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Scott Corey Milligan

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The God Squad II: An Analysis of the Financial Stability Oversight Council and the Designation of SIFIs

By:
Scott Corey Milligan

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I. Introduction

They called it the God Squad.[1] Mostly because of the Endangered Species Committee's (the "ESC") role as a decider of fate for certain endangered species, but the moniker accurately reflected the group's composition of powerful individuals.[2] High-ranking officials, including the Secretary of Agriculture, the Secretary of Army, the Administrator of the Environmental Protection Agency, and the Secretary of Interior, made up the committee.[3] These were members who, even without their ESC positions, made high-level decisions in their respective roles.[4] Bring all these members together, and the collective power was almost god-like.

Congress created a second God Squad in the Financial Stability Oversight Council (the "FSOC") when it passed the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2009 (the "Dodd Frank Act").[5] The Dodd-Frank Act is far-reaching and a thick-read: the act contains over 350,000 words.[6] While extensive, President Obama passed the Dodd-Frank Act in direct response to the 2008 financial crisis in attempt to prevent a similar financial crisis from reoccurring.[7] Though not as life and death as the original God Squad's determination, the FSOC decides the fate of financial institutions, both bank and nonbank, as Systemically Important Financial Institutions ("SIFIs").[8] If designated as systemically important, these institutions are

[1] *See*, *e.g.*, Maggie Kuhn, Note, *Climate Change and the Polar Bear: Is the Endangered Species Act up to the Task?*, 27 Alaska L. Rev. 125, 134 (2010).
[2] The Endangered Species Act, 16 U.S.C. § 1536(e)(3)(A)–(G)(1976).
[3] *Id.* The Endangered Species Act, 16 U.S.C. § 1536(e)(3)(A)–(G)(1976).
[4] *Id.* For example, the Secretary of Agriculture is the "leader of the U.S. Department of Agriculture." See *Biographies:*
[4] For example, the Secretary of Agriculture is the "leader of the U.S. Department of Agriculture." See *Biographies: Tom Vilsack*, UNITED STATES DEPARTMENT OF AGRICULTURE, http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=bios_vilsack.xml (last visited April 24, 2014).
[5] The Dodd Frank Act, Pub. L. 111-203, 124 Stat. 1376 (2010) (codified as 12 U.S.C. § 5301– 26 U.S.C. § 1256).
[6] *See id*.
[7] *See* Purpose Statement, The Dodd Frank Act, Pub. L. 111-203, 124 Stat. 1376 (2010) (codified as 12 U.S.C. § 5301– 26 U.S.C. § 1256). Hereinafter, the Dodd-Frank will be cited as its codified U.S.C. section.
[8] The Dodd Frank Act,12 U.S.C. § 5322(a)(2)(C).

subject to more stringent regulations and oversight by the Federal Reserve.[9] The FSOC essentially needs to assess which institutions pose a great enough risk to, with their failure, trigger a financial collapse.

Congress gave the FSOC specific criteria to assess whether banks fall under the systemically-important designation but failed to provide similar rigid standards for the FSOC to apply to nonbank financial institutions.[10] Therefore, in April 2012, the FSOC promulgated an interpretive guidance that outlined the Council's procedure for determining when a nonbank financial institution constitutes a SIFI for Dodd-Frank purposes.[11] To make such a determination, the FSOC set forth a three-stage process to assess each nonbank financial institution.[12] For the FSOC to classify an institution as a SIFI, a two-thirds vote is required, including an affirmative vote from the Secretary of Treasury.[13]

However, Congress' decision to assign various agency heads to form the FSOC is a peculiar structure that should invite scrutiny. While Congress has historically assigned agency heads to form different committees (such as the God Squad), these bodies historically have caused concern with respect to improper presidential influence.[14] In creating the FSOC, Congress also took the unique step of giving the only voting member representing an executive agency, the Secretary of Treasury, a veto power—a measure not historically used with these types of organizational structures.[15] While the two-thirds vote required for designation is a benefit of the FSOC's organizational structure, the Secretary of Treasury's veto power makes the FSOC more

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[9] *See* The Dodd-Frank Act, 12 U.S.C. § 5325.
[10] The Dodd-Frank Act, 12 U.S.C. 5323(a)–(i).
[11] Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies, 77 Fed. Reg. 21637–21662 (April 11, 2012) (to be codified at 12 C.F.R. pt. 1310), *available at* http://www.gpo.gov/fdsys/pkg/FR-2012-04-11/pdf/2012-8627.pdf.
[12] *See id*.
[13] The Dodd-Frank Act, 12 U.S.C. 5323(a)(1).
[14] *See*, *e.g*., Portland Audubon Soc. v. Endangered Species Committee, 984 F.2d 1534 (9th Cir. 1993).
[15] *See id*.

vulnerable to the President's influence: the veto power gives the only voting member from an executive agency the power to prevent a SIFI designation.[16]

The SIFI designation process, which entrusts the FSOC to designate and the Federal Reserve to regulate, gives two agencies significant power: (1) the Department of Treasury; and (2) the Federal Reserve. The former is given significant authority because of, among other things, an essential veto power given to the Secretary of Treasury during the designation process.[17] Congress delegated the Federal Reserve significant authority by granting it the power to subject the designated institution to stringent standards and oversight.[18] Instead of delegating the designation process to either agency, Congress chose to give the FSOC designation responsibility.[19] The recent designation of Prudential helps illustrate the costs and benefits to the FSOC's structure.

The Secretary of Treasury's veto power is an avenue for the President to influence the designation process and prevent the FSOC from designating institutions as SIFIs. The question remains: why would Congress create a system that gives the President more control? One logical answer is that Congress is simply shortsighted. The 111th Congress, with a majority controlled by the Democratic party,[20] would have no issue granting President Obama more control to ensure that his policy goals can influence the designation process. This increased power benefits the Democratic Party as a whole in the short term, while ignoring the long-term effects of such an organizational structure.

To promote transparency and help reduce presidential capture, however, Congress should amend the Dodd-Frank as it relates to section 113 in three ways. First, any communication

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[16] *See supra* note 13.
[17] *Id.*
[18] *See supra* note 9.
[19] *See supra* note 8.
[20] See JENNIFER E. MANNING, CONG. RESEARCH SERV., R40086, MEMBERSHIP OF THE 111TH CONGRESS: A PROFILE 1 (2010).

between the President (including his or her staff) and the FSOC members should be prohibited and any communication should require disclosure. Second, the voting majority should be required to respond to the non-majority's opinion in the Proposed Determination. Third, the Secretary of Treasury's veto power should be removed, leaving the FSOC's designation process to a two-thirds majority vote.

Part II of this piece provides an overview of the Dodd-Frank Act. Part III describes the FSOC's final rule, which outlines the Council's designation process for SIFIs. Part IV provides a background of Executive Orders and independent and executive agencies, with a particular focus on presidential control. Part V provides an overview of Congress' use of this type of structure, including an overview of the God Squad. Part VI provides an analysis of the FSOC structure and why Congress may have chosen this type of structure as opposed to delegating one agency with the responsibility of designating institutions as systemically important. Part VII looks at the designation of Prudential to assist the structural analysis of the FSOC. Part VIII examines briefly why Congress may have chosen to give the President more control. Part IX concludes by examining this author's proposed reforms to section 113 of the Dodd-Frank Act.

II. The Dodd-Frank Act Of 2009

President Obama signed the Dodd-Frank Act into effect on July 21, 2010.[21] Though the Dodd-Frank Act is an extensive bill encompassing many areas of the law, it primarily seeks to prevent a financial crisis akin to the 2008 financial crisis[22] from occurring in the future.[23] As President Obama described them, the reforms provided by the Dodd-Frank Act represented "the

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[21] *President Obama Signs Wall Street Reform:* "*No Easy Task,*" The White House Blog (July 21, 2010), http://www.whitehouse.gov/blog/2010/07/21/president-obama-signs-wall-street-reform-no-easy-task.
[22] For a discussion on the severity of the financial crisis, see *Three Top Economists Agree 2009 Worst Financial Crisis Since Great Depression; Risks Increase If Right Steps Not Taken*, Reuters (Feb. 27, 2009), http://www.reuters.com/article/2009/02/27/idUS193520+27-Feb-2009+BW20090227.
[23] *See supra* note 7.

strongest consumer financial protections in history."[24] Through its provisions, the Dodd-Frank Act also created the Financial Stability Oversight Council (the "FSOC") and introduced the world to the designation known as Systemically Important Financial Institutions ("SIFIs").

However, the Dodd-Frank Act has been severely criticized—and rightfully so.[25] Remarkably, Congress passed the Dodd-Frank Act, which is over 350,000 words and contains sixteen separate titles, in only one year.[26] This lack of adequate time for independent testimony from experts and affected individuals is an important backdrop to any discussion of the Dodd-Frank Act's provisions and possible future reforms.[27]

i. General Purpose of the Dodd-Frank

The purpose of the Dodd-Frank Act is: "To promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail,' to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes."[28] The term "too big to fail," though many definitions have been proposed, refers to the thought that "bankruptcy proceedings by a large firm can cause a financial crisis."[29] Another definition states that "too big to fail" refers to "the danger that the dissolution of a financial company will produce negative macro-economic effects."[30] Indeed, legislators enacted the Dodd-Frank Act because "politicians feared that the failure of certain large and interconnected nonbank financial companies would bankrupt its

[24] *Id.*
[25] *See*, *e.g*. Andrew Evans, Congressman: Dodd-Frank Financial Reform Unconstitutional (July 22, 2013), http://freebeacon.com/congressman-dodd-frank-financial-reform-unconstitutional/.
[26] The 2008 financial crisis triggered the need for the legislation. The Obama Administration first proposed the legislation's first version in July 2009.
[27] In comparison, the Security Exchange Act of 1934, which created the Security Exchange Commission was a product of several years of Congress' review of independent testimony.
[28] *Id.*
[29] *See* Troy S. Brown, *Legal Political Moral Hazard: Does the Dodd-Frank Act End Too Big to Fail*, 3 ALA. C.R. & C.L. L. REV. 1, 11 (2012).
[30] *See* Emerich Gutter, *Too-Big-To-Fail And The Financial Stability Oversight Council*, 30 REV. BANKING AND FIN. L. 73, 74 (2010).

creditors and counterparties."[31] Therefore, in attempt to preserve a stable economy, the politicians who drafted the Dodd-Frank Act sought to monitor these "too big to fail" institutions.[32]

ii. Creation of the Council

To help further the Dodd Frank Act's purpose, Congress created the Financial Stability Oversight Council (the "FSOC").[33] The Dodd-Frank Act entrusts the FSOC with broad authority to identify companies that pose systemic risk to the United States.[34] The FSOC seeks, among other things, "to identify risks to the financial stability of the United States that could arise from the material financial distress or failure, or on going activities, of large, interconnected bank holding companies or nonbank financial companies, or that could arise outside the financial services marketplace."[35] Additionally, the FSOC is required "to respond to emerging threats to the stability of the United States financial system."[36]

To achieve these ends, the Dodd-Frank Act enumerates several duties of the FSOC, including "collect[ing] information from member agencies, other Federal and State financial regulatory agencies, the Federal Insurance Office and, if necessary to assess the risks to the United States financial system, direct [other agencies] to collect information from bank holding companies and nonbank financial companies."[37] The FSOC is also tasked with "monitor[ing] the financial services marketplace in order to identify potential threats to the financial stability of the

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[31] *Id.*
[32] It is worth noting that many commentators have suggested that the Dodd-Frank Act does not respond to the primary cause of the 2008 financial crisis. *See, e.g.*, Peter J. Wallison, *The case for repealing Dodd-Frank* (Nov. 26, 2013), http://www.aei.org/speech/economics/financial-services/banking/the-case-for-repealing-dodd-frank/. This paper will not explore this angle, but the discussion on whether to repeal the entire Dodd-Frank Act is a healthy debate for legislators, and scholars, to have.
[33] *See supra* note 10.
[34] *See* The Dodd Frank Act, 12 U.S.C. § 5322.
[35] The Dodd Frank Act, 12 U.S.C. § 5322(a)(1)(A).
[36] The Dodd Frank Act, 12 U.S.C. § 5322(a)(1)(C).
[37] The Dodd Frank Act, 12 U.S.C. § 5322(a)(2)(A).

United States."[38] Moreover, the FSOC is responsible for "identify[ing] gaps in regulation that could pose risks to the financial stability of the United States."[39]

The FSOC also has authority to designate both bank and nonbanks as SIFIs.[40] If an institution is classified as systemically important, then the Federal Reserve subjects the designated institution to certain regulations.[41] This paper will focus on the designation of nonbank financial institutions as systemically important for two principal reasons. First, because nonbank institutions are new entities for the Federal Reserve to regulate, which raises questions as to why Congress delegated regulation authority to that agency. Second, because the designation of Prudential, discussed later in this paper, tests the theory that the FSOC is assembled as a way to bring together members with different expertise in order to produce a more informed decision.

Section 113 of the Dodd-Frank Act gives the FSOC the "authority to require supervision and regulation of certain nonbank financial companies."[42] The Dodd-Frank Act outlines several considerations for the FSOC to evaluate throughout the designation process, including the "nature, scope, size, scale, concentration, interconnectedness, and mix of the activities of the company."[43] Congress also provided the FSOC with a catchall factor, listing "any other risk-related factors that the Council deems appropriate" as a possible consideration for the FSOC to assess during the designation process.[44]

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[38] The Dodd Frank Act, 12 U.S.C. § 5322(a)(2)(C).
[39] The Dodd Frank Act, 12 U.S.C. § 5322(a)(2)(G).
[40] *See id*.
[41] *See supra* note 9.
[42] *See generally* The Dodd Frank Act, 12 U.S.C. § 5322.
[43] The Dodd Frank Act, 12 U.S.C. § 5323(a)(2)(G).
[44] The Dodd Frank Act, 12 U.S.C. § 5323(a)(2)(K).

The FSOC consists of both voting members and nonvoting members.[45] A SIFI designation requires a two-thirds vote from the Council's voting members, including an affirmative vote from the Secretary of Treasury.[46] There are ten voting members, including (1) the Secretary of the Department of Treasury; (2) the Federal Reserve's Chairman of the Board of Governors; (3) the Comptroller of the Currency; (4) the Director of the Bureau of Consumer Financial Protection; (5) the Chairman of the Securities Exchange Commission; (6) the Chairperson of the Federal Deposit Insurance Corporation; (7) the Chairperson of the Commodity Futures Trading Commission; (8) the Director of the Federal Housing Finance Agency; (9) the Chairman of the National Credit Union Administration Board; and (10) an individual with insurance expertise from the state level, nominated by the President and confirmed by the Senate.[47]

The nonvoting members include: (1) the Director of the Office of Financial Research; (2) the Director of the Federal Insurance Office; (3) one state insurance commissioner; (4) one state banking supervisor; and (5) one state securities commissioner.[48] The five nonvoting members serve as advisors to the voting members and do not have an individual vote, but their level of influence on the designation process is unclear.[49] Of course, the nonvoting members will not have a direct impact on whether an institution is classified as systemically important because these members do not enjoy a vote.[50] FSOC's bylaws also do not require the voting members to give nonvoting members' opinion a special emphasis even if the institution in question falls

[45] The Dodd Frank Act, 12 U.S.C. § 5321(b)(1)(voting members); 12 U.S.C. § 5321(b)(2)(nonvoting members).
[46] *See supra* note 13.
[47] The Dodd Frank Act, 12 U.S.C. § 5321(b)(1).
[48] The Dodd Frank Act, 12 U.S.C. § 5321(b)(2).
[49] *See* The Dodd Frank Act, 12 U.S.C. § 5321(b)(3).
[50] *See* The Dodd-Frank Act, 12 U.S.C. 5323(a)(1) (describing the FSOC's voting procedures when designating nonbank financial institutions as SIFIs).

within a nonvoting member's expertise.[51] Additionally, the only two nonvoting members from the federal government—the Office of Financial Research and the Federal Insurance Office—are both located within the Department of Treasury.[52]

The Department of Treasury also has large amount of power throughout the designation process. The Secretary of Treasury acts as the FSOC's chairperson and is given unprecedented power of the FSOC's decision-making.[53] At any point, for instance, the chairperson can call an FSOC meeting.[54] The Secretary of Treasury can also impact whether the FSOC meeting is open to the public.[55] Critically, while any decision that the FSOC makes requires a two-thirds vote, each designation also requires an affirmative vote from the Secretary of Treasury.[56] This affirmative vote requirement operates essentially as a veto because, even if the nine other FSOC voting members vote in favor of an action, the Secretary of Treasury can override the council's decision through his or her vote. To be sure, the Secretary of Treasury's vote is necessary, but not sufficient, for the FSOC to designate a nonbank financial institution as systemically important. That is, the Secretary of Treasury vote does not necessarily mean that an institution will be classified as systemically important because a two-thirds vote is still required from the FSOC voting members. The veto power, however, still gives the Secretary of Treasury, who serves at the President's pleasure, the ability to prevent a designation from occurring.

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[51] *Rule of Organization*, The FSOC, The Department of Treasury, http://www.treasury.gov/initiatives/Documents/FSOCbylaws.pdf (last visited April 24, 2014).
[52] *See supra* note 48.
[53] The Dodd Frank Act, 12 U.S.C. § 5321(b)(1)(A).
[54] The Dodd Frank Act, 12 U.S.C. § 5321(e)(1).
[55] *See supra* note 51.
[56] *See*, *e.g.*, The Dodd Frank Act, 12 U.S.C. § 5323(b)(1).

iii. Implications of Being Classified As A Systematically Important Financial Institution

A SIFI designation will bring with it tighter regulations and oversight.[57] Specifically, the Dodd-Frank Act requires that the designated institution be subject to supervision by the Federal Reserve's Board of Governors and must comply with prudential standards set forth in the Dodd-Frank Act.[58] These prudential standards "are more stringent" than those institutions that avoid the designation.[59] The Federal Reserve also has discretion to subject the SIFI to other prudential standards that it "determines are appropriate."[60] At a broad level, though, the Federal Reserve assumes responsibility for imposing additional regulations to the institution that are classified as systemically important.

The effects of a SIFI designation to a nonbank financial institution, however, remain uncertain because only recently has the FSOC used the designation in the nonbank context.[61] For example, some commentators have suggested that the classification will give debtors and consumers more confidence in the institutions because the government will bail out these institutions if troubled times arrive.[62] According to these commentators, the FSOC actually supports, rather than deters, the creation of too-big-to-fail institutions when it designates institutions as systemically important.[63] This, of course, would run contrary to the purpose of the Dodd-Frank Act.

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[57] The Dodd Frank Act, 12 U.S.C. § 5331.
[58] The Dodd Frank Act, 12 U.S.C. § 5323(a).
[59] The Dodd Frank Act, 12 U.S.C. §5365. When establishing prudential standards, the Board of Commissioners can also "differentiate among companies on an individual basis or by category" by considering any number of risk-related factors.
[60] The Dodd Frank Act, 12 U.S.C. § 5365(b)(2)(iv).
[61] *Designations*, U.S. DEPARTMENT OF THE TREASURY, http://www.treasury.gov/initiatives/fsoc/designations/Pages/default.aspx (last visited March 12, 2014).
[62] For a discussion of this position, see Ryan Caldbeck, *Too Big To Fail or Much Ado About Nothing? What Dodd-Frank Means To Small Businesses*, FORBES (10/30/2012 1:38PM), http://www.forbes.com/sites/ryancaldbeck/2012/10/30/too-big-to-fail-or-much-ado-about-nothing-what-dodd-frank-means-to-small-businesses/ (last visited April 24, 2014).
[63] *See id*.

Nonetheless, most institutions want to avoid the designation because the classification costs institutions vast amounts of money.[64] The designated institution will have to spend money on ensuring its operations comply with the tightened regulations, reporting information to the Federal Reserve, and informing it on the requirements imposed on it by the Dodd-Frank Act.[65] Put simply, the designation subjects the institution to additional regulations and complying with additional regulations costs money.[66] As a result of the designation, the institution's stock value might also be affected because of the public's fear that the designation will necessarily put the institution at a competitive disadvantage and harm the institution's financial well-being.[67]

iv. SIFI Designation Since The Dodd Frank's Enactment

Since Congress' enactment of the Dodd-Frank Act, several institutions have fallen under the Act's purview and have been classified as SIFIs. In 2011, for instance, the FSOC classified twenty-nine banks as systemically important, including Bank of America, Citigroup, Goldman Sachs, Morgan Stanley, and JPMorgan Chase.[68] Additionally, the FSOC has recently used its authority to designate certain nonbank entities as SIFIs by designating American International Group ("AIG"), General Electric Capital Corporation ("GE Money"), and Prudential Financial, Incorporated ("Prudential") as systemically important.[69] The FSOC's classification of nonbank

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[64] For a discussion on the effects of the SIFI designation, *see generally SIFI designation and its potential impact on nonbank financial companies: A roadmap for nonbank financial companies through the new world of systemically important financial institution designation*, DELOITTE (2013), http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/us_aers_grr_crs_SIFI%20Designation%20%20_0313.pdf (last visited Mar. 21, 2014).
[65] *See id.*
[66] *See* The Dodd Frank Act, 12 U.S.C. § 5323(a).
[67] Noam Noked, *FSOC Proposes the First Three Nonbank SIFIs*, HARV. L. FORUM ON CORP. GOVERNANCE AND FIN. REGULATION (June 8, 2013, 10:51 AM), https://blogs.law.harvard.edu/corpgov/2013/06/08/fsoc-proposes-the-first-three-nonbank-sifis/.
[68] Steve Schaefer, *JPMorgan, BofA, Goldman Sachs Among Eight U.S. Banks on Global Too Big To Fail List*, FORBES (Nov. 4, 2011), http://www.forbes.com/sites/steveschaefer/2011/11/04/jpmorgan-bofa-goldman-sachs-among-eight-u-s-banks-on-global-too-big-to-fail-list/.
[69] *See supra* note 61.

financials institutions as SIFIs came after the agency promulgated its interpretative guidance about the classification process.

III. Final Rule Announcing Standards for Nonbank Financial Institutions

The FSOC issued a final rule that interpreted its authority under Section 113 of the Dodd-Frank Act and outlined the FSOC's process for classifying nonbank financial institutions as SIFIs.[70] Before promulgating the final rule, the FSOC engaged in notice-and-comment rulemaking.[71] On October 6, 2010, the FSOC "issued an advance notice of proposed rulemaking regarding authority to require supervision and regulation of certain nonbank financial companies."[72] Several months later, on January 26, 2011, the FSOC published a notice of proposed rulemaking.[73] The comment period closed on February 25, 2011.[74] On October 18, 2011, the FSOC issued a "second notice of proposed rulemaking and proposed interpretive guidance."[75]

On April 3, 2012, the FSOC published its final rule,[76] and the Federal Register published the final rule on April 22, 2011.[77] Interestingly, after going through notice and comment

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[70] Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies, 77 Fed. Reg. 21637–21662 (April 11, 2012) (to be codified at 12 C.F.R. pt. 1310), *available at* http://www.gpo.gov/fdsys/pkg/FR-2012-04-11/pdf/2012-8627.pdf.
[71] *See* Advance Notice of Proposed Rulemaking Regarding Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies, 75 Fed. Reg. 61653 (proposed Oct. 6, 2010), *available at* http://www.gpo.gov/fdsys/pkg/FR-2010-10-06/pdf/2010-25321.pdf.
[72] *See id*.
[73] Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies, 76 Fed. Reg. 4555–4567 (proposed Jan. 26, 2011), *available at* http://www.gpo.gov/fdsys/pkg/FR-2011-01-26/pdf/2011-1551.pdf.
[74] *Id.*
[75] Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies, United States Treasury, *available at* http://www.treasury.gov/initiatives/fsoc/documents/nonbank%20designations%20-%20final%20rule%20and%20guidance.pdf.
[76] Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies, 77 Fed. Reg. 21637–21662 (April 11, 2012) (to be codified at 12 C.F.R. pt. 1310), *available at* http://www.gpo.gov/fdsys/pkg/FR-2012-04-11/pdf/2012-8627.pdf.
[77] Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies, 77 Fed. Reg. 21637–21662 (April 11, 2012) (to be codified at 12 C.F.R. pt. 1310), *available at* http://www.gpo.gov/fdsys/pkg/FR-2012-04-11/pdf/2012-8627.pdf.

rulemaking, the FSOC classified the final rule as interpretative guidance, not a substantive rule.[78] Additionally, the Council proposed a three-step analysis to determine whether a nonbank financial institution qualifies as systemically important.

i. Stage One

The purpose of stage 1 is "to identify a set of nonbank financial companies that merit company-specific evaluation."[79] If a nonbank financial institution is flagged under stage 1, the institution will then proceed to stage 2 and, if necessary, to stage 3 for further evaluation.[80] If a nonbank financial institution moves to stage 2 for further review, that institution is not determined to be systemically important.[81] Instead, this move only puts the financial institution on the FSOC's radar for further review—the institution is moving toward designation.

In the initial stage, the FSOC looks to qualitative and quantitative thresholds to determine whether a nonbank entity will move into stage 2.[82] The Dodd-Frank Act provides rigid threshold levels to assist institutions that will reach stage 2. Specifically, "the 'threshold[]' [categories] are: (1) credit default swaps outstanding; (2) derivative liabilities; (3) total debt outstanding; (4) leverage ratio; (5) short-term debt ratio; and (6) total consolidated assets."[83] In addition, only "publicly available information and information member agencies possess in their supervisory capacities" will be used in this process.[84]

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[78] *Id.* at 21637. It is also interesting that the FSOC decided to classify its final rule as interpretative guidance. While the FSOC was permitted to do so, issuing an interpretive guidance does not compel an agency to perform notice and comment rulemaking.
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.* The exact numbers are not necessarily important for the purposes of this paper. To give the reader an idea, however, these threshold include: "$50 billion in total consolidated assets; $30 billion in gross national credit default swaps outstanding for which a nonbank financial company is the reference entity." *See supra* note 46.
[84] *Id.*

However, the FSOC also reiterated the catchall provision that it may use in stage 1: even if an institution does not meet the threshold numbers, the FSOC may still use its discretion to move the nonbank financial institution into stage 2.[85] No notice is given to the institution if they are moved into stage 2 for further examination.[86]

ii. Stage Two

In stage two, the FSOC fails to provide any numbers that guide its analysis on whether a nonbank institution will continue to move towards designation.[87] This stage is called "Review and Prioritization of Stage 2 Pool."[88] Under this stage, "the [FSOC] intends to conduct a robust analysis of the potential threat that each of those nonbanks financial companies could pose to [United States] financial stability."[89] In addition to the six factors listed in stage 1, "[s]tage 2 evaluation will include a review, based on available data, of qualitative factors, including whether the resolution of a nonbank financial company . . . could pose a threat to U.S. financial stability, and the extent to which the nonbank financial company is subject to regulation."[90] The FSOC elaborates by stating that "the [FSOC] intends to evaluate the risk profile and characteristics of each individual nonbank financial company in the [s]tage 2 pool based on a wide range of quantitative and qualitative industry-specific and company-specific factors."[91]

Like in the transition from stage 1 to stage 2, an institution flagged under stage 2 will not be considered systemically important.[92] Instead, the FSOC will further consider the flagged institution in stage 3.[93] If the institution is moved from stage 2 to stage 3, the FSOC will give

[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*

notice to the affected institution that the FSOC is further examining whether a SIFI designation is appropriate.[94] At this point, however, the FSOC will not describe the Council's reasoning for moving the institution from stage 2 to stage 3.[95]

iii. Stage Three

The third stage, simply named "Review of Stage 3 Pool," is the last stage before the FSOC will designate a nonbank financial institution as systemically important.[96] In the FSOC's own words: "The review will focus on whether the nonbank financial company could pose a threat to U.S. financial stability because of the company's material financial distress or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the company."[97] After looking at these factors, the FSOC will determine whether the nonbank financial institution should be considered systemically important and issue a Proposed Determination of its finding.[98]

As previously noted, notice is given to the institution when it moves from stage 2 to stage 3.[99] In stage 3, the FSOC will also notify an institution if the Council determines the institution will not be designated as a SIFI.[100] That is, the FSOC will notify an institution that has reached stage 3 if the Council determines, at any point during the stage-3 review, that a SIFI designation is not warranted.[101] If the FSOC issues a Proposed Determination in favor of designation, the Council will inform the institution on the basis of the designation.[102]

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[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*

The institution, under section 113 of the Dodd-Frank Act, has the right to contest the Proposed Determination in a hearing.[103] This hearing is optional and not all institutions challenge the designation.[104] In either case, the FSOC's designation will only pass with a two-thirds vote and the affirmative vote of the Secretary of Treasury.[105] Notice will be given to the institution at least one business day in advance of announcing the designation to the public.[106] The institution, if designated, will then be subject to additional regulations set forth by the Federal Reserve.[107]

iv. Summary of the Process and the FSOC

In passing the Dodd-Frank Act, Congress set up a system where a council, the FSOC, has the responsibility to designate nonbank financial institutions as systemically important.[108] The FSOC's final rule, which outlines the three-step process that the Council uses to designate nonbank financial institutions as SIFIs, largely just restates Congress' statutory mandates and has left nonbank institutions largely in the dark about what metrics the FSOC will use during the process.[109] Suffice it to say, the FSOC retains a wide degree of discretion throughout the process, as evidenced by the catchall provision in stage 1 and the vagueness that the Council uses to describe stage 2 and stage 3 considerations.[110]

Moreover, the FSOC is composed of various department heads from different agencies across the federal government.[111] The Secretary of Treasury, who serves at the pleasure of the President, is the FSOC's chairperson and is given the most power.[112] Additionally, the only two FSOC non-voting members from the federal government are from the Department of

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103 *Id.*
104 *Id.*
105 *Id.*
106 *Id.*
107 *See supra* note 9.
108 *See supra* note 8.
109 *See supra* notes 79–107.
110 *See id*.
111 *See supra* note 45 (listing all the voting and nonvoting members of the FSOC).
112 *See supra* note 13.

Treasury.[113] The other members are heads of different independent agencies and enjoy "for cause" protection.[114] If the FSOC designates the institution as a SIFI, the institution then falls under the regulatory authority of the Federal Reserve, not the FSOC.[115]

This system raises several questions, including why Congress decided to structure the FSOC this way, the benefits to this structure, and the practical effect of having this type of structure. Before turning to each of these issues, it is worth providing a background of ways in which the President can influence agency decision-making by comparing independent agencies and executive agencies, and by providing an overview of relevant Executive Orders.

IV. Presidential Control Over Agencies: Independent Agencies, Executive Agencies and Executive Orders

There are two different types of agencies in the federal government: independent agencies and executive agencies.[116] The agency type is important when examining the level of presidential control that exists over the agency and the extent to which the President's politics will influence agency decision. The type of agency will also determine whether the agency must comply with mandates set forth by certain Executive Orders because some Executive Orders only apply to executive agencies. Independent agencies, executive agencies, and Executive Orders are each discussed in turn.

i. Independent and Executive Agencies

Since the 1800s, Congress has created independent agencies.[117] Independent agencies typically have boards that make the agency's high-level decisions.[118] Board members typically serve a fixed term and survive a presidential change as a way to promote independence from the

[113] *See supra* note 48.
[114] *See id*. (listing members of independent agencies).
[115] *See supra* note 9.
[116] It is often to distinguish whether an agency is considered an executive or independent agency. Some agencies will state the agency is independent explicitly.
[117] Paul R. Verkuil, *The Purposes and Limits Of Independent Agencies*, 1988 DUKE L.J. 257, 257 (1988).
[118] *Id.*

executive branch.[119] In fact, Congress sometimes inserts statutory requirements mandating both democrats and republicans serve on the board, making it even more unlikely that the board would be susceptible to presidential influence or control.[120]

Independent agencies are those agencies whose members are nominated by the President and confirmed by the Senate.[121] An important characteristic of independent agencies is that the President cannot remove members at will; in other words, they will generally not be removed simply for policy views.[122] Of course, independent agency members can be removed for other statutorily permitted reasons, but it is otherwise difficult to remove a chairperson of an independent agency.[123] Because the President cannot remove members of the agency at will, the agency member need not be concerned with the President's disapproval, or approval, of his or her decisions.[124] For example, when President Obama was elected president, he did not have the ability to remove board members of independent agencies "at will."

The independent agencies' organizational structure gives these agencies additional separation from presidential control. Independent agencies are usually composed of a group—usually "commissions or boards"—that makes its decisions.[125] Therefore, in order for the President to exert influence over independent agency decision-making, the President would have

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119 For example, the U.S. Election Assistance Commission is "an independent, bipartisan agency." *See* EAC Information Quality Guidelines, http://www.eac.gov/assets/1/AssetManager/eac%20information%20quality%20guidelines.pdf.
120 *Id.*
121 While there are instances where this general formula is not used, this paper will assume this proposition to be true. For a discussion on this proposition, as well as a discussion to the exception, see Marshall J. Breger & Gary J. Edles, *Established By Practice: The Theory And Operation Of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1139.
122 For a detailed discussion on the President's removal power, see Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (And Executive Agencies)*, 98 Cornell L. Rev. 769, 772–73 (2013).
123 *See* James C. Miller, III, *A Reflection On The Independence Of Independent Agencies*, 1988 DUKE L.J. 297, 297 (1988).
124 *See generally* Adrian Vermule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1168 (2013).
125 *See* Verkuil *supra* note 117, at 260.

to influence a group of individuals.[126] Many commentators have pointed out that it is much harder for the President to control a group of individuals as opposed to a single person.[127] As one commentator has described them, independent agencies are "collegial bodies" that engage in decision-making.[128] This type of decision-making, according to this commentator, "is meant to be consensual, reflective, and pluralistic."[129]

Most agencies related to financial industry regulation are independent agencies.[130] For example, the Federal Reserve and the Securities Exchange Commission both have boards that are insulated from presidential removal power—both are considered independent agencies.[131] In fact, "financial agencies, which exercise expansive influence over the nation's financial affairs, are among the most prominent independent agencies."[132]

Unlike independent agencies, executive agencies are more closely linked to the President. For instance, the President's cabinet is composed of certain high-level agency heads from different executive agencies, including the Department of Defense, Department of Commerce, Department of Homeland Security, and Department of Treasury.[133] For the purposes of this paper, these agencies are considered purely executive agencies. Each department head and personnel are removable at the President's will and serve at the pleasure of the President.[134] When the President leaves office, the incoming President will typically exercise his or her

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126 *Id.*
127 *Id.*
128 *Id.*
129 *Id.*
130 Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 607–08 (2010). This piece also provides an excellent background of independent agencies and financial reform measures, but will not be discussed at lengths here.
131 *Id.*
132 *Id.*
133 The Cabinet, WHITE HOUSE, http://www.whitehouse.gov/administration/cabinet (last visited March 31, 2014) (outlining President Obama's cabinet members).
134 *See* John O. McGinnis, *Presidential Review As Constitutional Restoration*, 51 DUKE L.J. 903, 918 (2001) (stating that "most agency heads serve at the pleasure of the President).

removal power and appoint members who have ideals that more closely align with the President's politics.

ii. Executive Orders

An agency can also be influenced by an Executive Order issued by the President.[135] Executive Orders are "directives or actions by the President" and allow the President to impart his or her policy views on a regulatory scheme.[136] Specifically, "[e]xecutive orders are generally directed to, and govern actions by, Governmental officials and agencies" and the number of executive orders issued will depend on the President.[137] It is well documented that a current President may revoke a former President's Executive Order and that such revocation occurs quite frequently when new presidents take office.[138] However, the use of Executive Orders has declined with each presidential administration since President Reagan.[139] Furthermore, the Office of Information and Regulatory Affairs ("OIRA") oversees the enforcement of Executive Orders.[140] OIRA is a subdivision of the Office of Management and Budget ("OMB")—the "implementation and enforcement arm of Presidential policy government-wide."[141] Indeed, the OMB's main purpose is to help "implement [the President's] vision."[142]

Some Executive Orders apply only to executive agencies. For instance, Executive Order 12,866, among other things, requires executive agencies to consider the costs and benefits of

[135] VANESSA K. BURROWS, CONG. RESEARCH SERV., RS20846, EXECUTIVE ORDERS: ISSUANCE AND REVOCATION 1 (2010).
[136] *Id.*
[137] *Id.*
[138] *Id.* at 6–7.
[139] *Executive orders coming? Here's how they work*, CNBC (Jan. 28, 2014), http://www.cnbc.com/id/101369574 (showing the number of Executive Orders issued by each president).
[140] The Mission and Structure of the Office of Management and Budget, THE WHITE HOUSE, http://www.whitehouse.gov/omb/organization_mission/.
[141] *Id.*
[142] *Id.*

their regulation when promulgating certain regulations.[143] Executive Order 12,866 requires that an executive agency issue a Regulatory Impact Analysis, including a cost-benefit analysis, for each major rule defined as those carry with it a $100 million dollar or more effect on the economy.[144] For those actions where OIRA determines that an agency action will have less than a $100 million dollar effect on the economy, the agency does not need to engage in a cost-benefit analysis.[145]

More recently, the Obama Administration has approved of the application of cost-benefit analysis in agency rulemaking in Executive Order 13,579.[146] Executive Order 13,579 treats independent agencies and executive agencies identically.[147] The Executive Order provides that:

> Wise regulatory decisions depend on public participation and on careful analysis of the likely consequences of regulation. Such decisions are informed and improved by allowing interested members of the public to have a meaningful opportunity to participate in rulemaking. To the extent permitted by law, such decisions should be made only after consideration of their costs and benefits (both quantitative and qualitative).[148]

The Executive Order expanded Executive Order 13,563 to include independent regulatory agencies.[149] Executive Order 13,563 sought to establish "a regulatory system that protects public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation."[150] Through Executive Order 13,579, President Obama unequivocally announced that: "Independent regulatory agencies, no less than executive

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[143]Executive Order 12,866, FEDERAL REGISTER NATIONAL ARCHIVES, http://www.archives.gov/federal-register/codification/executive-order/12291.html (last visited March 30, 2014).
[144] *Id.*
[145] *Id.*
[146] Executive Order 13,579, THE WHITE HOUSE (July 11, 2011), http://www.whitehouse.gov/the-press-office/2011/07/11/executive-order-regulation-and-independent-regulatory-agencies.
[147] *Id.*
[148] *Id.*
[149] Executive Order 13,563 THE WHITE HOUSE (January 18, 2011), http://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf.
[150] *See id.*

agencies, should promote that goal."[151] However, unlike Executive Order 12,866, Executive Order 13,579 does require independent agencies to perform a cost-benefit analysis, or submit final rules to OIRA for review, when making regulatory decisions. Instead, Executive Order 13,579 only encourages independent agencies to perform a cost-benefit analysis in the agency's decision making.

iii. What Type of Decision-Making Body is the FSOC?

The FSOC is a council consisting of high-level agency officials from different independent agencies and one executive agency. For example, the Federal Reserve, the Securities Exchange Commission, and the Federal Housing Finance Agency are each independent agencies.[152] On the other hand, the Department of Treasury is an executive agency and a member of the President's Cabinet—the Secretary of Treasury, Jack Lew, serves at the pleasure of the President.[153] Tellingly, Congress gave the only FSOC member from an executive agency the most power throughout the designation process.

The FSOC also acts like an executive agency in other respects. For example, the FSOC submitted its interpretative guidance for OIRA review before publishing the interpretative guidance in the federal register.[154] At this time, OIRA determined that the aggregate effect of the Interpretive Guidance did not mandate a Regulatory Impact Analysis under Executive Order 12,866.[155] This submission to OIRA is noteworthy because only executive agencies are required to submit their final rules to OIRA.[156] This, coupled with the Secretary of Treasury's veto power, creates the impression that the FSOC is acting as an executive agency despite its organizational

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[151] *Id.*
[152] *See*, *e.g.*, 12 U.S.C. § 242 (2006) (stating that each member of the Federal Reserve Board can only be removed "for cause").
[153] The Presidential Elections and Vacancies Act, 3 U.S.C. § 19(d)(1)(1947) (enumerating the succession line in the event of vacancies in the Presidential office).
[154] *See supra* note 11.
[155] *See id*.
[156] *See supra* note 143.

structure and members who belong to independent agencies. Nonetheless, Congress has created agencies, or groups, with similar organizational structures before, and looking at those examples can provide the proper context for determining the implications of this type of structure.

V. Congress' Use Of Multi-Head Agencies

Two examples provide a historical background to Congress creating committees using high-level agency officials: the God Squad and another committee created by the Environmental Species Act of 1973 (the "*Lujan* committee"). Each is discussed in turn.

i. The God Squad

One early example of Congress using multi-head agencies is its creation of the Endangered Species Committee (the "ESC").[157] Congress created the ESC when it enacted the Endangered Species Act in 1973 and tasked the ESC with deciding "where or not to grant an exemption from the [Endangered Species Act]."[158] The ESC was composed of numerous high-ranking environmental agency officials, including the Secretary of Agriculture, the Secretary of Army, the Administrator of the Environmental Protection Agency, and the Secretary of Interior.[159] The seven-member panel would vote on applications, and only those applications receiving five votes would be granted.[160]

The ESC rarely granted applications for exemptions under the ESA but received the most attention when granting the Bureau of Land Management's (the "BLM") application related to timber sales in Oregon.[161] In *Portland Audubon Society*, an environmental group challenged the BLM's exemption as invalid in part because of an alleged improper ex-parte communication

[157]The Endangered Species Act, 16 U.S.C. § 1536(e)(1)(1976).
[158] The Endangered Species Act, 16 U.S.C. § 1536(e)(2)(1976).
[159] The Endangered Species Act, 16 U.S.C. § 1536(e)(3)(A)–(G)(1976).
[160] The Endangered Species Act, 16 U.S.C. § 1536(h)(3)(1)(1976).
[161] *Portland Audubon Soc*, 984 F.2d at 1534.

between the ESC and White House officials.[162] The environmental group's challenge came after two media reports alleged that White House officials called several ESC members into the White House and pressured them to vote a certain way.[163] The media reports alleged that the communication influenced at least one ESC member's vote.[164]

The Ninth Circuit Court of Appeals decided that the APA's limits on ex-parte communication applied given the legislative history and the formal adjudication requirement provided for when Congress created the ESC.[165] The court also determined that the President and his staff fell within the realm of ex-parte communications for APA purposes.[166] In so doing, the Ninth Circuit opined that "members of [the ESC], despite the Cabinet-level status they otherwise enjoy, are, while serving in their Committee capacities . . . to be free from presidential influence."[167]

The FSOC, similar to the composition of the ESC, is composed of different high-level agency members.[168] Unlike the ESC, however, the FSOC only has one voting member who belongs to an executive agency.[169] The *Portland Audubon Society* case is an extreme example of the President, or the President's staff members, attempting (perhaps successfully) to influence members of a committee composed of cabinet members.[170] The FSOC is different than the original God Squad in other ways; for example, Congress gave no veto power to any members of the original God Squad.[171] Therefore, the ability for the President to have influence, whether overt or covert, on the FSOC is higher than with the original God Squad because of the Secretary

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[162] *Id.* at 1538–39.
[163] *Id.* at 1538
[164] *Id.*
[165] *Id.* at 1543.
[166] *Id.* at 1548.
[167] *Id.*
[168] *See supra* note 45.
[169] *See supra* note 13.
[170] *See supra* notes 161–167.
[171] *See id*.

of Treasury's veto power.[172] This increase in presidential power is because of the relationship between the Secretary of Treasury and the President: the Secretary of Treasury serves at the pleasure of the President and is fifth in line to succeed the President.[173] Additionally, unlike the God Squad, Congress did not provide for formal adjudication protections when it created the FSOC. Thus, the FSOC is not insulated from the President in the same way during its adjudications, making it more likely that the President can influence the FSOC's decisions.

ii. Congress' Use of a God-Squad Like Structure

A survey of statutes enacted by Congress show that this God-Squad like structure is rarely used.[174] However, in the same context as Congress' creation of the God Squad, in a different section of the Environmental Species Act, Congress delegated authority to different agency heads: the Secretary of Interior and the Secretary of Commerce.[175] The controversy in the seminal case *Lujan v. Defenders of Wildlife* stemmed from actions taken by these agency heads under their ESA authority.[176] Specifically, Congress mandated the "Secretary of Interior to promulgate by regulation a list of those species which are either endangered or threatened under enumerated criteria, and to define the critical habitat of these species."[177] Under section 7(a)(2) of the ESA, the Secretary of Interior and the Secretary of Commerce issued a joint resolution as it related to the obligation of the ESA extended to foreign countries.[178]

The FSOC is dissimilar to the *Lujan* committee because, first, the FSOC involves more agency heads.[179] Rather than two agency heads promulgating a rule, like with the *Lujan*

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[172] *See supra* note 13.
[173] *See supra* note 133.
[174] This author performed an Internet search, as well as Westlaw Next search, for similar decision-making bodies. No bodies similar to the God Squad were found.
[175] The Endangered Species Act, 16 U.S.C. § 1533.
[176] Lujan v. Defenders of Wildlife, 504 U.S. 555, 558–59 (1992).
[177] *Id.* at 558 (citing 16 U.S.C. §§ 1533, 1536).
[178] *Id.*
[179] *See supra* note 45.

committee, the FSOC is composed of ten voting members from different agencies.[180] Because the FSOC has more members who vote for or against designation, the increased number of members may add a layer of protection against agency capture. While different interest groups from affected industries—such as the insurance industry—will likely not be able to influence two-third of the FSOC to vote against designation of certain institutions, the Secretary of Treasury's veto power could allow the President to prevent designation in a similar way. No such veto power exists in the case of the *Lujan* committee.

While the FSOC, the God Squad, and the *Lujan* committee each have their differences in structure and function, the God Squad and the *Lujan* committee are good reminders that Congress has used this type of agency, in some form, in the past. Notably, Congress gave neither the God Squad nor the *Lujan* committee a similar veto power that Congress gave to the FSOC. This backdrop assists in analyzing the FSOC's structure.

VI. Analyzing the FSOC's Structure

The FSOC organization structure raises several questions, all of which will not be discussed here. Instead, this paper will focus on: (1) the benefits of using a structure where high-level agency officials compose the Council; (2) the drawbacks to assigning the designation responsibility to the Federal Reserve; and (3) the drawbacks to assigning the designation responsibility to the Department of Treasury.

i. The Benefits of Using a High-Level Structure

A close analysis of the legislative history behind the Dodd-Frank Act reflects that Congress spent little time discussing the designation process.[181] Specifically, the legislative

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[180] *Id.*

[181] This author performed a search using the editorially-enhanced legislative history tool available from ProQuest Legislative Insight, with the help of Law Librarian Hildur Hanna. This search did not uncover direct discussions on the matter. However, one commentator has noted that:

history does not answer the question of why the FSOC would be responsible for designating the institution, but then the Federal Reserve would be responsible for regulating the designated institution. However, the benefit of having a multi-member council composed of high-level officials is not hard to imagine. One benefit of the structure is that a SIFI designation requires a two-thirds vote from high-level agency members—a minimum of seven votes.[182] The two-thirds requirement helps prevent the voting members from being persuaded by outside influences and prevents agency capture from occurring, especially given that each member comes from a different agency with different expertise.[183] For example, the Federal Reserve is "the central bank" of the United States composed of the Board of Governors and several regional banks across the nation.[184] Similarly, the Department of Treasury is "the executive agency responsible for promoting economic prosperity and financial security of the United States."[185] Additionally, the SEC, which sends its Commissioner to the FSOC, seeks to "protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation."[186] Congress would also likely justify its decision to create the FSOC by stating that, by bringing together different agencies

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> In the wake of the financial meltdown of 2008, Congress considered numerous proposals to promote market stability. Specifically, these proposals would require the federal government to address systemic risk in the financial-services industry before that risk materializes into a crisis. Although every proposal grants this responsibility to an independent agency, these same proposals provide that the agency would have a formal, collaborative relationship with the Secretary of the Treasury.

Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 Vand. L. Rev. 599, 624 (2010). Still, this insight does not explain why Congress chose this structure.

[182] *See supra* note 13.
[183] *See supra* note 45 (listing each member of the FSOC).
[184] *See* Board of Governors of the Federal Reserve, Mission, last updated Nov. 6, 2009, http://www.federalreserve.gov/aboutthefed/mission.htm (last visited April 1, 2014). Additionally, the Federal Reserve seeks "to provide the nation with a safer, more flexible, and more stable monetary and financial system."
[185] U.S. Department of the Treasury, About, http://www.treasury.gov/about/role-of-treasury/Pages/default.aspx (last visited April 1, 2014).
[186] U.S. Securities Exchange Commission, *The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, http://www.sec.gov/about/whatwedo.shtml#.UzrXw1FdXNg (last visited April 1, 2014).

with different areas of expertise, the FSOC could make a more informed decision of which institutions pose the most significant risk to the United States' financial stability.

However, the ultimate substantive regulatory authority on what regulations will be imposed on the institution classified as systemically important ultimately rests with the Federal Reserve, an independent agency.[187] Congress also afforded the Secretary of Treasury, an individual appointed by the President, with an essential veto power over the FSOC's decision-making process.[188] While the two-thirds majority vote presents a layer of protection from outside influences, the Secretary of Treasury's veto weakens this protection by allowing presidential influence to permeate the FSOC's decision-making and perhaps preventing the FSOC from designating an institution as a SIFI.

Likewise, the Department of Treasury's fingerprint covers different aspects of the FSOC's operations. For instance, the Department of Treasury has posted the FSOC's final rule on its website, though no other agency has done so. When the FSOC engaged in notice and comment rulemaking, the Council directed interested persons to send comments to the FSOC and stated that interested persons could obtain more information from a representative of the Office of Domestic Finance in the Department of Treasury, Lance Auer.[189] However, the same contact person, Lance Auer, is listed as the contact person for sending comments directly to the FSOC, even though Mr. Auer is neither a FSOC voting member nor a nonvoting member.[190] Unlike the other agencies who have representatives in the FSOC, the Department of Treasury has the strongest affiliation with the Council.

[187] *See supra* note 19.
[188] *See supra* note 13.
[189] *Id.*
[190] *Id.*

The starting premise to the designation process is that each member of the FSOC possesses an equal voice in the decision-making process—after all, each member receives one vote in the process.[191] However, the practical effect of the FSOC decision-making process could be that the Secretary of Treasury and the Federal Reserve possess greater influence over the decisions of the group. The practical effect could also be that only the Secretary of Treasury possesses the greatest influence over the designation process, especially in light of the Department of Treasury's fingerprint and strong affiliation with the FSOC. It will be difficult to say with one-hundred percent certainty the extent of each person's influence within the group because the FSOC's meetings have been largely opaque.[192] Needless to say, however, the Department of Treasury and the Federal Reserve appear to be the two agencies with the most power in the FSOC.

It thus raises the question: why wouldn't Congress simply entrust the Federal Reserve with the duty of designating institutions as systemically important? On the other hand, why wouldn't Congress entrust the Department of the Treasury with the designation task given Congress' delegation of a veto power to the Secretary of Treasury? The answer appears to be that Congress wanted to give the President more control of the designation process through this organizational structure.

ii. The Drawbacks of Having the Federal Reserve Regulate

If Congress intended for the Federal Reserve to regulate institutions classified as SIFIs, a logical outgrowth of this intention would be for the Federal Reserve to also designate institutions as SIFIs. Historically, Congress gives the regulating agency the authority to decide whom it will be regulating and the type of substantive regulations that the agency would impose. For example,

[191] *See supra* note 13.
[192] *See supra* note 51.

the EPA issued a final rule on the standards it would use when deciding ambient air quality standards and then subjects each institution to those substantive regulations.[193] It seems, at the very least, this system would add continuity to the process and allow the Federal Reserve to examine each institution more closely throughout the entire procedure. If Congress gave the Federal Reserve power to designate and regulate, then the Federal Reserve presumably would have a deeper understanding of each institution because it would be privy to all discussions, both for and against designation, related to the institution. Congress could have disfavored this structure for two different reasons.

First, section 113 of the Dodd-Frank Act mandates that the FSOC designate nonbank financial institutions as SIFIs.[194] However, the Federal Reserve Board of Commissioners does not have expertise in the nonbank financial institution arena.[195] Therefore, one explanation could be that Congress worried that the Federal Reserve did not, by itself, have the requisite expertise to properly designate nonbank institutions as SIFIs. Still, the Federal Reserve is charged with subjecting each designated institution to substantive regulations.[196] If Congress' concern stemmed from the Federal Reserve's lack expertise with nonbank financial institutions, it would be odd to then trust that agency with the regulating responsibility. It seems, then, that the second explanation is more plausible.

The more plausible explanation is that Congress wanted to avoid giving designation power to an independent agency like the Federal Reserve. The 2008 financial crisis and its aftermath is a politically-charged topic.[197] The crisis crushed several businesses across the

[193] *See* The Clean Air Act, 40 C.F.R. part 150.
[194] *See supra* note 8.
[195] *See* Bressman & Thompson, *supra note* 130 at 627.
[196] *See supra* note 9.
[197] For example, many commentators blame certain individuals. For one media report's list, *see 25 People to Blame for the Financial Crisis*, TIME,

country and its aftermath is still felt even today.[198] Many commentators have placed blame on the Federal Reserve for their role in 2008 financial crisis, noting that the Federal Reserve is not suitable to handle the evaluation of systemic risk.[199] Congress likely knew that some decisions regarding which institutions required designation were political decisions: some institutions needed the classification to prevent political uproar.[200] The Federal Reserve, however, is widely considered to be a very independent agency.[201] If Congress gave the Federal Reserve the ability to designate, it would be giving one of the "most independent" agencies the task of making some political decisions. The President would have no ability to influence the process, a result that Congress likely wanted to avoid.

Thus, two explanations could explain why Congress did not give the designation power to the Federal Reserve: first, because the Federal Reserve lacks expertise in the area of nonbank financial institutions; and second, because Congress wanted to avoid giving an independent agency the power to designate institutions. The latter explanation seems more plausible because of the politically charged nature of the designation process, but both explanations could contribute to Congress' choice. A more appropriate question, however, is why Congress did not give the designation authority to the Department of Treasury.

iii. Drawbacks to the Department of Treasury Making the Designation

Similar reasons might explain why Congress did not entrust the Department of Treasury with the designation responsibilities. Congress clearly wanted to give the Secretary of Treasury large amounts of power in the designation process. As discussed above, the Secretary of

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http://content.time.com/time/specials/packages/article/0,28804,1877351_1877350_1877339,00.html (last visited April 1, 2014).

[198] *See The Origins of the financial crisis,* THE ECONOMIST (Sept. 7, 2013), http://www.economist.com/news/schoolsbrief/21584534-effects-financial-crisis-are-still-being-felt-five-years-article (last visited April 1, 2014).

[199] *Id.*

[200] *See supra* note 197.

[201] *See generally*, Bressman & Thompson, *supra note* 130.

Treasury acts as the FSOC's chairperson, has an essential veto power, and enjoys substantial control in running the FSOC's meetings.[202] If Congress wanted the Secretary to enjoy this broad power, why not just give the Secretary ultimate power?

The first and perhaps most obvious reason for this lack of designation is Congress' concern with a single agency being entrusted to make such large policy decisions. As discussed above, the Federal Reserve has not had much success in assessing risk (after all, the 2008 financial crisis occurred under its watch) and different viewpoints, the theory would go, could result in stronger policy decisions. Congress would likely use this justification—to harness different agencies' expertise—to support its decision to create the FSOC as an agency composed of high-level agency heads.

The second reason, like the decision not to give the Federal Reserve designation power, is political. Even if the above rationale does not actually occur, the appearance of such an agency would likely reduce public outcry. In the event of a perceived improper designation, each agency affiliated with the FSOC members can divert individual blame from their agency to each voting member's agency and the FSOC. Congress, too, maintains a nice degree of insulation from outcry, as multi-member agencies typically are at least perceived to be more rational decision-making bodies.[203] The multi-agency head provides a sort of "checks and balances" that promotes neutral power among its members. If the "checks and balances" are not actual, they are at least apparent to the public. Indeed, the FSOC is an excellent scapegoat if the public thinks the process is not working.

Another reason for not granting the Department of Treasury the power to designate could be to increase presidential influence over the Secretary of Treasury by removing institutional

[202] *See supra* note 13.
[203] *See supra* note 129.

barriers that exist within the Department of Treasury. While the Secretary of Treasury heads the Department of Treasury, several offices exist within the Department of Treasury to create policy and "overall management."[204] These offices include the Domestic Finance Office, the Economic Policy Office, the General Counsel, and the Treasurer of the United States, and each office has well-credentialed individuals acting in advisory capacities.[205] The Domestic Finance Office, for instance, "advises and assists in areas of domestic finance, banking, and other related economic matters . . . [and] . . . [] develops policies and guidance for the Treasury Department activities in the areas of financial regulation."[206] The Treasurer of the United States, on the other hand, is, among other things, "a key liaison to with the Federal Reserve."[207]

By placing the Secretary of Treasury in a powerful position within the FSOC, with a veto power, and not within the Department of Treasury, the President has a more direct line of influence with the Secretary of Treasury. In other words, Congress and the President would have to worry about the "overall management" provided by the different offices within the Department of Treasury. Nonetheless, Congress could have chosen to leave the SIFI designation process to the Department of Treasury, while still giving the Secretary of Treasury the veto power.

A plausible explanation for the Council's structure, then, could be that Congress sought to give the Department of Treasury ultimate authority but also provide the Department of Treasury with expertise from other sources. Perhaps Congress thought that the Department of

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[204] United States Department of Treasury, *About: Organizational Structure* (April 1, 2014, 10:43 PM), http://www.treasury.gov/about/organizational-structure/Pages/default.aspx (last visited April 1, 2014).
[205] *Id.*
[206] United States Department of the Treasury, *About: Domestic Finance Office* (June 13, 2013, 3:18 PM), http://www.treasury.gov/about/organizational-structure/offices/Pages/Domestic-Finance.aspx (last visited April 1, 2014).
[207] United States Department of the Treasury, *About: The Treasurer* (Aug. 13, 2013 5:05 PM), http://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-the-Treasurer.aspx (last visited April 1, 2014).

Treasury had the most expertise in the area of systemic risk and was the most relevant agency to make the designation given its expertise. Congress could have also structured the FSOC as a way to produce negotiations among agencies, but this theory would not explain why the Secretary of Treasury is given a veto power and the Department of Treasury has the most visible fingerprint on the FSOC. Examining the recent designation of Prudential provides an example to test the theory of whether the FSOC actually produces negotiated results.

VII. The Designation of Prudential

Prudential is an insurance company with over one trillion dollars in assets and is the second largest life insurance company in the United States.[208] While Prudential is not traditionally viewed as causing the 2008 financial crisis, many expected that Prudential would be designated because of its sheer size.[209]

The designation of Prudential as systemically important is a good example illustrating the costs and benefits of the FSOCs designation process. Earlier this year, the FSOC designated Prudential as systemically important after Prudential went through the three-stage process outlined by the interpretative guidance.[210] The FSOC made the determination after a vote of 7–2, with, of course, the Secretary of Treasury voting in favor of the designation.[211] Interestingly, the two members with actual insurance expertise voted against the designation—the Director of the Federal Housing Finance Agency (and former state regulator), Roy Woodal, and the Director of

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[208] Zachary Tracer, *Prudential Records $618 Million Loss On Derivatives*, Bloomberg (Nov. 7, 2012), http://www.bloomberg.com/news/2012-11-07/prudential-records-618-million-loss-on-derivatives.html (last visited April 1, 2014).
[209] *See id*.
[210] The FSOC designated Prudential as a SIFI, but Prudential challenged the designation. Prudential's challenge, however, did not prevail and the designation stood. For Prudential's statement about conceding its designation, *see* Scott Hoffman, *Statement from Prudential Financial, Inc. regarding final designation as non-bank systemically important financial institution* (October 18, 2013), http://news.prudential.com/article_display.cfm?article_id=6706.
[211] Zachary Tracer & Ian Katz, *Prudential Financial Got Systemic Risk Label in 7–2 vote*, Bloomberg (Sept. 20, 2013), http://www.bloomberg.com/news/2013-09-20/prudential-financial-got-u-s-systemic-risk-label-in-7-2-vote.html (last visited March 30, 2014).

the Missouri Department of Insurance.[212] In his dissent, John Huff stated that the voting members used "bank-like concepts to insurance products and their regulation, rendering their rationale for designation flawed, insufficient, and unsupportable."[213]

The other voting members did not address Mr. Woodal's concerns in their basis for Proposed Determination.[214] Instead, on September 19, 2013, the majority issued a statement of its basis for determination, which described the factors it used to reach its determination.[215] In its Proposed Determination, the majority placed emphasis on Prudential's size and perceived interconnectedness with the economy.[216] The Prudential designation is illustrative for two important reasons.

First, many have questioned what specific metrics the FSOC will use in the designation process and the validity of those metrics in the nonbank financial institution realm.[217] The Interpretative Guidance provides little actual guidance to what metrics the FSOC will use during the designation process because the interpretative guidance effectively restates Congress' statutorily mandated considerations.[218] Even in stage 1, where specific metrics are given, Congress included a catchall provision giving the FSOC the ability to pass into stage 2 any

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[212] Michael R. Crittenden & Leslie Scism, *Prudential Risk-Designation Vote Drew Dissents*, The Wall Street Journal (July 17, 2013 9:23 PM), http://online.wsj.com/news/articles/SB10001424127887324263404578612280163397450.
[213] View of Director John Huff, the State Insurance Commissioner Representative, http://www.naic.org/documents/index_fsoc_130920_huff_dissent_prudential.pdf.
[214] United States Department of Treasury, *Basis for the Financial Stability Oversight Council's Final Determination Regarding Prudential Financial, Inc*. (Sept. 19, 2013), http://www.treasury.gov/initiatives/fsoc/designations/Documents/Prudential%20Financial%20Inc.pdf.
[215] *Id.*
[216] *Id.*
[217] *See, e.g.*, Deschert News Release, Deschert Issues Comment Letter Regarding Financial Oversight Council's Proposed Rule Regarding the Desisgnation of Systemically Important Financial Institution (February 25, 2011), *available at* http://www.dechert.com/files/Uploads/Documents/02_2011_Dechert_Comment_Letter_FSOC_SIFI_Designation_Rule.pdf. Additionally, for a description of how lawmaker have recently called for more transparency in the FSOC process, *see* http://www.reuters.com/article/2013/03/14/financial-regulation-fsoc-idUSL1N0C67ND20130314
[218] *See supra* section III.

institution it deems threatens the United States economy.[219] In stage 2 and stage 3, it is largely unclear exactly what metrics the FSOC will use to assess each institution, and the FSOC retains huge discretionary power throughout the designation process.[220] The Prudential designation, and the dissents of the designation, indicates that the FSOC may be using the wrong metrics in the nonbank financial institution realm and that the FSOC has large discretion in deciding which institutions to classify as SIFIs.

The Prudential designation also tends to show that the FSOC's structure may not allow members with expertise regarding a particular industry to prevail in the designation process. As discussed above, one apparent benefit of Congress delegating different agency heads to the FSOC was that each member would bring a different level of expertise that can result in a more informed, collaborative decision.[221] However, Prudential's designation makes one think whether that collaboration is actually taking place. After all, the individuals who brought experience with the insurance industry, and presumably who know the most about which type of insurance companies pose a systemic risk to the economy with its failure, voted against designation.[222] Their expertise did not prevail in the decision-making process, and these members were not able to persuade a majority of the FSOC of their position.[223]

The fact that the opinions of those with insurance expertise did not prevail could also point to a benefit of FSOC structures: namely, that the council avoid the problem of capture. In an agency-decision process, there is always a fear that different interest groups will capture voting members.[224] Under the capture theory, the insurance industry could influence those two

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[219] *See supra* note 85.
[220] *See supra* Section III(ii)–Section III(iii).
[221] *See supra* Section VI(i).
[222] *See supra* note 212.
[223] *Id.*
[224] For an overview of the concept of capture, *see* Rachel E. Barkow, *Explaining and Curbing Capture*, 18 N.C. BANKING INST. 17, 17–21 (2013).

members with insurance expertise based on pre-existing relationships and attempt to influence the FSOC to make decisions that would benefit the insurance industry. In this context, the fear would be that insurance interest groups could sway members to vote against designation of certain institutions. Congress clearly would have an interest in avoiding giving power to captured members in order to promote valid SIFI designations. Therefore, the Prudential designation also tends to show a benefit to the FSOC's structure: avoiding agency capture.

Prudential's designation is illustrative of the costs and benefits of the FSOC's organizational structure. The costs of the structure are that it leaves decision-making to a God-Squad, with even more power and discretion than similar bodies Congress has created before. As a result of this structure, institutions are often left in the dark about what type of indicators would lead to a designation. This creates transparency problems and concerns with whether the FSOC is applying proper metrics during the designation process. The designation also helps show why the FSOC does not actually promote each agency's expertise. However, on the flip side, the structure has the benefit of helping prevent capture, which could be extremely problematic and detrimental to the overall scheme of the Dodd-Frank Act.

VIII. Why Would Congress Delegate More Presidential Control?

An important question remains: if Congress is using such committees as a way to increase presidential control over the designation process, why would Congress be interested in giving another branch of government (the Executive branch) more control? There may be no clear answer to this question, but a simple answer would be that Congress is shortsighted. The Democratic Party, the same party as President Barack Obama, controlled the 111th Congress.[225] By giving Secretary of Treasury Jack Lew more power, President Obama likely retains a high degree of influence because Mr. Lew serves at the pleasure of President Obama. Therefore, the

[225] *See supra* note 20.

policy choices of Mr. Lew likely reflect democratic ideals, which would be consistent with the enacting Congress' majority view. However, if the next presidential election produces a Republican president, power would be shifted and the FSOC decision-making process would likely reflect Republican ideals. However, the enacting Congress would benefit from this organization structure, which is probably the reason for giving the President more control.

IX. Future Proposals

So what now? As it stands, the FSOC and the SIFI designation process have flaws but also benefits. Congress' job should be to embrace the benefits of the FSOC structure, while remedying the Council's flaws. Because the FSOC is only able to designate an institution as a SIFI only with a two-thirds vote, the likelihood of agency capture is greatly reduced. For this reason, Congress chose wisely to create the FSOC and not leave the designation to a single agency. However, Congress should aim to make the designation process more transparent, especially with regards to any presidential influence over the process and to encourage more dialogue between all the members, both voting and nonvoting.

To help shed light on how the FSOC operates and whether the structure is in fact increasing presidential control, certain disclosure requirements should be implemented. There should be a requirement that any communications between the President (and White House staff) and the FSOC members, voting or nonvoting, must be disclosed. In other words, there should be a similar prohibition on ex-parte communication, like with the God Squad. Like with the God Squad, Congress could also amend the Dodd-Frank Act to provide nonbank financial institutions with the right to formal adjudication in stage 3 of the process. This type of procedural safeguard could help better insulate the FSOC from presidential control.

Second, there should be a requirement that the majority must acknowledge, and respond to, the dissent's viewpoint in its basis for determination. While minutes are kept of some meetings, the information provided in these documents is often limited. Minutes are also not kept for every meeting because the FSOC wants to prevent corporate information from being released to the public.[226] While requiring the majority to acknowledge the dissent's view is not a perfect solution, it would force the majority to consider and explore the dissent's viewpoint. This mandate would help encourage that the FSOC makes rational, not political, decisions. This requirement would also better promote transparency throughout the designation process because it would add another avenue for the public to understand the FSOC's decision-making in regards to nonbank financial institutions. By inserting this type of requirement, Congress could perhaps help move the organizational structure towards more collaboration between the agencies.

Requiring a decision-making body to respond to a different opinion is not unprecedented. For instance, Congress enacted the Clean Air Act (the "CAA") in 1973 and gave the Environmental Protection Agency to establish various air quality standards.[227] Through the CAA provisions, Congress also created the Clean Air Scientific Advisory Committee (the "CASAC"), which "provides independent advice to the EPA [] on the technical bases for the EPA's national ambient air quality standards."[228] Additionally,

> When EPA proposes to issue new or revise existing NAAQS, it must set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by CASAC. If the proposed rule differs in any important respect from any of CASAC recommendations, the Agency must provide an explanation of the reasons for such differences.[229]

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[226] *See supra* note 51.
[227] The Clean Air Act, 42 U.S.C. § 7409.
[228] EPA Clean Air Scientific Advisory Committee, The United States Environmental Protection Agency, http://yosemite.epa.gov/sab/sabpeople.nsf/WebCommittees/CASAC (last visited April 24, 2014).
[229] Am. Trucking Associations, Inc. v. E.P.A., 283 F.3d 355, 358 (D.C. Cir. 2002) (internal citations omitted).

Requiring the FSOC majority to respond to the dissent, like with the CASAC, would add a layer of collaboration that would produce more informed results. That is, the voting majority would have to respond to the FSOC members who voted against designation, members who bring their own expertise to the table. In short, this measure would help promote each members' expertise, which would benefit the designation process.

Third, and most importantly, Congress should amend section 113 of the Dodd-Frank Act and remove the Secretary of Treasury's veto power. While the FSOC's structure might help prevent the committee from agency capture from a particular industry, the veto power allows a similar capture problem to occur between the President and the Secretary of Treasury. Unlike the traditional view of agency capture, where, for example, special interest groups representing the insurance industry can influence voting members' decision, the Secretary of Treasury's veto power allows the President to exert influence over the FSOC's designation process. To be sure, the President's influence could only operate to prevent the FSOC from being designated as systemically important. Nonetheless, this type of veto power should raise concerns. Perhaps the biggest concern is that institutions would spend large amounts of money on presidential campaigns. For example, if the current President runs for re-election, institutions that may be on the fringe of being designated would have a large incentive to donate to the President's cause. After all, if that particular institution has a strong relationship with the President, the President could help influence the FSOC's designation process by pressuring the Secretary of Treasury to exercise its veto power. A newly elected President who received large amounts of money from an institution on the fringe may have even stronger motivation to pressure the Secretary of Treasury if that President runs for reelection. The newly elected President would want to remain in that institution's good graces by preventing a designation to encourage donations from that institution.

These concerns are exacerbated given that more industries will be effected in the future—the FSOC only very recently began using the SIFI designation for certain insurance institutions.[230] The FSOC will next consider whether certain "asset management firms—firms that manage the investments of stock and bond mutual funds, 401K retirement, and corporate pension funds" warrant a SIFI designation and continue to exercise its authority under section 113 of the Dodd Frank Act.[231] As the FSOC considers more nonbank institutions from different industries, the likelihood of presidential influence and improper influence will increase.

Likewise, the President could exert influence by exerting pressure on the Secretary to vote against designation simply for policy views. If the President believed in less governmental control, and the President elected a Secretary of Treasury with similar political views, the FSOC could go a whole 4-years without a designation of an institution as systemically important. This lack of designation could occur despite the fact that, hypothetically, nine other FSOC members voted in favor of designation and designating the institution as systemically important would actually help the economy.

By removing the Secretary of Treasury's veto power, Congress would gain more than it lost. The Secretary of Treasury would still be present at the Council's meeting and would still take part in the collaborative process. Congress would be left with a committee made of high-level officials from different agencies and different expertise that would make decisions based on

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[230] *See supra* note 61.
[231] Capital Flows, *Our Worst Fears About Dodd-Frank's FSOC Are Being Confirmed* (11/26/2013 8:00AM), http://www.forbes.com/sites/realspin/2013/11/26/our-worst-fears-about-dodd-franks-fsoc-are-being-confirmed/ (last visited April 24, 2014).

a two-thirds vote. The problem of agency, and presidential capture, would be reduced greatly because of the required two-thirds vote.

But having White House input could have its benefits. For example, the White House brings with it a broader perspective that different agencies provide. Maybe having White House input is something Congress wanted during the designation process and losing that input would leave us with narrow-minded high-level officials. This argument is weak, however, considering the expertise that each member brings to the table and the required two-thirds vote required for the FSOC to classify an institution as systemically important. If the veto is lost, much will be gained.

X. Conclusion

Congress has created a second God Squad in the FSOC, which has the power to designate institutions as SIFIs. Congress gave, however, the Secretary of Treasury the most power throughout the SIFI designation process due in large part to his or her veto power that can shield an institution from designation. This delegation of power raises questions as to the FSOC's structure and why Congress chose to entrust the only voting member who belongs to an executive agency such godly-power.

The simple answer is that Congress sought to give the President more control in the designation process. Congress should amend parts of the Dodd-Frank Act to create a body that is more insulated from outside influences, including agencies and the President. By removing these outside influences, the FSOC would likely make more informed decisions and Congress would better leverage the expertise that each member brings to the table.