

THE (WILLINGLY) FETTERED EXECUTIVE:  
PRESIDENTIAL SPINOFFS IN NATIONAL SECURITY  
DOMAINS AND BEYOND

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THIS Article considers two increasingly important—but poorly understood—case studies that involve the Executive, on its own initiative, relinquishing control over essential national-security responsibilities by way of institutional redesign. The Executive already enjoyed unfettered discretion with respect to (1) the Central Intelligence Agency (“CIA”) financing and developing new technologies for its spies and (2) the President scrutinizing foreign investments that threaten U.S. national security. Nevertheless, it created In-Q-Tel, a private venture-capital firm, to incubate intelligence technologies. It also empowered the inter-agency Committee on Foreign Investment in the United States (“CFIUS”) to investigate and impose conditions on foreign entities seeking to acquire controlling interests in strategically important American firms.

In creating In-Q-Tel rather than allowing the CIA to direct Research and Development (“R&D”) internally, and in delegating to an inter-agency committee sensitive responsibilities that Congress entrusted directly to the President, the Executive incurred a host of

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legal, political, and organizational constraints on its ability to control these two critical functions. These constraints would never have attached absent the reorganization efforts.

Delegating responsibility to In-Q-Tel and CFIUS—as opposed to retaining it within the CIA and the White House, respectively—limits presidential discretion in contexts where external legal checks are largely disabled and where political stewardship appears to be self-defeating. Whether these self-imposed limitations were the Executive’s intent all along or simply an unintended consequence of institutional reorganization, the ways in which In-Q-Tel and CFIUS bear the marks of novel forms of accountability and self-constraint are innovative, compelling, and suggestive of a new chapter of thinking about bureaucratic design, separation of powers, and the optimal amount of Executive control.

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## INTRODUCTION

Presidents typically design administrative institutions to maximize Executive power. This is the standard story, one borne out by recent history.<sup>1</sup> Over the past few decades, presidents have sought to marginalize the professional and politically insulated civil service; to shrink the relevant space where traditional administrative law most fully constrains Executive action; to tighten the connection between the White House and those charged with running administrative agencies; and to evade or reject transparency requirements or judicial review.<sup>2</sup> Presidents have done so through a

<sup>1</sup> David E. Lewis, *Presidents and the Politics of Agency Design* 91 (2003) (noting that an exhaustive survey of the administrative state “overwhelmingly indicates that presidents rarely create agencies that are insulated from their control”).

<sup>2</sup> *Id.* at 24–29, 71 (emphasizing presidential interest in centralized, hierarchical agency design that vests authority in politically appointed presidential loyalists); Robert Maranto, *Politics and Bureaucracy in the Modern Presidency* 1–2 (2002); Terry M. Moe, *The Politics of Bureaucratic Structure*, in *Can the Government Govern?* 267, 280 (John E. Chubb & Paul E. Peterson eds., 1989) (emphasizing the President’s preference for creating centralized, hierarchical control ensuring that programmatic responsibilities are in the hands of politically appointed department heads and, above

variety of mechanisms, perhaps none more important than institutional design: the shaping and structuring of the administrative state.<sup>3</sup>

This Article presents two apparent counterexamples. The case studies depict a very different Executive. This Executive does not appear singularly focused on becoming unshackled, unconstrained, and unfettered. To the contrary, the Executive appears to expend

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them, in the hands of the Office of Management and Budget); Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 *Tex. L. Rev.* 441, 453 (2010) (“Over time, presidents have taken proactive steps to operationalize presidential administration, pressing beyond their traditional oversight and advisory roles toward more robust managerial control over agency rulemaking.”); Matthew Diller, *Form and Substance in the Privatization of Poverty Programs*, 49 *UCLA L. Rev.* 1739, 1751–57 (2002); William G. Howell & David E. Lewis, *Agencies by Presidential Design*, 64 *J. Pol.* 1095, 1112 (2002) (noting that agencies created by presidential or administrative action are far more centralized and hierarchical than those created by Congress); Elena Kagan, *Presidential Administration*, 114 *Harv. L. Rev.* 2245, 2272–319 (2001); Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 *Yale L.J.* 1032, 1057–58 (2011) (emphasizing that presidential control over agency design results in the allocation of intra-agency power to those closest to the president); Jon D. Michaels, *Privatization’s Pretensions*, 77 *U. Chi. L. Rev.* 717, 719 (2010); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 *U. Chi. L. Rev.* 1, 11 (1995) (“Almost since the birth of the modern administrative agency, American presidents have struggled to assert more centralized control over the regulatory state.”); David A. Super, *Privatization, Policy Paralysis, and the Poor*, 96 *Cal. L. Rev.* 393, 393 (2008); see also L. Gordon Crovitz & Jeremy A. Rabkin, *Introduction*, in *The Fettered Presidency* 1, 1–2 (L. Gordon Crovitz & Jeremy A. Rabkin eds., 1989) (describing “how legal constraints adversely affect [the Executive’s] performance and thus the performance of government generally”).

Examples include the post-9/11 centralization of the previously disaggregated Intelligence Community under a National Intelligence Directorate, see *Intelligence Reform and Terrorism Prevention Act of 2004* § 1011, 50 U.S.C. § 403-3 (2006); attempts by President Obama to control his Administration’s most pressing and ambitious policy objectives through prominent and influential White House aides (rather than through his cabinet secretaries), see *infra* note 232; and the privatization of welfare programs for purposes of curtailing the autonomy of politically protected civil servants, see Daniel Guttman & Barry Willner, *The Shadow Government* 63–78, 151–52 (1976), and to evade procedural hurdles and substantive limitations imposed by Congress and the courts.

<sup>3</sup> Privatization and centralization are among the most prominent and successful Executive-aggrandizing design choices. See *infra* note 231 and accompanying text. A useful definition characterizes institutional design as “ask[ing] how institutions should be designed so as best to execute the tasks entrusted to them.” Magill & Vermeule, *supra* note 2, at 1077; see also Jacob E. Gersen, *Designing Agencies*, in *Research Handbook on Public Choice and Public Law* 333, 346–51 (Daniel A. Farber & Anne Joseph O’Connell eds., 2010).

considerable energy to disempower itself.<sup>4</sup> It does so to dramatic effect, and in innovative, far-reaching, yet subtle ways. In one case, the Executive shackles itself to the market. The privatization of government responsibilities is frequently a means of evading constraints such as the Administrative Procedure Act (“APA”) and judicial review.<sup>5</sup> Yet in this particular context already shorn of law, government outsourcing seems to cut in the opposite direction. It serves as a disciplining agent, introducing constraints where unfettered presidential discretion is apt to be disruptive and counter-productive. In the other case, the Executive employs one of the worst forms of institutional design, a sure-fire recipe for bureaucratic dysfunction. Indeed, versions of it are often advanced by those seeking to undermine a President or her regulatory agenda.<sup>6</sup> Yet in this particular and similarly unregulated domain, the recipe seems to work, likewise in imaginative and salutary ways. Here, too, the result is a harmonious cabining of discretion where presidential autonomy appears problematic if not self-defeating.

Consider first In-Q-Tel, the CIA’s shiny new venture capital (“VC”) outfit. A private non-profit organization, In-Q-Tel is entrusted to be the Intelligence Community’s gateway to the future, investing in and incubating new technologies that will give our spies a leg up on the bad guys for years to come. Heralded in the

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<sup>4</sup> I stress “appears” because one can never be certain about policymakers’ true motivations and intentions, or whether there is anything approaching a singular purpose. Scholars have resisted efforts to divine intent and purpose in a number of administrative and legislative contexts. See, e.g., Theodore R. Marmor, Jerry L. Mashaw & Phillip L. Harvey, *America’s Misunderstood Welfare State* 57 (1990) (public-benefits programs); Jerry L. Mashaw, *Greed, Chaos, and Governance* 66 (1997); Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”*: Legislative Intent as Oxymoron, 12 *Int’l Rev. L. & Econ.* 239, 244–47, 254 (1992) (legislative intent).

<sup>5</sup> See Jack M. Beermann, *Privatization and Political Accountability*, 28 *Fordham Urb. L.J.* 1507, 1551–52, 1553–56 (2001); Diller, *supra* note 2, at 1749; Michaels, *supra* note 2, at 718–19; see also Daniel Guttman, *Public Purpose and Private Service: The Twentieth Century Culture of Contracting Out and the Evolving Law of Diffused Sovereignty*, 52 *Admin. L. Rev.* 859, 861, 894–96 (2000) (identifying ways in which private contractors are not subject to the same regulations as government employees).

<sup>6</sup> Terry M. Moe, *The Politics of Structural Choice: Toward a Theory of Public Bureaucracy*, in *Organization Theory* 116, 126–27 (Oliver E. Williamson ed., 1995) [hereinafter Moe, *The Politics of Structural Choice*] (“In the political system, public bureaucracies are designed in no small measure by participants who explicitly want them to fail.”); Terry M. Moe, *Politics and the Theory of Organization*, 7 *J.L. Econ. & Org.* 106, 126 (1991) [hereinafter Moe, *Politics and the Theory of Organization*]; see also *infra* notes 21, 228, 342, 356 and accompanying text.

popular press as hip and edgy,<sup>7</sup> In-Q-Tel is a curiosity beyond its novelty. The CIA is as free from administrative law constraints as a government agency can be. Its budget is classified<sup>8</sup> and highly discretionary, its operations are beyond public (and often judicial and congressional) scrutiny,<sup>9</sup> and it can fire employees for any reason short of discrimination based on unconstitutional considerations.<sup>10</sup> The Agency further enjoys incomparable discretion to wheel and deal on the private market.<sup>11</sup> The CIA can establish shady front operations,<sup>12</sup> procure goods and services unburdened by the onerous Federal Acquisition Regulation (“FAR”),<sup>13</sup> and enter into secret personnel contracts that are unenforceable in court.<sup>14</sup> So, why, then, did the already unencumbered CIA create In-Q-Tel and

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<sup>7</sup> See Karen Breslau, *Snooping Around the Valley: The CIA Sets up a High-Tech Investment Fund*, Newsweek, Apr. 10, 2000, at 45; Warren P. Strobel, *The Spy Who Funded Me (and My Start-Up): The CIA’s Venture Capitalist in Silicon Valley*, U.S. News & World Rep., Jul. 17, 2000, at 38.

<sup>8</sup> On occasion, the federal government releases aggregate intelligence budget information, even though Congress does not require a public disclosure. See Ken Dilanian, *Overall U.S. Intelligence Spending Tops \$80 Billion*, L.A. Times, Oct. 29, 2010, at A6; Walter Pincus, *Intelligence Spending at Record \$80.1 Billion Overall*, Wash. Post, Oct. 29, 2010, at A2.

<sup>9</sup> Stephen Dycus et al., *National Security Law* 384–429, 1037–50 (4th ed. 2007).

<sup>10</sup> See *infra* Subsection III.A.1.

<sup>11</sup> See 50 U.S.C. § 403-4a(d)(4) (2006) (providing broad discretionary authority to perform “other functions and duties related to intelligence affecting the national security as the President or the Director of National Intelligence may direct”).

<sup>12</sup> See generally James Callanan, *Covert Action in the Cold War* (2010) (describing the CIA’s use of front operations to support paramilitary operations and other forms of covert action); Jim Houghan, *Spooks: The Haunting of America—the Private Use of Secret Agents* 21 (1978); Victor Marchetti & John D. Marks, *The CIA and the Cult of Intelligence* 5 (1974).

<sup>13</sup> See Federal Acquisition Regulations System, 48 C.F.R. §§ 1–51 (2009). As has been noted:

The Central Intelligence Agency Act of 1949 gives the CIA the authority to expend appropriated funds for purposes necessary to carry out its functions, “notwithstanding any other provisions of law.” 50 U.S.C. Section 403j.

Although not required by law, the CIA, as a matter of policy, adheres to the procurement goals and procedures of the Federal Acquisition Regulation (FAR) and the Federal Property and Administrative Services Act (FPASA) to the greatest extent possible.

Bus. Execs. for Nat’l Sec., *Accelerating the Acquisition and Implementation of New Technologies for Intelligence: The Report of the Independent Panel on the Central Intelligence Agency In-Q-Tel Venture* 31 (2001) [hereinafter BENS Report], available at [http://www.bens.org/mis\\_support/nqtel-panel-rpt.pdf](http://www.bens.org/mis_support/nqtel-panel-rpt.pdf).

<sup>14</sup> *Tenet v. Doe*, 544 U.S. 1, 3 (2005); see also *Totten v. United States*, 92 U.S. 105, 107 (1875).

thereby introduce a host of constraints on the presidentially appointed Director's discretion? After all, In-Q-Tel is a private corporation, legally insulated from the Agency in terms of day-to-day decisions regarding personnel, investment priorities, and resource allocation. Moreover, as a private entity and as a registered 501(c)(3) tax-exempt organization, In-Q-Tel is subject to greater legal restrictions—in terms of mandatory public disclosures, limitations on executive compensation, and anti-discrimination and labor laws—than would be the case were the investment and incubation responsibilities housed within the Agency.<sup>15</sup>

Consider second the Committee on Foreign Investment in the United States (“CFIUS”). In 1988, Congress vested in the President the authority to review and block proposed foreign investments deemed detrimental to national security.<sup>16</sup> This is a sensitive and significant responsibility, perhaps most closely identified with the now-infamous 2006 Dubai Ports deal.<sup>17</sup> Other than some broad guidelines and reporting requirements, Congress imposed almost no limitations or checks on the President's power.<sup>18</sup> Yet, notwithstanding the President possessing essentially unfettered control and discretion as to whether to block foreign firms from acquiring controlling stakes of American firms, President Reagan voluntarily re-assigned the bulk of the responsibilities. Pursuant to an Executive Order, Reagan empowered CFIUS, an inter-agency committee of officials from various Executive departments.<sup>19</sup> That is to say, rather than Reagan keeping the authority for himself or engaging

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<sup>15</sup> See *infra* Section I.A & Part III.

<sup>16</sup> See Omnibus Trade and Competitiveness Act of 1988 § 5021, 50 U.S.C. app. § 2170 (2006).

<sup>17</sup> To the extent that CFIUS has any resonance in the public consciousness, it is because of the controversy surrounding the attempt by Dubai Ports World, a company controlled by the United Arab Emirates government, to acquire a firm that, among other things, had contracts to manage terminal and stevedoring operations at U.S. ports. Jonathan Weisman, *Port Deal to Have Broader Review*, Wash. Post, Feb. 27, 2006, at A1; see also Heather Timmons, *Dubai Port Company Sells Its U.S. Holdings to A.I.G.*, N.Y. Times, Dec. 12, 2006, at C4 (recounting the history of the Dubai Ports acquisition and subsequent sale in response to the political fallout from the acquisition).

<sup>18</sup> See *infra* Section I.B. Congressional reporting requirements have subsequently been ratcheted up, but, as I argue below, the additional requirements do not necessarily enhance accountability in a meaningful way. See *infra* notes 280–82 and accompanying text.

<sup>19</sup> Exec. Order No. 12,661, 3 C.F.R. 618, 620 (1989).

in the usual practice of assigning responsibility to one agency, he charged CFIUS with primary responsibility for investigating proposed investments, and did so in a manner that significantly reduced presidential control.<sup>20</sup>

These are revealing case studies, weighty in their own right and interesting complements to one another. They give us insight into how these strategically important, but largely unknown, responsibilities are administered. They show how the Executive, rather than the Executive's usual rivals—Congress and the courts—can constrain public administration, through mechanisms within the administrative state and outside of it. And, they suggest why the Executive might welcome those constraints (and possibly others as well).

The studies bring into focus a new template, one with significant descriptive attributes and predictive power. They reveal an underappreciated phenomenon where (1) legal constraints and political accountability checks over administrative responsibilities are disabled, inapplicable, or dangerous; (2) the Executive seems surprisingly hamstrung by virtue of the absence of constraints; and (3) the Executive appears to take steps to impose an alternative regime of administrative discipline to better carry out the responsibilities in question. Combined, the studies reveal two alternative paths to compensate for the lack of conventional accountability assurances. With In-Q-Tel, the Executive uses an *external* institutional redesign seemingly to insulate the technology incubation process from perverse political pressures and to better align principal-agent interests. With CFIUS, the President employs an *internal* institutional redesign with the apparent effect of limiting White House control, both for the good of the parties engaged in the foreign-investment deal and in service of the President's larger foreign-policy goals. Taken in tandem, In-Q-Tel and CFIUS present a challenge to the dominant view of the Executive as power-aggrandizing. Equally important, however, is the fact that the acts and mechanisms of self-constraint are not obvious or celebrated. The Executive's subtlety in these domains thus itself serves as testament to the durability and primacy of the dominant understanding.

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<sup>20</sup> See *infra* Sections I.B & IV.B.



As significant as those insights are, the relevance of In-Q-Tel and CFIUS extends beyond their particular, perhaps parochial, hamlets within the administrative state. First, the two Executive redesigns help us think both about the need, elsewhere, for alternative accountability checks, and about ways (and reasons) for the Executive to manufacture those checks when neither the coordinate branches nor the electorate are able to help guide the administrative process.

Second, In-Q-Tel and CFIUS signal new potential for institutional designs long understood to have different—and arguably deleterious—effects. As suggested, privatization often enables the unfettering of the Executive. And, inter-agency design often invites bureaucratic slacking or gridlock. That is why we see the Executive—when it seeks greater authority and discretion—employing privatization schemes, or pushing for greater centralized, hierarchical administrative control. Thus, this study reminds us to pay close attention to contextual clues before automatically embracing or rejecting a particular structure.

Third, the case studies tell an arresting comparative legal process story. Outside of Executive self-sabotage,<sup>21</sup> the moves taken here by the President seem unfamiliar and counterintuitive. They have little in common with many of the old-line independent agencies such as the Federal Trade Commission (“FTC”) and the Securities and Exchange Commission (“SEC”). Those agencies differ from In-Q-Tel and CFIUS insofar as it is Congress—rather than the Executive—principally doing the constraining. Indeed, often the President would prefer to control those agencies more fully.<sup>22</sup> Another difference is that the de-politicization of the independent agencies (by, among other things, restricting at-will presidential removal<sup>23</sup>) is not a stand-in for the absence of functioning legal constraints. Instead, de-politicization is a supplement to those operational accountability checks. By contrast, with In-Q-Tel and

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<sup>21</sup> Ronald A. Cass, Colin S. Diver & Jack M. Beermann, *Administrative Law* 13–15 (5th ed. 2006); Moe, *supra* note 2, at 288–90; see also Amy B. Zegart, *Flawed by Design: The Evolution of the CIA, JCS, and NSC* 17–18 (1999) [hereinafter Zegart, *Flawed*]; *infra* note 356 and accompanying text.

<sup>22</sup> See *infra* note 356 and accompanying text.

<sup>23</sup> Removal is admittedly a blunt, imperfect, and incomplete instrument of presidential control. See *infra* notes 255–60 and accompanying text.

CFIUS, there are very few underlying legal safeguards. Given these differences, the closer approximations to In-Q-Tel and CFIUS might well be found in other branches, in schemes by Congress to limit its own discretion where discretion would be pernicious or undesirable, and even in comparable efforts by courts to limit their ability to intervene in legal disputes that they are otherwise authorized to hear.

This Article proceeds in five parts. Part I tackles the two case studies; it examines the creation, evolution, and institutional contours of In-Q-Tel and CFIUS. Part II takes a step back from the case studies. I describe how administrative agencies are constrained through a combination of legal and political checks, and how the absence or disabling of those checks in the contexts of technology incubation and foreign-investment review poses problems for administrative governance and legitimacy. Part II also serves as the bridge between the descriptive work of surveying the two case studies and the analytical and normative work that follows. Part III begins that work by addressing the ways in which the institutional structure of In-Q-Tel engenders self-constraints, thus compensating for the lack of legal and political safeguards. Part IV does the same for CFIUS. Jumping back and forth between the case studies is not without cost. But I proceed in this fashion to avoid conflating or otherwise glossing over what distinguishes In-Q-Tel from CFIUS, and what makes them complements rather than identical twins. I then turn to Part V, where I extrapolate from the case studies and discuss the project's broader implications.

## I. TWO ADMINISTRATIVE REDESIGNS

In what follows, I describe this study's two novel institutional designs. Despite their practical significance, not to mention what they suggest in terms of possible innovations in bureaucratic architecture, neither outfit has attracted much popular attention or academic scrutiny.

The importance of In-Q-Tel's work cannot be overstated. First, technological superiority is crucial to national security, perhaps more so now than ever before. Many of our contemporary strengths and vulnerabilities are a function of our heavy reliance on state-of-the-art technology to conduct surveillance, assess

threats, engage (and deter) enemy combatants, and defend against cyber attacks.<sup>24</sup> This is a far cry from traditional military and espionage efforts, which relied to a much greater extent on manpower—on soldiers and spies in the field. Thus, In-Q-Tel is no mere side-show, but rather increasingly one of the Intelligence Community's main attractions. Second, In-Q-Tel introduces new wrinkles and complications to the already robust and heated discussion regarding the centrality of private actors within our national-security and intelligence infrastructure.<sup>25</sup> Third, In-Q-Tel has become a trend-setter. Like the original *Tonight Show*, it now boasts a nascent generation of private-VC copycats of varying quality within other key Executive departments, including the Pentagon and NASA, and has sparked interest even among domestic regulatory agencies.<sup>26</sup>

Similarly, CFIUS's structural oddities and esoteric responsibilities should not distract us from its regulatory heft. It operates at the highly salient and contentious intersection where economic and national-security interests converge—a high-wire juggling act of immense consequence for American industry, labor, trade, diplomacy, and defense. The Committee must assess the danger associated with foreign governments—and firms closely tied to those governments—acquiring controlling interests in U.S. companies of strategic significance.<sup>27</sup> These foreign investments and acquisitions

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<sup>24</sup> See Jon D. Michaels, *All the President's Spies: Private-Public Intelligence Partnerships in the War on Terror*, 96 Cal. L. Rev. 901, 901 (2008); Peter P. Swire, *Privacy and Information Sharing in the War on Terrorism*, 51 Vill. L. Rev. 951, 955 (2006).

<sup>25</sup> See, e.g., Jeremy Scahill, *Blackwater: The Rise of the World's Most Powerful Mercenary Army* (2007); Michaels, *supra* note 24, at 901; Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 Wash. U. L.Q. 1001, 1004–05 (2004); Jon D. Michaels, *Deputizing Homeland Security*, 88 Tex. L. Rev. 1435, 1435 (2010) [hereinafter Michaels, *Deputizing Homeland Security*]; Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. Rev. 989, 992 (2005); Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 Stan. L. & Pol'y Rev. 549, 549–50 (2005).

<sup>26</sup> See *infra* note 50 and accompanying text.

<sup>27</sup> See James K. Jackson, Cong. Research Serv., RL 33388, *The Committee on Foreign Investment in the United States (CFIUS) 14* (Feb. 4, 2010) [hereinafter Jackson, Feb. 4, 2010] (noting that Huawei Technologies, a Chinese company, withdrew its bid to acquire 3Com “due to an inability to successfully negotiate a mitigation agreement with members of CFIUS”); Edward M. Graham & David M. Marchick, *US National Security and Foreign Direct Investment* 128–35 (2006) (describing unsuccessful mitigation efforts involving the China National Offshore Oil Company (“CNOOC”)),

might be nothing more than lucrative business opportunities, of mutual benefit to the parties involved. Or, they might be vehicles through which foreign interests exploit America's security vulnerabilities by gaining access to U.S. transportation hubs, natural resources, sensitive technologies, telecommunications facilities, and cyber infrastructure.

Beyond their intrinsic significance, In-Q-Tel and CFIUS serve as representative illustrations of complementary forms of institutional restructuring: restructuring *external* to the administrative state, and restructuring *within* the Executive Branch. Thus, in addition to surveying these interesting and important landscapes, this Part sets the stage for later discussions regarding how these alternative institutional design choices enhance accountability, and why the President might welcome (rather than shy away from) additional constraints on her discretion.

#### A. *The Case of In-Q-Tel*

Al Gore did not invent the Internet, but the Pentagon did. It also invented GPS and stealth technology. And, back in the day, the military developed the keychain-sized can opener known as the "John Wayne,"<sup>28</sup> which did for hungry soldiers fumbling to open their K-rations what the juice box has done for thirsty tykes on the go. Uniting these inventions is a singular motivation: the U.S. Government cannot always wait for the commercial sector to develop the tools that its personnel need to defend our borders and promote our national interests.

The Intelligence Community is in the same boat. Staying ahead of the technology curve has always been essential to the CIA's effectiveness. With that in mind, in the mid-1990s the spy agency decided to branch out from its dominant practice of procuring market-ready technologies or contracting with a company to manufacture a custom-made device from scratch. Going forward, it would also cultivate relationships with firms in the early stages of

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which sought to purchase Unocal); Eric Lipton, Chinese Withdraw Offer for Nevada Gold Concern, N.Y. Times, Dec. 22, 2009, at B3 (noting CFIUS's objection to the acquisition of a Nevada gold mine by an entity controlled by the Chinese government after finding no feasible mitigation possibility); see also *infra* notes 105-08 and accompanying text.

<sup>28</sup> See James E. Westheider, *The Vietnam War* 86 (2007).

developing innovative technologies, invest in them, and work with them to bring those technologies to market in a form that the intelligence agencies could then exploit.<sup>29</sup>

Rather than take on this responsibility itself—perhaps similarly to what the Defense Department has done through its in-house Defense Advanced Research Projects Agency (“DARPA”)<sup>30</sup>—the CIA created an independent, non-profit, VC firm called In-Q-Tel.<sup>31</sup> Its relationship with the CIA has been defined by a series of contractual agreements, and its principal source of funding has been annual disbursements from the CIA.<sup>32</sup> The funding gives In-Q-Tel operational as well as seed money to invest in promising technologies. For these reasons, In-Q-Tel has been likened to a “corporate” VC.<sup>33</sup>

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<sup>29</sup> See BENS Report, *supra* note 13, at v; Rick E. Yannuzzi, In-Q-Tel: A New Partnership Between the CIA and the Private Sector, 9 Def. Intelligence J. 25, 27 (2000) (describing In-Q-Tel’s mission as “foster[ing] the development of new and emerging information technologies and pursu[ing] research and development (R&D) that produce solutions to some of the most difficult IT problems facing the CIA”); Anne Laurent, Raising the Ante, Gov’t Exec., June 2002, at 34, 38. See generally Michael E. Belko, Government Venture Capital: A Case Study of the In-Q-Tel Model (March 2004) (unpublished Master’s thesis, Air Force Institute of Technology), available at <http://oai.dtic.mil/oai/oai?verb=getRecord&metadataPrefix=html&identifier=ADA423132>.

<sup>30</sup> DARPA is the Pentagon’s in-house R&D outfit responsible for developing the aforementioned Internet, GPS, and stealth technology. The comparison between DARPA and In-Q-Tel is not perfect. See BENS Report, *supra* note 13, at 14. That said, DARPA serves as a salient counterpart to In-Q-Tel, principally because, like In-Q-Tel, it promotes future technologies and, unlike In-Q-Tel, it does so from within the federal government.

<sup>31</sup> The VC originally incorporated under the name Peleus, Inc. Certificate of Incorporation of Peleus Inc., State of Delaware (Feb. 16, 1999) (on file with author). That summer it changed its name to In-Q-Tel. See Certificate of Amendment to Certificate of Incorporation of Peleus, Inc., State of Delaware (July 21, 1999) (noting corporate name amended to In-Q-Tel on Jan. 4, 2000) (on file with author).

The “Q” in the name In-Q-Tel pays homage to James Bond’s technology wizard, Q, who always outfitted 007 with the latest and greatest gadgets. Lisa M. Bowman, CIA Venture Arm Sees Post 9/11 Surge, CNET News (Mar. 18, 2002, 4:00 A.M.), <http://news.cnet.com/2100-1023-861873.html>.

<sup>32</sup> To date, and per the information publically available from the early 2000s, the CIA started slowly with In-Q-Tel, funding the VC in the range of \$28 million to \$50 million. See BENS Report, *supra* note 13, at 37; Josh Lerner et al., In-Q-Tel, Case 9-804-146, at 8 (2004) (case study, Harv. Bus. Sch.) (on file with author).

<sup>33</sup> Major corporations create their own “corporate VCs” for the primary purpose of advancing their own long-term needs. BENS Report, *supra* note 13, at 15–16; Omid Mashhadi et al., Chesapeake Crescent Initiative, In-Q-Tel as an Early Stage Invest-

In-Q-Tel is legally distinct from the CIA. It has its own, independent board of directors. The independent Board chooses In-Q-Tel's CEO, who in turn hires managers and employees.<sup>34</sup> Officials from In-Q-Tel and the CIA confer periodically. It is at these meetings that the CIA provides In-Q-Tel with what it calls a "problem set," essentially the Agency's long-term wish list of technologies that it would like to see developed for future acquisition and integration.<sup>35</sup> In-Q-Tel then studies what the private industry is developing and approaches firms appearing to advance compatible technologies.<sup>36</sup> If there is a match, In-Q-Tel provides the firms with investment capital and technical support.<sup>37</sup> In-Q-Tel sometimes demands in return an equity stake in the product or company, as well as considerable control over the trajectory of product development.<sup>38</sup>

In-Q-Tel prioritizes developing technologies that the CIA has requested.<sup>39</sup> At the same time, In-Q-Tel's investments are not en-

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ment Model 2 (2009); Belko, *supra* note 29, at 17; Lerner et al., *supra* note 32, at 1, 4; see also *infra* note 200 and accompanying text.

<sup>34</sup> The bylaws are not publically available, but this information was confirmed by sources with first-hand knowledge. See, e.g., Redacted E-mail from X to Jon D. Michaels, Acting Professor of Law at the UCLA School of Law (July 27, 2010 7:09 A.M.) (on file with author).

The CIA did not have to make the Board independent; it did not have to create an independent Board or a private corporation in the first place. Nor was there a precipitating scandal or heightened concern from the public or from Congress that might have compelled the CIA to establish the Board's independence for the sake of appearances. For those reasons, one might be inclined to assume that the Board's independence does intrinsic work in separating In-Q-Tel from the CIA Directorate.

It could, however, be the case that even though the CIA did not have to placate a hostile Congress, it might have wanted to confer additional assurances to technology firms that might be wary of entering into strategic partnerships with the Agency. But if independence from the Agency is just for show, whatever credibility the Agency is trying to establish in, say, Silicon Valley, would quickly be lost. See *infra* note 44 and accompanying text.

<sup>35</sup> BENS Report, *supra* note 13, at 27–30; Lerner et al., *supra* note 32, at 7–8, 19.

<sup>36</sup> Our Approach: Finding the Right Technology, In-Q-Tel, <http://www.iqt.org/mission/our-approach.html> (last visited Feb. 1, 2011).

<sup>37</sup> BENS Report, *supra* note 13, at 32–34; Lerner et al., *supra* note 32, at 6.

<sup>38</sup> BENS Report, *supra* note 13, at 34; Lerner et al., *supra* note 32, at 9.

<sup>39</sup> BENS Report, *supra* note 13, at 22; Certificate of Incorporation of Peleus, Inc., *supra* note 31, at 1; Mashhadi et al., *supra* note 33, at 2; Laurent, *supra* note 29, at 39; S.J. Ulvick & D.W. Tighe, In-Q-Tel, the Strategic Investment Firm for the U.S. Intelligence Community, 6954 Proc. SPIE 1, 1–2 (2008), available at

tirely dictated by the CIA, and the private entity is mindful of returns on equity.<sup>40</sup> In-Q-Tel invests in technologies that, in addition to being useful to the Intelligence Community, also have distinct commercial applications. For instance, In-Q-Tel worked with a small firm that developed a computer database of 3D satellite images. In-Q-Tel ultimately sold its equity stake in this company to Google, which subsequently marketed a scaled-down version of the product as Google Earth.<sup>41</sup>

As evidence of its independence from the CIA, In-Q-Tel does not need CIA authorization prior to making an investment. Nor is In-Q-Tel required to invest in a specific company or technology simply because the CIA instructs it to do so.<sup>42</sup> The CIA cannot remove In-Q-Tel's managers or employees, who answer to an independent Board of Trustees—not to Langley or the White House.<sup>43</sup> This independence ought not be overstated. The two entities work closely together, and the CIA no doubt can make its displeasure known through other channels.<sup>44</sup>

And, as evidence of the CIA's independence from In-Q-Tel, even in instances when In-Q-Tel successfully incubates a technology, there is no obligation on the part of the CIA to purchase the

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<http://spiedl.aip.org/getpdf/serlet/GetPDFServlet?filetype=pdf&id=PSISDG00695400000169540T000001&idtype=cvips&prog=normal>.

<sup>40</sup> As a non-profit, In-Q-Tel is of course obligated to reinvest its windfalls. See Laurent, *supra* note 29, at 38.

<sup>41</sup> See Tim Shorrock, *Spies for Hire* 145 (2008).

<sup>42</sup> BENS Report, *supra* note 13, at 40; Wendy Molzahn, *The CIA's In-Q-Tel Model: Its Applicability*, Acquisition Rev. Q., Winter 2003, at 49; Lerner et al., *supra* note 32, at 8.

<sup>43</sup> BENS Report, *supra* note 13, at 40.

<sup>44</sup> See *supra* note 34; cf. *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3173 (2010) (Breyer, J., dissenting) (suggesting that threatening to remove Board members is not the only way for the President to influence Board practices and policies). Moreover, there is not much by way of an alternative to, or substitute for, In-Q-Tel. This means that the CIA cannot readily take its business elsewhere. That is a common lament in the world of privatization. When there are no obvious rivals to the incumbent contractor—rivals willing to step in were the incumbent to underperform—the government cannot meaningfully sanction the incumbent, and the incumbent has fewer incentives to please the government. See John D. Donahue, *The Privatization Decision* 107–08 (1989); Super, *supra* note 2, at 420; see also *infra* notes 167 & 347 and accompanying text.

product.<sup>45</sup> Indeed, though public information is scant on this question, it appears to be the case that the CIA typically considers alternative technologies (if available), even though those have not been shepherded by In-Q-Tel.<sup>46</sup>

With few exceptions, government employees receive fixed salaries.<sup>47</sup> They do so regardless whether their office, their agency, or the government writ large has had a “good” year. By contrast, most In-Q-Tel employees have earnings tied to individual and organizational performance.<sup>48</sup> The performance bonuses, keyed to the successful incubation of adaptable technologies, serve to motivate and reward employees and thus help align principal-agent incentives.

Early studies of In-Q-Tel suggest that the In-Q-Tel enterprise has been successful.<sup>49</sup> Another possible indication of this success is that In-Q-Tel has spawned copycat VCs across the federal government.<sup>50</sup> That said, it is important to note how little is publicly known about In-Q-Tel, or about how the CIA defines “success.”

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<sup>45</sup> BENS Report, *supra* note 13, at 32; see also Lerner et al., *supra* note 32, at 5 (noting that the CIA may but need not choose to acquire any of the In-Q-Tel partners’ technologies).

<sup>46</sup> Belko, *supra* note 29, at 59.

<sup>47</sup> The top echelon of government officials is eligible for some performance-based bonuses. See *infra* note 155 and accompanying text.

<sup>48</sup> BENS Report, *supra* note 13, at 41–42 & fig. 5.

<sup>49</sup> BENS Report, *supra* note 13, at 48; Belko, *supra* note 29, at 39.

<sup>50</sup> See Mashhadi et al., *supra* note 33, at 7–11; Peter Eisler, Government Funds Power Research, *USA Today*, Apr. 16, 2009, at 8A (describing the Army’s “OnPoint Technologies”); Marc Kaufman, NASA Invests in Its Future with Venture Capital Firm, *Wash. Post*, Oct. 31, 2006, at A19 (describing NASA’s “Red Planet Capital”); Matt Richtel, Tech Investors Cull Start-Ups for Pentagon, *N.Y. Times*, May 7, 2007, at C1 (describing the Defense Department’s version of In-Q-Tel, the “Defense Venture Catalyst Initiative”); see also Mary Prendergast, Spies on Sand Hill Road: The CIA’s Venture Capital Fund 5–6 (May 7, 2010) (unpublished manuscript, on file with author). There are also entities that precede In-Q-Tel, though they have principally served different aims from the technology acquisition that drives today’s efforts. See Jonathan G.S. Koppel, The Challenge of Administration by Regulation: Preliminary Findings Regarding the U.S. Government’s Venture Capital Funds, 9 *J. Pub. Admin. Res. & Theory* 641, 646–47 (1999) (describing government-sponsored private VC initiatives dedicated to promoting free enterprise in former Soviet bloc and to promoting business opportunities in the developing world).

Both Ulvick and Lerner report that In-Q-Tel has started to provide its services to government entities in addition to the CIA. Lerner et al., *supra* note 32, at 8 (noting In-Q-Tel’s work with the National Imagery and Mapping Agency); Ulvick, *supra* note 39, at 5 (noting In-Q-Tel supports the National Geospatial-Intelligence Agency and some divisions within the Pentagon).



Very few comprehensive examinations have been conducted. The studies that have been undertaken have focused primarily on issues of commerce and finance—to the exclusion of law<sup>51</sup>—and have looked at In-Q-Tel in its relative infancy.<sup>52</sup> Given the scarcity of publicly available information,<sup>53</sup> it is difficult to say anything definitive as to whether the enterprise is truly effective, let alone more effective than were it housed entirely within the spy agency.

### B. *The Case of CFIUS*

CFIUS captured everyone's attention for something it *did not* do. In 2006, CFIUS did not object to a proposed deal that resulted in the United Arab Emirates ("UAE") having effective control over many of the United States's largest and most strategically significant ports, including the Ports of New York, Newark, Philadelphia, Baltimore, Miami, and New Orleans.<sup>54</sup> In the eyes of some, including members of Congress, this was an unforgivable oversight. The acquiring firm, Dubai Ports, was controlled by the UAE government, and some of the deal's critics viewed the UAE as hostile to American interests, perhaps even a sponsor of terrorism.<sup>55</sup> The critics could not fathom how CFIUS would allow Dubai Ports to control access at perhaps the most vulnerable points of entry into the United States.<sup>56</sup> (Most informed observers supported CFIUS's

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<sup>51</sup> To my knowledge, In-Q-Tel has never before been carefully studied by legal scholars.

<sup>52</sup> Although most of the published studies are from the early 2000s, Omid Mashhadi and his colleagues published a short essay in 2009. In it, they note that In-Q-Tel reports "its [internal rate of return] performance is . . . competitive with the performance of private venture capital firms in general." Mashhadi et al., *supra* note 33, at 5.

<sup>53</sup> See *supra* notes 8–10 and accompanying text.

<sup>54</sup> See *supra* note 17 and accompanying text.

<sup>55</sup> See Paul R. Verkuil, *Outsourcing Sovereignty* 69, 77 n.100 (2007) (capturing the sentiments of some members of Congress); cf. John Cranford, *Defining "Ours" in a New World*, *CQ Wkly.*, Mar. 6, 2006, at 592, 595 ("We wouldn't transfer [control of the ports] to the Devil; we're not going to transfer [control] to Dubai." (quoting Sen. Lautenberg)); *NewsHour with Jim Lehrer: Uproar over Control of Ports* (PBS television broadcast Feb. 21, 2006), transcript available at [http://www.pbs.org/newshour/bb/terrorism/jan-june06/ports\\_2-21.html](http://www.pbs.org/newshour/bb/terrorism/jan-june06/ports_2-21.html).

<sup>56</sup> See John F. Frittelli, *Cong. Research Serv.*, RL 31733, *Port and Maritime Security: Background and Issues for Congress* 6–7 (2005).

considered judgment, notwithstanding the fact that the outspoken critics succeeded in derailing the deal.<sup>57</sup>)

Scrutinizing foreign investments for purposes of balancing economic gains against the national-security risks is CFIUS's primary responsibility. In the vast majority of cases, foreign investment is a prized gift, an influx of capital spurring economic growth and prosperity. But occasionally it is a Trojan Horse, insidiously undermining U.S. national security by gaining control of key industries, technologies, or services.<sup>58</sup> The so-called Dubai Ports deal high-

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<sup>57</sup> See Alan P. Larson & David M. Marchick, Council on Foreign Relations, Council Special Report No. 18, *Foreign Investment and National Security: Getting the Balance Right 20* (2006), available at <http://www.cfr.org/content/publications/attachments/CFIUSreport.pdf>. Larson and Marchick note that port ownership had already been in foreign hands and thus CFIUS

concluded—correctly, in our view—that the transfer of terminal ownership from one foreign-owned company to another did not raise security concerns. In fact, the [Bush] administration correctly argued that the investment by [Dubai Ports] would have enhanced security by ensuring that [it] cooperated with U.S. security initiatives not only in the United States but at its port in Dubai.

Id. at 20; see also *Arabian Dreams: The Emirate Has Too Much to Lose by Being a Security Risk*, *Economist*, Mar. 4, 2006, at 70, 73 (noting that “Dubai’s security concerns are just the same as America’s” and that its entire economy and international reputation would be jeopardized were Dubai to be viewed as sympathetic to terrorism); *DP World’s Long Shadow*, *Economist*, June 16, 2007, at 74–75; Heather Timmons, *Outside U.S., Puzzlement over Reaction to the Dubai Port Deal*, *N.Y. Times*, Feb. 25, 2006, at C3 (emphasizing how unremarkable the acquisition seemed among government officials in Canada, Britain, and Belgium); Andrew Ward, *Transport Chiefs Warn on Ports Takeover Opposition*, *Fin. Times*, Mar. 8, 2006, at 9; *Israeli Shipper Endorses DP World*, *CNN.com* (Mar. 3, 2006, 9:58 PM), <http://www.cnn.com/2006/POLITICS/03/02/port.security/index.html>. Though hardly an objective observer, former CFIUS official Stewart Baker has since emphasized that the Dubai acquisition was, at the time, not at all controversial. Baker notes that eighty percent of U.S. ports were already administered by foreign companies and that security would remain in the hands of municipal port authorities, local governments, and the Coast Guard. Indeed, he reports that there was some surprise among insiders that Dubai Ports even sought pre-clearance approval from CFIUS. Stewart Baker, *Skating on Stilts* 244–50 (2010).

As a side note, political pressure compelled Dubai Ports to sell its interest in the U.S. ports to the American International Group (“AIG”). Verkuil, *supra* note 55, at 69. After the 2008 financial crisis and government bailout of AIG, the U.S. government presumably assumed a controlling financial interest in the ports. See Edmund L. Andrews, *Fed in an \$85 Billion Rescue of an Insurer Near Failure*, *N.Y. Times*, Sept. 17, 2008, at A1 (describing the government bailout as giving “the government control of the troubled insurance giant”).

<sup>58</sup> I am indebted to Jerry Kang for his article invoking the Trojan Horse metaphor in a legally salient context. See Jerry Kang, *Trojan Horses of Race*, 118 *Harv. L. Rev.* 1489 (2005).

lighted CFIUS's central role in promoting U.S. national and economic security, and brought to the fore the benefits, dangers, and political pitfalls of foreign investment.

Since its inception, CFIUS has operated in an obscurity that belies its importance. Its origins date back to 1975 when an unremarkable Executive Order established an inter-agency task force with little responsibility and even less power.<sup>59</sup> In the years and decades that followed, CFIUS has gradually acquired greater legal standing and authority. Today, in addition to screening and investigating foreign investments, CFIUS negotiates mitigation agreements with foreign investors to minimize security concerns and render proposed deals more acceptable. Where mitigation fails or is otherwise insufficient to allay security concerns, CFIUS advises the President to block the proposed deal.<sup>60</sup> Currently, the Committee is comprised of top-ranking officials from the Departments of Treasury, Justice, Homeland Security, Commerce, Defense, State, and Energy; the U.S. Trade Representative; and the head of the Office of Science and Technology Policy.<sup>61</sup> Additionally, the Director of National Intelligence and the Secretary of Labor are nonvoting CFIUS members.<sup>62</sup>

CFIUS was created to monitor foreign investments and report to the President on general trends.<sup>63</sup> The huge windfalls realized by OPEC nations in the 1970s<sup>64</sup> had sparked concern "that Arab oil states would use their enormous riches to buy control of important sectors of the U.S. economy."<sup>65</sup> More to the point, the worry was

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<sup>59</sup> Exec. Order No. 11,858, 3 C.F.R. 990 (1971–1975), *reprinted as amended in* 50 U.S.C. app. § 2170 note (Supp. II 2009).

<sup>60</sup> 50 U.S.C. app. § 2170(d) (2006 & Supp. II 2009).

<sup>61</sup> *Id.* § 2170(k)(2) (Supp. II 2009).

<sup>62</sup> *Id.*

<sup>63</sup> Exec. Order No. 11,858, 3 C.F.R. 990.

<sup>64</sup> James K. Jackson, Cong. Research Serv., RL 33388, *The Committee on Foreign Investment in the United States (CFIUS) 1* (Apr. 8, 2008) [hereinafter Jackson, Apr. 8, 2008].

<sup>65</sup> John King, *Tougher Line Is Sought in U.S. to Monitor Foreign Investment*, *Globe & Mail*, Aug. 10, 1981, at 12; see also H. Subcomm. on Foreign Econ. Policy of the Comm. on Foreign Affairs, 93d Cong., *Direct Foreign Investment in the United States 1, 5* (Comm. Print 1974) [hereinafter Subcomm. on Foreign Econ. Policy Report]; Larson & Marchick, *supra* note 57, at 4.

that “much of the OPEC investments were being driven by political, rather than economic, motives.”<sup>66</sup>

Early on, CFIUS “met infrequently”<sup>67</sup> and “seemed unable to decide whether it should respond to the political or the economic aspects of foreign direct investment in the United States.”<sup>68</sup> Moreover, even if it figured out how to respond, it was not clear that the Committee had any legal authority to respond. The same went for the President. Short of the proposed acquisition violating an existing federal law, or short of declaring a state of emergency (and invoking her authority under the International Emergency Economic Powers Act<sup>69</sup>), the President was equally powerless.<sup>70</sup>

CFIUS’s uncertain status became even more problematic in the 1980s, when the United States experienced another surge in direct foreign investment.<sup>71</sup> For the first time since World War I, America became a net capital importer,<sup>72</sup> and more foreign acquisitions were attracting CFIUS’s attention. Among the high-profile attempted foreign investments were several by Japanese firms seeking to acquire American manufacturers of important military technologies.

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<sup>66</sup> Jackson, April 8, 2008, *supra* note 64, at 1; see also Subcomm. on Foreign Econ. Policy Report, *supra* note 65, at 5 (stating that the “bulk” of “Arab money” is “Government controlled and so creates a new dimension to foreign investment in the United States”).

<sup>67</sup> James K. Jackson, Cong. Research Serv., RS 22863, Foreign Investment, CFIUS, and Homeland Security: An Overview 2 (Apr. 17, 2008) [hereinafter Jackson, Apr. 17, 2008]; see also James K. Jackson, Cong. Research Serv., RL 33856, Exon-Florio Foreign Investment Provision: Overview of H.R. 556, at 2 (Feb. 1, 2007) [hereinafter Jackson, Feb. 1, 2007]; King, *supra* note 65, at 12.

<sup>68</sup> Jackson, Apr. 8, 2008, *supra* note 64, at 3.

<sup>69</sup> International Emergency Economic Powers Act of 1977 § 202(a), 50 U.S.C. § 1701(a) (2006).

<sup>70</sup> See Jackson, Apr. 17, 2008, *supra* note 67, at 3; Martin Tolchin, Bill Would Curb Foreign Companies in U.S. Takeovers, N.Y. Times, Mar. 26, 1988, at 1. José Alvarez suggests that a presidential declaration of a state of emergency in furtherance of blocking a proposed foreign investment would be tantamount to declaring hostilities against the government of the acquiring company. See Jose E. Alvarez, Political Protectionism and United States Investment Obligations in Conflict: The Hazards of Exon-Florio, 30 Va. J. Int'l L. 1, 69 (1989); see also David Zaring, CFIUS as a Congressional Notification Service, 83 S. Cal. L. Rev. 81, 91 (2009) (noting that “it was not clear whether a troubling merger would qualify as a sufficient national emergency trigger to allow the president to exercise” authority under the International Emergency Economic Powers Act (“IEEPA”)).

<sup>71</sup> Alvarez, *supra* note 70, at 2 & n.1.

<sup>72</sup> Vito Tanzi & Isaias Coelho, Barriers to Foreign Investment in the U.S and Other Nations, 516 Annals Am. Acad. Pol. & Soc. Sci. 154, 157 (1991).

These proposed transactions divided the Committee along perhaps unsurprising agency lines. Lacking formal regulatory authority, CFIUS members engaged in “ideological brawl[s],”<sup>73</sup> using back-channel lobbying and political grandstanding to accomplish what the Committee could not do through legal means and reasoned deliberation.<sup>74</sup>

The ideological disagreements were not partisan, but institutional. Specifically, the national-security hawks, notably the Pentagon brass, opposed many of these deals. They feared the new Japanese owners might withhold the technologies from the U.S. military or share the technologies with our enemies.<sup>75</sup> Economic protectionists within the Commerce Department envisioned a domino effect—that entire industries would be swallowed up by overseas companies.<sup>76</sup> Further, because Japan’s markets were relatively closed to U.S. industry, opposing Japanese investments presented an opportunity for retaliation.<sup>77</sup>

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<sup>73</sup> William C. Rempel & Donna K. H. Walters, *Trade War: When Chips Were Down*, L.A. Times, Nov. 30, 1987, at 1.

<sup>74</sup> Id.; see also Jackson, Apr. 8, 2008, *supra* note 64, at 4–5; Norman J. Glickman & Douglas P. Woodward, *The New Competitors: How Foreign Investors Are Changing the U.S. Economy* 42 (1989); Alvarez, *supra* note 70, at 57–58.

<sup>75</sup> Jackson, Feb. 4, 2010, *supra* note 27, at 3 (noting that it was CFIUS’s representative from the Defense Department who typically pressed for greater scrutiny of proposed transactions); Jackson, Apr. 8, 2008, *supra* note 64, at 4; U.S. General Accounting Office, GAO-90-94, *Foreign Investment: Analyzing National Security Concerns*, Report to the Chairman, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, House of Representatives 22 (1990) [hereinafter GAO Report]; see also Stuart Auerbach, *U.S. May Halt Sale of Firm to Japanese: Deal for Chip Maker Raises Security Issues*, Wash. Post, Nov. 8, 1986, at A1 [hereinafter Auerbach, 1986] (quoting a Pentagon official as saying the Japanese company “wanted the technology, not the firm”). National security concerns became a big issue with Fujitsu’s proposed acquisition of Fairchild Semiconductor. See Alvarez, *supra* note 70, at 60 n.331; Stuart Auerbach, *Cabinet to Weigh Sale of Chip Firm: Fujitsu Bid Provokes Unusual U.S. Move*, Wash. Post, Mar. 12, 1987, at E1 [hereinafter Auerbach, 1987].

<sup>76</sup> Alvarez, *supra* note 70, at 58. Stewart Baker suggests that the Commerce Department, even with its increased national security responsibilities associated with export controls, is not reliably anti-investment, but alters its position to match the general inclinations of business. See Baker, *supra* note 57, at 265–66.

<sup>77</sup> Jackson, Apr. 8, 2008, *supra* note 64, at 4–5; Alvarez, *supra* note 70, at 58; Auerbach, 1987, *supra* note 75 (describing the Commerce Secretary as lobbying other CFIUS members and telling “reporters that Fujitsu’s takeover of Fairchild should be blocked in retaliation for Japan’s refusal to buy American supercomputers for its public agencies and universities”). Some suggested that the economic arguments were pretextual, concealing cultural biases, or more specifically, “Japan-bashing.” Alvarez,

At the same time, an equally adamant set of voices championed the investments. Officials from Treasury and State often pressed the position that free and open competition was the way of the world,<sup>78</sup> that Japan was a trusted ally, and that foreign investments would revitalize failing American companies.<sup>79</sup>

Recognizing the need for formal regulatory authority to supplant inter-agency bickering, Congress passed the Exon-Florio Amendment in 1988.<sup>80</sup> Exon-Florio gave the President the power “to suspend or prohibit any [foreign] acquisition, merger, or takeover” of a United States firm engaged in interstate commerce.<sup>81</sup> The President could do so upon finding that the deal “threaten[s] to impair the national security.”<sup>82</sup>

In drafting Exon-Florio, congressional sponsors initially sought to give the deal-cancelling discretion exclusively to the Commerce Department.<sup>83</sup> Though Congress assigns most administrative functions to one—and only one—agency,<sup>84</sup> such a move would have

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supra note 70, at 59; *id.* at 57 (noting that opponents of the Fujitsu’s acquisition likened it to “selling Mount Vernon to the redcoats”). For examples of opposition to Japanese attempts to purchase cultural landmarks such as Rockefeller Center and the golf course at Pebble Beach, see Lan Cao, *Corporate and Property Identity in the Postnational Economy: Rethinking U.S. Trade Laws*, 90 Cal. L. Rev. 401, 451 & n.204 (2002) (emphasizing American concerns not just over Japanese acquisitions in the high-tech sector but also in response to Japanese acquisitions of Rockefeller Center, Pebble Beach, and Columbia Pictures); Deborah M. Mostaghel, *Dubai Ports World Under Exon-Florio: A Threat to National Security or a Tempest in a Seaport?*, 70 Alb. L. Rev. 583, 609–10 (2007) (noting the public’s “outcry based on the perceived inappropriateness of a foreign owner taking over a beloved American landmark”); James Barron, *Huge Japanese Realty Deals Breeding Jokes and Anger*, N.Y. Times, Dec. 18, 1989, at B1.

<sup>78</sup> Rempel & Walters, *supra* note 73.

<sup>79</sup> Alvarez, *supra* note 70, at 57 n.313, 59 n.324.

<sup>80</sup> The Exon-Florio Amendment, 50 U.S.C. app. § 2170 (2006 & Supp. II 2009), was part of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (codified as amended in scattered sections of U.S.C. (2006)), which amended the Defense Production Act of 1950, Pub. L. No. 81-774, 64 Stat. 798 (codified as amended at 50 U.S.C. app. §§ 5021–5171 (2006 & Supp. II 2009)).

<sup>81</sup> See Omnibus Trade and Competitiveness Act of 1988 § 5021, 50 U.S.C. app. § 2170(d) (2006).

<sup>82</sup> *Id.*

<sup>83</sup> See Edward M. Graham & Paul R. Krugman, *Foreign Direct Investment in the United States* 126 (3d ed. 1995); Alvarez, *supra* note 70, at 69–70, 75.

<sup>84</sup> But see Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 Yale L.J. 2314, 2324–27 (2006) (cataloging

meant bypassing other relevant agencies and largely excluding them (individually or as part of the preexisting CFIUS) from the process. It would also have meant that Commerce's institutional inclinations—namely, Commerce's focus on promoting domestic business—would shape the review process, at the expense, perhaps, of defense and diplomatic considerations. Ultimately, though, Congress vested all of the administrative and decisionmaking power directly in the President.<sup>85</sup>

Rather than embracing his newly acquired authority or, as is customary, delegating it either to a single department or to presidential aides, President Reagan tapped CFIUS to handle all but the final decision to cancel deals.<sup>86</sup> This designation “transformed [CFIUS] from a purely administrative body with limited authority to review and analyze data on foreign investment to one with a broad mandate and significant authority.”<sup>87</sup> It also ensured the continuation of an inclusive, interdisciplinary approach to foreign investment. The members' institutional affiliations and commitments meant that a wide range of policy priorities, including free trade, international diplomacy, economic protectionism, and national security, would remain relevant to the analysis of foreign investments.<sup>88</sup> Indeed, the delegation was likely to reprise (and presumably purposefully so) the departmental clashes that were on display when the Committee grappled with the spike in Japanese investments.<sup>89</sup> With the passage of Exon-Florio, those clashes could now be constructively channeled into a regulatory framework.

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administrative contexts where multiple agencies are given shared or overlapping jurisdiction).

<sup>85</sup> Jackson, Apr. 8, 2008, *supra* note 64, at 6; Graham & Krugman, *supra* note 83, at 126; see also Exec. Order No. 12,661, *reprinted as amended in* 3 C.F.R. 618 (1989).

<sup>86</sup> Exec. Order No. 12,661, 3 C.F.R. at 620.

<sup>87</sup> Jackson, Apr. 8, 2008, *supra* note 64, at 6; Larson & Marchick, *supra* note 57, at 11.

<sup>88</sup> See Baker, *supra* note 57, at 263–66; Graham & Krugman, *supra* note 83, at 126–27.

<sup>89</sup> See *supra* notes 75–81 and accompanying text; see also Baker, *supra* note 57, at 263–64. The shift from the traditional one-agency regulatory responsibility to an inter-agency deliberative process became even more significant two decades later, with the passage of the Foreign Investment and National Security Act of 2007 (“FINSA”). Pub. L. No. 110-49, § 2, 121 Stat. 246, 247 (codified at 50 U.S.C. app. § 2170(b)(1)(A) (Supp. II 2009)). FINSA for the first time statutorily recognized CFIUS as directing Executive Branch review of foreign investments. *Id.*

CFIUS's responsibilities today are substantially the same as they were under Exon-Florio.<sup>90</sup> It is charged with reviewing proposed transactions,<sup>91</sup> a process that begins when CFIUS is notified by the parties to the proposed transaction and that lasts no longer than thirty days.<sup>92</sup> Notification is voluntary.<sup>93</sup> Because foreign acquisitions falling within CFIUS's ambit that are not reviewed in advance by CFIUS "remain subject indefinitely to divestment or other appropriate actions by the President,"<sup>94</sup> there has always been a strong incentive for opting in.<sup>95</sup> If that review leads CFIUS to find evidence of a threat to national security,<sup>96</sup> CFIUS is obligated to initiate a more rigorous, formal investigation lasting no more than forty-five days.<sup>97</sup> Actions taken by the President or the Committee are not subject to public scrutiny<sup>98</sup> or judicial re-

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<sup>90</sup> Subsequent revisions have been made chiefly through Section 837(a) of the National Defense Authorization Act for Fiscal Year 1993, Pub. L. 102-484, § 837(a), 106 Stat. 2315, 2464 (1992) (codified at 50 U.S.C. app. § 2170 (2006)), and through FINSA. Except where otherwise noted in this Article, those revisions are not materially significant to the instant inquiry and analysis.

<sup>91</sup> See FINSA, 50 U.S.C. app. § 2170(b)(1). Covered transactions are acquisitions that result in foreign control over an entity engaged in interstate commerce. 31 C.F.R. § 800.301 (2010). FINSA does not define control, but CFIUS regulations contain a functional definition. See 31 C.F.R. § 800.302 (2010).

<sup>92</sup> FINSA, 50 U.S.C. app. § 2170(b)(1)(E).

<sup>93</sup> FINSA, 50 U.S.C. app. § 2170(b)(1)(C); Jackson, Apr. 8, 2008, *supra* note 64; 1 J. Eugene Marans et al., *Manual of Foreign Investment in the United States* § 11:4 (3d ed. 2004).

<sup>94</sup> James K. Jackson, Cong. Research Serv., RS 22197, *The Exon-Florio National Security Test for Foreign Investment* 4 (Feb. 23, 2006).

<sup>95</sup> FINSA, 50 U.S.C. app. § 2170(b)(1)(D)(i); James K. Jackson, Cong. Research Serv., RL 33312, *The Exon-Florio National Security Test for Foreign Investment* 5 (Apr. 8, 2008); 31 C.F.R. § 800.601 (2010); Baker, *supra* note 57, at 245. Alternatively, any CFIUS member can initiate a review of a proposed or completed (but not already reviewed) investment. Recently, Huawei did not avail itself of the pre-clearance CFIUS review and was subsequently pressured by CFIUS to unwind its already completed deal with 3Leaf. See Andrew Dowell & Shayndi Raice, *Huawei Drops U.S. Deal Amid Opposition*, Wall St. J., Feb. 22, 2011, <http://online.wsj.com/article/SB10001424052748703407304576154121951088478.html>.

<sup>96</sup> FINSA, 50 U.S.C. app. § 2170(b)(2)(A)–(B).

<sup>97</sup> *Id.* § 2170(b)(2)(C).

<sup>98</sup> *Id.* § 2170(c) (exempting all materials filed with CFIUS from public disclosure); Ronald Lee, *The Dog Doesn't Bark: CFIUS, the National Security Guard Dog with Teeth*, M&A Law., Feb. 2005, at 5, 8 ("By law, CFIUS is not permitted to disclose to the public information or documentary material submitted by the parties to a transaction. Nor does CFIUS disclose information about its own deliberations or concerns.").



view.<sup>99</sup> CFIUS must notify Congress of its recommendations (though not necessarily the terms or tenor of mitigation negotiations),<sup>100</sup> and provide the legislature with an annual, confidential report summarizing the transactions reviewed or investigated in the past year.<sup>101</sup>

Two elements of CFIUS scrutiny are especially significant. The first is the breadth of the definition of national security. The precise meaning has never been defined in the U.S. Code or via regulation.<sup>102</sup> Congress has enumerated factors that CFIUS should consider in determining whether a transaction threatens national security.<sup>103</sup> But the factors are broad and malleable, and could easily be read to include consideration of economic security, too.<sup>104</sup>

The second is CFIUS's aforementioned authority to negotiate with the parties seeking to consummate the deal.<sup>105</sup> When CFIUS encounters troubling aspects of deals, it negotiates mitigation agreements with the parties to minimize the putative security con-

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<sup>99</sup> FINSA, 50 U.S.C. app. § 2170(e); see also Briefing by Representatives from the Departments and Agencies Represented on the Committee on Foreign Investment in the United States (CFIUS) to Discuss the National Security Implications of the Acquisition of Peninsular and Oriental Steamship Navigation Company by Dubai Ports World, a Government-Owned-and-Controlled Firm of the United Arab Emirates: Hearing before the S. Comm. on Armed Servs., 109th Cong. 20–21 (2006) (statements of Sen. Warner, Chairman, S. Comm. on Armed Servs. and Robert Kimmitt, Deputy Secretary of Treasury); *id.* at 35–36 (statements of Sen. Levin and Robert Kimmitt, Deputy Secretary of Treasury); Marans et al, *supra* note 93, § 11:10.

<sup>100</sup> FINSA, 50 U.S.C. app. § 2170(m).

<sup>101</sup> *Id.*

<sup>102</sup> Jackson, Feb. 4, 2010, *supra* note 27, at 10–11; see also GAO Report, *supra* note 75, at 2; Zaring, *supra* note 70 at 98 & n.82. See generally Neal Devins & Michael Herz, *The Battle that Never Was: Congress, the White House, and Agency Litigation Authority*, 61 L. & Contemp. Probs. 205, 215–16 (1998) (noting Congress is often purposefully ambiguous when writing legislation).

<sup>103</sup> FINSA, 50 U.S.C. app. § 2170(f).

<sup>104</sup> Jackson, Feb. 4, 2010, *supra* note 27, at 13. By no means a perfect analogy, or even complement, to Exon-Florio, the IIEPA's presidential emergency powers "may be exercised to deal with any unusual and extraordinary [external] threat . . . to the national security, foreign policy, or economy of the United States." 50 U.S.C. § 1701(a) (2006).

<sup>105</sup> Initially, under Exon-Florio, CFIUS mitigation was an informal practice. Jackson, Feb. 4, 2010, *supra* note 27, at 14. With the subsequent passage of FINSA, CFIUS now has statutory authority to conduct mitigation negotiations. 50 U.S.C. app. § 2170(l)(1)(A) (Supp. II 2009).

cerns.<sup>106</sup> One notable mitigation agreement arose out of the French company Alcatel's acquisition of Lucent. CFIUS conditioned its endorsement of the acquisition on Lucent's special research division—Bell Labs, which does extensive classified work for U.S. national-security agencies—remaining largely off-limits to Alcatel personnel.<sup>107</sup> In another, CFIUS required Lenovo, a firm owned in part by the Chinese government and seeking to acquire IBM's PC business, to agree to wall itself off from the identity of U.S. government purchasers of IBM products and from two IBM buildings.<sup>108</sup>

CFIUS rarely advises the President to block a proposed investment,<sup>109</sup> and the President has been even more selective in actually

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<sup>106</sup> See Jackson, Feb. 4, 2010, *supra* note 27, at 14–15. For an excellent description of mitigation agreements and how they are struck and enforced, see Baker, *supra* note 57, at 248–50, 254–59. Baker also addresses the difference between the early (post-Exon-Florio) mitigation process, in which individual agencies would pursue their own mitigation agreements, and more recent practices involving broader Committee participation, *id.* at 267–68, and then Committee consensus was required by statute, *id.* at 269–70.

<sup>107</sup> See Jackson, Apr. 8, 2008, *supra* note 64, at 7–8; Baker, *supra* note 57, at 258–60 (describing the Alcatel mitigation agreement as involving “the toughest security measures ever imposed under CFIUS”); James Kanter, Shareholders in Paris Approve Merger of Alcatel and Lucent, *N.Y. Times*, Sept. 8, 2006, at C3; Stephanie Kirchgaessner, Security Rule Raises Takeovers Fear, *Fin. Times*, Dec. 5, 2006, at 6.

<sup>108</sup> See Anthony Michael Sabino, Transactions That Imperil National Security, *N.Y. St. B. Ass'n J.*, Nov./Dec. 2005, at 20, 22, 24.

<sup>109</sup> The number of filings to CFIUS far exceeds the number of transactions warranting CFIUS's attention. See Baker, *supra* note 57, at 245 (suggesting that ninety percent of all proposed investments submitted to CFIUS “didn't raise even modest national security concerns” and that only ten percent “received CFIUS review”). It is widely believed that the high number of filings is a product of firms' risk-aversion, as the penalty for not submitting at the risk of having the deal unwound *ex post* is far in excess of the cost of submitting to what is, for those companies, a rather expeditious proceeding. See *id.*; Lee, *supra* note 98, at 7.

Some have, however, focused on the very high number of filings as indicating that CFIUS is not a very rigorous investigator. See Zaring, *supra* note 70, at 103–04. But given the tendency for investors to seek pre-clearance review out of an abundance of caution, see Baker, *supra* note 57, at 245; *supra* notes 94–95 and accompanying text, and in light of the fact that CFIUS scrutinizes only the handful of proposed acquisitions that credibly pose security risks, it is not readily apparent why the overall number of filings—rather than the number of CFIUS investigations—should be the denominator used to measure CFIUS's influence. See Lee, *supra* note 98, at 8 (“The small number of 45-day investigations by CFIUS may suggest to the casual observer that the Administration has been relatively lax . . . . That inference is not accurate.”). For these reasons, the fact that only about half of the deals that are investigated are

blocking an investment.<sup>110</sup> Yet of the proposed deals that raise serious national-security concerns (about 1.6% of all cases brought to CFIUS's attention),<sup>111</sup> many are undone not by the President's formal decision to block an acquisition, but rather earlier—through attrition at the review and investigation stages, and in the course of mitigation negotiations. This is where the Committee's subtle but substantial influence is most felt.<sup>112</sup> From 1990 to 2008, “nearly half of the transactions CFIUS investigated were terminated by the firms involved, because the firms decided to withdraw . . . rather than face a negative determination by CFIUS,”<sup>113</sup> or rather than accept mitigation terms imposed by CFIUS that would make the acquisition less economically (or, assuming ulterior motives, less po-

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subsequently consummated provides considerable support for the proposition that CFIUS review is indeed rigorous.

<sup>110</sup> GAO Report, *supra* note 75, at 92; Marans et al, *supra* note 93, § 11:3.

<sup>111</sup> See FINSA, 50 U.S.C. app. § 2170 (2006 & Supp. II 2009); James K. Jackson, Cong. Research Serv., RL 33388, The Committee on Foreign Investment in the United States (CFIUS), at 17 (Jul. 29, 2010) [hereinafter Jackson, July 29, 2010]. Between 1988 and 2005, there were approximately 1500 filings to CFIUS, triggering twenty-five investigations. *Id.*; Primer, CFIUS, Wash. Post, Jul. 3, 2005, at F3. This data comports with Stewart Baker's estimation of one percent of investments triggering serious CFIUS attention. See Baker, *supra* note 57, at 245. Note that the CFIUS safe-harbor provision has the effect of encouraging many companies to seek investment review even though their acquisitions do not touch upon security issues. See *supra* notes 94–95, 109 and accompanying text.

<sup>112</sup> C. S. Eliot Kang, U.S. Politics and Greater Regulation of Inward Foreign Direct Investment, 51 Int'l Org. 301, 304 (1997) (noting the CFIUS investigations have “led a number of foreign buyers to withdraw from ‘done-deals’”); Zaring, *supra* note 70, at 106 (“Blocking a transaction is a crude tool and serves no purpose when more subtle remedies are available.”) (quoting U.S. Treasury Dep't, Staff Analysis of the Economic Strategy Institute, Foreign Investment in the United States: Unencumbered Access 2 (July 1991)); see also Baker, *supra* note 57, at 256–58.

<sup>113</sup> Jackson, Apr. 8, 2008, *supra* note 64, at 9; see also Comm. on Foreign Inv. in the U.S., Annual Report to Congress 3 tbl.B-1 (2010), available at <http://www.treasury.gov/resource-center/international/foreign-investment/Documents/CFIUS%20Annual%20Report%20to%20Congress%20for%20CY09.pdf>; Comm. on Foreign Inv. in the U.S., Annual Report to Congress 3 tbl.B-1 (2009), available at <http://www.treasury.gov/resource-center/international/foreign-investment/Documents/2009%20CFIUS%20Annual%20Report.pdf>. Zaring's data indicates that from 1988 to 2007, twenty-two of the thirty-seven investigations initiated by CFIUS resulted in the parties withdrawing from the proposed deal. Zaring, *supra* note 70, at 104. Regardless what numbers we use, there is always the possibility that some deals would fall apart irrespective of CFIUS's influence.

litically<sup>114</sup>) desirable.<sup>115</sup> Indeed, the central importance of informal CFIUS negotiation—as opposed to official, formal presidential decisions to approve or block foreign investments—is not unlike that of plea-agreements vis-à-vis courtroom verdicts in the vast majority of criminal matters.<sup>116</sup>

## II. ACCOUNTABILITY DEFICITS AND DYSFUNCTIONS

Were it not for In-Q-Tel, the CIA would likely coordinate intelligence technology acquisition and incubation in-house. And, were it not for CFIUS, the scrutinizing of foreign investments would likely be a responsibility retained by the President herself<sup>117</sup> or delegated to a single line agency.<sup>118</sup> What, then, are the effects of this pair of deviations from the customary institutional allocation of administrative and regulatory functions? Given the secrecy that surrounds both domains, definite answers are not readily available, or apparent. But this Article suggests some revealing possibilities that help us to understand what might be accomplished by the turn

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<sup>114</sup> See *supra* notes 75–79 and accompanying text (noting political and military angles that influence foreign investment).

<sup>115</sup> See *supra* note 27 and accompanying text.

<sup>116</sup> The comparison with plea agreements is twofold. In the vast majority of cases, foreign investment review never requires a presidential determination and criminal prosecutions never require a conviction. Moreover, neither CFIUS investigations nor prosecutors' plea deals are (1) subject to public scrutiny or (2) governed by explicit legal rules. Cf. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 *Stan. L. Rev.* 869, 871 (2009) (“In the 95% of [criminal] cases that are not tried before a federal judge or jury, there are currently no effective legal checks in place to police the manner in which prosecutors exercise their discretion to bring charges [or] negotiate pleas . . . .”); Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 *Am. J. Crim. L.* 223, 248–49 (2006) (discussing prosecutors' broad discretion in the negotiation and execution of criminal plea agreements).

<sup>117</sup> The President's attention is obviously divided among many responsibilities. Thus, by “herself,” I mean the President in conjunction with her White House aides.

<sup>118</sup> Cf. *supra* note 2 and accompanying text (describing examples). A counterexample is the inter-agency National Security Council. See Alan G. Whittaker, et al., *Research Report, The National Security Policy Process: The National Security Council and Interagency System* 12–21 (2008), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA502949&Location=U2&doc=GetTRDoc.pdf>. With the advent of the modern special advisor to the president for national security affairs, that body is increasingly an arm of the White House. See Zegart, *Flawed*, *supra* note 21, at 56; see also Katyal, *supra* note 84, at 2324–27.

to alternative institutional design structures, both as applied here and more broadly.

Before examining the effects of each institutional redesign, which occupies my attention in the subsequent two Parts, it is important first to understand the following: were they to be conventionally assigned to a single agency or to the White House itself, both CIA technology incubation and foreign-investment scrutiny would be largely divorced from legal and political accountability.<sup>119</sup> That is no small feat. After all, legal checks and the disciplining effects of an engaged electorate are the principal mechanisms guiding administrative action, aligning principal-agent incentives, and reducing the likelihood that Executive decisions will be arbitrary, abusive, or significantly at odds with majoritarian sensibilities.

When it comes to the CIA, most everything that the spy agency does is largely free from legal control. Professional spies, intelligence analysts, and R&D gurus need flexibility. The imposition of legal constraints such as judicial review, civil service protections, and the APA could jeopardize the twin imperatives of speed and secrecy.<sup>120</sup> For these reasons, Congress has insulated the Agency

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<sup>119</sup> Accountability is a difficult term to define. Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, in *Public Accountability: Designs, Dilemmas and Experiences* 115, 115–34 (Michael Dowdle ed., 2006); Edward Rubin, *The Myth of Accountability*, 103 *Mich. L. Rev.* 2073, 2073, 2134 (2005). Professor Rubin notes that the “[i]nvocation of [accountability] confers a certain cachet . . . it makes them fashionable—but it neither justifies nor illuminates them.” Rubin, *supra*, at 2074.

I define accountability to mean that government officials are obligated to be responsive and responsible. The officials’ actions and deliberations must be reasoned and reasonable. Government accountability of this sort operates through various measures, including those that reward prudence and penalize parochialism, caprice, and self-dealing. This is consistent with Martha Minow’s definition of accountability, one I have relied upon in previous inquiries. See Michaels, *supra* note 24, at 904 n.10 (defining accountability as “being answerable to authority that can mandate desirable conduct and sanction conduct that breaches identified obligations” (quoting Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 *Harv. L. Rev.* 1229, 1260 (2003))); see also Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 *N.Y.U. L. Rev.* 557, 577–78 (2003) (understanding accountability as “focus[ing] on whether an agency is obligated to disclose and justify its actions and whether its authority can be seen as limited by meaningful constraints, be they internal or external”).

<sup>120</sup> See *infra* notes 159–66 and accompanying text. One could argue to the contrary: that the secrecy imperative is overstated. This Article takes no position regarding whether legislative and judicial checks would be acceptable, or whether the secrecy

from the range of legal checks that attach to most other agencies. Moreover, even where the legislature has failed to ensure sufficiently robust insulation, the courts have typically provided minimal scrutiny and generally looked unfavorably on lawsuits seeking to hold the CIA legally accountable.<sup>121</sup>

Political accountability, where it exists,<sup>122</sup> can supplement legal constraints or compensate for the absence of such legal checks.<sup>123</sup> The electorate's mindfulness—and capacity to discipline the President—encourages reasoned, prudent agency action.<sup>124</sup> Accordingly, even if Congress has not imposed strong procedural or substantive constraints on Executive agencies, an administration still cannot abuse its discretion lest it jeopardize the President's popular support. Political accountability no doubt helps legitimate Executive primacy in military and foreign affairs<sup>125</sup> and justifies in large part the judiciary's deference to agency action.<sup>126</sup>

Yet political accountability might have perverse effects when it comes to intelligence incubation. Political pressure from the electorate might result in the shortchanging of long-term investments in order to devote maximum resources to current and near-future needs. This is a pervasive problem for political officials responsible

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imperative is overstated. Instead, I take as a given that the current scheme, where the courts and the Congress are largely deferential, is appropriate.

<sup>121</sup> See Robert M. Chesney, National Security Fact Deference, 95 Va. L. Rev. 1361, 1362–63 & n.1 (2009); *infra* notes 162–65 and accompanying text.

<sup>122</sup> Political accountability might not have effect for reasons identified below. See *infra* notes 181–82 and accompanying text.

<sup>123</sup> See *N.Y. Times v. United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring) (“In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry . . .”).

A third source of administrative legitimacy is expertise. See Magill & Vermeule, *supra* note 2, at 103. I do not treat expertise as a distinct element in part because expertise is often buttressed by legal constraints. See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 532–35 (2007); see also *infra* notes 357–59 and accompanying text.

<sup>124</sup> See Nina A. Mendelson, Disclosing Political Oversight of Agency Decision Making, 108 Mich. L. Rev. 1127, 1128 (2010) (suggesting accountable administrative governance requires reason-giving by the president or other presidentially appointed source); *infra* notes 179–81 and accompanying text.

<sup>125</sup> See *infra* notes 179–81 and accompanying text.

<sup>126</sup> See *FDA v. Brown & Williamson Tobacco*, 529 U.S. 120, 188–89 (2000) (Breyer, J., dissenting); *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 864–66 (1984).

for long-term planning yet dependent on short-term popular approval. And, it is especially acute in this context because the fruits of long-term intelligence planning cannot, for secrecy reasons, be announced *ex ante* to the public—and thus the incumbent administration will not receive immediate credit for its foresight.<sup>127</sup> By contrast, the costs of failing *today* to devote (or be seen as devoting) maximal resources to the present task could be politically disastrous in the event an intelligence failure paves the way to another attack.<sup>128</sup> Hence, there appears to be a tension between the responsibility to pursue long-term technology incubation and political accountability.

With respect to scrutinizing foreign investments, a similar accountability deficit to the one just described would arise were the responsibility conventionally assigned to a single line agency or kept within the White House. Here, too, legal accountability is ratcheted down on the assumption that national security and diplomacy would be endangered by such safeguards as procedural transparency and judicial review.<sup>129</sup>

Likewise, political accountability is problematic in this space, albeit for reasons that differ from those associated with long-term intelligence incubation. First, the domestic public might be a particularly disruptive force, if able to influence the foreign-investment review process. The public's unease about foreign ownership—exacerbated by their limited ability to assess risks and by a range of cultural biases—could make it difficult for the President to readily endorse even objectively innocuous proposed investments. A telling set of examples recalls public opposition to the proposals by Japanese firms in the 1980s to acquire Rockefeller Center and the golf course at Pebble Beach. Japan was far from a hostile government. More to the point, neither Rockefeller Center nor Pebble Beach was (or is) of strategic significance.<sup>130</sup>

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<sup>127</sup> See *infra* notes 183–89 and accompanying text.

<sup>128</sup> See *infra* notes 183–95 and accompanying text. Thinking about “the next attack” obviously took on heightened importance after 9/11. It is not, however, necessarily how we will always look at intelligence planning and certainly was not as central to the pre-9/11 architects of In-Q-Tel.

<sup>129</sup> See *supra* note 120; *infra* note 271. My discussion here, too, accepts as reasonable the current state of the law. I take no position on the arguments for or against the imposition of greater externally imposed legal constraints.

<sup>130</sup> See *supra* note 77 and accompanying text.

Second, political accountability need not be principally a question of voters expressing approval or disapproval through the ballot. It might—and often does—have an international component as well.<sup>131</sup> Scrutinizing investments and negotiating mitigation agreements involves sensitive, adversarial, and at times accusatorial engagement with foreign companies and foreign governments. Foreign entities are no doubt offended by U.S. government investigations. If the President is viewed as being responsible for that inquiry, rigorous scrutiny over investments might interfere with presidential efforts to promote broader trade, defense, environmental, or human-rights agendas.<sup>132</sup> Thus, a President responsible for scrutinizing foreign investments might be tempted, given her other priorities, to “go easy” on the foreign entities.

Third, and further detached from the President’s own, immediate interests, but no less real, is the fact that approving, blocking, or renegotiating the terms of an investment is essentially a form of administrative adjudication. For a variety of reasons, fundamental fairness in adjudications is often in tension with politically expedient decisionmaking,<sup>133</sup> and thus foundational lessons of good governance (if not constitutional law) would suggest that politically accountable adjudication is problematic and rights infringing.

What we have in both the case of technology incubation and the case of foreign-investment scrutiny are accountability gaps or dysfunctions. These gaps or dysfunctions undermine the long-term interests of the federal government and at times also hamper the incumbent Administration. Ratcheting up legal constraints is not necessarily an answer. To do so could threaten national security more acutely. Or, to do so—and then have the courts ignore the heightened standards (because judges do not want to risk being the cause of a security lapse)<sup>134</sup>—might well be the worst of all worlds:

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<sup>131</sup> Impressions of how the United States is seen overseas have a role in shaping policies ranging from the death penalty to civil rights. See, e.g., Mary L. Dudziak, *Cold War Civil Rights* 6–15 (2000); Jeffrey Toobin, *Swing Shift: How Anthony Kennedy’s Passion for Foreign Law Could Change the Supreme Court*, *New Yorker*, Sept. 12, 2005, at 42, 42–43 (capturing how the Court has been influenced by “world opinion” in such cases as *Lawrence v. Texas* and *Roper v. Simmons*).

<sup>132</sup> See *infra* Section IV.D.

<sup>133</sup> See *infra* Subsection IV.B.2.

<sup>134</sup> David Dyzenhaus, *The Constitution of Law* 3 (2006); Adrian Vermeule, *Our Schmittian Administrative Law*, 122 *Harv. L. Rev.* 1095, 1134–35 (2009).



an unfulfilled promise of legal accountability that gives us a false sense of assurance.<sup>135</sup> Moreover, heightened political accountability cannot fill the void. To do so in the context of CIA technology incubation—that is, to shine a brighter light on the CIA’s process and invite greater public scrutiny—would exacerbate the perverse political incentives to focus resources on the here-and-now, short-changing future technology development.<sup>136</sup> And, to do so in the foreign-investment context would similarly be distorting along the dimensions identified above.

### III. IMPROVING REGULATORY POLICY THROUGH INSTITUTIONAL DESIGN EXTERNAL TO THE ADMINISTRATIVE STATE

One can never be certain what the architects of In-Q-Tel and CFIUS intended when they chose to empower those two entities. Regardless, the institutional redesign efforts very much appear to improve administrative governance, compensating for deficits and perversions of traditional accountability constraints.<sup>137</sup> But for the privatization of intelligence incubation, and but for assigning an inter-agency committee the bulk of the responsibilities associated with scrutinizing foreign investments, the absence of well-functioning legal and political constraints would be felt more acutely.

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<sup>135</sup> See *infra* notes 163–64 and accompanying text.

<sup>136</sup> This claim rests on the fact that despite the greater public attention, the government still would not divulge exactly what technologies it is developing and why. Were it to do so, presumably the political accountability perversion would be corrected, but at the cost of exposing to the world our self-acknowledged strategic vulnerabilities.

<sup>137</sup> Of course, there are real tradeoffs associated with jettisoning a commitment to legal and political accountability. For that reason and for others, see *infra* note 167 and accompanying text, the new designs exhibited by In-Q-Tel and CFIUS are by no means perfect. The absence of unmediated presidential control (and diffusion of authority) in both cases diminishes the unitary execution of our national security policy. See, e.g., Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive* 3–20 (2008). It also at times lessens the public’s ability to hold officials responsible for failing in their responsibilities—think FEMA’s Michael Brown—or acting in variance with majoritarian preferences—think Surgeon General Jocelyn Elders. See Michael Duffy, *Getting Out the Wrecking Ball*, *Time*, Dec. 19, 1994, at 41 (reporting that President Clinton fired the Surgeon General for staking out controversial positions at odds with the White House and the electorate); Spencer S. Hsu & Susan B. Glasser, *FEMA Director Singled Out by Response Critics*, *Wash. Post*, Sept. 6, 2005, at A1 (noting political backlash against the FEMA Director widely viewed as incompetent during and immediately after the Hurricane Katrina catastrophe).

In the Parts that follow, I discuss the effects of the move from in-house incubation to incubation by a private contractor, and the effects of the move from single-agency or White House investment scrutiny to scrutiny by an inter-agency committee. The case studies discussed herein represent two complementary archetypes, both in design and in effect. When it comes to design, one leverages the market seemingly to better align administrative and policy incentives; the other scrambles and flattens bureaucratic hierarchy to do the same. And, when it comes to effect, each limits the political leadership in ways that generates benefits both to the incumbent Administration as well as to the public writ large.

Here, in this Part, I discuss the CIA's turn to the market. The dual effects of this institutional reconfiguration are (1) to overcome the perverse political incentives to shortchange long-term intelligence incubation; and (2) to better align principal-agent interests in ways that promote sound fiscal and policy decisions. Before pursuing those lines of inquiry, however, I first question the conventional wisdom surrounding In-Q-Tel. Those who have looked at In-Q-Tel have for the most part concluded that the CIA's creation of a private VC furthered the Agency's presumptive preference for minimizing bureaucratic constraints. Specifically, the commentators have adverted to the hassles of complying with federal contracting and employment protocols. (One could, of course, couch this putative preference very differently—as the Agency seeking to evade meaningful legal constraints and important worker protections.<sup>138</sup>) Yet their conclusion is curious not just because of its biases and blindspots. It is also curious because it seemingly fails to appreciate how legally exceptional, and unfettered, the Agency already is. Questioning this conventional wisdom is a necessary predicate to uncovering In-Q-Tel's likely effects.

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<sup>138</sup> At the very least, one is reminded of the adage that one person's "red tape" is another's "accountability" safeguard. See, e.g., Ellen Dannin, *Red Tape or Accountability: Privatization, Public-ization, and Public Values*, 15 *Cornell J.L. & Pub. Pol'y* 111, 153 (2005); Michaels, *supra* note 2.

*A. Questioning the Dominant Narratives Surrounding In-Q-Tel as Executive Aggrandizing*

In this Section, I discuss why the conventional explanations for In-Q-Tel's existence are unconvincing. They are, to be sure, the explanations that best comport with the dominant understanding of the Executive as power-aggrandizing. They are also the explanations that most readily support the turn to privatization. Yet, however intuitive these claims are in general, they fail to account for the CIA's legal distinctiveness. This Section calls into question the conventional assumptions regarding In-Q-Tel. It also sets the stage for the following Section's work examining what actually seems to be going on and how the creation of a privatized VC constrains rather than unshackles the President and the CIA Director.<sup>139</sup>

*1. Avoiding the Legal Constraints Surrounding Government Procurement and Investment*

Some laws and regulations apply principally to government actors. The FAR and related procurement laws fall into that category. Federal agencies subject to the FAR must comply with a host of regulatory constraints. Dutiful adherence limits those agencies' discretion and flexibility, slowing down the process by which they enter into contracts for services and goods.<sup>140</sup> Moreover, the procedural hassles that go hand-in-hand with FAR compliance might well deter private firms from pursuing business opportunities with government agencies.<sup>141</sup>

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<sup>139</sup> Throughout, I refer to the CIA Director. Since 2005, the CIA Director answers in important ways to the Director of National Intelligence ("DNI"). See Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 104A, 118 Stat. 3638, 3660-62 (codified at 50 U.S.C. §§ 403-4-404-4b (2006)); see also *supra* note 1; *infra* note 231 and accompanying text. Because there was little intervening bureaucracy between the CIA and the President at the time In-Q-Tel was established and because my analysis is unaffected by the current intervening administrative layer (insofar as the DNI serves also at the President's pleasure and insofar as the CIA Director is largely subordinate to the DNI), I refer throughout only to the President and the CIA Director.

<sup>140</sup> Flexibility might be popular, but it has its drawbacks. See, e.g., David A. Super, *Against Flexibility*, 96 *Cornell L. Rev.* (forthcoming 2011) (manuscript at 2-4), available at <http://ssrn.com/abstract=1675225>.

<sup>141</sup> See BENS Report, *supra* note 13, at 16; Belko, *supra* note 29, at 3.

It might therefore not be surprising that the conventional account explaining In-Q-Tel celebrates the fact that the private VC need not comply with this cumbersome and onerous legal regime.<sup>142</sup> The FAR does not extend to In-Q-Tel any more than it does to a neighborhood deli, and thus In-Q-Tel can engage private technology firms comparatively free from regulatory shackles.

This account would be persuasive were the agency in question not the CIA but instead a domestic regulatory department.<sup>143</sup> Indeed, the same would be true with respect to the Pentagon or State Department. We would find efforts by those agencies to create a private vehicle to evade federal acquisition and procurement regulations plausible. That is because both Defense and State are typically bound by federal procurement regulations, notwithstanding the fact that they too are essential participants in U.S. national security and foreign affairs.<sup>144</sup> For that reason, perhaps it is not surprising that those other agencies have begun experimenting with quasi-privatized VC spinoffs of their own.<sup>145</sup>

Where the Executive views external legal constraints as hampering the Administration's objectives, one means of possibly evading those constraints involves privatization. By outsourcing responsibilities to the commercial sector, the terms of public engagement change. They are dictated more by contracts, drafted by the Execu-

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<sup>142</sup> See BENS Report, *supra* note 13, at 18 (emphasizing that In-Q-Tel is "not required to comply with the FAR requirements"). But see *supra* note 138 and accompanying text.

<sup>143</sup> See Koppel, *supra* note 50, at 641–42 (emphasizing that quasi-privatized government VC endeavors in domestic regulatory space free those entities from traditional administrative constraints).

<sup>144</sup> In the main, State and Defense abide by the FAR and the agency-specific supplements to the FAR. See Department of State Acquisition Regulations ("DOSAR"), 48 C.F.R. ch. 6 (2009); Defense Acquisition Regulations System ("DFARS"), 48 C.F.R. ch. 2 (2009). For our purposes, the differences among the government-wide FAR, the DOSAR, and the DFARS are inconsequential. See generally Steven J. Kelman, *Achieving Contracting Goals and Recognizing Public Law Concerns*, in *Government by Contract* 153, 159–65 (Jody Freeman & Martha Minow eds., 2009) (noting that important government objectives are hindered by having to comply with stringent federal procurement regulations). Agencies have what is known as "other transaction" authority, which allows them to disregard the FAR in various contexts. DARPA has been known to invoke this authority. Joseph Summerill, *Homeland Security's Not So Secret Weapon*, *Contract Management*, Nov. 2002, at 32.

<sup>145</sup> See *supra* note 50 and accompanying text. To the extent that acting through an independent VC enables other agencies to evade procurement rules, it suggests a more transparent motivation than what we find with the CIA. See *infra* Section III.B.

tive (and subject to Executive supervision, renewal, or cancellation), than by congressional enabling acts, the APA, and decisional law.<sup>146</sup> Concomitantly, expectations of transparency, the availability of judicial review, and employment protections typically afforded to government civil servants are ratcheted down considerably.<sup>147</sup> In their stead, the Executive can proceed via private proxy with a firmer, potentially more politicized grip on the nation's regulatory agenda.

This ought not explain In-Q-Tel's genesis. When it comes to the CIA, an Executive intent on maximizing autonomy along the lines just described would find privatization a waste of time. The CIA follows the FAR as a matter of policy, not legal obligation.<sup>148</sup> Where the spy agency would be burdened by adhering to the FAR, in general or in specific contexts, it simply opts out.<sup>149</sup> The Agency

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<sup>146</sup> Compare Jerry L. Mashaw et al., *Administrative Law* 154, 779–80 (5th ed. 2003) (emphasizing the role Congress and the courts play in creating and guiding agency action), with Laura A. Dickinson, *Public Values/Private Contract*, in *Government by Contract*, supra note 144, at 335, 336 (noting the control that the Executive has over contractors via the terms of the contractual agreement), and Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 *Harv. L. Rev.* 1285, 1285 (2003) (emphasizing that the agencies that engage in outsourcing could condition the award of contracts on the contractors embracing certain public norms).

Similarly it is the Executive's decision whether to renew a contract, rather than the judiciary's assessment whether decisions are supported by substantial evidence, that is the dominant referendum on administrative performance. Donahue, supra note 44, at 126–27 (emphasizing the importance of a competitive market of prospective contractors such that the Executive can readily replace the incumbent contractor based on poor performance).

<sup>147</sup> Verkuil, supra note 55, at 89–90; Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion and Entrepreneurial Government*, 75 *N.Y.U. L. Rev.* 1121, 1127–28 (2000) (noting that privatizing social-service responsibilities reduces transparency and limits opportunities for judicial review); Guttman, supra note 5, at 894–96; Nina A. Mendelson, *Six Simple Steps To Increase Contractor Accountability*, in *Government by Contract*, supra note 144, at 242, 244–45; Michaels, supra note 2, at 734–39.

<sup>148</sup> See BENS Report, supra note 13, at 31; supra note 13 and accompanying text; cf. Elizabeth Magill, *Agency Self-Regulation*, 77 *Geo. Wash. L. Rev.* 859, 873–76 (2009) (noting that self-regulatory commitments are often not legally binding).

<sup>149</sup> See supra note 13 and accompanying text; see also 50 U.S.C. § 403j (2006); Ginger Ann Wright, *Procurement Authorities of the CIA*, 53 *Admin. L. Rev.* 1195, 1208–15 (2001).

One is reminded of Justice Scalia's dissent in *Morrison v. Olson*, in which the Justice mocks the Government's assurance that the Independent Counsel complies with Justice Department practices except when not "possible." 487 U.S. 654, 707 (1988) (Scalia, J., dissenting) (citing 28 U.S.C. § 594(f) (1982 Supp. V)). For Scalia, the possi-

might be perfectly happy to comply with the FAR when buying pencils or printers, but less so in situations involving purchases of cutting-edge technologies where flexibility and secrecy are prized.<sup>150</sup> In short, one need not evade regulations that do not apply.

## 2. *Enhancing Employment Flexibility*

Another common explanation for tapping private actors to handle public responsibilities has to do with enhanced employment flexibility. Employment flexibility, and the capacity to encourage and discipline workers, often serves to justify agency decisions to outsource governmental functions.<sup>151</sup>

Unlike most government agencies with workforces dominated by civil servants, private businesses can lure high-level talent by offering top salaries, motivate workers by pegging wages to performance, and save money by offering few or no benefits to low-skilled laborers. Private businesses can also promote the most talented, not just those with the most seniority; and, they can summarily fire those who are not performing well.<sup>152</sup>

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bility that the Independent Counsel has discretion to chart her own course “shows this [assurance] to be an empty promise.” *Id.*

<sup>150</sup> And even if the CIA were to embrace some aspects of the FAR, perhaps where speed isn’t essential, it seems likely to resist certain transparency protocols and bid protests.

<sup>151</sup> See, e.g., Donahue, *supra* note 44, at 47–48, 143; Ronald A. Cass, *Privatization: Politics, Law, and Theory*, 71 *Marq. L. Rev.* 449, 467 (1988); see also *Richardson v. McKnight*, 521 U.S. 399, 421 (1997) (Scalia, J., dissenting) (noting “one of the principal economic benefits of . . . ‘out-sourcing’ [is] the avoidance of civil-service salary and tenure encrustations”); cf. Sean Gailmard & John W. Patty, *Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise*, 51 *Am. J. Pol. Sci.* 873, 873 (2007) (noting civil service protections “seem to weaken public sector employees’ extrinsic incentives to be responsive and energetic in pursuing their duties”).

<sup>152</sup> See Guttman, *supra* note 5, at 917 (noting that one advantage to outsourcing is the Executive’s freedom from rigid civil service constraints); Sidney A. Shapiro, *Outsourcing Government Regulation*, 53 *Duke L.J.* 389, 415 (2003) (“Private actors are not constrained by civil service regulations when they hire and fire employees, and they are not bound by other legal and constitutional constraints that raise the cost of providing government services, such as due process.”); Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 *N.C. L. Rev.* 397, 465–66 (2006) (suggesting that “civil service ‘deregulation’” would blunt the motivation to outsource for reasons of avoiding the civil service).

As in the case of privatizing ostensibly to avoid government procurement regulations, In-Q-Tel is celebrated as the CIA's inspired effort to hire the best and brightest.<sup>153</sup> But here too, celebratory accolades seem misplaced. The CIA is an outlier among government agencies. It has little need to resort to privatization to gain employment flexibility. The Agency already is "exempt from" those federal laws "concerning compensation and federal employment regulations."<sup>154</sup> This means that, with or without In-Q-Tel, the spy agency has considerable flexibility regarding salary, promotions, and terminations—far greater than what we find in most other government departments.<sup>155</sup> The CIA abides by the dominant government practices vis-à-vis employment when it sees fit. It is, however, under no legal obligation to do so, and need not resort to outsourcing simply to circumvent employment restrictions.<sup>156</sup> Indeed, if

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<sup>153</sup> BENS Report, supra note 13, at ix, 41–45; id. at 18 (noting that In-Q-Tel is "not restricted by civil service personnel policy"). Others, of course, view circumventing the civil service in a more problematic light. See Michaels, supra note 2, at 745–50.

<sup>154</sup> Bus. Execs. For Nat'l Sec., Pay for Performance at the CIA: Restoring Equity, Transparency and Accountability: The Assessment of the Independent Panel on the Central Intelligence Agency's Compensation Reform Proposals 8 (2004) [hereinafter BENS Compensation Report], available at [http://www.bens.org/mis\\_support/cia-reform-report.pdf](http://www.bens.org/mis_support/cia-reform-report.pdf); see also 50 U.S.C. § 403j(b) (2006) ("The sums made available to the Agency may be expended without regard to the provisions of law and regulations relating to the expenditure of Government funds.").

The BENS Compensation Report notes that "CIA Directors have generally followed the principles and practices" of federal law that automatically apply to most other agencies, but only to an extent. For instance, senior officials in the CIA have "authority to unilaterally determine salary levels for positions within their span of control with little centralized oversight," and that the Agency typically pays off of the government pay scale for, among others, engineers, scientists, and medical doctors. BENS Compensation Report, supra, at 8–9.

<sup>155</sup> But see National Defense Authorization Act for Fiscal Year 2004 § 1125, 5 U.S.C. §§ 5382–83 (2006) (updating the performance-based employment and merit system for the very top echelon of civil service employees and permitting salaries for that class of government officials to exceed the traditional government schedule); see also U.S. Office of Personnel Management, Senior Executive Service, Performance and Compensation, <http://www.opm.gov/ses/performance/index.asp> (last visited Feb. 4, 2011).

<sup>156</sup> See *Webster v. Doe*, 486 U.S. 592, 601 (1988); BENS Compensation Report, supra note 154, at 8–9. Moreover, as evidenced in *Webster*, short of the CIA terminating an employee for unconstitutional reasons, fired CIA employees are not permitted the same procedural and substantive challenges that are usually available for a civil servant in most other agencies. See *Webster*, 486 U.S. at 601. And, even where such suits might possibly lie, the CIA has successfully invoked the State Secrets doctrine to have

anything, because In-Q-Tel is a private company subject to state and federal labor and anti-discrimination laws, and because it is a 501(c)(3) organization prohibited from compensating employees above fair market value, it has *more*—not fewer—restrictions vis-à-vis personnel discretion than the almost entirely unencumbered Agency.<sup>157</sup>

### 3. *Evading Public Scrutiny and Oversight*

Another presumptive “benefit” of a government agency operating through a private proxy is that by privatizing functions, the responsibilities in question are typically subject to less public scrutiny and judicial remediation. (Others, of course, view this as a powerful reason to oppose government outsourcing.<sup>158</sup>) In most cases, it is comparatively more difficult to gain access to spending decisions, organizational protocols, salaries and the like from a private contractor working for government agencies than it would be to obtain comparable information about the agencies themselves.<sup>159</sup> Similarly, privatization can be a barrier to judicial review.<sup>160</sup>

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employee complaints dismissed. See *Sterling v. Tenet*, 416 F.3d 338, 347 (4th Cir. 2005).

<sup>157</sup> See Guttman, *supra* note 5, at 894 (indicating that it is typically easier for the public to learn the names and attendant responsibilities of public officials than it is to learn the same about contractors). To maintain status as a 501(c)(3) organization, entities such as In-Q-Tel cannot pay above-market wages to their executives. I.R.C. § 4958(c), (e) (2006). In-Q-Tel is constrained by the force of this law in a way that is alien to the CIA. Additionally, as a 501(c)(3) organization, In-Q-Tel must file a 990 Form itemizing (and publicly disclosing) some of its expenditures and publishing the names and annual compensation of certain key employees. See Internal Revenue Serv., Form 990, Return of Organization Exempt From Income Tax 1, 7–8, 10 (2010), available at <http://www.irs.gov/pub/irs-pdf/f990.pdf>. Finally, as a private business engaged in interstate commerce, it is subject to a range of federal and state anti-discrimination and labor laws.

<sup>158</sup> See *supra* notes 138, 142, 153 and accompanying text.

<sup>159</sup> Dan Guttman, *Governance by Contract: Constitutional Visions; Time for Reflection and Choice*, 33 *Pub. Cont. L.J.* 321, 345 (2004) (noting limitations on public access to information regarding government contractors); David H. Rosenbloom & Suzanne J. Piotrowski, *Reinventing Public Administration While “De-inventing” Administrative Law: Is It Time for an “APA” for Regulating Outsourced Government Work?*, 33 *Syracuse J. Int’l L. & Com.* 175, 185 (2005) (noting contractors’ comparative freedom from Freedom of Information Act (FOIA) requests, sunshine laws, and First Amendment imperatives and their reluctance to open themselves up to those public requirements).

<sup>160</sup> See *supra* note 147 and accompanying text.



But again, the exceptionalism of the CIA<sup>161</sup> and, to a lesser extent, national-security agencies in general,<sup>162</sup> suggests that avoidance of transparency requirements or judicial review is an unlikely motivation for (or outcome of) establishing In-Q-Tel. The public is not afforded much access to CIA deliberations, operations, personnel, or spending decisions when the Agency acts without the aid of contractors.<sup>163</sup> Likewise, given the breadth of the CIA's statutory

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<sup>161</sup> See Samuel J. Rascoff, *Domesticating Intelligence*, 83 S. Cal. L. Rev. 575, 575 (2010) ("Intelligence sits in an uncomfortable relationship with law's commitment to transparency and accountability. History amply demonstrates that intelligence . . . frequently begins where the rule of law gives out.").

<sup>162</sup> See Zegart, *Flawed*, supra note 21, at 26–34 (noting national security agencies have few legal constraints imposed on them); Gregory E. Maggs, *The Rehnquist Court's Noninterference with the Guardians of National Security*, 74 Geo. Wash. L. Rev. 1122, 1123 (2006); Jerry L. Mashaw, *Due Processes of Governance: Terror, the Rule of Law, and the Limits of Institutional Design*, 22 Governance 353, 354 (2009) (noting that "the maintenance of the rule of law . . . is fragile in the face of dogged claims by the executive that it is acting in the interests of national security"); Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 Yale L.J. 1170, 1176 (2007) (defending broad Executive deference in matters of foreign affairs); Cass R. Sunstein, *Administrative Law Goes to War*, 118 Harv. L. Rev. 2663, 2663–64 (2005) (same); Vermeule, supra note 134, at 1133 ("There are too many domains affecting national security in which official opinion holds unanimously, across institutions and partisan lines and throughout the modern era, that executive action must proceed untrammelled by even the threat of legal regulation and judicial review, no matter how deferential that review might be on the merits."). Where judicial review is available, it is substantially watered down. See, e.g., *Jifry v. FAA*, 370 F.3d 1174, 1180 (D.C. Cir. 2004); Chesney, supra note 121, at 1362; William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 Geo. L.J. 1083, 1100–02 (2008) (describing "super-deference" applied to decisions in the national security and foreign affairs contexts); Vermeule, supra note 134, at 1096–97.

Moreover, there is the national-security exemption to Federal Tort Claims Act (FTCA), see 28 U.S.C. § 2680(j) (2006), and to FOIA, 5 U.S.C. § 552(b)(1) (2006). See also *Boyle v. United Techs. Corp.*, 487 U.S. 500, 511–12 (1988) (emphasizing the significance of military needs and design capabilities in preempting state tort claims against government contractors); *Feres v. United States*, 340 U.S. 135, 146 (1950) (holding the FTCA does not cover injuries to military personnel in the course of their service).

<sup>163</sup> See 50 U.S.C. § 403j(b) (2006); supra note 154 and accompanying text; see also *Harrington v. Bush*, 553 F.2d 190, 195 (D.C. Cir. 1977) ("Since Congressional power is plenary with respect to the definition of the appropriations process and reporting requirements, the legislature is free to establish exceptions to this general framework, as has been done with respect to the CIA."); James A. Goldston et al., *Comment, A Nation Less Secure: Diminished Public Access to Information*, 21 Harv. C.R.-C.L. L. Rev. 409, 459–66 (1986) (describing the difficulties associated with the public's ability to scrutinize the CIA).

“sources and methods” protections, judicial review of core Agency actions is largely unavailable.<sup>164</sup> And even where those exemptions are not sufficiently categorical, courts have frequently credited Executive assertions of State Secrets and dismissed suits brought against the Agency.<sup>165</sup>

By contrast, IRS regulations of tax-exempt organizations require certain public accountings, including the publication of the names and salaries of key officers and employees.<sup>166</sup> The disclosures by tax-exempt organizations might not be much, but they are more revealing in many respects than what the CIA would publicly disclose.

### *B. Market Accountability as the Key Feature of Institutional Redesign*

Operating through In-Q-Tel cannot loosen the shackles of administrative procedure because the CIA is already largely free of them. Nor does it appear to generate much by way of increased efficiency when compared to an in-house operation.<sup>167</sup> So, what is

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<sup>164</sup> *Webster v. Doe*, 486 U.S. 592, 601 (1988); *CIA v. Sims*, 471 U.S. 159, 180–81 (1985). Judicial review amenable to challenges regarding where or how to invest could lead to the disclosure of clues regarding the CIA’s sources and methods and also reveal where the Agency is currently vulnerable or technologically outdated. Such information is potentially devastating from a national-security standpoint.

<sup>165</sup> See, e.g., *Tenet v. Doe*, 544 U.S. 1, 3, 11 (2005); *Totten v. United States*, 92 U.S. 105, 107 (1875); *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1092 (9th Cir. 2010) (en banc); *Dycus, et al.*, supra note 9, at 1037–50; see also *ACLU v. NSA*, 493 F.3d 644, 687 (6th Cir. 2007) (dismissing for want of standing in part because the State Secrets doctrine prevented plaintiffs from discovering documents from the government that might show their injury in fact). For a more general consideration of the State Secrets doctrine, see *United States v. Reynolds*, 354 U.S. 1, 7–11 (1953).

<sup>166</sup> See I.R.C. § 6104 (2006) (requiring tax-exempt organizations to file a Form 990, publicly disclosing the names and salaries of key employees).

<sup>167</sup> Efficiency hasn’t been prominently mentioned as a basis for creating In-Q-Tel or shown to be an effect of enabling In-Q-Tel; but, because it nevertheless is one of the chief motivations for, and celebrated outcomes of, privatization, it warrants some consideration. The standard account of efficiency through privatization is predicated on several conditions, none of which is present here. As John Donahue has forcefully captured, the delegation of discrete, observable tasks and the existence of a competitive pool of rival contractors are essential. Donahue, supra note 44, at 147 (noting the absence of competition “stifle[s] any benefits that privatization would otherwise offer”); David Osborne & Ted Gaebler, *Reinventing Government* 83–84 (1992) (“Those who deliver poor service at high prices are gradually eliminated, while those who deliver quality service at reasonable prices grow larger.”). Additionally, many

driving this institutional overhaul? Or, more importantly, what are the effects? Perhaps the Agency did not want to take full advantage of its statutory exemptions from administrative constraint, fearing that if it went too far in exploiting its exemptions, it might invite unwanted scrutiny and calls to scale back those exemptions. This is possible, though it is difficult for outsiders to detect any exploitation on the CIA's part, and many of the CIA's critics already assume the worst. In any event, creating a privatized VC entity has itself raised quite a few eyebrows,<sup>168</sup> and, as noted, has resulted in the Agency relinquishing a substantial amount of control in the process.<sup>169</sup>

Perhaps it is a case of the Agency being swept up in the latest fad in government reform.<sup>170</sup> Privatization has been immensely

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point to the contractors' quest for profits as an underlying reason why the private sector outperforms the government bureaucracy. Where competitive market conditions do not exist, privatization is less likely to be efficient. See Donahue, *supra* note 44, at 147. First, In-Q-Tel does not have any natural competitors. It was created especially for the CIA to promote the Agency's incubation and acquisition of future technology. Thus, it faces little in the way of competitive pressure from would-be rivals vying to win the CIA's VC contract. Second, the complicated, difficult-to-monitor, and discretionary responsibilities entrusted to In-Q-Tel make it less likely that the VC outfit will perform efficiently. Private sanitation collection is often held up as a classic example of where governments can realize cost savings through contracting out. The government can specify the scope, timing, and frequency of the garbage collection, and can monitor performance through visible inspections (or even rely on the constituents to report poor or untimely pickup). See *id.* at 58–59, 67. By contrast, incubating future technologies is a broad, unwieldy mandate, and especially difficult to monitor given the time lag between investment and realization. Moreover, the legal independence that affords In-Q-Tel especially broad autonomy to select its investments also makes it especially difficult to guide. Third, as a non-profit, In-Q-Tel might well lack the same institutional drive to lower costs and increase productivity, as might be the case were the contractors able to pocket the profits. That said, In-Q-Tel's incentive-laden employee compensation scheme, see *infra* notes 220–21 and accompanying text, mitigates that particular concern.

<sup>168</sup> See Neil King, Jr., *With a Nod To 007, the CIA Sets Up Firm to Invest in High Tech*, *Chi. Trib.*, Apr. 17, 2000, § 7, at 36 (cataloging concerns and objections raised by members of Congress); Terence O'Hara, *In-Q-Tel, CIA's Venture Arm, Invests in Secrets*, *Wash. Post*, Aug. 15, 2005, at D1 (noting critics' opposition to In-Q-Tel).

<sup>169</sup> See *supra* notes 7–15 and accompanying text (describing In-Q-Tel's independence from the CIA regarding personnel and investment decisions).

<sup>170</sup> Mariano-Florentino Cuéllar, "Securing" the Nation: Law, Politics, and Organization at the Federal Security Agency, 1939–1953, 76 *U. Chi. L. Rev.* 587, 640 (2009) (noting that institutional design is sometimes a reflection of "ideas that become fashionable—regardless of whether they advance political agendas or prescriptive goals").

popular for decades, possibly even a “national obsession.”<sup>171</sup> If this were a case of the CIA jumping on the outsourcing bandwagon, for the reasons described above it does not appear to have the same payoff as it would in domestic regulatory domains.<sup>172</sup> Besides, the intelligence agencies have always been at the forefront of government outsourcing of various stripes, from Cold War front operations,<sup>173</sup> to Iran-Contra,<sup>174</sup> to extraordinary rendition.<sup>175</sup>

The signature effect of the In-Q-Tel spinoff instead appears to be that the legal separation of investment policy from the rest of the Agency’s responsibilities promotes prudent, long-term policy-making. Because Executive control has perverse effects on the ability to incubate future technologies, the architectural innovation creating an independent In-Q-Tel and limiting the Administration’s discretion over long-term planning could well improve the government’s overall commitment to developing future intelligence technologies.<sup>176</sup> Indeed, absent that reconfiguration, the legally unfettered but perversely politically responsive Agency would face electoral and operational pressure to shortchange R&D plans in favor of more immediate pursuits. In addition, legal separation of this sort also prevents the CIA from using the revenue generated from equity returns on successfully incubated technologies to fund otherwise unauthorized and unfunded covert operations.

A secondary effect has more immediate payoff for the incumbent Administration: In-Q-Tel improves the principal-agent alignment between R&D personnel and the government architects of

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<sup>171</sup> See Gillian E. Metzger, *Privatization as Delegation*, 103 *Colum. L. Rev.* 1367, 1369 (2003). At the same time, another hot trend in the 1990s was the VC-Silicon Valley boom, which no doubt registered in Langley. See Lerner et al., *supra* note 32, at 2–3 (noting the Agency’s recognition of the technological surge in Silicon Valley and quoting then-CIA Director Tenet’s statement that “[t]he CIA needs to swim in the Valley”).

<sup>172</sup> See *supra* Section III.A.

<sup>173</sup> See *supra* note 12 and accompanying text.

<sup>174</sup> See Verkuil, *supra* note 55, at 10 (“[T]he Iran-Contra Affair provides a virtual textbook in how to establish a private foreign and military policy shop.”).

<sup>175</sup> Jane Mayer, *Outsourcing, The C.I.A.’s Travel Agent*, *New Yorker*, Oct. 30, 2006, at 34 (reporting that “[m]ost of the planes used in rendition flights are owned and operated by tiny charter airlines that function as C.I.A. front companies” and that a division of Boeing “handle[s] many of the logistical and navigational details for these trips, including flight plans, clearance to fly over other countries, hotel reservations, and ground-crew arrangements”).

<sup>176</sup> See *infra* note 183 and accompanying text.

intelligence planning. Lacking the customary legal and regulatory constraints (such as the FAR), which do not apply to the CIA, the Agency leadership cannot readily discipline its in-house employees. But, by instead tying itself to the market, the spy agency can leverage market forces and pressures to promote effective investment and procurement decisionmaking.<sup>177</sup>

*1. Executive Hand-Tying Promotes Long-Term Interests.*

In-Q-Tel's effective separation from the CIA insulates the task of promoting future technology from the temptation within the Agency leadership and the White House to shortchange that very objective.<sup>178</sup> The cabining of political pressure creates space for prudent, patient investment and incubation that will advance the government's technological capabilities for years and decades to come.

We often think of political control of decisionmaking as accountability enhancing—and, with good reason. Agency responsibilities assigned to high-ranking, politically responsive and responsible officials are likely to be carried out carefully. This is so because the officials' jobs, reputations, and credibility turn on whether the public approves of their efforts.<sup>179</sup> Thus, the President and her political appointees—all highly sensitive to voter prefer-

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<sup>177</sup> This is a limited argument, put forth only in a context where there are no underlying legal constraints. It does not extend to situations where there is a tradeoff between legal and market constraints. See *infra* Section V.B.

<sup>178</sup> See *supra* note 34.

<sup>179</sup> See Theodore J. Lowi, *The Personal President*, at xi (1985) (describing the modern federal government as a "plebiscitary republic with a personal presidency"); Jeffrey K. Tulis, *The Rhetorical Presidency* 14, 16, 185–88 (1987) (observing that Presidents communicate directly with the public to galvanize support for their programmatic and political agendas); Kagan, *supra* note 2, at 2300 (emphasizing the President's power to command public support and attention for his public policies); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 *J.L. Econ. & Org.* 81, 94–96 (1985) (describing presidential control of the administrative state as promoting "responsiveness . . . to the desires of the electorate"); Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 *Admin. L. Rev.* 181, 190 (1986) (emphasizing that presidential oversight of administrative responsibilities helps ensure that the "agencies are responsive to the public").

ences—will take into account majoritarian sensibilities, or else be disciplined for straying too far from the mainstream.<sup>180</sup>

Political accountability depends on the public being in a position to discern what its government is doing. Where national security and foreign affairs are opaque, the public cannot readily assess military, intelligence, and diplomatic engagement—and thus cannot hold the President and her principal officers accountable.<sup>181</sup>

Assuming that political accountability generally has a virtuous effect in constraining the Executive's foreign-affairs and national-security agenda,<sup>182</sup> it might nevertheless have a perverse effect

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<sup>180</sup> See, e.g., *Clinton v. City of New York*, 524 U.S. 417, 488, 490 (1998) (Breyer, J., dissenting). This is also one of the dominant justifications for judicial deference to Executive policymaking, see *United States v. Mead Corp.*, 533 U.S. 218, 250, 260 (2001) (Scalia, J., dissenting); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 188–89 (2000) (Breyer, J., dissenting); *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844, 864–66 (1984), and for disallowing excessive congressional limitation on the President's authority over subordinates, see *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151–54 (2010); *Morrison v. Olson*, 487 U.S. 654, 705–08 (1988) (Scalia, J., dissenting).

<sup>181</sup> See Kagan, *supra* note 2, at 2337; Katyal, *supra* note 84, at 2343 (noting that claims of political accountability in domestic regulatory contexts “ha[ve] little applicability to foreign affairs”); Heidi Kitrosser, *The Accountable Executive*, 93 *Minn. L. Rev.* 1741, 1741–44 (2009) (emphasizing that the President's ability to promote secrecy and unity in policy domains is to the detriment of political accountability); William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 *Yale L.J.* 2446, 2475 (2006) (indicating that there is especially little accountability “in the areas of national security and foreign affairs, [where] much executive action is done in secret”); Peter M. Shane, *Presidents, Pardons, and Prosecutors: Legal Accountability and the Separation of Powers*, 11 *Yale L. & Pol’y Rev.* 361, 400–01 (1993) (“There is an obvious tension between theoretical support for plenary presidential authority regarding foreign affairs on grounds of accountability and the efforts of Presidents who largely possess such authority to shield their exercise of power from public exposure.”).

<sup>182</sup> If this assumption is wrong, we are left with the realization that an even broader swath of Executive responsibilities are not politically accountable in a meaningful way. If those responsibilities are also not suited to be constrained by administrative law, they might well suffer from dual-accountability deficits similar to those discussed in this Article. See *infra* Section V.B. For scholarship raising doubts about political accountability writ large, see, e.g., Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 *U. Chi. L. Rev.* 1385, 1391–95 (2008); Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 *Chi.-Kent L. Rev.* 987, 1002–07 (1997); Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 *Ark. L. Rev.* 161, 196–97 (1995); Glen Staszewski, *Reason-Giving and Accountability*, 93 *Minn. L. Rev.* 1253, 1265–77 (2009).

when it comes to incubating intelligence technologies. “The short-term interests of any presidential administration have the potential to distort regulatory policies at the expense of long-range interests.”<sup>183</sup> Investing in the long-term will, at best, yield political benefits only for future administrations. Thus, whenever more politically expedient needs arise, presidents and their politically appointed heads of agencies might be tempted to shortchange future technology development and siphon resources away from technology incubation. Instead, they will focus on more demonstrable and immediate spending, such as hiring more field agents or more analysts *today*<sup>184</sup>—however imprudent that is in terms of the

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For purposes of this Article, I take no stance on that larger question whether the entire enterprise of political accountability is an impoverished one.

<sup>183</sup> Lisa Shultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 *Vand. L. Rev.* 599, 613 (2010) (noting that politically responsive Executive agencies will be tempted to pay insufficient attention to long-term objectives if those objectives detract from present-day priorities); see also Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 *B.U. L. Rev.* 459, 465–66 (2008) (emphasizing a president’s short-term calculations that at times impede her ability to promote the nation’s long-term interests); Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 *U. Chi. L. Rev.* 865, 911 n.118 (2007).

<sup>184</sup> Ethan Bueno de Mesquita, *Politics and the Suboptimal Provision of Counterterrorism*, 61 *Int’l Org.* 9, 11, 27 (2007) (noting that because officials are dependent on public approval, “the government will always allocate resources to observable counterterrorism [initiatives] in excess of the social optimum” and to the detriment of more subtle operations that are necessary but do not register with the voters); Jennifer Barrett, *An Enormous Waste of Money*, *Newsweek.com* (Mar. 17, 2004), <http://www.newsweek.com/2004/03/16/an-enormous-waste-of-money.html> (“Politicians tend to prefer security countermeasures that are very visible, to make it look like they’re doing something. So they will tend to pick things that are visible even if they are less effective.”); cf. Amy B. Zegart, *Spying Blind* 68 (2007) [hereinafter *Zegart, Spying*] (emphasizing that the CIA’s priorities often center on quantifiable output, including the number of spies in the field and the number of reports they produce); Lerner, et al., *supra* note 32, at 3 (noting the temptation among agency heads to cut costs where expedient to do so). Indeed, the fact that In-Q-Tel has exclusive control over a percentage of CIA funds—funds the CIA cannot then commandeer—is itself a source of resentment and frustration at Langley. BENS Report, *supra* note 13, at 23 (quoting unnamed Agency officials as seeing In-Q-Tel’s budget as a “tax” on the Agency).

This structural tension between accomplishing the mission and pleasing the public is not exclusive to this specific policy objective. We see similarly destructive dynamics at work in decisions whether to allocate transportation funds to the subtle reinforcement of bridges and tunnels (to extend their lives from, say, twenty years to fifty years) or to put that money into projects (such as filling potholes or adding lanes to highways) that pay more immediate, observable dividends in terms of public approval. It also comes up frequently vis-à-vis monetary policy. See Bressman & Thompson, *supra*

government's overall interests and needs.<sup>185</sup> They do so because focusing on present-day capabilities might marginally reduce the likelihood of an attack that occurs on the current leadership's "watch."<sup>186</sup>

The temptation to disregard future needs is especially powerful in the CIA context for additional reasons. More so than with other agencies, the CIA often cannot boast about the long-term projects it is developing.<sup>187</sup> Press conferences announcing that the NIH is building a new lab devoted to cancer research, or that NASA is de-

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note 183, at 613–14, 635–36 (describing a similar impulse in financial regulation); Geoffrey P. Miller, *An Interest-Group Theory of Central Bank Independence*, 27 *J. Legal Stud.* 433, 446–47 (1998) (emphasizing that political control over interest rates would invite political leaders to engage in expansionary monetary policies apt to generate runaway inflation and long-term instability); Steven A. Ramirez, *Depoliticizing Financial Regulation*, 41 *Wm. & Mary L. Rev.* 503, 546–48 (2000) (noting politicians' preference for an independent Federal Reserve that can curb inflation by raising interest rates in a way that the electorally accountable politicians would be reluctant to do).

<sup>185</sup> Amy Zegart captures the CIA's "counterproductive incentives" to focus on the short-term—what she calls "put[ting] out fires"—at the expense of the future needs. Zegart, *Spying*, *supra* note 184, at 68–69; see *id.* at 95, 104 (emphasizing the extreme emphasis on immediate concerns over long-term needs).

<sup>186</sup> See Tiberiu Dragu & Mattias Polborn, *Terrorism Prevention and Electoral Accountability* 9, 12, 26 (CESifo Working Paper No. 2864, 2009), available at <http://ssrn.com/abstract=1519806>; see also Jack Goldsmith, *The Terror Presidency* 74–75 (2007) (emphasizing the pressure under which Administration officials operated after 9/11 and noting that they all "would be blamed harshly by the American people for failing to stop a second attack"); Michaels, *Deputizing Homeland Security*, *supra* note 25, at 1436–37, 1441 (characterizing the government imperative to track down all possible leads to minimize the possibility of a terrorist attack). For instances of the CIA receiving the lion's share of political blame, see Report of the Select Comm. on Intelligence on the Intelligence Community's Prewar Intelligence Assessments on Iraq, S. Rep. No. 108-301, at 27–29 (2004); Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction, Report to the President of the United States 3–6, 9, 14–17 (2005). See generally Bruce Schneier, *Beyond Fear* 38 (2003) (discussing the concept of "security theater" as a way for the government to show the public that it is proactive in preempting and responding to threats); Ron Suskind, *The One Percent Doctrine* 9 (2006) (emphasizing the extreme measures taken by the Bush Administration in the wake of 9/11 to ensure that every threat, however remote or improbable, would be thoroughly investigated and addressed).

<sup>187</sup> See, for example, the In-Q-Tel website announcing strategic partnerships. About In-Q-Tel, Press Releases, In-Q-Tel, <http://www.iqt.org/news-and-press/press-releases/index.html> (last visited Feb. 6, 2011). For secrecy reasons, the press releases reveal almost no useful information as to what are the goals and objectives of the incubation endeavor.



veloping a rocket to Mars will generate excitement and enthusiasm. The announcements register with the electorate as tangible accomplishments even though it will be years, if not decades, until fruition.<sup>188</sup> The CIA cannot speak in concrete or accessible ways about the incubation and acquisition of future technologies; doing so would reveal too much information about our security priorities and vulnerabilities. There is thus comparatively little popular payoff associated with squirreling funds for such long-term objectives. Accordingly, the Agency is likely predisposed to prioritize immediate action—or, more accurately, to devote maximum resources in order to decrease the likelihood of bad results on their watch. And, correspondingly, the Agency is likely predisposed to shortchange investments that are neither apparent to voters nor immediate in terms of lowering the risk of instant and near-future threats.<sup>189</sup>

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<sup>188</sup> See, e.g., Man on the Moon: Kennedy Speech Ignited a Dream, CNN.com (May 25, 2001), [http://articles.cnn.com/2001-05-25/tech/kennedy.moon\\_1\\_single-space-project-apollo-space-race?\\_s=PM:TECH](http://articles.cnn.com/2001-05-25/tech/kennedy.moon_1_single-space-project-apollo-space-race?_s=PM:TECH).

<sup>189</sup> Bueno de Mesquita, *supra* note 184, at 11. Bueno de Mesquita notes the tradeoff between observable (for example, airport security) and unobservable operations (for example, infiltrating terrorist cells). With respect to observable operations, politicians receive “credit” from the voters. With respect to unobservable operations, “politicians receive no credit for them from voters, other than the credit the politicians receive for the absence of attacks.” CIA spending does not follow the general pattern among federal agencies for reasons already discussed. But a relationship to Bueno de Mesquita’s more general work is still instructive. Whatever benefits politicians enjoy as a result of the absence of attacks are largely sacrificed if the CIA spending will rebound only to the advantage of future governments (insofar as the technologies invested in will not be immediately available to the CIA). Moreover, every dollar directed to the future is one less devoted to stopping today’s threats.

The politicization of government spending need not have a time dimension; it might also have a geographically distributive dimension that prioritizes the electoral map rather than the electoral calendar. See Shawn Reese, Cong. Research Serv., RL 32696, Fiscal Year 2005 Homeland Security Grant Program: State Allocations and Issues for Congressional Oversight 4, 9 (2004), available at [http://homeland.cq.com/hs/flatfiles/temporaryItems/20041214\\_crs.pdf](http://homeland.cq.com/hs/flatfiles/temporaryItems/20041214_crs.pdf) (noting that both Congress’s and DHS’s approaches to distributing counterterrorism money are focused on proportional awards to states, largely irrespective of what locations are likely terrorist targets). Thus, contrary to recommendations by the National Commission on Terrorist Attacks upon the United States, see The 9/11 Commission Report 395–96 (2004) [hereinafter 9/11 Comm. Report], the government distributes funds in a way that each of the states gets some pork, the result being that in 2005, Wyoming received \$18 in funds per resident, whereas New York received only \$2.57 per capita. Reese, *supra*, at 9. See generally Louis Fisher, *Presidential Spending Power* (1975); Kenneth R. Mayer, *Electoral Cycles in Federal Government Prime Contract Awards: State-Level Evidence from the 1988 and 1992 Presidential Elections*, 39 *Am. J. Pol. Sci.* 162, 164, 177, 180 (1995);

Exacerbating this structural tendency for the White House to prioritize short-term goals<sup>190</sup> is the fact that many of the recent CIA directors have served for fewer than two years<sup>191</sup>—tenures considerably shorter than even those of one-term presidents.<sup>192</sup> CIA directors will often be long gone (and onto their next positions in government or the private sector) before any initial investment made today is put into use by the Agency, let alone possibly generates tangible benefits.<sup>193</sup> With that in mind and assuming the Director

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Walter R. Mebane, Jr. & Gregory J. Wawro, *Presidential Pork Barrel Politics* 4, 18–19 (July 13, 2002) (unpublished manuscript, available at <http://www-personal.umich.edu/~wmebane/targeting.pdf>) (noting strategic allocation of local funds by the President in electoral districts where re-election support is sought); Boris Shor, *Presidential Power and Distributive Politics: Federal Expenditures In the 50 States, 1983–2001*, at 32 (January 26, 2006) (unpublished manuscript, available at <http://home.uchicago.edu/~bshor/research/presidency.distributive.politics.pdf>).

<sup>190</sup> For the President, the popularity imperative is a function of her desire to improve reelection chances, as well as to augment her political capital, thus furthering her Administration's ability to carry out its legislative, regulatory, and foreign policy agendas. See Michael A. Fitts, *The Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership*, 144 U. Pa. L. Rev. 827, 869 (1996) (noting that not just elections, but also public opinion polls "can bolster" the prospects of a politician seeking to promote a policy agenda). For this reason, outgoing lame-duck presidents are seen as less encumbered by interest-group pressures and more apt to promote the broader public interest. See Jack M. Beeraman, *Presidential Power in Transitions*, 83 B.U. L. Rev. 947, 952–53 (2003).

<sup>191</sup> See *The Directors, Central Intelligence Agency*, <https://www.cia.gov/library/publications/additional-publications/the-work-of-a-nation/history/former-dcis-and-d-cias.html> (last visited Feb. 6, 2011).

<sup>192</sup> Cf. Bressman & Thompson, *supra* note 183, at 613–14 (noting the typically short tenure of presidentially appointed heads of departments); David Fontana, *Government in Opposition*, 119 Yale L.J. 548, 610 (2009) (explaining that the average tenure of political appointees in recent decades is approximately two years); Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. Cal. L. Rev. 913, 919 & n.23 (2009) (same).

<sup>193</sup> BENS Report, *supra* note 13, at xvi–xvii ("In the venture capital world, success or failure is measured after an average of five years after a venture has begun. A commitment must be made by the Agency and its Congressional partners to allow In-Q-Tel to complete its initial business cycle . . ."); Belko, *supra* note 29, at 20–21 (indicating that "[m]ost new ventures require about eight years before they reach profitability, and investments usually incur huge losses during the early years of operations. The issue becomes[:] how long will corporate management wait for a venture program to achieve success?"). Industry insiders suggest that In-Q-Tel technologies are incubated and delivered in shorter time intervals than those Belko and even the BENS Report estimate. See *Off-the-record Telephone Interview with Y and Z* by Jon D. Michaels, Acting Professor of Law at the UCLA School of Law (Jan. 2011). But it is not clear that the technologies start producing benefits to the CIA within the average

has discretion, she has ample reason to divert funds away from such future objectives.<sup>194</sup> Thus, insulating In-Q-Tel from the CIA and the White House allows the VC to pursue governmental objectives without being overly influenced by instant political calculations.<sup>195</sup>

Commentators have noted the potential gains associated with leaders ceding control over certain policy domains where it is apparent that the structural incentives to pursue perverse or counterproductive outcomes are too strong to defy in any given moment.<sup>196</sup> Similar questions have been raised in the corporate world, and are

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tenure of any one Director (especially because all the relevant technologies are not incubated on Day One of the Director's term).

<sup>194</sup> The fact that the CIA's congressional appropriations are far less public and far less earmarked than most other agencies' appropriations, see *supra* notes 8–9 and accompanying text, makes it relatively easy for the spy agency to shuffle funds.

Moreover, the decision to advance near-term or long-term Agency interests need not be a stark choice between, say, hiring additional agents, assets, and analysts today and devoting more funds to technology incubation. Even within the incubation world, there is the opportunity to prioritize investing in technologies that already are close to being marketable (and thus likely to reap near-term benefits) over “ideas” full of long-term potential.

<sup>195</sup> Elsewhere I have described the effects of long-term contracts that lock in a particular set of policy preferences in a particularly pernicious way and that bind the future administrations that inherit those contracts. See Michaels, *supra* note 2, at 719–21, 773–74. The effects here are no less binding. That said, because political accountability has perverse effects in this regulatory space, this act of binding might be far less pernicious. Cf. Lionel S. Sobel & Karen J. Mandel, “Let Them Watch Cable”: Financing Public Television in the Wake of Federal Downsizing, *Ent. & Sports L.*, Fall 1995, at 1, 26. See generally *infra* note 367 and accompanying text.

<sup>196</sup> See Jon Elster, *Ulysses Unbound* 1–6 (2000); Bressman & Thompson, *supra* note 183, at 631, 635 (noting the political incentives associated with the Executive ceding some administrative control and remarking that presidents “have an interest in allowing an independent agency to have final decisional authority as a form of self-protection, as if tying the presidency to the mast for fear of the Sirens”); Fitts, *supra* note 190, at 894–95; Jonathan Masur, *Judicial Deference and the Credibility of Agency Commitments*, 60 *Vand. L. Rev.* 1021, 1038–40, 1042 (2007); Posner & Vermeule, *supra* note 183, at 911 (noting the tradeoff between Executive credibility and Executive discretion); Super, *supra* note 140, at 2, 4.

Analogies might be drawn to the Federal Reserve's control over monetary policy, see Bressman & Thompson, *supra* note 183, at 613–14, 635 (describing impulse in financial regulation); see also *supra* note 184 and accompanying text; and, to the Base Realignment and Closure Commission that has taken the lead in deciding what U.S. military bases to close because members of Congress do not trust themselves to carry out this responsibility. Defense Base Closure and Realignment Act of 1990, *Pub. L. No.* 101-510, §§ 2902–2904, 104 *Stat.* 1485, 1808–13 (codified at 10 U.S.C. § 2687 note (2006)). For a fuller discussion of some of these considerations, see *infra* Section V.C.

of particular interest here given the incubation of technologies for the CIA lies at the intersection of government and commerce. Corporate executives are often seen as prioritizing short-term gains at the expense of long-term goals. Their present-mindedness is attributed to the fact that their staying power hinges on satisfying the expectations of shareholders in evaluative intervals far shorter than the time it takes to realize the benefits from long-term planning.<sup>197</sup>

Of even greater relevance to the instant inquiry, corporations are often criticized for acting impatiently when it comes to their own VCs, either underfunding the VCs or distorting their investment decisions to match short-term goals.<sup>198</sup> As noted above, In-Q-Tel has been likened to a corporate VC.<sup>199</sup> Scholars who study corporate VCs pay close attention to whether the VCs are legally separate from the parent corporation (like In-Q-Tel is), or whether the parent directly controls the VC. Their research shows that corporate VCs with meaningful independence from the parent corporation tend to perform better, in part because the parent cannot as easily impose its preference for short-term results on the VC.<sup>200</sup>

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<sup>197</sup> See Lawrence E. Mitchell, A Critical Look at Corporate Governance, 45 *Vand. L. Rev.* 1263, 1283–300 (1992) (describing the “problem of short-term managerial focus in American corporations,” attributing it to “the legal and practical pressures on directors and managers to look exclusively to the interests of stockholders,” and noting that it leads to a “managerial obsession with current profitability and stock price”); Richard A. Posner, Are American CEOs Overpaid, and, if So, What if Anything Should Be Done About It?, 58 *Duke L.J.* 1013, 1045–46 (2009) (noting that compensation of corporate managers leads them to overemphasize short-term interests); Andrei Shleifer & Robert W. Vishny, The New Theory of the Firm: Equilibrium Short Horizons of Investors and Firms, 80 *Am. Econ. Rev. (Papers & Proc.)* 148, 148 (1990); David I. Walker, The Challenge of Improving the Long-Term Focus of Executive Pay, 51 *B.C. L. Rev.* 435, 439 (2010) (“Perhaps the leading corporate governance concern . . . at present is the reckless pursuit of short-term profits by corporate executives who will have cashed out before the long-term repercussions are felt.”); Judith F. Samuelson & Lynn A. Stout, Op-Ed., Are Executives Paid Too Much?, *Wall St. J.*, Feb. 26, 2009, at A13 (noting that corporate executives typically focus on increasing “next quarter’s profits” and adopt short-term corporate strategies in service of that goal).

<sup>198</sup> See supra note 194.

<sup>199</sup> See supra note 33 and accompanying text.

<sup>200</sup> See, e.g., Susan A. Hill et al., Transferability of the Venture Capital Model to the Corporate Context: Implications for the Performance of Corporate Venture Units, 3 *Strategic Entrepreneurship J.* 3, 8, 21–22 (2009); Robin Siegel et al., Corporate Venture Capitalists: Autonomy, Obstacles, and Performance, 3 *J. Bus. Venturing* 233, 238–46 (1988); see also Ralph Biggadike, The Risky Business of Diversification, *Harv. Bus. Rev.*, May/June 1979, at 103, 104.

Similarities between corporate CEOs and politically appointed agency heads are apparent. Both have relatively short tenures as organizational leaders and both are motivated to please their constituents in even shorter intervals.<sup>201</sup> Thus, connecting the insights from the private sector to the instant case study, we could well imagine that had the spy agency not precommitted funds to In-Q-Tel via contractual agreement,<sup>202</sup> and granted legal independence to In-Q-Tel, it would regularly be tempted to reallocate incubation and investment resources in a way that puts all its eggs in the here-and-now basket while jeopardizing the vital but politically unrewarding objective of long-term planning for distant needs.<sup>203</sup> In

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<sup>201</sup> Compare supra notes 183, 184, and 189, with supra note 197.

<sup>202</sup> See supra note 195 and accompanying text.

<sup>203</sup> See supra note and 189 accompanying text.

This discussion no doubt begs the question whether DARPA itself fares poorly because of its location within the political hierarchy of the Department and the Executive Branch. DARPA does not appear to suffer as acutely from perverse incentives to short-change the future. In part, this is because the Department (and the White House) can score political points by announcing the projects it is developing in a way that In-Q-Tel likely cannot. For examples of news stories trumpeting DARPA innovations, see Philip M. Boffey, *Small Agency Quietly Plays Powerful Role in Developing Exotic Research*, N.Y. Times, Apr. 23, 1985, at C1; Robert O'Harrow, Jr., *U.S. Hopes to Check Computers Globally: System Would Be Used to Hunt Terrorists*, Wash. Post, Nov. 12, 2002, at A4; Walter Pincus, *From Tiny Aircraft to Robots and Radars, Pentagon Pursues New Tools*, Wash. Post, Mar. 29, 1998, at A2; Walter Pincus, *How Defense Research Is Making Troops More Effective in Wartime*, Wash. Post, May 12, 2008, at A17; Michael Schrage, *Pentagon Plans To Build Computers That See, Talk, and 'Think,'* Wash. Post, Nov. 4, 1983, at A1; Michael Schrage, *Transporting the Pentagon into the Future*, Wash. Post, Jul. 24, 1983, at F1; Tom Wicker, *The High-Tech Future*, N.Y. Times, May 24, 1990, at A25.

But public access and media attention is a dual-edged sword. DARPA chiefs have been removed for pushing priorities that differed from the preferences of the Administration, see Lionel Barber, *Industrial Policy Row Claims Victim: White House Removes Pentagon Agency Head*, Fin. Times, Apr. 24, 1990, at 10, and of the Congress (and op-ed pundits). See Shane Harris, *The Watchers* 236–48 (2010); Bradley Graham, *Poindexter Resigns but Defends Programs: Anti-Terrorism, Data Scanning Efforts at Pentagon Called Victims of Ignorance*, Wash. Post, Aug. 13, 2003, at A2; Vernon Loeb, *Pentagon Drops Bid For Futures Market*, Wash. Post, Jul. 30, 2003, at A17. These political interventions might have been good or bad, but it does suggest that R&D will be closely linked to popular preferences.

Another question might be whether In-Q-Tel's relatively modest funding from the CIA is that vulnerable to political machinations. Siphoning off funds tagged for long-term investing won't make a huge difference in terms of the Agency's aggregated resources to devote to instant needs. But, as insiders acknowledge, every bit counts and there is no reason why Agency leadership wouldn't be tempted to divert resources away from technology incubation. BENS Report, supra note 13, at 23 (noting opposi-

other words, based on these studies, we would expect the independent In-Q-Tel to outperform a version of itself completely controlled by the CIA.<sup>204</sup> That would be true regardless whether In-Q-Tel were a division within the CIA, or simply a private entity with less legal separation from the Agency.<sup>205</sup>

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The President might be concerned with a VC housed within the CIA for additional reasons relating to unfettered political and legal discretion. A VC housed within the spy agency might generate profits (through equity returns and technology sales) that could then be used in otherwise-unauthorized ways. Profit-generating CIA operations have long been a source of controversy and con-

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tion within the CIA to the Agency's decision to fund In-Q-Tel); Off-the-record Telephone Interview with Y and Z, *supra* note 193; cf. Dara K. Cohen, Mariano-Florentino Cuéllar & Barry R. Weingast, *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 *Stan. L. Rev.* 673, 686–87 (2006) (describing intra-agency squabbles regarding what responsibilities within an agency receive more or fewer resources).

<sup>204</sup>Note that because the CIA has periodic occasions to renew (or decide against renewing) In-Q-Tel's contract, it retains opportunities to influence the "independent" entity in a way that suggests the separation is not entirely complete—and that the CIA's perverse political incentives might on occasion infect In-Q-Tel's decisionmaking process. In an earlier footnote, *supra* note 167, I mentioned that lack of apparent rivals to In-Q-Tel. I mentioned the absence of competition in the context of suggesting that privatization absent a robust market of would-be contractors is unlikely to yield efficiency benefits. That said, the absence of competition might help ensure that meaningful separation exists between the CIA and In-Q-Tel. After all, the CIA cannot exert as much pressure on In-Q-Tel as it could were there many In-Q-Tel rivals eager to replace the incumbent VC.

<sup>205</sup>See *supra* note 200 and accompanying text.

A fair question to consider here might be whether an independent agency within the CIA (perhaps akin to the independent adjudicatory agency within OSHA, see *infra* note 342 and accompanying text) might serve the same purpose of insulating long-term investment decisions from day-to-day politics. But see Bressman & Thompson, *supra* note 183, at 619–50 (discussing opportunities for presidential control over ostensibly independent regulatory agencies); Devins & Lewis, *supra* note 183, at 498 (contending that independent agencies "will adhere to presidential preferences once a majority of commissioners are from the President's party"); Peter Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 *Colum. L. Rev.* 573, 587–91 (1984) (noting the President's not-insignificant influence over independent agencies). Even if the independent entities aren't responsive to the President, they still might be political. They are still part of the government and, in this case, responsible for keeping America safe. The more complete separation of In-Q-Tel from the CIA and In-Q-Tel's private status gives it greater legal, functional, psychological, and atmospheric distance from government concerns and allows it to focus principally as prudent investors. See *supra* notes 199–200 and accompanying text.

cern.<sup>206</sup> To the extent the CIA's VC is incubating technologies that have commercial applications (such as Google Earth<sup>207</sup>), the President might worry that were the CIA to have direct access to the profits, the Agency could use them to fund covert operations without congressional and maybe even White House notice or support.<sup>208</sup> In-Q-Tel, by contrast, must by law reinvest whatever proceeds the VC generates.<sup>209</sup> That is to say, the private, independent, non-profit In-Q-Tel precludes the CIA from turning technology incubation into something akin to a revenue-raising front operation.<sup>210</sup>

## 2. *The Market Improves Principal-Agent Alignment*

In addition, In-Q-Tel's private status seems to enable a better alignment of principal-agent incentives than otherwise could be achieved. This is a direct and immediate boon to the incumbent Administration. It lessens the need to micromanage the technical experts and procurement officials entrusted to pursue the best and most promising technologies, and reduces variance between what the government needs and what rank-and-file employees prioritize.

The FAR, for all of the bureaucratic hassles it creates for government agencies, does provide this service to the Executive.<sup>211</sup> The FAR and related laws limit the agent's (in most cases, a bureaucrat's) discretion.<sup>212</sup> The bureaucrat cannot simply select her friend's company, or go with the first company listed in the Yellow

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<sup>206</sup> See supra notes 12, 173–75 and accompanying text.

<sup>207</sup> See supra notes 40–41 and accompanying text.

<sup>208</sup> See Dycus et al., supra note 9, at 447–50 (describing CIA front operations and their capacity to be a source of revenue for the CIA); see also Verkuil, supra note 55, at 10 (describing efforts by the National Security Council to raise revenue to support paramilitary operations that Congress refused to fund).

<sup>209</sup> See supra note 40 and accompanying text.

<sup>210</sup> See supra note 208 and accompanying text. I have confined this discussion to one paragraph in part because the CIA has other means, independent of In-Q-Tel, of raising funds for covert operations (were it so motivated), and in part because I recognize (or at least hope) that this concern is a remote one.

<sup>211</sup> See supra note 138 and accompanying text.

<sup>212</sup> Cf. Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. Rev. 461, 470 (2003) (noting agency discretion cabined within “identifiable and determinate bounds”); Strauss, supra note 205, at 586 (noting that civil servants are constrained in their discretion by statutory directives).

Pages. She cannot do so, that is, unless she can show that those companies happen also to objectively provide the “best value” to the government.<sup>213</sup> The legal imperative for a government employee to choose the best offer among those vying for a contract reduces the likelihood of any divergence of interests between the agent (the employee) and the principal (the government).<sup>214</sup> That is to say, the law guides the procurement process with stringency, limiting the number of opportunities for graft or sloppiness on the part of the employee-agent responsible for acquiring everything from armchairs to artillery. Of course, “best value” is a malleable, even slippery term, capable of being manipulated by agents. And, notwithstanding the procurement regulations, criminal prohibitions on self-dealing,<sup>215</sup> and the right of affected parties to challenge allegedly misguided contract awards through bid protests,<sup>216</sup> government officials subject to the panoply of procurement laws and regulations still make poor and corrupt decisions.<sup>217</sup> But the application of these traditional legal safeguards helps keep avarice and indifference to a minimum.

For reasons already discussed, these traditional safeguards do not extend into sensitive areas of intelligence procurement. Thus, a critical component of principal-agent alignment is absent. To compensate for the absence of the legal checks in the CIA context, adopting market mechanisms as proxies might limit the possibility of abusive or self-interested decisionmaking of the sort that the

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<sup>213</sup> See, e.g., 48 C.F.R. § 15.002 (2009); John Cibinic, Jr. & Ralph C. Nash, Jr., *Formation of Government Contracts* 261, 264–65 (3d ed. 1998).

<sup>214</sup> For seminal works on principal-agent theory, see Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 *Am. Econ. Rev.* 777, 785–90 (1972); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 *J. Fin. Econ.* 305, 312–30, 333–43 (1976).

<sup>215</sup> See, e.g., 18 U.S.C. §§ 201, 208 (2006) (criminalizing self-dealing by government officials).

<sup>216</sup> See Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 *Am. U. L. Rev.* 627, 629–30 (2001) (discussing the importance of contractors and potential contractors in “polic[ing] the buying process”).

<sup>217</sup> See *id.* at 629; see also Office of the Inspector General of the United States Department of Defense, *Management Accountability Review of the Boeing KC-767A Tanker Program ii*, May 13, 2005, available at <http://www.dodig.mil/fo/foia/ERR/FOIA-Tanker1.pdf>; Al Gore, *Creating a Government that Works Better & Costs Less: Report of the National Performance Review 1* (1993) (characterizing the government as frequently overpaying for goods and services).



FAR and related procurement laws help root out.<sup>218</sup> One such mechanism, though hardly a perfect one, is In-Q-Tel's employment compensation scheme. If relatively unchecked agents<sup>219</sup> cannot be guided by legal constraints, perhaps financial incentives will help. Specifically, the performance-based bonus structure<sup>220</sup> creates incentives for employees to make shrewd, responsible decisions on behalf of In-Q-Tel and the Agency.<sup>221</sup>

Monetary bonuses are not typically part of the salary structure for the vast majority of federal workers. Because most government employees who handle procurement and acquisitions in less sensitive domains than intelligence can be constrained through the FAR and through bid protests, performance-based inducements are largely unnecessary. With respect to incubating intelligence technologies, however, the FAR would presumably be overly restrictive, and bid protests could likewise threaten national security.<sup>222</sup> Thus monetary incentives—whereby employees receive more money for better promoting governmental needs<sup>223</sup>—are the “carrot” that replaces the FAR “stick” in an effort to motivate employees and align their interests with those of the government writ large.

It is, of course, possible for the CIA to adopt this compensation scheme in-house. Federal law grants the CIA broad leeway in

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<sup>218</sup> Posner & Vermeule, *supra* note 183, at 893 (suggesting that where external constraints from Congress or the courts are unavailable or ineffective, “compensating mechanisms must be adopted to fill the area of slack, the institutional gap between executive discretion and the oversight capacities of other institutions”); see also *supra* notes 148–49 and accompanying text.

<sup>219</sup> Of course, they (like most government employees across all agencies) have supervisors and are subject to managerial oversight. But if supervisor oversight were sufficient, there would never be a need for the FAR or the APA or any other procedural requirement.

<sup>220</sup> See Jay Solomon, *Investing in Intelligence: Spy Agencies Seek Innovation Through Venture-Capital Firm*, *Wall St. J.*, Sept. 12, 2005, at A4; Lerner et al., *supra* note 32, at 10.

<sup>221</sup> See Posner & Vermeule, *supra* note 183, at 880–81 (noting that in order to promote quality work among agents, principals can tie compensation to performance). It is always possible that the agents engage in creative accounting. Moreover, it is likely that in some respects the success of an investment decision by In-Q-Tel does not correlate perfectly with the CIA's success in making use of the In-Q-Tel-incubated technology.

<sup>222</sup> Again, this is an assumption I adopt based on the extant legal regime. See *supra* note 120.

<sup>223</sup> See *supra* Section I.A.

structuring employee salaries.<sup>224</sup> It might, however, be difficult to implement. Once some employees within the Agency became eligible for bonuses, would not field agents and intelligence analysts—among the Agency’s most pivotal personnel—demand performance-based salaries, too? If so, at what cost to effective teamwork and compliance with international and domestic law? Working now in part for monetary bounty, field agents might be that much more likely to conduct surveillance on domestic soil, coerce detainees, or otherwise engage in other acts of what might euphemistically be called “cutting corners” to gain an edge. Less brazenly but arguably no less problematically, analysts and field agents alike might not share information with colleagues and superiors, fearing that if an intelligence success is considered a “team effort,” the bonus would have to be divided among the team members.<sup>225</sup>

#### IV. IMPROVING REGULATORY POLICY THROUGH INSTITUTIONAL REDESIGN INTERNAL TO THE ADMINISTRATIVE STATE

The privatization of intelligence incubation responsibilities through In-Q-Tel seems at first blush to be an Executive power grab. After all, the conventional (albeit largely positive) account of In-Q-Tel suggests as much.<sup>226</sup> In the case of scrutinizing foreign investments and CFIUS, such a portrayal is far less intuitive. Fragmented, inter-agency deliberation does not fit the presumed model of Executive aggrandizement. Thus, the mystery surrounding this architectural-design choice is both more obvious and more complicated.

By all appearances, the CFIUS structure seems to be a textbook example of bad institutional design. Non-hierarchical agency architecture diffuses responsibility and invites bureaucratic slacking and disorganization. Such a design is often championed by those opposed to a given regulatory policy,<sup>227</sup> leading proponents to cry foul

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<sup>224</sup> See *supra* Subsection III.A.2.

<sup>225</sup> Even without the complicating factor of bonuses, the failure to share intelligence information has been recognized as a serious problem. See 9/11 Comm. Report, *supra* note 189, at 403, 418; see also Seymour M. Hersh, *The Stovepipe*, *New Yorker*, Oct. 27, 2003, at 77, 80–81.

<sup>226</sup> See *supra* Section III.A.

<sup>227</sup> See *infra* note 356 and accompanying text.

and suggest that “the point of [a] many headed administrative monstrosity is to make sure that as little as possible gets done.”<sup>228</sup>

For this reason, the dominant practice in efficient institutional design has long been in the direction of greater centralization and hierarchical control.<sup>229</sup> Centralization includes greater supervision of cabinet departments by the Office of Management and Budget (OMB);<sup>230</sup> administrative mergers that unite previously scattered Executive responsibilities under one director or department’s aegis;<sup>231</sup> the advent of the so-called czars in the White House to over-

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<sup>228</sup> See Cass, Diver, & Beermann, *supra* note 21, at 13 (quoting an AFL-CIO leader expressing his frustration with a proposal to decentralize occupational health and safety responsibilities); see also Moe, *The Politics of Structural Choice*, *supra* note 6, at 148 (“Interest groups and legislators create whatever labyrinthine bureaucratic arrangements suit their political purposes, but presidents resist their organizational monstrosities and try to rationalize them.”).

<sup>229</sup> For a sampling of those recognizing the connection between hierarchy and bureaucratic efficiency, see *The Hoover Commission Report on Organization of the Executive Branch of the Government* 6–7 (1949); Peri Arnold, *Making the Managerial Presidency* 3–4 (2d ed. 1998); Lewis, *supra* note 1, at 1, 26–29; Max Weber, *The Theory of Social and Economic Organizations* 329–40 (Talcott Parsons ed., A.M. Henderson & Talcott Parsons trans., 1947); Fitts, *supra* note 190, at 847–53; cf. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3155 (2010) (noting that the diffusion of bureaucratic power, in that case through two layers of for-cause protections against presidential terminations, deprived the politically accountable President adequate control over the administrative state); *id.* (“Without a clear and effective chain of command, the public cannot determine on whom the blame or punishment of a pernicious measure . . . ought really to fall.”) (internal quotation marks omitted).

<sup>230</sup> See Exec. Order No. 12,291, 3 C.F.R. 127 (1981), *reprinted in* 5 U.S.C. § 601 note (1988) (requiring Executive agencies to comply with regulatory guidelines prescribed by the President and OMB and to submit major rules to OMB for review); Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted in* 5 U.S.C. § 601 note (2006) (revising, updating, and superseding 12,291); see also Steven Croley, *White House Review of Agency Rulemaking*, 70 U. Chi. L. Rev. 821, 824–27 (2003); Fitts, *supra* note 190, at 842; Mendelson, *supra* note 124, at 1150–53 (noting extensive and frequent OMB revisions to agency rules as well as more subtle efforts to redirect agency policy); Terry Moe & Scott Wilson, *Presidents and the Politics of Structure*, 57 L. & Contemp. Probs. 1, 18, 34–38 (1994) (noting that the President employs “the OMB and other presidential agencies . . . to exercise control[,] . . . extend[] the reach of the presidential team by infiltrating alien territory[, and] ensure that important bureaucratic decisions are made, or at least overseen and monitored, by presidential agents”); Alan Morrison, *Commentary, OMB Interference with Agency Rulemaking*, 99 Harv. L. Rev. 1059 (1986); Strauss & Sunstein, *supra* note 179, at 181.

<sup>231</sup> *Intelligence Reform and Terrorism Prevention Act of 2004*, Pub. L. No. 108-458, 118 Stat. 3638 (codified as amended in scattered sections of U.S.C.); see also *Homeland Security Act of 2002*, Pub. L. No. 107-296, 116 Stat 2135 (codified as amended in scattered sections of 6 U.S.C.); *supra* note 2 and accompanying text. But see Cohen,

see and direct the line agencies;<sup>232</sup> and intra-departmental “layering” in the form of adding tiers of political appointees atop agency bureaucracy.<sup>233</sup> The combined effect of these measures is to increase agency fidelity to the Administration’s goals, limit the autonomy of career departmental personnel (whose institutional commitments or obligations might not align with those of the President), and at least in some respects lessen opportunities for congressional oversight and judicial review.<sup>234</sup>

CFIUS bucks the dominant trend. Of course, it could be the case that the presidential design embodied in the 1988 Executive Order bespeaks a desire to make foreign-investment review weak.<sup>235</sup> Diffusion of responsibility certainly undermines regulatory or adminis-

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Cuéllar & Weingast, *supra* note 203, at 676, 700–43 (suggesting the Department of Homeland Security was created for political reasons rather than for reasons of administrative efficiency).

<sup>232</sup> See Bressman & Thompson, *supra* note 183, at 646–47, 660, 666 (noting the advent of White House czars to oversee Executive agencies and “temper agency independence”); O’Connell, *supra* note 192, at 930–31; José D. Villalobos & Justin Vaughn, *More Czars than the Romanovs? Obama’s Czars in Historical and Legal Context*, 1–3 (APSA 2010 Annual Meeting Paper), available at <http://ssrn.com/abstract=1642679>; Neil King, *Role of White House Czars Sparks Battle*, *Wall St. J.*, Sept. 11, 2009, at A4.

<sup>233</sup> David E. Lewis, *The Politics of Presidential Appointments* 31, 34–35 (2008); see also Paul Light, *Thickening Government* 7–13 (1995); David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 *Geo. Wash. L. Rev.* 1095, 1128 (2008); Cuéllar, *supra* note 170, at 595, 661–62.

<sup>234</sup> Katyal, *supra* note 84, at 2348; Kitrosser, *supra* note 181, at 1765–66; Shane, *supra* note 182, at 172–73. There is support for the position that agency heads deserve greater deference, upon judicial review of agency action, than do bureaucrats. To the extent that is the case, see *United States v. Mead Corp.*, 533 U.S. 218, 239–40 (2001) (Scalia, J., dissenting); *Webster v. Doe*, 486 U.S. 592, 609–10 (1988) (Scalia, J., dissenting); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170–71 (1803); David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 *Sup. Ct. Rev.* 201, 202–05, 235–36, transferring authority from the bureaucracy to the political appointees could lead to more deferential judicial review. Moreover, to the extent that the locus of decisionmaking authority is drifting out of the departments and into the West Wing, there are fewer opportunities for congressional influence—because White House advisors are not typically subject to Senate confirmation and because White House aides can more readily invoke Executive privilege to resist testifying before Congress. See Bruce Ackerman, *Op-Ed.*, *A Role for Congress To Reclaim*, *Wash. Post*, Mar. 11, 2009, at A15; Aaron Saiger, *Obama’s “Czars” for Domestic Policy and the Law of the White House Staff*, 79 *Fordham L. Rev.* (forthcoming 2011) (manuscript at 1, 16, 27, 29, available at <http://ssrn.com/abstract=1719746>).

<sup>235</sup> See Alvarez, *supra* note 70, at 78.

trative potency in other contexts.<sup>236</sup> But the President had far easier means of creating an impotent review structure. For example, Reagan could have assigned the responsibilities to one of the cabinet departments already institutionally inclined to champion (or even rubber stamp) foreign investment and international trade.<sup>237</sup> Delegating the responsibilities instead to CFIUS, by contrast, is less likely to result in automatic approval, not the least of all because defense hawks and economic protectionists combine to constitute a substantial bloc of Committee members.<sup>238</sup>

The same is equally true in the opposite direction. Had the President preferred to make foreign-investment review as difficult as possible for foreign investors, delegating exclusive responsibility to the Defense Department or to the CIA would have made greater sense.

It is thus not apparent that the CFIUS story tracks the all-too-familiar account of purposive sabotage via institutional redesign. Very few foreign investments—fewer than two percent—are actually seriously scrutinized.<sup>239</sup> Moreover, the President's 1988 Executive Order imposed strict time limitations on how long CFIUS could deliberate,<sup>240</sup> what Stewart Baker calls “a fairly quick ninety-day process.”<sup>241</sup> Yet when CFIUS does initiate an investigation, the process is a muscular one leading to a good deal of foreign-investor attrition.<sup>242</sup> For these reasons, CFIUS does not appear (and seemingly was not intended) to act indecisively or as a bottleneck.

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<sup>236</sup> See Cass, Diver & Beermann, *supra* note 21, at 13–15; Moe, *supra* note 2, at 298–300; *infra* text accompanying note 341.

<sup>237</sup> See *supra* notes 83–85 and accompanying text.

<sup>238</sup> See *supra* notes 75–79 and accompanying text; see *infra* Sections IV.B–D.

<sup>239</sup> See *supra* note 111 and accompanying text.

<sup>240</sup> See Exec. Order No. 12,661, 3 C.F.R. 618, 620 (1988). The time limits have subsequently been incorporated into FINSA. See *supra* note 97 and accompanying text.

<sup>241</sup> Baker, *supra* note 57, at 245. At times, Committee members might try to hold up the review process in order to frustrate the deal. *Id.* at 266. Presumably, government efforts to kill deals through such measures would be far more successful were foreign-investment review tasked to a single agency generally opposed to foreign investment and comparatively less encumbered by the dissenting views of other agencies. The same would be true in the opposite direction. Were an agency generally intent on promoting trade singularly responsible for reviewing foreign investments, it would be easier for that one agency to race through the review process than is the case under inter-agency review. See *id.* at 265–70.

<sup>242</sup> See *supra* notes 105–15 and accompanying text.

Rather than serving to game the system in either direction, CFIUS appears to cultivate accountability, where it otherwise would not naturally take root.<sup>243</sup> Instead of giving the responsibility for scrutinizing foreign investments to a single agency, the President prescribed interdisciplinary consideration. The review process focuses on national security.<sup>244</sup> But it can hardly ignore other issues, including diplomacy, the domestic economy, the labor market, and perhaps even conceptions of culture.<sup>245</sup> The breadth of this policy portfolio—ranging from concerns about illicit technology transfers to provincial protectionism—may be normatively good or bad.<sup>246</sup> As a descriptive matter, however, CFIUS's breadth is unmistakable.<sup>247</sup>

The interdisciplinary breadth is a function of Committee membership, and thus institutional design. CFIUS's structure "almost guarantee[s] . . . bitter conflict."<sup>248</sup> The institutional diversity embodied by the Committee assures that proposed foreign investments are assessed from a variety of perspectives. Treasury, Commerce, State, Justice, Energy, and Defense will all represent their institutional concerns. In the process of coming to terms with each other's positions, they are more likely to achieve balance in promoting the United States's core interests than were the assignment vested in only one agency.

Inter-agency scope and membership seems to direct a substantive outcome different from one that would be produced by, for

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<sup>243</sup> Again, the actual motivation is less important to this inquiry than the ultimate effects. CFIUS, after all, represents an architectural possibility. Like a breakthrough drug discovered serendipitously in the course of an unrelated laboratory pursuit, the product—and its ability to be replicated—overshadows the chemist's original aim.

<sup>244</sup> See FINSA, 50 U.S.C. app. § 2170 (2006) (directing CFIUS to scrutinize foreign investments that threaten national security).

<sup>245</sup> See *supra* note 77 and accompanying text. As Stewart Baker notes, the United States is not alone in sometimes appearing to consider cultural issues when opposing foreign investment. See Baker, *supra* note 57, at 262 (noting among other examples that France prevented Pepsi from acquiring a French yogurt company).

<sup>246</sup> See, e.g., Graham & Marchick, *supra* note 27, at 145–46; Alvarez, *supra* note 70, at 16; Douglas Holtz-Eakin, Op-Ed., You Can't Be CFIUS, *Wall St. J.*, Jul. 13, 2006, at A8.

<sup>247</sup> See *supra* notes 61, 73–79, 88 and accompanying text (noting CFIUS's interdisciplinary focus of scrutiny); see also Zaring, *supra* note 70, at 82–83, 128 (recognizing the role played by "domestic actors and regulatory policy" and noting the relevance of "bread-and-butter questions of economic regulation" to the CFIUS paradigm).

<sup>248</sup> Baker, *supra* note 57, at 263.

example, either the Pentagon or Treasury, acting alone. This is so for three related, reinforcing reasons: (1) the interdisciplinary nature of deliberations demands consideration of a broad array of issues, many of which would not register with any one agency acting alone; (2) the interdisciplinary structure makes presidential interference as well as interest-group capture much more difficult than were one agency acting alone; and, (3) the combined effect of interdisciplinary focus and limited presidential involvement increases the likelihood that policy outcomes are based on reasoned and fair deliberation (as CFIUS members from opposing institutional camps duke it out<sup>249</sup>) rather than parochial interests or political predilections. Reasoned, fair, and somewhat de-politicized consideration, rarely a bad thing, ought to be especially prized in this space. Foreign investors and the domestic firms being invested in are at the mercy of the government. The Committee's deliberative process might serve to allay concerns that the Executive is acting in an arbitrary or capricious fashion.

Additionally, the insulation from the White House and the inter-agency deliberative process generate a range of governance benefits. The President could obviously assemble a group of White House advisors representing different world views or constituencies. Think Lincoln's team of rivals. But White House decision-making, even assuming interdisciplinary engagement, would be an inadequate substitute for CFIUS. In part this is because the individuals assembled would still be presidential aides, rather than heads of agencies with strong institutional commitments.<sup>250</sup> And, in part this is because the White House would be forgoing the specific benefits that come from distancing itself from most aspects of the foreign-investment investigation. A President unable to stand apart from CFIUS's investigations might be frequently compelled to apologize to her foreign counterparts insulted by rigorous scrutiny

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<sup>249</sup> See *supra* notes 73–79 and accompanying text; see also Baker, *supra* note 57, at 264 (noting Committee members' "turf struggles" and "fight[s with] their rivals"); cf. Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 Cal. L. Rev. 1655, 1677–78 (2006) (describing how bureaucratic redundancy can at times yield efficiencies when the agencies are tasked with competing with one another); Michael M. Ting, *A Strategic Theory of Bureaucratic Redundancy*, 47 Am. J. Pol. Sci. 274, 274–75 (2003) (same).

<sup>250</sup> See *supra* note 232 and accompanying text; see *infra* notes 279, 312 and accompanying text.

of “their” companies and offended by CFIUS’s mitigation demands. Distancing herself from those investigations allows her to promote overarching foreign-policy goals without having to address allegations of CFIUS slights or disparate treatment.

These considerations will be addressed in turn. Specifically, I lead in Sections A, B, and C with the good-governance account, focusing on those benefits that accrue to the nation as a whole; if anything, the CFIUS structure is disempowering to an incumbent President intent on maximizing authority and discretion. This parallels the account I provided for In-Q-Tel and its prioritization of long-term goals at the expense of immediate control by the sitting President and CIA Director. I then turn in Section D to the other governance virtues, of more immediate benefit to the incumbent Administration: White House insulation as enabling the President to advance her broader foreign-policy agenda.

#### *A. Marginalizing the President*

The President of course retains authority to approve or block a proposed foreign investment. But recall that much of the important work occurs beforehand. It is up to the Committee to do the bulk of the investigatory and review work, and to negotiate mitigation agreements with foreign investors.<sup>251</sup> Recall, too, that troublesome deals typically are unwound or the troublesome aspects are mitigated at those intermediate stages, rather than at the final stage of presidential approval or rejection.<sup>252</sup> Indeed, of the investments CFIUS chooses to investigate, more than fifty percent are undone at the intermediate stages well before the President is expected to weigh in; and, many of those that successfully run the gauntlet have nevertheless been substantially altered by accommodations or concessions made to satisfy CFIUS.<sup>253</sup>

Under the Unitary Executive theory, in order to give effect to the purposes and structure undergirding Article II of the Constitution, the President must completely control and direct her subordi-

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<sup>251</sup> See *supra* notes 60, 86, 91, 105 and accompanying text.

<sup>252</sup> See *supra* notes 112–15 and accompanying text.

<sup>253</sup> See *supra* notes 105–08 and accompanying text.



nates.<sup>254</sup> CFIUS members are all subject to at-will removal (and more subtle forms of influence), and are expected to take their marching orders from the Oval Office.<sup>255</sup> Thus, in theory, the distinction between what happens through CFIUS interventions and what happens when the President personally acts is artificial and meaningless.

As a practical matter, however, administrative governance does not conform to that stylized, simplified account.<sup>256</sup> The President cannot completely control all of the decisions rendered by administrative agencies, each one having its own institutional interests and priorities that might be given precedence over those of the White House.<sup>257</sup> Usually we think of a divergence between agency action and presidential priorities happening with respect to independent

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<sup>254</sup> See Calabresi & Yoo, *supra* note 137, at 3–4; Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 *Colum. L. Rev.* 1, 2 (1994).

<sup>255</sup> See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3146–47 (2010); *Morrison v. Olson*, 487 U.S. 654, 716, 724 n.4 (1988) (Scalia, J., dissenting); *Myers v. United States* 272 U.S. 52, 106, 176 (1926). Though I focus on formal removal of Executive Branch officers, the point holds true even when we think of more subtle pressures that the President can use to influence her top officials. See, e.g., *Free Enter. Fund*, 130 S. Ct. at 3170 (Breyer, J., dissenting). Whether it be a refusal to champion an agency's programs, limiting that agency's autonomy, or other forms of persuasion and punishment less drastic than outright termination, it is far easier to apply such pressure to one agency than to take aim at several important agencies or departments at the same time.

<sup>256</sup> See, e.g., Evan J. Criddle, *Chevron's Consensus*, 88 *B.U. L. Rev.* 1271, 1288–89 (2008); Katyal, *supra* note 84, at 2347 (noting that administrative positions of a given Executive agency might be affected by mandatory requirements to consult with other Executive agencies); Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Designs*, 94 *Minn. L. Rev.* 1789, 1840–43 (2010); Mendelson, *supra* note 124, at 1133 n.20 (noting the importance of the choice between the EPA and the Department of Agriculture on the question which federal agency should be responsible for addressing climate change and indicating that agro-business interests prefer the Agriculture Department and environmentalists prefer the EPA); Strauss, *supra* note 205, at 588 (noting interagency disputes). See generally Lessig & Sunstein, *supra* note 254, at 118–19 (noting various instances of agency insulation from presidential control and emphasizing that the "Opinions Clause would be entirely superfluous if the framers understood the President to have plenary control over administration").

<sup>257</sup> See, e.g., Kagan, *supra* note 2, at 2250, 2334. The divergence is, of course, greater when it comes to independent agencies. But even with Executive agencies, the possibility of agencies' divergence from the President's agenda is at least a partial explanation for the creation of centralized review by the OMB and for the appointment of White House Czars to oversee agency activity. See *supra* notes 232–33 and accompanying text.

agencies, headed by officers removable only for cause. But that is not to say deviations from the White House's agenda and other acts of agency "independence" are exclusively the province of formally independent agencies. They occur, too, among Executive agencies headed by at-will, and ostensibly highly responsive, presidential appointees.<sup>258</sup> Indeed, where administrative responsibilities are assigned to an entity such as CFIUS, which boasts an inter-agency membership structure and a non-hierarchical deliberative process,<sup>259</sup> divergence is far more likely notwithstanding each member serving at the President's pleasure (and, of course, each subject to more subtle pressures, too).<sup>260</sup>

With a single agency, the President could credibly threaten to remove or otherwise pressure or discipline that agency's Secretary or Administrator. But there is strength in numbers. Short of a recurrence of the Saturday Night Massacre (and a massacre on a larger scale given the greater number and breadth of agencies that might be involved),<sup>261</sup> the CFIUS members—or at least a substantial bloc of them—could commit to rigorous review without fear that they would *all* be sanctioned, despite approaching a foreign investment in a way that conflicts with the White House's goals.<sup>262</sup>

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<sup>258</sup> See *infra* note 262 and accompanying text.

<sup>259</sup> O'Connell, *supra* note 249, at 1704 ("All modern Presidents, in an effort to increase control over agencies, have attempted to reshape the bureaucracy by eliminating overlapping jurisdictions, duplication of administrative functions, and fragmented political control.") (internal citation omitted); see also Lewis, *supra* note 1, at 3–15; cf. *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1537, 1544 (9th Cir. 1993) (describing allegations that the President tried to influence the adjudicatory deliberations of the Endangered Species Committee); *Sierra Club v. Costle*, 657 F.2d 298, 387–89, 404–08 (D.C. Cir. 1981) (describing allegations that the President tried to influence the EPA's rulemaking process).

<sup>260</sup> See *supra* note 255 and accompanying text.

<sup>261</sup> Ken Gormley, Archibald Cox: Conscience of a Nation 361–72 (1997); Stanley I. Kutler, *Wars of Watergate* 406–11 (1990).

<sup>262</sup> See Jeffrey Rosen, *Conscience of a Conservative*, N.Y. Times, Sept. 9, 2007, (Magazine), at 40, 45 (noting that "Goldsmith, Comey, Mueller and other Justice Department officials were prepared to resign en masse" if the President would not reconsider his NSA warrantless eavesdropping program); see also Goldsmith, *supra* note 186, at 153 (noting that an Assistant Attorney General, as an officer who serves at the pleasure of the President, did not consult with the White House on a key decision because the responsibility was vested solely in his office and because he suspected that the White House would not approve of his decision); Peter Strauss, *Overseer or "The Decider"?* The President in Administrative Law, 75 Geo. Wash. L. Rev. 696, 736 (2007) ("While the President has a formal capacity to discipline agency heads

Even President George W. Bush, a strong proponent of the Unitary Executive,<sup>263</sup> felt compelled to modify his warrantless eavesdropping program in light of Justice Department objections backed by the threat of mass resignations within the law-enforcement agency.<sup>264</sup> As Bush later noted, “I was willing to defend the powers of the presidency under Article II. But not at any cost.”<sup>265</sup> For these reasons, to the extent that the political costs of effectively sanctioning several key cabinet-level departments are so high,<sup>266</sup> the Committee is largely insulated from presidential domination<sup>267</sup>—especially at what I have been calling the critical, intermediate stages.<sup>268</sup>

### *B. Promoting Reasoned Deliberation*

Having suggested that a buffer appears to exist, insulating CFIUS from the President during the investigatory and mitigation stages of foreign-investment review, it is necessary to explain what interests might be served by such separation. Insulation increases the likelihood that reasoned policy rather than raw politics shapes

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whose work displeases him, that capacity is sharply limited by the political costs of doing so—including the necessity of securing senatorial confirmation of a successor.”); *id.* (describing anecdotal instances where cabinet secretaries openly defied the President’s preferred position).

<sup>263</sup> See Goldsmith, *supra* note 186, at 85–86; Levinson & Balkin, *supra* note 256, at 1828.

<sup>264</sup> George W. Bush, *Decision Points* 172–74 (2010).

<sup>265</sup> *Id.* at 173.

<sup>266</sup> See Akhil Reed Amar, *Nixon’s Shadow*, 83 *Minn. L. Rev.* 1405, 1412 (1999) (noting that though the President has the legal right to summarily remove officials, removal might well come at a high political cost).

<sup>267</sup> Richard A. Posner, *Preventing Surprise Attacks* 116 (2005) (noting that under the 2004 intelligence reorganization that centralized responsibilities in one administrator, the President has a far easier job of “bend[ing] the Intelligence Community] to his will” than was the case prior to the centralization when the President would have to direct the heads of the multiple Executive Branch intelligence agencies).

<sup>268</sup> See *supra* notes 112–16 and accompanying text; cf. Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 *Colum. L. Rev.* 263, 267 (2006) (arguing that the President has the power to directly act pursuant to a statute “only when the statute expressly grants power to the President in name”); Strauss, *supra* note 262, at 704–05 (“[I]n ordinary administrative law contexts, where Congress has assigned a function to a named agency subject to its oversight and the discipline of judicial review, the President’s role—like that of the Congress and the courts—is that of overseer and not decider. These oversight responsibilities, in my judgment, satisfy the undoubted constitutional specification of a unitary chief executive . . .”).

the Committee's investigation, mitigation strategy, and even ultimate recommendation.<sup>269</sup> This is of heightened significance in adjudicatory and quasi-adjudicatory contexts, where public reasoning, political non-interference, and judicial scrutiny are usually the norm.<sup>270</sup> They are absent here, albeit with justification, principally because of the national-security overlay.<sup>271</sup> Many of the most sophisticated arguments in favor of significant presidential influence over the administrative state turn on the transparency and political accountability of the President's decision.<sup>272</sup> To the extent that accountability is blurred by the secretive nature of foreign-investment review, obscured by the electorate's inability to assess

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<sup>269</sup> See generally Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 Sup. Ct. Rev. 51, 52 (discussing presidential influence as dangerous and disruptive); *id.* at 87 (noting that the Court's decision in *Massachusetts v. EPA* "hearkens back to an older, pre-*Chevron* vision of administrative law in which independence and expertise are seen as opposed to, rather than defined by, political accountability, and in which political influence over agencies by the White House is seen as a problem rather than a solution"); Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 Am. U. L. Rev. 443, 462 (1987); Robert V. Percival, *Presidential Management of the Administrative State*, 51 Duke L.J. 963, 1003–10 (2001); Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 Mich. L. Rev. 53, 93–95 (2008).

<sup>270</sup> *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1545 (1993) ("No ex parte communication is more likely to influence an agency than one from the President . . . . No communication from any other person is more likely to deprive the parties and the public of their right to effective participation in a key governmental decision at a most crucial time."); see also *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 264, 267–68 (1954); Percival, *supra* note 269, at 971 & n.38.

<sup>271</sup> Here, too, I take no normative position endorsing or criticizing the position that secrecy is a paramount concern. See *supra* notes 120, 129. Administrative law tends to be more accepting of political influence in rulemaking contexts than in adjudicatory ones. Compare *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 223–24 (D.C. Cir. 1959) (rejecting ex parte communications with agency adjudicators), with *Sierra Club v. Costle*, 657 F.2d 298, 400 (D.C. Cir. 1981) (taking a more relaxed view of ex parte influence on rulemaking). See generally Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 Colum. L. Rev. 1749, 1786–88 (2007) (discussing ex parte contacts); Paul R. Verkuil, *Jawboning Administrative Agencies*, 80 Colum. L. Rev. 943, 944 (1980). The APA prohibits ex parte involvement in formal adjudicatory proceedings, 5 U.S.C. § 557(d)(1) (2006), but is silent with respect to ex parte involvement in other agency actions.

<sup>272</sup> Margaret Gilhooley, *Executive Oversight of Administrative Rulemaking: Disclosing the Impact*, 25 Ind. L. Rev. 299, 333 (1991); Kagan, *supra* note 2, at 2337; Kitrosser, *supra* note 181, at 1751; Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 Yale L.J. 2, 42–45 (2009).

the risk and rewards of foreign investment,<sup>273</sup> or muddied by the electorate's focus on considerations unrelated to the merits of the security threat,<sup>274</sup> the accountability and legitimacy benefits diminish considerably<sup>275</sup>—and concerns about presidential predilections supplanting reasoned decisionmaking correspondingly rise.<sup>276</sup>

As a result, the effects of insulation appear to pay dividends in unusually far-reaching and important ways. Rarely are individual

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<sup>273</sup> See, e.g., Cass R. Sunstein, *Laws of Fear* 3–5 (2005); Richard A. Posner, *Catastrophe: Risk and Response* 12–14 (2004); Cass R. Sunstein, *Terrorism and Probability Neglect*, 26 *J. Risk & Uncertainty* 121, 122, 133 (2003); Suskind, *supra* note 186, at 150–51.

<sup>274</sup> For instance, the President could pressure CFIUS to make unreasonable mitigation requests on the ground that an otherwise unobjectionable (from a security standpoint) acquisition will lead to jobs leaving a state, such as Ohio or Florida, crucial to her re-election, or because the public possesses an irrational fear associated with the foreign acquisition of cultural landmarks. *Supra* note 77. Because of the opacity of the decisionmaking process, she could do so without revealing her true motivation. Cf. *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1245–50 (D.C. Cir. 1971) (rejecting an agency determination in light of congressional pressure—unrelated to the merits of the determination—that tainted the determination process); *Tummino v. Torti*, 603 F. Supp. 2d 519, 544 (E.D.N.Y. 2009) (rejecting an FDA decision to limit availability of the Plan B contraceptive on the ground that the agency succumbed to White House and constituent-group pressure); Mendelson, *supra* note 124, at 1142–43 (discussing political pressures on agencies regarding the decision to make the Plan B contraceptive available without a prescription and the decision to select Nebraska as a site for depositing nuclear waste).

<sup>275</sup> Kitrosser, *supra* note 181, at 1751 (stressing that political accountability requires “transparency and mechanisms to respond to transparent information”); Marshall, *supra* note 181, at 2475 (“[T]here is often no political accountability in the current unitary executive because accountability requires transparency and, particularly in the areas of national security and foreign affairs, much executive action is done in secret.”); McGarity, *supra* note 269, at 451 (noting that if it is not apparent what involvement the President had in an agency decision, there is no accountability boost); Mendelson, *supra* note 124, at 1159 (“The lack of adequate transparency [in terms of White House influence on agency decisions] has significant adverse consequences, both for the appropriateness of presidential influence and for the legitimacy of agency decision making.”); Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 *Mich. L. Rev.* 2073, 2077–78 (2005) (emphasizing accountability turns at least in part on the ability to provide a public explanation of administrative action).

<sup>276</sup> *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007); Freeman & Vermeule, *supra* note 269, at 52; Kagan, *supra* note 2, at 2337 (noting that where the President is not transparently involved in agency decisionmaking, she can more readily promote “parochial interests”); Mendelson, *supra* note 124, at 1163 (noting that below-the-radar “presidential influence . . . allows more successful presidential pressure that is the result of presidential capture”); cf. Posner & Vermeule, *supra* note 183, at 911 (noting that the President shows good faith by ceding discretionary control over policy).

rights, diplomacy, and business interests all promoted at the same time, through the same policy or institutional architecture. But they are here, by way of presidential insulation through inter-agency design. In this Section and in the ones that follow, I will explain why those considerations are important in the foreign-investment context and how they are advanced through the CFIUS framework.

### 1. *Approximating “Hard Look”*

The information that has trickled into the public domain about CFIUS’s largely secretive deliberations suggests that proposed investments spark robust internal debate and disagreement. These disagreements typically track the institutional interests of the Committee members. Free-traders and diplomats push for approval of foreign investment.<sup>277</sup> Security hawks and economic protectionists tend to be more wary when it comes to foreign investment.<sup>278</sup> As Ron Lee, a former high-ranking official in the Justice Department, the NSA, and the CIA, notes:

No two agencies approach [their CFIUS responsibilities] in exactly the same way, because they have different principal missions, objectives, and institutional experiences. Moreover, each involved official of an agency brings his or her own perspectives and experiences to the table. What satisfies one agency as consistent with the national security interests of the United States may not satisfy another agency.<sup>279</sup>

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<sup>277</sup> Baker, *supra* note 57, at 264 (suggesting that the State Department and the U.S. Trade Representative typically advocate for quick approval of investments); Alvarez, *supra* note 70, at 11–12; see Verkuil, *supra* note 55, at 69 & 77 n.101 (indicating that CFIUS was less concerned about the minimal threat Dubai Ports World posed to U.S. port security than about the diplomatic fallout and alienation of a strategic ally in the Persian Gulf were the acquisition blocked).

<sup>278</sup> See Jackson, Apr. 8, 2008, *supra* note 64, at 4 (noting that the Pentagon often led the contingent of CFIUS members opposing foreign acquisitions); Baker, *supra* note 57, at 264–65 (reporting that the Pentagon, the Department of Homeland Security, and the Justice Department were often the Committee members most sensitive to the security risks attendant to foreign investments); Alvarez, *supra* note 70, at 13 (describing the clash within CFIUS between free traders, on one hand, and the protectionists and security hawks, on the other).

<sup>279</sup> Lee, *supra* note 98, at 9.

The broad assembly of government officials representing vastly different sets of interests, institutional commitments, and constituencies—in conjunction with limitations on presidential control—serves as a rough proxy for a court’s judicial review, which is not feasible in this particularly sensitive space. What better way of ensuring the equivalent of agency “hard look”<sup>280</sup> and to satisfy some of the chief aims of judicial review than to force the CFIUS decisionmakers to come to terms with a broad array of informed viewpoints, interests, and objections from across the Cabinet.<sup>281</sup> To the extent a single agency’s deliberations ostensibly generate legitimate, rational public policy,<sup>282</sup> the wide-ranging, non-hierarchical, and inter-agency deliberative process is an even stronger substantiation of this ideal. This is so because the insulation from the President is more complete, because the diverse assembly militates against the dangers of groupthink<sup>283</sup> and against capture by con-

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<sup>280</sup> *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851–52 (D.C. Cir. 1970); Peter L. Strauss, *Overseers or “The Deciders”*—The Courts in Administrative Law, 75 U. Chi. L. Rev. 815, 821 (2008); see also Mashaw, *supra* note 179, at 99 (describing an agency’s consideration of a policy question as an opportunity for consensus building); Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 Wis. L. Rev. 763, 768 (emphasizing that hard look review safeguards “citizen participation and deliberative government”); Thomas O. Sargentich, *The Critique of Active Judicial Review of Administrative Agencies: A Reevaluation*, 49 Admin. L. Rev. 599, 603 (1997).

<sup>281</sup> Katyal, *supra* note 84, at 2324 (suggesting overlapping jurisdiction among agencies will generate viewpoint diversity and improve reasoning “before [matters] are teed up to the President for decision”); *id.* at 2325 (indicating that multi-agency consultations serve to enlarge perspective and improve agency deliberation processes); Gillian Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 Emory L.J. 423, 430 (2009) (noting how “dividing staff with similar responsibilities into separate agencies can” have the effect of “limit[ing] the role of raw political calculations in setting policy”); cf. Fitts, *supra* note 190, at 884 (noting that the Founders’ intentional fragmentation of power “promote[s] deliberation”).

<sup>282</sup> See, e.g., Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 Harv. L. Rev. 1511, 1515 (1992) (contending that agency deliberations are the “best hope of implementing civic republicanism’s call for deliberative decision-making informed by the values of the entire polity”); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667, 1678 (1975).

<sup>283</sup> As Luis Garicano and Richard Posner discuss, centralized agencies, while efficient, are prone to groupthink. By contrast, “[l]ooser, less centralized organizations filter out fewer ideas and thus produce a more diverse set of options . . . to choose among.” Luis Garicano & Richard A. Posner, *Intelligence Failures: An Organiza-*

gressional committees<sup>284</sup> or special interests,<sup>285</sup> and because the Committee must be able to respond to counterarguments raised from within by members who disagree. And, that, after all, is the relevant comparison: the inter-agency process as preferable in this regard to a single agency's (or single person's) approach.

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tional Economics Perspective, 19 *J. Econ. Perspectives* 151, 157 (2005). See generally Paul 't Hart, *Groupthink in Government* 31–40 (1990); Irving L. Janis, *Groupthink: Psychological Studies of Policy Decisions and Fiascoes* 233–34 (2d ed. 1982); Cass R. Sunstein, *Why Societies Need Dissent* 143–44 (2003); O'Connell, *supra* note 249, at 1676 (noting that less centralized, streamlined organization may “combat” groupthink); Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 *Yale L.J.* 71, 75, 85–95 (2000). Groupthink might have particular bite in intelligence contexts, relevant here insofar as CFIUS must rely on intelligence reports to gauge the security threat posed by a foreign investment. See, e.g., Select Comm. on Intelligence, *Report on the U.S. Intelligence Community's Prewar Intelligence Assessments on Iraq*, S. Rep. No. 108-301, at 18, 21, 24 (2004) (discussing groupthink as contributing to the intelligence failures in the lead up to the 2003 invasion of Iraq). In the context of security reviews of foreign investments, presumably if the decision rested solely with the defense agencies, there would be polarization in the direction of rejecting a disproportionate number of proposed investments; and, if the decision were to be made by those institutionally focused on promoting free trade, perhaps too few investments would be flagged as raising security threats.

Of course, were CFIUS in charge of ensuring that the trains run on time or making eligibility determinations and distributing public benefits, the benefits of hierarchy and centralization might be worth the cost of groupthink infiltrating decisions. But given CFIUS's modest jurisdictional scope and that it need not meet time-sensitive demands, it might well afford to be loosely organized. See *infra* Section IV.B; cf. *Garicano & Posner, supra*, at 163–64 (comparing the need for decentralization in certain contexts with the need for centralization in others).

<sup>284</sup> See William Morrow, *Congressional Committees* 241 (1969) (noting congressional committees resist bureaucratic reorganization on the ground that the committee will likely have less influence post-reorganization); Cuéllar, *supra* note 170, at 660 n.274 (noting that congressional committees are often comprised of “preference outliers” that are not representative of the legislature as a whole); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 *J. Pol. Econ.* 765, 793 (1983) (emphasizing the dominant influence of the FTC's oversight committee on the agency's policies). See generally *infra* note 290 and accompanying text.

<sup>285</sup> See Karen M. Hult, *Agency Merger and Bureaucratic Redesign* 8 (1987) (noting that interest groups are more likely to capture one agency than multiple agencies); see also Katyal, *supra* note 84, at 2324–25 (noting overlapping jurisdiction among agencies narrows opportunities for interest group capture); O'Connell, *supra* note 249, at 1677 (noting that multiple agencies having overlapping responsibility may reduce private capture). Amy Zegart suggests that capture is far less likely in national security domains, in part because industry would have to lobby multiple agencies. Zegart, *Flawed, supra* note 21, at 22–26. That said, given the economic overlay to these national security considerations, perhaps there is greater interest-group pressure than in a purely national security domain.



Indeed, prevailing over the objections and factual challenges presented by one or more cabinet departments is likely a more rigorous standard than is demanded within any single Executive agency, where hierarchy (and, again, groupthink and a shared affinity for a particular set of special interests or constituencies) might trump otherwise persuasive but contrary viewpoints.<sup>286</sup> Moreover, prevailing over the objections and factual challenges presented by one or more cabinet departments might prove a more demanding standard than is typically required by courts deferentially reviewing agency actions,<sup>287</sup> and thus be of comparable, if not greater, legitimacy and accountability than judicial review.<sup>288</sup> Of course, at times the deliberative process will be subverted by procedural gamesmanship,<sup>289</sup> or, sound deliberation will take a back seat to unvarnished political power, from elements within the Committee, from the White House, or from some external source, such as Congress.<sup>290</sup> But such subversions are apt to occur less fre-

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<sup>286</sup> See Baker, *supra* note 57, at 265 (suggesting that the Committee could not force a decision over a member's dissent).

<sup>287</sup> See 5 U.S.C. § 706(2)(A) (2006). This would be especially so given the additional deference accorded to matters touching upon national security. See *supra* note 162 and accompanying text.

<sup>288</sup> Amy Gutmann & Dennis Thompson, *Democracy and Disagreement* 12–13 (1996) (emphasizing that legitimacy attaches to institutions that engage in deliberative processes); Mendelson, *supra* note 124, at 1134–35; see also *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 66 (2004) (noting the danger of judicial review going too far and the need “to protect agencies from undue judicial interference” and “to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve”). See generally Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 *Sup. Ct. Rev.* 201, 211–14 (noting that when multiple agencies are involved in a given regulatory matter their give-and-take is likely to yield policy outcomes that more closely align with congressional preferences).

<sup>289</sup> Baker, *supra* note 57, at 269–72 (noting procedural tricks used to frustrate Committee action).

<sup>290</sup> See Graham & Marchick, *supra* note 27, at 123–40; Zaring, *supra* note 70, at 99, 102.

As noted above, when Congress passed FINSA in 2007, it imposed on CFIUS new reporting requirements. David Zaring views Congress's more muscular oversight role as providing a limitation on Executive discretion: “In a world where scholars bemoan the lack of oversight of the executive's national security determinations by the coordinate branches, CFIUS may offer a way forward.” Zaring, *supra* note 70, at 101. To the extent Zaring is correct in terms of muscular legislative oversight, it remains contestable whether congressional involvement is truly accountability-reinforcing and law-promoting so much as it is introducing opportunities for political grandstanding at

quently than were one agency or agent deciding the matter unilaterally.<sup>291</sup> And, in any event, we always run the risk of judicial review being impeded by barriers of the courts' own creation,<sup>292</sup> or being corrupted by the judges' political or ideological preferences.<sup>293</sup>

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the last possible moment. In some ways, Congress would simply be engaging in the same type of political grandstanding that marked the pre-Exon-Florio days, when CFIUS members had no legal authority and thus would resort to public bickering. See *supra* notes 73–74 and accompanying text.

When Congress does intervene, it likely does not do so as a deliberative body. Rather, the intervention will be by select members, any one of whom—perhaps a backbencher or a member representing a district potentially adversely affected economically by the deal's consummation—can stir up enough trouble to scare off the parties to the deal. Once the specter of a national-security threat is raised in a public forum, it becomes difficult for other elected representatives to do anything but join the chorus in opposing the transaction. This is what happened with the Dubai Ports deal. No one in Congress wanted to seem soft on national security, even though CFIUS considered the deal so innocuous as not to warrant the full, forty-five day investigation. See David S. Cloud & David E. Sanger, *Action on Port Deals Fails to Sway Critics*, N.Y. Times, Feb. 25, 2006, at A10 (noting the political pressure on members of Congress, once opposition to a deal arises, to join suit); Sheryl Gay Stolberg, *How a Business Deal Became a Big Liability for Republicans in Congress*, N.Y. Times, Feb. 27, 2006, at A14 (same); Jonathan Weisman, *Port Deal to Have Broader Review: Dubai Firm Sought U.S. Security Probe*, Wash. Post, Feb. 27, 2006, at A1 (reporting that in response to congressional pressure CFIUS would conduct its forty-five day investigation); *supra* note 57 and accompanying text; see also Robert J. Samuelson, *The Dangers of Ports (and Politicians)*, Wash. Post, Mar. 14, 2006, at A19 (criticizing “grandstanding” by “self-indulgent” members of Congress). The heated rhetoric in Congress, not to mention the fact that these sensitive deals are especially susceptible to being undone by even minority opposition, makes legislative involvement a potentially dangerous tool; cf. Cuéllar, *supra* note 170, at 660 n.274 (indicating that congressional committees are not necessarily representative of the legislative bodies from which they are drawn); Mashaw, *supra* note 4, at 152–53 (describing Congress's parochialism as making it particularly susceptible to being dominated by special interests); Strauss, *supra* note 205, at 594 (“Congressional oversight can be just as political as presidential oversight and, with 535 members of Congress, much more complicated.”).

<sup>291</sup> See *supra* Section IV.A.

<sup>292</sup> See, e.g., *Barlow v. Collins*, 397 U.S. 159, 167–73 (1970) (Brennan, J., concurring in result and dissenting) (objecting to the Court's reliance on non-constitutional bases for denying standing to plaintiffs); Alexander M. Bickel, *The Supreme Court, 1960 Term, Foreword: The Passive Virtues*, 75 Harv. L. Rev. 40, 75 (1961) (concluding that the political question doctrine is a prudential doctrine); see also *infra* note 374 and accompanying text.

<sup>293</sup> See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 191 (2007) (Ginsburg, J., dissenting) (“[T]he Court, differently composed than it was when we last considered a restrictive abortion regulation, is hardly faithful to our earlier invocations of ‘the rule of law’ and the ‘principles of *stare decisis*.’”).

## 2. *Promoting Fundamental Fairness*

The imperative for reasoned and fair regulatory intervention is especially great in this context. After all, decisions whether to allow, block, or modify a foreign-investment proposal seem more like individual adjudications (or quasi-adjudications) than anything else.<sup>294</sup> Regardless whether constitutional due process would be available here,<sup>295</sup> some assurances against the arbitrary denial of an investment proposal (or against constructive denial, via unreasonable mitigation demands) might improve the foreign-investment review process.<sup>296</sup>

In the In-Q-Tel case, because of the perverse incentives to short-change long-term planning, political control complicates the task of incubating long-term foreign investments. Similarly, when it comes to scrutinizing foreign investments, there is a tension between un-harnessed political control and individualized decisionmaking.<sup>297</sup> This is especially true here where presidential control over foreign investments might be strongly affected by whatever other crises or considerations the President happens to be dealing with. Indeed, even full-throated defenses of the Unitary Executive recognize this qualification, noting, as the Court did in *Myers v. United States*, the need to limit White House control over adjudicatory matters.<sup>298</sup>

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<sup>294</sup> See Kenneth Culp Davis, *Administrative Law Text* 160 (1959); Mashaw et al., *supra* note 146, at 313–14, 351, 393–94.

<sup>295</sup> For a variety of reasons, I am not confident that due process rights would be constitutionally mandated. See, e.g., *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59–61 (1999).

<sup>296</sup> See David A. Super, *Are Rights Efficient? Challenging the Managerial Critique of Individual Rights*, 93 Cal. L. Rev. 1051, 1063–70 (2005).

<sup>297</sup> See generally U.S. Const. art. I, § 9, cl. 2 (enshrining right of Habeas Corpus); *Portland Audubon Soc’y v. Endangered Species Comm.*, 984 F.2d 1534, 1540 (9th Cir. 1993) (likening inter-agency, cabinet-level committee considerations to agency adjudications insofar as the decision was based on a narrow set of particular, disputed facts and the outcome would not be generally applied); *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1261–62 (9th Cir. 1977) (citing *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 245 (1973)) (noting that administrative determinations are quasi-judicial when the agency’s task is “to adjudicate disputed facts in particular cases”) (internal quotation marks omitted). Cf. *Chadha v. INS*, 462 U.S. 919, 966 (1983) (Powell, J., concurring) (raising concerns about Congress effectively adjudicating the rights or status of individuals).

<sup>298</sup> *Myers v. United States*, 272 U.S. 52, 135 (1926) (“[T]here may be duties of a quasi-judicial character imposed on executive . . . tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a

Often the non-applicability of political control over adjudication is understood in constitutional and statutory terms,<sup>299</sup> but for our purposes the relevant analytical consideration is a functional one: whether an adjudicatory proceeding is fundamentally fair. As Peter Strauss has written, “above all . . . [an adjudicator] ought not to be called upon to explain her decision in the political forum.”<sup>300</sup> Cynthia Farina, for her part, has emphasized the need to separate administrative adjudication from presidential control.<sup>301</sup> And, Heidi Kitrosser arrives at a similar conclusion. Kitrosser notes that a case could be made that “those exercising discretion in quasi-adjudicative contexts” ought to be protected against at-will removal by the President.<sup>302</sup> Simply put, the political accountability that generally legitimizes White House control over the adminis-

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particular case properly influence or control.”); see *Sierra Club v. Costle*, 657 F.2d 298, 406–07 (D.C. Cir. 1981) (noting the prohibition on presidential influence over the administrative state in certain adjudicatory or quasi-adjudicatory proceedings).

Of course, presidential insulation may at times be imperfect or incomplete. Cf. *Withrow v. Larkin*, 421 U.S. 35, 41, 47 (1975) (presuming an absence of bias when an administrative agency performs both investigatory and adjudicatory functions); *United States ex. rel. Accardi v. Shaughnessy*, 347 U.S. 260, 265–67 (1954) (prohibiting the Attorney General from interfering with an adjudicatory decision of the Board of Immigration Appeals, notwithstanding the fact that the Board serves at the pleasure of the Attorney General and notwithstanding the fact that the Attorney General can weigh in after the Board has rendered its own judgment); *Portland Audubon*, 984 F.3d at 1538 (acknowledging while circumscribing White House influence over inter-agency deliberative process); see also Metzger, *supra* note 281, at 429 (2009) (emphasizing the need to limit political influence over individualized agency adjudications by separating and depoliticizing administrative employees overseeing agency adjudications). To be sure, there are White House representatives on CFIUS. See 50 U.S.C. app. § 2170(k)(2) (Supp. II 2009). But that does not mean that the President controls the committee’s agenda. First, the White House personnel constitute a minority of the committee’s membership. Moreover *Portland Audubon* rejects the assumption that the President can dictate an interagency committee’s adjudicatory agenda even through White House aides who are statutory members of the Endangered Species Committee. See 984 F.2d at 1545 (relying in no small part on *Shaughnessy*).

<sup>299</sup> 5 U.S.C. § 557(d) (2006); *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 224 (D.C. Cir. 1959) (prohibiting ex parte contact in a rulemaking proceeding where the FCC was deciding how to allocate VHF and UHF licenses between two stations in nearby cities and thus was in effect resolving “conflicting private claims to a valuable privilege”).

<sup>300</sup> Strauss, *supra* note 205, at 622.

<sup>301</sup> Cynthia R. Farina, *Undoing the New Deal Through the New Presidentialism*, 22 *Harv. J.L. & Pub. Pol’y* 227, 233–34 (1998).

<sup>302</sup> Heidi Kitrosser, *Accountability and Administrative Structure*, 45 *Willamette L. Rev.* 607, 616 n.39 (2009).

trative state is not likely to ensure fundamental fairness in individualized decisions.<sup>303</sup>

Moreover, given the secrecy that seemingly necessarily attaches, courts cannot do the work here that we see them doing elsewhere, in more conventional but still-politicized administrative contexts more amenable to judicial review.<sup>304</sup> This is because the sensitivity of CFIUS investigations makes true adversarial proceedings with the possibility of discovery and cross-examination impossible. Were the government to acknowledge its concerns in an adjudicatory setting, it would offend other nations, and perhaps reveal military and intelligence assessments, sources, and methods.<sup>305</sup> Furthermore, even if there were a more limited adjudicatory procedure that narrowed the scope of discovery and cross-examination to maintain secrecy, we would still have to confront the possibility that this watered-down adjudication would be a government rubber stamp,<sup>306</sup> or that the time delay and the very hint that the courts are suspicious of a proposed investment would be

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<sup>303</sup> Cases such as *Shaughnessy*, 347 U.S. at 266–67, *Myers*, 272 U.S. at 135, and *Londoner v. Denver*, 210 U.S. 373, 385 (1908), acknowledge the disconnect between adjudication and political accountability and thus suggest as much. See *Myers*, 272 U.S. at 135 (“[T]here may be duties of a quasi-judicial character imposed on executive . . . tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control.”).

<sup>304</sup> See, e.g., *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971) (exercising judicial review over a quasi-adjudicatory decision by the Secretary of Transportation).

<sup>305</sup> See, e.g., *supra* notes 160–62, 181–82 and accompanying text. In addition, consider for example, the recent publication of a revealing memo detailing CFIUS’s apparent unease regarding an attempted acquisition of a Nevada silver mine. Evidently, the concern was not that the foreign investor—a firm controlled by the Chinese government—would own the mine per se, but rather than ownership of the mine was risky given its proximity to key military bases. See Eric Lipton, *Chinese Withdraw Offer for Nevada Gold Concern*, N.Y. Times, Dec. 22, 2009, at B3 (suggesting CFIUS’s intention to reject the acquisition of a Nevada gold mine by an entity controlled by the Chinese government after finding no feasible mitigation possibility); Memorandum from Davis Graham & Stubbs LLP to Northwest Non-Ferrous Int’l Co. and Firstgold Corp. 3–4 (Dec. 14, 2009), available at <http://graphics8.nytimes.com/packages/images/nytint/docs/memo-regarding-the-sale-of-firstgold-corp/original.pdf>.

<sup>306</sup> Cf. Michaels, *supra* note 24, at 920–22 & n.86 (describing the highly deferential process by which the Foreign Intelligence Surveillance Court evaluates government requests for national-security wiretaps).

enough to mar the foreign investor's reputation and impede the deal.

Faced with the infeasibility of judicial safeguarding and the questionable legitimacy of presidential adjudication, it is not clear that our traditional institutional designs and administrative law tools provide an answer. But, in this respect too, CFIUS might just do the trick.

Needless to add, limiting White House control is not the same as subordinating politics altogether in the name of reasoned decisionmaking. But that is where the inter-agency design comes in once again. As noted above, the Committee structure has the dual effect of crowding out the President and also better ensuring that many sides of the complex, interdisciplinary set of questions associated with foreign investment—including, likely, the side or sides favorable to the investors—are well ventilated.<sup>307</sup> Former CFIUS insider Stewart Baker, though expressing frustration over rival agencies' attempts at gamesmanship, nevertheless concludes that reasoned arguments usually prevail, and parochial institutional preferences give way when persuasive evidence is marshaled to the contrary.<sup>308</sup> Indeed, it is likely the case that fragmented decisionmaking "promote[s] deliberation."<sup>309</sup> As Paul Verkuil has observed in administrative contexts:

Collegial decisionmaking has far different purposes and effects from single (or executive) decisionmaking. It is meant to be consensual, reflective and pluralistic. It expresses shared opinions rather than decisive ukases. In this sense, collegial bodies express deeply felt values about the decisional process. They are more concerned with the values of fairness, acceptability and accuracy than with the single dimension of efficiency.<sup>310</sup>

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<sup>307</sup> For the many virtues of pressing claims through a rights-based approach and of the substantive benefits of adversarial administrative decisionmaking, see Super, *supra* note 296.

<sup>308</sup> Baker, *supra* note 57, at 272–73.

<sup>309</sup> Fitts, *supra* note 190, at 884.

<sup>310</sup> Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 *Duke L.J.* 257, 260–61; see also Lewis A. Kornhauser & Lawrence Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 *Cal. L. Rev.* 1, 4 (1993) ("Collegial enterprises . . . are like team enterprises in that each participant must consider and respond to her colleagues as she performs her tasks. Collaboration and deliberation are the trademarks of collegial enterprise . . .").

Verkuil is speaking about multi-headed, but otherwise singular line agencies, such as the FTC or SEC. That said, Verkuil's claims and findings would likely be even more robust vis-à-vis multi-headed, multi-agency (or multi-tribunal) collaboration. Indeed, perhaps the CFIUS process is sufficiently deliberative and pluralistic that it provides the investing parties with a vicarious day in court.

*C. Fostering Inter-Administration Consistency, Regularity, and Predictability*

In addition, by insulating the crucial work of CFIUS from the President, there is likely to be a higher level of consistency over time (and between presidential administrations) than if the President had sole discretion.<sup>311</sup> This is because the interests advanced by cabinet officials involved in the decisionmaking may reflect common institutional goals across administrations, rather than just partisan or presidential objectives.<sup>312</sup> Consistency over time is especially important in this space given the need to accommodate core regulatory questions, diplomatic considerations, national-security concerns, and the interests of the parties to the proposed transaction—coupled with the inability to explain publicly what, if any-

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<sup>311</sup> The predictability is, of course, contingent on an absence of changed circumstances, such as new threats, the utility of new technologies, and new foreign regimes.

<sup>312</sup> See William A. Niskanen, Jr., *Bureaucracy and Representative Government* 36–41, 195–200 (1971) (noting that agency leaders champion their institutional needs and causes even to the extent that they resist presidential direction); James Q. Wilson, *Bureaucracy* 260–61 (1989) (“A remarkable transfiguration occurs at the very moment a president administers the oath of office to cabinet secretaries . . . . [A]lmost immediately, the oath takers . . . see the world through the eyes of their agencies—their unmet needs, their unfulfilled agendas, their loyal and hard-working employees.”); Bressman & Thompson, *supra* note 183, at 621 (“[I]ndividual agencies, if left to their own devices, would focus on their own missions without devoting sufficient attention to government-wide priorities.”); Moe & Wilson, *supra* note 230, at 17, 18 (noting that “each agency has its own mission, expertise, clientele, linkages with congressional committees, and methods of operation” and will deviate from the president when it is in its interest to do so especially because even the presidentially appointed leaders “are under pressure to become advocates for the parochial interests of their agencies”); *supra* notes 250, 279 and accompanying text; see also *supra* note 262 and accompanying text. But see Darryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 *Harv. L. Rev.* 915, 933 (2005) (“[P]olitical appointees [are] much less invested in the agency’s mission and much more interested in pleasing their political overseers.”).

thing, distinguishes superficially inconsistent outcomes.<sup>313</sup> Without judicial review, changes in presidential administrations would lead to destabilizing about-faces in administrative governance of foreign investment.<sup>314</sup> Although much is made in the administrative law literature about ossification,<sup>315</sup> the converse—administrative vacillation—can be just as problematic. It is problematic not just for legitimacy reasons but also because uncertainty substantially increases costs to regulated parties.<sup>316</sup> American companies seeking to attract foreign investors and foreign investors seeking business opportunities in the United States already express unease about having to submit to CFIUS review. Prospective investors would have even colder feet and perhaps fewer deals would be pursued, especially in the months leading up to a presidential transition, were foreign-investment regulation more variable and unpredictable.<sup>317</sup> Investigations, mitigation negotiations, and final recom-

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<sup>313</sup> Baker, *supra* note 57, at 263 (emphasizing the difficulty CFIUS faces in demonstrating its fairness because it cannot discuss individual cases or disclose the types of concerns that trigger additional scrutiny).

<sup>314</sup> See *Massachusetts v. EPA*, 549 U.S. 497, 532–55 (2007); *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–44, 57 (1983); cf. Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 *Pub. Choice* 33, 33–38, 55–60 (1982) (noting that the delegation to administrative agencies is fraught with uncertainty as the regulatory process might generate outcomes beyond what the delegating legislators envisioned or intended); Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk and the Choice Between Agencies and Courts*, 119 *Harv. L. Rev.* 1036, 1043–59 (2006) (indicating that one reason for Congress to delegate to courts as opposed to an Executive agency is to ensure more stable interpretations and decisions across presidential administrations).

<sup>315</sup> See e.g., *United States v. Mead Corp.*, 533 U.S. 218, 247 (2001) (Scalia, J., dissenting); Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 *N.Y.U. L. Rev.* 1272, 1302–04 (2002).

<sup>316</sup> See Magill, *supra* note 148, at 871 (noting the government's incentive to be stable, reliable, and restrained in order to “induce investment by private parties and foster economic growth”). This is perhaps best evidenced by the overwhelming volume of unproblematic deals filed with CFIUS that neither involve government-controlled foreign investors nor touch upon security concerns. Even though undergoing CFIUS review is expensive in terms of legal fees and time delays, the companies evidently place a premium on certainty and finality. See Baker, *supra* note 57, at 245. See generally *State Oil v. Khan*, 522 U.S. 3, 20 (1997) (“[I]n most matters it is more important that the applicable rule of law be settled than that it be settled right.”) (internal quotation and citations omitted).

<sup>317</sup> See Matthias Busse & Carsten Hefeker, *Political Risk, Institutions and Foreign Direct Investment*, 23 *Euro. J. Pol. Econ.* 397, 407 (2007) (finding that high levels of government stability, legal accountability, and bureaucratic quality correlate with for-



mendations that need to go through the Committee's inter-agency deliberative ringer—and thus are not simply a function of presidential predilections<sup>318</sup>—potentially go a long way in minimizing that unease. Further, this deliberative process conveys to participants that the legally and politically unaccountable framework for foreign-investment review is nevertheless rational and rigorous.<sup>319</sup>

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eign direct investment flows); Hans-Peter Lankes & A.J. Venables, *Foreign Direct Investment in Economic Transition*, 4 *Econ. of Transitions* 331, 346 (1996) (emphasizing that countries viewed as politically stable tend to attract foreign investments); Friedrich Schneider & Bruno S. Frey, *Economic and Political Determinants of Foreign Direct Investment*, 13 *World Dev.* 161, 161, 173 (1985) (same); Samuelson, *supra* note 290, at A19 (emphasizing that when CFIUS appears highly political, international interest in investing in the United States declines); William H. Donaldson, Chairman, U.S. Securities and Exchange Comm., *U.S. Capital Markets in the Post-Sarbanes Oxley World: Why Our Markets Should Matter to Foreign Issuers*, Remarks before the London School of Economics (Jan. 25, 2005) (transcript available at [www.sec.gov/news/speech/spch012505whd.htm](http://www.sec.gov/news/speech/spch012505whd.htm)) (emphasizing the need for regulatory regimes to instill “trust and confidence” in would-be investors and noting “[c]apital will flee environments that are unstable or unpredictable . . .”).

<sup>318</sup> See Bressman, *supra* note 212, at 463–64 (noting that presidential control absent safeguards against “arbitrary agency decisionmaking” is not necessarily accountable); Eskridge & Baer, *supra* note 162, at 1177 (disputing relevance of public opinion in agency reason-giving); Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 *Fordham L. Rev.* 17, 21 (2001) (noting that an agency's reliance on “political will . . . delegitimate[s] administrative action rather than count[s] as good reasons.”); Stephenson, *supra* note 269, at 55 (arguing that “[f]orcing the politically responsive president to share power with a partially insulated . . . bureaucracy tends to reduce the variance in policy outcomes,” thereby moderating those outcomes and making them less likely to deviate too far to the left or right). Consistency and reliability are prized in this space, so that foreign investors and their domestic counterparts can move forward in a predictable manner. Zaring speaks in part to this concern, particularly insofar as the CFIUS process has unnerved foreign governments. Zaring, *supra* note 70, at 86–87 (noting China's and India's frustration with CFIUS and efforts by the U.S. government to explain “that CFIUS review is narrowly tailored to national security issues”).

<sup>319</sup> Jackson, Feb. 4, 2010, *supra* note 27, at 4 (noting “the nation's long-standing international commitment to maintaining an open and receptive environment for foreign investment”); Holtz-Eakin, *supra* note 246 (emphasizing “the U.S. tradition of open international investment”). As Geoffrey Miller notes, financial interests typically welcome the predictability and stability of, say, an independent central bank that is more likely than elected officials to promote stable, long-term interests. Geoffrey P. Miller, *An Interest-Group Theory of Central Bank Independence*, 27 *J. Legal Stud.* 433, 449–53 (1998); cf. Bressman, *supra* note 212, at 462–68, 496–99 (emphasizing the importance of avoiding arbitrariness, a value often overshadowed by traditional notions of accountability). The Committee is, to this extent, not unlike unelected courts insofar as their credibility is in no small part a function of their consistent adherence to something akin to *stare decisis*, which both constrains their discretion with respect

Though the foreign investors might not on their own be clued in to this and other subtleties, many rely on a relatively small group of experienced lawyers who deal regularly with CFIUS and can counsel their clients accordingly.<sup>320</sup>

*D. Advancing the Interests of the Incumbent Administration*

Up until now, I have addressed the way in which the President voluntarily forgoes control and authority to advance interests other than her immediate own. This last consideration suggests more of a tradeoff: the President cedes ground over foreign-investment review in order to have greater freedom in pursuing other foreign-affairs objectives.

CFIUS's insulation from the White House (at least through the critical intermediate stages of investment scrutiny) provides the President with important political cover. A foreign nation is undoubtedly offended when the U.S. government implies that one of its investments is a Trojan Horse. To the extent that the President can credibly claim—and demonstrate—that it is CFIUS and not the White House driving the investigation or demanding mitigation, the important but politically treacherous work of screening foreign investments will not compromise her relationship with fellow heads of state. There might be overarching diplomatic, trade, defense, or human-rights issues in need of immediate resolution. Those delicate negotiations might otherwise be disturbed or compromised by a disagreement over a foreign acquisition of a U.S. technology firm. (The agency heads who similarly must deal with their foreign counterparts could also displace blame and responsibility onto their colleagues on the Committee for *their* mistaken ways.) Obviously, the ability to convey this message credibly depends, too, on the existence of experienced lawyers who explain to their clients how CFIUS operates.<sup>321</sup>

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to individual decisions and renders them trustworthy and legitimate over the long haul. See generally Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 Colum. L. Rev. 1448 (2010) (describing the Office of Legal Counsel's adherence to its past decisions as a form of self-constraint and de-politicization).

<sup>320</sup> See Zaring, *supra* note 70, at 107 (emphasizing the existence of “a savvy bar of [CFIUS] practitioners”).

<sup>321</sup> See *supra* note 320 and accompanying text.

Moreover, there might well be domestic opposition to approving a foreign investment, because the investor is from an unpopular country, or because that investment helps breathe new life into an influential, American-based competitor's business.<sup>322</sup> In most regulatory contexts, the President is not asked, and often not allowed, to choose winners or losers in the economic marketplace,<sup>323</sup> and would presumably prefer not to do so in this context either.<sup>324</sup> Foreign-investment scrutiny is arguably a place where the President need not put her personal stamp on the process, and thus this might be a context better left to others. As just one example, President Bush took pains to demonstrate his distance from the controversial Dubai Ports deal. Bush explained that CFIUS independently approved the acquisition. And, as it turned out, CFIUS bore the brunt of the ensuing political backlash.<sup>325</sup>

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<sup>322</sup> The Chevron Corporation reportedly offered to buy American-based Unocal for a lower price than CNOOC, a Chinese company, offered. Some observers have suggested that instead of Chevron raising its offer price, it rallied opposition to CNOOC's acquisition by alleging national-security concerns. That competition-driven (as opposed to national-security-driven) public relations campaign might have encouraged CNOOC to withdraw its offer, enabling Chevron to purchase Unocal at the lower price. See Graham & Marchick, *supra* note 27, at 128–35 (2006). See generally Michael Petrusic, *Recent Developments, Oil and National Security: CNOOC's Failed Bid to Purchase Unocal*, 84 N.C. L. Rev. 1373 (2006).

<sup>323</sup> See Michaels, *Deputizing Homeland Security*, *supra* note 25, at 1453–57 (describing the ways in which informal intelligence-gathering partnerships between the government and private businesses present the government with unusual opportunities to provide business-advancing perks to those companies that participate, while effectively punishing those that refuse by withholding such business-advancing perks).

<sup>324</sup> Note that President Reagan initially opposed the authority conferred by Exon-Florio. See Graham & Krugman, *supra* note 83, at 126; cf. Fitts, *supra* note 190, at 863–64, 895 (noting that members of Congress can blame institutional rules when votes go against the interests of their constituents and that because the White House dominated the push for health care reform in 1993, President Clinton could not escape the lion's share of blame when the proposal failed).

<sup>325</sup> See *supra* note 55 and accompanying text. The President received some criticism for his lack of engagement with the ports acquisition, see Jim VandeHei & Paul Blustein, *Bush's Response to the Ports Deal Faulted as Tardy: By the Time President's Political Team Took Notice, Controversy Was an Uproar*, *Wash. Post*, Feb. 26, 2006, at A5, but he insisted that he was not privy to the deliberations and learned about CFIUS's tacit approval only weeks after that approval was given. See Elisabeth Bumiller & Carl Hulse, *Panel Saw No Security Issue in Port Contract, Officials Say*, *N.Y. Times*, Feb. 23, 2006, at A1. For strategic delegations by Congress (ostensibly to avoid political blame), see *infra* note 361 and accompanying text.

## V. BROADER CONSIDERATIONS

These case studies are intrinsically important. They address critical responsibilities that, for a variety of reasons, have failed to capture the public's attention. The fact that their importance far exceeds their political salience, public resonance, or scholarly attention is of sufficient significance to warrant careful consideration. But the case studies are important for additional reasons. They suggest broader lessons, three of which are briefly sketched below.

*A. Other Domains Where Legal and Political Accountability Might Fail*

Assurances of legal constraint or political accountability would be misplaced when it comes to our two case studies. Such assurances might be similarly misplaced in other regulatory contexts. Those other contexts might benefit from bureaucratic reconfigurations that compensate for deficient or dysfunctional traditional accountability mechanisms. If so, In-Q-Tel and CFIUS provide two possible blueprints for institutional redesign.

Indeed, there is growing recognition of so-called "black" and "grey holes" across the administrative state.<sup>326</sup> Black holes are domains where the Executive is entirely free from legal checks.<sup>327</sup> Grey holes exist where some legal checks are in place; but those checks are sufficiently weak that they effectively allow the Executive "to do as it pleases."<sup>328</sup>

Concern over black and grey holes might be lessened by the assurance of political accountability. But even outside of In-Q-Tel and CFIUS, political accountability cannot be taken for granted. How effective political constraints are depends on whether the public can appreciate what the government is doing, and whether it cares about the particular issue enough to register objections.<sup>329</sup> And, as both case studies show, political accountability turns also on whether the public's views about "good" outcomes match the

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<sup>326</sup> See generally Dyzenhaus, *supra* note 134, at 3; Vermeule, *supra* note 134.

<sup>327</sup> See Dyzenhaus, *supra* note 134, at 3.

<sup>328</sup> *Id.* at 42.

<sup>329</sup> See *supra* note 181 and accompanying text.

intended goals of the regulatory regime. Otherwise, public engagement creates perverse incentives.

These legal and political black and grey holes might be expanding. Domestic regulatory domains previously subject to stringent legal constraints are now being viewed as having important national-security implications. We see this particularly in environmental and public-health domains. There, Congress and the courts have been quick to broaden the Executive's discretion. For instance, in Section 102 of the Real ID Act of 2005, Congress authorizes the Secretary of Homeland Security, in her "sole discretion," to "waive all legal requirements," including environmental regulations, in service of expeditious efforts to safeguard the nation's borders.<sup>330</sup> In addition, Congress enacted the Project BioShield Act of 2004,<sup>331</sup> principally to bolster the government's capacity to counter bioterrorist threats.<sup>332</sup> Section 2 permits the Secretary of Health and Human Services ("HHS") to conduct procurement without soliciting competitive bids, to expedite peer review when it comes to public-health matters that touch also upon national security, and to bypass civil-service protocols when developing solutions for "pressing qualified countermeasure research."<sup>333</sup> And, Section 4 empowers the FDA Commissioner, upon the HHS Secretary's declaration of a state of emergency, to (1) authorize use of unapproved medical products and (2) permit approved medical products to be used for otherwise unauthorized applications.<sup>334</sup> Given the absence of meaningful constraints—as evidenced by provisions authorizing the Secretary of Homeland Security, in her "sole discretion" to waive "all legal requirements"<sup>335</sup> and allowing

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<sup>330</sup> REAL ID Act of 2005 § 102, 8 U.S.C. § 1103 note (2006); see also Hope Babcock, *National Security and Environmental Laws: A Clear and Present Danger?*, 25 Va. Envtl. L.J. 105, 110–20 (2007); Kerry Rodgers, *The Limits of Collaborative Governance: Homeland Security and Environmental Protection at U.S. Ports*, 25 Va. Envtl. L.J. 157, 162, 209–10, (2007).

<sup>331</sup> Project BioShield Act of 2004, Pub. L. No. 108-276, 118 Stat. 838 (2004).

<sup>332</sup> See Frank Gottron, Cong. Research Serv., RS 21507, *Project BioShield: Purposes and Authorities 1* (Jul. 6, 2009), available at <http://www.fas.org/sgp/crs/terror/RS21507.pdf>.

<sup>333</sup> See Bioshield Act § 2, 42 U.S.C. § 247d-6a(b), (c), (e) (2006).

<sup>334</sup> See id. § 4, 21 U.S.C. § 360bbb-3(a) (2006).

<sup>335</sup> REAL ID Act § 102, 8 U.S.C. § 1103 note (2006); cf. 5 U.S.C. § 701(a) (2006) (exempting from judicial review agency action that is "committed to agency discretion by law"); *Webster v. Doe*; 486 U.S. 592, 600 (1988) (exempting from judicial review

the HHS Secretary to bypass procurement and civil-service safeguards<sup>336</sup>—much would depend on the proper functioning of political checks to stem arbitrary or abusive public administration. Were political constraints effectively disabled here, too, policymakers might consider employing alternative fortifications, again perhaps along the lines of In-Q-Tel or CFIUS.

### B. Context Matters

In addition, In-Q-Tel and CFIUS compel us to reconsider how clear the connection is between institutional choices and substantive outcomes. As noted, privatization typically enhances Executive discretion. By contracting *out* government responsibilities to the private sector, the Executive is also contracting *around* many legal constraints, and some political ones, too. After all, contractors are unlikely to be beholden to civil-service protections, obligated by APA requirements, or subject to much public scrutiny.<sup>337</sup> Thus, an administration intent on maximizing its authority might contract around a bureaucracy hostile to the White House's agenda.<sup>338</sup> An administration bristling under statutory restrictions covering government personnel might use contractors to avoid having to abide by those laws.<sup>339</sup> And, an administration seeking to mask politically unpopular government action might use private proxies, thereby limiting the electorate's ability to monitor the action, associate the

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non-constitutional allegations of wrongful termination of an agency employee when the relevant statute authorizes the agency head to fire employees whenever she "shall deem such termination necessary or advisable") (internal quotation marks omitted).

<sup>336</sup> See BioShield Act § 2, 42 U.S.C. § 247d-6a(b), (e) (2006).

<sup>337</sup> See *supra* notes 151, 152 and accompanying text.

<sup>338</sup> See Michaels, *supra* note 2, at 745-50. Such claims have been made about President Nixon and his decision to hire a cadre of private consultants to the Office of Economic Opportunity. The consultants shared the Administration's ideology, and their presence reduced the influence of the rank-and-file bureaucracy, which was populated by Great Society liberals suspicious of Nixon's efforts to scale back anti-poverty programs. See Guttman & Willner, *supra* note 2, at 28, 65.

<sup>339</sup> It has been suggested that data-mining operations might be an apt place for outsourcing precisely because key privacy restrictions on collecting and synthesizing personal information apply only to government officials. See Michaels, *supra* note 2, at 738-39; Daniel J. Solove & Chris Jay Hoofnagle, A Model Regime of Privacy Protection, 2006 U. Ill. L. Rev. 357, 359.

private actors with government officials, and hold those officials accountable.<sup>340</sup>

Similarly, a shift from hierarchical administrative design to an inter-agency architecture is routinely seen as impeding rather than advancing regulatory governance. The central concern is that a deliberative body of equals (as opposed to a hierarchical chain of command) invites diffusion of responsibility.<sup>341</sup> When inter-agency architecture is deployed, our immediate response might be to assume the corresponding administrative function is being sabotaged. Indeed, scholars point to the bureaucratic fragmentation with the Occupational Safety and Health Administration—parts of which are within the Labor Department’s political hierarchy and parts of which are an independent enclave, insulated against political promotions and terminations—as an express attempt to undermine the federal government’s regulatory capabilities.<sup>342</sup>

Conventional wisdom fails us here, too. As Parts III and IV suggest, the effects of privatization and the flattening of administrative governance improve rather than undermine the regulatory aims of central importance to this inquiry. But that does not mean the conventional wisdom is wrong. Far from it. Where legal constraints are in place—namely, in most administrative contexts—privatization likely has its customary effect.

True, market competition provides some accountability checks. Private contractors are disciplined by the promise of profits and the threat of replacement by more efficient rivals. In turn, firms motivate their employees by the promise of performance-based bonuses and the threat of immediate termination for unsatisfactory work.<sup>343</sup> Often, however, competition is not robust, replacing an incumbent contractor is difficult,<sup>344</sup> and the pursuit of profits (and the

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<sup>340</sup> Guttman, *supra* note 5, at 894–96 (indicating that government personnel are constrained differently and to a greater extent than are contractors); Michaels, *supra* note 2, at 751–57 (suggesting that a government might use private actors to more fully conceal its administrative actions).

<sup>341</sup> See *supra* note 236 and accompanying text.

<sup>342</sup> E.g., Cass, Diver & Beermann, *supra* note 21, at 10–14; Moe, *supra* note 2, at 297–303.

<sup>343</sup> See *supra* note 167 and accompanying text.

<sup>344</sup> See Super, *supra* note 2, at 455–56 (describing some difficulties that governments face when trying to extricate themselves from contracts); Super, *supra* note 296, at 1128 (noting that “once discretionary functions are contracted out, government may

possibility of extracting extra rents) leads contractors not to increase efficiency but rather to cut corners.<sup>345</sup> Thus, in many cases, market constraints pale in comparison to the legal constraints imposed on the administrative state. Those legal constraints are bypassed by the turn to privatization. And, as a result, privatization usually has a comparatively unfettering effect on the Executive. But, where there are minimal underlying legal constraints (such as in the CIA's case), there is no tradeoff between the market and law<sup>346</sup> and whatever the market might provide by way of accountability checks is gravy. For this reason, those generally concerned with Executive evasions should approach with great skepticism efforts to replicate In-Q-Tel within agencies already stringently constrained by administrative law.<sup>347</sup>

The same caveats apply, albeit for different reasons, when it comes to universally replicating CFIUS's inter-agency design. Inter-agency design's effectiveness, or lack thereof, is likewise context specific. In most cases, presidents try to maximize hierarchical bureaucratic structures, within an agency (through political layering<sup>348</sup>), across agencies (through centralization and consolidation<sup>349</sup>),

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feel that it is effectively tied to the same set of policies for the term of the contract, which may run several years").

<sup>345</sup> See Jon Michaels, *Deforming Welfare: How the Dominant Narratives of Devolution and Privatization Subverted Federal Welfare Reform*, 34 *Seton Hall L. Rev.* 573, 629–33 (2004) (discussing efforts by contractors to skimp on service provision to maximize profits).

<sup>346</sup> See, e.g., Beermann, *supra* note 5, at 1551–52; Guttman, *supra* note 5, at 909 & n.193.

<sup>347</sup> It bears mentioning that even in the CIA context, harnessing market constraints is hardly perfect. The In-Q-Tel model has flaws and limitations. There may be some vital information lost in the conveyance of CIA goals to In-Q-Tel; this might be a function of the need to rely on two distinct entities, as well as a function of the fact that certain sensitive information might not be transmitted to In-Q-Tel. Moreover, In-Q-Tel incentives might not align perfectly with CIA goals. This is true both at the individual employee level, where the bonus goals are at best rough proxies for CIA success. It is also true at the institutional level insofar as In-Q-Tel is essentially rival-free and thus might not be as responsive and efficient as a contractor who has competitors breathing down its proverbial neck. See *supra* note 167 and accompanying text.

It further bears mentioning that the market accountability in the In-Q-Tel story is likely secondary to the story about political insulation. Thus, In-Q-Tel might be considered successful even if it is administratively less efficient than if it were housed within the CIA.

<sup>348</sup> See *supra* note 233 and accompanying text.

<sup>349</sup> See *supra* note 231 and accompanying text.



and between the White House and the agencies (through OMB<sup>350</sup> and White House czars<sup>351</sup>).

The upside to inter-agency design is reasoned, reasonable decisionmaking when neither political nor legal constraints can guarantee such results. That said, the absence of legal and political constraints might not be a sufficient justification for departing from a hierarchical bureaucratic design. This is especially so in situations requiring immediate, resolute action. There, inter-agency deliberation might be an impediment, not an improvement.<sup>352</sup> Perhaps this explains why the 2004 reforms to the Intelligence Community pushed for greater centralized control and administration under the newly created National Intelligence Directorate,<sup>353</sup> and why there was a similar effort to unify sundry and scattered federal agencies and departments within the newly minted Department of Homeland Security.<sup>354</sup>

By contrast, where responsibilities do not require immediate and unwavering engagement, inter-agency deliberation is possible and perhaps desirable. Such is the case with scrutinizing foreign investments—though, even there, CFIUS must act within stringent time limits. The time limitations no doubt serve to prevent Committee members from dragging their feet. Those limitations, along with the relative discreteness of the task at hand<sup>355</sup> and the high stakes associated with economic and national security, ensure that at least in the foreign-investment space (and those like it) inter-agency deliberation likely facilitates sound public administration.

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<sup>350</sup> See supra note 230 and accompanying text.

<sup>351</sup> See supra note 232 and accompanying text.

<sup>352</sup> See M. Elizabeth Magill, *Can Process Cure Substance?*, 116 *Yale L.J. Pocket Part* 126, 126 (2006) (criticizing advocates of “internal separation of powers” for “remaking the executive branch into a debating society”).

<sup>353</sup> See supra note 231 and accompanying text.

<sup>354</sup> See *id.*

<sup>355</sup> See generally Wilson, supra note 312, at 25–26 (emphasizing that single-task agencies often outperform those entrusted with multiple tasks); Cohen, Cuéllar & Weingast, supra note 203, at 710 (noting that the consolidation of broad responsibilities under one organizational umbrella can have the effect of dividing an agency’s attention and thus increase the likelihood that some of the responsibilities will be overlooked or shortchanged).

*C. Comparative Legal Process and Anti-Aggrandizing Behavior*

In this Section, I first discuss possible comparisons between the architectural innovations studied above and others found across the government. I then consider the nature of the Executive's apparent anti-aggrandizing behavior as seemingly evidenced by the creation and perpetuation of In-Q-Tel and CFIUS.

*1. Comparative Institutional Self-Constraints**a. Independent Agency Analogues*

Perhaps the most obvious starting point is with independent agencies. Generally speaking, independent agencies are of a different breed from In-Q-Tel and CFIUS. This is true because of differences in design structure and because Congress rather than the Executive is typically clamoring to create independent agencies insulated from direct presidential control.<sup>356</sup> But, more importantly, most of the responsibilities tasked to independent agencies, such as the SEC and the FTC, do not suffer from the same underlying accountability deficits that plague foreign-investment review and long-term intelligence incubation. Legal constraints, anathema in the sensitive spaces currently occupied by In-Q-Tel and CFIUS, are readily available when it comes to securities rulemaking and enforcement, and policing consumer fraud and anti-competitive business practices.<sup>357</sup>

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<sup>356</sup> See, e.g., Moe, *supra* note 2, at 299 & n.33 (indicating that presidents ordinarily dislike independent agencies); see also *Humphrey's Executor v. United States*, 295 U.S. 602, 628–32 (1935) (upholding the insulation of the FTC Commissioners notwithstanding the President's preference for removing an uncooperative one).

An important exception is Executive self-sabotage, when the Executive dislikes a regulatory mandate and seeks to blunt its impact by, for instance, housing it in an independent agency. President Nixon wanted such a structure for OSHA, in large part because the business community did. Nixon and those interests worked "to design a bureaucratic structure that would make effective regulation impossible." Moe, *supra* note 2, at 298.

<sup>357</sup> See, e.g., *SEC v. Chenery Corp.*, 318 U.S. 80, 94–95 (1943) (vacating an administrative adjudicatory decision on the ground that the SEC had misinterpreted judicial precedents); *Cinderella Career & Finishing Sch. v. FTC*, 425 F.2d 583, 590–92 (D.C. Cir. 1970) (vacating the Commission's cease-and-desist order upon determining that the FTC Chairman appeared to have prejudged the matter); *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 224 (D.C. Cir. 1959) (invalidating a FCC rule resolving "conflicting private claims to a valuable privilege").

Moreover, were the responsibilities currently entrusted to the SEC or FTC allocated instead to Executive agencies, such as Treasury or Justice, it is not apparent that the newfound political accountability through the President would generate perverse incentives. The temptation for present-mindedness, certainly a problem among Executive agencies across the board,<sup>358</sup> is typically less acute than it is in the intelligence-incubation context. This is so for the simple reason, mentioned above, that the intelligence service cannot announce to the electorate its major, long-term initiatives in a way that agencies not operating under the same secrecy imperatives can. And, even if we were worried about politicized adjudication when it comes to transferring traditional independent agency responsibilities to Executive agencies, the courts would certainly be open to review challenges to those final agency decisions in a way that is not possible when it comes to scrutinizing foreign investments.<sup>359</sup>

*b. Legislative and Judicial Analogues*

Analogues to In-Q-Tel and CFIUS might well reside in coordinate branches. Congress seems to constrain itself in a variety of telling ways. Most prominently, it creates administrative agencies and then delegates massive amounts of authority and discretion to

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<sup>358</sup> See *supra* Subsection III.B.1.

<sup>359</sup> By focusing this discussion on classical (and familiar) independent agencies, I do not mean to suggest that there are no closer comparisons within the Executive Branch. The Endangered Species Committee (ESC) might, for one, serve as a counterexample. The ESC is comprised principally of representatives from several Executive agencies, and is responsible for deciding whether federal projects may proceed notwithstanding their apparent conflict with the Endangered Species Act. 15 U.S.C. § 1536(e) (2006). In *Portland Audubon Society v. Endangered Species Committee*, it was alleged that President Bush and his staff pressured the EPA Administrator and the Administrator of the National Oceanic and Atmospheric Administration (“NOAA”) (both presidential appointees subject to at-will removal) to vote in favor granting such an exemption to a timber-harvesting project on land inhabited by the endangered spotted owl. 984 F.2d 1534, 1538 (9th Cir. 1993). Notwithstanding this apparent pressure, the EPA Administrator voted no, as did at least one other member of the Endangered Species Committee. *Id.* at 1550–51. Though a majority of the Committee voted in favor of authorizing the exemption, it is worth underscoring that divisions within the supposedly Unitary Executive existed, and persisted notwithstanding efforts by the President to the contrary.

the Executive (through those agencies) on a regular basis.<sup>360</sup> Some aspects of the delegation are political; Congress simply does not want to be on the hook for controversial regulatory decisions.<sup>361</sup> And, some aspects are prudential; Congress might lack the capacity or expertise that an agency has.

In other contexts, it appears<sup>362</sup> as if Congress understands that each member's need to be politically responsive to her constituents has dysfunctional effects on the legislative body's ability to pursue overarching, national goals. Two examples bear mentioning. First, members of Congress would likely succumb to political pressure to underfund, de-fund, or attempt to micromanage particularly controversial public television and radio programming were they to have greater and more immediate control over those appropriations.<sup>363</sup> It is therefore quite possible that Congress created an independent corporation, the Center for Public Broadcasting ("CPB"),<sup>364</sup> as a "heat shield."<sup>365</sup> In effect, Congress ties its hands,

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<sup>360</sup> See, e.g., *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457 (2001). Congress, of course, continues to delegate broadly even after the legislative veto was held unconstitutional in *INS v. Chadha*, 462 U.S. 919, 959 (1983).

<sup>361</sup> See, e.g., Fiorina, *supra* note 314, 33–36, 47 (1982); Mathew D. McCubbins & Talbot Page, *A Theory of Congressional Delegation*, in *Congress: Structure and Policy* 409–10 (Mathew D. McCubbins & Terry Sullivan eds., 1987). But see, e.g., Adrian Vermeule, *Mechanisms of Democracy* 83 (2007) (suggesting delegation doesn't relieve Congress of accountability "because legislators are accountable for the choice to delegate itself").

<sup>362</sup> As I suggested with respect to In-Q-Tel and CFIUS, we can never be fully certain what, if any, singular motivation the decisionmakers in question had. See *supra* note 4 and accompanying text.

<sup>363</sup> Then-Senator Al Gore said that if legislators seek[] to review the editorial decisions made by those who decide what programming goes on, then it will not be long before we are seeing the rightwing insist that Mr. Rogers change his lesson plan to include a rightwing political agenda in 'Mister Rogers Neighborhood,' or that 'Sesame Street' come up with different characters because they did not meet the political or ideological litmus test.

Steven D. Zansberg, Note, "Objectivity and Balance" in Public Broadcasting: Unwise, Unworkable, and Unconstitutional, 12 *Yale L. & Pol'y Rev.* 184, 184 (1994) (internal citation omitted).

<sup>364</sup> Public Broadcasting Act of 1967 § 201, 47 U.S.C. § 396 (2006); see also Glenn J. McLoughlin, Cong. Research Serv., RS 22168, *The Corporation for Public Broadcasting: Federal Funding Facts and Status 1-2* (June 1, 2007), available at [http://www.policyarchive.org/handle/10207/bitstreams/4149\\_Previous\\_Version\\_2007-06-01.pdf](http://www.policyarchive.org/handle/10207/bitstreams/4149_Previous_Version_2007-06-01.pdf).

<sup>365</sup> Zansberg, *supra* note 363, at 184.

sacrificing legislative control in exchange for gaining greater insulation from passionate citizens offended by certain programs. Thus, Congress authorizes the private CPB to disperse funds and direct programming decisions. To further give teeth to the separation between Congress and what might be controversial programming, Congress appropriates funds for the CPB *two* years in advance of the fiscal year for which the funds will be used.<sup>366</sup> This limits Congress's ability to make hasty decisions in response to constituents' demands, allowing cooler heads to prevail.<sup>367</sup>

Second, Congress has traditionally struggled to close unnecessary or redundant military bases. This is because the closing of a domestic base disproportionately affects one member of Congress's home district (and perhaps a couple of adjacent districts as well). Among other things, not only do military jobs disappear, but so too do all the service industries that cater to the base and to the military families stationed there. Individual members, or small coalitions of congressmen and congresswomen, thwart attempts to close their hometown bases, thus preventing the Congress as a whole from closing any. Appreciating that the problem turns in large part on the fact that individual members would lose their seats were their constituents to hold them responsible for a base closing, Congress decided to reform the decisionmaking process to blunt those political pressures. In enacting the Defense Base Closure and Realignment Act,<sup>368</sup> Congress established an independent commission and essentially outsourced many of the base-closing responsibilities to it. The Act directs the Secretary of Defense to recommend a slate of base closures. Those recommendations are then considered by the Defense Base Closure and Realignment

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<sup>366</sup> See McLoughlin, *supra* note 364, at 3 (noting that between 1975 and 1992 Congress appropriated funds for a five-year period, and since 1992 Congress began appropriating "two years in advance of stations' receiving their funds from the CPB"). Most congressional appropriations are on one-year cycles. Indeed, it might be the case that the Founders feared future Congresses might seek some version of a "heat shield" when it came to military and defense matters. The Constitution expressly prohibits block defense appropriations for periods extending longer than two years. U.S. Const. art. I, § 8, cl. 12.

<sup>367</sup> See About CPB, Purpose and History of CPB's Advance Appropriations, Center for Public Broadcasting, <http://www.cpb.org/appropriation/purpose.html> (last visited Mar. 10, 2011).

<sup>368</sup> Pub L. No. 101-510, §§ 2902–2903, 104 Stat. 1485, 1808–12 (codified at 10 U.S.C. § 2687 note (2006)).

Commission (“BRAC”). That Commission then holds hearings, makes modifications to the slate, and submits its findings to the President. If the President approves, the designated bases will be closed unless Congress passes a Joint Resolution to reject the entire slate of recommended closures.<sup>369</sup> In other words, members could not save their hometown bases without effectively agreeing not to have any closures; and, even if they were to rally enough votes in Congress to take the drastic step of affirmatively rejecting all recommended closures, they would still need the President’s signature upon presentment, or a supermajority of both houses to override a veto.<sup>370</sup>

Courts, too, provide a basis for comparison, though perhaps without the need for creative institutional designs. Briefly stated, courts often make prudential decisions to decline to exercise their decisionmaking authority in the name of other virtues. For example, they cede authority out of deference for majoritarian democracy.<sup>371</sup> This is evidenced by, among other things, the political question doctrine<sup>372</sup> and the *Chevron* doctrine.<sup>373</sup> They also do so for comity purposes, as evidenced by the various abstention doctrines.<sup>374</sup>

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<sup>369</sup> The process is succinctly explained in *Dalton v. Specter*, 511 U.S. 462, 464–65 (1994).

<sup>370</sup> See Natalie Hanlon, *Military Base Closings: A Study of Government by Commission*, 62 U. Colo. L. Rev. 331, 337 (1991); Kenneth R. Mayer, *Closing Military Bases (Finally): Solving Collective Dilemmas Through Delegation*, 20 Leg. Stud. Q. 393, 393–94 (1995).

A similar impulse seemingly shaped Congress’s attempt to equip the President with line-item veto authority over the budget. Because members could not wean themselves off of pork projects, they delegated to the President the authority to cancel lines of the budget. See Line Item Veto Act of 1996, Pub. L. No. 104-30, § 2, 110 Stat. 1200, 1200–11, codified at 2 U.S.C. §§ 691–691f (Supp. III 1998), invalidated by *Clinton v. New York*, 524 U.S. 417 (1998); see also Vermuele, *supra* note 361, at 210 (finding a similar connection between the BRAC and the line-item veto).

<sup>371</sup> See generally Alexander M. Bickel, *The Least Dangerous Branch* 16–23 (1962) (describing the “countermajoritarian difficulty”).

<sup>372</sup> *Baker v. Carr*, 369 U.S. 186, 210 (1962); Bickel, *supra* note 292, at 74–75.

<sup>373</sup> *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 865–66 (1984).

<sup>374</sup> *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813–14 (1976); *Hicks v. Miranda*, 422 U.S. 332, 349 (1975); *Younger v. Harris*, 401 U.S. 37, 43–44 (1971).

## 2. *Executive Self-Constraints*

Such legislative and judicial examples suggest a multiplicity of reasons why any one of the branches of government might choose to relinquish authority. Among them, a branch might strategically avoid decisions that undermine its legitimacy or hamstring it in terms of other obligations; and, a branch might relinquish authority rather than retain it in the face of political pressures that run contrary to sound policy decisions. In short, the examples reflect possibly the same motives that likely contribute to the occasional efforts by the President to willingly cede or voluntarily precommit authority.

It is not the aim of this project to delineate exactly where the President does and does not seek to aggrandize authority. Instead, I simply suggest that such departures do appear to happen, and perhaps ought to happen more, at least when political accountability and legal constraints fail to effectively monitor, guide, or discipline the Executive.<sup>375</sup>

Moreover, it is not necessary to determine that the original architects of In-Q-Tel and CFIUS were motivated by an anti-aggrandizing impulse. That said, there are, of course, reasons to doubt that the President always seeks to maximize authority. Accordingly, we ought not dismiss the possibility that the President will prioritize the good of the country over what is good for the Executive Branch, when the two are in conflict.

There are other possible explanations, too. First, the sitting President believes she is capable of balancing the public interest and unfettered authority, yet doubts her successors have the same ability. Thus, she precommits her successors. The cost of her own, immediate self-binding is a small price to pay to ensure a more stable future.<sup>376</sup>

Second, the effects of In-Q-Tel and CFIUS might have been accidental and unwitting, though it is telling that neither the original

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<sup>375</sup> In a literal sense, anything the President chooses to do is likely in her self-interest. But it does not follow that what is in her interest is necessarily aggrandizing.

<sup>376</sup> See, e.g., McNollgast, *The Political Origins of the APA*, 15 *J.L. Econ. & Org.* 180, 183–89 (1999); Moe, *supra* note 2, at 274–77. Such moves raise inter-generational questions, making it more difficult for future presidents to enjoy the same option to exercise discretion that their predecessor decided to make for them.

architects nor their successors in the White House have taken steps to correct the “mistake.”

Third, the anti-aggrandizing effects might have been necessary to preempt more stringent congressional regulations. That is to say, the Executive likely will not be alone in noticing that the traditional legal and political constraints are absent or dysfunctional. Congress and the courts will no doubt realize that the President has unfettered discretion. The Executive, aware that Congress or the courts might try to address the accountability deficits, thus has reason to move first, and possibly lessen the need for legislative or judicial intervention. By doing so, the Executive welcomes constraints. But it does so on its terms. The President’s constraints likely will not be as stringent as Congress’s would be. But the President’s constraints might nevertheless be adequate—sufficiently so that the coordinate branches’ concerns are allayed, and they can focus their attention elsewhere.<sup>377</sup>

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<sup>377</sup> We have seen various iterations of this move. For example, presidents, who do not want new regulatory regimes, have nevertheless taken the lead in proposing them. By so doing, the Executive—and not just Congress—gets to take credit, and to shape those new regimes’ substantive and institutional contours. See Moe, *supra* note 2, at 297–98, 309–11 (describing President Nixon coopting new regulatory regimes that were politically popular and that he could then take the lead in shaping). For a discussion of reasons why agencies self-regulate, see Magill, *supra* note 148, at 882–88. Magill notes that one reason for agencies to engage in self-regulation is to keep Congress at bay. *Id.* at 889; cf. Frederic M. Bloom, *Jurisdiction’s Noble Lie*, 61 *Stan. L. Rev.* 971, 974 (2009) (describing efforts by courts similarly to keep Congress from legislating).

Not surprisingly, there are private sector analogues, too. Industries and trade groups fearing public regulation will often develop professional “best practices” and engage in a variety of self-regulatory efforts. Neil Gunningham & Joseph Rees, *Industry Self-Regulation*, 19 *L. & Pol’y* 363, 390–91 (1997). There, industry groups want to assure Congress and regulatory agencies that they need not intervene with what likely would be harsher or more demanding legal requirements. Indeed, even if the government does decide to regulate, at times it has simply “turned the voluntary standards of associations into law.” *Mitchel V. Abolafia, Self-Regulation as Market Maintenance*, in *Regulatory Policy and the Social Sciences* 312, 341 (Roger G. Noll ed., 1985).

By no means is the first-mover impulse foolproof. Executive self-regulation might serve merely as a foundation, which Congress then adds to: first, by codifying those internal directives such as Executive Orders into statutory law; and, second, by imposing additional limitations on Executive discretion. One might view the 2007 FINSA legislation through this lens. FINSA not only instantiated CFIUS as the legally relevant, *statutory* authority but it also imposed a set of additionally intrusive congres-



Fourth, there are some immediate, direct benefits that accrue to the incumbent Administration as a result of the switch to In-Q-Tel,<sup>378</sup> and even more so with respect to the switch to CFIUS.<sup>379</sup> The incumbents might value those direct benefits—akin to Ulysses enjoying the Sirens' music<sup>380</sup>—to a greater extent than they lament the loss of discretion and authority—akin to Ulysses being tied to the mast—that comes with the respective promotion of long-term security interests and deliberative adjudication.<sup>381</sup>

#### CONCLUSION

The thrust of this inquiry has been descriptive and analytical. The Article has explored, dissected, and situated two important but poorly understood bureaucratic entities, notable because of their pivotal responsibilities and because their architecture departs from conventional understandings and expectations. This Article has a normative valence as well, and its implications along that axis are profound, albeit tentative. Profound because they expand our understanding and complicate our thinking about the ways in which accountability might be disabled, about the different responses to that disability, and about the efforts of various actors to remedy (or exploit) the lack of accountability. And, tentative because we are, after all, dealing with only two case studies and thus lack a sufficiently broad foundation on which to construct a robust theory.

In all, the In-Q-Tel and CFIUS examples compel us to reconsider the relationship between institutional design and legal and political accountability. Indeed, they suggest a new template, a way of understanding and reconfiguring regulatory space deprived of

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sional controls beyond what the Executive likely preferred. See *supra* note 290 and accompanying text.

<sup>378</sup> See *supra* Subsection III.B.2.

<sup>379</sup> See *supra* Section IV.D.

<sup>380</sup> See Elster, *supra* note 196, at 3–6; Daryl Levinson, *Parchment and Politics*, 124 *Harv. L. Rev.* 657, 672 (2011) (noting the ways in which external constraints can directly benefit those seeking to be constrained).

<sup>381</sup> Connecting the point of the paragraph corresponding to this note with the claim made above about a sitting president binding future presidents (whom the incumbent fears will not subordinate their own self-interests in service of public objectives), see *supra* note 376 and accompanying text, there is of course a difference between Ulysses ordering his sailors to bind their captain to the mast, and Ulysses ordering his sailors *and all future sailors* to bind their respective captains to the mast.

the traditional mechanisms employed to ensure reasoned and reasonable public administration. As such, the case studies pose a real challenge to the dominant understanding of the Executive as power-aggrandizing. Yet, in marking that challenge, we ought not lose sight of the subtlety with which that challenge is presented. Indeed, the fact that the Executive seemingly takes pains to obscure the acts and mechanisms of self-constraint itself pays fealty to the durability and resonance of that dominant understanding.