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Cover Page Footnote

Roberta S. Karmel is Centennial Professor of Law and Co-Director of the Dennis J. Block Center for the Study of International Business Law at Brooklyn Law School. She is a former Commissioner of the Securities and Exchange Commission. A research stipend from Brooklyn Law School was of assistance in the preparation of this article.

MARSHALL J. BREGER & GARY J. EDLES,
INDEPENDENT AGENCIES IN THE UNITED
STATES—LAW, STRUCTURE, AND POLITICS

Roberta S. Karmel⁺

This book is an elegant and comprehensive analysis of federal independent regulatory agencies. My own lens on the independent agencies in the federal system comes from my experiences as a staff member of the Securities and Exchange Commission (SEC) from 1962–1969, and then a commissioner from 1977–1980. I was a director of the New York Stock Exchange, Inc. from 1983–1989 and then a member of the National Adjudicatory Council of the National Association of Securities Dealers (now the Financial Industry Regulatory Authority, also known as “FINRA”), so I also view securities regulation from the perspective of a self-regulatory organization (“SRO”). The authors had gained experiences in other sectors of the government, and so their viewpoints are a bit different from my own. Those differences made for interesting reading on my part, and some objections to their analysis. However, the authors and I are all academics, and similarly interested in the history, operation, and future of independent federal agencies.

At times this book fails to adequately distinguish between executive branch agencies and classic independent agencies, such as the SEC. This is not surprising because, as the authors concede in their final chapter, “[t]he administrative process owes more to history and experience than to doctrine.”¹ Very generally, the authors view the President and the Congress as engaged in a tug of war over the independent agencies.² This is a valid framework, except that it has greater validity during periods when the executive and legislative branches of government are controlled by different political parties, with different perspectives on the utility and purposes of federal regulation. This was not as true when I was a commissioner and President Carter and the congressional oversight committees for the SEC were basically in agreement on the SEC’s mission and operations. Further, viewing control of independent agencies as a grand constitutional power struggle fails adequately to address the

⁺ Roberta S. Karmel is Centennial Professor of Law and Co-Director of the Dennis J. Block Center for the Study of International Business Law at Brooklyn Law School. She is a former Commissioner of the Securities and Exchange Commission. A research stipend from Brooklyn Law School was of assistance in the preparation of this article.

1. MARSHALL J. BREGER & GARY J. EDLES, *INDEPENDENT AGENCIES IN THE UNITED STATES: LAW, STRUCTURE, AND POLITICS* 395 (Oxford Univ. Press 2015).

2. *See id.* at 16.

politicization of agencies due to partisan congressional influence and oversight.³ The authors also do not address how congressional influence results in agency capture, which undermines an agency's mission. The authors concede that "a substantial body of the Republican Party is determined to reduce the role and scope of government in the American economy . . . [and] should they succeed, the impact on the independent agency forum will be significant."⁴

Two great strengths of this book are the extensive and authoritative footnotes (happily on each page for easy reference) and the appendices on agency characteristics; comparisons of multi-member and other agencies;⁵ cases, statutes, bills and reorganization plans;⁶ and an index and bibliography.⁷ All of these materials make this book a useful research tool, and should be helpful to academics and others interested in understanding federal agencies.

Chapter Two of the book traces the origins of independent agencies, using the Interstate Commerce Commission (ICC) as a template, as the ICC is commonly considered the first independent federal regulatory agency.⁸ Other agencies discussed are the Federal Trade Commission, the Federal Power Commission, the National Labor Relations Board, and the Federal Reserve Board.⁹ Each is a multi-member agency, each is in some ways like the ICC but also different, and as the authors note, their "creation reveals a considerable degree of pragmatic development and evolution."¹⁰ Although independence and non-partisanship were both values in their creation, a greater value was expertise. In today's complicated, technologically advanced world, expertise is probably needed more than ever in regulation, but populists on the right and left tend to debunk expertise and it does not seem to be as valued as it was by those who created the ICC and other independent agencies.

Chapter Three on "Theories of Agency Independence" sets forth the authors' view on how efforts to centralize administrative power in a unitary executive and congressional pushback has affected agency independence, but has not met with any consistent Supreme Court decisions on the constitutionality of independent agencies or intellectual theories on how independent agencies

3. See, e.g., *id.*; see also, e.g., Christopher R. Berry & Jacob E. Gersen, *Agency Design and Distributive Politics* 11 (John M. Olin Program in Law and Economics, Working Paper No. 539, 2010). The authors in their last chapter acknowledge that "Congress, perhaps more than the president, is now a primary influence on most independent agencies." BREGER & EDLES, *supra* note 1, at 382.

4. BREGER & EDLES, *supra* note 1, at 392, 394.

5. *Id.* at 463–64.

6. *Id.* at 465–99.

7. *Id.* at 501–62.

8. *Id.* at 19–36. Actually, an agency supervising boilers on steamships, which were frequently blowing up and killing passengers, was the first federal regulatory agency, and it was housed in the Treasury Department. See Act of Aug. 30, 1852, ch. 106, 10 Stat. 61.

9. BREGER & EDLES, *supra* note 1, at 37–55.

10. *Id.* at 56.

should be organized.¹¹ In Chapter Four, on agency structure and appointments, the authors discuss the few cases where the Supreme Court addressed the issue of whether agency members enjoy freedom from firing by the President once appointed by him, with the advice and consent of the Senate.¹² In these chapters and elsewhere, the authors view agency independence as a matter of independence from the President. The authors hardly discuss agency independence from Congress. Although the authors explain that the statutory composition of multi-member agencies is designed to eliminate partisan decision-making, there is little focus on whether today's agencies are non-partisan.

In the current highly divisive and partisan world of the Obama Administration, nominated members of the SEC other than the Chair have been paired as Democratic and Republican commissioners—many of whom have a background from the congressional committees that have oversight over the SEC.¹³ Neither the SEC Chair nor the President seems to enjoy the freedom to choose non-partisan candidates who will be confirmed by the Senate.¹⁴ Qualifications are based on ideological correctness rather than expertise.¹⁵ This has led to very contentious and partisan decision making with many 3-2

11. *Id.* at 59–85.

12. *See id.* at 87–132.

13. *See* Robert Schmidt & Dave Michaels, *Ex-Senate Aide Said to Be Leading Candidate for SEC Seat*, BLOOMBERG (Jun. 3, 2015, 4:02 PM), <http://www.bloomberg.com/news/articles/2015-06-03/ex-banking-panel-aide-said-to-be-leading-candidate-for-sec-seat>.

14. *See id.* President Obama's first choice of a Democratic commissioner to replace Commissioner Aguilar was torpedoed by Senator Elizabeth Warren because he came from a private law firm. *E.g.*, David Dayen, *Obama Names Lisa Fairfax to SEC, a Vote for Wall Street Reform*, THE INTERCEPT (Oct. 20, 2015, 6:37 PM), <https://theintercept.com/2015/10/20/obama-names-lisa-fairfax-to-sec-a-vote-for-wall-street-reform/>. Many stellar previous SEC commissioners had such a background in the past, and because they were experts and they left their clients at the door, they were able to make significant contributions to the development of securities regulation. These commissioners include: Ray Garrett, Frank Wheat, Richard Smith, and Al Sommer. *See Ray Garrett Jr., 59, Dies, Former SEC Chairman*, WASH. POST, Feb. 5, 1980, at C4; Wolfgang Saxon, *Frank Wheat, 79, of S.E.C. And California Desert Fight*, N.Y. TIMES, Jul. 29, 2000, at A11; *N.Y. Attorney Chosen To Be Member of SEC*, WASH. POST, Mar. 12, 1967, at A5; Claudia Levy, *A.A. Sommer Jr., 77, Dies; Lawyer Spurred SEC Reforms in '70s*, WASH. POST, Jan. 18, 2002, at B7. Recent Republican commissioners, including Kathleen Casey, and the nominee Hester Peirce, have worked for Senator Richard Shelby. *See SEC Biography: Commissioner Kathleen L. Casey*, SEC, <http://www.sec.gov/about/commissioner/casey.htm> (last updated Mar. 17, 2008); *see also* Schmidt & Michaels, *supra* note 13. When William Proxmire was head of the Senate Banking Committee, he preferred the appointment of persons with prior experience on the SEC Staff. *See* Jack Egan, *Senate Banking Committee Approves Garrett for SEC*, WASH. POST, Jul. 27, 1973, at D10. In my opinion, while a background in government is useful, an agency like the SEC needs some commissioners who have had real world experience in the securities industry or the private practice of securities law.

15. *See* Mark Schoeff, Jr., *How partisan politics have poisoned the SEC*, INVESTMENT NEWS (May 10, 2015, 12:01 AM), <http://www.investmentnews.com/article/20150510/REG/150509926/how-partisan-politics-have-poisoned-the-sec>.

decisions on important issues. Moreover, the selection of commissioners in this manner results in strong dissents designed to enable affected constituencies to appeal rulemaking to the United States Court of Appeals for the District of Columbia Circuit and prevail by upending new regulations.¹⁶ As discussed by the authors, this kind of partisanship has been a historical hallmark of the National Labor Relations Board, where labor and management commissioners are often at odds. It was not traditionally the case at the SEC where the agency's mission is to police the securities markets and protect investors, and where influence by outside political forces has been rare.¹⁷ In my opinion, this kind of partisanship has undermined the SEC's mission and credibility and made it very difficult for the SEC to complete rulemaking mandated by statute.¹⁸ When the agency operated in a collegial manner, I believe it was much more effective and respected.

In Chapter Four the authors discuss the appointments process, including recess appointments and paired appointments.¹⁹ The creation of the Public Company Accounting Oversight Board (PCAOB) as an idiosyncratic agency (which, according to Congress, is neither a government nor private enterprise organization), and its attack under the Appointments Clause of the Constitution,

16. *See id.*; *see also, e.g.*, Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359, 363–65, 373 (D.C. Cir. 2014); Am. Petroleum Inst. v. SEC, 953 F. Supp. 2d 5, 8 (D.D.C. 2013).

17. *See* BREGER & EDLES, *supra* note 1, at 46–47; *see also What We Do*, SEC, <http://www.sec.gov/about/whatwedo.shtml> (last updated June 10, 2013); Schoeff, *supra* note 15.

18. It took five years for the SEC to complete the bulk of mandated rulemaking under the Dodd-Frank Wall Street Reform and Consumer Protection Act, in part because Republicans in the Congress and at the SEC objected to many of the statutory provisions. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of the U.S. Code); *Dodd-Frank Progress Report: Fourth Quarter 2015*, DAVIS POLK, http://prod.davispolk.com/sites/default/files/Q4_2015_Dodd-Frank_Progress_Report.pdf (last modified Dec. 31, 2015) (reporting that as of December 31, 2015, only 63 of the 94 mandated rulemakings had been finalized by the SEC); Marcus Baram, *Dodd-Frank One Year Later: Slow Progress On Rules Amid Industry And GOP Onslaught*, HUFFINGTON POST (Jul. 22, 2011, 9:22 AM), http://www.huffingtonpost.com/2011/07/21/dodd-frank-one-year-later_n_904391.html; Josh Boak, *Wall Street reform law bogged down*, POLITICO (Oct. 30, 2011, 11:04 PM), <http://www.politico.com/story/2011/10/wall-street-reform-law-bogged-down-067192> (discussing the slow progress of reform under the Dodd-Frank Act, and the wishes of Republicans to dismantle the law entirely). In the meantime, Congress passed the JOBS Act, which mandated new deregulatory rules, and again the SEC was slow to pass rules implementing this law. *See* Jumpstart Our Business Startups (JOBS) Act, Pub. L. No. 112-106, 126 Stat. 306 (2012) (codified in scattered sections of 15 U.S.C.); Ben Goad, *Lawmakers fuming as jobs law 'disappears into the bureaucracy'*, THE HILL (June 9, 2013, 7:00 PM), <http://thehill.com/regulation/legislation/304299-lawmakers-fume-as-jobs-law-disappears-into-the-bureaucracy>; Ross Kenneth Urken, *Amidst Employment Anxiety, Are the JOBS Act Haters Justified?*, MAINSTREET (May 1, 2013, 6:55 AM), <https://www.mainstreet.com/article/amidst-employment-anxiety-are-jobs-act-haters-justified-0>.

19. BREGER & EDLES, *supra* note 1, at 119–30.

which it barely survived, is discussed from a constitutional law perspective.²⁰ However, the politics behind the creation of the PCAOB and the congressional effort to protect oversight of the accounting profession from industry capture after the 2008 economic meltdown, is not discussed. While I can appreciate the authors' efforts to be high-minded and theoretical in their approach, I do not believe the controversy and litigation surrounding some of the independent agencies, like the PCAOB, can be divorced from raw political decision making.

Chapter Five discusses the restriction on the President's power to remove agency members from office only for "cause" as a key to agency independence.²¹ While such tenure has long been considered a key feature of agency independence by academics, I believe that two other earmarks of independence discussed in Chapter Six—agency control of its own litigation and independent funding—are more important as a practical matter.²² If the SEC did not have the ability to sue anyone the agency believes has violated the securities laws—including high level political appointees and members of Congress—it would not be as independent as the SEC is today.²³ For example, the effort by the Nixon Administration to quash the SEC's case against Robert Vesco was one of the Watergate scandals, which led to the resignation of an SEC Chair.²⁴ When I was an SEC Commissioner, this event resulted in a preoccupation with affirming agency independence from the President, but not the Congress.²⁵

In my opinion, independent funding is a key to such agency independence as enjoyed by the Federal Reserve Board. Although the SEC takes more money into the U.S. Treasury than its budget, from registration fees and fines, the SEC budget is subject to annual appropriations by the Congress.²⁶ Serious efforts to insulate the SEC from partisan and Wall Street interference by giving the agency independent funding authority floundered in Dodd-Frank.²⁷ Currently, the Commodity Futures Trading Commission's budget is being pared down because

20. *Id.* at 109–18. See generally Donna M. Nagy, *Playing Peekaboo with Constitutional Law: The PCAOB and Its Public/Private Status*, 80 NOTRE DAME L. REV. 975, 1023–24 (2005).

21. BREGER & EDLES, *supra* note 1, at 133–61.

22. *Id.* at 167–75.

23. When I was a commissioner of the SEC, the SEC and the Comptroller of the Currency brought an action against Bert Lance, President Carter's Director of OMB. See *SEC v. Nat'l Bank of Ga.*, 1978 WL 1081, at *1 (N.D. Ga. Apr. 26, 1978). Currently the SEC is investigating whether members of Congress or staffers violated the STOCK Act by trading on inside information. See *SEC v. Comm. on Ways & Means of the U.S. House of Reps.*, No. 14 Misc. 193 (PGG), 2015 U.S. Dist. LEXIS 154302, at *29–33 (S.D.N.Y. Nov. 13, 2015) (subpoena enforcement case).

24. ROBERTA S. KARMEL, *REGULATION BY PROSECUTION: THE SECURITIES AND EXCHANGE COMMISSION VS. CORPORATE AMERICA* 66–67 (1982).

25. See *id.*; see also BREGER & EDLES, *supra* note 1, at 16.

26. See Roberta S. Karmel, *The SEC's Budget and Organization*, 244 N.Y. L.J., Dec. 2010, at 3, 3–4.

27. See *id.* at 3–4.

of a dispute between the Chair and the head of the agency's oversight committee in Congress.²⁸

The authors of *INDEPENDENT AGENCIES IN THE UNITED STATES* view Congressional efforts to control agencies as part of the tension between autonomy and accountability, the topic of Chapter Seven, but they do not delve into the question of to whom agencies should be accountable.²⁹ Voters do not elect the members of the agencies, but each agency has a statutory mission, and most of them have regulatory responsibilities.³⁰ Accountability to Congress unfortunately often means accountability to regulated industries and others who fund congressional election campaigns, instead of accountability to the constituencies that the agencies were created to serve.³¹ Court review of agency action is, in my opinion, a more measured and more important accountability mechanism. Although the authors discuss a great many cases in their book, they do not treat judicial review as an influence on how agencies function and the extent of their independence.

Chapter Six also discusses how agency focus on independence led to Presidential efforts to centralize authority over agency rulemaking through reviews by the Office of Information and Regulatory Affairs (OIRA).³² OIRA's creation and continued viability is related to some extent to the law and economics reform deregulatory idea of a cost/benefit analysis for all new agency rules.³³ Congress, however, does not make any such calculation in its statutory mandates for the creation of new regulations, a problem that can lead to some interesting judicial challenges.³⁴

Chapter Eight reviews the outsourcing of governmental functions to the private sector, including government constraints and constitutional obligations on certain private sector organizations.³⁵ Among the topics in this chapter is supervised self-regulation in the securities industry.³⁶ This chapter is not strictly speaking about independent agencies at all, but as government outsources more

28. See Daniel Siegal, *CFTC Chair Slams Congress For Denying Budget Bump*, LAW 360 (Dec. 21, 2015, 8:24 PM), <http://www.law360.com/articles/740471/cftc-chair-slams-congress-for-denying-budget-bump>.

29. See BREGER & EDLES, *supra* note 1, at 195–247; see also Ralph S. Tyler & Karen Stakem Homig, *Administrative Law: Rules to Results*, 44 MD. B.J., May/June 2011, at 44, 46–47 (noting that administrative agencies are accountable to the judiciary and the legislature).

30. See Tyler & Homig, *supra* note 29, at 45; see also, e.g., BREGER & EDLES, *supra* note 1, at 197 (discussing that the President appoints the members of agencies with Senate confirmation through the example of the Assassination Records Review Board).

31. See, e.g., Catherine E. Bill, *FCC v. Fox: Has the Supreme Court Sanctioned Political Influence in Agency Decision-Making?*, 61 MERCER L. REV. 643, 658–60 (2010).

32. BREGER & EDLES, *supra* note 1, at 176–77.

33. *Id.*

34. See *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359, 363–65 (D.C. Cir. 2014).

35. BREGER & EDLES, *supra* note 1, at 249–87.

36. *Id.* at 282–86.

and more of its regulatory and other functions to the private sector, it is interesting and informative.³⁷ These private sector bodies exercising governmental functions can be viewed as independent actors and they raise serious issues as to their accountability.³⁸

Chapter Nine reviews how multi-member agencies function and how the responsibilities of the agency Chair vis-à-vis its other commissioners affect internal agency operations.³⁹ The chapter has interesting examples of different traditions and compromises that different agencies utilize.⁴⁰ The authors also consider the inhibiting effect of the Sunshine Act on agency decision-making.⁴¹

The authors discuss independent agencies in Europe in Chapter Ten.⁴² This chapter is necessarily cursory. It does not analyze how independence in a parliamentary system is different from independence in the U.S. system, or the extent to which the European Union system is fundamentally different from either since it is an organization of nation states. The authors suggest that there is an opportunity for more research on independent agencies abroad.⁴³ I would suggest that an analysis of the securities commissions might be particularly of interest. Theoretically, these specific agencies are supposed to be independent.⁴⁴ While these agencies are often housed within the Finance Ministry, they are sometimes free standing.⁴⁵ Also touched on, but not fully developed in Chapter Ten, is the influence of international bodies, like the Bank for International Settlements and the Basle Committee, on national financial regulation.⁴⁶

In conclusion, in Chapter Eleven the authors speculate on the future of the independent agency.⁴⁷ The authors refer to efforts by the executive branch to centralize power, as discussed in Chapter Six, over federal agencies and

37. *Id.*

38. *See id.* at 272–77.

39. *Id.* at 289–351.

40. *See id.*

41. *Id.* at 316–24.

42. *Id.* at 353–79.

43. *E.g., id.* at 378–79 (discussing how the “emergence of an interdependent world” will change our understanding of European agencies, thereby requiring additional research).

44. *Id.* at 354. The International Organization of Securities Commissions (“IOSCO”) recommends that securities regulators “should be operationally independent from external political or commercial interference in the exercise of its functions and powers and accountable in the use of its powers and resources.” INT’L ORG. OF SEC. COMMISSIONS, OBJECTIVES AND PRINCIPLES OF SECURITIES REGULATION 10 (2003), <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD154.pdf>.

45. *See* BREGER & EDLES, *supra* note 1, at 353–54; *see, e.g., Directorates-General, FEDERAL MINISTRY OF FINANCE*, <http://www.bundesfinanzministerium.de/Web/EN/About/Directorates-General/directorates-general.html> (last visited Apr. 8, 2016) (demonstrating that the Ministry of Finance in Germany houses the department that deals with securities regulation).

46. *See* BREGER & EDLES, *supra* note 1, at 375–76.

47. *Id.* at 381–96.

congressional push back.⁴⁸ The authors wonder whether the Tea Party's effort to destroy, or at least seriously curtail federal government regulation, will change the nature of the independent agencies.⁴⁹ I think the answer is: no. Some agencies have been abolished by reformers, and the book does tell the story of the Civil Aeronautics Board's demise. But many of its functions were then transferred to other agencies.⁵⁰ All of the independent agencies were established to fill a need for regulation or service, and they are too entrenched in our system of government to be abolished.⁵¹

It can be anticipated, therefore, that *INDEPENDENT AGENCIES IN THE UNITED STATES* will continue to be read and referred to as a valuable book about the creation and operation of independent federal regulatory agencies in the federal system. Although my own career has involved the study and practice of administrative law, in and out of the government, I learned a great deal from this book, and despite the quibbles expressed in this review, I found it well-written, well-researched, and fairly balanced.

48. *Id.* at 385–94.

49. *Id.* at 392–94.

50. *Id.* at 222–23.

51. *Id.* at 1–8, 222–23.