decade in which all seven regulatory agencies were established. An examination of regulatory agencies created in earlier years might determine if the explanations presented in this study hold over time. Finally, the explanations offered are by no means exhaustive. Here, too, an examination of additional agencies might point to the importance of additional or alternative factors which influence Congress to select one type of agency over another. For example, the nature of the clientele, whether it is relatively broad or specific, may be influential in the choice of organizational arrangements. Whether or not the regulated industry must compete with another interest group may also be influential. It might be argued that the FGIS was not given independent status because there was no significant opposition from outside interest groups to support such a move. Finally, Congress' experience with past regulatory agencies may be influential. There was some indication that the CFTC was created (as an independent commission) because its function was similar to that of the Securities and Exchange Commission and Congress was relatively pleased with that arrangement and so decided to repeat it in the case of the CFTC.

Organizational arrangements are not neutral and the struggle among congressmen, executive branch officials, and various interest groups over the type of regulatory agency to be established attest to this fact. In particular, organizational arrangements affect the balance of power between the legislative and executive branches, and the independent regulatory commissions have been perceived by many executive branch officials to tip the bal-
ance in favor of Congress. While many critics of the regulatory commissions have argued that the problems of regulation are due to the statutory bases of regulation or the political environment which surrounds regulatory activity, the executive branch has focused on the organizational structure of the regulatory agencies. As Chapter Two indicated, since the Brownlow Committee report in 1937 through the Ash Council report in 1971, various presidential administrations have argued that the independent commissions have been ineffective instruments for regulatory administration, that the collegial executive and "independence" have impeded political accountability and coordination of national regulatory policies. Thus, the executive branch has long been struggling to alter the balance of power between itself and the Congress by eliminating the independent commissions and transferring their regulatory functions to agencies located within executive departments and headed by single administrators appointed by the President. By proposing such reorganization plans, Presidents have reflected their acceptance of the orthodox theories of administration which focus almost exclusively on organizational anatomy to ensure that functions are appropriately assigned to governmental units, that component parts of the executive branch are properly related, and that responsibilities are clearly assigned. -28-

However, the evidence on the relationship between the organizational structure of regulatory agencies and the performance of these agencies remains inconclusive. One recent study on this topic, which examines both independent commissions and departmental agencies, has demonstrated a link between organizational structure and both the agency's decision making processes and its political environment, two elements which many organization

theorists argue affect an organization's performance. Certainly, future research on the relationship between organizational structure and performance of regulatory agencies is warranted. Of course, the lack of research on this relationship is largely a consequence of the difficulty of developing unambiguous measures of regulatory agency performance. Judgments of performance have generally reflected whether or not the researcher agreed with the regulatory agency's policies. However, some performance indicators of both independent commissions and departmental agencies may be precisely measured. For example, the number of agency backlogs in processing cases and the number of cases decided in favor of the regulated industry might indicate the degree of administrative delay and the susceptibility of the agency to the interests of the regulated group. While these measures may appear somewhat crude, nevertheless, they do represent one step toward clarifying the relationship between organizational structure and performance of regulatory agencies. For it may well be that organizational arrangements are a (if not, the) critical variable in understanding the behavior of regulatory agencies. Questions which need to be addressed in future research include: Do independent commissions provide more openness (and thus fairness) in their decision making processes than do departmental agencies? Do departmental agencies ensure greater political accountability (to either the President or the Congress) than do independent commissions? Are more competent individuals attracted to the independent commissions (thus providing greater expertise) or to the departmental agencies? Are departmental agencies more or less susceptible to pressures from the regulated industries than are the

-29- Kenneth J. Meier, "The Impact of Regulatory Organization Structure: IRCs or DRAs?" Southern Review of Public Administration (March 1980).
independent commissions? Government regulation is likely to continue to receive major attention in the 1980s as it has in every decade since the 1930s. Therefore, as regulatory agencies are created, reorganized, or rearranged, government officials would surely benefit from the answers, if only tentative, that systematic, empirical research on these questions could provide.

BIBLIOGRAPHY


