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**Independent Agencies:  
US and EU**

MARTIN SHAPIRO

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Jean Monnet Chair Papers

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Shapiro: *Independent Agencies: US and EU*



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The Jean Monnet Chair

The Jean Monnet Chair was created in 1988 by decision of the Academic Council of the European University Institute, with the financial support of the European Commission. The aim of this initiative was to promote studies and discussion on the problems, important and current, of European Union following the Single European Act by associating renowned economists and political scientists from the various countries of the Institute in Florence.

European University Institute

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## **Independent Agencies: US and EU**

MARTIN SHAPIRO

1996

The Robert Schuman Centre at the  
European University Institute

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US and EU

MARTIN SHAPIRO

The Jean Monnet Chair

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## Independent Regulatory Commissions: Independent from Whom

The United States has experienced a very large number and broad range of “independent” agencies. That experience is usually interpreted, by Americans as well as others, as independence from one or more other government entities. The most prominent US independent agencies have been the large number of independent regulatory commissions, the alphabet of the ICC, FTC, FCC, SEC, CAB, FPC, NRC, etc., etc.<sup>1</sup> The first of these was the Interstate Commerce Commission of 1888 and most of the rest are roughly modelled upon it. These commissions are regulatory in the sense that they conduct government interventions into the private economic sector designed to correct some market failure or other anomaly concerning which the private sector is allegedly not self-correcting. It is this sensitive intrusion, in a nation deeply committed to *laissez-faire*, that inspires the call for “independence”. It is hard enough that the government is driven to interfere with the market. God forbid that regular government should do so in regular ways. Driven by necessity, government action may be justified, but it must be purified government action.

The structural feature that unites the independent regulatory commissions is that they are commissions, that is multi-headed agencies. The commissioners, typically five to twelve in number, serve for a fixed term of years, often twelve and always more than four. They serve staggered terms, typically one or more leaving every two years. They are appointed by the President and must be confirmed by the Senate – the same arrangement as for most of the executives of the Executive Branch. In short, the arrangement is that the President appoints, just as he does the heads of other federal agencies, but no given President in any four year term gets to appoint a majority of the commissioners of a given commission.

<sup>1</sup> Because of frequently encountered misunderstandings in Europe, it should be added that *neither* OSHA (Occupational Safety and Health Administration) *nor* E.P.A. (Environmental Protection Agency) are independent agencies. OSHA is a unit of the Department of Labor. E.P.A. is a cabinet department in all but name. Its director serves at the pleasure of the President and the agency’s organization and legal status is that of a regular executive branch agency. Congressional opponents of environmental regulation were able to deny it the symbolic prestige that the title “Department” carries, but it has no more or less “independence” than the Department of Commerce or the Department of Labor.

It would appear then that independent means independent of the President. Certainly it does not mean independent of Congress. For the independent commissions bear exactly the same relation to Congress as the cabinet departments (ministries) and their subdivisions. All federal agencies, independent or otherwise, are created by Congressional statute and their missions assigned and defined by statute. All receive their money by annual Congressional appropriation. All are overseen by four, subject matter specialized, permanent Congressional committees: House and Senate "legislative" committees with jurisdiction over the making of the laws involving the agency and House and Senate Appropriations Committees. While it is often claimed that most of the Commissions receive relatively little Congressional attention most of the time, that inattention does not differentiate them from non-independent agencies. Congress, or rather particular Congressmen, pay attention to particular agencies when, and only when, agency action or lack of action raises the opportunity for politically advantageous Congressional intervention.

It also is sometimes said that the Commissions bear a special relation to Congress. The typical commission situation is that Congress has recognized the need for legislation but is reluctant to write detailed laws because the area involved is one that is rapidly changing in unanticipatable ways or requires many hundreds or thousands of short-term decisions that must be constantly updated. The Federal Communications Commission and the Nuclear Regulatory Agency, for instance, were created at times in which government intervention was obviously needed but the technology to be regulated was new, mysterious and rapidly developing. The ICC, the Federal Power Commission, the Civil Aeronautics Board and the Securities and Exchange Commission each was designed to approve thousands of constantly changing rates or transactions. Because Congress was delegating its legislative authority to the Commissions in a rather open-ended way, Congress might be expected to maintain particularly close supervision. In this view the independent commissions ought to be less independent, of Congress at least, than the non-independent agencies. In fact, however, Congress has often engaged in rather sweeping and open-ended delegations of legislative authority to various regular departments and other entities of the federal government. Supplementary law making (rule-making) is conducted by many independent and non-independent agencies of the federal government, and Congress does not seem to supervise these delegations more closely for one than the other.

Almost without exception the legislation governing the independent commissions provide very generous opportunities for judicial review. The Admin-



istrative Procedures Act does not distinguish between independent and non-independent agencies either in its provisions for administrative rule making and adjudication or its provisions for judicial review. The independent commissions are no more or less independent of the courts than are the non-independent ones.

So are we quite sure then that the “independent” in independent regulatory commission means and only means independent of the President. We are not even sure of that. The legislation establishing the ICC in 1888 and that establishing most subsequent Commissions did not specify whether the President might dismiss commissioners at will before their fixed terms expired. We only know retrospectively that Presidents can’t dismiss Commissioners at will because the Supreme Court said so in the *Humphreys* case in 1935<sup>2</sup>. The Supreme Court still has not told us whether or when or how the President may communicate his policy preferences to the commissions as to the substance of their proposed rules or adjudicatory outcomes. (The President may not veto the proposed rules of even non-independent agencies because those agencies are fulfilling a statutory duty to make such rules.) The President chooses the chair of each commission from among the commissioners, and that person does serve as chair, but not as a commissioner, at the will of the President.

In short, Congress has always chosen to keep Presidential appointment of commissioners (it is not clear that it could constitutionally do otherwise) and has itself placed almost no specific limits on Presidential authority over the commissions except to provide that no President in one four year term can appoint a majority of the commissioners.

That the independent agencies are not at all independent of Congress or the courts, or no more independent than other federal agencies, and that their independence of the President is so marginal and indeterminate, particularly in the actual language of the statutes establishing them, suggests that we will not really discover the meaning of “independent” in this context by asking the question “independent from whom?” that is independent from what other organs of government. Independence, if there be independence, would seem to lie along another dimension.

2 *Humphrey's Executor v. United States*, 292 US 602 (1935).

## Independence from Partisan Political Control

A clue to that dimension may be found in the fact that the impetus for the first independent commission, the ICC, is to be found in Progressivism, an American intellectual movement of the late 19th and early 20th Century<sup>3</sup>. The Progressives were reacting to the widespread graft and corruption that marked federal, state and local government in that period. That corruption appeared to be the result of a deeply rooted American democratic theory and practice. The theory was that the affairs of government should be conducted by the people themselves not by an elite corps of officials. The practice was that government employees had no tenure in office. When a Republican succeeded a Democrat as mayor, governor or President, he dismissed all serving government officials, replacing them with his own party faithful. If a Democrat was next elected, the process was repeated in favor of a new round of Democratic government job seekers. "To the victor goes the spoils". Given the two-party system in the US, such Democrat-Republican turn overs should occur fairly frequently so that there would be "rotation in office" (recall the circulation of elites of Pareto). This democratic vision of endless Cincinnati stumbling to and from the plow had in fact resulted in massive corruption and inefficiency in government service.

The Progressive response was to argue that much of government, and certainly all of public administration, was not about policy choice and thus about politics and the demos but was a matter of management and thus about scientific and technological expertise. Those large parts of government should be pulled out of politics and placed in the hands of experts. The great monument to the Progressives is the Pendleton Act of 1883 which created a neutral, expert, career civil service for the federal government and the many similar state and local statutes enacted in the same period. Other monuments to be found particularly in many mid-western and western states where Progressives were most influential are "city-manager" systems in which the executive functions of local government are placed in the hands of an expert civil servant rather than an elected mayor and non-partisan elections for certain state and local office in which the names on the ballot may not carry party designations.

The commission form was surely not invented by the Progressives, but they championed that form at many government levels from local sanitation com-

<sup>3</sup> For an exhaustive history of the ICC, see I.L. Sharfman, *The Interstate Commerce Commission* (New York: Commonwealth Fund, 1931-37).

missions to manage garbage collection on up to the I.C.C. The commission form has obvious anti-corruption benefits, which had been evident to the English centuries earlier when they put the admiralty "in commission", and which naturally attracted the Progressives. But the commission form had an even greater attraction for the Progressives who had, after all, to peddle their elitist political theory in a country profoundly committed to democracy. The commissioners, either themselves elected or appointed by someone who was elected, could serve as a kind of popular or democratic board of directors overseeing but not interfering in the day-to-day decisions of expert managers. Moreover, the commissions, even though representing the people, could avoid the excesses of partisan, party politics either through having the commissioners chosen by non-partisan elections or insuring that their membership was split between Republicans and Democrats so that neither party could steal the spoils.

Thus the appointment and terms of office arrangements for the ICC, which appear to be directed against the President, are really much more concerned with party partisanship. At any given time commissioners appointed in three different four-year presidential terms will be sitting. Given two party competition in the US, the normal result will be that in any given year the Commission will consist of some Democrats and some Republicans. The point is to avoid complete control by a single party. Indeed in setting up the FCC, Congress actually specified that no more than a bare majority of the commissions could be from one political party.

Certainly the Commissions were not to be independent of politics. The commissioners were selected by exactly the same process as all the standard political appointees of the President such as his cabinet officers. The Commissions are not even independent of partisan politics. Congress clearly anticipated that party partisanship would carry on to the Commissions. (At state and local levels the Progressives did frequently seek to eliminate partisan politics, but not democratic politics, by providing for non-partisan election of boards and commissions, but the Progressives never achieved non-partisan elections at the national level.) What the federal independent regulatory commissions were supposed to be independent of was control by one political party. The degree of control by the President was left unclear in the statutes because Congress was less interested in creating independence from the President as President than they were in creating independence from the political party of the President. Where government is extraordinarily intervening in private property matters worth millions of dollars, what was essential is that neither of the two

great political parties be able to manipulate the intervention to its own material and ideological advantage.

I have just suggested that the Progressives were more or less reluctantly pushed into acknowledging some role for the demos in public administration. Progressive commitment to technocratic government nevertheless remained deeply rooted. Thus the independent regulatory commissions have always presented a somewhat paradoxical face. When their existence or their particular decisions are being defended either in public or in court, technological legitimacy is invariably trotted out. The decisions of the Commissions are defended on the ground that they involve complex, technical and thus non-partisan questions, to which there are not Republican or Democratic, but only correct answers. These decisions are made on the basis of expert evaluation of huge bodies of information that only the commissions have the specialized competence to gather and evaluate. Yet the Commissions are not composed of experts but of political appointees whose only claim to special legitimacy is that usually not all of the commissioners are of the same political party. Of course, one is free to view this in either of two ways. Either we have a falling between two stools of legitimacy in which democratic and technocratic rationales contradict one another. Or we have the best of both worlds: expert analysis by the commissions technocratic staff with sufficient oversight by politically appointed commissioners to ensure that the experts are "on tap but not on top".

## **A Model of Independence**

The American experience I have described can be rendered in a rough model. Independence itself is essentially a political dimension running to three degrees: (1) independence from serving the partisan advantage of one political party, (2) independence from partisan party politics, and (3) independence from politics. The Commissions, headed by partisan, party politicians, but with membership balanced between the two parties, is an example of (1). Various state and local boards and commissions filled by nonpartisan elections are examples of (2). Various government agencies which, either by statutory provision or general expectation, are headed by one or more persons appointed on the basis of technical qualifications illustrate (3). But most such technically headed agencies are not independent. It is expected that the President will name banking and financial experts to the Federal Reserve Board and

economists to the Council of Economic Advisors. The former is an independent agency. The latter is not. Indeed the appeal to technological legitimacy is less often the basis for establishing an agency independent of politics than a justification for establishing an agency of type (1) or type (2), that is an agency freed of the normal workings of two party, partisan politics.

While I have concentrated on regulatory agencies, independent agencies may be created to pursue other missions. Such agencies are sometimes created for largely managerial purposes – to conduct some ongoing operation. The government corporation, established as an essentially private corporation but with the government as principal or sole stock holder is one such form with many variations of detail designed to create independence from direct political supervision. The Reconstruction Finance Corporation and many other government credit operations in the US are prominent examples. Operational independence is also sometimes achieved through entities like the Tennessee Valley Authority, as agency created to manage the construction and operation of a complex of government owned dams and power generating stations. But the TVA, while not lodged in one of the cabinet departments is not “independent” in the legal sense the Commissions are because its head serves at the will of the President. The US Postal Service and Amtrac, which operates passenger trains, are other examples of the various kinds of management entities that can be structured with more or less isolation from direct political control. For instance, while Postal Service management is essentially autonomous, postal rates are set by Congressional statute. Finally, while regulation to a very large extent, and management invariably to some extent, involves public policy making, some independent agencies are established whose sole or primary mission is policy making. The Federal Reserve Board is the most prominent example. While it performs some regulatory functions, and manages a large banking operation, its central significance is as a financial policy maker through its influence on interest rates. City planning boards or commissions are another example. Typically detailed zoning or land use regulation is done by statute but with provision that a board or commission may issue variances or waivers. Such planning entities are usually structured as more or less independent agencies.

If we now consider the three degrees of independence and the regulation, management and policy making missions, a number of observations are rather obvious. For instance, most management activities of government are carried on by regular executive agencies. The creation of independent management agencies usually involves some special rationale and that rationale is usually

akin to privatization rationales. It is alleged that the government is inherently less efficient at a particular operation than non-government would be. For example, the most significant activities of the Federal Aviation Agency (which is not an independent agency) are airline safety regulation and operation of the air traffic control system. The FAA has proven incapable of creating an efficient air traffic control system. It claims that its incapacity is the result of cumbersome government procurement regulations that prevent it from purchasing efficiently in an electronics and computer market characterized by rapid technical change. The suggestion is now being made that air traffic control be spun off as some sort of independent or private entity solely for the purpose of freeing it from government procurement regulations.

Whether or not to grant government program management entities independence depends, however, not only on efficiency arguments but also on the degree to which it seems desirable for some special reason to reduce or eliminate the influence on those operations of normal, partisan politics. In a democracy we choose to conduct most of the operations of government democratically, that is through party, electoral politics. Some degree of independence is sometimes chosen as a compromise when Americans cannot decide whether a particular operation should be in the public or private sector, as with the TVA. Or it may be chosen when the operation is particularly subject to corruption by partisan politics, such as credit or banking operations or zoning variances. Or it may be chosen because some peculiar weakness of government renders government operation difficult, as in the air traffic situation. Or, invoking the Progressive ideology, it may be chosen because the operation is a "purely technical" one in which "politics" should play no part.

## Technological Legitimacy and "Information"

This latter rationale, however, is a particularly volatile one and is particularly relevant to the EU. A number of the EU independent agencies, and such proposed ones as the statistical agency, are described as essentially information gathering agencies. The technological or Progressive rationale is then invoked. Information gathering operations are purely managerial not political. They involve no discretion. Facts are facts. American experience suggests a more complex reality. American statistical agencies have not been independent. The Bureau of Labor Statistics and the Census Bureau are units of regular cabinet

departments. Their statistical work is considered purely managerial and apolitical *until* some important issue of public policy turns on, or some substantial private or public interest is helped or harmed by, their statistical findings. Then their data gathering, procedures of analysis, and findings become very much matters of politics. And the long acknowledged technical expertise of these agencies does not save them from political attack. In other words activities which in the abstract and/or most of the time are perceived as nondiscretionary, managerial and technical will be reconstituted in public perception as discretionary and political when they produce results that are significant to public policy choices or to the clash of political interests. It may be argued, of course, that American statistical agencies would have been less suspect and more sheltered from political controversy had they been independent. All that the American experience makes completely clear is that statistics like war is seen as far too important to leave to the experts.

The modern world gives us complex information and complex information gathering and analysis technologies, technologies that are constantly changing and increasingly tuned to uncertainty, risk, probability, and estimation. Under such technologies there are likely to be two or more versions of most of the information we care about. Clearly information is a central weapon in most contemporary political or policy conflicts. The vision that X will gather and present the information to Y who will do the policy making so that X should be independent and Y should be political is a curiously mechanical one today. Most information gatherers are likely to find that they are indeed studiously ignored day after day until one day some bit of information they have gathered becomes politically salient. And it is on that day, when they need it most, that their claim to technological detachment will be credited least.

## **The Independence of Policy Making Agencies and Problems of Coordination**

Where the mission of an agency is more or less pure policy making, it is difficult to see how independence in the form of complete apoliticism through direction by technicians can be justified within democratic political cultures. For those who believe in democracy, why should any government policy decisions be made undemocratically? Even where, for very peculiar and compelling reasons, one might wish to exempt some narrow policy segment from

immediate or even indirect democratic control, in modern polities policies almost always interact. In democracies such institutions as parties or cabinet governments are intended to coordinate and harmonize the various policies of government and failures of coordination are often dearly paid for. To isolate one or more policy areas from these coordinating instruments by establishing independent policy makers almost insures lack of coordination and its attendant costs. The Federal Reserve Board currently enjoys great favor in the US because by luck or skill it appears to have chosen just the right changes in interest rates to facilitate the remarkably long, slow growth, relatively low unemployment, low inflation economy that the US has been experiencing. But in other periods when the US economy has not been doing so well, tensions between the President and his Treasury Department and Council of Economic Advisors on the one hand and the Board on the other have been acute. Presidents have complained bitterly that on the one hand they are held responsible for adopting and implementing acoherent economic policy while one of the key elements in such a policy is beyond their control. There has long been concern in the US for the coordination problems created by the large number of independent agencies in the US. Those problems become particularly acute where a central element in government policy is turned over to an independent agency.

## Independence and Regulation

Independent agencies that regulate privately owned business enterprises are a sort of half-way house in a number of respects. As I have already indicated, in a nation so devoted to laissez-faire if government could not be kept out of business, independence at least kept out partisan political manipulation. Moreover in the creation of most of the regulatory commissions, their managerial functions, as opposed to their policy making functions, were stressed. The ICC's central job was setting rail freight rates. This task was presented as a purely information gathering, technical nondiscretionary activity. Commission accountants would gather from the railroads data on their capital investment and operating costs. The financial markets would provide data on the going interest rates and returns on various types of investment. From all this data setting rates that provided each railroad a reasonable return on investment was alleged to be a purely technical, accounting, indeed arithmetic task. Getting this task "out of politics" seemed desirable. No one, however, was naive



enough to believe that rate setting had no policy dimension, that it did not somehow involve balancing the interests of carriers and shippers and of various parts of the country. But because management of information seemed paramount and policy making secondary, some degree of independence seemed appropriate. Indeed the prototypic independent agency in the US has been one that regulates private enterprise by means of gathering and analyzing technical information and thus appears doubly suitable for placement outside of regular democratic politics.

### The American Model

	management	regulation	policy
no party in control		federal and state regulatory commissions	
nonpartisan electoral	state and local sanitation, police boards and commissions	some state utilities commissions	local boards of education
apolitical	city managers government corporations		Federal Reserve Board city planning commissions

## Some Further Comments on the American Model

At least in terms of American experience the model proposed here generates a fair number of instances of agencies in the cell defined by relatively complete apoliticism or technocratic legitimacy along the independence dimension and managerial along the functional dimension. Most of these are government owned or majority share holder corporations or similar entities that are conducting particular enterprises that might under slightly different circumstances be entire privatized and which essentially provide consumer goods and services.

At the other extreme is the cell defined by apoliticism on the independence dimension and policy making on the functional dimension. It takes extremely exceptional circumstances to justify nondemocratic policy making in democratic polities. This cell is rather like constitutionally guaranteed rights. It is the announcement by the demos that it does not trust itself and wishes to put certain policy questions beyond its own reach. It is one thing, however, to place a policy beyond democratic control by the relatively fixed provisions of a constitution and quite another to place it in the hands of an agency of government wielding ongoing discretion. It may be argued of course that excluding a policy from democratic control by constitutional provision in reality is also simply placing that policy in the discretion of a government agency wielding ongoing discretion, namely whatever court authoritatively interprets the constitution. But the movement of policy discretion from the demos to a policy making elite is far less obvious when the transfer is to courts by way of constitution than when it is to independent agencies.

In this connection the EU proposals for an independent central bank are interesting. To the extent that the proposals envision a central bank that actually exercises discretion over interest rates and monetary and fiscal policy more generally, the proposals trigger both democracy and government policy coordination concerns echoing those about the Federal Reserve in the US. To the extent that the proposals really involve simply an elaborate institutional structure for fastening a fixed, high interest rate, low growth, high unemployment policy on the Union indefinitely, then they are actually a kind of constitutional amendment creating a Union right to no inflation which, like other constitutional rights, takes precedence over such mere policy concerns as economic growth and full employment.

The cells generated by nonpartisan democracy on the independence dimension and management and policy making on the functional dimensions are rather full of state and local government agencies in the US. These clusters represent the distrust of partisan party politics that has swept the US from time to time.

Finally the cell defined by avoidance of one party control along the independence dimension and regulation along the functional dimension is filled by American federal and state regulatory commissions that are the best known examples of American independent agencies. They exhibit the least independent form of independence, some limited independence of the President but no particular independence of Congress or the Supreme Court and only the small degree of independence of partisan party politics that come from avoiding total dominance by one of the two major parties. This intermediate and ambiguous degree of independence results from the convergence of three tensions. The first is the American dedication to *laissez faire* in conflict with the perceived need for regulation. Because we are invoking government only reluctantly at least let it be less than normal government. The second tension arises because regulation inevitably is in part management and in part policy making. Perhaps management should be separated from normal government but, in a democracy, policy shouldn't usually be. Some politics and some independence from politics reflects the mixed managerial-policy functions of regulatory agencies. Finally there is the general tension between technocratic and democratic legitimacy. Some Americans believe some of the time that there are some tasks of government that are purely technical and ought to be controlled by experts. But all Americans know most of the time that so-called technical judgments nearly always harbor some element of policy preference. Thus agencies may be somewhat separated from politics because of their exercise of technical expertise but not too separated.

## Independent Agencies in the EU

So while it is true that in a very few instances Americans have attempted to establish agencies or executives defined as purely technical and, therefore almost completely divorced from politics, most of the best known of the American independent agencies have been independent in the very special sense of being isolated from the immediate control of either of the two major political

parties rather than as being independent of the three great constitutional branches.

From this perspective US experience may appear entirely irrelevant to the EU. For one of the most unique characteristics of the EU is the peripheral role of political parties. More broadly, however, American experience might be read as an attempt to partially isolate certain agencies from "normal politics" or "the usual politics". The normal or usual politics of the EU is, of course, not party politics but member state politics. Even from this normal politics perspective, American style independence may appear irrelevant because the organization of the EU independent agencies has invariably incorporated management boards that reproduce the member state representation structure of the Council itself. In this sense the agencies are less independent of politics as usual than the Commission.

Paradoxically perhaps it turns out that the EU independent agencies are much more a matter of separation of powers independence and much less a matter of independence of normal politics than are the American. EU independent agencies are "independent" because they are (partially) independent of the Commission not because they are independent of the normal partisan politics of the EU, that is, intergovernmental politics.

However, before turning to the partial independence from the Commission, a further look needs to be taken at the notion that the EU agencies are not independent of normal intergovernmental EU politics because of the structure of their boards. The standard overt rationale for the creation of EU agencies is that they ought to be partially or wholly independent of the Commission because they are "managerial", perform "technical" tasks or are engaged in "information" gathering and analysis only. In the US it may make sense to say that managerial, technical, informational functions should be separated from the regular cabinet departments or ministries because those departments are part of the Executive Branch which is political, because it is headed by a democratically elected president. This is the get-technology-out-of-politics theme. But the separation of powers in the European Union is entirely different. The Commission-Council separation is itself a supposed separation of technocracy (the Commission) from intergovernmental politics (the Council). Therefore, to assert a managerial-technical-informational rationale for separating the agencies from the Commission is, in a certain sense, absurd. It is the assertion that the technical ought to be separated from the technical.

Is all this managerial-technical-informational talk simply a smoke screen for the more fundamental argument that, because Europeans don't like the technocrats in Brussels and fear concentrating even more governance there, if we want more EU technocrats, we need to split them up and scatter them about Europe? I think the answer to this question is largely yes but not entirely.

A second motive is, I believe, a kind of "neo functionalism". If currently direct routes to further political integration of the Union are blocked then, following Haass' old arguments about the World Health Organization and the U.N., further growth can be achieved indirectly through the proliferation of small, limited jurisdiction, allegedly "technical agencies" that will appear politically innocuous. That is why it is not enough to say that the agencies are not in Brussels. It must also be said that they are merely technical or informational.

A third motive really is about technocracy. The member state composed management boards were a political necessity no doubt. But by stressing the technical and informational functions of these agencies, by making each highly specialized to a particular technology and by incorporating large components of scientific personnel, there is undoubtedly the hope that the technocrats will take over these agencies from the politicians. And the technocrats for each of these agencies, it is hoped will create Europe-wide epistemic communities whose technical truths transcend intergovernmental politics. As Americans say "there is no Republican or Democratic way to pave a street", Europeans may be able to say there is no French or Greek way. Thus, while the proffered technocratic rationales do not really explain why the agencies should be independent of the Commission, they do explain why the agencies should each take a small slice of allegedly technical-informational activity. That kind of organization is most likely, over time, to assure the internal dominance within each agency of its technocrats over its national politicians.

The fundamental argument for EU independent agencies may well be that, given the current state of the EU, the only road toward further positive development is the proliferation of government functions outside of Brussels prescribed with a technological-informational sedative to rampant anti-EU sentiment. If this is the argument, American experience is hardly relevant on the benefits side. Whether this route will or will not achieve EU growth and, indeed whether further EU growth is desirable now or ever, are hardly American questions. On the cost side, however, American experience may be relevant along three dimensions.

## Problems of Coordination

The first of these dimensions is coordination. The United States has over a hundred years of experience at creating independent regulatory commissions one at a time, each on pragmatic grounds, each with relatively narrow competencies, each allegedly without policy discretion. The ultimate American result has been continuing complaints of a “headless fourth branch of government” and grave concerns about piecemeal diversions of policy making from overall Presidential coordination<sup>4</sup>. The total size of the sector of governance that has escaped the regular government has turned out to be fairly large. More important, the independent pieces tend to overlap and interact with the policy making of the regular government so that incoherence of government policy is always a risk.

A response that the EU agencies are informational only and not regulatory and so do not present problems of policy coordination is not entirely satisfactory for a number of reasons. Most importantly, at least three of the EU agencies, Harmonizational, Medical Products, and Plant Registration, are clearly regulatory and calling them “technical” does not make them less regulatory. Each grants or withholds an extremely valuable economic right to a private enterprise in furtherance of a public policy. It is indicative that, while constantly asserting that “technical” decisions are “non-discretionary”, the Harmonization Agency was created with a trademark appeals board – a clear indication that no one expected trademark decisions to go uncontroverted. Clearly the creation of this appeals board reflects the experience of trademark lawyers that, while trademark decisions are about “technical” matters, there is often “technical” evidence and argument on both sides and ultimate decision is, to some degree, discretionary and to some degree based in public policy grounds.) Moreover, I will try to argue in a moment that even the “informational” functions of agencies have policy dimensions of key importance that raise policy coordination issues.

It could be argued that coordination problems will not be raised by the EU agencies because each is governed by an intergovernmental board. Given that each board has representatives of each member state, coordination will be

<sup>4</sup> This concern for coordination is reflected in a whole series of Presidential reports, Congressional hearings and academic writings. For an introduction to these materials, see H. Linde, G. Bunn, F. Paff and W. Church. *Legislative and Administrative Processes*, 2nd ed. (Mineola, N.Y.: Foundation Press, 1981) pp. 599-639.

achieved by the usual intergovernmental routes. That is, the French cabinet government system will assure that the French member(s) of agency X will favor policies coordinated with those favored by the French member(s) of agency Y. Such coordination through member state governments is problematic, however, for two reasons. First, national governments are not usually as successful as in theory they ought to be at coordinating the policies of their own ministries and, of course, different national ministries will direct the national members of different EU agencies. Second, in many instances policy issues will arise at EU levels before they have solidified and been coordinated at national levels. National governments cannot easily coordinate their positions on policy X and Y when they, as yet, have no such positions.

Moreover, the very emphasis on scientific and technological expertise in the agencies poses potential coordination problems. Experts by definition are specialists who devote "more and more" of their lives to "less and less" because modern knowledge is so large and complex that expertise can only be gained by any one person over a small part of it. Thus scientific and technological experts exhibit the most classical *deformation professionnelle*. By the very nature of their lives, they assign a far higher priority to some very small arena than any of the rest of us would or than we would collectively. A forest turns out to be a series of entirely different places to the timber manager, recreation specialist, fire control specialist, fish and wild life expert, highway engineer, water quality monitor, range manager, wilderness enthusiast and land use planner. They quite literally do not see the same thing when they look at the trees. The attempt of the US Forest Service to generate multi-use forest plans has been a, so far, unending story of inability to resolve conflicts among experts. The expertise of agencies has a kind of multiplier effect on the independence of agencies in generating a potential for conflict.

## Problems of Legitimacy

The second major future cost that independent agencies might generate involves legitimacy. To the extent that the independent agency movement is a device for countering public disaffection with the Commission, the move is paradoxical on the legitimacy dimension. It seeks to respond to public disillusion with one technocracy by the creation of many more. The Union may indeed suffer from some kind of "democracy deficit". But the whole Western world has been going through a phase of disillusion with technocratic govern-

ment. Anti-Commission public sentiment is not simply a discrete and unique Community phenomenon. Rather it is one among many symptoms of a general Western reaction to technology and technocracy. Other symptoms include the Green Party, many facets of the environmental movement, many facets of the deregulation movement, the many "agency forcing" and "technology forcing" provisions of recent major US legislation and the strong anti-technocratic themes sounded in the last French presidential elections. It is true that episodes of political party corruption and breakdown such as the recent ones in Italy and Japan may engender calls for "governments of experts", but such calls should not mislead us as to the relative legitimacy of technocracy and democracy. Today's "experts" are tomorrow's "bureaucrats". Today's "politicians" are tomorrow's leaders of their countries.

On a broader front we may speak of the "legitimacy crisis" of modern governments or the general Western withdrawal of perceived legitimacy from institutional hierarchies of all kinds. The point is that curing weak democratic legitimacy by a move to technocratic (and thus obviously elite) legitimacy has a certain "out of the frying pan into the fire" aspect.

I have already argued that dressing technocracy in the garb of "information" and thus attempting to denature its political significance is not necessarily a winning strategy because, as soon as information becomes highly relevant to policy outcomes, the information and the information gatherers cease to be defined by the public as neutral and objective and are redefined as part of the political struggle. In general, when we are now talking about "the information society" and the "power" of information, and when political parties, interest groups and individuals spend billions of dollars on informational political campaigning, it is hard to maintain the vision some kind of clear disjunction between information and politics or policy making. Contemporary politics is a politics of information. The politics and policy making of environmental, health and safety regulation, energy, international trade, the seas, global warming, tobacco regulation, nuclear proliferation, privatization, etc. are arenas in which scientific and technological information battles are central to political outcomes. To say that an agency only provides information, that it neither makes nor enforces policy, is in a certain sense incomprehensible in the conditions of modern politics. Is there really no enforcement dimension when an agency provides the "information" that vehicular emissions are the cause of 90% of the excess of air pollution over the legal standard set for pollution in a given area? Is there really no policy making dimension to the "information" that German brown coal burning is killing the forests of Swe-



den. If scientific information is not a crucial form of politics, then the tobacco industry has certainly been foolish in spending the billions it has on "research" over the years.

Aside from this general point, there are three structural factors that make it difficult to maintain a separation between information and policy making. First, we simply cannot do all research about everything. We cannot gather and analyze all information. We must have research and analysis agendas. What research we do determines what policies we make. What policies we wish to make determines what research we do. In this way information agencies are always policy agencies.

Secondly, in the modern corporate capitalist world, private enterprise always knows more than public and has considerable capacity to hide and manipulate what it knows to its own advantage. If we respond to corporate capitalism by government regulation, then public "information" agencies are necessarily deeply involved in regulatory politics and deeply involved on the side of the regulators against the regulated. Much of government's current investment in data gathering and analysis is devoted to evening up its information resources with those of the private sector. Information is a crucial tool of both regulatory policy making and enforcement. It is hard to see how a government agency gathering information about the performance and impact of regulated enterprises can be kept separate from regulatory politics particularly when the resistance of the regulated to regulation will frequently take the form of challenging the information presented by the regulator.

Moreover, the dominance of many regulated industries in the support of the very scientific and technical research and analysis crucial to their regulation creates situations in which government agencies devoted to information are peculiarly vulnerable to capture. If all of the first line pharmaceutical research chemists work for the drug industry, then a government agency devoted to drug information will gather whatever information the industry chooses. Such capture, real or suspected, tends to bring the politics of information to public attention. Where government regulates, information is hard to keep clear from regulatory politics.

Thirdly most new laws are not really new but amendments to existing laws. Most new government programs are not new but incremental changes in existing programs. Thus much of the information relevant to governance is feed back. For the most part government does not go out on its own and collect

new information and having done so create new programs and policies based on that information. For the most part government is already running programs. In the course of doing so it receives a lot of information from the beneficiaries and/or targets of the programs concerning their successes and failures. No one knows more about a government program or policy than the government agency operating or implementing the program or policy because the agency is the natural focus of complaints about it. Government programs and policies are altered on the basis of this end use information. Although one might somehow conceive a pure information agency that did no operation or implementation, one cannot at all conceive of pure operators or implementers who do no information gathering and analysis. Thus if we set up pure information agencies, we are bound to create information rivalries between those agencies and operating agencies. To the extent that conflicts are engendered between information agency information and operating agency information, we have not only a coordination problem but a legitimacy problem. For nothing more quickly delegitimizes technocrat legitimacy than government experts announcing mutually contradictory bodies of information.

If the independent agency argument is that information = technical expertise outside of politics = technocracy = a non- democratic legitimacy, then the response is that information is not technical but political and that technocracy is, these days, not perceived by the public as very legitimate.

## Problems of Control

We have looked at potential costs of coordination and legitimacy. The third potential cost of independent agencies lies in the area of control. Although the American separation of powers system is not necessarily always a zero sum game in which more power to one branch means less to another and vice versa, it sometimes operates that way. One way to look at the situation of the independent regulatory commission is that, because Congress delegated to them a substantial quantum of its law making authority, it sought to reduce levels of Presidential control and so increase its own relative degree of control. For it is noteworthy that in setting them up, Congress somewhat freed them from Presidential control but made them no more independent of Congress and the federal courts than are the nonindependent agencies. In the context of delegated legislation, American courts act as a watchdog for Congress insuring that the supplementary legislation enacted by agencies is in

accord with the parent legislation of Congress establishing the delegation. Thus maintaining judicial review control of the independent agencies actually maintains rather than reduces Congressional control. On the other hand because Congress and the President exercise rival influence on the agencies' budgets and rival influence on their policy initiatives, weakening Presidential control of independent agencies does strengthen Congressional control.

In assessing Congressional control, attention must be paid as much to the absolute as to the relative control powers of Congress. Congress exercises far more control over all agencies, independent and otherwise, than do most democratic legislatures. First of all, while the theory is the reverse, legislatures have a potential for greater control of agencies in presidential than in parliamentary systems. At least where party discipline can be maintained, in parliamentary systems the theoretical legislative control of administration through cabinet government actually turns into cabinet control of the parliament in favor of the ministries. The cabinet, composed of the leaders of the majority party or parliamentary coalition in parliament, and also composed of the heads of the ministries, orders its party subordinates in the legislature to do what they are told under the threat of a general election at which their seats are at risk and loss of the party label which is essential to their reelection. In presidential systems the political executive has no such control over the legislature. It may vote against the President's policy proposals or budget without provoking a general election and, of course, the President is not necessarily the head of the majority party or parties in the legislature. Moreover in the American presidential system, party discipline is extremely weak. Even when the President is of the majority Congressional party, he cannot control its votes.

Added to these general features of American separation of powers, is a particular feature that the American Congress has long enjoyed, and also suffered from, a peculiarly strong committee system. Congress has created an elaborate system of highly specialized standing committees and sub-committees with a strong element of self-selection and substantial professional staff resources. Members interested in a particular policy subject matter sit for extended periods of time on a committee that is devoted to that subject matter, has a staff which is expert in that subject matter and maintains continuity of control over the agencies handling that subject matter. Actually four Congressional committees or subcommittees oversee each agency, a Senate and a House committee responsible for legislation in the agency's jurisdiction and a Senate and House committee responsible for its annual appropriations. While the President pro-

poses budget figures for each agency, including the independent ones, Congress may, and very often does, change those figures either upward or downward. While the President accompanies each proposal for new legislation made by any agency, independent or otherwise, with a statement of his own position, the Congress passes or refuses to pass whatever versions of the proposed legislation it pleases. Congress exercises both these powers largely through its specialized committees.

As a result when Congress is interested in what either an independent or nonindependent agency is up to, it can and does find out in very great detail what the agency is doing and plans to do. Both through arduous committee hearings guided by its staff whose expertise rivals that of the agencies and which can and does tap further expertise from the private sector, and through continuous direct contact between individual committee members and agency officials, an agency can be subjected to extremely detailed oversight and given extremely detailed instruction on what the committees want. And if the committees do not get what they want in year one, the result will be extremely uncomfortable budget hearings and perhaps an extremely uncomfortable budget for the agency in year two and, by about year three, amendments the agency does not want to the legislation that defines its structure and missions. Keeping Congress happy is as important as keeping the President happy to most agencies and is more important to the independent agencies. (It must be emphasized, however, that political salience is always the crucial question. Most of the time neither Congress nor the President pays much attention to most of the things most of the independent agencies do.)

No such legislative control will exist for the foreseeable future over the EU independent agencies. Under current arrangements in those instances where EU independent agencies actually make regulatory decisions, those decisions finally lie with the Commission and sometimes with the Council. In those instances it may certainly be claimed that adequate control exists. Paradoxically, however, it is where the agencies are providing "information" only that this variety of control collapses. That is both the Commission and the Council may find themselves confronted by agency announced "information" that markedly constrains the policy options open to them without having had any way of controlling the production of that information.

The central mode of control of the EU agencies is, of course, the national representation on their management boards. It may be argued that Commission control may be weak, and indeed may be intended to be weak, but that Council

control is irrelevant because a microcosm of Council control is established within each agency. The continuing force of this argument depends upon the degree to which the expert staffs and advisors of the highly specialized "informational" "technical" agencies coopt the boards so that they become conveyors to the member states of the policy consensus arrived at by communities of expertise rather than member state controllers of that expertise. If one were of a suspicious disposition one might believe that the member state management board device common to the agencies is intended, at least by some proponents of agencies, to begin as the latter and eventually turn into the former. Indeed for neo-functionalists planning to build the Union by building the agencies that must be the ultimate hope.

In any event it is clear that EU independent agencies are independent in the sense of being relatively free of control by any of the other organs of the Community. This absence of control will be considered more or less of a problem depending on the degree to which one believes that the agencies will be purely "informational" and that information somehow lies outside of the politics of policy making.

## Conclusion and Proposal

The proliferation and expansion of agencies is fairly clearly a strategy for growing the Union by evading the current popular hostility to the Commission. Often in politics the best way to go is to seek the short term, and thus fairly certain, benefits and ignore the long term, and therefore far less certain, costs. The short term benefits of the proliferation of agencies may be great and may carry the Union over a period of what otherwise would be doldrums. The long term potential cost of lack of coordination, it might well be argued, should simply be ignored for the moment. It may be better to create such a problem than to have no growth of Union policies that eventually need coordination. Coordination mechanisms may be invented when the need arises. Similarly control problems are ameliorated for the moment by the arrangements for passing actual regulatory decisions to the Commission and Council and the structure of the management boards. Long term control problems may be ameliorated by further development of the European Parliament.

Legitimacy problems are more serious perhaps, because they are more immediate. I personally do not believe that the claimed disjunction between "in-

formation” and “technical decisions” on the one hand and policy initiation and implementation on the other can be successfully maintained for very long. Sooner or later, and more likely sooner, situations will arise that will make it clear that information constrains decisions about what policies are or are not to be initiated and when initiated policies are to be implemented. It will become equally clear that very often policy initiators and implementors are crippled unless they can direct what information will be gathered when. The technical becomes political when it becomes policy relevant and in the modern world most policies turn on whether one version or another of “information” is accepted.

When the politics of information becomes clear, will technocratic rationales be strong enough to establish the legitimacy of the agencies. I personally believe not. My own view is that popular faith in technology and particularly in technocracy is at a very low ebb. If indeed it is the low legitimacy of the Commission that fuels the move to agencies, why should we expect that the same appeal to technocratic legitimacy that failed the Commission will succeed for the agencies?

One positive response to the legitimacy problem might be to pay heed to the clamor for transparency and participation in government that is heard all around the world. The Council-Commission-Comitology process is among the least transparent policy making processes in the democratic world. And, while the comitology process is in a sense highly participatory, it is among the most unequally participatory in the democratic world. Some interests participant heavily. Others are nearly excluded.

If proliferation of independent agencies is to be the next mode of growth for the Union, then perhaps they could become an opportune vehicle for enhancing transparency and participation in Union affairs. In one sense the mere existence of fixed agencies of defined structure and jurisdiction is an improvement in transparency over the comitology process. Perhaps more ways could be found to introduce transparency and participation into the internal processes of the new agencies and thus increase their perceived legitimacy. But such moves will actually be hampered to the extent that we try to build the legitimacy of the agencies by insisting that “information” and “technical decisions” somehow lie in a cradle of scientific harmony above and beyond the clash of interests and the exercises of discretion in the face of uncertainty that we call politics.

## Biographical Note

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