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THESIS

**AN AGENCY'S PATH TO INDEPENDENCE: HOW
TO GAIN ADMINISTRATIVE AUTONOMY AS A U.S.
GOVERNMENT AGENCY**

by

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September 2022

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ADMINISTRATIVE AUTONOMY AS A U.S. GOVERNMENT AGENCY**

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ABSTRACT

U.S. government administrative agencies that are subject to political polarization may find it difficult to fulfill their long-term missions while addressing short-term political needs, lacking sufficient autonomy to do their jobs. This thesis asks what U.S. government agencies can do to foster autonomy from political influences to be neutral arbiters or administrators. This thesis reviews the history of U.S. government agencies and analyzes the viability of their seeking wholesale autonomy. It also examines the impact of formal agency structure on agency autonomy for the Federal Trade Commission (FTC)—an independent agency—and the Environmental Protection Agency (EPA) and the Food and Drug Administration (FDA)—executive agencies. It further outlines three informal factors that may contribute to some level of autonomy in all three agencies. This thesis finds that wholesale autonomy of agencies is not a viable option at this time, and a formal structure of independence does not guarantee autonomy. It recognizes, however, that focusing on a clear mission, hiring qualified candidates, and decentralizing authorities provide a certain level of autonomy, as experienced by the EPA, FTC, and FDA.

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LIST OF ACRONYMS AND ABBREVIATIONS

ABA	American Bar Association
EPA	Environmental Protection Agency
FDA	Food and Drug Administration
FTC	Federal Trade Commission
ICE	Immigration and Customs Enforcement
NDA	new drug application

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EXECUTIVE SUMMARY

At the inception of the United States as a nation, the creation and existence of government agencies were not clearly laid out in the U.S. Constitution.¹ However, as the government grew, administrative agencies were created to enforce and administer relevant laws and regulations. Because government agencies are closely tied to the political system, a complete divorce from politics is neither feasible nor desirable, but maintaining government agency neutrality is critical for effective service, particularly given the context of conflicting short-term-focused politics with the long-term goals of administrative agencies. Administrative agency neutrality, or perceived neutrality, may depend on some independence from direct political influences. Then, what can U.S. government agencies do to foster autonomy from political influences to be neutral arbiters or administrators?

The historical development of federal agencies shows that at some point in time, expert-run neutral agencies were considered a solution to social problems.² Persistent efforts by political actors to provide autonomy to administrative agencies extended to influencing the courts.³ However, a series of significant controversies and increased public loss of trust in large institutions resulted in distrust of government agencies and their ability to carry out their missions independently.⁴ This distrust seemed to discredit the idea that an administrative agency could act neutrally for the benefit of the public, and these changing attitudes brought about the difficulties federal agencies currently face in seeking autonomy. Based on such a challenge, advocating for wholesale autonomy of agencies—to depend on their expertise to carry out their missions—may not be a viable move at this time. Absent wholesale trust in expert-run administrative agencies in a global sense, the next question involves whether a formal structure of agencies can provide sufficient

¹ “The Constitution of the United States: A Transcription,” National Archives, accessed August 21, 2022, <https://www.archives.gov/founding-docs/constitution-transcript>.

² Reuel E. Schiller, “The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law,” *Michigan Law Review* 106, no. 3 (2007): 415, <http://www.jstor.org/stable/40041626>.

³ Schiller, 415.

⁴ Richard N. L. Andrews, *Managing the Environment, Managing Ourselves: A History of American Environmental Policy*, 2nd ed. (New Haven, CT: Yale University Press, 2006), 219, ProQuest.

autonomy for the agencies to pursue their missions, without undue influence of political maneuvers.

Recognizing the reality of politics, Congress created some administrative agencies to be independent of political influences. This thesis considers three agencies: one an independent agency and two executive agencies. The Federal Trade Commission (FTC) was created to be an independent agency, but a review of its history reveals one rife with political influences.⁵ Under the direction of president-appointed FTC chairmen, its direction quickly changed.⁶ Congress also pressured the FTC by passing legislation and lapsing the budget to pressure the agency to take a different direction.⁷

The Environmental Protection Agency (EPA) and the Food and Drug Administration (FDA) were created as executive agencies. The EPA weathered direct frontal attacks by the Reagan administration, and William Ruckelshaus—a two-time EPA administrator—built the agency in a way that garnered respect.⁸ Meanwhile, the FDA faced pressure from advocates of seriously ill cancer and AIDS patient regarding the drug approval process that arose amid relative silence from the executive branch.⁹ The FDA weathered the controversies by sticking to its clear mission to protect the public based on science, showing its ability to amend its rules to allow easier access to drugs for people in

⁵ Marshall J. Breger and Gary J. Edles, “Established by Practice: The Theory and Operation of Independent Agencies,” *Administrative Law Review* 52, no. 4 (2000): 1132, <https://scholarship.law.edu/scholar/360/>.

⁶ Stanley E. Cohen, “The Ronald Reagan Era: Another New Beginning,” *Journal of Advertising* 10, no. 2 (1981): 5, <http://www.jstor.org/stable/4188343>.

⁷ Deborah Platt Majoras, “The Federal Trade Commission: Learning from History as We Confront Today’s Consumer Challenges,” *UMKC Law Review* 75 (Fall 2006): 118, Lexis-Nexis; Debra L. Scammon, “Federal Trade Commission Bureau of Consumer Protection, 1978–1979,” *Journal of Public Policy & Marketing* 33, no. 2 (Fall 2014): 206–207, <https://doi.org/10.1509/jppm.14.FTC.005>.

⁸ J. Patrick Dobel, “Managerial Leadership in Divided Times: William Ruckelshaus and the Paradoxes of Independence,” *Administration & Society* 26, no. 4 (1995): 493, <https://doi.org/10.1177/009539979502600404>; Luc Bernier, “Public Enterprises as Policy Instruments: The Importance of Public Entrepreneurship,” *Journal of Economic Policy Reform* 17, no. 3 (2014): 258, <https://doi.org/10.1080/17487870.2014.909312>.

⁹ Daniel Carpenter, *Reputation and Power: Organizational Image and Pharmaceutical Regulation at the FDA* (Princeton: Princeton University Press, 2010), 410, 431, ProQuest.

dire need.¹⁰ The histories of both the EPA and FDA suggest that executive agencies have no less autonomy than independent agencies.

If wholesale agency autonomy is inappropriate and a formal independent structure does not protect an agency, then the next question remains whether some informal factors may provide a level of autonomy. Based on the investigation of the EPA, FTC, and FDA, it appears that focusing on building a clear mission, hiring qualified staff, and decentralizing agency authority may provide an answer. Both the EPA and FTC have had effective leaders who focused on all three. When the EPA's William Ruckelshaus and the FTC's Casper Weinberger were appointed, they concentrated their efforts on hiring qualified staff, clarifying their agencies' mission, and decentralizing their authority to regional offices.¹¹ Their work boosted the reputation of their respective agencies, which allowed the agencies to fulfill their missions. Furthermore, for the FDA, its focus on hiring the best possible scientists and commitment to its mission have allowed it to hold a greater degree of respect and autonomy than other agencies.¹² Therefore, agencies should seek to bolster their reputations by defining a clear mission, hiring qualified staff, and decentralizing their authorities to those closest to the objectives or goals—through which they may obtain a level of autonomy.

¹⁰ Carpenter, 438.

¹¹ Dobel, "Managerial Leadership in Divided Times"; Philip B. Heymann, *The Politics of Public Management* (New Haven, CT: Yale University Press, 1987).

¹² Carpenter, *Reputation and Power*.

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I. INTRODUCTION

The field of administration is a field of business. It is removed from the hurry and strife of politics; it at most points stands apart even from the debatable ground of constitutional study. It is a part of political life only as the methods of the counting-house are a part of the life of society; only as machinery is part of the manufactured product.

—Woodrow Wilson¹

A. PROBLEM STATEMENT

For someone working in a highly political area of public service, it may be difficult to believe that the service performed could be “removed from the hurry and strife of politics”—because one’s duty may drastically change depending on which political party is in power. For example, the Obama administration directed U.S. Immigration and Customs Enforcement (ICE) to prioritize only serious criminals in removal proceedings.² Such focus was appraised to “have prioritized about 13 percent of the estimated 11.3 million unauthorized immigrants in the country.”³ Under the Trump administration, however, the previous priorities were rescinded, and all unauthorized immigrants were designated an enforcement priority.⁴ From narrowly tailored priorities to virtually no priorities, the drastic change forced ICE to alter its operations overnight.⁵ The political influences over ICE not only affected its mission but also created an environment that

¹ Woodrow Wilson, “The Study of Administration,” *Political Science Quarterly* 2, no. 2 (1887): 209–10, <https://doi.org/10.2307/2139277>.

² Jeh Johnson, “Policies for the Apprehension, Detention and Removal of Undocumented Immigrants” (official memorandum, Washington, DC: Department of Homeland Security, 2014).

³ Lazaro Zamora, “Comparing Trump and Obama’s Deportation Priorities,” Bipartisan Policy Center, Feb 27, 2017, <https://bipartisanpolicy.org/blog/comparing-trump-and-obamas-deportation-priorities>.

⁴ Zamora, “Comparing Trump and Obama’s Deportation Priorities”; Exec. Order No. 13768, 82 Fed. Reg. 8800 (2017), <https://www.federalregister.gov/documents/2017/01/30/2017-02102/enhancing-public-safety-in-the-interior-of-the-united-states>.

⁵ As of this writing, the Biden administration has undertaken another drastic change of priorities.

called for its abolishment because it was perceived as having become a political tool for politicians.⁶

At the inception of the United States as a nation, the creation and existence of government agencies were not clearly laid out in the U.S. Constitution.⁷ However, as the government grew, administrative agencies were created to enforce and administer relevant laws and regulations. Because government agencies are closely tied to the political system, a complete divorce from politics is neither feasible nor desirable, but maintaining government agency neutrality is critical for effective service, particularly given the context of conflicting short-term-focused politics with long-term goals of administrative agencies. Administrative agency neutrality, or perceived neutrality, may depend on some independence from direct political influences.

Existing literature does not clearly define agency autonomy or describe how it is developed and managed. Similarly, there does not appear to be an agreed-upon mechanism or process for granting agency autonomy or rescinding it. Thus, this thesis explores and addresses these questions by reviewing the history of U.S. government agency development and examining the formal structure and informal authority of autonomy in various agencies.

B. RESEARCH QUESTION

What can U.S. government agencies do to foster autonomy from political influences to be neutral arbiters or administrators?

C. RESEARCH DESIGN

This thesis seeks to examine literature and studies related to government agency autonomy that would permit agencies to fulfill their core missions when faced with extreme

⁶ Elaine Godfrey, "What 'Abolish ICE' Actually Means," *Atlantic*, July 11, 2018, <https://www.theatlantic.com/politics/archive/2018/07/what-abolish-ice-actually-means/564752/>; Sean McElwee, "The Power of 'Abolish ICE,'" *New York Times*, August 5, 2018, <https://www.nytimes.com/2018/08/04/opinion/sunday/abolish-ice-ocasio-cortez-democrats.html>.

⁷ "The Constitution of the United States: A Transcription," National Archives, accessed August 21, 2022, <https://www.archives.gov/founding-docs/constitution-transcript>.

political tides. This thesis addresses first whether a historical review of U.S. administrative agencies provides some answer about the value of advocating for a wholesale neutral, expert-based agency autonomy. Second, this thesis examines the impact on a bureaucracy's formal structure designed for autonomy by examining the history of the Federal Trade Commission (FTC), the Environmental Protection Agency (EPA), and the Food and Drug Administration (FDA).⁸ Finally, in reviewing these agencies, this thesis analyzes the impact of three variables that may provide a level of agency autonomy through informal authority.

First, the historical development of federal agencies shows that at some point in time, expert-run neutral agencies were considered a solution to social problems. Persistent efforts by political actors to provide autonomy to administrative agencies extended to influencing the courts. However, a series of significant controversies and increased public loss of trust in large institutions resulted in distrust of government agencies and their ability to carry out their missions independently. The changing attitudes brought about the difficulties federal agencies currently face in seeking autonomy.

Second, recognizing the reality of politics, some administrative agencies were created to be independent of political influences. This thesis considers three agencies: one an independent agency and two executive agencies. The FTC was created to be an independent agency, but a review of its history reveals one rife with political influences. By contrast, the histories of the EPA and FDA suggest that executive agencies have no less autonomy than independent agencies.

Third, this thesis explores independence and autonomy in the three agencies apart from the formal structure. In investigating the EPA, FTC, and FDA as examples, this thesis notes some informal patterns of development or practice that may provide some answers

⁸ Kutsal Yesilkagit and Jørgen G. Christensen, "Institutional Design and Formal Autonomy: Political versus Historical and Cultural Explanations," *Journal of Public Administration Research and Theory* 20, no. 1 (2010): 53–74, <https://doi.org/10.1093/jopart/mup002>; Daniel P. Carpenter, *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862–1928* (Princeton: Princeton University Press, 2001), <https://doi.org/10.2307/j.ctv10crfk2.7>; Kutsal Yesilkagit and Sandra van Thiel, "Political Influence and Bureaucratic Autonomy," *Public Organization Review* 8, no. 2 (June 2008): 137–53, <https://doi.org/10.1007/s11115-008-0054-7>.

for achieving a level of autonomy. Then, it synthesizes the meaning of agency autonomy and its optimal application in the U.S. government.

II. THE U.S. HISTORY OF GOVERNMENT AGENCIES

The development of government agencies came in response to societal needs for the burgeoning United States. As the United States developed as a nation, changes in the social structure and developments in technology and science shaped the political perspective on the need for administrative agencies. What was perceived as a homogeneous society became more diverse and carried with it greater issues not considered before. This chapter reviews the development of the technocratic, expert-led administrative agency—thus autonomous—ideal for the public good, and its demise.

A. DEVELOPMENT OF ADMINISTRATIVE AGENCIES AND CHANGING ATTITUDES

Historically, Congress created agencies as needs or interests arose and without uniformity or structure in mind.⁹ Creating and utilizing administrative agencies were justified in the context of the three branches: 1) the administrative agency's role was seen as an executive arm to carry out the legislative directives, implementing goals and standards set by the legislature; 2) Congress was tasked with setting clear goals and standards for the agencies to implement; and 3) the courts were designed to police the relationship between the executive (agency action) and the legislature, thereby limiting administrative authority.¹⁰

Changes in societal attitudes toward the role of administrative agencies came during the early 1900s, when industrialization and urbanization altered the make-up of American society. Technological advancements changed how products were produced, how people traveled, and how people communicated.¹¹ Most of the American population moved to cities, which changed the dynamics of relationships and destabilized family support

⁹ David E. Lewis, *Presidents and the Politics of Agency Design* (Stanford: Stanford University Press, 2003), 22–23.

¹⁰ Morton J. Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* (Oxford: Oxford University Press, 1994), 216, ProQuest.

¹¹ Daniel Beland, Christopher Howard, and Kimberly J. Morgan, *The Oxford Handbook of U.S. Social Policy* (Oxford: Oxford University Press, 2014), 42.

systems, particularly in times of recession.¹² Crowded cities meant a rise in various problems, including “overcrowded tenements, urban sewerage, garbage and pollution, and crime,” aggravated by millions of new immigrants who contributed to social and cultural conflicts.¹³ These complex social problems and conflicts challenged earlier 19th century legal theories that had assumed homogeneity of the populace.¹⁴ Along with the rise of social problems, technological and scientific advancements brought with them scientific approaches to solve social ills and the inception of progressive ideals.

B. PROGRESSIVE ERA AND NEW DEAL

Expertise-based public policy was developed during the Progressive Era, defined by the beliefs that scientific methods could better solve social ills and that technocratic experts should be given authority to implement science-based policy.¹⁵ The New Deal era applied this ideal in the wake of the Great Depression, as those involved in policymaking were convinced that free market capitalism destroyed societies.¹⁶ According to Schiller, the vision of the New Dealers was that “experts would formulate policy, agencies would implement it, and courts would stay out of the way.”¹⁷ It was the expertise and specialization that gave legitimacy to administrative agencies to regulate policies.¹⁸ The Roosevelt administration firmly believed that capitalism had failed in the United States, as evidenced by the Great Depression; that there were “objectively correct solutions to the Depression” that experts would discover; and that applying this expert, scientific approach would replace capitalism and the federal government.¹⁹

¹² Beland, Howard, and Morgan, 42.

¹³ Beland, Howard, and Morgan, 42.

¹⁴ Horwitz, *The Transformation of American Law*, 219.

¹⁵ Paul Sabatier, “Social Movements and Regulatory Agencies: Toward a More Adequate—and Less Pessimistic—Theory of ‘Clientele Capture,’” *Policy Sciences* 6, no. 3 (1975): 302, <http://www.jstor.org/stable/4531610>.

¹⁶ Reuel E. Schiller, “The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law,” *Michigan Law Review* 106, no. 3 (2007): 415–17, <http://www.jstor.org/stable/40041626>.

¹⁷ Schiller, 415.

¹⁸ Horwitz, *The Transformation of American Law*, 216.

¹⁹ Schiller, “The Era of Deference,” 415.

Stemming from the Great Depression, the New Deal thinkers considered capitalism dead and any remnants of capitalistic ideals no longer applicable.²⁰ The thought at the time was that the president must have concentrated power to implement the necessary policies.²¹ Adherents believed that the administrative agencies represented individual citizens, and armed with expertise and objective policies, they could combat the big, bad industries and their interests, and promote equality.²² Central to agency creation was granting power and authority to independent agencies to apply expertise and science-based regulation.²³ The idea was that “the detached, neutral, technocratic experts of the agency were viewed as those most able to make the detailed decisions necessary to implement a functioning regulatory system.”²⁴ The opposing side of the New Deal saw this move toward concentrated power as a prelude to authoritarianism and rejected the idea of objective expertise, noting that government administration was inherently political and that there was no such thing as neutral expertise.²⁵

This progressive ideal of administrative agencies would be something agencies—particularly ones under extreme political pressure—desire, as expressed by two-time EPA administrator William Ruckelshaus.²⁶ However, the wholesale trust of agencies did not last.

²⁰ Schiller, 417.

²¹ Schiller, 419–20.

²² Schiller, 428.

²³ Paul Sabin, “Environmental Law and the End of the New Deal Order,” *Law and History Review* 33, no. 4 (2015): 974–75, <http://www.jstor.org/stable/43670840>.

²⁴ Philip J. Harter, “Negotiating Regulations: A Cure for Malaise,” *Georgetown Law Journal* 71, no. 1 (October 1982): 8, <https://www.acus.gov/sites/default/files/documents/1982-04%20Procedures%20for%20Negotiating%20Proposed%20Regulations.pdf>.

²⁵ Schiller, “The Era of Deference,” 422–23.

²⁶ William D. Ruckelshaus, “Stopping the Pendulum,” *Environmental Toxicology and Chemistry* 15, no. 3 (1996): 231, <https://doi.org/10.1002/etc.5620150301>.

C. EROSION OF PROGRESSIVE IDEALS IN AGENCIES

The archetype of a science- and expert-based neutral government agency that acted on behalf of the public began the modern movement of increasing federal agencies.²⁷ Over time, however, doubts about detached public administrators arose even among those who supported the idea of such experts.²⁸ Starting in the mid-1950s, multiple controversies arose that greatly eroded trust in experts and science. For example, when cities began fluoridating their water supplies based on scientific studies that showed it prevented tooth decay, public opposition intensified, with some citizens arguing it was compulsory or even “socialized medicine.”²⁹ The battle was fought between citizens and public health authorities and scientists, causing mutual disdain and mistrust of each other. Also in the 1950s, government nuclear scientists were proven wrong when they assumed that the radioactive fallout from above-ground nuclear experiments was harmless.³⁰ To the public, government agency experts appeared to be working not for the larger public interest but for special interest groups or their agendas.³¹ The idea that agency administrators were not neutral experts working for the public good led to the belief that they needed accountability.³² These sentiments simmered in the background of disappointment over the Vietnam War and the stunted civil rights movement, which created greater disillusionment with the government.³³ Even ardent believers of administrative expertise became disillusioned over the years, recognizing that the ideal administrative expertise might have been appropriate only in the context of the Great Depression.³⁴ However, the distrust of government agencies did not arise from opposition to expertise or neutrality but

²⁷ Harter, “A Cure for Malaise,” 8.

²⁸ Sabin, “Environmental Law and the End of the New Deal Order,” 979–80.

²⁹ Richard N. L. Andrews, *Managing the Environment, Managing Ourselves: A History of American Environmental Policy*, 2nd ed. (New Haven, CT: Yale University Press, 2006), 211–212, ProQuest.

³⁰ Andrews, 212.

³¹ Andrews, 219.

³² Andrews, 219.

³³ Sabin, “Environmental Law and the End of the New Deal Order,” 969.

³⁴ Horwitz, *The Transformation of American Law*, 237–40.

from the lack thereof. Indeed, the public saw a lack of neutrality and trustworthy expertise in large institutions.

D. CONCLUSION

This brief historical review of the general attitude toward administrative agencies over time seems to indicate that what administrative agencies have wanted—greater autonomy and trust in their expertise—might have seen their heyday in the 20th century. Thus, wholesale trust in expert-run agencies will not easily be revisited absent a major historical event that shifts the public’s attitude.

The public’s mistrust of large institutions may be well placed. Even the Constitution was written based on distrust of one branch of government and calls for checks and balances among the three branches. Therefore, wholesale trust in administrative agencies may not be appropriate, nor is it achievable today. Without such trust in expert-run administrative agencies in a global sense, the next question involves whether a formal structure for agencies can provide sufficient autonomy for them to pursue their missions without the undue influence of extreme political games.

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III. AUTONOMY BASED ON A FORMAL STRUCTURE

As discussed in the previous chapter, Congress has created agencies as needs or interests arise without regard to their structures.³⁵ Many, however, view the U.S. federal government as having two different types of government agencies: executive and independent agencies. Almost all agencies created early in the country's history are commonly referred to as executive agencies—those placed closely within an executive department. Then, the Progressive Era and the New Deal brought about independent agencies.³⁶ Although bipartisanship, not independence, was the initial goal of forming regulatory agencies, the idea of independence grew a few years after Congress created the first independent agency, the Interstate Commerce Commission.³⁷ Independent agencies were designed specifically to provide structural protection from political influences and foster expertise and impartial decision-making.³⁸ The idea of independent agencies, as promoted by the Progressive Era, was grounded in confidence in science and administration, and independence was thought to shield the agency from partisan politics and rely on experts who applied logic and data to decision-making.³⁹ Presumably, then, based on the intent of their structure, independent agencies should have more autonomy than executive agencies. In this chapter, a historical review of one independent agency and two executive agencies explores this notion.

A. INDEPENDENT AGENCY: THE FEDERAL TRADE COMMISSION

What defines an independent agency is currently a matter of debate, but the Administrative Procedure Act and many scholars define it as an agency situated outside

³⁵ Lewis, *Presidents and the Politics of Agency Design*, 22–23.

³⁶ Kirti Datla and Richard L. Revesz, “Deconstructing Independent Agencies (and Executive Agencies),” *Cornell Law Review* 98, no. 4 (May 2013): 769–844, <http://scholarship.law.cornell.edu/clr/vol98/iss4/1>.

³⁷ Marshall J. Breger and Gary J. Edles, “Established by Practice: The Theory and Operation of Independent Agencies,” *Administrative Law Review* 52, no. 4 (2000), <https://scholarship.law.edu/scholar/360/>.

³⁸ Datla and Revesz, “Deconstructing Independent Agencies.”

³⁹ Breger and Edles, “Established by Practice.”

the executive branch and the cabinet.⁴⁰ According to Datla and Revesz, independent agencies have seven characteristics that define independence: “removal protection, specified tenure, multimember structure, litigation authority, partisan balance requirements, budget and congressional authority, and adjudication authority.”⁴¹ Patterned after the original independent agency, the Interstate Commerce Commission, a multimember commission structure comprises most independent agencies.⁴² Generally, the structure involves odd-numbered commission members with requirements of party (or political) balancing for limited terms. In most cases, the members are appointed by the president with the advice and consent of the Senate.⁴³ Further, the president’s power to remove an agency officer can be limited by Congress in some circumstances.⁴⁴ When Congress does set limits on the president’s removal power, the provision generally states that an agency member may be removed by the president for “inefficiency, neglect of duty, or malfeasance in office.”⁴⁵

1. Creation

In 1911, the Supreme Court issued a landmark antitrust decision in *Standard Oil*. In it, the court decided that the 1890 Sherman Act, the first antitrust law of the land, applied only to commercial contracts directly involving interstate commerce.⁴⁶ The decision came on the heels of increased mergers and acquisitions in many industries that realistically strengthened the threat of monopolies.⁴⁷ From 1898 to 1902, as described by Winerman,

⁴⁰ David E. Lewis and Jennifer L. Selin, “Political Control and the Forms of Agency Independence,” *George Washington Law Review* 83, no. 4–5 (2015): 1502–503, <https://www.gwlr.org/political-control-and-the-forms-of-agency-independence/>.

⁴¹ Datla and Revesz, “Deconstructing Independent Agencies,” 784.

⁴² Breger and Edles, “Established by Practice,” 1136.

⁴³ Breger and Edles, 1138.

⁴⁴ Breger and Edles, 1143.

⁴⁵ Breger and Edles, 1144.

⁴⁶ Deborah Platt Majoras, “The Federal Trade Commission: Learning from History as We Confront Today’s Consumer Challenges,” *UMKC Law Review* 75 (Fall 2006): 116, Lexis-Nexis.

⁴⁷ Majoras, “The Federal Trade Commission,” 116; Peter Temin, “The Origin of Compulsory Drug Prescriptions,” *Journal of Law and Economics* 22, no. 1 (April 1979), <https://doi.org/10.1086/466934>.

“303 firms disappeared annually through mergers; 1,208 disappeared in 1899.”⁴⁸ After the *Standard Oil* decision, the momentum of support accelerated for additional antitrust laws from the executive and legislative branches, spurring the Federal Trade Commission Act of 1914, which became law on September 26, and the Clayton Act of 1914, on October 17.⁴⁹ The Clayton Act granted dual prosecutorial jurisdiction to the Department of Justice as well as the FTC.⁵⁰

When the FTC was created, the “belief in apolitical expertise provided the justification for independence and was embodied” in its establishment.⁵¹ The FTC was formed specifically with the independence to address “the partisan and pressure-controlled administration of the antitrust laws by the Department of Justice.”⁵² The five members of the FTC are appointed by the president with the advice and consent of the Senate and serve staggered, fixed seven-year terms.⁵³ Of the five members, no more than three can belong to one political party, and they can be removed from office only for cause.⁵⁴ The assumption was that because the commission members cannot be removed at will by the president, the agency is independent of presidential influence.⁵⁵

2. Two Political Crises

The FTC was granted considerable support and authority to prosecute violators of antitrust laws. Such broad authority and support apparently did not translate into effective administration, however. In 1969, a critical report sponsored by Ralph Nader resulted in

⁴⁸ Marc Winerman, “The Origins of the FTC: Concentration, Cooperation, and Competition,” *Antitrust Law Journal* 71, no. 1 (2003): 6, <http://www.jstor.org/stable/40843580>.

⁴⁹ Winerman, 92.

⁵⁰ Winerman, 92.

⁵¹ Breger and Edles, “Established by Practice,” 1132.

⁵² Breger and Edles, 1132.

⁵³ Breger and Edles, 1267.

⁵⁴ William E. Kovacic and Marc Winerman, “The Federal Trade Commission as an Independent Agency: Autonomy, Legitimacy, and Effectiveness,” *Iowa Law Review* 100, no. 5 (May 2015): 2087, <https://ilr.law.uiowa.edu/assets/Uploads/ILR-100-5-Kovacic-Winerman.pdf>; Breger and Edles, “Established by Practice,” 1267.

⁵⁵ Breger and Edles, “Established by Practice,” 1138.

President Nixon's requesting the American Bar Association (ABA) study the FTC.⁵⁶ When the ABA issued its report several months later, it criticized the FTC's lack of goals and priorities, poor management, and ineffective enforcement tactics.⁵⁷ The report also cited a lack of quality leaders and staff in the FTC.⁵⁸ The review was so critical that some, including the writers of the report, considered shutting the agency down as an option.⁵⁹ The ABA report prompted the Nixon administration's appointment of Caspar Weinberger for FTC chair, who quickly reorganized the commission.⁶⁰ All three Nixon-appointed FTC chairs reorganized and developed the commission's consumer activist course, which Congress, including the Senate Commerce Committee, approved.⁶¹ In fact, throughout the 1960s and into the 1970s, politicians on both ends of the political spectrum supported the FTC and its mission of consumer protection.⁶² Starting with Weinberger, Republican successors of the FTC were considered successful at turning an old agency on the brink of collapse into a healthy organization through good leadership.⁶³ This success would be short lived.

In 1975, Congress granted the FTC broad rulemaking authority through the Magnuson-Moss Act, and in 1977, well-known consumer activist Michael Pertschuk was appointed FTC chairman.⁶⁴ While the FTC had engaged in rulemaking before the 1975 Magnuson-Moss Act, it generally involved trivial matters that did not arouse the anger of

⁵⁶ William E. Kovacic, "The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement," *Tulsa Law Journal* 17, no. 4 (1981): 593.

⁵⁷ Kovacic, 594–96.

⁵⁸ Kovacic, 599.

⁵⁹ Kovacic, 599.

⁶⁰ Terry M. Moe, "An Assessment of the Positive Theory of 'Congressional Dominance,'" *Legislative Studies Quarterly* 12, no. 4 (1987): 495, <https://doi.org/10.2307/439745>.

⁶¹ Moe, 496.

⁶² Ernest Gellhorn, "The Wages of Zealotry: The FTC under Siege," *Regulation* 4 (January 1980): 33.

⁶³ Stanley E. Cohen, "The Ronald Reagan Era: Another New Beginning," *Journal of Advertising* 10, no. 2 (1981): 5, <http://www.jstor.org/stable/4188343>.

⁶⁴ Gellhorn, "The Wages of Zealotry," 33; Mark E. Budnitz, "The FTC's Consumer Protection Program: Lessons for Administrative Agency and Operation," *Catholic University Law Review* 46, no. 2 (1997): 376, <https://scholarship.law.edu/lawreview/vol46/iss2/3/>.

large industry or congressional opposition.⁶⁵ The FTC's most aggressive industry-wide rules were introduced in the late 1970s.⁶⁶ Some observed that the FTC had become not just an enforcer of laws passed by Congress but effectively an advocate and evangelist, which spurred aggressive opposition.⁶⁷ Unfortunately for the FTC, when Congress shifted to a more conservative make-up, businesses impacted by the FTC's rules organized and used their political power against the commission.⁶⁸ Thus, support for the FTC waned in the late 1970s amid several rulemaking controversies, particularly its children's advertising rule, otherwise known as "KidVid," which prompted a public outcry.⁶⁹

To some, the FTC's rulemaking during that period lacked support and overstepped its authority.⁷⁰ On the children's advertising rule, the FTC concluded that television advertising that targeted children was deceptive because children could not understand the advertisers' intent—that they could not distinguish between advertisement and children's programming. Based on this conclusion, the FTC attempted to stop advertising that targeted children.⁷¹ However, the FTC's recommendations were confusing and almost impossible to execute effectively, thus greatly affecting advertisers.⁷² Congress responded by passing the Federal Trade Commission Improvements Act in 1980, which barred the FTC from regulating unfair advertising industry-wide.⁷³ Also in response to the popular dislike of the FTC's practices, Congress let the commission's budget lapse for a time.⁷⁴ In response to the political resistance, the FTC changed direction and shut down most of its

⁶⁵ Budnitz, "The FTC's Consumer Protection Program," 415–17.

⁶⁶ Moe, "An Assessment of the Positive Theory," 504, 506.

⁶⁷ Miles W. Kirkpatrick et al., "Debate: The Federal Trade Commission under Attack: Should the Commission's Role Be Changed?," *Antitrust Law Journal* 49, no. 4 (1980): 1487–88, <http://www.jstor.org/stable/40842642>.

⁶⁸ Budnitz, "The FTC's Consumer Protection Program," 376–77.

⁶⁹ Majoras, "The Federal Trade Commission," 118.

⁷⁰ Gellhorn, "The Wages of Zealotry," 37, 40.

⁷¹ Debra L. Scammon, "Federal Trade Commission Bureau of Consumer Protection, 1978–1979," *Journal of Public Policy & Marketing* 33, no. 2 (Fall 2014): 206, <https://doi.org/10.1509/jppm.14.FTC.005>.

⁷² Gellhorn, "The Wages of Zealotry," 38.

⁷³ Scammon, "Federal Trade Commission," 206–7.

⁷⁴ Majoras, "The Federal Trade Commission," 118.

controversial rulemaking actions.⁷⁵ President Ronald Reagan appointed FTC Chairman James Miller, who reorganized the agency into a centralized top-down structure and attempted to downsize regional offices to solidify central authority.⁷⁶

3. Analysis

In the case of the FTC, even though it was meant to be an independent agency, both Congress and the president were influential in developing and changing its course. Presidents exercised great authority over the FTC, as political appointment positions within the commission granted presidents the opportunity to appoint politically like-minded candidates into the bureaucracy.⁷⁷ Even in a multimember commission like the FTC, presidents appoint the chair of the committee, and the chair holds great authority to sway the direction of the agency.⁷⁸ The FTC chair is designated specifically by the president and has authority to carry out the executive and administrative functions of the commission as well as “designate which personnel, including Commissioners, are to perform...delegated functions.”⁷⁹ During the Nixon administration, three FTC chairmen appointed by the president reorganized the FTC as a consumer activist agency, thus fulfilling the president’s purpose in appointing them.⁸⁰ On the flip side, under the guidance of Miller, a Reagan appointee, the number of FTC enforcement actions and rules was reduced.⁸¹

Congress also influenced this supposed independent agency on multiple levels. Congress’s most powerful source of authority comes from the power of the purse, as no agency can operate without the funds to do so.⁸² While some agencies are granted authority

⁷⁵ Barry R. Weingast and Mark J. Moran, “Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission,” *Journal of Political Economy* 91, no. 5 (October 1983): 775, <https://doi.org/10.1086/261181>.

⁷⁶ Budnitz, “The FTC’s Consumer Protection Program,” 386–89.

⁷⁷ Lewis and Selin, “Political Control and the Forms of Agency Independence,” 1498.

⁷⁸ Breger and Edles, “Established by Practice,” 1177–78.

⁷⁹ Breger and Edles, 1267–68.

⁸⁰ Moe, “An Assessment of the Positive Theory,” 495–96.

⁸¹ Budnitz, “The FTC’s Consumer Protection Program,” 392–93, 417–19.

⁸² Lewis and Selin, “Political Control and the Forms of Agency Independence,” 1500.

to fund themselves through various means—thereby limiting congressional sway over their operations—the FTC was vulnerable to congressional purse tightening, as shown by Congress’s willingness to let its funding lapse for a period.⁸³ Congress also exercises influence over agencies through committees and subcommittees, which hold hearings, conduct investigations, and review agency and interested-party reports on the agency’s actions.⁸⁴ As Weingast and Moran observed, when the congressional subcommittee over the FTC’s political make-up changed in the late 1970s, the FTC’s regulations changed accordingly.⁸⁵ Also, when Miller was FTC chairman, Congress strongly opposed his attempts to reduce regional offices, and the chairman could not overcome its opposition.⁸⁶

Both presidential and congressional authority changed the FTC’s direction—toward increased consumer activism from the 1960s through the early 1970s and then decreased enforcement in the late 1970s, even though the commission was designed to be independent of political influences. The FTC’s example shows that being an independent agency does not necessarily mean the agency exercises greater autonomy than executive agencies do. The FTC is not alone in these challenges. As observed here and elsewhere, studies conducted regarding independent or formally structured agencies have shown that the formal structure does not necessarily grant greater autonomy.⁸⁷

B. EXECUTIVE AGENCY: THE ENVIRONMENTAL PROTECTION AGENCY

If the FTC, a supposedly independent agency, did not enjoy autonomy from politics, would an executive agency be any different? This section examines the EPA—an executive agency designed with presidential oversight—for some guidance. EPA

⁸³ Lewis and Selin, “Political Control and the Forms of Agency Independence,” 1500; Majoras, “The Federal Trade Commission,” 118.

⁸⁴ Lewis and Selin, “Political Control and the Forms of Agency Independence,” 1500–1501.

⁸⁵ Weingast and Moran, “Bureaucratic Discretion or Congressional Control?,” 793; Barry R. Weingast and Mark J. Moran, “The Myth of Runaway Bureaucracy: The Case of the FTC,” *Regulation* 6, no. 3 (1982): 36–37.

⁸⁶ Budnitz, “The FTC’s Consumer Protection Program,” 390.

⁸⁷ Yesilkagit and van Thiel, “Political Influence and Bureaucratic Autonomy,” 145–46.

administrators and senior staff are appointed by the president, and leadership changes with each administration.⁸⁸

1. Creation

With the 1960s came an earnest national awareness and debate over the environment, and by the end of that decade, pollution and environmental issues had arrived at the forefront of national politics.⁸⁹ Visible negative impacts on the environment spanned the United States—in California, an offshore drilling rig spewed oil along the Santa Barbara Channel; in Ohio, the Cuyahoga River burned for eight days due industrial waste; and Lake Erie was declared “dead” from pollution.⁹⁰ With all these controversies combined, the possibility of massive environmental destruction mobilized the public.⁹¹ Mass grassroots movements, high media attention, and bipartisan support drove interest in the environmental protection movement.⁹² The federal government, however, did not have a central way to address threats to the environment. In fact, its approach was to address a small subset of environmental issues as they arose, and different agencies handled different issues. Such divisions created conflict among the missions that impacted the environment.⁹³

President Richard Nixon had no personal commitment to the environment, but political necessity compelled his series of moves in 1970 to create the EPA.⁹⁴ On New Year’s Day, Nixon signed the National Environmental Policy Act on live television; in February, he executed an executive order requiring all federal facilities to reduce pollution; in July, he sent his reorganization plan to Congress for the creation of the EPA; in

⁸⁸ Richard N. L. Andrews, “The EPA at 40: An Historical Perspective,” *Duke Environmental Law & Policy Forum* 21, no. 2 (April 2011): 220, <https://scholarship.law.duke.edu/delpf/vol21/iss2/2/>.

⁸⁹ David W. Case, “The Lost Generation: Environmental Regulatory Reform in the Era of Congressional Abdication,” *Duke Environmental Law & Policy Forum* 25, no. 1 (Fall 2014): 55, <https://scholarship.law.duke.edu/delpf/vol25/iss1/2/>.

⁹⁰ Andrews, *Managing the Environment, Managing Ourselves*, 224.

⁹¹ Andrews, 225.

⁹² Andrews, 237.

⁹³ Andrews, 223.

⁹⁴ Andrews, 229.

September, the reorganization became effective; and finally, in December, the EPA came into being.⁹⁵ As an agency created under a presidential reorganization plan, the EPA's powers were not new but a mere collection of already existing authorities.⁹⁶ In fact, the reorganization consolidated 15 different programs from 15 different agencies into one agency, and William Ruckelshaus was appointed the administrator.⁹⁷ The EPA's authority also expanded piecemeal during the 1970s through various bipartisan legislation.⁹⁸ Notably, the piecemeal nature of the legislation did not provide the EPA with the authority for the overall management of pollutants.⁹⁹

Although the EPA is an executive branch-created agency, Congress has wielded great power over it through detailed statutes that direct the EPA in its day-to-day operations.¹⁰⁰ These newly enacted laws did not leave the work solely to government administrators but provided for citizen groups to seek information and challenge agency decisions in court.¹⁰¹ Granting such private rights reflected the congressional acknowledgment that agencies might not always act in the best interest of the public.¹⁰² Contending with the complex web of interested principals, as Konisky describes it, "agency leaders and managers have been careful not to stray too far from the media-based policy

⁹⁵ Andrews, 229.

⁹⁶ Andrews, "The EPA at 40," 228–29.

⁹⁷ Raanan Lipshitz and Leon Mann, "Leadership and Decision Making: William R. Ruckelshaus and the Environmental Protection Agency," *Journal of Leadership & Organizational Studies* 11, no. 4 (Summer 2005): 42, <https://doi.org/10.1177/107179190501100404>; B. Dan Wood, "Principals, Bureaucrats, and Responsiveness in Clean Air Enforcements," *American Political Science Review* 82, no. 1 (1988): 215, <https://doi.org/10.2307/1958066>.

⁹⁸ Andrews, "The EPA at 40," 229; Case, "The Lost Generation," 56; Clean Air Act of 1970, 42 U.S.C. §§ 7401 et seq.; Clean Water Act of 1972, 33 U.S.C. §§1251 et seq.; Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451 et seq.; Federal Environmental Pesticide Control Act of 1972, 7 U.S.C. §§ 136 et seq.; Endangered Species Act of 1973, 16 U.S.C. §§ 1531 et seq.; Safe Drinking Act of 1974, 42 U.S.C. §§ 300f et seq.; Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901 et seq.; Toxic Substances Control Act of 1976, 15 U.S.C. §§ 2601 et seq.; Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601 et seq.

⁹⁹ Andrews, "The EPA at 40," 229.

¹⁰⁰ Ruckelshaus, "Stopping the Pendulum," 230.

¹⁰¹ Andrews, *Managing the Environment, Managing Ourselves*, 228.

¹⁰² Sabin, "Environmental Law and the End of the New Deal Order," 1001–2.

and organizational path because political overseers have denied it ‘an overarching framework of authority and tools to protect the environment and set priorities.’”¹⁰³

Internally, the EPA had to transition different subparts of other agencies that were not focused on regulatory enforcement into one “more adversarial overall culture of regulatory standard-setting and enforcement.”¹⁰⁴ Further, per the Nixon administration’s direction, Ruckelshaus created regional offices outside Washington, DC, to form a decentralized agency that conducted its day-to-day work in partnership with state agencies.¹⁰⁵ The EPA was directed to establish a “new federalism”—a decentralized regional structure whereby 10 regional offices were essentially autonomous in “permitting, enforcement, and program development”—which was eventually deemed a highly successful, effective strategy.¹⁰⁶ The new federalism structure garnered broad support from the regions and permitted the agency to operate under regional differences, both environmental and political.¹⁰⁷ The structure also exposed the regional offices to the danger of being captured by local interests and bureaucratic self-interest.¹⁰⁸

2. The Crisis

As a result of the EPA’s fragmented authority, its efforts were often incoherent in application, thus increasing costs and unintended consequences.¹⁰⁹ Businesses affected by the piecemeal regulation united against the EPA—against overregulation, big government, and bureaucratic zealotry.¹¹⁰ When Ronald Reagan took presidential office in 1980, he was committed to undoing federal environmental enforcement and intended to return

¹⁰³ David M. Konisky, ed., *Handbook of U.S. Environmental Policy* (Cheltenham, UK: Edward Elgar Publishing, 2020), 43.

¹⁰⁴ Andrews, “The EPA at 40,” 230.

¹⁰⁵ Andrews, 231.

¹⁰⁶ Andrews, *Managing the Environment, Managing Ourselves*, 231.

¹⁰⁷ Andrews, 231.

¹⁰⁸ Andrews, 231.

¹⁰⁹ Andrews, “The EPA at 40,” 233.

¹¹⁰ Andrews, 234.

environmental regulation back to the states.¹¹¹ Reagan issued an executive order requiring that any new regulation from the EPA had to show its benefit exceeded the cost—in doing so, he reduced the rate of executive approval of the EPA’s initiatives. Reagan also appointed an administrator without expertise or experience in environmental regulation solely for her loyalty to his agenda.¹¹² Many of Reagan’s EPA appointees held fundamentally opposing views to the agency’s policies.¹¹³ Reagan attempted to reduce the EPA’s budget by two-thirds and make personnel changes that could have reduced its workforce by 80 percent through firings, demotions, and reshuffling.¹¹⁴ The White House centralized the EPA’s decision-making process, transitioning from Ruckelshaus’s decentralized EPA enforcement structure whereby regional offices had decision-making authority.¹¹⁵

3. Analysis

Some might conclude that the EPA has been a victim of political brinkmanship. During the Reagan administration, there was an intentional effort to minimize the EPA’s effectiveness. The administration made careful personnel changes and centralized the EPA’s decision-making process, as well as subjected the agency to constant reorganization.¹¹⁶ Theoretically, these actions should have given the administration greater control. An additional blow came from Congress when the EPA saw a 24 percent cut of its operating budget for fiscal year 1982.¹¹⁷ In early 1983, however, a toxic waste scandal brought scrutiny to EPA Administrator Ann Burford’s failures, and she ultimately

¹¹¹ Andrews, 236.

¹¹² Andrews, 236.

¹¹³ J. Patrick Dobel, “Managerial Leadership in Divided Times: William Ruckelshaus and the Paradoxes of Independence,” *Administration & Society* 26, no. 4 (1995): 493, <https://doi.org/10.1177/009539979502600404>.

¹¹⁴ David Bornstein, *How to Change the World: Social Entrepreneurs and the Power of New Ideas* (New York: Oxford University Press, 2004), 56, ProQuest.

¹¹⁵ Wood, “Principals, Bureaucrats, and Responsiveness,” 217.

¹¹⁶ Andrews, “The EPA at 40,” 217.

¹¹⁷ Wood, “Principals, Bureaucrats, and Responsiveness,” 218.

resigned; then, Reagan nominated William Ruckelshaus—the first EPA administrator—to the post.

When analyzing EPA data on clean air enforcement during this period, Wood made some interesting observations. He examined two different types of EPA enforcement actions: 1) monitoring activities—actions related to checking on continual air pollution source compliance—and 2) abatement activities—actions on “notices of violation, administrative orders, consent orders, consent decrees, case development inspections, cases referred for litigation, and meetings for formal and informal negotiations.”¹¹⁸ Wood observed that when Reagan was inaugurated, there was a 30 percent increase in the monitoring activities conducted by the EPA.¹¹⁹ When the EPA’s budget was cut, however, monitoring was reduced by 23 percent from the average under the previous administration.¹²⁰ When EPA Administrator Burford resigned under controversy, however, monitoring activities increased by 16 percent over the pre-Reagan average, even without a budgetary increase.¹²¹

Abatement activities also took a similar pattern. When Reagan was inaugurated, the EPA’s abatement actions increased by 76 percent over the prior administration.¹²² When the budget cuts came, abatement activities were reduced by 56 percent over the prior administration, but ultimately, the number was slowly restored to the previous number in early 1983.¹²³ By the time of Burford’s resignation, activities had increased to 58 percent above the prior administration’s average.¹²⁴ Even EPA-brought litigation case numbers showed interesting trends. Although the first year of the Reagan administration, 1981, saw a significant reduction in the number of cases brought by the EPA, in subsequent years, the number of cases was on par with what had been in previous administrations, despite budget

¹¹⁸ Wood, 219–20.

¹¹⁹ Wood, 224.

¹²⁰ Wood, 224.

¹²¹ Wood, 224.

¹²² Wood, 226.

¹²³ Wood, 226–27.

¹²⁴ Wood, 227.

cuts.¹²⁵ Wood notes that “bureaucracies are subject to limited manipulation by elected institutions, but their responsiveness is bounded by a legitimate representational task.”¹²⁶

Ringquist conducted a similar study related to the EPA’s water-pollution activities.¹²⁷ In water-quality abatement actions, the EPA did not show a difference on Reagan’s inauguration but reduced the number of actions by 42 percent upon Ann Burford’s appointment and budgetary reduction.¹²⁸ Upon Burford’s resignation and Ruckelshaus’s reappointment, abatement actions increased immediately by 52 percent.¹²⁹ Water-pollution referrals largely followed the same pattern, where the 1982 budget cut saw a 28 percent decrease in civil-case referrals and a jump by 77 percent when Burford resigned.¹³⁰ Interestingly, the reduction in abatement actions and civil-case referrals did not change the conversion ratio of civil suits to abatement actions or the average amount of civil fines. In reality, the amount of civil fines remained constant, but the number of civil suits filed doubled six months after Burford’s appointment.¹³¹

When the public saw the intentional effort to reduce water-pollution regulation, environmental law enforcement rose to pre-Reagan levels through citizen lawsuits, encouraged by the EPA, against polluters.¹³² Facing an onslaught of restrictions, according to Ringquist, “EPA bureaucrats used more subtle strategies and ‘hidden actions’ to maintain a strong enforcement presence, keeping civil fines high and transferring resources to civil litigation contrary to Reagan administration policy wishes.”¹³³ Moreover, as seen across many bureaucratic organizations, if an area of an agency’s work is noncontroversial

¹²⁵ Eric Helland, “Prosecutorial Discretion at the EPA: Some Evidence on Litigation Strategy,” *Journal of Regulatory Economics* 19, no. 3 (July 2001): 279, <https://doi.org/10.1023/A:1011111223487>.

¹²⁶ Wood, “Principals, Bureaucrats, and Responsiveness,” 232.

¹²⁷ Evan J. Ringquist, “Political Control and Policy Impact in EPA’s Office of Water Quality,” *American Journal of Political Science* 39, no. 2 (1995), <https://doi.org/10.2307/2111616>.

¹²⁸ Ringquist, 349.

¹²⁹ Ringquist, 349.

¹³⁰ Ringquist, 351.

¹³¹ Ringquist, 353.

¹³² Ringquist, 359.

¹³³ Ringquist, 359.

politically, such as water-quality regulation for the EPA, the agency does not experience the full effect of political control.¹³⁴ As Ringquist puts it,

EPA was responsive not only to the wishes of a popularly elected president and Congress, but also to the values of clientele groups and public opinion, which supported a continued strong role for EPA. Public bureaucracies play a legitimate role in American government not simply by responding to political directives, but also by using their expertise to craft policy solutions, by being faithful to legislative intent and statutory requirements, and by articulating a broader view of the public good. Governance would be almost impossible if agencies did not sometimes act on these larger perspectives of responsiveness and legitimacy.¹³⁵

The EPA's environmental litigation strategy did change while Burford was the administrator, but the hard data showing the change in Burford's litigation strategy—that of pursuing a limited number of cases with a strong chance of winning—resulted in higher settlement amounts as well as more cases awarded when the EPA went to trial.¹³⁶ Thus, the change to a litigation strategy in pursuing cases with a greater chance of winning did not reduce the effectiveness of environmental enforcement. Therefore, neither the control mechanisms that the president and Congress possessed and utilized nor the EPA's executive agency status affected the EPA's mission for long at that time. In fact, despite the structural differences, Ringquist found that “political control was more effective at altering the values of FTC bureaucrats than in affecting the values of EPA personnel.”¹³⁷

C. EXECUTIVE AGENCY: THE FOOD AND DRUG ADMINISTRATION

Although the FDA did not suffer an existential crisis like the FTC did or the political pendulum of the EPA, its development and sustained authority in its drug-gatekeeping function have had numerous critical oppositions. When the political pressure came from somewhere other than the president or Congress, what was the FDA's response as an executive agency, and did it reflect a more politically sensitive structure?

¹³⁴ Ringquist, 351.

¹³⁵ Ringquist, 360.

¹³⁶ Helland, “Prosecutorial Discretion at the EPA,” 291.

¹³⁷ Ringquist, “EPA's Office of Water Quality,” 360.

1. Creation

The FDA in its present form has had a long winding history as an executive agency. Initially called the Division of Chemistry under the Department of Agriculture, in 1862, the division went through multiple name changes before ultimately becoming the Food and Drug Administration in 1930.¹³⁸ Then, in 1979, the FDA was subsumed under the Department of Health and Human Services, a move ultimately affirmed under the 1988 Food and Drug Administration Act.¹³⁹ The FDA's commissioner is appointed by the president with the advice and consent of the Senate but is conferred no term protection.¹⁴⁰

The authority of the FDA was strengthened and recast under the Federal Food, Drug and Cosmetic Act of 1938 in the aftermath of Elixir Sulfanilamide, which caused 107 deaths in 1937.¹⁴¹ The Elixir Sulfanilamide tragedy catalyzed the need for a pre-market drug clearance process, and this 1938 law provided the means for the FDA to put one in place.¹⁴² The development of the new drug approval process directly resulted in the FDA's Frances Kelsey delaying the approval of thalidomide in the United States in 1960–1961 despite high pressure to approve it.¹⁴³ Developed in Germany in 1953, thalidomide had been deemed effective at promoting sleep.¹⁴⁴ In 1957, the drug was introduced in Germany and gained traction as a sleeping pill for young and old alike.¹⁴⁵ However, by 1961, thalidomide had been withdrawn from the German market due suspicions that it caused birth deformities, and estimates suggest that 8,000–80,000 deformed babies were born in

¹³⁸ Patricia A. Curtis, *Guide to U.S. Food Laws and Regulations*, 2nd ed. (Chichester, UK: Wiley-Blackwell, 2013), 48.

¹³⁹ Curtis, 48.

¹⁴⁰ Food and Drug Administration, 21 U.S.C. § 393(d) (2011).

¹⁴¹ Daniel Carpenter, *Reputation and Power: Organizational Image and Pharmaceutical Regulation at the FDA* (Princeton: Princeton University Press, 2010), 73, ProQuest.

¹⁴² Carpenter, 73, 112.

¹⁴³ Lisa A. Seidman and Noreen Warren. "Frances Kelsey & Thalidomide in the US: A Case Study Relating to Pharmaceutical Regulations," *American Biology Teacher* 64, no. 7 (2002): 497–98, <https://doi.org/10.2307/4451354>.

¹⁴⁴ Seidman and Warren, 496.

¹⁴⁵ Seidman and Warren, 496–97.

Europe due to the drug.¹⁴⁶ When the story about Kelsey and thalidomide broke, it mobilized the public to strengthen the FDA's role as an effective protector of society, and the agency gained considerable authority.¹⁴⁷

2. Health Crises

The FDA has not been free from challenges, however. The obstacles and controversies that the FDA has faced often revolve around its apparent delay in approving drugs. Many have taken the FDA to court, but many have lost.¹⁴⁸ Two significant controversies against the FDA arose related to drugs for cancer and AIDS treatments.

a. *The Laetrile Controversy*

In the first controversy of note, the FDA opposed a once-popular naturopathic cancer treatment, Laetrile, whose efficacy was unproven, but it was popular and had support among state and federal legislatures, some experts from the National Cancer Institute, and alternative medicine groups.¹⁴⁹ During the controversy, the FDA was challenged in its gatekeeping function and application of rigorous scientific standards.¹⁵⁰ Furthermore, the 1962 Kefauver-Harris Amendment, which required proof of both the efficacy and safety of drugs, was challenged when a drug's claim was only of safety and not of efficacy.¹⁵¹ When the investigational new drug application (NDA) on Laetrile was filed in 1958, the parties expected a quick approval, but instead, the FDA denied the distribution of the drug for research.¹⁵² Laetrile spread through underground networks, however, and the media questioned the FDA's decision.¹⁵³ By the mid-1970s, against the

¹⁴⁶ Seidman and Warren, 498.

¹⁴⁷ Carpenter, *Reputation and Power*, 213.

¹⁴⁸ Carpenter, 373.

¹⁴⁹ Carpenter, 410.

¹⁵⁰ Carpenter, 410.

¹⁵¹ John F. Cannizzaro and Madelon M. Rosenfeld, "Laetrile and the FDA: A Case of Reverse Regulation," *Journal of Health Politics, Policy and Law* 3, no. 2 (1978): 183–84, <https://doi.org/10.1215/03616878-3-2-181>.

¹⁵² Carpenter, *Reputation and Power*, 412–13.

¹⁵³ Carpenter, 414.

backdrop of public distrust of large institutions, the Laetrile issue gained popular support, and over half of the states legalized its use.¹⁵⁴

When the FDA was taken to federal court by a patient, the administration could not enforce the Laetrile ban for two years.¹⁵⁵ Another court ruled that Laetrile was assumed to be safe and it was the FDA's burden to prove otherwise.¹⁵⁶ These court rulings seriously undermined the FDA's authority in its gatekeeping function.¹⁵⁷ However, the Supreme Court sided with the FDA in denying the patient's demand to place cancer in a special category of drugs to circumvent the FDA's requirements.¹⁵⁸ The decision was not the end of the controversy, however, and some have predicted that the Laetrile issue will not die until a cancer cure is discovered.¹⁵⁹

Perhaps wisely, and in line with its commitment to scientific data, the FDA did not move to squelch Laetrile altogether. Throughout the controversy, the FDA's position was based on scientific data, so its commitment to science did not completely close its doors to testing the drug. Subsequently, the drug's efficacy has been tested in limited studies and has shown no significant change in cancer cells.¹⁶⁰ Likewise, actor Steve McQueen, who had promoted the Laetrile cancer treatment, passed away while under such alternative care, bringing a slow end to Laetrile usage.¹⁶¹

b. The AIDS Controversy

The FDA also showed flexibility and generosity when the AIDS health crisis arose. The AIDS epidemic was largely ignored by the Reagan administration, but it remained a

¹⁵⁴ Carpenter, *Reputation and Power*, 417; Arnold S. Relman, "Closing the Books on Laetrile," *New England Journal of Medicine* 306, no. 4 (1982), 236, <https://doi.org/10.1056/NEJM198201283060410>.

¹⁵⁵ Carpenter, *Reputation and Power*, 418.

¹⁵⁶ Carpenter, *Reputation and Power*, 419; Cannizzaro and Rosenfeld, "Laetrile and the FDA," 188.

¹⁵⁷ Cannizzaro and Rosenfeld, "Laetrile and the FDA," 189–90.

¹⁵⁸ Diane C. Sheiring, "The Laetrile Movement: A Challenge to the FDA's Regulating Authority," *Journal of Legal Medicine* 1, no. 4 (1979): 118, <https://doi.org/10.1080/01947648009513317>.

¹⁵⁹ Sheiring, 123.

¹⁶⁰ Relman, "Closing the Books on Laetrile," 236.

¹⁶¹ Carpenter, *Reputation and Power*, 424.

highly relevant social issue in the media.¹⁶² For those who were facing death, the FDA's reliance on science might not have meant much, and the desperate might have chosen to take experimental drugs without a medical blessing. Recognizing the serious need for a quick solution to the epidemic, the FDA paid close attention to the development of AIDS-related drugs even before official NDAs were filed.¹⁶³ The FDA had to consider the balance "between consumer safety and product innovation, the issue of scientific credibility, and the precise role of the drug regulator."¹⁶⁴ In response to the dying patients' interests and careful scientific reviews of drugs, what was informally available became a formal rule whereby the FDA permitted "compassionate use" of drugs to treat AIDS while they were still under consideration for approval.¹⁶⁵ Accordingly, when azidothymidine showed promise, it was released for compassionate use after the Phase 2 trial was over based on its promise of efficacy for those who were desperate for such a drug.¹⁶⁶ A new rule was created, providing for cases involving "immediately life-threatening" or otherwise "serious" cases without existing alternative treatments.¹⁶⁷

Despite the FDA's flexibility and creativity in addressing the AIDS issue, the AIDS community was vocal in attacking the FDA and its perceived inefficiency and callousness.¹⁶⁸ Its decision to deny wide distribution of ribavirin was criticized and described as "heartless."¹⁶⁹ However, the FDA responded with efficiency in its handling of NDAs, and ultimately, the blame shifted from the FDA to politicians who were not granting a sufficient budget for the FDA to do its job. Further, the FDA was active in inviting both militant and treatment-based AIDS support organizations into advisory

¹⁶² Carpenter, 431.

¹⁶³ Carpenter, 434–37.

¹⁶⁴ Lucas Richert, "Reagan, Regulation, and the FDA: The U.S. Food and Drug Administration's Response to HIV/AIDS, 1980–90," *Canadian Journal of History* 44, no. 3 (Winter 2009): 470, ProQuest.

¹⁶⁵ Richert, 470–71.

¹⁶⁶ Carpenter, *Reputation and Power*, 437.

¹⁶⁷ Carpenter, 438.

¹⁶⁸ Carpenter, 440.

¹⁶⁹ Carpenter, 442.

committees so that their voices could be heard, and the function of the FDA could be observed by those groups.¹⁷⁰

3. Analysis

The FDA did not experience existential crises from executive or legislative branches of the government as the FTC and EPA did. As observed, it did experience its versions of crises stemming from pressures by private organizations and courts that could have reduced its authority. The FDA remained committed to rigorous scientific support but also showed its flexibility in the face of human needs. Ultimately, neither the Laetrile matter nor the AIDS issue reduced the FDA's gatekeeping authority to a significant degree. As an executive agency, when politicians stood relatively silent and public opinion was leveraged against it, the FDA remained committed to its mission and actively listened to and incorporated the demands of society.

D. CONCLUSION

Based on the review of the FTC, EPA, and FDA, the formal structure of an independent agency, as seen with the FTC, does not achieve what Congress hoped it would—that is, a regulatory body run by experts who are not affected by political maneuvering. Moreover, the EPA and FDA, executive agencies that one might expect to be more susceptible to political pressure, are more independent than the FTC. There is some indication that an independent structure provides more longevity for the agency, but longevity alone does not provide agencies with the ability to carry out their missions.¹⁷¹ If a formal structure of independence, though preferable, does not confer autonomy to administrative agencies, what can? The answer may reside in their informal authority.

¹⁷⁰ Carpenter, 448.

¹⁷¹ Lewis, *Presidents and the Politics of Agency Design*, 154–55.

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IV. INFORMAL AUTHORITY FOR AGENCY AUTONOMY

Government agencies prefer autonomy to resources. Clear examples are found in relationships between secretaries of defense and the military. Robert McNamara was unpopular with the Pentagon, even though he increased the defense budget by \$6 billion, because he established procedures that reduced the military's autonomy.¹⁷² By comparison, Melvin P. Laird was popular with the Pentagon, even though he reduced the military's budget by more than \$4 billion, because he increased its autonomy.¹⁷³ As with any organization, administrative agencies are not created in a vacuum but based on needs and sentiments of the time. Part of the reason the FTC, EPA, and FDA were challenged considerably was the change in societal perceptions of experts and large agencies. Identifying ways to move forward means reviewing the past and learning from it.

A. THE ENVIRONMENTAL PROTECTION AGENCY

Some of the EPA's resilience can be traced to the agency's focus and development under the leadership of William Ruckelshaus, a Republican administrator. Ruckelshaus, a two-time EPA administrator, is considered "legendary for the way he worked to build the reputation of the EPA."¹⁷⁴ Reviewing the EPA under his leadership may assist in understanding the informal authorities that agencies could build to carry out their missions effectively.

William Ruckelshaus has observed the cyclical nature of pro- and anti-environmental movements in history: "The anti-environmental push of the nineties is prompted by the pro-environmental excess of the late eighties, which was prompted by the pro-environmental excess of the seventies" and so forth.¹⁷⁵ He also describes the

¹⁷² Morton H. Halperin and Priscilla Clapp, *Bureaucratic Politics and Foreign Policy* (Washington, DC: Brookings Institution Press, 2007), 51, ProQuest.

¹⁷³ Halperin and Clapp, 51.

¹⁷⁴ Luc Bernier, "Public Enterprises as Policy Instruments: The Importance of Public Entrepreneurship," *Journal of Economic Policy Reform* 17, no. 3 (2014): 258, <https://doi.org/10.1080/17487870.2014.909312>.

¹⁷⁵ Ruckelshaus, "Stopping the Pendulum," 229.

politicized EPA as “an agency paralyzed by the conflict between its statutory mandate and sound public policy, and a public debate that erroneously depicts the social choices in apocalyptic terms.”¹⁷⁶ Furthermore, according to Ruckelshaus, “people who run the EPA are not so much executives as prisoners of the stringent legislative mandates and court decisions that have been laid down like archaeological strata for the past quarter-century.”¹⁷⁷ Ruckelshaus has also noted the erosion of trust in government and businesses. Congress, fearing that an opposing side might wield power over issues it cared about, wrote stringent statutes and requirements that in turn bound the agency administrator from doing good, and such actions further eroded trust in the government.¹⁷⁸ A reform of environmental regulation must promote effectiveness, Ruckelshaus has observed, through Congress “setting national policy and providing vigorous oversight, and leave the EPA to get on with implementing that policy, free of direct supervision from 535 administrators.”¹⁷⁹ Ruckelshaus believed in the importance of building a credible independent agency because such an agency could “overcome the mistrust that poisoned legislative–executive interaction.”¹⁸⁰

1. Hiring

Ruckelshaus considered the agency’s credibility essential because “public support was the agency’s only independent power base.”¹⁸¹ To that end, he fought hard to hire those he wanted and block any politically motivated hires.¹⁸² Ruckelshaus’s staffing choices were based not on political loyalty but on the needs of the agency, and he protected his senior staff from politically motivated resignations.¹⁸³ When he returned for the second

¹⁷⁶ Ruckelshaus, 229.

¹⁷⁷ Ruckelshaus, 229.

¹⁷⁸ Ruckelshaus, 230.

¹⁷⁹ Ruckelshaus, 231.

¹⁸⁰ Dobel, “Managerial Leadership in Divided Times,” 495–96.

¹⁸¹ Lipshitz and Mann, “Leadership and Decision Making,” 42.

¹⁸² Dobel, “Managerial Leadership in Divided Times,” 497.

¹⁸³ Dobel, 497.

term decades later, he “rebuilt the shattered morale, personnel, and budget”; developed the EPA’s culture; and reestablished its credibility.¹⁸⁴

As part of his strategy of building public confidence, Ruckelshaus focused on hiring respected experts during both terms. In fact, Ruckelshaus’s one condition for returning as EPA administrator was that he would fill the EPA’s senior positions, and he immediately filled those positions with highly respected experts.¹⁸⁵ Dobel describes Ruckelshaus’s efforts to protect people in the EPA as “the most important element of Ruckelshaus’s strategy for which he expended considerable political capital and incurred major costs.”¹⁸⁶ Even so, such appointments and hiring indicated independence from political influence, which was important to build credibility. Although Progressive Era and New Deal principles have mostly been discounted and distrust of experts has risen over time, in practice, employing respected experts seems to bring a level of trust and reputation.

2. Clear Mission

As the first EPA administrator, Ruckelshaus worked to clearly delineate the EPA’s mission, expand congressional support and the budget, and lay a foundation for public support.¹⁸⁷ During the first term, he identified the EPA’s mission as “pollution abatement” because it was narrow yet identifiable and understandable.¹⁸⁸ Through highly visible prosecutions, the EPA’s reputation for public protection from polluters was built in the early years. For example, in November 1971, seeking to take high-visibility actions, the EPA obtained a temporary restraining order against 23 serious air pollutants of Birmingham, Alabama, based on the emergency powers granted in the Clean Air Act of 1970.¹⁸⁹ Such an action played a major role in shaking up the industry and providing stern

¹⁸⁴ Dobel, 489.

¹⁸⁵ Dobel, 497.

¹⁸⁶ Dobel, 498.

¹⁸⁷ Dobel, 489.

¹⁸⁸ Lipshitz and Mann, “Leadership and Decision Making,” 42.

¹⁸⁹ *Clean Air Act Oversight: Hearings before the Subcommittee on Public Health and Environment of the Committee on Interstate and Foreign Commerce, House of Representatives*, 92nd Cong., 1st–2nd sess. (1971–1972), 54–57.

warnings about the pollutants nationwide.¹⁹⁰ The success was credited to Ruckelshaus even though the action was taken without his knowledge by the regional office.¹⁹¹

During the second term, Ruckelshaus found the agency demoralized with a smaller budget and negative reputation. Under the previous administrator, Ann Burford, the EPA was viewed as an agency that manipulated science to satisfy political means.¹⁹² Ruckelshaus's goal was to "reestablish public confidence" by using "sound science," not politics.¹⁹³ He sought to reestablish the EPA's reputation by prioritizing its work through risk assessments, reframing the EPA's mission from pollution abatement to risk-based enforcement, which enabled the EPA to justify its programs to the Office of Management and Budget.¹⁹⁴ The clear mission and rigorous enforcement helped to establish the EPA's reputation before the regulated industries.¹⁹⁵ Wilson notes the importance of performing unique tasks that would promote agency autonomy and a clear mission, articulated by those in and outside the agency, in affirming the agency's legitimacy.¹⁹⁶

3. Decentralization

Another successful practice came from Ruckelshaus's mandate during his first term as the EPA administrator. Applying "new federalism," whereby regional offices had autonomy and authority to work with local groups, brought great success to the agency.¹⁹⁷ The regional presence also garnered broader support from the states and congressional

¹⁹⁰ Thomas Spencer, "An Old Cloud of Polluted Air Lifts from Birmingham's Shoulders," *Advance Local Alabama*, November 13, 2011, https://www.al.com/spotnews/2011/11/an_old_cloud_of_polluted_air_1.html.

¹⁹¹ Lipshitz and Mann, "Leadership and Decision Making," 43.

¹⁹² Sandra A. Hoffmann and Michael R. Taylor, eds., *Toward Safer Food: Perspectives on Risk and Priority Setting* (London: Routledge, 2010).

¹⁹³ Hoffmann and Taylor.

¹⁹⁴ Hoffmann and Taylor.

¹⁹⁵ Dobel, "Managerial Leadership in Divided Times," 500.

¹⁹⁶ James Q. Wilson, *Bureaucracy: What Government Agencies Do and Why They Do It* (New York: Basic Books, 1991), 188–89.

¹⁹⁷ Andrews, *Managing the Environment, Managing Ourselves*, 232.

districts and allowed greater sensitivity to regional environmental issues.¹⁹⁸ Ruckelshaus has recognized the complexity of environmental law, suggesting it requires a change that slowly emerges “from local experiences in this country and from the experience of some other nations” calling for a consensus process.¹⁹⁹ This practice appears to promote what General Stanley McChrystal observed in his command of the military in Iraq. When dealing with complex conditions, applying bottom-up creativity, not top-down management, brings a more effective result.²⁰⁰

B. THE FEDERAL TRADE COMMISSION

Although the FTC was not as successful in resisting political pressure as the EPA, there were glimpses of informal authority in the agency’s history. Particularly, when the 1969 reports by Ralph Nader and the ABA brought about an existential crisis in the FTC, a series of Republican FTC chairmen appointed by Nixon efficiently reorganized the agency and garnered much praise.

1. Hiring

One of the criticisms of the FTC was that its staff was inferior and a result of political patronage.²⁰¹ The ABA’s report noted that the FTC had hired and promoted people without qualifications.²⁰² In fact, when Weinberger was confirmed as FTC chairman, U.S. Representative Joe Evins, then-chair of the House Appropriations Subcommittee, handed Weinberger a list of three names of top-level FTC staff that Evins wanted protected.²⁰³ Weinberger did not heed the suggestion, removing and hiring staff as

¹⁹⁸ Andrews, 232.

¹⁹⁹ Ruckelshaus, “Stopping the Pendulum,” 231.

²⁰⁰ Stanley A. McChrystal et al. *Team of Teams: New Rules of Engagement for a Complex World* (New York: Portfolio/Penguin, 2015), 104–14.

²⁰¹ Philip B. Heymann, *The Politics of Public Management* (New Haven, CT: Yale University Press, 1987), 16–17.

²⁰² Robert E. Freer Jr., “The Federal Trade Commission—A Study in Survival,” *Business Lawyer* 26, no. 5 (July 1971): 1505, <http://www.jstor.org/stable/40684826>.

²⁰³ Heymann, *The Politics of Public Management*, 17.

he saw fit and not according to political patronage.²⁰⁴ According to Heymann's account, "Eighteen of thirty-one top staff members had left the agency; about 200 of the nearly 600 middle- and lower-level staff attorneys had also cleaned out their desks."²⁰⁵ Such actions were not without costs, as the FTC saw budget cuts, but the house-cleaning changed the direction of the agency.²⁰⁶ Subsequent FTC chairmen Miles Kirkpatrick, Lewis Engman, and Calvin Collier continued the pattern of hiring staff based on qualifications, not patronage. They encouraged rigorous recruiting practices to hire bright and committed attorneys.²⁰⁷ The reorganization also provided an opportunity to hire highly respected activists as part of the FTC team.²⁰⁸ The newly qualified, energized team of staff could carry out the new mission of addressing consumer protection issues. As an agency whose hiring practices had been criticized and qualifications questioned, the FTC needed an aggressive hiring process to lift its reputation.

No agency can be truly autonomous from Congress or the president, nor can it escape congressional or presidential control.²⁰⁹ As Wilson noted, though Congress may determine how many employees an agency can hire, it cannot control who may be hired for the positions.²¹⁰ Thus, taking advantage of hiring practices to staff its agency with qualified individuals would go far in developing the legitimacy of the FTC.

2. Clear Mission

Until Ralph Nader and the ABA issued scathing criticisms of the FTC, the commission had not been considered important to politicians; often, FTC positions were used for political favors, and nothing significant came from the commission.²¹¹ The ABA

²⁰⁴ Heymann, 23.

²⁰⁵ Heymann, 25.

²⁰⁶ Heymann, 24.

²⁰⁷ Heymann, 26.

²⁰⁸ Moe, "An Assessment of the Positive Theory," 495–96.

²⁰⁹ Wilson, *Bureaucracy*, 237.

²¹⁰ Wilson, 238.

²¹¹ Heymann, *The Politics of Public Management*, 15–17.

report noted that unclear priorities had caused mismanagement of resources.²¹² In the aftermath of the critical reports, and in the context of increasing consumer protection awareness, FTC Chairman Caspar W. Weinberger was tasked with restructuring the commission.²¹³ Under the direction of newly appointed FTC chairmen, the agency moved from individualized case-by-case prosecutions to a focus on nationwide deceptive advertising.²¹⁴ Merely 18 months after the ABA report was issued, the FTC's transformation garnered praise from its fiercest critics.²¹⁵ The FTC turned to cases that had nationwide implications, thereby increasing its visibility.²¹⁶ Criticism of the FTC's ill-defined goals and priorities and failing management was addressed fully within a short time.

3. Decentralization

To some, Weinberger's most notable achievement as the chairman of the FTC was strengthening and reorganizing its field offices because he wanted the FTC to be closer to the people.²¹⁷ Weinberger worked together with the field offices and determined the benefit of expanding their resources and responsibilities to make them mini FTCs of their own.²¹⁸ The field office attorneys were granted the authority to investigate regional matters, issue subpoenas, file their own complaints, and try their own cases.²¹⁹ These changes afforded the regional offices an opportunity to address local issues promptly and gather trends for enforcement.²²⁰ Granting the field offices greater authority to issue and pursue cases permitted closer relationships with state, local, and other agencies to result in

²¹² Freer, "The Federal Trade Commission," 1506.

²¹³ Heymann, *The Politics of Public Management*, 15.

²¹⁴ Wilson, *Bureaucracy*, 207–8.

²¹⁵ Freer, "The Federal Trade Commission," 1506.

²¹⁶ Freer, 1519.

²¹⁷ Cohen, "The Ronald Reagan Era," 5.

²¹⁸ Freer, "The Federal Trade Commission," 1508.

²¹⁹ Freer, 1508–1509.

²²⁰ Freer, 1509–10.

a more effective impact on the agency's mission.²²¹ The FTC staff called this decentralization revolutionary and the most significant change in the agency's history.²²²

Regional authorities allowed the field offices to address local and regional deceptive practices efficiently and effectively.²²³ For example, the FTC's Cleveland office held public hearings that permitted staff to gather sufficient information related to the local issues impacting their communities.²²⁴ As Wilson notes, "Central management of the bureaucracy, in all its important aspects, is not possible," and quoting Dean Acheson, former U.S. secretary of state, "the springs of policy bubble up; they do not trickle down."²²⁵ By strengthening the field offices and affording closer contact with the people and local and state governments, the FTC could address regional issues quickly.

Just as decentralization is an effective way to strengthen an agency, it may also be targeted by those who seek to take away an agency's autonomy. When Ronald Reagan became president, one of the strategies he used to limit the power of the FTC with businesses was to eliminate field offices and its authorities.²²⁶ However, partly due to the regional connections by field offices, Reagan-appointed FTC Chairman Miller could not eliminate them.²²⁷ In a way, the strength of decentralization prevented the total destruction of the field offices' reach in regional areas. Furthermore, as of 2005, "all but three regional offices specialize entirely in consumer protection matters, and competition cases are a

²²¹ Cohen, "The Ronald Reagan Era," 5.

²²² Carl L. Swanson, "Revolution at the Federal Trade Commission," *American Bar Association Journal* 57, no. 2 (1971): 132–33, <http://www.jstor.org/stable/25725387>.

²²³ Swanson, 134.

²²⁴ Carol G. Emerling, "The FTC Goes to the People," *American Bar Association Journal* 58, no. 2 (1972): 171–74, <http://www.jstor.org/stable/25725746>.

²²⁵ Wilson, *Bureaucracy*, 276.

²²⁶ Cohen, "The Ronald Reagan Era," 7.

²²⁷ Budnitz, "The FTC's Consumer Protection Program," 390.

relatively small part of any regional office's agenda."²²⁸ While this trend appears to be holding true as of this writing, the regional offices remain functioning.²²⁹

C. THE FOOD AND DRUG ADMINISTRATION

Though it had its own trials, the FDA is generally well respected and, thus, retains some level of autonomy to pursue its mission without political intervention. It did not experience an existential crisis as the FTC did in the 1970s, nor consistent political whiplash as experienced by the EPA. The reason may be multifaceted, but reviewing the FDA's handling of mission development and management of controversies may assist in understanding agency autonomy. As noted previously, the FDA's authority from the 1938 Food, Drug, and Cosmetic Act was born out of the Elixir Sulfanilamide tragedy, and the subsequent development came from FDA leaders who focused on pharmacology and toxicology and adhered strictly to scientific procedures to protect the public from danger.²³⁰ The FDA built its credibility through a focus on scientific neutrality.

1. Hiring

While the FDA's budget reduced unexpectedly in the mid-1940s and 1950s, the administration shifted from food regulation to pharmaceuticals.²³¹ Personnel were hired from top medical scientists who were also active participants in nearly 60 committees and scientific organizations.²³² When the FDA's focus lay on the review of the study designs for investigational drugs, hiring at the administration also emphasized pharmacology and toxicology experiences to properly support its mission.²³³ Carpenter notes, "The FDA has

²²⁸ Spencer Weber Waller, "In Search of Economic Justice: Considering Competition and Consumer Protection Law," *Loyola University Chicago Law Journal* 36, no. 2 (Winter 2005): 634, <https://law.ecommons.luc.edu/lucj/vol36/iss2/21/>.

²²⁹ "Regional Offices," Federal Trade Commission, accessed August 21, 2022, <https://www.ftc.gov/about-ftc/bureaus-offices/regional-offices>.

²³⁰ Kristin Jarrell, "Regulatory History: Elixir Sulfanilamide," *Journal of GXP Compliance* 16, no. 3 (Summer 2012): 13–14.

²³¹ Carpenter, *Reputation and Power*, 169.

²³² Carpenter, 307.

²³³ Carpenter, 470.

long employed more scientists and more heavily trained personnel than other agencies performing its functions, at times (in the 1970s) more so than in all the world's other drug regulators combined.”²³⁴ Moreover, the staff created and shaped networks and public relationships to legitimize the FDA through formal and informal committee management.²³⁵ Meanwhile, the FDA effectively utilized congressional hearings to establish its reputation as a scientific expert in its field.²³⁶

The FDA's hiring practices were richly rewarded during a medical tragedy in the 1960s. The legitimacy of the FDA was established when Frances Kelsey delayed approval of thalidomide in 1960, which had been used in Germany without a prescription and had been taken by three million people in Europe as a sedative.²³⁷ Kelsey was assigned the task of processing the NDA but identified a serious problem with the application and refused to approve it, standing against repeated pressure by the pharmaceutical company.²³⁸ By the end of 1961, the same drug was “tied to an epidemic of birth defects in Europe and Australia, and it was withdrawn from the European market.”²³⁹ Kelsey was not recognized until 1962 in a newspaper article, which was perfectly timed to influence upcoming legislation.²⁴⁰ The crisis opened the door for the Kefauver-Harris Amendments of 1962 and the Investigational New Drug Regulations of 1963.²⁴¹ The new amendments required both effectiveness and safety of all new drugs, creating a new drug investigational designation with the FDA's power to nullify and new power to enforce the protection of patients in medical research.²⁴² The benefits of hiring did not end there. In addition to

²³⁴ Carpenter, 21.

²³⁵ Carpenter, 308.

²³⁶ Carpenter, 333.

²³⁷ Carpenter, 213.

²³⁸ Seidman and Warren, “Frances Kelsey & Thalidomide in the US,” 497–98.

²³⁹ Carpenter, *Reputation and Power*, 213.

²⁴⁰ Seidman and Warren, “Frances Kelsey & Thalidomide in the US,” 499.

²⁴¹ Carpenter, *Reputation and Power*, 230.

²⁴² Carpenter, 260.

successes in the FDA's gatekeeping function, others have noted the enterprising FDA staff who have paved the way to expand the administration's authority throughout its history.²⁴³

2. Clear Mission

Beginning around the late 1930s, the FDA slowly moved away from focusing on food regulation to pharmaceuticals and began developing NDAs in the 1960s, seeking evidence of efficacy on almost all new drug submissions.²⁴⁴ The FDA's image was developed through changing regulations on NDAs, and the FDA tied its role in pharmaceutical gatekeeping to protecting the consumer.²⁴⁵ The FDA's pursuit of efficacy was done in ways that earned the admiration of medical practitioners.²⁴⁶ It also garnered the respect of well-known pharmacologists, scientific review committees, and even the media.²⁴⁷ Even when it struggled with a lack of resources to process all of the requests, the FDA's difficulties were viewed for what they were, and not a weakness of the administration.²⁴⁸

Kelsey solidified the perception of the FDA as dispassionate, neutral, and objective in the eyes of society, and Congress responded by granting the FDA greater authority and helping it solidify its role in society.²⁴⁹ However, by the time Kelsey joined the FDA, "its central precepts and institutions—efficacy, therapeutic value, clinical pharmacology's dominance, investigational-stage constraints, and the new drug application—were in place."²⁵⁰ The Drug Amendments of 1962 codified the FDA's power and practices that had stemmed from the 1950s: pre-market notifications transitioned to mandatory approvals

²⁴³ Eric R. Claeys, "The Food and Drug Administration and the Command-and-Control Model of Regulation," *Saint Louis University Law Journal* 49, no. 1 (2004): 117–21, <https://scholarship.law.slu.edu/lj/vol49/iss1/7/>.

²⁴⁴ Carpenter, *Reputation and Power*, 169.

²⁴⁵ Carpenter, 172.

²⁴⁶ Carpenter, 190.

²⁴⁷ Carpenter, 194–98.

²⁴⁸ Carpenter, 197.

²⁴⁹ Claeys, "The Food and Drug Administration," 114.

²⁵⁰ Carpenter, *Reputation and Power*, 226.

by the FDA; the approval standard changed from “safety in use” with implied efficacy to the formal “effectiveness” requirement. Then, in the 1960s and 1970s, the FDA developed a three-phase testing system for new drug investigations, which required bipartisan agreement in Congress, judicial deference, and continual FDA decisions that garnered support.²⁵¹

The FDA was not immune from accusations of politicians for being overly intrusive and too slow to move during a time of general distrust in government agencies.²⁵² Overall, U.S. society had lost trust in large institutions and professional expertise in the 1970s onward, and although the FDA fared better than other agencies, it also suffered from diminished influence and reputation.²⁵³ The FDA’s support was broad and vague, but attacks on it were particular; this dynamic shielded general attacks on the agency because “the specificity of the agency’s blame often supported the generality of the confidence Americans and others placed in it.”²⁵⁴

The FDA also showed its commitment to a neutral science-centered goal by being flexible in the face of controversy. One of the more controversial issues threatening the FDA surrounded a once-popular cancer treatment that the FDA vigorously denied: Laetrile. The FDA was taken to federal court by a patient, who saw success in lower courts, but ultimately, the Supreme Court sided with the FDA in denying the patient’s demand to place cancer in a special category of drugs to circumvent the administration’s requirements.²⁵⁵ Following the Supreme Court decision, the efficacy of the drug was tested in limited studies, which showed no significant change in cancer cells, and actor Steve McQueen, who had promoted and was undergoing the Laetrile cancer treatment, passed away, bringing a slow death to Laetrile usage.²⁵⁶ The FDA also showed flexibility and generosity

²⁵¹ Carpenter, 297.

²⁵² Carpenter, 379–80.

²⁵³ Lewis A. Grossman, “FDA and the Rise of the Empowered Consumer,” *Administrative Law Review* 66, no. 3 (2014): 633, <http://www.jstor.org/stable/24475486>.

²⁵⁴ Carpenter, *Reputation and Power*, 384.

²⁵⁵ Carpenter, 418–23.

²⁵⁶ Carpenter, 424.

when the AIDS health crisis arose by formalizing the “compassionate use” of drugs to treat AIDS while they were still under consideration for approval.²⁵⁷ Having a clear mission translated into flexibility and adaptability rather than self-preservation.

3. Decentralization

The FDA, unlike other regulatory bodies, developed centralized authority to regulate drugs entering and distributed in the United States. In developing its mission as the gatekeeper of new drugs, the FDA realized that decentralizing its power would not have supported its mission. Perhaps the FDA’s success in hiring qualified staff and its maintenance of core missions did not necessitate the distribution of authorities for preservation and effectiveness. The FDA did, however, make great efforts to plug into scientific and medical societies.²⁵⁸ As the FDA’s main audiences and interactions occurred within those communities, such connectedness would amount to the decentralization of the EPA and the FTC. The reputation built among the scientific and medical communities has supported the FDA’s legitimacy and garnered respect. Such “decentralization” also acted to neutralize threats the FDA faced when it intentionally incorporated AIDS activist groups into a conversation by providing them seats on advisory committee boards.²⁵⁹

Furthermore, within the FDA, a micro-level of decentralization occurred. As described by Carpenter, both “formal and informal authority diffused downward, coming to rest partially among the medical officers and principally in the middle layer represented by the Bureau of Drugs Director and the directors and deputy directors of the review offices.”²⁶⁰ Ultimately, the authority to revoke and withdraw drugs shifted down from the commissioner to the director of the Bureau of Drugs, which was later codified in law.²⁶¹ Again, “the springs of policy bubble up; they do not trickle down.”²⁶² Akin to

²⁵⁷ Richert, “Reagan, Regulation, and the FDA,” 470–71.

²⁵⁸ Carpenter, *Reputation and Power*, 308.

²⁵⁹ Carpenter, 448.

²⁶⁰ Carpenter, 491.

²⁶¹ Issuance of Notices Relating to Proposals to Refuse Approval or to Withdraw Approval of New Drug Applications and Their Supplements, 21 C.F.R. 5.82 (2001).

²⁶² Wilson, *Bureaucracy*, 276.

Ruckelshaus's belief in the importance of the EPA's reputation, the FDA maintained its reputation and respect by hiring highly qualified staff, developing and maintaining a clear mission, and connecting with the relevant community, which permitted a certain level of independence from political influences.

V. CONCLUSION

This thesis sought to find ways for an administrative agency to gain autonomy from political influences to accomplish its mission. This chapter provides an overview of the main findings of this research. It also includes a set of recommendations for those serving in politically sensitive agencies to build their reputations to gain support and autonomy. Finally, this chapter ends with future research recommendations.

A. FINDINGS

The first finding of this research is that a wholesale pursuit of autonomy that relies on technocratic experts and a science-based agency may not be possible for now, nor may it be ideal to pursue. Second, based on the comparative analysis of the FTC, EPA, and FDA, a formal agency structure for independence does not protect the agency, nor does it provide autonomy. Third, informal authorities arising from hiring qualified staff, developing a clear mission, and decentralizing the organization may be the solution for obtaining some form of agency autonomy.

A look at the EPA, FTC, and FDA shows that an agency's formal structure does not protect it from political tides and influences that drastically change or limit its functions. Although Lewis and Selin assert that considerations for agency independence should be based solely on formal structures, they do acknowledge that functional autonomy from political control is possible for "agencies with effective political strategies, monopolies over their policy jurisdictions, reputations for expertise, sympathetic interest group environments, and important symbolic value...with significant political independence."²⁶³

Based on the EPA's, FTC's, and FDA's experiences, it appears that developing and sustaining its credibility and reputation is the best way for an agency under high political pressure to maintain a certain level of autonomy in its core mission. Changing times and attitudes mean that such autonomy might look differently for each agency. However, some

²⁶³ Lewis and Selin, "Political Control and the Forms of Agency Independence," 1511.

common threads in the agencies include hiring qualified individuals, setting clear goals for core functions, and plugging into relevant communities through decentralization.

During Ruckelshaus's two terms as the EPA administrator decades apart, his core strategy for building the credibility of the agency involved the authority to appoint and keep critical positions.²⁶⁴ The FTC also built its reputation by hiring qualified staff during its brief time of reorganization under the Nixon administration. The FDA, too, took hiring seriously and acquired scientists who were connected to the scientific community.²⁶⁵

Moreover, Ruckelshaus's second step was "using law as a credible source to legitimize agency actions, increasing EPA's enforcement action."²⁶⁶ The FDA, too, developed its core function, focusing on toxicology and pharmacology, giving it clear direction.²⁶⁷ As Wilson notes, "The keys to organizational success" involve leaders who command personal loyalty, "define and instill a clear and powerful sense of mission, attract talented workers who believed they were joining something special, and make exacting demands on subordinates."²⁶⁸

Just as decentralization proved beneficial for the EPA and FTC, so too might decentralized authority bolster the autonomy of other agencies. The EPA's regional offices built relationships with those in the region and addressed regional environmental issues.²⁶⁹ It is in the regional-level offices that public entrepreneurs rise and innovate for the core mission, permitting the agency greater autonomy. The EPA's visible action against air pollutants in Birmingham, Alabama, was taken by its local office without the knowledge of its administrator. A clear mission combined with decentralization accomplished what was critical to the agency's reputation.

²⁶⁴ Dobel, "Managerial Leadership in Divided Times," 496–97.

²⁶⁵ Carpenter, *Reputation and Power*, 307.

²⁶⁶ Dobel, "Managerial Leadership in Divided Times," 498.

²⁶⁷ Carpenter, *Reputation and Power*, 226.

²⁶⁸ Wilson, *Bureaucracy*, 370.

²⁶⁹ Andrews, *Managing the Environment, Managing Ourselves*, 231.

As observed by Carpenter, “Mezzo-level bureaucrats...best allow for cross-divisional and cross-office comparisons.”²⁷⁰ In politically salient agencies, public entrepreneurs face many challenges—such as ambiguous goals, undue political interference, media and public attention, and restrictive managerial authority—but they might utilize such ambiguity to obtain a level of autonomy by leveraging opportunities in the present environment to innovate, not just respond to political pressure.²⁷¹ Many have observed that such public-sector innovations come from “managers far from the top” or “bottom-up entrepreneurship” arising from among experts in an area, from a collective rather than star individuals.²⁷² Regarding the politicization of environmental issues, Ruckelshaus similarly describes “all the significant stakeholders...brought together to hammer out a solution to a set of environmental problems” related to regionally significant issues.²⁷³ Such consensus building would be possible if authorities were decentralized. The FDA was engaged in such activities when its personnel were involved in almost 60 different committees and developed concrete relationships with relevant fields, garnering much respect from them.

B. RECOMMENDATIONS

The preceding discussion has indicated several lacunae in understanding how an agency may seek and obtain a certain level of autonomy that allows it to fulfill its mission. Wholesale agency autonomy does not appear to be a viable objective given the historical background and the public’s distrust in government institutions. Moreover, administrative agencies are political arms that cannot be completely free from politics. Furthermore, advocating for a formal structure of independence, which happens often, may not necessarily provide the autonomy the agency seeks. An independent structure may not hurt the agency, but it does not necessarily provide more autonomy, especially when the agency faces opposing political forces.

²⁷⁰ Carpenter, *The Forging of Bureaucratic Autonomy*, 21.

²⁷¹ Bernier, “Public Enterprises as Policy Instruments,” 255–56.

²⁷² Bernier, 257.

²⁷³ Ruckelshaus, “Stopping the Pendulum,” 231.

When an agency is faced with short-term political pressure, rather than seeking structural independence, it may be more effective to ask whether the agency has a clear mission for the good of the public that distinguishes itself from other agencies. If the agency lacks a definite mission, political tides could easily overwhelm its ability to function properly. Further, the mission must not lead the agency to take on the role of sole advocate at the expense of the impacted industry. For example, while the EPA balanced its mission and the industry's ability to change, the FTC's failure to consider both sides and take only the advocate's role resulted in significant political opposition and a reduction in its authority.

Hiring qualified staff to carry on the mission effectively is just as important to an agency as defining a clear mission. One reason the public's mistrust of large institutions intensified was that people did not see neutral competent agency staff who sought the good of the public. The ABA's scathing report against the FTC cited the commission's incompetent leadership and staff. Moreover, Ruckelshaus took the EPA administrator position only when he was given the authority to hire his own people. Building an agency's reputation and taking advantage of unforeseen opportunities—as Frances Kelsey of the FDA did when she prevented a national thalidomide crisis—are critical for an agency committed to hiring the right people for the right mission.

Finally, an agency should seek to distribute its authority to those closer to the subject of the agency's mission. Doing so ensures that the agency completes its mission effectively and allows greater discretion and reputation building by increasing the distance between agency action and undue political influences.

C. FUTURE RESEARCH

The findings of this thesis show that informal authorities may be more effective at obtaining and maintaining some level of discernible agency autonomy. An additional study on decentralization may be helpful to discern what this autonomy looks like in different agencies, as not all agencies have regional or local issues to address. Even without regional offices, it appears that centrally organized agencies can improve the regional relationship

by engaging in a broad spectrum of communities and committees, but an additional study could better determine which factors various agencies might implement.

Further, informal authorities arising from a clear mission, competent staff, and decentralization seem to support agency autonomy, but more research may be necessary to determine how to extend their effectiveness. The FDA is a good example of sustained autonomy through qualified staff and a neutral science-based application of its mission, but for some agencies, such success might not be possible due to the political climate of the day. Of note, the EPA's ultimate success was somewhat limited and the FTC's even less so.

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