Deepwater Horizon: Agency Reorganization and Appropriations in Offshore Oil Regulation

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This Note discusses the reorganization of the Minerals Management Service into the Bureau of Ocean Energy Management, the Office of Natural Resources Revenue, and the Bureau of Safety and Environmental Enforcement in the wake of the Deepwater Horizon oil spill, and raises potential constitutional challenges to the Secretary of the Interior’s ability to create the Minerals Management Service or to split it into three new agencies. The Note then discusses the funding of the Minerals Management Service through congressional appropriations and highlights the disadvantages of this funding approach, such as agency capture and inefficient agency reorganization. In light of this problem, the Note suggests that funding from industry may be a solution and describes how this funding scheme could help insulate the offshore drilling agencies from regulatory capture and eliminate needless agency reorganizations. Last, this Note presents a path forward for the Department of the Interior with respect to the structure of offshore drilling oversight agencies.

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INTRODUCTION

Sitting there hour after hour watching the conflagration with all its cascading smaller explosions was “one of the most painful things we could have ever done,” said Randy Ezell [senior Transocean employee aboard Deepwater Horizon]. “To stay on location and watch the rig burn. Those guys that were on there were our family.”

In the early morning of Earth Day, April 22, 2010, Randy Ezell and other rescued rig workers arrived in Port Fouchon and took stock of all that had been lost. The Macondo Well blow out—known by many as the BP or Deepwater Horizon oil spill—destroyed almost everything in its wake, taking the lives of eleven men and seriously injuring others. In addition to the loss of human life, more than four million barrels of oil would spill into the Gulf of Mexico in the months after the disaster. This influx of oil “immediately threatened a rich, productive marine ecosystem” from the ocean depths to the surface waters. Because of the massive environmental effects, the spill was detrimental for economic enterprises that depend on Gulf wildlife and aesthetic beauty—namely, fishing and tourism.

2. Id. at 19.
3. Id. at vi–vii.
4. Id. at vi.
5. Id. at 174.
6. Id. at 185.
The catastrophic human, environmental, and economic effects of the Deepwater Horizon spill call upon us to determine and deconstruct all causes of the disaster, so that we can make preventative changes in governmental oversight and in the offshore drilling industry. Though the direct causes of the Macondo Well blowout were related to cement failure,\(^7\) there were overarching causes related to agency regulation of offshore drilling in the Gulf. This Note will analyze a portion of the latter type of precipitating factors by discussing agency structure through the lens of offshore drilling oversight.

I. ADMINISTRATIVE HISTORY OF OFFSHORE DRILLING

Large-scale regulation of offshore drilling began with Congress’s passage of the Outer Continental Shelf Lands Act (OCSLA) in 1953 and subsequent amendments to the Act in 1978.\(^8\) OCSLA charged the Secretary of the Interior with the administration of a leasing system for the Outer Continental Shelf (OCS),\(^9\) with the guiding purpose of making the oil resources on the shelf “available for expeditious and orderly development, subject to environmental safeguards.”\(^10\) From the very beginning, this purpose statement encapsulated the conflicting duties delegated to the Department of the Interior through OCSLA. Through the Act, Congress had charged one agency with hastening oil-drilling development while also ensuring that this development was executed in a safe and environmentally sound manner. Essentially, the department was meant to support industry while also serving as a watchdog. OCSLA left it up to the secretary to delegate the implementation of these conflicting goals within the department.\(^11\)

The first leases of the OCS under OCSLA began in September of 1954.\(^12\) This leasing structure remained unchanged until the Santa Barbara Oil Spill in 1969 and the OCSLA Amendments of 1978.\(^13\) In 1969, the first oil spill on the OCS occurred in the Santa Barbara Channel, where three million gallons of oil poured into the ocean.\(^14\) Many commentators have noted that this event spurred the onslaught of comprehensive environmental statutes in the 1970s.\(^15\) Relatedly, it also spurred stricter offshore drilling regulations from the

\(^7\) See id. at 115–22 (providing a detailed account of the mechanical causes of the blowout).
\(^8\) Id. at 23.
\(^10\) § 1332.
\(^11\) § 1334.
\(^12\) DEEPWATER HORIZON OIL SPILL REPORT, supra note 1, at 58.
\(^13\) Id.
Department of the Interior in the form of the OCSLA Amendments of 1978. These amendments were the result of extensive congressional deliberations dating back to 1974 that focused on finding a balance between the policy goals of energy independence and environmental protection. The resulting amendments “fundamentally transformed federal offshore leasing” by laying out an expedited four-stage process for the leasing of the OCS while also ratcheting up the Secretary of the Interior’s duties to consider corresponding environmental impacts. Similar to the congressional delegations in the original OCSLA, the 1978 amendments delegated all duties to the Secretary of the Interior (excepting some duties that were delegated to the secretary of the department where the Coast Guard sits) and were silent on how the conflicting duties of development on the OCS and environmental and safety regulation should be organized within the department.

Not only was the department faced with the paradoxical goals of oil development and environmental protection, but it was also tasked with revenue collection. Congressional silence on how the Department of the Interior should manage revenue collection and regulation allowed for the deregulation philosophy of the Reagan administration to deeply influence the department’s oversight of offshore drilling. In the offshore drilling context, deregulation meant emphasizing offshore development and leasing over offshore regulation. A key actor in this change was President Ronald Reagan’s Interior Secretary, James Watt, who was fully aligned with the president’s anti-regulation philosophy.

16. Deepwater Horizon Oil Spill Report, supra note 1, at 58–60. Despite attempts at reform in offshore drilling, coastal oil spills continue to occur. Recently, there was another damaging oil spill very close to the site of the 1969 spill in Santa Barbara. Adam Nagourney, Richard Pérez-Peña, and Clifford Krauss, Oil Again Fouling California Coast Near Site of Historic Spill, N.Y. Times (May 21, 2015), http://www.nytimes.com/2015/05/22/us/workers-race-to-clean-up-oil-spill-on-california-coast.html?_r=0.

17. The oil embargo of 1973 caused the federal government to prioritize energy independence. See id. at 59–60.

18. American citizens and the federal government prioritized environmental protection in the 1970s, evidenced by the passing of twenty major environmental statutes during that decade. See id.

19. Broadly, the amendments charged the Secretary of the Interior with finding the balance between the benefits of accelerated development on the OCS and the costs of the resulting environmental damage. Id. at 61. Additionally, the amendments ordered the secretary to complete studies of the environmental impacts of oil drilling on the OCS. Id. at 61–62. Last, the amendments directed the secretary to determine the economic feasibility of the best available safety technologies for offshore drilling. Id. at 62. Those technologies she deemed economically feasible were to be included in regulations. Id.


platform. Secretary Watt came into his position with the primary goal of increasing offshore development—so much so that he promised to lease one billion acres of the OCS within five years.\footnote{DEEPWATER HORIZON OIL SPILL REPORT, supra note 1, at 63.} Pursuant to this goal, Secretary Watt overhauled offshore drilling management by removing revenue collection authority from the Bureau of Land Management and the Bureau of Indian Affairs, the agencies to which the secretary had delegated this authority upon OCSLA’s enactment.\footnote{Id. at 63–64.} Secretary Watt further stripped regulatory oversight authority from the U.S. Geological Survey, the agency to which the secretary had delegated safety and environmental oversight at OCSLA’s enactment.\footnote{Id. at 64.} Completing the overhaul, Secretary Watt placed both of these functions within the purview of a single, new agency: the Minerals Management Service (MMS).\footnote{Id. at 63.} Secretary Watt created MMS by secretarial order on January 19, 1982,\footnote{Establishment of Organizations, 47 Fed. Reg. 4751-01 (Feb. 2, 1982).} claiming authority to do so under the discretion conferred to him by the 1978 OCSLA\footnote{DEEPWATER HORIZON OIL SPILL REPORT, supra note 1, at 64.} and the Reorganization Plan No. 3 of 1950.\footnote{Memorandum from John D. Leshy, Solicitor, Office of the Solicitor, to Sec’y of the Interior app. A (May 2, 1994), available at http://www.doi.gov/solicitor/opinions/M-36980.pdf.} MMS implemented the department’s leasing, revenue collection, and regulatory oversight duties until shortly after the Deepwater Horizon spill in 2010.\footnote{Establishment of the Bureau of Ocean Energy Management, the Bureau of Safety and Environmental Enforcement, and the Office of Natural Resources Revenue, U.S. Dep’t of the Interior, Secretarial Order No. 3299 (May 19, 2010) [hereinafter Secretarial Order No. 3299], available at http://www.doi.gov/deepwaterhorizon/loader.cfm?csModule=security/getfile&PageID=32475.}

The next major administrative change in offshore development happened as a direct result of the Deepwater Horizon spill. On May 19, 2010, Interior Secretary Ken Salazar terminated MMS and reassigned its responsibilities to three new agencies: the Bureau of Ocean Energy Management (BOEM), which would be in charge of leasing; the Bureau of Safety and Environmental Enforcement (BSEE), which would oversee environmental and safety regulation of the offshore drilling industry; and the Office of Natural Resources Revenue (ONRR), which would supervise revenue collection.\footnote{Press Release, U.S. Dep’t of the Interior, Interior Establishes Office of Natural Resources Revenue (Oct. 1, 2010), available at http://www.doi.gov/news/pressreleases/Interior-Establishes-Office-of-Natural-Resources-Revenue.cfm.} ONRR would be housed in the Office of the Assistant Secretary for Policy, Management and Budget,\footnote{Originally, Secretary Salazar placed the leasing and regulation functions within a single Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE), but then within a year and a half reorganized these functions into their own respective agencies, replacing BOEMRE with BOEM and BSEE. Reorganization of the Bureau of Ocean Energy Management, Regulation and Enforcement, BUREAU OCEAN ENERGY MGMT. REG. & ENFORCEMENT, http://www.boemre.gov (last}
Secretary Salazar issued his secretarial order under the authority of OCSLA and the Reorganization Plan No. 3 of 1950. The reformulation of MMS was an attempt to separate the “conflicting missions” of energy development, enforcement and environmental protection, and revenue collection into three separate agencies.

II. CASE BACKGROUND

The National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, the commission President Barack Obama charged with determining the cause of the Deepwater Horizon spill, focused heavily on MMS’s lax regulation in its final report. The commission marked failures in MMS’s regulation and enforcement as contributing causes of the spill, but most of the litigation resulting from the disaster has centered on more direct, mechanical causes in order to determine corporate liability. A key decision in the large mass of Deepwater Horizon litigation, In re Deepwater Horizon, affirmed the liability of BP and Anadarko Petroleum for discharge of oil into the Gulf of Mexico under the Clean Water Act (CWA). In this case, the Fifth Circuit reasoned that a “discharge” under section 311(b) of the CWA occurs when “controlled confinement [of the oil or hazardous substance] is lost.” Using this definition, the court deduced that, since a cement failure at the well caused the initial freeflow of oil, BP and Anadarko Petroleum were liable as co-owners of the well.

It would appear that this liability determination should have been fairly simple for courts, but the division of ownership in the Deepwater Horizon operation complicated the matter. BP and Anadarko Petroleum were co-owners of the Macondo Well, but the Deepwater Horizon rig that drilled the Macondo Well was owned and operated by Transocean. By extension, Transocean owned the “riser”, a pipe-type structure through which oil flows from the well to the rig. Transocean also owned the blowout preventer, a device placed at the juncture of the riser and the well to stop the flow of oil into the riser in case of a blowout. At trial, no parties disputed that the Macondo Well blowout

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33. Secretarial Order No. 3299, supra note 30.
35. DEEPWATER HORIZON OIL SPILL REPORT, supra note 1, at vi, 55–56.
36. Id. at 126–27.
37. In re Deepwater Horizon, 753 F.3d 570 (5th Cir. 2014).
38. Id. at 573.
39. Id.
40. Id. at 571.
41. Id.
42. Id.
was initially caused by a failure of the cement that lined the well. This failure caused a surge of oil, gas, and other substances to flow from the well, into the riser, and then onto the rig. The massive flow of oil onto the rig ultimately severed the riser, through which oil flowed into the Gulf for nearly three months afterward. The blowout preventer should have quickly halted the blowout, but it failed, leading to the unrestricted flow of oil into the Gulf.

After the spill, the United States filed suit against BP, Anadarko, and other defendants. The case, In re Deepwater Horizon, eventually went to the Fifth Circuit, where the court first had to decide on the definition of “discharge” under the CWA. Section 311(b)(7)(A) of the CWA states that “an owner, operator, or person in charge of any vessel, onshore facility, or offshore facility from which oil or a hazardous substance is discharged” is liable for volume-based penalties. Anadarko and BP argued on appeal that “discharge” under section 311 means the point at which oil enters the marine environment. Since the oil from the well blowout technically entered the ocean through the broken riser owned by Transocean, this definition would free BP and Anadarko of liability. Building on this argument, BP and Anadarko also contended that because the oil traversed, and spilled from, property owned by a third party—the riser and rig owned by Transocean—BP and Anadarko were precluded from liability. Conversely, the United States argued for the “uncontrolled movement” definition of “discharge,” which would hold BP and Anadarko liable because the “uncontrolled movement” of oil began in the Macondo Well—the well that BP and Anadarko owned.

In a huge win for the United States, the Fifth Circuit defined “discharge” as the “point at which controlled confinement is lost,” which the court determined was within the well, under the purview of BP and Anadarko.

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43. Id. at 573. After oil wells are drilled, they must go through a process called “completion,” wherein a cement casing is poured to line the well, thereby supporting the sides of the well against collapse and protecting the land or water outside the well from the oil and gas flowing through. How Does Casing Work?, RIGZONE, http://www.rigzone.com/training/insight.asp?insight_id=333&c_id=24 (last visited Feb. 7, 2015).
44. In re Deepwater Horizon, 753 F.3d at 571.
45. Id.
46. Id.
52. Answering Brief of the United States at 18, In re Deepwater Horizon, 753 F.3d 570 (No. 12-30883), 2013 WL 10215527.
53. In re Deepwater Horizon, 753 F.3d at 573.
54. Id. at 575.
so holding, the court focused on examples of “discharge” provided in the statute, and also on the statute’s plain meaning.\(^55\) The court cited multiple cases where courts had found liability under section 311(b), even when oil had traveled over land or other structures before reaching water.\(^56\) In support of this ruling, the court further cited a litany of cases where courts had ruled shared fault should be taken into account at the penalty stage rather than the liability stage.\(^57\) As a result, the court ruled that BP and Anadarko would be subject to civil fines for violating the CWA.\(^58\)

III. THE IMPORTANCE OF AGENCY STRUCTURE

_In re Deepwater Horizon_ focused on liability for various engineering failures—notably, a faulty concrete job and a malfunctioning blowout preventer—but was silent on the overarching regulatory structure that allowed these failures to happen. The court has now apportioned fault between BP, Transocean, and Halliburton,\(^59\) but these fault percentages do nothing to illuminate the government’s role in failing to prevent “the worst environmental disaster America has ever faced.”\(^60\) Many legal and governmental scholars have theorized that the agency charged with regulatory oversight of the offshore drilling industry before the spill, MMS, was beleaguered by conflicting goals of regulatory oversight and revenue collection, causing it to cave disastrously to industry’s desire for lax regulation.\(^61\) This Note will expand upon that theory by discussing deeper, structural problems in the federal agencies that oversee offshore development. This broader focus will contribute to a prospective framework for analyzing MMS’s regulatory failures in contrast to the important, yet backward-looking world of liability litigation.

It is important to examine the structure of MMS and its three successor agencies because, as evidenced by the BP spill, an agency’s failed oversight can have disastrous effects. More importantly, the integrity of the American governance system hinges on the functionality and legitimacy of agencies, as their authority is so widely utilized by Congress. An estimated 4.9 million barrels of oil spilled into the Gulf and eleven people died as a result of the

\(^{55}\) _Id._ at 573 (citing to a dictionary definition).

\(^{56}\) _Id._ at 574.

\(^{57}\) _Id._ at 575.

\(^{58}\) _Id._

\(^{59}\) The District Court for the Eastern District of Louisiana found that BP was 67 percent at fault, Transocean was 30 percent at fault, and Halliburton was 3 percent at fault. Daniel Gilbert & Justin Scheck, _BP Is Found Grossly Negligent in Deepwater Horizon Disaster_, WASH. POST (Sept. 4, 2014), http://m.wsj.com/articles/u-s-judge-finds-bp-grossly-negligent-in-2010-deepwater-horizon-disaster-1409842182?mobile=y.

\(^{60}\) Press Release, White House, Remarks by the President to the Nation on the BP Oil Spill (June 15, 2010), _available at_ http://www.whitehouse.gov/the-press-office/remarks-president-nation-bp-oil-spill.

Deepwater Horizon disaster.\textsuperscript{62} With such monstrous effects, it is paramount that we bring to the surface and remedy any root causes of regulatory failure—not only for safer management of offshore drilling, but for better regulation in other policy areas under agency oversight. It is worth saying that these areas are varied and vast. Federal agencies and the regulatory regimes they “administer . . . intrude into virtually every sphere of American life.”\textsuperscript{63} Yet, knowledge gleaned from regulatory failures in the MMS context may have wide applicability and, we must hope, can be utilized to prevent disasters in other regulatory spheres.

Many scholars have pointed to the importance of agency structure in determining how functional and true to congressional intent an agency will be.\textsuperscript{64} Structure is likely especially important when, as in the Deepwater Horizon case, an agency is charged with conflicting duties\textsuperscript{65} or with advocating for the public interest against powerful regulated groups.\textsuperscript{66} Since MMS and its three successor agencies fall into both of these categories, they present an interesting context in which to analyze agency structure and identify structural best practices for agencies facing similar problems.

Using MMS and its three successor agencies as a lens for analysis, this Note examines three issues surrounding agency structure. First, this Note analyzes the reorganization authority used to create MMS and its three successor agencies. In doing so, the Note highlights potential constitutional problems with this restructuring framework. Next, this Note describes the ways in which the funding of MMS, now BOEM/BSEE/ONRR, affects reorganization and vulnerability to agency capture. This Part will also propose and analyze potential funding alternatives for these agencies; primarily, industry-sourced funding. Building on this discussion, the Note concludes with a summary of suggestions for the Secretary of the Interior (and Congress) that could improve regulatory oversight of offshore drilling.

IV. AGENCY REORGANIZATION

A. Reorganization Authority

The Secretary of the Interior has reorganized the offshore drilling regulatory framework twice: once with the creation of MMS in 1982, and again

\textsuperscript{62} Deepwater Horizon Oil Spill Report, supra note 1, at 167–68; see also Gulf Oil Spill, Smithsonian Nat’l. Museum Nat. Hist., http://ocean.si.edu/gulf-oil-spill (last visited May 29, 2015).


\textsuperscript{65} Biber, supra note 64, at 11 (arguing that “substitute” functions an agency must perform—those that conflict with the agency’s other functions—are more likely to be underperformed by the agency).

\textsuperscript{66} Barkow, supra note 64, at 42.
with the creation of BOEM, BSEE, and ONRR in 2010.\textsuperscript{67} Congress never authorized these new agencies via statute. As Congress is generally the only body that can delegate power to agencies, the secretary’s creation of these agencies without congressional authorization is a broad exercise of power.\textsuperscript{68} It is troubling that the secretary of a department as broad as the Department of the Interior seemingly has power to redelegate congressional directives among a vast array of agencies and even create new, powerful agencies—all with no direction from Congress to do so. Congress delegated authority to oversee offshore development to the secretary through OCSLA, but this delegation did not include the authority to create new agencies like MMS, BSEE, ONRR, and BOEM within the department.

In examining the constitutionality of the secretary’s reorganization of offshore drilling agencies, this Note draws heavily on the nondelegation doctrine. This doctrine has its basis in the legislative vesting clause, which states that “[a]ll legislative powers herein granted shall be vested in a Congress of the United States.”\textsuperscript{69} Courts have interpreted this clause to mean that Congress may delegate legislative powers only if it provides an “intelligible principle” within the delegating statute to guide the implementation of the delegated duties.\textsuperscript{70} That said, courts have interpreted the intelligible principle test liberally,\textsuperscript{71} and accordingly, the Supreme Court has only struck down a statute on the basis of the nondelegation doctrine twice.\textsuperscript{72} Many believe that these two cases—\textit{Panama Refining} and \textit{Schechter Poultry}—were decided with the purpose of scaling back President Franklin Roosevelt’s expanded power during the New Deal.\textsuperscript{73} These cases, as outliers, represent the unwillingness of courts to strike down statutes on nondelegation grounds unless they feel that the separation of powers is supremely threatened. For this reason, this Note examines nondelegation concerns with the Secretary of the Interior’s creation and reorganization of agencies, but does not purport to make a case that courts would strike down OCSLA or the Reorganization Act of 1949\textsuperscript{74} upon hearing

\begin{itemize}
\item \textsuperscript{67} See supra notes 25–34 and accompanying text.
\item \textsuperscript{68} U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States.”); see also J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928) (“The field of Congress involves all and many varieties of legislative action, and Congress has found it frequently necessary to use officers of the executive branch within defined limits, to secure the exact effect intended by its acts of legislation.”).
\item \textsuperscript{69} U.S. CONST. art. I, § 1.
\item \textsuperscript{70} J.W. Hampton, Jr., & Co., 276 U.S. at 409 (“If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.”).
\item \textsuperscript{71} Mistretta v. United States, 488 U.S. 361, 372–73 (1989) (“this Court has deemed it ‘constitutionally sufficient’ if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.”).
\item \textsuperscript{72} Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Co. v. United States, 295 U.S. 495 (1915).
\item \textsuperscript{73} Andrew J. Ziajka, Note, \textit{Hot Oil and Hot Air: The Development of the Nondelegation Doctrine through the New Deal, a History, 1813–1944}, 35 HASTINGS CONST. L.Q. 921, 922–23 (2008).
\item \textsuperscript{74} See infra note 82 and accompanying text.
\end{itemize}
these arguments, as this threshold is incredibly high. Rather, this Note suggests that the problematic creation of MMS, BOEM, BSEE, and ONRR is a sign of congressional neglect of agency structure. This Note then questions the efficacy of the resulting governance framework.

B. Reorganization Authority History and Application to Offshore Drilling

The power to reorganize and create agencies lies, organically at least, with Congress alone. The strongest evidence that this power does not organically lie in the president or agency heads is the string of intermittent congressional grants of this power to the president. The first such statute was the Economy Act of 1932, which allowed President Herbert Hoover to propose reorganizations within or among the agencies via executive order. If neither house of Congress passed a resolution of disapproval within sixty days, the executive order became law. Congressional passage of such a statute indicates that power to reorganize agencies does not exist in the executive branch otherwise. Further supporting this point, the Economy Act of 1932 and the string of reorganization acts and reauthorizations that followed it all had expiration dates or were amended with expiration dates, indicating that Congress thought it important to reserve the decision to grant reorganization authority for future Congresses. Additionally, when speaking publicly about the split of MMS into its three successor agencies, Interior Secretary Salazar stated that he would “be working with members of Congress to draft legislation that would establish the agencies by law,” suggesting he believed authorizing legislation necessary for the legality of new agencies on this level. Such legislation was never passed. President Obama also recently asked Congress to grant him reorganization authority to consolidate a few agencies, but it was never granted. In summary, though courts have not had a chance to formally define the reorganization authority, it is evident from the secretary and the president’s statements, and from Congress’s passage of multiple reorganization acts, that the reorganization authority is, in fact, Congress’s to utilize or delegate.

Secretary Watt and Secretary Salazar apparently relied on Reorganization Plan No. 3 of 1950 for the authority to create MMS, BOEM, BSEE, and ONRR. Reorganization Plan No. 3 was a presidential reorganization proposal

75. **Henry B. Hogue, Cong. Research Serv., R42852, Presidential Reorganization Authority: History, Recent Initiatives, and Options for Congress 5 (2012).**
76. *Id.*
77. Numbering fourteen in total. *Id.* at 4.
78. *Id.*
79. Straub, *supra* note 34 (quoting Secretary Salazar).
81. Reorganization Plan No. 3 is not directly cited as a source of authority in the secretarial order that created MMS. See Establishment of Organizations, 47 Fed. Reg. 4751-01 (Feb. 2, 1982). Nevertheless, Reorganization Plan No. 3 has subsequently been understood by those within the Interior
submitted to Congress under the Reorganization Act of 1949,82 a congressional grant of reorganization authority in force from 1949 to 1953.83 Under Reorganization Plan No. 3, Congress did not grant the president authority to directly reorganize or create a new agency, like other plans had done. Instead, Reorganization Plan No. 3 conferred upon the Interior Secretary the power to redelegate within the Department of the Interior any authority given to him or any member of the department by congressional delegation.84 Essentially, the plan authorizes a delegation of reorganization authority from the president to the Secretary of the Interior.

Reorganization Plan No. 3 is a constitutionally problematic basis for the creation of MMS, BOEM, BSEE, and ONRR because it constitutes a presidential delegation of power that, if permissible under the Reorganization Act of 1949, would violate the nondelegation doctrine’s intelligible principle requirement. In the 1949 Reorganization Act, Congress delegated the power to reorganize agencies—a legislative power—to the president. When such a delegation occurs, the Supreme Court has stated that, in order to contain the requisite intelligible principle, the organic statute must at least define the executive actor to which Congress is giving authority and the boundaries of that authority.85 The Reorganization Act of 1949 delegated reorganization authority only to the president by giving her or him the power to submit plans to Congress.86 In narrowing the reorganization authority delegation to one executive actor, Congress seems to satisfy Mistretta’s two requirements.87 But if Reorganization Plan No. 3 is a valid implementation of the Act, neither requirement is met. This is because Reorganization Plan No. 3 effectively nullified the president-only limitation in the Act when it further delegated reorganization authority to the Secretary of the Interior.

Reorganization Plan No. 3 is also problematic because it allows the Secretary of the Interior to continue reorganizing the Interior Department indefinitely with none of the congressional oversight required by the 1949 Reorganization Act. The 1949 Act specified a particular procedure for the exercise of reorganization authority—the president was to convey a reorganization plan to Congress, and if in sixty days neither house of Congress had passed a resolution of disapproval, the reorganization plan became law.88 This procedure was the subject of much debate in Congress, as the houses originally disagreed as to whether the congressional veto should have required both houses to pass the resolution of disapproval, or only one.89 This debate

83. HOGUE, supra note 75, at 4.
84. 5 U.S.C. app. 1.
87. See Mistretta, 488 U.S. at 372–73.
88. Heady, supra note 86, at 170, 172.
89. See id. at 170–72.
culminated in the final statute, which represents Congress’s reasoned policy
decision concerning the tug-of-war between the legislative branch and the
president over reorganization authority. In Reorganization Plan No. 3 the
president circumvented this decision by allowing reorganizations to continue in
the Interior Department without an opportunity for Congress to check this
power by veto.

Even if Reorganization Plan No. 3 was once constitutional, it may not
have carried force when MMS or BOEM/BSEE/ONRR were created because
the presidential reorganization authority did not exist at either of those points.
MMS and BOEM/BSEE/ONRR were created in 1982 and 2010, respectively,
at times when the president’s reorganization authority had sunsettled. The
relevant reorganization acts here are the Reorganization Act Amendments of
1980, which sunsettled in 1981, and the last reorganization act Congress passed,
which sunsettled in 1984.90 Beyond merely allowing the sunsets to pass, Congress also refused to grant President Obama reorganization power when he
explicitly asked for it in 2012.91 Such blatant inaction from Congress evidences
a conscious decision to no longer delegate the reorganization authority. The
Interior Secretary’s reorganization authority existed only by virtue of the
congressional delegation of this authority to the president. When this delegation
ended, the president was no longer able to constitutionally redelegate this
authority since he no longer possessed it. Therefore, since the president did not
possess the reorganization authority during the creation of MMS, BSEE,
BOEM, and ONRR, the secretary’s power to reorganize also did not exist when
those agencies were created.

Reorganization Plan No. 3 is also tarnished by the Supreme Court’s ruling
in Immigration & Naturalization Service v. Chadha, which held the legislative
veto unconstitutional.92 A legislative veto occurs when Congress delegates
powers to the executive branch, but reserves the right to veto an executive
action by a majority vote in either house.93 In Chadha, the Supreme Court
found the legislative veto unconstitutional on the grounds that it violated the
constitutional requirements of bicameralism and presentment.94 Congress
utilized the legislative veto in the Reorganization Act of 1949 by making
reorganization plans subject to veto by either house.95 The ruling in Chadha
threw the constitutionality of every reorganization plan, including
Reorganization Plan No. 3, into question. There was a circuit split regarding the

90. HOGUE, supra note 75, at 4.
91. Press Release, White House, supra note 80. See also Steven T. Dennis, Obama Zings
Congress on Reorganization Authority, ROLL CALL (July 8, 2013, 4:34 PM),
(“Obama had proposed to revive the authority—held by presidents from Harry Truman to Ronald
Reagan—with a reorganization of the Commerce Department as his first target. But lawmakers in both
parties poured cold water on that plan a year ago.”).
93. See id. at 944–46.
94. Id. at 959.
95. Heady, supra note 86, at 170, 172.
constitutionality of past reorganization plans, but the Second Circuit held the legislative veto inseverable from the reorganization acts, and therefore, held all the corresponding plans unconstitutional.\textsuperscript{96} Despite its finding of unconstitutionality, the Second Circuit stayed its judgment so that Congress could legislate on the matter, which it then did with the passage of Public Law No. 98-532.\textsuperscript{97} This law purported to “ratify[\ldots] and affirm[] as law each reorganization plan that has, prior to the date of enactment of this Act, been implemented pursuant to the provisions of [any previous federal reorganization statute].”\textsuperscript{98} The Third Circuit upheld this statute in \textit{Equal Employment Opportunity Commission v. Westinghouse}, which was the final case in which a court ruled on the constitutionality of reorganization plans in relation to the legislative veto.\textsuperscript{99} Under Public Law No. 98-532 and \textit{Westinghouse}, it appears that all reorganization plans submitted prior to 1984 were formally unburdened from the unconstitutionality of the legislative veto.

Notwithstanding Congress’s wholesale approval of tens of reorganization plans in Public Law No. 98-532, the legislative veto provision of the Reorganization Act of 1949 is constitutionally troubling as it applies to Reorganization Plan No. 3 of 1950. Unlike the static, one-time agency reorganization plan under question in \textit{Westinghouse},\textsuperscript{100} Reorganization Plan No. 3 allows the Secretary of the Interior to continue to reorganize even now, every time relying on the plan.\textsuperscript{101} Thus, Reorganization Plan No. 3 is in a sense dynamic. Yet, the text of Public Law No. 98-532, and the \textit{Westinghouse} ruling interpreting it, indicate that Public Law No. 98-532 only authorized plans that were implemented \textit{before} the law was passed.\textsuperscript{102} Therefore, since Reorganization Plan No. 3 is still being implemented—in that the secretary derives authority from it for current, major reorganizations—Public Law No. 98-532 did not retroactively apply, and therefore, did not ratify the plan or eliminate the legislative veto origin of the plan, which is now unconstitutional under \textit{Chadha}.

Ultimately, the potential constitutional problems that arise with the creation of MMS, BOEM, BSEE, and ONRR are the result of Congress’s lack of direction when it comes to agency structure. Because it takes enormous

\textsuperscript{96} Equal Emp’t Opportunity Comm’n v. Columbia Broad. Sys., Inc., 743 F.2d 969 (2d Cir. 1984).

\textsuperscript{97} Id. at 975; Pub. L. No. 98-532, 98 Stat. 2705 (1984) (“The Congress hereby ratifies and affirms as law each reorganization plan that has, prior to the date of enactment of this Act, been implemented pursuant to the provisions of chapter 9 of title 5, United States Code, or any predecessor Federal reorganization statute.”).


\textsuperscript{100} The reorganization plan at issue in \textit{Westinghouse} was the Reorganization Act of 1977, which transferred authority from the Department of Labor to the Equal Employment Opportunity Commission to enforce certain provisions of the Equal Pay Act. Id. at 390.

\textsuperscript{101} See supra notes 81–82 and accompanying text.

\textsuperscript{102} §§ 1–2, 98 Stat. at 2705; \textit{Westinghouse}, 765 F.2d at 391.
political will for Congress to pass a statute, the Department of the Interior has used Reorganization Plan No. 3 as a way to be flexible and responsive when faced with disasters such as Deepwater Horizon. Practically speaking, the question of whether this reorganization process within the Department of the Interior is technically unconstitutional likely matters little because, as described above, courts are extremely unwilling to invalidate statutes under the nondelegation doctrine. More important is the process of determining agency structure through appropriations that results from Reorganization Plan No. 3 and whether this process can be improved, as discussed in the next Part.

V. APPROPRIATIONS

An agency’s funding source is central to determining who will have control over reorganization and whether the agency will be insulated from regulatory capture. In this Part, the Note explores agency funding issues by first explaining the current role of appropriations in the Reorganization Plan No. 3 framework. Next, it highlights ways in which this role is problematic, and last, proposes a new funding scheme that will help insulate MMS and similar agencies from capture while curbing the inefficiencies of the Reorganization Plan No. 3 restructuring process.

A. The Role of Appropriations in Reorganization

In order to elucidate the connections between appropriations and reorganization, it is helpful to pull from another example of agency creation under Reorganization Plan No. 3—the National Biological Survey (NBS). The first public proclamation about the NBS, what would become a new agency within the Department of the Interior, was a speech by then President Bill Clinton on Earth Day 1993. In his speech, President Clinton laid out plans for a new science agency that would attempt to head off fights over endangered species habitat by determining what wildlife was likely to be listed under the Endangered Species Act if remediation did not occur in the near future. The idea for an objective science agency within the Department of the Interior actually originated with President Clinton’s Interior Secretary, Bruce Babbitt, at the beginning of his tenure in 1993. Secretary Babbitt wanted to take the science functions from various agencies within the Department of the Interior and consolidate them into a new, independent agency. With the public support of the president and Secretary Babbitt, authorizing legislation for the

105. Id.
106. Id.
NBS was introduced into the House and Senate during the summer of 1993. The bill quickly faced staunch opposition from land rights and farmers groups and, once NBS was establishing through other means, from a conservative Congress. As a result, the Senate bill never made it out of committee, and the NBS was never formally authorized by Congress. Regardless, Secretary Babbitt created the NBS through secretarial order in September of 1993, relying on the authority of Reorganization Plan No. 3.

Though Secretary Babbitt managed to bring NBS into existence via secretarial order, the fledgling agency was beholden to congressional appropriations, the lack of which eventually led to its demise. Since the NBS was never authorized via statute, it was fated to rely on “a series of annual renewal orders from Secretary Babbitt’s desk, and the budgetary whims of Congress.” This reliance turned out to be disastrous for the new agency when Republicans took over both houses of Congress in 1994. Congressional hostility to, and disapproval of, the NBS continued to increase until October of 1996 when Congress and the Department of the Interior came to an agreement to do away with the agency. The compromise was to transfer the NBS into the department’s U.S. Geological Survey as that agency’s new Biological Resources Division and decrease appropriations for the new Biological Resources Division by 15 percent of the previous year’s appropriation for the NBS. Where Congress failed to block the creation of the NBS due to the secretary’s assertion of authority under Reorganization Plan No. 3, it was eventually able to exact its views regarding agency structure through its appropriations power.

Similarly, Congress has also exerted its will through appropriations in the context of offshore drilling agency structure. Though Congress did not create MMS, Congress passed appropriations to adequately fund the agency in its first

107. Id.
108. LEWIS, supra note 103, at 93–94.
110. Id. at 161.
111. Establishment of the National Biological Survey, U.S. Dep’t of the Interior, Secretarial Order No. 3173 (Sept. 29, 1993), available at http://www.clintonlibrary.gov/assets/DigitalLibrary/AdminHistories/Box%20011-020/Box%20012/1225030-interior-u.s-geological-survey.pdf (starting on page seven of the online document). The legality of Secretary Babbitt’s creation of the NBS over congressional disapproval was widely questioned at the time. Memorandum from John D. Leshy to Sec’y of the Interior, supra note 28, at 1 (“I understand that questions continue to arise about your authority to establish the National Biological Survey.”); see also LEWIS, supra note 103, at 94 (quoting the record from Secretary Babbitt’s congressional hearing: “Mr. Taylor: I think you probably have the legal authority (to obtain appropriations without statutory authorization). I just—you’re going to go ahead and do it then? So this authorization is really, if it comes, it comes, but if it doesn’t, you are going ahead unauthorized?”).
112. Krahe, supra note 104, at 163.
113. Id. at 161.
115. Id.
116. Id.
year. The House Appropriations Committee was clear when granting this first appropriation that it was thereby endorsing the existence of the new agency, but it also made a thinly veiled threat to withhold appropriations in the future by saying that it would “be looking carefully at the progress [the] organization ma[de]” to ensure that the new agency was doing a better job of protecting resources, developing the OCS, and collecting revenue than the various agencies in the department that had previously carried out these duties. MMS received steadily declining appropriations until its split in 2010. After the split, Congress appropriated funds to the three new agencies after hearings before the House Appropriations Committee. Appropriations are the only means through which Congress has formally spoken on MMS’s reorganization, and thus far, it appears that Congress has passively endorsed the split of the agency.

The appropriations-as-authorization framework that has arisen as a result of Reorganization Plan No. 3 is an inefficient pathway to gain congressional approval of agency restructuring, especially when the executive and legislative branches are at odds politically. In this situation, the secretary reorganizes an agency, but then has to wonder if the reorganization will be undone by meager appropriations from an unfriendly Congress. If the secretary bets incorrectly on congressional acquiescence, as Secretary Babbitt did in the creation of the NBS, he wastes resources and employee morale in implementing the reorganization. The creation of NBS is an apt example here, as President Clinton and Secretary Babbitt were both Democrats, while Congress at the time was overwhelmingly Republican. In this instance, as explained above, Congress slowly killed the NBS by whittling away its appropriations until it did away with the agency a mere three years after its creation. The original creation of the NBS by Secretary Babbitt had already necessitated the move of scientists from various agencies within the department to a new agency. These personnel were to be moved again to the U.S. Geological Survey when the agency was terminated. Many of these scientists complained that the multiple restructures inhibited their ability to do their jobs, and critics within the Department of the Interior said that the quality of scientific research was

118. Id.
119. DEEPWATER HORIZON OIL SPILL REPORT, supra note 1, at 72–73 (stating that MMS’s budget decreased throughout the 1990s, just as oil drilling grew exponentially in the Gulf of Mexico).
121. Krahe, supra note 104, at 163.
122. Wagner, supra note 114, at 219.
123. Id. at 220.
better before either of the restructures.\textsuperscript{125} Such complaints are a natural result of the appropriations-as-authorization framework, since uncertainty about congressional support translates into a risk of needless and multiple reorganizations. As evidenced by the NBS, these reorganizations take a toll on employee morale and may not even lead to an agency structure better than the status quo.\textsuperscript{126}

In the MMS and BOEM/BSEE/ONRR context, Congress faced several options in responding to the secretary’s reorganization.\textsuperscript{127} It has thus far chosen the route of yearly approvals via appropriations.\textsuperscript{128} Congress’s choice, both here and in the NBS context, to use appropriations rather than statutes to control reorganization points to the attractiveness of this option. Appropriations are a logically better option for Congress because Congress can decide year-by-year whether to defund or more heavily support the reorganization in the future. By refusing to pass a statute that either confirms the secretary’s reorganization or puts in place a new reorganization, Congress conveniently neglects to tie its hands, thus maintaining yearly congressional control over reorganization. The alternative—a statute dictating structure—would also waste political capital, since Congress can just as easily effect its will through appropriations, statute notwithstanding. This state of affairs places agencies that have already gone through “considerable strain” by reorganizing in an unstable position where their “relationships and processes” can be disrupted by annual congressional appropriations decisions.\textsuperscript{129}

\textbf{B. Funding from Industry as a Possible Solution}

An option to reduce the inefficiencies of unnecessary reorganizations described in the previous subpart and reduce agency capture is to have appropriations come, not from Congress, but from the regulated industry. This appropriations process would remove some congressional oversight power, possibly decreasing political accountability, but would insulate agencies from needless reorganizations and regulatory capture. This subpart will explore this

\textsuperscript{125} Wagner, \textit{supra} note 114, at 221.

\textsuperscript{126} The defunding of the Office of Technology Assessment provides another example of congressional use of appropriations to effect a reorganization. The Office of Technology Assessment was an agency created in 1972 that provided objective scientific studies to help guide congressional policy decisions. Ed O’Keefe, \textit{When Congress Wiped an Agency off the Map}, WASH. POST (Nov. 29, 2011, 1:40 PM), http://www.washingtonpost.com/blogs/federal-eye/post/when-congress-wiped-an-agency-off-the-map/2011/11/29/gIQAh109N_blog.html. The Republican Congress of 1995 defunded the Office of Technology Assessment, effectively terminating it. \textit{Id}.

\textsuperscript{127} The Congressional Research Service outlined four particular options for congressional action post-creation of BOEM, BSEE, and ONRR. \textit{HOGUE, supra} note 117, at 16–22. The first was oversight through appropriations with no legislative action. \textit{Id} at 16. The second was to establish MMS by statute in its pre-oil spill configuration. \textit{Id} at 17. The third was to divide the agency, by statute into two or more agencies, and the fourth was to create a new independent commission within the Department of the Interior and assign a portion of MMS’s functions to it. \textit{Id} at 21–22.

\textsuperscript{128} See \textit{supra} note 120 and accompanying text.

\textsuperscript{129} \textit{Id} at 17.
possible funding scheme through the analytical lens of the offshore drilling regulatory regime.

If BOEM, BSEE, and ONRR were to draw operating funds from the leasing revenue they collect, this would significantly shift reorganization power from Congress to the Secretary of the Interior, therefore lessening the inefficiencies in the current Reorganization Plan No. 3 system. This funding arrangement would help Congress and the secretary create a measured balance between the flexibility of secretarial reorganization and the implementation of congressional intent. Taking appropriations out of the congressional quiver of BOEM/BSEE/ONRR oversight would, at best, force Congress to stabilize agency structure by passing organic legislation. Within this legislation, Congress would feel a greater need to dictate structural components it found most important, lest the secretary undo the structure in the future.\(^\text{130}\) Knowing it no longer had the appropriations check, Congress might also utilize other tools to cabin secretarial discretion, such as establishing “mission preservation requirements” that would make “clearer, in statute, the relative priority of the agency(ies’) various missions.”\(^\text{131}\) Organic legislation, incentivized by Congress’s lack of appropriations power, would both stabilize the important aspects of agency structure and remedy constitutional defects that might exist from these agencies’ origin in Reorganization Plan No. 3.

1. **Regulatory Capture in MMS and BOEM/BSEE/ONRR**

In addition to reorganization benefits, funding from industry could also help insulate BOEM/BSEE/ONRR from regulatory capture. Originally conceived of by economist George Stigler, regulatory capture occurs when “regulation is acquired by the [regulated] industry and is designed and operated primarily for its benefit.”\(^\text{132}\) Thus, regulatory capture is a troubling state of affairs when, as in the case of MMS and now BSEE, an agency is charged with a public interest mission that necessarily conflicts with the regulated industry’s goals.\(^\text{133}\) Unfortunately, critics from all sides have come to agree that MMS had been captured by industry.\(^\text{134}\) In fact, before the spill, a number of

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\(^{130}\) Id. at 20.

\(^{131}\) Id. at 18.


\(^{133}\) Senator Sheldon Whitehouse articulated the importance of curbing agency capture within MMS and other public interest agencies when he said the following in an address to President Obama: “By all accounts, MMS operated as a rubber stamp for BP. It is a striking example of regulatory capture: Agencies tasked with protecting the public interest come to identify with the regulated industry and protect its interest against that of the public. The result: Government fails to protect the public.” *Sheldon Discusses Regulatory Capture in Response to the Gulf Oil Spill and the Financial Meltdown, Sheldon Whitehouse* (July 13, 2010), http://www.whitehouse.senate.gov/news/speeches/sheldon-discusses-regulatory-caputure-in-response-to-the-gulf-oil-spill-and-the-financial-meltdown.

\(^{134}\) Secretary Salazar stated in a congressional hearing that “sex and drugs and a whole host of other inappropriate conduct regarding employees of MMS and the industry, are issues of concern.” *Hogue, supra* note 117, at 2 (citation omitted). A report by the Department of the Interior Inspector
congressional oversight hearings and a House bill both aimed to curb MMS’s cozy relationship with industry.\textsuperscript{135} The well-documented corruption within MMS\textsuperscript{136} before the spill was supplemented by a strong tie between the agency and the American Petroleum Institute, the “national trade association that represents all aspects of America’s oil and natural gas industry.”\textsuperscript{137} MMS’s “basic strategy” for offshore drilling safety “was to follow the guidance provided by the American Petroleum Institute [ ] in its Recommended Practice 75—Development of a Safety and Environmental Management Program for Offshore Operations and Facilities.”\textsuperscript{138} This near industry self-regulation, in addition to insufficient enforcement of safety and environmental protocols by MMS,\textsuperscript{139} contributed to inadequate regulation. Regulatory capture of MMS had progressed to such an extent “that MMS had accepted a spill response plan from BP so thoughtless that it listed Arctic walruses in the Gulf of Mexico.”\textsuperscript{140}

Though critics have praised BOEM, BSEE, and ONRR’s reorganization and heightened enforcement as measures that might help insulate the agencies from capture,\textsuperscript{141} others emphasize that BSEE is still adopting revised versions of the American Petroleum Institute’s safety guidelines, and therefore is still too close with the industry it is meant to regulate.\textsuperscript{142}

2. \textit{Funding from Industry as a Response to Capture}

Obtaining agency funding from the oil industry would be a major step in remedying regulatory capture in BSEE and insulating it from such capture in the future. In her article \textit{Insulating Agencies: Avoiding Capture through Institutional Design}, Professor Rachel Barkow argues that having regulated

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\textsuperscript{135} HOGUE, supra note 117, at 1–2.
\textsuperscript{136} See supra note 134.
\textsuperscript{141} Id.
industry provide agencies’ operating funds is one avenue to insulate agencies from capture, particularly when the agencies in question are charged with public interest missions that necessarily put them at odds with a powerful regulated community. Barkow frames funding as an “equalizing factor”—an element of agency design “that [is] particularly well-suited to addressing the problem of capture in the context of asymmetrical political pressure.” The keystone of this argument is that an agency having an independent, consistent source of revenue insulates itself from the “particular pitfalls of politicization, such as pressures that prioritize narrow short-term interests at the expense of long-term public welfare.” Barkow identifies the sources of these pitfalls, within the funding context, as agencies’ common reliance on the Office of Management and Budget’s budget approvals and the congressional appropriations process. Many agencies’ budgets are beholden to the president through the Office of Management and Budget’s approval process, and to Congress through the appropriations process. These agencies are thus beholden to any special interests that manage to influence Congress or the president.

As an alternative, Barkow suggests a funding scheme where the agency collects its operating funds by levying fees upon the companies it regulates. She presents the Federal Reserve as a key example, where the agency is authorized to levy an annual assessment against member banks to fund operating costs. The Federal Reserve “levies the assessment based on each Federal Reserve Bank’s capital and surplus balances” at the end of every year. In the BSEE context, this type of collection scheme would likely fail to protect the agency from capture without some alterations.

Under a funding-from-industry framework, the primary concern would be that BSEE would increase leasing development and limit regulation out of agency self-interest. The oil companies could take advantage of this system and

143. Barkow, supra note 64, at 42–45.
144. Id. at 15.
145. Id. at 19.
146. Id. at 43.
147. Id. at 44.
148. Id.; 12 U.S.C. § 243 (2012). Analogy to the offshore drilling context might be imperfect here, as the Federal Reserve Banks could be characterized as federal or semi-federal institutions and not wholly private actors like offshore drilling companies. Current FAQs: Who Owns the Federal Reserve?, BOARD GOVERNORS FED. RES. SYS., http://www.federalreserve.gov/faqs/about_14986.htm (last updated Aug. 2, 2013). A more apt analogy, which Barkow did not discuss, is the Federal Reserve’s powers to levy fees under the Dodd-Frank Act; under section 318(c) of the act, the Federal Reserve Board can collect regulatory fees from “those bank holding companies and savings and loan holding companies with total consolidated assets of $50 billion or more, and any systematically important nonbank financial companies that are designated by the [Financial Stability Oversight Council].” Board of Governors of the Federal Reserve System Notes to Financial Statements as of and for the Years Ended December 31, 2011 and 2010, BOARD GOVERNORS FED. RES. SYS., http://www.federalreserve.gov/publications/annual-report/2011-federal-reserve-system-audits.htm (last updated July 11, 2012).
149. See Board of Governors of the Federal Reserve System Notes to Financial Statements as of and for the Years Ended December 31, 2011 and 2010, supra note 148.
lobby the agency directly (rather than through Congress or the president) to loosen regulations for the monetary benefit of both the agency and the oil companies. However, MMS’s split into BOEM, BSEE, and ONRR partially preempts this issue. Due to the split of conflicting functions, for example, BSEE is not charged with increasing development and leasing on the OCS; rather, this is BOEM’s function. Therefore, BSEE is less likely to forego safety and environmental enforcement in pursuit of higher industry revenue, as this would be viewed as a blatant refusal to execute the agency’s single duty of regulatory oversight. An additional solution to this capture issue could be that, beyond a certain threshold level of funds, which could be determined objectively in reference to BSEE’s cost of regulation, any excess funds would be returned to the U.S. Treasury. Since the offshore drilling industry produces $5–$10 billion per year in revenue\textsuperscript{150}—certainly more than enough to fund BSEE’s regulatory activities—a cap on BSEE’s funding could remove incentives for BSEE to relax regulations in pursuit of higher revenue from industry.

A cap, though, might be too inflexible to solve the capture problem. If BOEM, for instance, was to ratchet up leasing and development, BSEE would require more funding in order to effectively regulate. A static cap might eventually inhibit necessary increases in funding. A more measured approach might be a scaled adjustment system, where ONRR collects a standardized fee from new wells and/or leases only to a certain point. If leasing increased too sharply over a given time frame—signaling agency action in its own financial interest—then per-lease or per-well fees would decrease, thereby decreasing the amount of money going to the agency. Such a cap system would incentivize slow, thoughtful development of the OCS and, at best, would curb the overseeing agencies’ financial interest in increased offshore drilling.

Last, related to a cap, a leasing application fee could provide an additional agency capture mitigation tool. Under an application fee, ONRR would collect a certain fee per well application, regardless of whether the permit to drill is granted. This fee would provide BOEM, BSEE, and ONRR with operating funds divorced from actual drilling activity. The downside would be that the offshore drilling industry might slow, as there would be fewer permit applications submitted. Therefore, any application fee should be kept relatively low and be supplemented by rents on leases, bonuses, and royalties.\textsuperscript{151}

A consistent source of funding from the offshore drilling industry could insulate BSEE from capture by empowering the agency to regulate more vigilantly. For example, critics have argued that BSEE will require a greater budget if it is to stay on pace with technological developments in the offshore


\textsuperscript{151}. For more information on the differences between these funding streams, see supra note 20.
drilling industry. In various reviews of MMS after the spill, employees stated that they lacked the “technical resources (laptops)” and training they needed to provide meaningful inspection and review. The National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling similarly discussed in its report that the few regulations MMS did promulgate were undermined by a lack of enforcement. MMS officials lacked the technical resources, training, and manpower to meet oversight requirements that were ever-increasing, and this situation led to inspectors “relying too much on industry’s assertions of the safety of their operations.” To the new agencies’ credit, a reorganization implementation plan in BOEMRE (the bureau that previously contained both BSEE and BOEM) included various measures to strengthen oversight, such as increased training, hiring, and technical resources. But however mitigatory these measures might be, BOEMRE’s implementation plan emphasized that these improvements would be impossible without increased appropriations. Without these resources, BSEE employees will be forced to resort to the regulatory laxity and reliance on industry standards that have, unfortunately, been the hallmarks of offshore drilling regulation.

Efforts by the president and some members in Congress to increase funding for offshore drilling agencies have been met by strong opposition from

152. Monroe, supra note 137, at 75–76.
153. Id. at 75.
154. DEEPWATER HORIZON OIL SPILL REPORT, supra note 1, at 127.
155. Monroe, supra note 137, at 75.
156. DEEPWATER HORIZON OIL SPILL REPORT, supra note 1, at 127.
159. In a letter from BOEMRE Director Michael R. Bromwich to the Secretary of the Interior, he stated:

We appreciate your support as well as the support of the rest of the Administration and Congress in our efforts to obtain the main ingredient that has been missing over the three decades of the agency’s existence: adequate resources to do the job. For the first time, those resources appear to be on the way. They will provide grounds for optimism that the agency will, finally, have what it needs to perform the important tasks assigned to it.


Recommendations of the Board that will require additional resources in order to be properly implemented include, for example, the development of strengthened inspection and safety enforcement programs, creating new training and professional development programs, upgrading information systems and technological resources, and recruiting new staff and bringing additional, specialized expertise into the Bureau.

BROMWICH, supra note 157, at 4.
Republican lawmakers and the offshore drilling industry.\textsuperscript{160} In December of 2010, three months after BOEMRE’s reorganization implementation plan was published, the Senate killed an omnibus spending bill that would have increased inspection fees paid by OCS lessees to between $12,000 and $36,000.\textsuperscript{161} As opposed to the royalties revenue deposited into the general treasury, inspection funds go directly to the agencies’ budget,\textsuperscript{162} so this bill would have provided some much needed revenue for the agency. The BOEMRE appropriations portion of the failed bill was in direct response to a National Commission proposal calling for increased inspection funds from industry.\textsuperscript{163} The proposal faced a “hostile response” from the offshore drilling industry and Republican congressmen and women on the grounds that increased inspection levies would push offshore drilling companies to move operations overseas.\textsuperscript{164} Further evidencing congressional reluctance to increase appropriations, President Obama’s request for an additional $100 million for BOEMRE after the spill was met with an appropriation of less than a fourth of what was requested.\textsuperscript{165} These incidents represent the highly political nature of appropriations for offshore drilling regulation, and thus, illustrate the need for a funding framework that will provide adequate, stable, and insulated resources.

A congressional statute would be the most obvious avenue for instituting a new funding framework for regulating offshore drilling, but, as congressional action is difficult to come by, it is more useful to articulate ways in which the Secretary of the Interior could work to secure funding from industry. Industry representatives have stated that they would prefer any increase in inspection funds to come out of the annual royalties they already give the federal government.\textsuperscript{166} This Note has suggested this approach because it would have the least negative economic impact on industry, but it may not be the easiest to implement. The difficulty of this approach lies in its reliance on legislation that would redirect revenue royalties from the U.S. Treasury to the offshore drilling agencies or, more narrowly, BSEE. The Interior Department’s legal ability to siphon funds from royalties, or raise royalties to a higher percentage, is murky at best, and the department has stated that it does not believe itself capable without an act of Congress.\textsuperscript{167} The department’s restraint seems appropriate, as section 9 of OCSLA clearly states that “[a]ll rentals, royalties, and other sums paid to the Secretary . . . under any lease on the outer Continental Shelf . . . shall be deposited in the Treasury of the United States and credited to

\begin{thebibliography}{99}
\bibitem{160} Monroe, \textit{supra} note 137, at 76.
\bibitem{162} \textit{Id.}
\bibitem{163} \textit{Id.}
\bibitem{164} \textit{Id.}
\bibitem{166} Taylor, \textit{supra} note 161.
\bibitem{167} \textit{Id.}
\end{thebibliography}
miscellaneous receipts."168 Due to general gridlock, it seems unlikely that Congress in the near future would be willing to amend OCSLA to direct some of these funds to BSEE.

Despite this roadblock, the Interior Department might have legal authority to obtain funding from industry if it frames the levy as an inspection fee rather than a royalty. The Interior Department under Secretary Salazar asserted that it did not have the authority to increase inspection fees without congressional approval,169 but the National Commission disagreed. A Commission source said in a January 2011 statement that “[e]xisting statutory authority at [the Department of the Interior] includes fees for specific services like inspections and permits that the agency [currently] charges,” alluding to the possibility of BSEE or the Interior Department unilaterally increasing those charges in the future.170 In its official report, the Commission cited to OCSLA language that might support a broad interpretation of BSEE’s authority, stating that OCSLA grants the Department of the Interior authority over “such rental and other provisions as the Secretary may prescribe at the time of offering the area for lease.”171 Thus, the Interior Secretary could theoretically institute—through an informal rule or a secretarial order—higher inspection fees as a provision of OCS leases. At least in the context of reorganization, Congress has been willing to let the Department of the Interior stretch the bounds of its delegated authority in regards to offshore drilling.172 This history, combined with congressional gridlock, makes it unlikely that Congress could muster the political will to undo secretarial action increasing inspection fees. Such secretarial action would likely be the most realistic avenue to securing a stable funding base173 for BSEE that would allow the agency to be an effective regulator.

CONCLUSION

Barring a large increase in oil prices174 or another offshore drilling disaster, it is unlikely that we will see much congressional movement in the near future regarding the agency structure of BOEM, BSEE, and ONRR. But it is for this very reason—congressional unwillingness to act—that the Department of the Interior has taken on a leadership role in offshore drilling oversight over the years. From the creation of MMS to the split of the agency

169. Taylor, supra note 161.
170. Id.
171. Id. (quoting DEEPWATER HORIZON OIL SPILL REPORT, supra note 1, at 290).
172. See supra Part IV.
173. The secretary, at her choosing, could increase inspection fees to a level wherein BSEE was completely funded by industry, or the secretary could take a subtler approach and increase fees to a smaller extent (while still keeping some congressional appropriations in the funding mix). See infra Part VI.
into BOEM, BSEE, and ONRR, the Secretary of the Interior has been the primary actor in determining the structure of the offshore drilling regulatory framework. Due to the Interior Secretary’s (as of yet) wide latitude in determining structure, there is currently an opportunity for the secretary to institute structural changes that will insulate the agency from regulatory capture and provide resources for adequate oversight.

In order to continue making gains in safety and environmental oversight, the Secretary of the Interior—and Congress, should it decide to enact an authorizing statute—should maintain the structural separation of functions among BOEM, BSEE, and ONRR. As many have voiced, the commingling of the leasing, revenue collection, and safety and environmental oversight functions within MMS was almost certainly a contributory factor in the agency’s lax regulation and its failure to prevent the Deepwater Horizon blowout.\(^{175}\) Scholars have buttressed this notion by arguing that agencies with conflicting purposes are apt to pursue the purpose that is easiest to measure economically, at the expense of the others.\(^{176}\) As Professor Eric Biber has argued, environmental protection is difficult to quantify, so there is a danger it will be neglected by an agency that has other more easily measurable goals.\(^{177}\) When there is intense anti-regulatory pressure from industry, as in offshore drilling, there is an even stronger possibility that environmental and safety oversight and enforcement will be underperformed.\(^{178}\) Thus, the Secretary of the Interior should maintain BSEE as a separate agency so that environmental protection and safety are its only objectives. This way, the Department of the Interior will ensure the agency carries out its duty to regulate safety and environmental protection in offshore drilling without having to balance these duties against revenue collection and leasing—a balancing game that regulation and environmental protection are sure to lose.

As discussed above, the Secretary of the Interior can also better the offshore drilling regulatory structure by increasing the inspection fees paid by industry. This change would ensure a consistent funding source for BSEE, allowing it to forego its reliance on industry standards and safety assurances. In order to guard against regulatory capture, the secretary would need to stringently limit and monitor the use of inspection funds to ensure that the increased amount of money changing hands does not lead to too close of a relationship between the agency and industry. As this Note has discussed, the secretary’s legal authority to increase these fees is unclear, but, as the secretary

\(^{175}\) See supra note 61 and accompanying text.

\(^{176}\) Building on the principal-agent literature from the political science field, Professor Eric Biber has argued that agencies with multiple goals will tend to underperform their environmental protection goals, as such goals are hard to measure. Biber, supra note 64, at 18–19.

\(^{177}\) Id.

\(^{178}\) Barkow, supra note 64, at 42–45 (“However, a key danger to avoid is giving a single agency conflicting responsibilities that require the agency to further the goals of industry at the same time that it is responsible for a general public-interest mission. In that scenario, there is a significant risk that industry pressure and a focus on short-term economic concerns that are easily monitored will trump the long-term effects on the public that are harder to assess.”).
created new agencies in BSEE, BOEM, and ONRR under similarly unclear authority, it is plausible that Congress would again be unresponsive to this jurisdictional stretch.

If Congress did respond with legislation, the potential nondelegation issues this Note has discussed would be resolved, and agency structure would be less mutable. A significant benefit of legislation would be that it would make the structure of offshore drilling regulation more concrete. One of the key problems with the framework of structural change this Note analyzes—changes the Secretary of the Interior has and should make—is that it allows new Interior Secretaries to make changes to the structure as they see fit. Changing the funding scheme to depend less on annual appropriations and more on industry would lessen this organizational instability, but a congressional act would be ideal because it would freeze whatever structural elements the act created (if or until Congress gathered enough political capital to pass another statute). Of course, the structural design Congress would produce might not be ideal for insulating BSEE against capture or ensuring that it has the resources it needs to regulate effectively, but it would be more stable, and thus, more predictable for the regulated community and the public.

A congressional act delegating a structural framework and authorizing BOEM, BSEE, and ONRR might be ideal for constitutionality and consistency, but since such legislation is unlikely, the Secretary of the Interior should take the opportunity to make structural changes to improve the regulation of drilling on the OCS. These include the preservation of BOEM, BSEE, and ONRR as three single-duty agencies and their insulation from the congressional appropriations process through funding derived from industry. Though potentially temporary, these changes could last for twenty-eight years, like Interior Secretary Watt’s MMS. Regardless of how long they last, Interior Secretaries can and should make structural improvements to ensure safety and environmental health on the OCS, as America has seen what happens when these duties are overlooked.

179. Henry Hogue of the Congressional Research Service alluded to this tension between secretarial flexibility on the one hand and consistent implementation of congressional intent on the other when he outlined four different options for Congress in response to MMS’s administrative reorganization. See HOGUE supra note 117. In discussing the first option—“no legislative action,” which Congress ended up choosing—Hogue stated that the “option would . . . continue to provide the Secretary of the Interior with administrative flexibility,” but that it could also be argued that “functions as important as those performed by MMS should be organized in statute” because “greater levels of organizational flexibility have sometimes resulted in administrative actions that appear to be contrary to congressional intent.” Id. at 16.

We welcome responses to this Note. If you are interested in submitting a response for our online companion journal, Ecology Law Currents, please contact cse.elq@law.berkeley.edu. Responses to articles may be viewed at our website, http://www.ecologylawquarterly.org.