

Baked-In Corruption: The Need to Reform Boards and Commissions – Summary*

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“No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.”

– James Madison in *Federalist No. 10*

Legislatures too often give individuals the power to judge their own cause by giving too little thought to the institutional structures of boards and commissions. Special interests often suggest creation of boards and commissions in the first place, receiving overwhelming representation on them at the hand of accommodating lawmakers. The result is that the regulated become the regulators. Those who should be mere participants in programs become overlords of us all. Legislatures must stop creating governance structures where conflicts of interest, self-dealing, and groupthink are to be expected.

- *A pecuniary interest* by an official in a decision that official is involved in making is practically the very definition of a conflict of interest.
 - A pecuniary interest in a decision occurs any time a person will, expects to, or is likely to be financially impacted as a direct result of that decision.
- Public officials have a *fiduciary duty* (an obligation to act in the best interest of someone else) to their constituents as a whole, one of the highest forms of legal obligation.
 - When a person acting in an official capacity has a pecuniary interest in the outcome of decisions they make or help to make self-dealing can be expected.
- *Groupthink* occurs when a group loses a clear view of

reality and of what is moral in its deliberations and decision making due to group pressures, even when attempting to act in good faith.

- *Agency capture* occurs when an agency is largely under the influence of the interest groups that agency is supposed to regulate; the agency acts in the interest of those it regulates.
- Many state regulatory agencies are “captured” *by law* since oversight commissions and boards are packed with representatives of that regulated industry.

Boards with Inherent Conflicts of Interest and Groupthink

Licensing Boards

- Every licensing agency is headed by a board comprised mostly of individuals licensed to practice the profession they regulate.
- Virtually every decision licensing board members make financially impacts their own professional practice directly or indirectly.

Health Boards

- Oklahoma’s Health Department Board and its Health Care Authority both have pluralities one vote short of a majority that are made up of what amount to industry insiders.
- As is often claimed with licensing boards, the problem is making sure boards have expertise, but if an institutional structure cannot avoid conflicts of interest, that structure should be questioned.
- Where expertise is required, it can be consulted, or put on staff if necessary.

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Lawyer and Judicial Boards

- The Oklahoma Bar Association (OBA) is purely a creature of the Supreme Court with no legislative authorization or oversight.
- The OBA, a quasi-private nonprofit, licenses lawyers and its board, elected only by lawyers, includes no non-lawyers.
- Over a third of the members of the Judicial Nominating Commission is made up of OBA members.

Educational Boards

- Of the seven members of the Educational Quality and Accountability Commission, which accredits teacher education programs, certifies teachers, and oversees the state testing system, only two come from the general public; the rest are education insiders.
- The Board of Private Vocational Schools licenses most private jobs-training schools in the state. A plurality one-vote short of majority is industry insiders.
- Public school boards suffer conflict of interest mainly due to the timing of elections and the potential that school employees can determine election outcomes due to low voter turnout.

Institutional Alternatives

Straightforward Governance

- End board/commission governance and appoint individuals to administer programs/agencies and hold them to account.
- This is especially appropriate for the Health Care Authority.

Reconstitute Board/Commission Membership

- Populate Boards/Commissions with knowledgeable industry outsiders.
- Expertise can be consulted or hired onto staffs.

Competition

- End the bulk of regulation and allow market forces to regulate industries.
- Consumers of banking, education, and health care services would all benefit from more competition.

Consumer-Friendly Innovations for Self-Regulation

- Create an environment that encourages industries to self-regulate.
- For licensing, the *21st Century Consumer Protection and Private Certification Act* (available from the 1889 Institute) can serve as a model.

Conclusion

This paper seeks to accomplish two goals:

- Call attention to the fact that states have created institutions that almost automatically lead to corrupt, self-dealing behavior.
- Point out that there are alternative ways to protect the general interest other than creating self-dealing boards and commissions.

The hope is that legislators will learn to recognize for themselves self-serving institutional arrangements and reform them. Then, when legislators are convinced that government action and institutions are warranted, understand that what form these institutions take matters a great deal. Only future legislatures can correct past errors.