

## When Influence Encroaches: Statutory Advice in the Administrative State

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# WHEN INFLUENCE ENCROACHES: STATUTORY ADVICE IN THE ADMINISTRATIVE STATE

William C. Hudson\*

## ABSTRACT

This Article revisits the D.C. Circuit’s 1993 decision in *FEC v. NRA Political Victory Fund*, and concludes that the separation of powers reasoning applied in *NRA Political Victory Fund* could invalidate other common practices in the administrative state, such as statutory requirements that Executive Branch officers serve on the boards of corporations created and staffed by Congress.

|                                                                                                                           |     |
|---------------------------------------------------------------------------------------------------------------------------|-----|
| INTRODUCTION . . . . .                                                                                                    | 658 |
| A. <i>Both Decisional Authority and Advisory Influence Are “Power” for Purposes of the Separation of Powers</i> . . . . . | 658 |
| B. <i>Both “Undermining” and “Aggrandizing” Violate the Separation of Powers</i> . . . . .                                | 659 |
| I. STATUTES GRANTING CONGRESS ADVISORY INFLUENCE OVER THE EXECUTIVE BRANCH . . . . .                                      | 660 |
| A. <i>Corporate Boards</i> . . . . .                                                                                      | 660 |
| B. <i>Advisory Committees</i> . . . . .                                                                                   | 664 |
| 1. <i>Appointment Creep</i> . . . . .                                                                                     | 666 |
| 2. <i>Powerful Committees</i> . . . . .                                                                                   | 668 |
| C. <i>Mandatory Consultations</i> . . . . .                                                                               | 668 |
| II. REGULATORY CAPTURE . . . . .                                                                                          | 669 |
| A. <i>Defined</i> . . . . .                                                                                               | 669 |
| B. <i>Social Psychology</i> . . . . .                                                                                     | 673 |
| C. <i>Political Science</i> . . . . .                                                                                     | 675 |
| 1. <i>Congress</i> . . . . .                                                                                              | 675 |
| 2. <i>Executive Branch</i> . . . . .                                                                                      | 676 |
| III. THE SEPARATION OF POWERS . . . . .                                                                                   | 678 |
| A. <i>NRA Political Victory Fund</i> . . . . .                                                                            | 680 |
| B. <i>Interference with Decision-Making Processes</i> . . . . .                                                           | 684 |
| C. <i>The Formalist Fix</i> . . . . .                                                                                     | 687 |
| CONCLUSION . . . . .                                                                                                      | 689 |

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## INTRODUCTION

This Article addresses a specific legal question: whether Congress violates the separation of powers by requiring Executive Branch officers to serve on the boards of corporations, and on advisory committees, created and staffed by Congress. These statutorily enacted opportunities for Congressional appointees to influence Executive Branch officers' decision-making is what I call "statutory advice." To answer this question, two principles need stating from the start. First, the *type* of power to be separated in our constitutional structure is both the actual authority to decide an issue ("decisional authority") and the power arising from opportunities to influence decision makers ("advisory influence"). This was the holding of *FEC v. NRA Political Victory Fund*<sup>1</sup> in the D.C. Circuit, and was also suggested by the Supreme Court in *Bowsher v. Synar*.<sup>2</sup> Second, to violate the separation of powers, one branch need only be "undermined;" there need not be "aggrandizement," or the assumption of additional powers by another branch. Next, these two principles are discussed in more detail.

*A. Both Decisional Authority and Advisory Influence Are "Power" for Purposes of the Separation of Powers*

Courts have, at times, conducted separation of powers analysis by taking stock of power—not just as a formal grant of decisional authority, but also as the opportunity for advisory influence.<sup>3</sup> A comparison of three cases—*INS v. Chadha*,<sup>4</sup> *FEC v. NRA Political Victory Fund*, and *Bowsher v. Synar*—will illustrate this principle.

In *INS v. Chadha*, the Supreme Court held unconstitutional a statute granting the House of Representatives the power to veto certain executive branch decisions.<sup>5</sup> By contrast, in *FEC v. NRA Political Victory Fund*, the D.C. Circuit held unconstitutional an arrangement in which Congressional agents, though not possessing any powers to vote on the Commission, had been given *ex officio* advisory roles on the Commission.<sup>6</sup> Finally, whereas *Chadha* and *NRA Political Victory Fund* are at opposite ends of the spectrum in terms of the *type* of power to be separated, *Bowsher v. Synar* registers somewhere between them. In *Bowsher*, the Supreme Court held that the Comptroller General could not balance the budget pursuant to the Gramm-Rudman-Hollings Act because the Comptroller General is an agent of Congress, not the Executive Branch.<sup>7</sup>

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<sup>1</sup> 6 F.3d 821 (D.C. Cir. 1993).

<sup>2</sup> 478 U.S. 714 (1986).

<sup>3</sup> Cf. HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATIONS 44 (4th ed. 1997) ("Administrative description suffers currently from superficiality, over-simplification, lack of realism. It has confined itself too closely to the mechanism of authority, and has failed to bring within its orbit the other, equally important, modes of influence on organizational behavior.").

<sup>4</sup> 462 U.S. 919 (1983).

<sup>5</sup> *Id.* at 959.

<sup>6</sup> 6 F.3d at 828.

<sup>7</sup> 478 U.S. 714, 736 (1986).

In reaching this conclusion regarding the Comptroller General's status, the Court weighed both the formal authorities and the informal influences bearing upon the Comptroller General.<sup>8</sup> The Court reasoned that, as a formal matter, the Comptroller General was removable only by Congress, and also that "the political realities reveal that the Comptroller General is [not] free from influence by Congress."<sup>9</sup> Instead, "Congress has consistently viewed the Comptroller General as an officer of the Legislative Branch," and "the Comptrollers General have also viewed themselves as part of the Legislative Branch."<sup>10</sup> In short, the Court in *Bowsher* considered both formal authorities and informal influences bearing upon the Comptroller General.

*B. Both "Undermining" and "Aggrandizing" Violate the Separation of Powers*

The Supreme Court has stated a second principle repeatedly—for example, in *Loving v. United States*,<sup>11</sup> *Commodity Futures Trading Commission v. Schor*,<sup>12</sup> and *Nixon v. Administrator of General Services*<sup>13</sup>—that one branch violates the separation of powers when it undermines the constitutionally assigned powers of another branch, even without aggrandizing its own powers.<sup>14</sup> Consistent with these decisions, the Office of Legal Counsel has repeatedly objected to any legislation "that unduly reduces the accountability of officials or agencies to the President, or that unnecessarily interferes with the flexibility and efficiency of executive decision making and action,"<sup>15</sup> because doing so undermines the Executive Branch.<sup>16</sup> Legislative "attempts to dictate the processes of executive deliberation, and legislation that has the purpose or would have the effect of 'micromanaging' executive action" threatens the separation of

<sup>8</sup> See *id.* at 732–34.

<sup>9</sup> *Id.* at 730.

<sup>10</sup> *Id.* at 731.

<sup>11</sup> 517 U.S. 748, 757 (1996) ("Even when a branch does not arrogate power to itself, moreover, the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties." (citing *Mistretta v. United States*, 488 U.S. 361, 397–408 (1989))).

<sup>12</sup> 478 U.S. 833, 856–57 (1986) ("Unlike *Bowsher*, this case raises no question of the aggrandizement of congressional power at the expense of a coordinate branch. Instead, the separation of powers question presented in this litigation is whether Congress impermissibly undermined, without appreciable expansion of its own power, the role of the Judicial Branch.").

<sup>13</sup> 433 U.S. 425, 443 (1977) ("[I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions." (citing *United States v. Nixon*, 418 U.S. 683, 711–12 (1974))).

<sup>14</sup> See *Loving*, 517 U.S. at 757; *Schor*, 478 U.S. at 856–57; *Nixon*, 433 U.S. at 443.

<sup>15</sup> The Constitutional Separation of Powers Between the President & Cong., 20 Op. O.L.C. 124, 135 (1996); see also Constitutionality of Statute Requiring Exec. Agency to Report Directly to Cong., 6 Op. O.L.C. 632, 638 (1982) ("[T]he constitutional separation of powers requires the President to have effective control over the decisionmaking process within the Executive Branch.").

<sup>16</sup> See The Constitutional Separation of Powers Between the President & Cong., 20 Op. O.L.C. 124, 176–77 (1996).

powers because it “undercuts the constitutional purpose of creating an energetic and responsible executive branch.”<sup>17</sup> In short, legislation that “undermines” the Executive Branch violates the separation of powers, and “interference” with “executive decision making” constitutes “undermining.”

These principles, in combination, suggest that statutes that could legitimately be claimed to contribute to the “regulatory capture” of the Executive Branch would likewise be a violation of the separation of powers. If regulatory capture is anything, it is a loss in “accountability of officials or agencies to the President” and a reduction in “the flexibility and efficiency of executive decision making and action”—to use Assistant Attorney General of the Office of Legal Counsel Walter Dellinger’s terms.<sup>18</sup> The concept of regulatory capture is discussed in Part II; but first, Part I discusses statutes that grant Congress the power to exert advisory influence over the Executive Branch.

#### I. STATUTES GRANTING CONGRESS ADVISORY INFLUENCE OVER THE EXECUTIVE BRANCH

[The legislative branch’s] constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments.

—James Madison<sup>19</sup>

##### *A. Corporate Boards*

Congress has been creating corporations to supplement government functions—that is, to perform functions it considers better suited for the private sector—ever since the First Congress created the First Bank of the United States in 1791.<sup>20</sup> Of course, Congress continues to create such entities. These corporations include household names such as AMTRAK,<sup>21</sup> Freddie Mac,<sup>22</sup> and the Smithsonian Institution,<sup>23</sup> and many lesser or virtually unknown entities such as the U.S. Institute of Peace,<sup>24</sup> the American Institute in Taiwan,<sup>25</sup> and the National Environmental Education and Training

<sup>17</sup> *Id.* at 135.

<sup>18</sup> *Id.*

<sup>19</sup> THE FEDERALIST NO. 48 (James Madison).

<sup>20</sup> *See generally* Act of Feb. 25, 1791, ch. 10, 1 Stat. 191.

<sup>21</sup> Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105-134, 111 Stat. 2570.

<sup>22</sup> Emergency Home Finance Act of 1970, Pub. L. No. 91-351, 84 Stat. 450 (establishing the Federal Home Loan Mortgage Corporation, commonly known as Freddie Mac).

<sup>23</sup> Act of Aug. 10, 1846, ch. 178, 9 Stat. 102 (establishing the Smithsonian Institute “for the increase and diffusion of knowledge”).

<sup>24</sup> United States Institute of Peace Act, Pub. L. No. 98-525, 98 Stat. 2492, 2649 (1984) (codified as amended at 22 U.S.C. §§ 4601–11 (2012)).

<sup>25</sup> Taiwan Relations Act, Pub. L. No. 96-8, § 6, 93 Stat. 14, 17 (1979) (codified at 22 U.S.C. §§ 3301–16 (2012)).

Foundation.<sup>26</sup> They include private and publicly traded corporations, government-controlled or merely government-sponsored corporations, and for-profit and non-profit corporations.<sup>27</sup>

Of particular relevance to this Article is the fact that since at least 1967, with the creation of the National Park Foundation, Congress has been creating corporations whose stated purpose is to supplement executive branch agencies, primarily by serving as vehicles for private donations that can be directed towards particular agency activities that align with donors' programmatic preferences.<sup>28</sup> Corporations of this type include: the Reagan-Udall Foundation (supporting the Food and Drug Administration),<sup>29</sup> the Foundation for the National Institutes of Health,<sup>30</sup> the Centers for Disease Control

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<sup>26</sup> National Environmental Education Act, Pub. L. No. 101-619, § 10, 104 Stat. 3325, 3335–39 (1990) (codified at 20 U.S.C. § 5509 (2012)).

<sup>27</sup> See generally MARSHALL J. BREGER & GARY J. EDLES, *INDEPENDENT AGENCIES IN THE UNITED STATES: LAW, STRUCTURE, AND POLITICS* 249–87 (2015); JONATHAN G S KOPPELL, *THE POLITICS OF QUASI-GOVERNMENT: HYBRID ORGANIZATIONS AND THE DYNAMICS OF BUREAUCRATIC CONTROL* (2003); KEVIN R. KOSAR, CONG. RESEARCH SERV., RL30533, *THE QUASI GOVERNMENT: HYBRID ORGANIZATIONS WITH BOTH GOVERNMENT AND PRIVATE SECTOR LEGAL CHARACTERISTICS* (2011); KEVIN R. KOSAR, CONG. RESEARCH SERV., RL30340, *CONGRESSIONALLY CHARTERED NONPROFIT ORGANIZATIONS (“TITLE 36 CORPORATIONS”): WHAT THEY ARE AND HOW CONGRESS TREATS THEM* (2011); U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-97, *FEDERALLY CREATED ENTITIES: AN OVERVIEW OF KEY ATTRIBUTES* (2009); A. Michael Froomkin, *Reinventing the Government Corporation*, 1995 U. ILL. L. REV. 543; Anne Joseph O'Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 855–61 (2014); Thomas H. Stanton & Ronald C. Moe, *Government Corporations and Government-Sponsored Enterprises*, in *THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE* 80 (Lester M. Salamon ed., 2002).

<sup>28</sup> See, e.g., Act of Dec. 18, 1967, Pub. L. No. 90-209, 81 Stat. 656 (codified as amended at 54 U.S.C. subchapter II of Chapter 1011 (Supp. II 2012)) (“That in order to encourage private gifts of real and personal property or any income therefrom or other interest therein for the benefit of, or in connection with, the National Park Service, its activities, or its services, and thereby to further the conservation of natural, scenic, historic, scientific, educational, inspirational, or recreational resources for future generations of Americans, there is hereby established a charitable and nonprofit corporation to be known as the National Park Foundation to accept and administer such gifts.”); see also *About the Foundation*, NAT'L PARK FOUND., <http://www.nationalparks.org/about-foundation> [<https://perma.cc/3N62-EMBG>] (last visited Feb. 21, 2018) (stating that the National Park Foundation's “mission is to [directly] support the National Park Service”).

<sup>29</sup> Food and Drug Administration Amendments Act of 2007, Pub. L. No. 110-85, 121 Stat. 823 (codified in scattered sections of 21 U.S.C.). “The purpose of the Foundation is to advance the mission of the Food and Drug Administration to modernize medical, veterinary, food, food ingredient, and cosmetic product development, accelerate innovation, and enhance product safety.” 21 U.S.C. § 379dd(b) (2012).

<sup>30</sup> National Institutes of Health Amendments of 1990, Pub. L. No. 101-613, § 2, 104 Stat. 3224, 3224–27 (codified as amended at 42 U.S.C. § 290b (2012)). “The purpose of the Foundation shall be to support the National Institutes of Health in its mission (including collection of funds for pediatric pharmacologic research), and to advance collaboration with biomedical researchers from universities, industry, and nonprofit organizations.” 42 U.S.C. § 290b(b).

and Prevention (CDC) Foundation,<sup>31</sup> the Foundation for the Advancement of Military Medicine (supporting the Uniformed Services University of the Health Sciences),<sup>32</sup> the National Fish and Wildlife Foundation (supporting the U.S. Fish and Wildlife Service),<sup>33</sup> the National Forest Foundation (supporting the National Forest Service),<sup>34</sup> and the Foundation for Food and Agriculture Research (supporting the Department of Agriculture).<sup>35</sup>

Congress is increasingly granting itself the power to appoint the board members of these nonprofit corporations. For example, the 21st Century Cures Act, which passed the House in 2015,<sup>36</sup> would have created the 21st Century Cures Act Council, authorizing the Comptroller General<sup>37</sup> to appoint all seventeen<sup>38</sup> board members serving

<sup>31</sup> Preventive Health Amendments of 1992, Pub. L. No. 102-531, § 201, 106 Stat. 3469, 3475 (codified as amended at 42 U.S.C. § 280(e)-11(b) (2012)) (“The purpose of the Foundation shall be to support and carry out activities for the prevention and control of diseases, disorders, injuries, and disabilities, and for promotion of public health.”).

<sup>32</sup> Foundation for the Advancement of Military Medicine Act of 1983, Pub. L. No. 98-36, § 2, 97 Stat. 200 (codified as amended at 10 U.S.C. § 178 (2012)).

<sup>33</sup> National Fish and Wildlife Foundation Establishment Act, Pub. L. No. 98-244, § 2(b), 98 Stat. 107, 107 (1984) (codified as amended at 16 U.S.C. § 3701 (2012)) (“The purposes of the Foundation are—(1) to encourage, accept, and administer private gifts of property for the benefit of, or in connection with, the activities and services of the United States Fish and Wildlife Service; and (2) to undertake and conduct such other activities as will further the conservation and management of the fish, wildlife, and plant resources of the United States, and its territories and possessions, for present and future generations of Americans.”).

<sup>34</sup> National Forest Foundation Act, Pub. L. No. 101-593, § 402(b), 104 Stat. 2969, 2970 (1990) (codified as amended at 16 U.S.C. 583j (2012)) (“The purposes of the Foundation are to—(1) encourage, accept, and administer private gifts of money, and of real and personal property for the benefit of, or in connection with, the activities and services of the Forest Service of the Department of Agriculture; (2) undertake and conduct activities that further the purposes for which units of the National Forest System are established and are administered and that are consistent with approved forest plans; and (3) undertake, conduct and encourage educational, technical and other assistance, and other activities that support the multiple use, research, cooperative forestry and other programs administered by the Forest Service.”).

<sup>35</sup> Agricultural Act of 2014, Pub. L. No. 113-79, § 7601, 128 Stat. 649, 904–911 (codified as amended at 7 U.S.C. § 5939 (Supp. III 2015)) (“The purposes of the Foundation shall be—(1) to advance the research mission of the Department [of Agriculture] . . .”).

<sup>36</sup> H.R. 6, 114th Cong. § 1141 (as passed by House, July 10, 2015).

<sup>37</sup> As discussed above, the Supreme Court held that the Comptroller General is an agent of Congress. *Bowsher v. Synar*, 478 U.S. 714, 731 (1986) (“It is clear that Congress has consistently viewed the Comptroller General as an officer of the Legislative Branch. . . . Over the years, the Comptrollers General have also viewed themselves as part of the Legislative Branch.”); *see also* S. 421, A Bill to Require the Comptroller General to Ascertain Increases in the Cost of Major Acquisition Programs of Civilian Agencies and to Limit the Expenditure of Fed. Funds to Carry Out Those Programs, 7 Op. O.L.C. 162 (1983) (arguing that the Comptroller General is an agent of Congress and may not be granted executive functions).

<sup>38</sup> H.R. 6, § 1141. These seventeen representatives were four representatives of the pharmaceutical industry, two representatives of the medical device industry, two representatives of the information and digital technology industry, two representatives of academic researchers,

alongside eight executive branch officials, including the Director of the National Institutes of Health, the Commissioner of the FDA, the Administrator of CMS, and “[t]he heads of five other Federal agencies deemed by the Secretary to be engaged in biomedical research and development.”<sup>39</sup> The bill, in other words, provided for Congress to appoint seventeen persons who would thereby be entitled to regular, mandatory meetings with the heads of executive branch agencies. In 2016, Congress passed a revised version of the 21st Century Cures Act, which instead expanded the board membership of the pre-existing Reagan-Udall Foundation, thereby achieving a similar outcome.<sup>40</sup>

President Reagan understood such appointment schemes to be unconstitutional violations of the separation of powers. For example, when President Reagan signed into law the statute creating the Foundation for the Advancement of Military Medicine,<sup>41</sup> he issued a signing statement making clear that the “reservation by Congress of the power to appoint the officers who are to discharge the legal responsibilities of the Foundation . . . constitutes a violation of the principle of the separation of powers.”<sup>42</sup> Executive Branch objections to these arrangements are discussed more fully in Part III below.

At times, Congress has used fairly convoluted means of controlling appointments to the corporate boards it creates. For example, the appointment structure of the Foundation for the National Institutes of Health, enacted into law in 1990, requires that four members of Congress serve on the board along with two Executive Branch officials; then, by three-fifths agreement these initial six persons appoint the additional board members, after which time, the statute then provides for the four members of Congress to discontinue serving on the board.<sup>43</sup> However, because four out of six (0.67) is greater than the necessary three-fifths (0.60) to appoint, the four members of Congress could simply decide amongst themselves whom to appoint.<sup>44</sup>

Of course, the preferences of Congress and the current administration may align, and they may seek to secure their mutual donor-constituent’s access to, and influence within, a future administration. That would be one interpretation of the Reagan-Udall Foundation’s appointment structure.<sup>45</sup> Created pursuant to a law enacted in

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three representatives of patients, two representatives of health care providers, and two representatives of health care plans and insurers. *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> 21st Century Cures Act, Pub. L. No. 114-255, § 3076, 130 Stat 1033, 1139 (2016).

<sup>41</sup> Foundation for the Advancement of Military Medicine Act of 1983, Pub. L. No. 98-36, § 2, 97 Stat. 200 (codified as amended at 10 U.S.C. 178 (2012)).

<sup>42</sup> Presidential Statement on Signing the Foundation for the Advancement of Military Medicine Act of 1983, 19 WEEKLY COMP. PRES. DOC. 788, 789 (May 27, 1983).

<sup>43</sup> National Institutes of Health Amendments of 1990, Pub. L. No. 101-613, § 2, 104 Stat. 3224, 3225 (codified as amended at 42 U.S.C. § 290b (2012)).

<sup>44</sup> *See id.*

<sup>45</sup> It may be worth noting the larger political and agency context into which the Foundation was enacted, as circumstantial evidence of sorts about its purpose (or one of its purposes). In terms of national politics, the Bush Administration’s approval rating at the time was below 40% and still falling, signaling the likelihood of a less “industry-friendly” Democratic Party victory



2007, it provides that four *ex officio* members of the current administration appoint by majority vote the initial fourteen board members, but future board members are to be appointed by the existing board—not a future administration’s executive officials—even though the future administration’s officials are also required by the statute to sit on the board.<sup>46</sup> The result is that the outgoing administration’s chosen persons (presumably, donor-constituents, their agents, or allies) will enjoy legislatively required access to the next administration’s officials.<sup>47</sup>

### B. Advisory Committees

It was with the rise of the modern administrative state, and its many agencies’ mandates to make rules based on expert knowledge and technical information, in which the modern “advisory state” came into being. By mid-century, “executive branch procedures for regulating public committees reflected concerns that public committees could

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in the next Presidential election. *See Presidential Approval Ratings—George W. Bush*, GALLUP, <https://news.gallup.com/poll/116500/presidential-approval-ratings-george-bush.aspx> [<https://web.archive.org/save/http://news.gallup.com/poll/116500/presidential-approval-ratings-george-bush.aspx>] (last visited Feb. 21, 2018). With respect to the FDA in particular, the Institute of Medicine (IOM) and Government Accountability Office (GAO) published in-depth reports concluding that the agency needs to reduce financial conflicts of interest among its advisory committee members, and to otherwise improve agency decision-making processes. In other words, the Foundation was enacted when the industry’s future access to the agency appeared comparatively uncertain. *See INST. OF MED. OF THE NAT’L ACADS., THE FUTURE OF DRUG SAFETY: PROMOTING AND PROTECTING THE HEALTH OF THE PUBLIC* 141 (Alina Baciú et al. eds, 2007) (“The committee recommends FDA establish a requirement that a substantial majority of the members of each advisory committee be free of significant financial involvement with companies whose interests may be affected by the committee’s deliberations.”); U.S. GOV’T ACCOUNTABILITY OFF., GAO-08-640, *FDA ADVISORY COMMITTEES: PROCESS FOR RECRUITING MEMBERS AND EVALUATING POTENTIAL CONFLICTS OF INTEREST* (2008); NYSSA ACKERLEY, JOHN EYRAUD, MARISA MAZZOTTA, E. RESEARCH GRP., *MEASURING CONFLICT OF INTEREST AND EXPERTISE ON FDA ADVISORY COMMITTEES* (2007), <http://www.fda.gov/downloads/AdvisoryCommittees/AboutAdvisoryCommittees/UCM165332.pdf> [<https://perma.cc/SSQ3-WJSL>]; U.S. GOV’T ACCOUNTABILITY OFF., GAO-07-856T, *DRUG SAFETY: FURTHER ACTIONS NEEDED TO IMPROVE FDA’S POSTMARKET DECISION-MAKING PROCESS* (2007), <http://www.gao.gov/assets/120/116573.pdf> [<https://perma.cc/L8J2-3EXM>]; *see also* Gardiner Harris, *At F.D.A., Strong Drug Ties and Less Monitoring*, N.Y. TIMES (Dec. 6, 2004), <https://nyti.ms/2F0B7kn>. For a discussion of how these public reports affected the FDA, see Susan L. Moffitt, *The Policy Impact of Public Advice: The Effects of Advisory Committee Transparency on Regulatory Performance*, in *REGULATORY BREAKDOWN: THE CRISIS OF CONFIDENCE IN U.S. REGULATION* 180 (Cary Coglianese ed., 2012).

<sup>46</sup> 21 U.S.C. § 379dd(d)(1) (2012).

<sup>47</sup> The Rural Tourism Development Foundation had a similar appointment scheme. Created in September 1992, the first Bush Administration appointed its initial members, but subsequent members would be appointed according to the bylaws of the Foundation—not by the next administration—even though the next administration’s officials were required to serve as *ex officio* members. *See* Tourism Policy and Export Promotion Act of 1992, Pub. L. No. 102-372, § 4, 106 Stat. 1170, 1171–72 (codified as amended at 22 U.S.C. § 2124c(c) (2012)).

give private industry privileged and potentially undemocratic access to agency policy-making.<sup>48</sup> In 1972, Congress passed the Federal Advisory Committee Act,<sup>49</sup> the stated purpose of which was to limit the influence of private interests via advisory committees, in part by “requir[ing] the membership of [advisory committees created by Congress] to be fairly balanced in terms of the points of view represented and the functions to be performed.”<sup>50</sup> Today, statutes that create advisory committees oftentimes satisfy this requirement by requiring a specified diversity of qualifications<sup>51</sup> or interests represented.<sup>52</sup>

In 2016, there were 1,062 federal advisory committees including some 68,000 persons,<sup>53</sup> figures which have remained remarkably consistent over the past

<sup>48</sup> SUSAN L. MOFFITT, MAKING POLICY PUBLIC: PARTICIPATORY BUREAUCRACY IN AMERICAN DEMOCRACY 61 (2014).

<sup>49</sup> Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972).

<sup>50</sup> *Id.* § 5(b)(2), 86 Stat. at 771. *But see* Pub. Citizen v. Nat’l Advisory Comm. on Microbiological Criteria for Foods, 886 F.2d 419, 426–30 (D.C. Cir. 1989) (Silberman, J., concurring) (stating that balanced viewpoint requirement in § 5(b)(2) of FACA is not justiciable); *Nw. Forest Res. Council v. Espy*, 846 F. Supp. 1009, 1015 (D.D.C. 1994) (refusing to enjoin the President from acting on advice obtained from an advisory committee in violation of FACA); *but see also* Mark B. Brown, *Fairly Balanced: The Politics of Representation on Government Advisory Committees*, 61 POL. RES. Q. 547, 551–53 (2008) (summarizing federal courts’ adjudication of advisory committee balance requirements).

<sup>51</sup> *See, e.g.*, National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 576, 126 Stat. 1632, 1758–62 (“The members of each panel shall be selected from among private United States citizens who collectively possess expertise in military law, civilian law, the investigation, prosecution, and adjudication of sexual assaults in State and Federal criminal courts, victim advocacy, treatment for victims, military justice, the organization and missions of the Armed Forces, and offenses relating to rape, sexual assault, and other adult sexual assault crimes.”).

<sup>52</sup> *See, e.g.*, National Quality Council, 15 U.S.C. § 3717(b) (2012) (“Members shall include—(1) at least 2 but not more than 3 representatives from manufacturing industry; (2) at least 2 but not more than 3 representatives from service industry; (3) at least 2 but not more than 3 representatives from national Quality not-for-profit organizations; (4) two representatives from education, one with expertise in elementary and secondary education, and one with expertise in post-secondary education; (5) one representative from labor; (6) one representative from professional societies; (7) one representative each from local and State government; (8) one representative from the Federal Quality Institute; (9) one representative from the National Institute of Standards and Technology; (10) one representative from the Department of Defense; (11) one representative from a civilian Federal agency not otherwise represented on the Council, to be rotated among such agencies every 2 years; and (12) one representative from the Foundation for the Malcolm Baldrige National Quality Award.”); *see also* Forestry Advisory Council, 16 U.S.C. § 2105(g) (2012) (listing the composition requirements of the National Urban and Community Forestry Advisory Council); Tobacco Products Scientific Advisory Committee, 21 U.S.C. § 387q(b)(1)(A) (2012) (listing the membership requirements for the Tobacco Products Scientific Advisory Committee); Towing Safety Advisory Committee, 33 U.S.C. § 1231a(a) (2012) (listing the membership requirements for the Towing Safety Advisory Committee).

<sup>53</sup> *See* Federal Advisory Committees by Agency, FACA DATABASE (last visited Feb. 21,

decade.<sup>54</sup> The vast majority of these advisory committees are appointed entirely by the President or another executive branch official, with Congress appointing members in approximately less than two percent of committees.<sup>55</sup> Interestingly, the issue of who has the power to appoint advisory committee members is nowhere addressed in FACA,<sup>56</sup> with the default at the time,<sup>57</sup> as now, seeming to be that the President and executive agencies would appoint their own advisors.

It would require focused research to determine whether Congress has in fact granted itself materially more appointment powers over time. What can be said for sure is that Congress oftentimes grants itself no, or modest, appointment powers initially, but then later increases its share of appointment powers years after creating a committee (“appointment creep”); and that in some circumstances Congress grants itself the overwhelming share of appointment powers to new—and powerful—committees.

### 1. Appointment Creep

Examples of increasing appointment powers over time include the National Advisory Committee on Institutional Quality and Integrity, created in 1998,<sup>58</sup> which

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2018), <http://www.facadatabase.gov/rpt/rptq01.asp?hdr=0> [<https://perma.cc/ZZH3-PJWW>] (select all agencies from first dropdown menu, then 2016 in the second dropdown bar, then click search).

<sup>54</sup> See, e.g., WENDY GINSBERG, CONG. RESEARCH SERV., R44248, THE FEDERAL ADVISORY COMMITTEE ACT: ANALYSIS OF OPERATIONS AND COSTS 7 (“[T]he number of FACA committee members remained around 70,000 per year from FY2004 through FY2014, the only exception being FY2009, when membership rose by 28.4% (an increase of 18,113 members).”).

<sup>55</sup> Advisory committees first began reporting the “appointment type” of every member in 2001 to the FACA database. Unfortunately, however, the reporting to the database clearly contains some errors with respect to appointment type, the existence of which I have confirmed with agency officials by email. Therefore, determining an exact figure on the number of committees with Congressional appointments would require cross-checking all 1000+ committees in the database with their enabling statutes. Still, the errors appear to be relatively minimal, and after conducting extensive but not exhaustive crosschecking, it appears that approximately 1.1% and 1.6% of advisory committees included Congressional appointees in 2001 and 2014, respectively. *FACA Membership*, OFF. OF THE GEN. COUNS., <https://ogc.commerce.gov/page/Faca-membership> [<https://perma.cc/2QDG-GVF6>] (last visited Feb. 21, 2018). See generally FED. ADVISORY COMMITTEE ACT DATABASE, <http://www.facadatabase.gov/datasets/> [<https://perma.cc/FBR5-WVHT>] (last visited Feb. 21, 2018).

<sup>56</sup> See generally Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972).

<sup>57</sup> COMM. ON GOV'T OPERATIONS, THE ROLE AND EFFECTIVENESS OF FEDERAL ADVISORY COMMITTEES, H.R. REP. NO. 91-1731, at 23 (1970) (making recommendations for what “the departments and agencies” should do with respect to advisory committee appointments, without any references to Congressional appointments); see also *FACA Membership*, *supra* note 55.

<sup>58</sup> See Higher Education Amendments of 1998, Pub. L. No. 105-244, § 101, 112 Stat. 1581, 1592–93.

originally consisted of fifteen members appointed by the Secretary of Education;<sup>59</sup> in 2008, however, Congress changed the total to eighteen members, six appointed by the Speaker of the House, six by the President pro tempore of the Senate, and just six appointed by the Secretary.<sup>60</sup> Another example is the Coordinating Council on Juvenile Justice and Delinquency Prevention, created in 1974,<sup>61</sup> originally consisting of only executive branch appointees<sup>62</sup> until six congressional appointees were added in 1992,<sup>63</sup> and a seventh in 2010.<sup>64</sup> There are many examples of this practice.<sup>65</sup>

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<sup>59</sup> *Id.*

<sup>60</sup> Higher Education Opportunity Act, Pub. L. No. 110-315, § 106, 122 Stat. 3078, 3090–93 (2008) (codified as amended at 20 U.S.C. § 1011c (2012)).

<sup>61</sup> *See* Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, § 207, 88 Stat. 1109, 1117.

<sup>62</sup> Technically, the 1974 statute created the Coordinating Council consisting only of *ex officio* Executive Branch officials, and a separate advisory committee advising the Coordinating Council consisted of only private citizens appointed by the President. *See id.* These are now regarded as a single advisory committee. *See Charter, COORDINATING COUNCIL ON JUV. JUST. AND DELINQ. PREVENTION*, [https://www.juvenilecouncil.gov/materials/OJP\\_Charter\\_Renewal\\_Juv\\_Justic\\_and\\_Deliq\\_Prev\\_Council\\_AG\\_signed.pdf](https://www.juvenilecouncil.gov/materials/OJP_Charter_Renewal_Juv_Justic_and_Deliq_Prev_Council_AG_signed.pdf) [<https://perma.cc/R7HS-8NDX>] (last visited Feb. 21, 2018).

<sup>63</sup> Act of Nov. 4, 1992, Pub. L. No. 102-586, § 2, 106 Stat. 4982, 4984–5017 (“Three members shall be appointed by the Speaker of the House of Representatives, after consultation with the minority leader of the House of Representatives” and “[t]hree members shall be appointed by the majority leader of the Senate, after consultation with the minority leader of the Senate”).

<sup>64</sup> Indian Arts and Crafts Amendments Act of 2010, Pub. L. No. 111-211, § 246, 124 Stat. 2258, 2295–96 (adding one member to the advisory council and providing that “[o]ne member shall be appointed by the Chairman of the Committee on Indian Affairs of the Senate, in consultation with the Vice Chairman of that Committee and the Chairman and Ranking Member of the Committee on Natural Resources of the House of Representatives”).

<sup>65</sup> *Compare, e.g.,* National Council on the Arts, 20 U.S.C. § 955(b) (2012) (stating that six members of Congress are appointed by *ex officio* members of Congress), *with* National Arts and Cultural Development Act of 1964, Pub. L. No. 88-579, § 5(a), 78 Stat. 905, 905–06 (stating that original membership consisted of twenty-four members appointed by the President, a Chairperson appointed by the President, and the Secretary of the Smithsonian *ex officio*); National Committee on Vital and Health Statistics, 42 U.S.C. § 242k (2012) (stating that one member is appointed by the Speaker of the House of Representatives after consultation with the Minority Leader of the House of Representatives, one member is appointed by the President *pro tempore* of the Senate after consultation with the Minority Leader of the Senate, and sixteen members appointed by the Secretary), *with* Health Services Research and Evaluation and Health Statistics Act of 1974, Pub. L. No. 93-353, § 105, 88 Stat. 362, 365–67 (originally providing for a committee consisting of fifteen members appointed entirely by the Secretary); Higher Education Opportunity Act, Pub. L. No. 110-315, § 494C, 122 Stat. 3078, 3319–24 (2008) (stating that four members are appointed by the President pro tempore of the Senate, four members are appointed by the Speaker of the House of Representatives, and three members are appointed by the Secretary to the Advisory Committee on Student Financial Assistance), *with* Higher Education Act of 1965, Pub. L. No. 89-329, § 109(a), 79 Stat. 1219, 1223 (stating that the President appoints twelve members to the original committee, called the National Advisory Council on Extension and Continuing Education); National Foundation on the Arts and the Humanities

## 2. Powerful Committees

An example of a powerful advisory committee consisting almost entirely of Congressional appointees is the Health Information Technology Policy Committee, a federal advisory committee created in 2009 with the prodigious assignment of recommending “a policy framework for the development and adoption of a nationwide health information technology infrastructure.”<sup>66</sup> Pursuant to the enabling statute, the Comptroller General of the United States appoints thirteen members, and *ex officio* members of Congress appoint an additional four.<sup>67</sup> The Secretary of Health and Human Services (HHS) appoints just three members, though one must represent HHS and one must be a public health official,<sup>68</sup> therefore, among the twenty-member committee advising the Executive Branch in formulating its policy on this matter, the Secretary may select just one or two members from outside government to advise the agency<sup>69</sup>—all of the other advisors are congressional appointees.

### C. Mandatory Consultations

A more straightforward tool that Congress sometimes employs is to require that the President or other executive branch officials “consult” with specific interest groups before taking some specified action.<sup>70</sup> These are opportunities for industry

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Amendments of 1973, Pub. L. No. 93-133, § 2, 87 Stat. 461, 462–64 (codified as amended at 20 U.S.C. § 958(b) (2012)) (stating that the Foundation includes “a member designated by the Chairman of the Senate Commission on Art and Antiquities, and a member designated by the Speaker of the House”), with National Foundation on the Arts and the Humanities Act of 1965, Pub. L. No. 89-209, § 8, 79 Stat. 845, 851 (originally including no Congressional appointees).

<sup>66</sup> Health Information Technology for Economic and Clinical Health Act of 2009, Pub. L. No. 111-5, § 13101, 123 Stat. 228, 228–42 (codified as amended at 42 U.S.C. § 300jj-12(b) (2012)).

<sup>67</sup> *Id.* (codified as amended at 42 U.S.C. § 300jj-12(c)).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* The statute also provides for “[s]uch other members as shall be appointed by the President as representatives of other relevant Federal agencies,” but does not provide for other appointees from outside of the federal government. *Id.*

<sup>70</sup> *See, e.g.*, 19 U.S.C. § 2512(c)(3) (2012) (discussing the President’s authority to encourage reciprocal competitive procurement practices, and stating “the President shall consult with representatives of the public, industry, and labor, and make available pertinent, nonconfidential information obtained in the course of such preparation to the advisory committees established pursuant to section 2155 of this title”); *id.* § 3108(a), (d) (discussing the President’s responsibilities for outside consultation with respect to telecommunications trade); 22 U.S.C. § 4703(c) (2012) (profiling the President’s responsibility to consult “United States institutions of higher education, educational exchange organizations, United States missions in developing countries, and the governments of participating countries” before providing undergraduate scholarships through the United States Information Agency); 33 U.S.C. § 2711 (2012)

to make its pitch to the Executive Branch before it makes certain decisions. They are legislatively granted rights of access to Executive Branch officials.

## II. REGULATORY CAPTURE

### A. Defined

There are many definitions of capture.<sup>71</sup> What follows is a lengthy discussion about these definitions. Regulatory capture is defined here to mean: *the result or process by which regulation, in law or application, through means induced by industry, is directed away from the public interest and towards the interests of the*

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(stating that the President must consult with affected trustee regarding removal efforts of discharged oil); 50 U.S.C. § 4605(d), (f) (Supp. III 2015) (discussing the President's responsibility to consult other countries and Congress when implementing export controls); *see also* Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 YALE L.J. 51, 102 (1994) (discussing the International Security and Development Cooperation Act of 1985, which requires the President to consult Congress extensively before implementing his authority under said Act).

<sup>71</sup> Susan Webb Yackee, *An Agent, but an Agent of Whom? Organized Interests and the U.S. Bureaucracy* (2003) (unpublished Ph.D. dissertation, University of North Carolina at Chapel Hill) (on file with author) ("There are many definitions of *agency capture*; however, I use the term to refer to the broad notion that federal agencies are more responsive to their clientele group(s) than to the general public or the general public's elected representatives." (citation omitted)). Yackee elsewhere defines capture "as the control of agency policy decision making by a subpopulation of individuals or organizations external to the agency." Susan Webb Yackee, *Reconsidering Agency Capture During Regulatory Policymaking*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 292, 300 (Daniel Carpenter & David A. Moss eds., 2014) [hereinafter PREVENTING REGULATORY CAPTURE] (emphasis removed). In the 1970s, economists such as Stigler and Posner defined capture more in terms of rent-seeking behaviors, using regulations to control market entry and to fix prices. *See* George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971). Nicolas Bagley calls capture "shorthand for the phenomenon whereby regulated entities wield their superior organizational capabilities to secure favorable agency outcomes at the expense of the diffuse public." Nicholas Bagley, *Response, Agency Hygiene*, 89 TEX. L. REV. *SEE ALSO* 1, 2 (2010); *see also* FRANCIS E. ROURKE, *BUREAUCRACY, POLITICS, AND PUBLIC POLICY* 58 (3d ed. 1984) ("The agency may come to lean so heavily on the political support of an outside group that the group in time acquires veto power over many of the agency's major decisions. In extreme cases, the agency becomes in effect a 'captive' organization, unable to move in any direction except those permitted it by the group upon which it is politically dependent."); Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1069 (1997) ("In the social science literature of the 1970s and 1980s there is no sharp analytical break between capture theory and public choice theory; indeed, what I call capture theory would be regarded today as a quaint species of public choice theory."); John Shepard Wiley Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713 (1986).

*regulated industry*. This is the definition offered by Daniel Carpenter and David Moss,<sup>72</sup> but with two modifications.

First, “by the intent and action of the industry itself”<sup>73</sup> is replaced with “through means induced by industry,” thereby recognizing that industry may cause capture without necessarily having the intent to do so. This change is meant to create greater room for emerging theories about capture, such as “cultural capture,”<sup>74</sup> in which regulators may come to identify with the regulated. There is no obvious reason why this dynamic could not happen even in the absence of intentional acts by the regulated to bring it about,<sup>75</sup> though we may reasonably assume that industry would generally have that intent.<sup>76</sup>

The second modification reflected in this definition of regulatory capture is in removing the necessity of regulation being “consistently or repeatedly”<sup>77</sup> directed away from the public interest. While acknowledging that this condition is typically implied in capture theory, there is no obvious reason why, as a definitional matter, we should not consider these same dynamics, happening in just one instance (for example, in a single, important rulemaking), as a form of capture. An agency like the FDA may, after all, only issue one set of rules in an entire two-term administration that bears directly on a particular industry within its vast regulatory jurisdiction. The FDA may not be “captured” as a whole, but if, for example, during the only

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<sup>72</sup> Daniel Carpenter & David A. Moss, *Introduction*, in PREVENTING REGULATORY CAPTURE, *supra* note 71, at 1, 13 (“*Regulatory capture* is the result or process by which regulation, in law or application, is consistently or repeatedly directed away from the public interest and toward the interests of the regulated industry, by the intent and action of the industry itself.”).

<sup>73</sup> *Id.*

<sup>74</sup> See James Kwak, *Cultural Capture and the Financial Crisis*, in PREVENTING REGULATORY CAPTURE, *supra* note 71, at 71, 80–81.

<sup>75</sup> In fact, the mechanisms that Kwak identifies as mechanisms of cultural capture—identity, status, and relationships—would seem to act primarily without any intentional effort by industry at all. *Id.* For example, Kwak gives an example in which “I am an agency employee meeting with a lawyer who is representing a Wall Street investment bank, I may feel she is in my in-group because we went to the same law school, I may feel she is of higher status because she makes several times as much money as I do, and we may send our children to the same schools and therefore be in the same social networks.” *Id.* None of those mechanisms would seem to be for the *purpose* of capture.

<sup>76</sup> Carpenter and Moss seem to conflate the task of *defining* capture in theory with the task of outlining a reasonable *approach* to testing for its presence in practice. See Carpenter & Moss, *supra* note 72, at 14 (“We recognize that the high evidentiary bar associated with the necessity of showing intent, to meet our *definition*, may lead us to under-diagnose capture, but we believe that over-diagnosis is currently far more common and that our *approach* testifies to the robust empirical standards that are needed for scholarly analysis . . .” (emphases added)).

<sup>77</sup> *Id.* at 13.

instance of agency rulemaking that pertains to it, the tanning bed industry is able to secure rules that unduly harm the public interest while benefiting itself, then that particular industry may have successfully captured the agency in 100% of the decisions that matter to it.<sup>78</sup> Capture, then, in addition to being “strong” and “weak”<sup>79</sup> (meaning, on balance, harms the public interest or is merely less beneficial than it otherwise could be), should be understood, again, as a definitional matter, as occurring both at macro levels, affecting many or all decisions by an agency, or micro levels, affecting few or just one decision, or anywhere between these two poles.

Still, this definition of regulatory capture is not meant to serve as the single, universal definition. It has its own limitations. As others have noted, actors other than the regulated industry, for example public interest firms, could cause regulatory capture as well.<sup>80</sup> There are also definitional problems regarding at what point to consider the capture to have taken place, and whether the actor causing capture must necessarily be exogenous to government. For example, if a “business-friendly,” deregulatory President is elected and appoints an industry-friendly administrator who makes many regulatory decisions that benefit industry while harming the public interest, this would not normally be considered “regulatory capture,” but is rather a democratically endorsed change in governing philosophy that nonetheless resulted in harm to the public interest. The President and the Administrator are bringing their approach to government, rather than their approach being shaped by industry while they are in government. The matter is further complicated by the consideration that they may have come by their views after much critical thought, though their conception of what would benefit the public interest is just incorrect; perhaps they were strongly influenced by false narratives promulgated by powerful interests in media and the

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<sup>78</sup> Cf. Beth L. Leech, *Lobbying and Influence*, in *THE OXFORD HANDBOOK OF AMERICAN POLITICAL PARTIES AND INTEREST GROUPS* 534, 548 (L. Sandy Maisel & Jeffrey M. Berry eds., 2010) (“Many interest group scholars have noted the truism that it is easier for an interest group to protect an existing policy than it is to change that policy. What is less seldom noted is that means that interest group influence over policy change will not be incremental and linear, but substantial and punctuated. Baumgartner et al. found that about two-thirds of the issues exhibited no policy change whatsoever over the four years that we studied them. We also found, however, that when change did occur it tended to be substantial rather than incremental.”).

<sup>79</sup> “Strong” capture is when “government adopts regulations that are so far away from what is in the public interest that it would be better not to have the policy at all. ‘Weak’ capture, on the other hand, is a case in which the regulation does not, as the result of special interest influence, advance the public interest as much as it might, but it is on balance better to have the regulation than not.” M. Elizabeth Magill, *Courts and Regulatory Capture*, in *PREVENTING REGULATORY CAPTURE*, *supra* note 71, at 397, 401.

<sup>80</sup> Michael A. Livermore and Richard L. Revesz define regulatory capture as caused by “well-organized special interest,” meaning not just industry but also public interest firms. Michael A. Livermore & Richard L. Revesz, *Can Executive Review Help Prevent Capture?*, in *PREVENTING REGULATORY CAPTURE*, *supra* note 71, at 420, 425–26.



academy.<sup>81</sup> Capture theory thus suffers from difficult line-drawing problems: when are views the result of capture, and when are they something more legitimate?<sup>82</sup> And how does one determine definitively what the “public interest” is anyway? (Maybe deregulation was in the public interest.) Having recognized these difficulties in defining the outer boundaries of regulatory capture, this Article suspends that line of questioning—it will suffice to say for the purposes herein that “capture” means some change in thinking that works to industry’s advantage after an official takes office and harms the public interest.

One additional observation bears mentioning before moving on. Agency “regulations” are promulgated by agencies, but individuals constitute agencies, and ultimately capture is about the thoughts and decisions of those individuals.<sup>83</sup> It should therefore be appreciated that an agency may consist of 90% individuals whose views and decisions are perfectly aligned with the public interest, and 10% who are not, and by that constitution still make rules and decisions that are harmful to the public interest. It follows that an interest group may reap large benefits from the “capture” of a relatively limited number of persons within the agency, especially high-level officials, as, in general, an agency administrator who shares an industry’s views will be capable of exerting greater influence in that industry’s favor than a low-level employee<sup>84</sup> (though perhaps the ability to exert influence within a bureaucracy is not strictly a matter of hierarchy).<sup>85</sup> Thus, where industry is able to secure opportunities

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<sup>81</sup> See, e.g., Eric Lipton & Brooke Williams, *How Think Tanks Amplify Corporate America’s Influence*, N.Y. TIMES (Aug. 7, 2016), <https://nyti.ms/2kkEpRt>; Anahad O’Connor, *How the Sugar Industry Shifted Blame to Fat*, N.Y. TIMES (Sept. 12, 2016), <https://nyti.ms/2jDtsxa>.

<sup>82</sup> Lawrence Frolik notes similar line-drawing problems in the 200-year-old common law doctrine of undue influence in probate: “[H]ow is it that one person can unduly influence another, absent the use of duress, misinformation, or fraud? Just what is the difference between legally permitted influence and ‘undue influence’?” Lawrence A. Frolik, *The Biological Basis of the Undue Influence Doctrine*, in *LAW & EVOLUTIONARY BIOLOGY: SELECTED ESSAYS IN HONOR OF MARGARET GRUTER ON HER 80TH BIRTHDAY* 169, 172 (Lawrence A. Frolik et al. eds., 1999).

<sup>83</sup> Cf. BRYAN D. JONES, *POLITICS AND THE ARCHITECTURE OF CHOICE: BOUNDED RATIONALITY AND GOVERNANCE* 208 (2001) (“The analysis of organizations and institutions in social science must have a microfoundation in the actions and interactions of individual humans.”).

<sup>84</sup> Cf. Steven Davidoff Solomon, *The Government’s Elite and Regulatory Capture*, N.Y. TIMES DEALBOOK (June 11, 2010, 2:00 PM), <https://nyti.ms/2eTexip> (“[W]e have ideological and social capture of the top regulators. This is an issue that trumps what can be a model regulator at the bottom where the line people are quite competent, able and uncaptured, but the message from the top skews their effectiveness.”).

<sup>85</sup> See generally George A. Krause, *The Institutional Dynamics of Policy Administration: Bureaucratic Influence over Securities Regulation*, 40 AM. J. POL. SCI. 1083 (1996) (demonstrating how bureaucrats could influence their political principals).

to influence even a limited number of high-level individuals, such as through means detailed in Part I, it makes sense to understand those interactions as possible causes of regulatory capture no different from when industry exerts a more generalized influence upon a much greater cross-section of the agency. It is by this logic that a President or Administrator, intending to minimize regulatory capture within the administration as a whole, may rightly train their attention on sources of influence that on their face appear to bear only on a limited number of persons.

### *B. Social Psychology*

Building on other scholars' work applying behavioral science to law in general,<sup>86</sup> and identifying nontraditional capture dynamics in particular,<sup>87</sup> James Kwak discusses how non-rational mechanisms of influence, such as in-group bias, social status bias, and relationships,<sup>88</sup> may cause regulators to adopt the points of view of their peers in regulated industries;<sup>89</sup> that is, "why regulators' perspectives and actions might be shaded by the nature of their interactions with interest groups, not just the substantive content of those interactions."<sup>90</sup> This "non-rational" cause of regulatory capture Kwak labels "cultural capture."<sup>91</sup> To be clear, this alleged cause of regulatory capture acts not in isolation from traditional capture theory based on rational actors operating for material gain, but rather complements mechanisms of traditional capture.

At any rate, the claim of this Article, stated in these terms, is that there may be some point at which executive branch decision-making in implementing substantive statutes diverges so significantly from what the President or relevant agency heads understand to be correct, preferred, or even within the range of reasonableness—such that the President has lost the "accountability of officials or agencies."<sup>92</sup>

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<sup>86</sup> See, e.g., BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein ed., 2000); Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199 (2006); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969 (2006); Owen D. Jones, *Time-Shifted Rationality and the Law of Law's Leverage: Behavioral Economics Meets Behavioral Biology*, 95 NW. U. L. REV. 1141 (2001); Owen D. Jones & Timothy H. Goldsmith, *Law and Behavioral Biology*, 105 COLUM. L. REV. 405 (2005); Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009); Thomas S. Ulen, *The Growing Pains of Behavioral Law and Economics*, 51 VAND. L. REV. 1747 (1998).

<sup>87</sup> See, e.g., Stephen J. Choi & A.C. Pritchard, *Behavioral Economics and the SEC*, 56 STAN. L. REV. 1, 20–42 (2003) (profiling various biases SEC officials may face).

<sup>88</sup> Kwak, *supra* note 74, at 80.

<sup>89</sup> *Id.* at 79–80.

<sup>90</sup> *Id.* at 79.

<sup>91</sup> *Id.*

<sup>92</sup> The Constitutional Separation of Powers Between the President and Cong., 20 Op. O.L.C. 124, 135 (1996).

Continuing to comply with statutory mechanisms of “advisory influence” causing this regulatory capture would thereby undermine the Executive Branch and run afoul of the separation of powers.<sup>93</sup>

It is significant—especially in the modern administrative state—that the President has limited awareness of the minutia of agency decision-making, or more precisely, how the *actual* range of possible agency actions compares to the range of agency actions *perceived* or *stated* to be possible by agency officials and employees who inform the President.<sup>94</sup> That is, Presidents, like the officers of any large organization, must necessarily rely on the accuracy and integrity of information filtering up to them.<sup>95</sup> In this environment, “tak[ing] [c]are that the Laws be faithfully executed”<sup>96</sup> *as a whole* and in general may in fact require non- or only partial compliance with certain laws that undermine accountability. Another way of stating the problem is that the President operates in an environment of vast “unknown unknowns”<sup>97</sup> with

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<sup>93</sup> In theory, factors that bear on “rational” decision-making may also present constitutional problems. For example, Chief Justice John Roberts labels “the failure to raise judicial pay” as having “now reached the level of a constitutional crisis that threatens to undermine the strength and independence of the federal judiciary.” JOHN G. ROBERTS, JR., 2006 YEAR-END REPORT ON THE FEDERAL JUDICIARY 1 (2007), <http://www.supremecourt.gov/publicinfo/year-end/2006-year-endreport.pdf> [<https://perma.cc/E7GY-FPQR>]; *see also* JOHN G. ROBERTS, JR., 2005 YEAR-END REPORT ON THE FEDERAL JUDICIARY 5 (2006), <http://www.supremecourt.gov/publicinfo/year-end/2005year-endreport.pdf> [<https://perma.cc/89J5-96Z9>] (“I understand that it is difficult for Congress to raise the salaries of federal judges, especially in a tight budget climate. I also understand that it is the responsibility of Congress to do difficult things when necessary to preserve our constitutional system. Our system of justice suffers as the real salary of judges continues to decline.”).

<sup>94</sup> *See generally* MAX H. BAZERMAN & DON A. MOORE, JUDGMENT IN MANAGERIAL DECISION MAKING (8th ed. 2013) (describing the limits executives have on knowing all minutia of the decisions they make).

<sup>95</sup> *Cf. id.*; SIMON, *supra* note 3, at 103 (“In executive positions characterized by great busyness on the part of their occupants, a great many stimuli for decision come from outside the individual. A difficult case is referred upward for appellate review; a caller or a member of another organization insists on discussing a problem with the ‘top man.’ Innumerable other persons, problems, and things are constantly being forced on his attention. In any such position the particular questions to be decided will depend largely on the accident of what stimuli are presented. Not only do the stimuli determine what decisions the administrator is likely to make, but they also have a considerable influence on the conclusion he reaches. An important reason for this is that the very stimulus which initiates the decision also directs attention to selected aspects of the situation, with the exclusion of others.”); *see also* ROURKE, *supra* note 71, at 21 (“Herbert Simon emphasizes the importance of being able to shape the value or factual premises of decision makers as a means of ensuring control over decisions themselves, and it is precisely in this way that bureaucratic information and advice commonly function in the policy process.”).

<sup>96</sup> U.S. CONST. art. II, § 3.

<sup>97</sup> *See generally* Ranga V. Ramasesh & Tyson R. Browning, *A Conceptual Framework for Tackling Knowable Unknown Unknowns in Project Management*, 32 J. OPERATIONS

respect to the administrative state, while relying on expert agencies to know what is “known” and what is “unknown.” It may be insufficient, then, for the President or Administrator to rely on an *ex post* solution to problems of accountability (such as removability), when the difference between how a subordinate considers an issue and how the superior would have instructed the subordinate to consider the issue could rarely come within the superior’s purview. For this reason, *ex ante* solutions<sup>98</sup> to ensuring accountability (e.g., preventing regulatory capture<sup>99</sup>) would seem to be a valid use of the Take Care Clause powers.

### C. Political Science

#### 1. Congress

Matthew McCubbins and Thomas Schwartz theorized that Congress is incentivized to respond to “fire alarms” rather than conduct “police patrols,”<sup>100</sup> meaning to act when a constituent interest group informs Congress of unwanted executive actions, rather than actively patrol the bureaucracy themselves. Similarly, Steven Balla and John Wright,<sup>101</sup> using data collected from the National Drinking Water Advisory Council, concluded that Congress used appointments to federal advisory committees as a tool for monitoring the bureaucracy.<sup>102</sup>

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MGMT. 190 (2014) (describing the intricacies of known and unknown unknowns in decision-making and administration).

<sup>98</sup> Cf. Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 23 (2010) (“[T]he difficulty in assessing *ex post* whether a decision is the result of capture is all the more reason why policy makers often hope *ex ante* to create structural checks on capture by designing the agency to better protect it from one-sided political pressure.”).

<sup>99</sup> See generally David A. Moss & Daniel Carpenter, *Conclusion: A Focus on Evidence and Prevention*, in PREVENTING REGULATORY CAPTURE, *supra* note 71, at 451.

<sup>100</sup> See Mathew McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984); see also WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 1142 (4th ed. 2007) (“There are opportunity costs for oversight; time spent monitoring agencies is time away from fundraising, casework, and enacting new programs to benefit constituents. The latter are activities that often mean more to a legislator’s reelection chances than tedious oversight.”); Sean Gailmard, Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, in THE OXFORD HANDBOOK OF CLASSICS IN PUBLIC POLICY AND ADMINISTRATION 465, 468 (Steven J. Balla, Martin Lodge & Edward C. Page eds., 2015) [hereinafter Gailmard et al.] (“Monitoring through legislative oversight is costly, in the sense that time spent on it is time taken away from other valuable activities such as fundraising, campaigning, legislating, and constituent service.”).

<sup>101</sup> Steven J. Balla & John R. Wright, *Interest Groups, Advisory Committees, and Congressional Control of the Bureaucracy*, 45 AM. J. POL. SCI. 799 (2001).

<sup>102</sup> See *id.* at 804–11.

Indeed, oversight through advisory committee appointments would appear to be in the best interest of both Congress and Congress's donor-interest groups. Presumably, Congress's preferences largely overlap with their most important donor-constituents' preferences, and it is the donor-interest groups' representatives themselves who have the necessary subject-matter expertise to exercise the most comprehensive "oversight." Both parties would incur additional transaction costs if they had to coordinate regularly and relay all possibly pertinent information.<sup>103</sup> The most efficient arrangement is for Congress to put its donor-interest groups as close to the executive branch decision makers as possible. Essentially, these placements make for more sensitive "fire alarms," enabling industry and Congress to address disfavored action within the Executive Branch at the slightest suggestion of smoke.<sup>104</sup>

However, the same reasoning that applies to more sensitive fire alarms also applies to influencing the substantive outcomes of executive branch decision-making. Giving their donor-constituents opportunities to exert their preferences onto Executive Branch decision-making at the very site of that decision-making within the bureaucracy is more efficient for both parties; it puts the influence on autopilot, requiring much less involvement from any given Congressperson as compared to the involvement required to exert "traditional" forms of Congressional influence, such as letter writing. This influence-on-autopilot would seem to allow Congress to "deliver a flow of benefits to those interests without even knowing the specific outcomes they desire to achieve."<sup>105</sup>

## 2. Executive Branch

Access<sup>106</sup> is a necessary antecedent to influence.<sup>107</sup> Access is "the basic objective" of interest groups.<sup>108</sup> Notice and comment itself may be conceptualized as a

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<sup>103</sup> See generally DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* (1999).

<sup>104</sup> See generally McCubbins & Schwartz, *supra* note 100.

<sup>105</sup> Gailmard et al., *supra* note 100, at 470; see also Steven J. Balla & John R. Wright, *Can Advisory Committees Facilitate Congressional Oversight of the Bureaucracy?*, in CONGRESS ON DISPLAY, CONGRESS AT WORK 167, 172-73 (William T. Bianco ed., 2000) ("In our view, a principal function of advisory committees is to provide competing interest groups with institutionalized access to agency policy making."); William N. Eskridge, Jr. & John Ferejohn, Comment, *Structuring Lawmaking to Reduce Cognitive Bias: A Critical View*, 87 CORNELL L. REV. 616, 625 (2002) ("The more ambitious the statutory bargain, the greater the need for [special interest] buyers to have access to the implementing organ.").

<sup>106</sup> For definitions of "access," see JOHN MARK HANSEN, *GAINING ACCESS: CONGRESS AND THE FARM LOBBY, 1919-1981* 22 (1991) (defining "access" as a "close working relationship between members of Congress and privileged outsiders"); S. J. MAKIELSKI, JR., *PRESSURE POLITICS IN AMERICA* 7 (1980) (stating that access "can mean that a group is simply able to convince a policy-maker to listen to its arguments. It can mean the group establishes a regular relationship with the policy-maker, one in which the legislator or administrator turns to the

statutory grant of access to bureaucratic decision-making; it is an opportunity for the public to have some (perhaps, nominal) influence,<sup>109</sup> as agencies must read all comments.<sup>110</sup> In practice, however, real access and opportunities for influencing agency decision-making happen well before the notice and comment process. Don Elliott explains:

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pressure group for information, guidance, or even instructions. Access can mean the group becomes ‘institutionalized’ into the policy process: it actually becomes a functioning part of government. . . . Access may also mean that a pressure group gains its influence through a direct exchange of favors . . . .”); *see also* JEFFREY H. BIRNBAUM, *THE LOBBYISTS: HOW INFLUENCE PEDDLERS GET THEIR WAY IN WASHINGTON* 31 (1992); LESTER W. MILBRATH, *THE WASHINGTON LOBBYISTS* 255–56 (1963) (lobbying is about “keeping communication channels open”); KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* 165 (1986) (“[A]ccess and influence are not fully separable.”).

<sup>107</sup> This statement is meant as both a matter of formal logic and of practice. As a matter of formal logic: if one’s message cannot reach the intended recipient, then it cannot register an effect. Of course, in the absence of direct access one may use methods of indirect access, such as media campaigns, to reach the recipient. As a matter of practice: lobbying is as much about gaining access as it is about delivering a compelling message. *See* Scott R. Furlong, *Business and the Environment: Influencing Agency Policymaking*, in *BUSINESS AND ENVIRONMENTAL POLICY: CORPORATE INTERESTS IN THE AMERICAN POLITICAL SYSTEM* 155, 162–63 (Michael E. Kraft & Sheldon Kamieniecki eds., 2007) (“[A]ccess is likely a necessary condition for influence to occur.”); JOHN R. WRIGHT, *INTEREST GROUPS AND CONGRESS: LOBBYING, CONTRIBUTIONS, AND INFLUENCE* 76 (1996) (“All lobbying begins with access. Access is absolutely critical to any successful lobbying campaign and, along with influence, is one of the principal objectives of organized interests. Yet, exactly what access is and how it differs from influence is seldom made clear by the politicians, journalists, and academics who frequently talk and write about access and influence.”); *id.* at 81 (“[T]he distinction between access and influence is much easier to make at a conceptual level than at an empirical one, and this may explain why access is frequently taken as the standard measure of a lobbyist’s success. Relative to influence, access is tangible.”).

<sup>108</sup> DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION* 264 (2d ed. 1971); *see also* RONALD J. HREBENAR, MATTHEW J. BURBANK & ROBERT C. BENEDICT, *POLITICAL PARTIES, INTEREST GROUPS, AND POLITICAL CAMPAIGNS* 253 (1999) (“Almost every interest group pursues an access-creating strategy to set the stage for future lobbying campaigns.”); RONALD J. HREBENAR & BRYSON B. MORGAN, *LOBBYING IN AMERICA: A REFERENCE HANDBOOK* 29 (2009) (“The primary job for most lobbyists is to persuade policy makers to support their organization’s policy objectives. So getting access to these decision makers is one of the keys to successful lobbying. Whether it is true or not, most legislators and bureaucrats think of themselves as extremely busy people, and with tens of thousands of lobbyists prowling the corridors of Washington, getting access can be very difficult.”); MAKIELSKI, *supra* note 106, at 7 (“The task which pressure groups set themselves is to gain leverage over what government does, to influence public policy. The general term which political scientists use for this process of influence is ‘gaining access.’”).

<sup>109</sup> U.S. DEP’T OF JUSTICE, *ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT* 9 (1947) (“To provide for public participation in the rule making process.”).

<sup>110</sup> *Id.* at 31.

No administrator in Washington turns to full-scale notice-and-comment rulemaking when she is genuinely interested in obtaining input from interested parties. Notice-and-comment rulemaking is to public participation as Japanese Kabuki theater is to human passions—a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues.<sup>111</sup>

Besides happening in “other venues,” meaningful influence on executive agencies happens *early*. “Stakeholders acknowledge[ ] that the earlier they can engage in the rulemaking process with an agency, the best chance they have of influencing a rulemaking before an agency sets its course, gets locked into a position, or devotes limited resources to a particular rulemaking option.”<sup>112</sup>

The three mechanisms of legislated advisory influence discussed in Part I—nonprofit corporations, advisory committees, and mandatory consultations—may therefore be best understood in terms of their temporality vis-à-vis the administrative decision-making process. Whereas having the ear of executive branch officials on nonprofit corporate boards is an opportunity for influence *before* the agency has initiated any formal action, advisory committees are opportunities to influence administrative policy as it is being actively developed; also, mandatory consultations are comparatively late, deal-closing opportunities before final decisions are made. Of course, one need not conclude that Congress creates these entities solely, or even primarily, in order to give donor-constituents access and influence. Rather, in choosing between varieties of possible appointment schemes, if all other things were equal, it would simply be a rational choice for Congress to create positions of access and influence to offer its donor-constituents.

### III. THE SEPARATION OF POWERS

Courts tend not to decide cases about legislative influence on Executive Branch officials on separation of powers grounds. Instead, in cases of formal adjudication, the

<sup>111</sup> E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (1992).

<sup>112</sup> ESA L. SFERRA-BONISTALLI, ADMIN. CONFERENCE OF THE U.S., *EX PARTE COMMUNICATIONS IN INFORMAL RULEMAKING* 18 (2014) (“Engaging early [in the rulemaking process] also provides stakeholders an opportunity to let an agency know how it would be affected and provide its policy positions to the agency at the beginning of the agency’s deliberative process.”); *see also* Leech, *supra* note 78, at 544 (“[S]urveys of interest group behavior repeatedly find that organizations spend a vast amount of time on [early lobbying] tactics.”); Keith Naughton, Celeste Schmid, Susan Webb Yackee & Xueyong Zhan, *Understanding Commenter Influence During Agency Rule Development*, 28 J. POL’Y ANALYSIS & MGMT. 258, 274 (2009) [hereinafter Naughton et al.] (“Rulemaking, like many political processes, is path dependent. Stated differently, the early stages of rulemaking influence the framing, content, and argumentation found later in government regulations.”).

legal harm cognized by the courts has been a violation of the APA's ban on *ex parte* communications and of the Due Process Clause itself;<sup>113</sup> in informal adjudication and rulemaking cases, the legal harm has been decisions which "proceeded from an erroneous premise" in violation of statutory direction.<sup>114</sup> Influence upon an agency when it acts in a "judicial" capacity is of greater (but not necessary or sufficient) concern as compared to when it acts merely in a "quasi-judicial" or "legislative" capacity.<sup>115</sup> Pressure targeted directly at the agency decision makers is more troublesome than more general influence on the agency.<sup>116</sup>

There are several possible explanations for why undue legislative influence on executive agencies does not normally incur separation of powers jurisprudence. When members of Congress are the ones exerting the influence, they are not likely acting *qua* the Legislative Branch (i.e., through bicameralism). Moreover, doctrines of constitutional avoidance in general and the difficult, sometimes amorphous, nature of separation of powers jurisprudence<sup>117</sup> in particular likely makes deciding cases on other grounds preferred and also doctrinally more straightforward.

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<sup>113</sup> SECTION OF ADMIN. LAW & REGULATORY PRACTICE, AM. BAR ASS'N., A BLACKLETTER STATEMENT OF FEDERAL ADMINISTRATIVE LAW 12 (2d ed. 2013) ("Legislative pressure on adjudicators may violate the APA prohibition on *ex parte* contacts and may also deprive parties of their constitutional rights to due process. Claims of such violations are most likely to succeed where the congressional pressure probably influenced the decision of the adjudicators, the communication concerned disputed facts as opposed to issues of law or policy, and the particular application of pressure served no legitimate purpose, such as statutory revision or congressional oversight of administration."); *see* Government in the Sunshine Act, Pub. L. 94-409, § 4, 90 Stat. 1241, 1246-47 (1976) (banning *ex parte* communications from all "interested person[s] outside the agency" under section 557(d)(1)(A)); *see also* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 117 (1982) (White, J., dissenting) (stating that if Congress attempted to influence Article I bankruptcy judges, "the Due Process Clause might very well require that the matter be considered by an Art. III judge: Bankruptcy proceedings remain, after all, subject to all of the strictures of that constitutional provision"); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (stating that in an agency adjudication, "an impartial decision maker is essential").

<sup>114</sup> D.C. Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231, 1247 (D.C. Cir. 1971) (in the context of informal adjudication); *see also* Sierra Club v. Costle, 657 F.2d 298, 409 (D.C. Cir. 1981) (in the context of rulemaking).

<sup>115</sup> *See, e.g.*, Pillsbury Co. v. FTC, 354 F.2d 952, 963-65 (5th Cir. 1966).

<sup>116</sup> *See, e.g.*, Aera Energy LLC v. Salazar, 642 F.3d 212, 224 (D.C. Cir. 2011) ("[W]e have held that congressional actions not targeted directly at [agency] decision makers—such as contemporaneous hearings—do not invalidate an agency decision." (alteration in original) (citation omitted)).

<sup>117</sup> Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1517 (1991) (describing the Supreme Court's separation of powers jurisprudence as an "incoherent muddle"); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489-96 (1987) (asserting that the Court has adopted inconsistent reasoning in separation of powers cases).



*FEC v. NRA Political Victory Fund* is therefore similar to canonical cases on undue influence in its fact pattern—a plaintiff seeks invalidation of an agency action due to improper influence<sup>118</sup>—but the case is unique for having decided the issue on separation of powers grounds, not “just” as a violation of procedural due process or statutory intent.

#### A. NRA Political Victory Fund

In *NRA Political Victory Fund*, the D.C. Circuit held unconstitutional a statute making congressional agents (the Secretary of the Senate and the Clerk of the House of Representatives) *ex officio* non-voting commissioners of the FEC.<sup>119</sup> They had no voting power; they could not serve as chairmen, call or adjourn meetings, or count towards a quorum;<sup>120</sup> that is, they had no formal authority whatsoever. It is therefore not difficult to understand why Congress might have thought the arrangement constitutional: Congressional appointees elsewhere served in advisory roles within the Executive Branch, even on entities said to have an executive function (albeit, comparatively much less significant executive functions).<sup>121</sup> Nonetheless, Judge

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<sup>118</sup> 6 F.3d 821, 822–23 (D.C. Cir. 1993).

<sup>119</sup> *Id.* at 822.

<sup>120</sup> *See id.* at 823, 826.

<sup>121</sup> Presidential Statement on Signing the Ronald Reagan Centennial Commission Act, 1 PUB. PAPERS 756 (June 2, 2009) (“I wholeheartedly welcome the participation of members of Congress in the activities of the Commission. In accord with President Reagan’s Signing Statement made upon signing similar commemorative legislation in 1983, I understand, and my Administration has so advised the Congress, that the members of Congress ‘will be able to participate only in ceremonial or advisory functions of [such a] Commission, and not in matters involving the administration of the act’ in light of the separation of powers and the Appointments and Ineligibility Clauses of the Constitution.” (emphasis removed) (citation omitted)); Constitutionality of the Ronald Reagan Centennial Commission Act of 2009, 33 Op. O.L.C. 1, 5 (2009) (“To address these constitutional concerns, the functions of the Commission in subsection 3(1) should be limited to giving advice and making recommendations with respect to planning, developing and carrying out commemorative activities. In such an advisory capacity, the Commission could remain composed as it is under section 4(a) of the Act.”); Presidential Statement on Signing the Bill Establishing a Commission on the Bicentennial of the United States Constitution, 2 PUB. PAPERS 1390 (Sept. 29, 1983) (“I welcome the participation of the Chief Justice, the President pro tempore of the Senate, and the Speaker of the House of Representatives in the activities of the Commission. However, because of the constitutional impediments contained in the doctrine of the separation of powers, I understand that they will be able to participate only in ceremonial or advisory functions of the Commission, and not in matters involving the administration of the act. Also, in view of the incompatibility clause of the Constitution, any Member of Congress appointed by me pursuant to section 4(a)(1) of this act may serve only in a ceremonial or advisory capacity.”); Appointments to the Commission on the Bicentennial of the Constitution, 8 Op. O.L.C. 200 (1984); Presidential Statement on Signing the American Folklife Preservation Act, 1 PUB. PAPERS 6–7 (Jan. 3, 1976) (“I have serious reservations concerning the constitutional propriety

Silberman reasoned that “[a]dvice, however, surely implies influence, and Congress must limit the exercise of its influence, whether in the form of advice or not, to its *legislative role*.”<sup>122</sup> Judge Silberman, writing for the three-judge panel that included Judges Wald and Ruth Bader Ginsburg, further explained:

[W]e cannot conceive why Congress would wish or expect its officials to serve as *ex officio* members if not to exercise *some* influence. Even if the *ex officio* members were to remain completely silent during all deliberations . . . their mere presence as agents of Congress conveys a tacit message to the other commissioners. The message may well be an entirely appropriate one—but it nevertheless has the potential to influence the other commissioners.<sup>123</sup>

There would therefore seem to be a dispositive question (at least, in the D.C. Circuit) between whether, in any given legislative arrangement, Congress exerts influence from “within” its “legislative role,” or whether it exerts influence from “beyond” its “legislative role.” In typical administrative law cases on undue influence—e.g., *D.C. Federation of Civic Ass’ns v. Volpe*,<sup>124</sup> *Sierra Club v. Costle*,<sup>125</sup> and *Aera Energy LLC v. Salazar*<sup>126</sup>—plaintiffs generally must show some evidence that the decision makers were actually influenced by the direct communication from the non-executive branch person in an inappropriate way—that they “succumbed” under the “pressure”<sup>127</sup> exerted by members of Congress. By contrast, *FEC v. NRA Political*

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of placing the functions to be performed by the Center outside the executive branch and the assignment of executive duties to officers appointed by Congress. However, given historical practice and custom in the area of cultural and educational affairs and the potential of H.R. 6673 to enrich the cultural life of the Nation, I am granting my approval to the measure.”); Presidential Statement on Signing the Japan-United States Friendship Act, 2 PUB. PAPERS 1719 (Oct. 21, 1975) (“Because of the constitutional provision against Members of Congress serving in any other office of the United States, the Congressional members of the Commission will serve in an advisory capacity, as nonvoting members.”); *see also* Constitutionality of Bill Establishing American Folklife Center in the Library of Congress, 1 Op. O.L.C. Supp. 379 (1975).

Note, however, that the World War I Centennial Commission, which is currently in operation, does include commissioners appointed by Congress who are not limited to an advisory role (i.e., the precise constitutional issue consistently raised in the past), yet no signing statement was issued. *See* World War I Centennial Commission Act, Pub. L. No. 112-272, 126 Stat. 2448 (2013).

<sup>122</sup> *NRA Political Victory Fund*, 6 F.3d at 827 (emphasis added).

<sup>123</sup> *Id.* at 826.

<sup>124</sup> 459 F.2d 1231 (D.C. Cir. 1971).

<sup>125</sup> 657 F.2d 298 (D.C. Cir. 1981).

<sup>126</sup> 642 F.3d 212 (D.C. Cir. 2011).

<sup>127</sup> *Id.* at 224 (“[S]ometimes [Congressional] pressure crosses the line and prevents an agency from performing its statutorily prescribed duties.”); *Sierra Club*, 657 F.2d at 409 (“D.C.

*Victory Fund* explicitly disavowed the need for such evidence of influences' actual effects, instead holding that the mere opportunity for influence beyond the legislative role is sort of *per se* unconstitutional.<sup>128</sup>

As a result, it seems essential to the legal analysis for Courts to better determine what are the boundaries of the “legislative role.” For if Congress acts within that role to influence agency decision-making, then real evidence of “succumbing” to pressure must be shown to invalidate the agency action; by contrast, if Congress somehow acts outside its proper legislative role, then no such evidence is necessary, and the agency action becomes unconstitutional without any further showings.

The D.C. Circuit in *NRA Political Victory Fund* does explain that from within its proper “legislative role” Congress can validly influence agencies “through oversight hearings, appropriation and authorization legislation, or direct communication with the Commission.”<sup>129</sup> Other core legislative powers of influence that courts would surely sustain include the power to investigate<sup>130</sup> and to defund agencies and programs.<sup>131</sup> But how exhaustive is this list?

A narrow reading of *NRA Political Victory Fund* would hold that the case stands only for the proposition that Congress may not place its agents, even as non-voting members, among the Commissioners or heads of Executive Branch agencies—“within the very heart of [the] agency.”<sup>132</sup> However, a broader reading of *NRA*

*Federation* thus requires that two conditions be met before an administrative rulemaking may be overturned simply on the grounds of Congressional pressure. First, the content of the pressure upon the Secretary is designed to force him to decide upon factors not made relevant by Congress in the applicable statute. . . . Second, the Secretary’s determination must be affected by those extraneous considerations.”); *Am. Pub. Gas Ass’n v. Fed. Power Comm’n*, 567 F.2d 1016, 1070 (D.C. Cir. 1977) (declining to overturn the Federal Power Commission’s decision where Congressional “interference,” though “regrettable,” had only the “possibility” of actually influencing the Commission); *Volpe*, 459 F.2d at 1262 (MacKinnon, J., concurring in part and dissenting in part). See generally MORTON ROSENBERG & JACK H. MASKELL, CONG. RESEARCH SERV., RL32113, CONGRESSIONAL INTERVENTION IN THE ADMINISTRATIVE PROCESS: LEGAL AND ETHICAL CONSIDERATIONS (2003).

<sup>128</sup> See 6 F.3d at 827.

<sup>129</sup> *Id.*

<sup>130</sup> See *Watkins v. United States*, 354 U.S. 178, 187 (1957) (“The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.”); see also JAMES HAMILTON, *THE POWER TO PROBE: A STUDY OF CONGRESSIONAL INVESTIGATIONS* (1976).

<sup>131</sup> See Josh Chafetz, *Congress’s Constitution*, 160 U. PA. L. REV. 715, 725–35 (2012); Kate Stith, *Congress’ Power of the Purse*, 97 YALE L.J. 1343 (1988).

<sup>132</sup> The Constitutional Separation of Powers Between the President and Cong., 20 Op. O.L.C. 124, 176 (1996) (“We believe that *NRA Political Victory Fund* was correctly decided:

*Political Victory Fund* would call into question the constitutionality of many statutes that create corporate boards on which the heads of executive agencies are required to sit with Congressional appointees, because ultimately the type of influence achieved is likely the same in either scenario.

It would probably be a mistake to read *NRA Political Victory Fund* so narrowly that Congress could only act “beyond” its “legislative role” when it literally places its agents physically within the Executive Branch, on a commission that exercises significant executive powers. As the discussion above is meant to illustrate, it is not at all clear that Congress’ influence on executive branch officials in the *NRA Political Victory Fund* context would be greater than Congress’ influence on decision-making through the entities discussed in Part I. That is to say, Courts and other constitutional interpreters should not assume that proximity in space and time to the final agency decision necessarily equates to greater influence overall,<sup>133</sup> and the specific facts of *NRA Political Victory Fund* were therefore sufficient, but not necessary, to constitute influence beyond the legislative role. In fact, as discussed previously, there are many strategic advantages to exerting such influence at earlier stages in the executive decision-making process.<sup>134</sup> It seems plenty reasonable, then, to hold that at some point, influence on executive officials through appointments to the entities discussed in Part I are as much examples of Congress improperly acting beyond its “legislative role” as *NRA Political Victory Fund* was.

The only real difference between the *NRA Political Victory Fund* arrangement and contemporary statutory corporate boards is that the same statutory opportunity for influence happens outside the four walls of the agency (space), and before the actual decision-making (time). This difference in space and time might actually *help* the Congressional appointees exert more, not less, influence on agency decision makers than was the case in *NRA Political Victory Fund*. Having the opportunity to develop an administrator’s view of an issue well before the administrator has actually taken steps in his or her official capacity to address the issue may be more impactful than intervening when the issues have matured into actual deliberations;

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however modest the ability of Congress’s agents to influence the Commission’s actions may have been formally, the statute placed the agents intended to communicate that influence *within the very heart of [the] agency* charged with enforcing the federal law.” (emphasis added)).

<sup>133</sup> Cf. Leech, *supra* note 78, at 541–42 (“If we see, for example, interest groups making the rounds of members of Congress, encouraging a vote one way or another, we might assume these last pressure-filled rounds of persuasion are the main source of interest group influence. We are liable to forget that simply reaching that end stage—where a vote or a decision on a rule is imminent—is itself a measure of success. We may forget that the long years of research, issue framing, and building alliances were necessary to that success.”).

<sup>134</sup> See Naughton et al., *supra* note 112, at 274 (“Rulemaking, like many political processes, is path dependent. Stated differently, the early stages of rulemaking influence the framing, content, and argumentation found later in government regulations.”).

the advantages that accrue to early influencers is a recognized feature of both administrative law practice<sup>135</sup> and cognitive psychology.<sup>136</sup>

### *B. Interference with Decision-Making Processes*

Although significant cases about the proper separation of powers between the Executive and Congress tend to be about the powers of appointment<sup>137</sup> and removal,<sup>138</sup>

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<sup>135</sup> See SFERRA-BONISTALLI, *supra* note 112, at 18 (“Stakeholders acknowledged that the earlier they can engage in the rulemaking process with an agency, the best chance they have of influencing a rulemaking before an agency sets its course, gets locked into a position, or devotes limited resources to a particular rulemaking option. Engaging early also provides stakeholders an opportunity to let an agency know how it would be affected and provide its policy positions to the agency at the beginning of the agency’s deliberative process.”); Susan Webb Yackee, *The Politics of Ex Parte Lobbying: Pre-Proposal Agenda Building and Blocking During Agency Rulemaking*, 22 J. PUB. ADMIN. RES. & THEORY 373, 378 (2011) (“By lobbying early in the regulatory policymaking process, groups introduce the facts agencies consider, define policy problems, and develop the detailed stipulations in proposed government rules. Many of these stipulations are likely to persist in the final regulations that become law—thereby extending the influence of groups that lobby early. And even if they do not persist in exactly the same form, they do affect the Final Rule by, at a minimum, framing the debate and scope of action available during the notice and comment period.” (internal citations omitted)); Naughton et al., *supra* note 112, at 274 (“We find that participation by early-bird commenters holds direct effects on regulatory content and suggestive evidence that early commenters help to thwart or kill unwanted regulations.”); Andrea Bear Field & Kathy E.B. Robb, *EPA Rulemakings: Views from Inside and Outside*, 5 NAT. RESOURCES & ENV’T 9 (1990) (“Get involved during the preproposal phase of an Agency rulemaking. That is when the regulation writers want reliable technical information that they can use in crafting their regulations and are thus most receptive to comments from interested persons. While Agency representatives may consider comments received after proposal and even after the close of the comment period, they will be less open to new ideas and new information as the proceeding develops.”).

<sup>136</sup> See KATHRYN SCHULZ, *BEING WRONG: ADVENTURES IN THE MARGIN OF ERROR* 124–25 (2010) (“[C]onfirmation bias is the tendency to give more weight to evidence that confirms our beliefs than to evidence that challenges them. On the face of it, this sounds irrational . . . . In fact, though, confirmation bias is often entirely sensible. We hold our beliefs for a reason, after all—specifically, because we’ve already encountered other, earlier evidence that suggests that they are true. And, although this, too, can seem pigheaded, it’s smart to put more stock in that earlier evidence than in whatever counterevidence we come across later. Remember how our beliefs are probabilistic? Probability theory tells us that the more common something is—long-necked giraffes, white swans, subject-verb-object-sentences—the earlier and more often we will encounter it. As a result, it makes sense to treat early evidence preferentially.”).

<sup>137</sup> See, e.g., *Nat’l Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2550 (2014); *Freytag v. Comm’r*, 501 U.S. 868 (1991); *Buckley v. Valeo*, 424 U.S. 1 (1976).

<sup>138</sup> See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010); *Morrison v. Olson*, 487 U.S. 654 (1988); *Wiener v. United States*, 357 U.S. 349 (1958); *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935); *Myers v. United States*, 272 U.S. 52 (1926).

or whether a particular power is an exclusively executive function<sup>139</sup> (likely because such issues place *individuals'* rights at stake<sup>140</sup>), the type of legislation at issue in this Article, and the reasoning that finds it problematic, is perhaps most analogous to the attempts by Congress to impose concurrent reporting requirements on the Executive Branch<sup>141</sup>—which the Executive Branch has repeatedly resisted.<sup>142</sup>

Such legislation, which would require executive branch officials to report information simultaneously to Congress at the time of reporting to their superiors within the Executive Branch, has been understood to be an unconstitutional (“indirect,”<sup>143</sup> perhaps) encroachment on the President’s “control over the *decisionmaking process* within the Executive Branch.”<sup>144</sup> Because Presidents, as discussed previously, are

<sup>139</sup> See, e.g., *Metro. Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991); *Bowsher v. Synar*, 478 U.S. 714 (1986).

<sup>140</sup> See Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1109–11 (2013) (explaining that courts tend to avoid legislative-executive controversies unless individual rights are at stake).

<sup>141</sup> See *Constitutionality of Statute Requiring Exec. Agency to Report Directly to Cong.*, 6 Op. O.L.C. 632, 641–42 (1982) (analyzing constitutionality of legislative proposals that imposed concurrent reporting requirements on the executive branch); see also *The Constitutional Separation of Powers Between the President and Cong.*, 20 Op. O.L.C. 124, 175 (1996).

<sup>142</sup> See *Constitutionality of Statute Requiring Exec. Agency to Report Directly to Cong.*, 6 Op. O.L.C. 632, 640–41 (“This Office has previously considered, and found constitutionally defective, legislative proposals that impose concurrent reporting requirements upon executive officials.”).

<sup>143</sup> See *Constitutionality of Statute Requiring Exec. Agency to Report Directly to Cong.*, 6 Op. O.L.C. 632, 636 (1982) (quoting *Humphrey’s Ex’r*, 295 U.S. at 629–30); see also *Gubiensio-Ortiz v. Kanahale*, 857 F.2d 1245, 1260 (9th Cir. 1988), *vacated sub nom.* *United States v. Chavez-Sanchez*, 488 U.S. 1036 (1989) (“Interference by one branch with the operation of another branch need not be immediate and direct in order to be unconstitutional; subtle, indirect or even potential interference may be enough.”).

<sup>144</sup> *Constitutionality of Statute Requiring Exec. Agency to Report Directly to Cong.*, 6 Op. O.L.C. 632, 638 (1982) (emphasis added); see also Presidential Statement on Signing the Consolidated Appropriations Act, 2017 DAILY COMP. PRES. DOC. 2 (May 5, 2017) (“Several provisions . . . mandate or regulate the submission of certain executive branch information to the Congress. I will treat these provisions in a manner consistent with my constitutional authority to withhold information that could impair foreign relations, national security, the deliberative processes of the executive branch, or the performance of my constitutional duties. . . . I will construe these provisions not to apply to any circumstances that would detract from my authority to supervise, control, and correct employees’ communications with the Congress related to their official duties, including in cases where such communications would be unlawful or could reveal confidential information protected by executive privilege.”); *Constitutionality of Direct Reporting Requirement in Section 802(e)(1) of the Implementing Recommendations of the 9/11 Commission Act of 2007*, 32 Op. O.L.C. 27 (2008); *The Constitutional Separation of Powers Between the President and Cong.*, 20 Op. O.L.C. 124, 175 (1996) (“[L]egislation that attempted to impose concurrent reporting requirements across a broad spectrum of executive branch activities might well constitute so serious an interference with the President’s fulfillment of his obligations under the Take Care Clause, U.S. CONST.

responsible for a vast bureaucracy, the direct workings and subject matter of which they have only limited direct knowledge, legislation that contributes to regulatory capture similarly “interfere[s] with the President’s right to control or receive effective service from his subordinates within the Executive Branch” and thereby “limit[s] the ability of the President to perform his constitutional function.”<sup>145</sup>

Thus, whereas Jay Bybee has contended that “prescribe[d] consultations . . . do[] not infringe upon [the President’s] judgment and, indeed, become[] part of the President’s duty to faithfully execute the law,”<sup>146</sup> I would instead contend that while that may effectively be true in small doses vis-à-vis Presidents themselves, the opportunity for access and influence throughout an administration could unconstitutionally infringe upon the administration’s decision-making processes.

Another way to frame the issue is that instead of directing the Executive to implement a set of laws according to a set of preferred values (what may be called a traditional form of legislating<sup>147</sup>), forced consultations and other acts that shape social infrastructure can indeed introduce bias (or “infringe”) into the executive’s own judgment. This follows from John Allison’s observation that “bias” is a “condition leading to the introduction of an alien factor” where “the term *condition* includes both state of mind and particular decision-making structures that encourage these states of mind.”<sup>148</sup> If the information reaching the President has been *pre*-biased in a sense, then the decision-making structures of the executive branch have in fact affected the President’s own judgment unwittingly.<sup>149</sup>

One counterargument to address is that agencies are already, as a matter of standard Washington, D.C. regulatory practice, in frequent contact with both Congresspersons<sup>150</sup> and stakeholders before beginning official notice-and-comment

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art. II, § 3, that it should be deemed invalid. . . . For this reason, we think the presumption should be that the executive branch will object to any concurrent reporting provision in proposed legislation.”).

<sup>145</sup> Constitutionality of Statute Requiring Exec. Agency to Report Directly to Cong., 6 Op. O.L.C. 632, 639 (1982).

<sup>146</sup> Bybee, *supra* note 70, at 123.

<sup>147</sup> *Cf.* *Bowsher v. Synar*, 478 U.S. 714, 733–34 (1986) (“[O]nce Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation.”).

<sup>148</sup> John R. Allison, *Combinations of Decision-Making Functions, Ex Parte Communications, and Related Biasing Influences: A Process-Value Analysis*, 1993 UTAH L. REV. 1135, 1136.

<sup>149</sup> *Cf.* HAROLD SEIDMAN, *POLITICS, POSITION, AND POWER: THE DYNAMICS OF FEDERAL ORGANIZATION* 197 (5th ed. 1998) (“Advice becomes limiting when an executive’s discretion in the choice of his advisers is restricted by law or executive order and advisory bodies assume an independent status.”).

<sup>150</sup> Andrew Rudalevige, *The Executive Branch and the Legislative Process*, in *THE EXECUTIVE BRANCH* 419, 422 (Joel D. Aberbach & Mark A. Peterson eds., 2005) (“Grounded in laws and funded by budgets passed by Congress, bureaus and bureaucrats have long maintained a close relationship with legislators and especially with legislative committees. Departments

rulemaking (or even before issuing major guidance).<sup>151</sup> Under this view, congressional attempts to shape executive branch social infrastructure would have little overall effect on actual decision-making within the Executive Branch because stakeholders will inevitably be heard from anyway (and surely good governance requires that government bureaucrats open their ears to the industries they regulate, to gather information relevant to their regulatory mission). This view, however, I think fails to appreciate the categorical difference between a practice that is regular but optional, and one that is regular because it is required.<sup>152</sup> In the absence of statutory mandates, agency officials retain control over the terms and frequency of their exchanges—they retain the power to say no.<sup>153</sup> That is, they retain control over the sources of influence—both rational and nonrational—acting on their decision-making processes.

### C. *The Formalist Fix*

A formalist approach to the separation of powers is generally associated with political conservatism.<sup>154</sup> Presidents Reagan and H.W. Bush consistently issued signing statements voicing their constitutional qualms with the type of nonprofit corporation discussed in Section I.A, whereas the Clinton administration cautiously

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lobby on behalf of their programmatic initiatives, all the while providing information and occasional advice to members of Congress; legislators try to direct departmental behavior through statute, oversight hearings, and the budget process. The scope of official interactions is suggested by the two to three thousand executive communications to Congress (testimony, letters, draft legislation) coordinated and cleared each year through the president's staff.”)

<sup>151</sup> See *id.* at 422, 424.

<sup>152</sup> Cf. *Gubiensio-Ortiz v. Kanahale*, 857 F.2d 1245, 1265 (9th Cir. 1988), *vacated sub nom.* *United States v. Chavez-Sanchez*, 488 U.S. 1036 (1989). Judge Kozinski, in holding the Federal Sentencing Commission to be an unconstitutional separation of powers, reasoned that “[d]istinctive in the Sentencing Reform Act is the *requirement* that judges serve as members of the Commission. This requirement of judicial participation greatly heightens the dangers we perceive.” *Id.* (emphasis added); see also Lewis J. Liman, Note, *The Constitutional Infirmities of the United States Sentencing Commission*, 96 YALE L.J. 1363, 1369 (1987) (“The Sentencing Reform Act violates the separation of powers in two ways. Locating the power to determine sentences in an administrative agency violates the nondelegation doctrine. At the same time, the requirement that three article III judges sit on the Sentencing Commission, with the possibility that the President might appoint—and discharge—up to six judges, compromises judicial independence and impartiality.”).

<sup>153</sup> See Rudalevige, *supra* note 150, at 422.

<sup>154</sup> See, e.g., Gary Lawson, *Prolegomenon to Any Future Administrative Law Course: Separation of Powers and the Transcendental Deduction*, 49 ST. LOUIS U. L.J. 885, 887 (2005). Lawson, founding member and member of the Board of Directors of the Federalist Society, describes himself as “a committed (and many would say fanatical) formalist.” *Id.*; Gary Lawson, FEDERALIST SOC’Y, <https://fedsoc.org/contributors/gary-lawson> [<https://perma.cc/HFL3-CET5>] (last visited Feb. 21, 2018).



embraced them.<sup>155</sup> The broadest and most formalist claim (stated word-for-word by both the Reagan and Bush Administrations) was that “[e]ntities that are neither clearly governmental nor clearly private should not be created.”<sup>156</sup> Justice Alito, who served as a Deputy Assistant Attorney General in the Office of Legal Counsel during the Reagan Administration, understood executive branch participation on private entities to “predictably give rise to problems of divided loyalty.”<sup>157</sup> President H.W. Bush similarly understood these entities to “undermine[] the separation of powers principles of our Constitution, blurring the distinction between public and private entities in a way that may diminish the political accountability of government.”<sup>158</sup>

The Reagan Administration’s Office of Legal Counsel also routinely objected to “hybrid commissions” containing appointees from both the Legislative and Executive Branches, “[e]ven if its functions are merely advisory”<sup>159</sup> (i.e., advisory committees). The separation of powers problem is, “[i]n many instances,” further “aggravated by the fact that the commission’s membership is to contain more representatives of the legislative branch than of the executive branch.”<sup>160</sup> Instead, “the proper

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<sup>155</sup> See Memorandum from Alice M. Rivlin, Office of Mgmt. & Budget, for Heads of Exec. Dep’ts and Agencies (Dec. 8, 1995), <https://www.whitehouse.gov/sites/default/files/omb/assets/omb/memoranda/m96-05.pdf> [<https://perma.cc/52PU-3AV9>]; AL GORE, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS, REPORT OF THE NATIONAL PERFORMANCE REVIEW (1993) (encouraging the creation of public-private partnerships); see also DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR (1992); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 555 (2000) (“[T]he Clinton Administration, both in its rhetoric and in practice, has sought to promote public-private partnerships.”); cf. Ronald C. Moe, *The “Reinventing Government” Exercise: Misinterpreting the Problem, Misjudging the Consequences*, 54 PUB. ADMIN. REV. 111 (1994); James Q. Wilson, *Reinventing Public Administration*, 27 PS: POL. SCI. & POL. 667, 668 (1994) (“The near absence of any reference to democratic accountability is perhaps the most striking feature of the Gore report.”).

<sup>156</sup> Presidential Statement on Signing the Tourism Policy and Export Promotion Act of 1992, 2 PUB. PAPERS 1722 (Sept. 30, 1992); Presidential Statement on Signing the National Environmental Education Act, 2 PUB. PAPERS 1615 (Nov. 16, 1990); Presidential Statement on Signing the National Fish and Wildlife Foundation Establishment Act, 1 PUB. PAPERS 418 (Mar. 26, 1984).

<sup>157</sup> Memorandum from Samuel A. Alito, Jr., Deputy Assistant Attorney Gen., Office of Legal Counsel, to David H. Martin, Dir., Office of Gov’t Ethics (Dec. 3, 1986) (on file with the National Archives); see also *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 135 S. Ct. 1225, 1234 (2015) (Alito, J., concurring) (“[E]veryone should pay close attention when Congress ‘sponsor[s] corporations that it specifically designate[s] not to be agencies or establishments of the United States Government.’” (alterations in original) (quoting *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 390 (1995))).

<sup>158</sup> Presidential Statement on Signing the National Environmental Education Act, 2 PUB. PAPERS 1615 (Nov. 16, 1990).

<sup>159</sup> Common Legislative Encroachments on Exec. Branch Auth., 13 Op. O.L.C. 248, 251 (1989).

<sup>160</sup> *Id.* at 252.

relationship between the two co-equal Branches would require that they be equally represented on a Commission of this type in terms of numbers as well as rank.”<sup>161</sup>

By today’s standards and practices, it is hard to imagine an Executive Branch objecting outright to all government-created corporations, “hybrid commissions,” and more, that person *and* rank parity would be constitutionally required! And yet, scholarship on “cultural capture” and social psychology, if believed, would seem to illuminate some of the virtues of this formalist approach. Reagan’s Office of Legal Counsel seemed to see in the separation of powers something subtler, a constitutional prescription for maintaining an independent organizational culture: “[T]he separation of powers suggests that each branch maintain its *separate identity*.”<sup>162</sup> Following the 2008 financial crisis, BP oil spill, and other episodes of catastrophic regulatory failure, the maintenance of separate organizational cultures became a top priority for many regulatory agencies.<sup>163</sup> Greater constitutional emphasis on these values of identity and loyalty characteristic of a formalist separation of powers may rightly grant agencies important powers for resisting their capture.

#### CONCLUSION

The Office of Legal Counsel has long claimed a right and duty to defy acts of Congress that it regards as unconstitutional. This general duty becomes an “enhanced responsibility” where unconstitutional provisions “encroach upon the constitutional powers of the Presidency.”<sup>164</sup> David Pozen calls this constitutional “self-help,” in

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.* (emphasis added).

<sup>163</sup> See, e.g., ALYSON FLOURNOY ET AL., CTR. FOR PROGRESSIVE REFORM, REGULATORY BLOWOUT: HOW REGULATORY FAILURES MADE THE BP DISASTER POSSIBLE, AND HOW THE SYSTEM CAN BE FIXED TO AVOID A RECURRENCE (2010), [http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1994&context=fac\\_pubs](http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1994&context=fac_pubs) [[https://web.archive.org/web/20170922211902/http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1994&context=fac\\_pubs](https://web.archive.org/web/20170922211902/http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1994&context=fac_pubs)]; Rob Blackwell, *How Specter of Regulatory Capture Shaped CFPB’s First Year*, AM. BANKER (July 9, 2012, 12:29 PM), [http://www.americanbanker.com/issues/177\\_131/how-specter-regulatory-capture-shaped-cfpb-first-year-1050723-1.html?pg=1](http://www.americanbanker.com/issues/177_131/how-specter-regulatory-capture-shaped-cfpb-first-year-1050723-1.html?pg=1) [<https://perma.cc/X4CV-UGC5>]; Ian Katz & Matthew Boesler, *Fed Weighs Steps to Prevent ‘Regulatory Capture’ by Banks*, BLOOMBERG (Apr. 20, 2015, 2:51 PM), <http://www.bloomberg.com/news/articles/2015-04-20/fed-said-to-weigh-steps-to-prevent-regulatory-capture-by-banks> [<https://perma.cc/9A99-VT5V>] (“The New York Fed is continuing a program to move employees from the banks they examine to the regulator’s Manhattan offices.”); Catherine Rampell, *Lax Oversight Caused Crisis, Bernanke Says*, N.Y. TIMES (Jan. 4, 2010), <http://www.nytimes.com/2010/01/04/business/economy/04fed.html>. For a fascinating report suggesting regulatory capture dynamics at the Federal Reserve, see Jake Bernstein, *Inside the New York Fed: Secret Recordings and a Culture Clash*, PROPUBLICA (Sept. 26, 2014, 5:00 AM), <https://www.propublica.org/article/carmen-segarras-secret-recordings-from-inside-new-york-fed> [<https://perma.cc/G6BT-J5QA>].

<sup>164</sup> Presidential Auth. to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 201 (1994).

that a coordinate branch of government need not always rely on the judiciary, but may instead take unilateral remedial action.<sup>165</sup> Sometimes the remedial action is an outright refusal to comply with an act of Congress,<sup>166</sup> but other times the executive “seek[s] redress in subtler ways,” such as by “deploy[ing] interpretive strategies designed to neutralize congressional conduct.”<sup>167</sup> In Walter Dellinger’s words, the Executive’s role is “heightened by the absence or reduced presence of the courts’ ordinary guardianship of the Constitution’s requirements.”<sup>168</sup>

Although the Obama Administration sought to reduce the “*direct advisory influence*” resulting from “formalized access to decision makers” within the administration,<sup>169</sup> the issue was never taken to its full conceptual scope as a matter of

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<sup>165</sup> David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2 (2014); see also EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787–1984*, at 9 (Randall W. Bland et al. eds., 5th rev. ed. 1984) (claiming “that each department should be able to defend its characteristic functions from intrusion by either of the other departments” follows “logically” from the doctrine of the separation of powers).

<sup>166</sup> See, e.g., *Constitutionality of Statute Requiring Exec. Agency to Report Directly to Cong.*, 6 Op. O.L.C. 632 (1982) (Office of Legal Counsel refusing to comply with the concurrent reporting requirements created by the Tax Equity and Fiscal Responsibility Act of 1982).

<sup>167</sup> Pozen, *supra* note 165, at 19; see also Presidential Statement on Signing the National Fish and Wildlife Foundation Establishment Act, 1 PUB. PAPERS 418–19 (Mar. 26, 1984) (President Reagan declaring that appointees to the National Fish and Wildlife Foundation “will be removable at the discretion of the Secretary of the Interior” and therefore “[i]t will not be necessary to enforce compliance through suit by the Attorney General, an aspect of the bill which raises significant constitutional issues”).

<sup>168</sup> *The Constitutional Separation of Powers Between the President and Cong.*, 20 Op. O.L.C. 124, 180 (1996) (“The judiciary is limited, properly, in its ability to enforce the Constitution, both by Article III’s requirements of jurisdiction and justiciability and by the obligation to defer to the political branches in cases of doubt or where Congress or the President has special constitutional responsibility. In such situations, the executive branch’s regular obligations to ensure, to the full extent of its ability, that constitutional requirements are respected is *heightened by the absence or reduced presence of the courts’ ordinary guardianship of the Constitution’s requirements.*” (emphasis added) (footnote omitted)).

<sup>169</sup> Jacob R. Straus, Wendy R. Ginsberg, Amanda K. Mullan & Jaclyn D. Petruzzelli, *Restricting Membership: Assessing Agency Compliance and the Effects of Banning Federal Lobbyists from Executive Branch Advisory Committee Service*, 45 PRESIDENTIAL STUD. Q. 310, 317 (2015) (“Serving on advisory committees and using *direct advisory influence* gives individual lobbyists direct and formalized access to decision makers. This direct access, and the idea that lobbyists have too much influence within the federal government, likely contributed to the Obama administration’s prohibition on federally registered lobbyists serving on executive branch advisory committees.”); see also Letter from Norman L. Eisen, Special Counsel to the President, to Gregory Dole et al. (Oct. 21, 2009), [https://www.whitehouse.gov/assets/documents/Signed\\_Lobbyist\\_Response\\_Letter\\_\(10-21-09\).pdf](https://www.whitehouse.gov/assets/documents/Signed_Lobbyist_Response_Letter_(10-21-09).pdf) [<https://perma.cc/6UKJ-HNHA>] (“The President’s overarching goal is to reduce special interest influences that threaten the public interest and undermine public confidence. And his concerns extend to the appointment or retention of those who lobby the government and simultaneously serve on federal boards and commissions.”).

constitutional law. For example, the administration's policy was quite limited: it simply explained that federally registered lobbyists would not be appointed by the President to federal advisory committees;<sup>170</sup> that is, the administration explained how the President would use discretion already expressly granted to him by statute. This Article instead contemplates that the constitutional structure could itself limit formalized access to decision makers within the Executive Branch, even where such access has been provided for by legislation—as was the case in *NRA Political Victory Fund*.

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<sup>170</sup> Memorandum on Lobbyists on Agency Boards and Commissions, 2010 DAILY COMP. PRES. DOC. 1 (June 18, 2010) (“I hereby direct the heads of executive departments and agencies not to make any new appointments or reappointments of federally registered lobbyists to advisory committees and other boards and commissions.”); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, FR DOC. 2011-25736, FINAL GUIDANCE ON APPOINTMENT OF LOBBYISTS TO FEDERAL BOARDS AND COMMISSIONS (2011), <https://www.federalregister.gov/articles/2011/10/05/2011-25736/final-guidance-on-appointment-of-lobbyists-to-federal-boards-and-commissions> [<https://perma.cc/EL2W-X99U>]; Norm Eisen, *Lobbyists on Agency Boards and Commissions*, WHITE HOUSE: BLOG (Sept. 23, 2009, 2:33 PM), <https://www.whitehouse.gov/blog/2009/09/23/lobbyists-agency-boards-and-commissions> [<https://perma.cc/9QYM-RGH3>] (“[T]he President issued Executive Order 13490, which bars anyone appointed by the President who has been a federally-registered lobbyist within the past two years from working on particular matters or in the specific areas in which they lobbied or from serving in agencies they had lobbied.”); *see also* Exec. Order No. 13,490, 74 Fed. Reg. 4673 (Jan. 26, 2009); Norm Eisen, *Why We Bar Lobbyists from Agency Advisory Boards and Commissions*, WHITE HOUSE: BLOG (Oct. 21, 2009, 8:01 PM), <https://www.whitehouse.gov/blog/Why-We-Bar-Lobbyists-from-Agency-Advisory-Boards-and-Commissions> [<https://perma.cc/9XB5-NCD6>]; Norm Eisen, *Why We Closed the Revolving Door*, WHITE HOUSE: BLOG (Oct. 28, 2009), <https://www.whitehouse.gov/blog/2009/10/28/why-we-closed-revolving-door> [<https://perma.cc/FUL3-EZY8>]. *But see* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, FR DOC. 2014-19140, REVISED GUIDANCE ON APPOINTMENT OF LOBBYISTS TO FEDERAL ADVISORY COMMITTEES, BOARDS, AND COMMISSIONS (2014), <https://www.gpo.gov/fdsys/pkg/FR-2014-08-13/pdf/2014-19140.pdf> [<https://perma.cc/3X4Z-GCYG>] (“OMB is now issuing revised guidance regarding the prohibition against appointing or re-appointing federally registered lobbyists to clarify that the ban applies to persons serving on advisory committees, boards, and commissions in their individual capacity and does not apply if they are specifically appointed to represent the interests of a nongovernmental entity, a recognizable group of persons or nongovernmental entities (an industry sector, labor unions, environmental groups, etc.), or state or local governments.”).

