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CONGRESSIONAL ADMINISTRATION

JACK M. BEERMANN

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Congressional Administration

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Abstract

In recent years, at least since President Reagan's precedent-setting Executive Order 12291, the phenomenon of direct presidential supervision of agencies has received significant attention in legal scholarship. Congress's involvement has been much less thoroughly examined, and, although most people are familiar with congressional hearings and oversight, the dominant image as a legal matter is that once Congress legislates, it loses control over how its laws are administered unless it chooses to legislate again. In the political science/public policy literature, the understanding of Congress's role in monitoring agencies has evolved from despair that Congress is not sufficiently engaged to a recognition that Congress gets involved when it is worth it in terms of gaining political support from oversight activities. The police patrol/fire alarm model of oversight predicts that Members of Congress have the strongest incentive to get involved when a constituent "pulls an alarm." However, the high volume of oversight that is not responsive to particular alarms contradicts this prediction. Congress routinely engages in a very high volume of oversight, both formal and informal. Formal oversight includes more precise legislation, appropriations riders, earmarked funding, certification requirements and Senate advice and consent on appointments. Informal oversight includes hearings, direct communication with agencies, influence over appointments, investigations, and casework. This article sets out and analyzes the various forms of formal and informal oversight and then examines key doctrines of administrative law, namely the nondelegation doctrine, Chevron and Vermont Yankee, and asks whether our understanding of those doctrines is affected by the fact of constant and consistent congressional involvement in and oversight of the administrative process.

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We take notice that since early in the 19th Century there have been marked differences between the United States Congress and other parliamentary bodies. One is the greater development of the committee system here Committee chairmen and members naturally develop interest and expertise in the subjects entrusted to their continuing surveillance. Officials in the executive branch have to take these committees into account and keep them informed, respond to their inquiries, and it may be, flatter and please them when necessary. Committees do not need even the type of "report and wait" provision we have here to develop enormous influence over executive branch doings. There is nothing unconstitutional about this: indeed, our separation of powers makes such informal cooperation much more necessary than it would be in a pure system of parliamentary government.¹

Although more than a century has passed since the birth of the administrative state in the United States, a great deal of uncertainty remains concerning the actual and appropriate distribution of power within the government. There is a continuing struggle between the President and Congress over control of the administration. Legal conflicts have resulted from innovations of more or less recent vintage, including legislative and line-item vetoes,² congressional appointment of members of independent agencies,³

[†] This title is not meant to express disagreement with Elena Kagan's pathbreaking article *Presidential Administration*, 114 Harv. L. Rev. 2245 (2001), but rather to reflect the focus here on Congress's involvement in the administration of the laws.

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¹ *City of Alexandria v. United States*, 737 F.2d 1022, 1025-26 (Fed. Cir. 1984).

² See *INS v. Chadha*, 462 U.S. 919 (1983) (striking down legislative veto); *Clinton v. New York*, 524 US 417 (1998) (striking down line-item veto).

³ See *Buckley v. Valeo*, 424 U.S. 1 (1975) (holding, inter alia, appointment of members of Federal Election Commission by Speaker of the House and President pro tempore of the Senate improper).

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assignment of administrative tasks to officials under the control of Congress,⁴ and the creation of a mechanism for the appointment (by an Article III court) of a prosecutor outside the control of the Department of Justice to investigate and prosecute Executive Branch misconduct.⁵ Another set of skirmishes have involved assignment of power to adjudicate disputes among private parties to non-Article III tribunals such as agencies⁶ and arbitrators.⁷

Disputes concerning the proper distribution of power over the administration of the laws have also arisen in somewhat more rarified constitutional contexts.⁸ There have been two attempts in recent decades to revive the nondelegation doctrine, which in some circumstances limits the power Congress may grant to the President and administrative agencies.⁹ Legislation passed relating to an administrative matter during the pendency of judicial review litigation also has been attacked as usurping the judicial role.¹⁰ And

⁴ See *Bowsher v. Synar*, 478 U.S. 714 (1986) (holding that Comptroller General, an official subject to removal by Joint Resolution of Congress, may not exercise authority to enforce budget controls).

⁵ See *Morrison v. Olson*, 487 U.S. 654 (1988) (upholding provisions of Ethics in Government Act concerning the appointment and removal of independent counsel with authority to investigate and prosecute Executive Branch officials).

⁶ See *CFTC v. Schor*, 478 U.S. 833 (1986) (upholding assignment to CFTC to adjudicate state law counterclaims in dispute between commodities broker and customer).

⁷ See *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985) (upholding mandatory binding arbitration, with limited judicial review, of compensation claim by pesticide registrant against private party wishing to make use of trade secrets contained in registration materials).

⁸ For an overview of separation of powers disputes between Congress and the President, see Louis Fisher, *Constitutional Conflicts between Congress and the President* (1985).

⁹ See *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 646 (1980) (plurality opinion) (noting that if OSH ACT lacked threshold requirement before agency may regulate workplace, it might be unconstitutional under the nondelegation doctrine); *id.* at 671-88 (Rehnquist, J. concurring in the judgment) (arguing that OSH Act violated the nondelegation doctrine), *American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490, 543-48 (1981) (Rehnquist J. dissenting) (arguing that OSH Act violated nondelegation doctrine); *Whitman v. American Trucking Associations*, 531 US 457 (2001) (rejecting novel holding of D.C. Circuit that Clean Air Act violated the nondelegation doctrine because the EPA failed to articulate standards under which it would exercise regulatory discretion).

¹⁰ See, e.g., *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992) (upholding legislation passed during the pendency of judicial review that, in effect, legislatively approved the administrative action under review).

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Congress has been twice rebuffed when it attempted to retain control over the administration of the airports in the Washington, D.C. area.¹¹

There have also been numerous non-constitutional administrative law controversies that implicate the allocation of power to control the administration of the laws. Many of these controversies center on appropriate standards of judicial review: May courts impose procedural requirements on agencies when, in the courts' judgment, APA procedures are insufficient?¹² How much and when should courts defer to agency policy decisions¹³ or agency interpretations of statutes?¹⁴ When is an agency decision beyond the reach of judicial review?¹⁵ May the President or Members of Congress communicate with administrative officials about matters pending before the agency¹⁶ or force the agency to submit some or all administrative decisions to review by agents of the President?¹⁷ These issues, while not explicitly constitutional, have implications for the distribution of power among the President, Congress, independent agencies and the courts.

Underlying many of these controversies is a fact that is insufficiently noted in legal scholarship, that Congress is deeply involved in the day to day administration of the

¹¹ See *Metropolitan Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991) (Members of Congress may not serve on Board of Review with power to overrule decisions of Airport Authority); *Hechinger v. Metropolitan Washington Airports Authority*, 36 F.3d 97 (D.C. Cir. 1994) (Congress may not require appointments to Board of Directors of Airport Authority be made from lists supplied by Speaker of the House and President pro tempore of the Senate).

¹² See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978) (courts lack power, absent unconstitutionality, to impose procedures in addition to those statutorily required).

¹³ *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

¹⁴ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

¹⁵ *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991); *Webster v. Doe*, 486 U.S. 592 (1988).

¹⁶ *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981).

¹⁷ See Executive Order 12,291; Executive Order 12,866.

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law.¹⁸ In recent years, at least since President Reagan's precedent-setting Executive Order 12291, which subjected administrative rules to centralized review by the Office of Management and Budget, there has been a resurgence of direct Presidential supervision of the administrative state, and this phenomenon has received significant attention in legal academia.¹⁹ Congress's involvement has been much less thoroughly examined, and, although most people are familiar with congressional hearings and oversight, the dominant image as a legal matter is that once Congress legislates, it loses control over how its laws are administered. Under this dominant image, the only mechanisms that prevent the administration from ignoring Congress's goals altogether are judicial review and the possibility of further legislation.²⁰ This article is an attempt to initiate a greater

¹⁸ There has been some very good legal scholarship on this point, including Mark Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 *Duke L. J.* 1015 (2001); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 *Harv. L. Rev.* 1511, 1525 (1992) and Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 *J. L. Econ. Org.* 93 (1992). However, the political science literature on congressional oversight of the administration of the law is much more developed. See, e.g., Seymour Scher, *Congressional Committee Members as Independent Agency Overseers*, 54 *Am. Pol. Sci. Rev.* 911 (1960); Arthur Lupia & Mathew D. McCubbins, *Designing Bureaucratic Accountability*, 57 *Law & Contemp. Probs.* 91 (1994); Mathew D. McCubbins, *McNollgast, Administrative Procedures as Instruments of Political Control*, 3 *J. L. Econ. Org.* 243 (1987); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 *Va. L. Rev.* 431 (1989); Mathew D. McCubbins, *The Legislative Design of Regulatory Structure*, 29 *Am. J. Pol. Sci.* 721 (1985); B. Dan Wood, *The Dynamics of Political Control of the Bureaucracy*, 85 *Am. Pol. Sci. Rev.* 801 (1991). Further, administrative law has not been sufficiently influenced by the realities of congressional oversight.

¹⁹ The classic recent work is Elena Kagan, *Presidential Administration*, 114 *Harv. L. Rev.* 2245 (2001). It is clear, as Dean Kagan describes, that the President has become much more directly involved in agency action in recent decades. See also Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 *U. Chi. L. Rev.* 123 (1994); Mark Seidenfeld, *A Big Picture Approach to Presidential Influence of Agency Policy Making*, 80 *Iowa L. Rev.* 1 (1994); Thomas O. Sargentich, *The Contemporary Assault on Checks and Balances*, 7 *Widener J. Pub. L.* 231, 241, 247-50 (1998); Terry M. Moe, *Regulatory Performance and Presidential Administration*, 26 *Am. J. Pol. Sci.* 197 (1982); David Strauss & Cass Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 *Minn. L. Rev.* 181 (1986); Martin S. Flaherty, *The Most Dangerous Branch*, 105 *Yale L.J.* 1725 (1996) (discussing the dominance of executive power); Daniel B. Rodriguez, *Management, Control and the Dilemmas of Presidential Leadership in the Modern Administrative State*, 43 *Duke L. J.* 1180 (1994).

²⁰ In the early days of review of regulations under President Reagan's Executive Order 12291, there was a great deal of commentary on whether centralized review was proper in light of Congress's usual practice of delegating regulatory authority directly to a particular agency. See Alan Morrison, *OMB Interference with Agency rulemaking: The Wrong Way to Write a Regulation*, 99 *Harv. L. Rev.* 1059 (1986); Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 *Am. U.L. Rev.* 443 (1987);

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appreciation of Congress's role in the administration of the laws and to infuse that understanding into certain key features of administrative law.

In the political science/public policy literature, the understanding of Congress's role in monitoring agencies has evolved from despair that Congress is not sufficiently engaged²¹ to a recognition that Congress gets involved when it is worth it in terms of gaining political support from oversight activities.²² In a seminal paper reconstructing our understanding of Congress's supervisory role, McCubbins and Schwartz compared Congress's oversight of agencies to police patrols and fire alarms. Police patrols involve constant supervision under which the "police" are ever searching for problems. Under fire alarm supervision, the department sits back and waits for someone to pull the alarm indicating that there is a problem. This theory holds that while it may not be worth it very often for Congress to devote "police patrol" resources to oversight, Members gain a

Colin S. Diver, *Presidential Powers*, 36 *Am. U.L. Rev.* 519 (1987); Morton Rosenberg, *Presidential Control of Agency Rulemaking: An Analysis of Constitutional Issues that May Be Raised by Executive Order 12,291*, 23 *Ariz. L. Rev.* 1199 (1981); Frank B. Cross, *Executive Orders 12,291 and 12,498: A Test Case in Presidential Control of Executive Agencies*, 4 *J.L. & Pol.* 483 (1988). Now that review under the successors to 12291 is an entrenched and accepted element of the administrative process, scholarship has focused on its justifications, its effects, and its limits. See John O. McGinnis, *Presidential Review as Constitutional Restoration*, 51 *Duke L.J.* 901 (2001) (arguing that presidential review helps restore control over excessive delegation to agencies); Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 *U. Chi. L. Rev.* 821 (2003); William D. Araiza, *Judicial and Legislative Checks on Ex Parte OMB Influence over Rulemaking*, 54 *Admin. L. Rev.* 611 (2002). Seidenfeld, *Psychology of Accountability*, *supra* note x at 1068-75.

²¹ Theodore Lowi, *The End of Liberalism: The Second Republic of the United States* (2d ed. 1979).

²² Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 2 *Am. J. Pol. Sci.* 165 (1984); Mathew D. McCubbins, *Abdication or Delegation? Congress, the Bureaucracy, and the Delegation Dilemma*, 31 *Regulation* 30 (1999). I do not mean to argue that there is general agreement that Congress is more powerful than the President or vice versa. Political scientist Robert Spitzer recognizes that Congress has the tools to exert control over the execution of the law, but argues that a careful examination of institutional realities reveals that the President exercises "hegemony" over the U.S. government despite the availability of tools with which Congress could resist presidential domination. See Robert J. Spitzer, *President and Congress: Executive Hegemony at the Crossroads of American Government* (1993). See also Lucy Drotning & Lawrence S. Rothenberg, *Predicting Bureaucratic Control: Evidence from the 1990 Clean Air Act Amendments*, 21 *Law and Policy* 1 (1999) (noting disparate views on degree of congressional control and constructing an empirical test to determine the conditions under which oversight is likely).

great deal of political credit for “putting out fires” called in by constituents.²³ Thus, the appearance of lack of oversight may in actuality reflect a rational decision that in most cases it is more cost-effective to sit back and wait for an alarm. The proliferation of congressional casework is also a reflection of this reality.

On the other hand, the high volume of reports that agencies are required to file with Congress and the constant monitoring of agencies that Congress performs indicates that some more generalized, police patrol type oversight is worthwhile. Police departments find it worthwhile to send officers out in automobiles, airplanes, helicopters and boats looking for problems, and even fire departments do some inspections without waiting for an alarm. Similarly, Congress requires thousands of periodic reports from agencies, holds numerous hearings and sends the Government Accountability Office (GAO)²⁴ out looking for problems even in the absence of a pulled alarm. While the McCubbins and Schwartz model is obviously a very powerful conceptual tool for understanding the incentives underlying oversight, the high volume of oversight that is not responsive to particular alarms contradicts the prediction that there will be little in the way of police patrol type oversight.²⁵ To the contrary, oversight, like police patrols, seems to be everywhere, whether alarms are being sounded or not.²⁶

²³ McCubbins, *supra* note x at 33 (“Political leaders and therefore likely to prefer the low-risk, high-reward strategy of fire-alarm oversight[.]”) See also Terry M. Moe, *The Politics of Bureaucratic Structure in Can the Government Govern?* 267-329 (John E. Chubb & Paul E. Peterson eds. 1989); John A. Rohr, *Civil Servants and Their Constitutions* 84-86 (2002).

²⁴ The role of the GAO in congressional oversight of agencies is discussed *infra* at notes x-x and accompanying text.

²⁵ It is even somewhat difficult in some situations to distinguish between police patrol and fire alarm oversight. Many, if not most, legislative and regulatory initiatives are in response to an alarm sounded by a group of constituents demanding resolution of a problem or favorable governmental treatment, just as the level of police patrols in a community is likely to be very responsive to the articulated demands of the citizenry. Once a regulatory program is in place, the constant monitoring of agency performance that Congress tends to do may be thought of as responsive to the initial “alarm” that resulted in the regulatory

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Congress's oversight of and involvement in the administration of the laws is a result of the unique structure of the United States government. Ironically, as the above quoted passage from an opinion of the Court of Appeals for the Federal Circuit recognizes, the brand of separation of powers practiced in the United States is a significant cause of Congress's ongoing intervention into Executive Branch activity. In most countries with parliamentary systems, principal executive officers are drawn from the legislature, and they are a natural conduit for legislative input into the execution of the law. In the United States, with the constitutional prohibition of service in both Congress and the Executive Branch,²⁷ other channels are necessary, and sometimes it appears that the only the creativity of Congress limits the form of oversight and control.

Congress's involvement in the administration of the law takes place both formally and informally.²⁸ Formally, Congress attempts to control the administration of the law legislatively, through devices as general as the Administrative Procedure Act and as specific as legislation enumerating with particularity the purposes for which appropriated funds may or may not be spent and legislation approving particular agency action during the pendency of judicial review litigation. Informally, Congress uses the threat of

program, or it may be viewed as police patrol oversight if no new alarm precipitated the particular instance of oversight.

²⁶ An additional difficulty is that there is no clear normative baseline for judging whether the amount of congressional oversight of the Executive Branch is proper. This makes it very hard to come to a conclusion on whether Congress is fulfilling its role as legislator or whether it has abdicated that role to executive decisionmaking. Basic economic modeling, as exemplified by the McCubbins and Schwartz thesis, would predict that Congress will retain or delegate power based on the political costs and benefits.

²⁷ See U.S. Const. II, sec. 6, cl. 2.

²⁸ For a collection of citations to the literature on congressional influence over the administration of the law, most of which come from non-legal publications, see Rachel E. Barkow, *Administering Crime*, 52 U.C.L.A. L. Rev. 715, 755 n. 135 (2005). For a useful collection of essays on the relative roles of Congress and the President in matters of public policy see *Divided Democracy: Cooperation and Conflict Between the President and Congress* (James A. Thurber ed., Congressional Quarterly Inc. 1991). See also Walter Dellinger, *The Constitution Under Clinton: A Critical Assessment: Appendix the Constitutional Separation of Powers Between the President and Congress*, 63 L. & Contemp. Probs. 513, 562-66 (2000) (discussing oversight).

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legislative action, especially relating to its power over the budget, to control or at least influence the administration of the law in myriad ways, from insisting that particular candidates for executive positions are appointed by the President to pushing administrative action in the substantive direction favored by Members of Congress without the need to resort to the full legislative process. Through its oversight and supervision of the administration of the laws, Congress is involved in a great deal of the output of the administrative state.

The consistent and constant involvement of Congress in the administration of the laws has interesting ramifications for key features of administrative law such as the nondelegation doctrine, which regulates the amount of discretion Congress may delegate to an agency, the Chevron doctrine, which specifies the standard for judicial review of agency statutory interpretation, and the Vermont Yankee doctrine, which prohibits courts from imposing procedural requirements on agencies in addition to those that are required by either the Constitution or applicable statutes and rules. The lenient nondelegation doctrine, which allows for the delegation of a great deal of discretion to agencies, is consistent with a full appreciation of Congress's role. As far as deference to agency statutory interpretation, Congressional administration counsels in favor of a deferential version of Chevron in those instances in which congressional involvement in agency interpretation is likely. Finally, a broad application of the Vermont Yankee doctrine to prohibit courts from imposing their own ideas of proper procedures on agencies is consistent with Congress's involvement in the execution of the laws.

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This article is structured as follows. The first part of the article is a catalog of the ways that Congress is involved in the administration of the law, formal and informal.²⁹ Included in this part is some analysis of whether Congress's involvement is appropriate as a constitutional and legal matter. The second part of the article analyzes important doctrines of administrative law in light of Congress's involvement and asks whether and to what extent any of these doctrines should be modified or at least reconceptualized in that light. In particular, three pillars of administrative law are examined, the nondelegation doctrine, the Vermont Yankee doctrine and the Chevron doctrine.

I. Congress's Involvement in the Administration of the Laws

The form of Congress's involvement in the administration of the laws ranges across a wide spectrum of formal and informal methods.³⁰ On the formal side, Congress employs its legislative power to map out its preferred course of administrative action, and then it continually supervises the Executive Branch through legislation and other formal action.³¹ Some legislation is directed at particular agencies, and ranges from directive provisions in enabling legislation to very specific appropriations riders that prohibit or direct particular agency actions. Other legislation, such as the Administrative Procedure Act and the National Environmental Policy Act, is more general and is designed to shape

²⁹ I have purposely omitted discussion of the war power. It is worth noting that Louis Fisher believes that Congress has, in recent times, abdicated its historical position of primacy in the decision whether to commit the armed forces of the United States to foreign conflict. See Louis Fisher, *Congressional Abdication on War and Spending* (2000); Louis Fisher, *Presidential War Power* (2d ed. revised 2004). For an analysis of Congress's role in authorizing the war on terrorism, see Curtis A. Bradley and Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047 (2005).

³⁰ For a comprehensive look at the relationship between Congress and the President, see Louis Fisher, *The Politics of Shared Power: Congress and the Executive* (4th ed. 1998). See also *The Tethered Presidency: Congressional Restraints on Executive Power* (Thomas M. Franck ed., New York University Press 1981).

³¹ Of course, the President supervises Congress's legislative actions through the veto power, Article I, section 7, and the Recommendations Clause, Article II, section 3. For an interesting discussion of the President's involvement in the legislative process, including an argument that Congress is constitutionally required to consider the President's recommendations, see Vasana Kesavan & J. Gregory Sidak, *The Legislator-In-Chief*, 44 Wm. & Mary L. Rev. 1 (2002).

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the conduct and policies of many agencies. In many cases, Congress enlists the aid of the courts by prescribing judicial review under specified standards. Although most formal congressional action is in the form of legislation, the Senate's power to reject executive appointments and the impeachment and removal power of the House and Senate, respectively, are additional formal tools that Congress employs to supervise the Executive Branch.

In addition to formal supervision, Congress, or at least small groups and individual Members of Congress, supervise agencies informally. Informal supervision also takes a variety of forms, including cajoling, adverse publicity, audits, investigations, committee hearings, factfinding missions, informal contacts with agency members and staff, and pressure on the President to appoint persons chosen by Members of Congress to agency positions. All of the informal congressional action directed at agencies takes place in the context of (often unspoken) threats that Congress (or a particularly powerful Member or committee) will not cooperate with the Executive Branch in the future. Congress's power over the annual budget, and the Senate's advice and consent power over appointments create a strong incentive for the President and the rest of the Executive Branch to keep Congress happy. Thus, informal tools of supervision are often as powerful as formal tools.³²

Sometimes, it seems that Members of Congress do not much care about how the laws they have passed are executed, or at least they do not care enough to react formally or informally to administrative action. Other times, Congress seems incredibly concerned, even obsessed, with how their laws are administered. Perhaps they should

³² See generally Barry R. Weingast and Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 *J. Pol. Econ.* 767 (1983).

care more often, and it may be a major defect in our political system that Congress can take credit with constituents for passing legislation and then sit idly by while the Executive Branch fails to carry out its terms or even worse interfere with the execution of the law to please a different group of constituents.³³ Overall, however, the level of oversight is high enough that it is incorrect to assert that Congress abdicates its responsibility when it delegates discretion to those administering the law.

The remainder of this section describes and analyzes the principal tools, both formal and informal, that Congress uses to supervise the execution of the laws. These mechanisms are far from perfect if the standard of perfection is ensuring implementation of programs in accord with the intent of the legislative coalitions that enacted the programs. Numerous principal-agent problems prevent Congress from ensuring that agencies implement programs in accordance with congressional desires. Further, once post-hoc supervision comes into play, the difficulties may be magnified, with a new coalition or group within Congress acting in accordance with aims that may be different from those of the coalition that originally enacted the law being administered.³⁴ Nonetheless, even though perfection may be unattainable, oversight of agencies is important to Congress and constitutes a substantial part of Congress's work.

A. Formal Congressional Involvement in the Execution of the Laws

1. The Legislative Power

³³ Over the years, there have been many attacks on delegation based upon the political distortions that occur when Congress does not make the hard choices itself. A good example is David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People through Delegation* (1993).

³⁴ See McNollgast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 Va. L. Rev. 431 (1989).

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Congress's most important formal method of influencing the administration of the law is legislation, i.e. by passing a bill through both Houses of Congress and presenting it to the President for signature or veto. Aside from a few constitutionally prescribed exceptions discussed below, formal action by Congress has been limited to the legislative process by a number of Supreme Court decisions in the past few decades, including the invalidation of the legislative veto,³⁵ the insistence that officials under Congress's formal supervision may not take part in the execution of the laws³⁶ and the invalidation of any attempt by Members of Congress to appoint the members of administrative agencies³⁷ or serve on such agencies themselves.³⁸

Put quite simply, Congress provides the laws to administer, and the President's primary power and duty is to faithfully execute those laws. When Congress legislates with precision, the President and other administrative officials may have little discretion in the execution of the law, especially if there are effective tools for enforcing Congress's expressed intent. Congress can also attempt, in the legislation creating an agency or granting it the power to act, to "hard wire" the agency through procedural and structural devices to make the agency more likely to act in line with congressional preferences.³⁹ If Congress is less than precise, or if enforcement is not very strong, Congress may be unable to exert much direct control over the administration of the law.

³⁵ *INS v. Chadha*, 462 U.S. 919 (1983).

³⁶ *Bowsher v. Synar*, 478 U.S. 714 (1986).

³⁷ *Buckley v. Valeo*, 424 U.S. 1 (1975).

³⁸ See *Metropolitan Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991).

³⁹ See Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War over Administrative Agencies*, 86 *Geo. L. Rev.* 671 (1992). This illustrates a conceptual distinction in understanding congressional control of administrative action, the distinction between *ex ante* and *ex post* controls. *Ex ante* controls, such as precise statutory language and agency structure, attempt to control agency action in advance. *Ex post* controls, such as statutory amendments and appropriations riders, attempt to control agency action after the fact, when Congress notices that the agency has done something it does not like. Hard wiring the agency, as Macey describes, is an example of an *ex ante* control device.

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The legislative power gives Congress an enormous ability to control the execution of the laws.⁴⁰ The President's power to execute the laws is completely dependent on Congress passing laws to execute. There are, no doubt, some areas in which the President has unreviewable authority, such as decisions concerning the recognition of foreign governments.⁴¹ In most areas, however, the President and the entire Executive Branch are highly dependent on legislation enabling them to carry out their constitutionally assigned functions. As Judge Michael McConnell stated recently in an opinion upholding very specific legislation aimed controlling the execution of the law, “[W]hen Congress is exercising its own powers with respect to matters of public right, the executive role of ‘tak[ing] Care that the Laws be faithfully executed,’ U.S. Const. art. II, § 3, is entirely derivative of the laws passed by Congress, and Congress may be as specific in its instructions to the Executive as it wishes.”⁴²

The language of the Constitution underscores the extent of congressional superiority: “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”⁴³ The

⁴⁰ “Unlike other legislatures that are constitutionally barred from legislating in certain areas of executive prerogative, or whose decisions may be overridden by an executive veto or popular vote, Congress has a jurisdiction that is virtually coterminous with that of the national government. Congress, rather than the president or the voters, has the final say on public policy questions.” Michael L. Mezey, *Congress within the U.S. Presidential System in Divided Democracy: Cooperation and Conflict Between the President and Congress* 23 (James A. Thurber ed. 1991).

⁴¹ *Goldwater v. Carter*, 444 U.S. 996 (1979). However, Congress has been active in the general field of foreign affairs. Thomas Franck interestingly ascribes congressional activism in the international human rights field to the failure of the Executive Branch to enforce the law. See Thomas M. Franck, *Human Rights and Constitutional Wrongs: A Case Study of the Origins of Congressional Imperialism in The Tethered Presidency: Congressional Restraints on Executive Power* 153, 160-62 (Thomas M. Franck ed. 1981). In another essay in the same collection, a foreign diplomat complains that legislative oversight of the conduct of foreign affairs causes problems because congressional meddling reduces the reliability of the Executive Branch. See H.E. Ambassador Ivor Richard, *Foreign Perspective: With Whom Do You Deal in The Tethered Presidency: Congressional Restraints on Executive Power* 21 (Thomas M. Franck ed. 1981). The problem appears to arise from the lack of a connection between the Cabinet and Congress.

⁴² *Biodiversity Associates v. Cables*, 357 F.3d 1152, 1162 (10th Cir. 2004).

⁴³ U.S. Const., Art. I, § 1.

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Constitution amplifies the legislative power in incredibly broad terms. Article I, Section 8 of the Constitution grants Congress the power “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” The analysis of this clause has by and large focused on the meaning of “necessary and proper,” with most scholars (and courts) adopting a very broad reading.⁴⁴ I want to focus on the last part of the clause which grants Congress the power to make all laws necessary and proper for carrying out “all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” This language means that in addition to legislation to carry out Congress’s enumerated powers, Congress has the power to legislate on all matters properly within the purview of the federal government, whether or not they are listed as within the legislative power.⁴⁵

Just what does Congress’s ability to make law relating to powers vested in other departments or officers entail? May Congress restrict the exercise of powers vested in other officials, or does “carrying out” mean that Congress may only enable other officials to carry out their constitutionally assigned functions? For example, the prevailing

⁴⁴ My colleague Gary Lawson is among the exceptions. He has consistently argued for a narrow interpretation of the Necessary and Proper Clause. See Gary Lawson and Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 *Duke Law Journal* 267 (1993). I do not mean to enter into the debate over the proper meaning of the clause, except to note that the courts have by and large allowed Congress very wide latitude in the laws it enacts, perhaps with a bit of tightening up in the last decade or so. One way in which the Supreme Court has narrowed Congress’s power is by using the procedural device of requiring that Congress make findings to justify its legislation. See Harold J. Krent, *Turning Congress into an Agency: The Propriety of Requiring Legislative Findings*, 46 *Case Western L. Rev.* 731 (1996). In my view, this proceduralization of the analysis is not really genuine, but rather designed to meet the criticism that the Court should not aggressively review the substantive bases for congressional action.

⁴⁵ See David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 *BYU L. Rev.* 75.

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understanding is that Congress may not restrict the President's recognition of foreign governments because the power to receive "Ambassadors and other public Ministers" is explicitly granted to the President and is part of the President's authority in foreign affairs, where it is most important for the nation to speak with one voice. Congress legislates in this area by providing funds for the conduct of foreign affairs and by passing laws regarding the immunities and privileges of foreign diplomats. Does Congress also have the power to limit the President's exercise of his constitutional powers on the theory that the clause grants Congress the power to legislate even on matters vested by the Constitution in other officers? Consider also legislation relating to the judiciary. There has long been controversy over whether Congress has the power to restrict the jurisdiction of the lower federal courts. The most common argument in favor of Congress's power is that the power to restrict the courts' jurisdiction is implicit in Congress's complete discretion over whether to create any lower federal courts at all. The second half of the necessary and proper clause adds another, perhaps even stronger, argument, that restricting the lower courts' jurisdiction is within Congress's power to make laws relating to the powers vested by the Constitution in the federal courts.

There are conflicting views regarding the scope of Congress's power over the other branches, particularly the Executive Branch, under the second half of the Necessary and Proper Clause. William Van Alstyne has taken a broad view of Congress's power, concluding that except in areas of constitutional necessity, the President and the federal courts are highly dependent on Congress for their powers, even in sensitive areas such as

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“confidentiality, removal [and] remedy.”⁴⁶ According to Van Alstyne’s reading of the Necessary and Proper Clause, “the absence of affirmative action by Congress may defeat an assertion of ancillary executive or judicial powers that cannot be defended as having been expressly provided in articles II and III or as necessarily implied by the nature of the expressed duties of those branches.”⁴⁷

David Engdahl has argued for a more restrictive view of Congress’s power, concluding that the language of the necessary and proper clause grants Congress power only to enable, but not to restrict, other branches in the exercise of their constitutional powers:

With reference to the powers of another branch, however, whatever discretion inheres in them belongs not to Congress but to that other branch, and the Necessary and Proper Clause only empowers Congress to help effectuate the discretion confided to that other branch. Although the decision whether and how to render assistance is committed to Congress’ discretion, it is only assistance that is authorized by the Necessary and Proper Clause. *The words of this clause are so perfectly adapted as to seem specifically tailored to exclude laws that restrict or inhibit the constitutionally contemplated power (hence discretion) of another branch.*⁴⁸

⁴⁶ William W. Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, 40 *Law & Contemp. Probs.* 102, 118 (1976).

⁴⁷ *Id.*

⁴⁸ Engdahl, *supra* note x at 102 (emphasis supplied).

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I do not find the language of the necessary and proper clause as clear as Engdahl does. Although Van Alstyne observes that a construction allowing Congress only to enable the other branches is compatible with the language of the clause, he does not reach any firm conclusions on whether Congress has the power also to restrict the other branches.⁴⁹ But Engdahl has gone much further, concluding that the enabling only construction is almost compelled by the language. To the contrary, when the Constitution grants Congress the power to make all laws necessary and proper for carrying out “all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof” it is not linguistic nonsense to interpret this language as granting Congress the power to decide what is “necessary and proper” and *what is not*. Almost any legislation Congress might pass with regard to another branch may include some restrictions or limitations, such as a requirement that a particular agency employ a rulemaking or adjudicatory procedure before issuing a rule or order or even that a particular agency may issue only rules or only orders. A law may be necessary and proper for carrying into the execution of a power granted to another branch if it confines the other branch to exercising the power in a manner consistent with legislatively expressed standards or procedures.⁵⁰ Engdahl cites for support of his conclusion the following language from an opinion of Chief Justice John Marshall: “As Chief Justice Marshall said, Congress may ‘exercise its best judgment in the selection of measures to carry into execution the

⁴⁹ See Van Alstyne, *supra* note x at 133 n. 100. In my view, Van Alstyne’s analysis and the sources he cites point toward the power to restrict. However, his main focus is on the other branches’ need for enabling legislation from Congress, while Engdahl focuses a bit more on the possibility of restrictive legislation.

⁵⁰ This would be nonsense to Gary Lawson, who argues that the word “proper” in the necessary and proper clause requires Congress to respect background norms of federalism and separation of powers. Among separation of powers norms at the founding, according to Lawson, is a ban on congressional interference with the performance by the other branches of their constitutionally assigned functions. See Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 *Const. Commentary* 191, 195-200 (2001).

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constitutional powers of the government.”⁵¹ This language does not answer whether the Court would strike down Congress’s judgment if it embodied restrictions that are not contained in the Constitution itself, for example by selecting some measures while disallowing others or requiring that particular actions be done according to prescribed procedures.

It is thus not a simple question whether Congress has the power to place limitations on other branches in the exercise of their constitutional powers. Consider the following example. The Constitution grants the President the power to issue pardons. Assume that Congress authorizes the position of “pardon attorney” in the Department of Justice and also appropriates funds for the pardon process. So far so good, but suppose also that the legislation requires the President to consult the pardon attorney, and give her 30 days to render advice, before issuing a pardon and that pardons issued in contravention of these requirements are invalid. Then, on his last day in office, the outgoing President issues several pardons that were never submitted to the pardon attorney. Are these pardons valid?⁵² Most people’s reaction to this example is likely to be in favor of the President’s power to disregard the restrictions because the President is exercising a constitutional power, not a power granted under a statute passed by Congress. That seems to be the best reading of Supreme Court case law, but I am not completely convinced that Congress cannot regulate the exercise of the pardon power at

⁵¹ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420 (1819) quoted in Engdahl, *supra* note x at 102 n. 103.

⁵² See Krent, *supra* note x at 194-96 (discussing congressional interference in the President’s pardon power).

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all under the Necessary and Proper clause's reference to other powers granted in the Constitution.⁵³

Even if the necessary and proper clause is read to grant Congress the power to enable, but not restrict, other officers in the exercise of their constitutional powers, Congress is likely to maintain some discretion regarding how much to enable the other branches. For example, Congress, perhaps out of dissatisfaction with the President's conduct in foreign affairs, may fail to afford foreign diplomats customary protections or it may appropriate insufficient funds for the President to conduct the diplomacy the President would prefer. Congress may similarly fail to provide the federal courts with adequate resources and may refuse to increase the number of judges when the workload indicates the need. Insufficient enabling is unlikely to be viewed as unconstitutional, and Congress's legislative power, even if it is restricted by doctrines prohibiting direct interference in the other branches' activities, provides Congress with significant supervisory authority. Neither the Constitution nor Marshall's language clearly states that Congress must enable the other branches to exercise their powers to the fullest possible extent.

There is no question that in the foreign affairs area, Congress can have a great deal of effect on the President's conduct. Most directly, the Senate can reject treaties

⁵³ The Supreme Court's only decision directly on point struck down an effort by Congress to interfere with the pardon power by converting a pardon from evidence of loyalty during the Civil War to evidence of disloyalty. See *United States v. Klein*, 80 U.S. 128 (1871). The Court has also expressed its views on the pardon power in dicta, usually recognizing expansive presidential power free from congressional interference. See, e.g., *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866). For a comprehensive study of Congress's role in the pardon power, see Todd David Peterson, *Congressional Power over Pardon & Amnesty: Legislative Authority in the Shadow of Presidential Prerogative*, 38 *Wake Forest L. Rev.* 1225 (2003). Peterson concludes that Congress may not restrict the pardon power and probably cannot exercise pardon power on its own. In Peterson's view, Congress has the power both to create the position of pardon attorney and to regulate the conduct of the pardon attorney, but Congress may not condition the President's exercise of the pardon power on the observance of pardon attorney procedures or any other statutory requirements, procedural or substantive.

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agreed to by the President. Even if a treaty is ratified, the Senate may attach conditions to the ratification to force interpretation or application of the treaty in a particular direction. Further, a subsequent Congress can pass legislation that is inconsistent with the treaty or that, in effect, prevents the President from carrying out the treaty. While this legislation does not void the treaty, it can force the United States into default on the treaty because the President is bound by legislation that is inconsistent with treaty obligations.⁵⁴

A key formal method Congress employs to control executive discretion is to nip discretion in the bud by legislating with precision. Under current law, Congress has a great deal of freedom over the degree of precision in laws granting power to agencies, with somewhat less freedom over the design of mechanisms it creates to control executive discretion.⁵⁵ There are few, if any, situations in which Congress's choice to be very precise concerning the substance of a regulatory program would be subject to challenge on constitutional or other grounds.⁵⁶ On the other hand, lack of precision is often attacked as violating the separation of powers by delegating legislative power to the Executive Branch. Under the current very lenient application of the nondelegation

⁵⁴ See Louis Henkin, *Foreign Affairs and the United States Constitution* 209-10 (2d ed. 1996). See also Comment, *Congressional Control over Treaty Interpretation*, 70 U. Chi. L. Rev. 1093 (2003) (describing efforts in Congress to legislate the proper interpretation of a treaty).

⁵⁵ Congress's freedom over the degree of precision in the laws it passes derives from the leniency of the nondelegation doctrine, which requires only that Congress legislate an intelligible principle under which the administering agency must act. See *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001) and *infra* notes x-x and accompanying text. The Court has strictly enforced structural provisions of the Constitution against innovations such as the legislative veto and congressional attempts to vest execution of the law in officials under congressional supervision. See *INS v. Chadha*, 464 U.S. 919 (1983); *Bowsher v. Synar*, 478 U.S. 714 (1986). On the appointment and removal front, the Court has been strict about not allowing Congress to be involved in the process, but has allowed Congress to reduce the President's authority by restricting removal and placing appointive authority in hands other than the President's. See *Morrison v. Olson*, 487 U.S. 654 (1988) (approving independent counsel who is appointed by a federal court and subject to removal by the Attorney General but only for good cause).

⁵⁶ There are constraints where independent presidential powers are concerned such as the President's powers over foreign affairs, the pardon power, the appointments power. There may also be substantive constraints when Congress legislates to resolve an issue that is the subject of litigation. This is discussed in detail below.

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doctrine, Congress must establish only an “intelligible principle” to guide the exercise of executive discretion.⁵⁷ Under the intelligible principle standard, Congress can legislate its goals and the broad contours of a regulatory program and leave it to the Executive Branch to carry out the program. To some, this is unfortunate because it allows Congress to evade its responsibility for the laws it passes and allows Congress to be all things to all people, legislating in favor of one interest while ensuring lax enforcement to another. To others, the delegation of discretion to agencies is an inevitable and even desirable response to the complexities and numbers of problems with which government is confronted.

The lenient nondelegation doctrine, coupled with no significant limitations on the degree of precision with which Congress legislates, means that the output of Congress may sometimes be indistinguishable from the output of an agency. For example, Congress may legislate precise limits on the emission of pollutants from automobiles, or it may set a goal of cleaner air and rely on an agency to establish the precise limits. When a bill specifying the precise limits makes its way through both Houses of Congress and is presented to the President, it is a proper exercise of the legislative power. When the exact same text is published in the Federal Register as a final rule after notice and comment, it is an agency rule and a proper element of the execution of the law. To advocates of a stricter nondelegation doctrine, this reveals the illogic of the lenient nondelegation doctrine’s denial that Congress delegates legislative power in these imprecise statutes. However, unless the Supreme Court changes course, which it has

⁵⁷ See *Whitman v. American Trucking Associations*, 531 U.S. at 472-74.

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declined to do in the face of sustained attack for more than twenty years, the choice of the degree of precision in regulatory statutes is largely for Congress to make.

There are general substantive doctrines that apply to all legislation that may require some precision in regulatory statutes. Excessive vagueness may violate due process by failing to give fair notice of legal requirements or potential penalties when property or liberty interests are threatened. However, there is no general constitutional requirement of clarity in regulatory legislation that has any significant bite. In fact, the D.C. Circuit's recent unsuccessful attempted revival of the nondelegation doctrine is best understood as an attempt to find a constitutional home for a clarity requirement in administrative law which would require agency decisions to be deduced from preexisting rules. In its decision in the American Trucking case, the Court of Appeals held that the nondelegation doctrine was violated, not by any lack of clarity in the statute under which Congress granted the EPA its authority to regulate air pollution but rather because the EPA could not explain its regulatory choice based on a preexisting standard of its own, i.e. a lack of clarity in underlying regulatory standards. This, to the court, meant that the agency's discretion was unconstrained, and constituted a violation of the nondelegation doctrine. The Supreme Court rejected the Court of Appeals' attempt to import into the nondelegation doctrine the requirement that agencies derive their rules from preexisting standards on the simple basis that the nondelegation doctrine regulates the clarity of Congress's instructions to agencies and not the clarity of the agency's own standards from which it derives its rules. The Court resoundingly reaffirmed that constitutional clarity concerns are met by statutes that contain an "intelligible principle" to guide agency discretion and facilitate judicial review of agency action.

When acting to enforce the law, the President's authority to issue orders directed to Executive Branch officials is often dependent, at least partly, on legislative authority granted by Congress. Executive Orders are directed at officials within the Executive Branch. As a formal matter, the President has the constitutional authority to issue such orders. However, the substance of an Executive Order must have a legal basis in one of the President's constitutionally based powers or from statutory authorization,⁵⁸ and the President may not contravene the law when issuing one. In the most well-known Supreme Court decision involving an Executive Order, the Supreme Court held that President Truman's order directing the Secretary of Commerce to seize the nation's steel mills during a wartime labor dispute had no legal basis and was thus invalid.⁵⁹ In this case, Justice Jackson wrote his famous concurring opinion in which he divided presidential actions into three categories, those in which the President acts with congressional authorization, those in which the President acts in the face of a congressional prohibition and those in which the President acts without authorization but not against a prohibition.⁶⁰ Justice Jackson argued that there is room for the President to act without authorization, but his analysis was not very specific or satisfying. Here is what Justice Jackson wrote:

When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least

⁵⁸ See Kevin M. Stack, *The Statutory President*, 90 *Iowa L. Rev.* 539 (2005).

⁵⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1953).

⁶⁰ *Id.* at 635-38.

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as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.⁶¹

The emphasized part of Justice Jackson’s opinion implies that when there is an absence of statutory law governing the President’s conduct, practicalities rather than law should determine the legality of the President’s conduct. The majority was more focused on law, looking for congressional authorization for the President’s action, in seizing the steel mills. The majority found that the President had essentially usurped the legislative function by taking significant action without congressional authorization. To the majority, the lack of authorization rendered the President’s actions illegal. Justice Jackson places much less stress on the lack of authorization from Congress than the majority did, at least in the particular context of the case. To Justice Jackson, “imperatives of events and contemporary imponderables” might justify presidential action in the absence of authorization. Jackson found, however, that the President’s action seizing the steel mills was in his third category, prohibited by congressional action. While the President was not statutorily prohibited from seizing the steel mills in so many words, Justice Jackson inferred the prohibition by negative implication from the existence of congressional authorization to seize private businesses in other circumstances and with other procedures. Placing the seizure in the category of actions prohibited by Congress,

⁶¹ Id. at 637 (emphasis supplied).

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he found lacking any independent presidential authority to act, and thus agreed with the Court that the President's order was unlawful.⁶²

More recently, the Court of Appeals for the D.C. Circuit invalidated an Executive Order that it found contrary to law.⁶³ President Clinton's Executive Order 12,594, purportedly issued under federal procurement legislation, prohibited the federal government from purchasing goods and services from companies that had hired permanent replacements for their striking workers.⁶⁴ The court held the President's order unlawful because it was contrary to a provision of federal labor law that guarantees employers the right to permanently replace their striking employees.⁶⁵ The court brushed aside challenges to its authority to hear the case, holding that Executive Orders are subject to "nonstatutory" judicial review under the pre-APA doctrine of judicial declaration of executive actions as "ultra-vires," even if the APA does not subject Executive Orders to judicial review.⁶⁶ Thus, Executive Orders are subject to review for compliance with statutory provisions.⁶⁷

In addition to the possibility of judicial review for compliance with pre-existing statutes, Congress often legislates specifically to direct, override or prevent particular

⁶² Id. at 640-56.

⁶³ *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996).

⁶⁴ Executive Order No. 12,954, 60 Fed. Reg. 13,023 (1995).

⁶⁵ *Reich*, 74 F.3d at 1336-38.

⁶⁶ *Reich*, 74 F.3d at 1326-27. The President is not an "agency" under the APA and thus presidential actions are not subject to APA judicial review. See *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992).

⁶⁷ If the President is careful in drafting executive orders, the possibility of illegality can be avoided. President Bush's Executive Order 13,202 instructed federal agencies not to require or prohibit a certain kind of labor contract in federally funded projects under their jurisdiction. In *Building and Const. Trades Dept., AFL-CIO v. Allbaugh*, 295 F.3d 28 (D.C. Cir. 2002), the order was challenged on the ground that some statutes required or permitted the particular form of labor agreement in federal projects. Because the order required action only "to the extent permitted by law," the court held that the order was not contrary to law. Under this language, if the order was contrary to the particular statute administered by an official, the official was instructed by the order itself to follow the statute. Similarly, President Reagan's landmark Executive Order 12,291 required agencies to engage in cost-benefit analysis only to the extent permitted by law.

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administrative action. As long as required legislative procedures are employed, specific substantive restrictions on executive action do not transgress separation of powers or other constitutional limits on legislative action and in fact are desirable because they maximize democratic input into important policy decisions. While Congress does not legislatively override particular agency action very often, especially when compared to the volume of administrative action that receives no apparent attention from Congress, when it does happen, it places Congress in a strong supervisory role over the administration of the law.

Congress has the power legislatively to reject particular administrative action without changing the underlying substantive law.⁶⁸ Before 1983, Congress overrode particular agency decisions pursuant to legislative veto provisions. After the legislative veto was declared unconstitutional, Congress eventually established a formal legislative method of reviewing major administrative rules.⁶⁹ Under this statute, the Congressional Review Act,⁷⁰ before any administrative rule can go into effect, the promulgating agency must submit a report containing the text of the rule and the rule's concise general statement of basis and purpose to each House of Congress and the Comptroller General. The report must also include any cost-benefit analysis prepared regarding the rule and various other compliance documents required by other statutes. With regard to major rules, the effective date of the rule must be at least 60 days after Congress receives the report. Under this process, Congress may legislatively reject rules within a specified

⁶⁸ There may be some limits to Congress's power to overrule agency actions in adjudication based on due process and related concerns. However, Congress's power is not limited to general rules. Courts have approved legislation regarding agency action with significant effects on particular parties even while judicial review is pending. See *infra* notes x-x and accompanying text.

⁶⁹ See Congressional Review Act, 5 U.S.C. §§ 801 et seq.

⁷⁰ See 5 U.S.C. §§ 801 et seq.

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period of time.⁷¹ While the constitutional requirements for legislating are not affected by this procedure, the statute eases Congress's own rules, (although the statute recognizes the right of each House to apply different rules⁷²) making it easier for the rejection legislation to make it to the floor of each House of Congress for votes. Substantively, the CRA is unnecessary, because Congress always had the power to legislatively override agency rules. The main innovations of the CRA are procedural, mainly the advance notice to Congress of proposed rules and the expedited procedure for a resolution disapproving an agency rule to reach the floor of each House of Congress for a vote. This procedure has been used only once,⁷³ but the threat of such action may influence the content of administrative rules. By enacting this statute, Congress has taken responsibility for supervising agency rulemaking and, in a sense, is lending its authority to those rules that it does not overrule under the procedure.

2. The Power of the Purse, Appropriations Riders and Earmarking

The fact that the nondelegation doctrine does not require Congress to be very specific when it empowers agencies does not mean that Congress is forbidden or should

⁷¹ Under current law, if Congress does not act, the administrative rules go into effect after a specified period of time. Conceivably, Congress could statutorily provide that rules do not go into effect unless Congress passes legislation approving them. While this would maintain an even greater degree of control in Congress, Congress is unlikely to adopt such a procedure because of the volume of rules it would be forced to act upon and because then politically Congress would be responsible for all rules adopted through the procedure.

⁷² See 5 U.S.C. § 802. This means that the statute is “essentially hortatory or directory” because each House is free not to employ the expedited procedure. See Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. Chi. L. Rev. 361, 428 (2004). Vermeule does opine that although it may be unconstitutional, Congress should have the power to establish binding rules of congressional procedure. *Id.* at 430. See also Aaron-Andrew P. Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation of Power, and the Rules of Proceedings Clause*, 19 J.L. & Pol. 345 (2003) (arguing that binding statutory rules of congressional procedure are constitutionally suspect); Virginia A. Seitz & Joseph R. Guerra, *A Constitutional Defense of “Entrenched” Senate Rules Governing Debate*, 20 J. L. & Pol. 1 (2004) (agreeing that entrenched laws are unconstitutional but defending entrenched Senate Rules for ending debate).

⁷³ See Public Law 107-5 (Joint Resolution disapproving Department of Labor's Ergonomics Rule).

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even be discouraged from being very specific when it wants to be. One way in which Congress has supervised agencies with great particularity, both formally and informally,⁷⁴ is through the appropriations process.⁷⁵ The power of the purse is among Congress's most potent weapons in its effort to control the execution of the laws.⁷⁶ The other branches of government are completely dependent on Congress for funding.⁷⁷ The Appropriations Clause, U.S. Const., Art. I, § 9, cl. 7, provides: "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." "Appropriations made by law" means appropriations made through the legislative process, i.e. bills that pass both Houses of Congress and are presented to the President.⁷⁸

As a political matter, Congress's power over the budget has been somewhat diminished since the passage of the Budget and Accounting Act of 1921. That statute enhanced the President's power within the budget process by unifying the process of preparing the annual budget and professionalizing the President's budget staff.⁷⁹ However, as a formal matter, Congress retains the power of the purse, and it has used that

⁷⁴ Informal supervision through the appropriations process is discussed below at xxx-xxx.

⁷⁵ See generally Harold J. Krent, *Presidential Powers 77-83* (2005) (discussing strength of and limits on Congress's power over appropriations).

⁷⁶ For an argument that Congress has not adequately supervised the budget process, see Louis Fisher, *Congressional Abdication on War and Spending* (2000). For a reply, denying that Congress has abdicated its responsibility for the budget, see Neal Devins, *Abdication by Another Name: An Ode to Lou Fisher*, 19 *St. Louis U.L. Rev.* 65 (2000). See also D. Roderick Kiewiet & Mathew D. McCubbins, *The Logic of Delegation: Congressional Parties and the Appropriations Process* 167-85 (1991) (concluding that Congress, through parties and committees, supervises the appropriations process more than the critics contend). For an interesting general look at how the congressional budget procedures affect the balance of power in the appropriations process see Elizabeth Garrett, *The Congressional Budget Process: Strengthening the Party-in-Government*, 100 *Colum. L. Rev.* 702 (2000).

⁷⁷ See Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 *Va. L. Rev.* 833 (1994). The Constitution might require Congress to fund the core functions of the other branches such as providing enough funding for the Supreme Court to function and for the President to review legislation and to exercise his powers such as the pardon power and the power over foreign affairs.

⁷⁸ Congress has statutorily prohibited agencies getting around limits on their appropriations by raising and spending their own funds. See 31 U.S.C. § 3302. Agencies are also statutorily prohibited from spending more than what has been appropriated. See 31 U.S.C. § 1341.

⁷⁹ See Kiewiet and McCubbins, *supra* note x at 15; Alan Feld, *Separation of Political Powers: Boundaries or Balance*, 21 *Georgia L. Rev.* 171, 188 (1986).

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power to influence if not control the administration of the law. As a practical matter, in a disagreement between Congress and the President over the priorities or the value of a particular program, Congress will win if it uses its power over the allocation of funds.

In addition to simply appropriating more money for favored programs and less (or no) funds for disfavored programs, Congress has used what are known as appropriations riders to supervise the execution of the laws in a very direct and particularized way. Steve Calabresi characterizes appropriations riders as Congress using its “power of the purse to affect directly the President's exercise of what would otherwise appear to be his core executive powers.”⁸⁰ Appropriations riders are used by Congress across a broad spectrum of substantive areas to supervise the activities of federal agencies. Appropriations riders typically single out a specific regulatory activity and prohibit the expenditure of funds for carrying out that regulatory activity or plan. For example, early on in his presidency, President Bill Clinton made ergonomics regulation a priority for his administration. For several years, however, Congress prevented OSHA from issuing regulations with provisions in appropriations bills like the following:

None of the funds made available in this Act may be used by the Occupational Safety and Health Administration directly or through section 23(g) of the Occupational Safety and Health Act to promulgate or issue any proposed or final standard or guideline regarding ergonomic protection. Nothing in this section shall be construed to limit the Occupational Safety and Health Administration from conducting any peer reviewed risk assessment activity regarding ergonomics, including

⁸⁰ Steven G. Calabresi, Some Normative Arguments for the Unitary Executive, 48 Ark. L. Rev. 23, 53 (1995)

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conducting peer reviews of the scientific basis for establishing any standard or guideline, direct or contracted research, or other activity necessary to fully establish the scientific basis for promulgating any standard or guideline on ergonomic protection.⁸¹

There are many more examples of appropriations riders. For example, in the 1980s, when the FCC was considering abandoning its longstanding broadcast licensing preferences for women and minorities, Congress added riders to the FCC's appropriations bills prohibiting the expenditure of FCC funds to reexamine or reverse these preferences.⁸²

Another striking example of the use of the rider to influence the execution of the law is a series of riders in the 1980s prohibiting the Executive Branch from taking any action to change the per se rule in antitrust law that prohibits resale price maintenance agreements.⁸³ As J. Gregory Sidak reports, this rider prevented the Department of Justice from presenting an oral argument in support of a legal position it had taken in an amicus curiae brief it had filed in a pending case.⁸⁴ Sidak calls riders like this one “muzzling” riders because they prevent the President and the Executive Branch as a whole from advocating for changes in law or policy, and he argues that they may violate the

⁸¹ Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-34, 110 Stat. 1321 (1996).

⁸² See Daniel A. Farber & Philip P. Frickey, *Is Carolene Products Dead? Reflections on Affirmative Actio and the Dynamics of Civil Rights Legislation*, 79 Cal. L. Rev. 685, 714 n. 164 (1991) citing Pub. L. No. 100-202, 101 Stat. 1329-31 (1987).

⁸³ See Departments of Commerce, Justice and State, The Judiciary, and related Agencies Appropriations Act of 1984, Pub. L. No. 98-166, 97 Stat. 1071, 1102 (1983), cited in J. Gregory Sidak, *The Recommendation Clause*, 77 Geo. L.J. 2079, 2080 n. 6 (1989). See also Act of Nov. 28, 1983, Pub. L. No. 98-166, 510, 97 Stat. 1102-03; Act of Oct. 18, 1986, Pub. L. No. 99-500, 605, 100 Stat. 1783, 1783-73; Act of Sept. 30, 1988, Pub. L. No. 100-202, 605, 101 Stat. 1329-1, 1329-38 discussed in Peter J. Hammer, *Antitrust Beyond Competition: Market Failures, Total Welfare, and the Challenge of IntraMarket Second-Best Tradeoffs*, 98 Mich. L. Rev. 849, 915 n. 176 (2000).

⁸⁴ See Sidak, *supra* note x at 2080.

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Recommendations Clause of the Constitution which requires the President to “give to the Congress Information of the State of the Union, and recommend such Measures as he shall judge necessary and expedient”⁸⁵ Whether constitutional or not, this use of the rider dramatically illustrates how the power of the purse allows Congress to control important aspects of the execution of the law in ways that appear to impinge on the discretion of Executive Branch officials.

Riders often function as temporary, narrowly focused amendments to the underlying statute. For example, Congress has used appropriations riders to prevent the listing of a species as endangered even if all of the statutory requirements for listing are met. The effect of such a rider is to exempt the particular species from coverage for the duration of the rider. The rider legally supersedes the provisions of the general statutes referred to in the rider. A rider is more effective than the simple failure to appropriate funds for a particular action or program because agencies are often able to reallocate appropriated funds among various programs.⁸⁶

The legal effect of an appropriations rider is illustrated very clearly by a dispute over a government program that made its way to the Supreme Court a few years ago. Under federal law,⁸⁷ convicted felons are prohibited from owning or possessing firearms. A felony conviction in Mexico (for illegally, although possibly accidentally, importing ammunition into Mexico) made it impossible for Thomas Bean to continue in his profession as a firearms dealer. A provision of the federal law at issue, however, allows

⁸⁵ U.S. Const, Art. II, section 3.

⁸⁶ See *Lincoln v. Vigil*, 508 U.S. 182 (1993) (agency decision to re-allocate sums included in a lump sum appropriation is exempt from judicial review). Reallocation in the face of objections from Members of Congress may be difficult due to informal supervision from the appropriations committees. See *infra* notes x-x and accompanying text.

⁸⁷ See 18 U.S.C. § 922(g)(1). The description of the statutory scheme and the case decided under it are from *United States v. Bean*, 537 US 71 (2002).

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the Secretary of the Treasury to restore a convicted felon's right to own or possess firearms if the Secretary finds that "the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest."⁸⁸ Bean applied for this relief, but the Bureau of Alcohol, Tobacco and Firearms (BATF), to which the Secretary had delegated his authority to act, returned the application without acting on it because Congress had, since 1992, attached riders to the Treasury Department's appropriations bills prohibiting the Department from using any of its funds to act on applications for relief from federal firearms restrictions.⁸⁹ Bean then sought judicial review, characterizing the BATF's refusal to act on and the return of his application as a denial of the application subject to judicial review.⁹⁰ The Supreme Court rejected Bean's argument, holding that judicial review is available only after the BATF has actually made a decision on the merits of an application for relief. Because the appropriations rider prevents the BATF from acting on the merits of any applications, Bean could not get judicial review of what, in effect, was a denial of his application. The appropriations rider prevents the Treasury Department from executing the substantive provisions of the statute, demonstrating Congress's ability legislatively to control the execution of the law.

⁸⁸ 18 U.S.C. § 925(c).

⁸⁹ See, e.g., Treasury, Postal Service, and General Government Appropriations Act, 1993, Pub. L. 102—393, 106 Stat. 1732; Treasury and General Government Appropriations Act, 2002, Pub. L. 107—67, 115 Stat. 519; Consolidated Appropriations Act, 2001, Pub. L. 106—554, 114 Stat. 2763A—129; Treasury and General Government Appropriations Act, 2000, Pub. L. 106—58, 113 Stat. 434; Treasury and General Government Appropriations Act, 1999, Pub. L. 105—277, 112 Stat. 2681—485; Treasury and General Government Appropriations Act, 1998, Pub. L. 105—61, 111 Stat. 1277; Treasury, Postal Service, and General Government Appropriations Act, 1997, Pub. L. 104—208, 110 Stat. 3009—319; Treasury, Postal Service, and General Government Appropriations Act, 1996, Pub. L. 104—52, 109 Stat. 471; Treasury, Postal Service and General Government Appropriations Act, 1995, Pub. L. 103—329, 108 Stat. 2385; Treasury, Postal Service, and General Government Appropriations Act, 1994, Pub. L. 103—123, 107 Stat. 1228.

⁹⁰ On the merits, Bean had a decent case for relief since he might have been able to prove that the violation was accidental and that he had an otherwise unblemished record.

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The use of appropriations riders is controversial for a number of reasons. For one, the placement of a rider in an appropriations bill makes it difficult for the President to veto because he would have to veto an entire appropriations bill.⁹¹ Another criticism of the use of riders is that they often fly below the political radar, placed in the bill by a few connected Members of Congress and voted on by Members who may not even be aware of their presence in the bill. Even if they are aware of the riders, Members face a great deal of pressure to vote in favor of the bill and may be unable to get serious consideration of an amendment to remove the rider.⁹² Riders are thus viewed in some circles as a method for Congress to dodge responsibility for its legislative actions.⁹³ Nonetheless, despite these criticisms, the rider is an effective method for supervision by Congress of the execution of the laws.⁹⁴

⁹¹ This is Farber and Frickey's explanation for why Congress used appropriations riders rather than passing substantive legislation to prevent the FCC from revising its affirmative action policies. See Farber and Frickey, *supra* note x at 714.

⁹² See David Schoenbrod, *Power Without Responsibility* 52-57 (1993). Schoenbrod illustrates the problems with riders with the example of administrative and legislative activity designed to keep the price of oranges high. According to Schoenbrod, when the Department of Agriculture threatened to take steps that would reduce the largest grower's grip on the market, Congress used a combination of appropriations riders and other pressure to prevent changes to the status quo. One interesting rider prohibited the Department from using its funds to provide the public with information about growers. The Department interpreted this rider to forbid it from complying with requests for information under the Freedom of Information Act even if the requester was willing to bear all the costs of obtaining the information. A court rejected this interpretation. See *Cal-Almond, Inc. v. United States Department of Agriculture*, 960 F.2d 105 (9th Cir. 1992) cited in Schoenbrod, *supra* at 218, n. 54. See also *City of Chicago v. U.S. Dept. of Treasury*, 384 F.3d 429 (7th Cir. 2004) (Rider does not prohibit Treasury Department from releasing firearms data in response to FOIA request).

⁹³ See Neal E. Devins, *Regulation of Government Agencies through Limitation Riders*, 1987 *Duke L.J.* 456; Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 *Ariz. St. L.J.* 941, 995-96 (2000) (suggesting that if the nondelegation doctrine were strengthened, Congress would use appropriations riders as one method of avoiding accountability). See also Neal E. Devins, *Appropriations Redux: A Critical Look at the Fiscal Year 1988 Continuing Resolution*, 1988 *Duke L.J.* 389 (1988) (criticizing secretive nondeliberative process for passing continuing resolutions). For these reasons, there is a mythic rule that appropriations provisions are not supposed to change substantive law. The rule is a myth because, as we have seen, riders are used all the time to change the law.

⁹⁴ The Supreme Court has treated appropriations riders with the same respect it affords to legislation in other forms. For example, congressional approval in the form of appropriations riders prohibiting the FCC from changing its affirmative action policies was one factor the Court relied upon when it upheld those policies against constitutional challenges. See *Metro Broadcasting Inc. v. FCC*, 497 U.S. 547, 572 (1990).

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Congress also earmarks funds in a manner that may be considered the converse of riders, appropriating funds for very particular purposes or programs and sidestepping agency discretion. Earmarked spending is a type of congressional administration because it often runs parallel to an agency program. In the area of endangered species, for example, Congress has mandated that funds be spent to take steps to protect species that the administering agency would not have taken under its usual standards.⁹⁵ For example, at the same time that Congress funds large granting agencies such as the National Science Foundation to distribute federal funds for scientific research that is funded under statutory and administrative standards, Congress appropriates funds for particular research projects that may or may not meet the usual, scientifically accepted, standards.⁹⁶ Often, earmarked appropriations are a type of pork barrel legislation in which powerful legislators procure funds for research or projects that benefit businesses or educational institutions in their districts.⁹⁷ Earmarked appropriations are problematic when they fund unnecessary programs or are inconsistent with rational priorities for spending limited funds. They are also a good example of the lack of fiscal discipline in Congress. However, they are well within Congress's constitutional power.

3. Private Bills

⁹⁵ See in J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 *Tex. L. Rev.* 1443, 1477 n. 124 (2003) and accompanying text (describing how practice of earmarking funds for the protection of particular species avoids the usual discretion of the Fish and Wildlife Service to decide how best to allocate resources for species protection).

⁹⁶ See Donald N. Langenberg, *Earmarked Appropriations: The Debate Over the Method of Federal Funding*, 20 *U. Mich. J.L. Ref.* 1029 (1987). An good example of this is research into the usefulness for military purposes of chewing gum with nicotine made by a company located in the district of the Speaker of the House Dennis Hastert. See Ceci Connolly and Juliet Eilperin, *Hastert Steps Up to Leading Role*, *Washington Post*, January 5, 1999 at A1.

⁹⁷ See John Terrence A. Rosenthal & Robert T. Alter, *Clear and Convincing to Whom? The False Claims Act and its Burden of Proof Standard: Why the Government Needs a Big Stick*, 75 *Notre Dame L. Rev.* 1409, 1455-60 (2000) (describing earmarked appropriations for military projects that were not requested by the Department of Defense, and were militarily unnecessary, but would benefit a large contractor headquartered in the district of former Speaker of the House New Gingrich).

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Private bills are another way that Congress remains involved in what appears to be the execution of the law.⁹⁸ A private bill is a legislative measure, usually to grant a benefit to a single party, that is published in the Statutes at Large but not as a public law.⁹⁹ The process for passing a private bill is the same as the procedure used for public laws, including passage through both Houses of Congress and presentment to the President. Congress has used private bills in a variety of contexts, some of which resemble the activity of administrative agencies, including awarding pensions to war veterans¹⁰⁰ and granting particular aliens permanent residency despite legal deportability.¹⁰¹ Any attempt to use a private bill to punish a particular person would raise constitutional concerns under the due process and bill of attainder clauses, and some of the historical uses of private bills, such as private bills waiving *res judicata* in private litigation, raise constitutional issues today that may not have been recognized earlier.¹⁰²

⁹⁸ Thanks to my colleague Wendy Gordon for drawing my attention to the relevance of private bills to this project.

⁹⁹ For a general discussion of private bills, see Note, Private Bills in Congress, 79 Harv. L. Rev. 1864 (1966).

¹⁰⁰ The history of awarding war pensions through private bills dates all the way back to pensions for veterans of the Revolutionary War. Recall the famous *Hayburn's Case* from 1792 in which federal judges and Supreme Court Justices addressed whether it was consistent with their status as federal judges to hear petitions for war pensions when their decision resulted not in a final judgment but rather in a recommendation to the Secretary of War and ultimately to Congress. *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). Interestingly, the judges who expressed their views on the matter in *Hayburn's Case* did not identify any constitutional problem with Congress deciding individual pensions legislatively. Rather, the constitutional issue identified was that issuing non-final judgments was beyond the judicial power and thus the judges could not act on the petitions, at least not in their judicial capacity since some of the judges agreed to hear the petitions as extra-judicial commissioners.

¹⁰¹ There is a long history of Congress reserving to itself the decision whether a particular deportable alien should be allowed to stay in the United States. As the history recounted in the *Chadha* opinion illustrates, even though Congress was apparently suffering under a heavy load of private immigration bills, the legislative veto was included in the immigration provision at issue in *Chadha* because Congress was unwilling to surrender the power to suspend deportation to the Department of Justice.

¹⁰² Under current law, a private bill reopening litigation might violate the defendant's due process property rights, especially if the case had already been litigated to judgment. However, in a very early case, the Supreme Court found no constitutional problem when a state supreme court ordered a new trial in a pending civil action. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798).

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In the immigration context, the private bill process illustrates cooperation between the Executive Branch and Congress in the execution of the law. Congress and the agency administering the deportation process have agreed to delay deportation while Congress considers a private bill. The rules of the House Judiciary Committee on private immigration bills, administered by a subcommittee, explain the process:

5. The Subcommittee may, at a formal meeting, entertain a motion to request that the Immigration and Naturalization Service provide the Subcommittee with a departmental report on a beneficiary of a private bill. In the past, the Immigration and Naturalization Service has honored requests for departmental reports by staying deportation until final action is taken on the private bill. Only those cases designed to prevent extreme hardship to the beneficiary or a U.S. citizen spouse, parent, or child will merit a request for a report.¹⁰³

Thus, the actions of a single subcommittee result in a stay of deportation, albeit via an informal agreement between Congress and the agency.

When Congress decides that a particular alien should be allowed to remain in the United States or that a particular war veteran should receive compensation or a pension,¹⁰⁴ this action, though legislative in form, resembles the administration of the law. It is certainly action that could have been taken by an agency under standards

¹⁰³ House Committee on the Judiciary, Rules of Procedure and Statement of Policy on Private Immigration Bills. See <http://judiciary.house.gov/media/pdfs/privimmpro.pdf>. The rules of the Senate Subcommittee on Immigration, Border Security and Citizenship similarly state “1. The introduction of a private bill does not act as a stay of deportation until the committee requests a departmental report.”

¹⁰⁴ Carmel Sileo , Gulf War POWs Can’t Get Satisfaction, 40-FEB Trial 74 Trial February, 2004 “A similar suit filed by former civilian hostages--the infamous ‘human shields’ who were also held during the Gulf War--was settled two years ago, and that judgment was paid out of the same now-disputed Iraqi funds, through private bills passed in Congress. (Hill v. Republic of Iraq, 175 F. Supp. 2d 36 (D.D.C. 2001).)”

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prescribed by Congress. In fact, in some cases, private bills directly overturn the result of an administrative process, although this is a use of the private bill that apparently invites a presidential veto.¹⁰⁵ While there is no constitutional impediment to Congress legislating in this manner, problems with the private bill process have been recognized. For example, although private bills almost by definition raise no important social or legal issue, Presidents have vetoed private bills on at least two interesting grounds, first that they are discriminatory when they single out particular parties for a benefit not available to others and second, they can be inconsistent with a general legislative plan when they grant relief from the provisions of a public law.¹⁰⁶

4. Legislation During the Pendency of Judicial Review

Another method of supervision of agencies, analogous to the appropriations rider because of its specificity, is legislation during the pendency of judicial review. Congress sometimes legislates with great particularity regarding administrative action even while judicial review is pending in an apparent effort to influence the outcome of the judicial review proceeding or perhaps even short circuit it altogether. This practice raises separation of powers concerns, not only with regard to the power of the Executive Branch but also with regard to the judicial branch. On the one hand, Congress may not directly interfere in ongoing litigation by ordering a court of law to take a particular action in a pending case. On the other hand, Congress may, however, change the law while litigation is pending, and courts will generally follow the law as amended.

¹⁰⁵ See Note, Private Bills, *supra* note x at 1702.

¹⁰⁶ See *id.* at 1702.

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The distinction between congressional interference in ongoing litigation and legislation that changes underlying law is not terribly clear. The best relatively recent illustration of this difficulty is a case arising out of a controversy regarding logging on federal land in old growth forests in the Pacific Northwest that are habitat for an endangered species of owl.¹⁰⁷ The controversy over timber cutting reached the courts after the United States Forest Service and the Bureau of Land Management of the Department of the Interior approved sales of timber in the old growth forests. Environmental groups and logging interests challenged the logging plans, with environmental groups claiming too much logging was allowed and loggers claiming too little was allowed. After a variety of judicial proceedings in two federal district courts, Congress intervened into the controversy by passing a comprehensive plan for timber sales in the area for fiscal year 1990 as § 318 of the Department of Interior annual appropriations bill.¹⁰⁸ The statute mandated a certain level of timber sales, but, to protect the spotted owl, placed new restrictions and requirements on the sales. It stated that no sales of timber may occur in areas identified, with some congressional adjustments, in the Forest Service's 1988 environmental impact statement,¹⁰⁹ and prohibited sales in 110 areas that had been identified in an agreement between the Bureau of Land Management and the Oregon Department of Fish and Wildlife.¹¹⁰ In effect, the statute constituted congressional approval of a great deal of what the agencies had previously done. Subsection (b)(6)(a) dealt specifically with the ongoing litigation concerning spotted owl protection:

¹⁰⁷ *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992).

¹⁰⁸ See § 318 of the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. 101-121, 103 Stat. 745.

¹⁰⁹ See § 318(b)(3).

¹¹⁰ See § 318(b)(5).

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Without passing on the legal and factual adequacy of the Final Supplement to the Environmental Impact Statement for an Amendment to the Pacific Northwest Regional Guide--Spotted Owl Guidelines and the accompanying Record of Decision issued by the Forest Service on December 8, 1988 or the December 22, 1987 agreement between the Bureau of Land Management and the Oregon Department of Fish and Wildlife for management of the Spotted Owl, the Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned Seattle Audubon Society et al., v. F. Dale Robertson, Civil No. 89-160 and Washington Contract Loggers Assoc. et al., v. F. Dale Robertson, Civil No. 89-99 (order granting preliminary injunction) and the case Portland Audubon Society et al., v. Manuel Lujan, Jr., Civil No. 87-1160-FR. The guidelines adopted by subsections (b)(3) and (b)(5) of this section shall not be subject to judicial review by any court of the United States.

The environmentalist plaintiffs in the ongoing spotted owl litigation challenged § 318 on the ground that it interfered with the judicial function by directing the outcome of a case pending in the federal courts. Under the plaintiffs' (and the court of appeals') interpretation of the statute, Congress had directed the federal courts to hold that § 318's

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provisions satisfied the statutes under which the plaintiffs were challenging the sales, namely NEPA, the Migratory Bird Treaty Act ["MBTA"], the Federal Land Policy and Management Act of 1976 ["FLPMA"], the National Forest Management Act ["NFMA"] and the Oregon-California Land Grant Act ["OCLA"].¹¹¹ Under the plaintiffs' argument, § 318 did not amend any of the statutes under which they were challenging the sales but rather mandated a particular interpretation of those statutes in pending litigation, violating Article III principles.

The plaintiffs relied for their challenge on United States v. Klein,¹¹² a Civil War era decision that invalidated a statute on the ground that it, inter alia, "prescribe[d] a rule of decision of a cause in a particular way."¹¹³ Before Klein, the Supreme Court had decided that a presidential pardon would make a claimant entitled to the return of property seized during the Civil War because, according to the Court, a pardon was sufficient evidence of loyalty to warrant return of captured property under relevant statutes. Klein received a presidential pardon and then brought a claim for the value of his captured property to the Court of Claims. After the Court of Claims ruled in Klein's favor, the United States appealed. In the meantime, Congress passed a statute providing that when a pardon stated that the person pardoned had aided the rebellion, and the pardon was accepted without a disclaimer, the pardon should be considered "by the Court of Claims and on appeal as conclusive evidence that the claimant did give aid to the rebellion; and on proof of such pardon . . . the jurisdiction of the court shall cease, and

¹¹¹ See Seattle Audubon Society v. Robertson, 914 F.2d 1311 (9th Cir. 1990) reversed 503 U.S. 429 (1992).

¹¹² 80 U.S. (13 Wall.) 128 (1872).

¹¹³ See Klein, 80 U.S. at 146. It is also possible to read Klein much differently, as holding that Congress unconstitutionally was interfering with the pardon power.

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the suit shall be forthwith dismissed."¹¹⁴ Under the statute, then, the Supreme Court would have been required to hold that the pardon was evidence of disloyalty and Klein's case should be dismissed.

The argument in favor of upholding the statute in Klein (and in the spotted owl litigation) was provided by the Court's earlier decision in Pennsylvania v. Wheeling & Belmont Bridge Co.¹¹⁵ In Wheeling Bridge, after the Supreme Court declared that a bridge constructed under state authority was a nuisance¹¹⁶ because it interfered with navigation on a navigable river and thus interfered with Congress's commerce power, Congress passed a statute declaring the bridge a "lawful structure" and making the bridge a post-road. The Supreme Court, on a motion to enforce the injunction granted pursuant to the earlier nuisance ruling, held that the new legislation superseded its prior ruling and that the bridge was therefore no longer a nuisance. The Klein Court distinguished Wheeling Bridge on the ground that in Wheeling Bridge the law had been changed while in Klein, Congress had merely instructed the Court on how to treat a particular piece of evidence without changing the underlying legal norms.

The Robertson Court carried forward this distinction between Wheeling Bridge and Klein and presented the key issue in the case as whether Congress had changed the law (constitutional) or directed court action in a particular case in a particular direction (unconstitutional).¹¹⁷ The Court concluded that § 318 changed the law rather than merely directed the outcome of the Robertson litigation, and therefore did not violate the

¹¹⁴ Klein, 80 U.S. at 143-44.

¹¹⁵ 59 U.S. (18 How.) 421 (1856).

¹¹⁶ See 54 U.S. (13 How.) 518 (1852).

¹¹⁷ See Robertson, 503 U.S. 429 (1992).

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principles underlying Klein.¹¹⁸ In rejecting the argument that the statutory reference to the district court case names and numbers establishes that Congress had intervened into ongoing litigation, the Court adopted the government's position that Congress mentioned the pending litigation only to identify the statutes that § 318 was deemed to satisfy.

The Court's decision recognizes broad authority in Congress to make very particular changes to the law in its supervisory role over federal agencies.¹¹⁹ The Court does not require Congress to adopt general rules to govern future agency action. As applied to other agency action, the requirements of the five statutes at issue in Robertson are no different after § 318 than they were before it. What Congress actually did was exempt timber sales pursuant to § 318 from the requirements of the five statutes and make that exemption apply retroactively in pending litigation.

¹¹⁸ The Court acknowledged that § 318 did not partially repeal the statutes that were the basis of the challenges to the sales, but the Court held that Congress had deemed that the new requirements of § 318 met the requirements of the other statutes. See 503 U.S. at 439-41. This does not literally mean that Congress was of the opinion that in this particular instance the provisions of § 318 satisfied the requirements of the other statutes (hence the proviso that Congress was not "passing on the legal and factual adequacy of the Final Supplement to the Environmental Impact Statement for an Amendment to the Pacific Northwest Regional Guide--Spotted Owl Guidelines and the accompanying Record of Decision issued by the Forest Service on December 8, 1988 or the December 22, 1987 agreement between the Bureau of Land Management and the Oregon Department of Fish and Wildlife for management of the Spotted Owl") but rather that Congress was legislating that § 318's standards should govern the particular situation. This practice of "deeming" one statute to comply with another, for example deeming that the plan for the spotted owl satisfied NEPA is common and raises some interesting issues. One member of Congress, in commenting on the legislative compromise in § 318, decried Congress's frequent resort to this type of exemption from general regulatory requirements. The problem is that Congress undercuts the effectiveness of statutes like NEPA when it overrides them because the particular political winds blow in that direction. For an argument that Robertson and Klein are inconsistent, see Amy D. Ronner, *Judicial Self-Demise: The Test of When Congress Impermissibly Intrudes on Judicial Power after Robertson v. Seattle Audubon Society and the Federal Appellate Courts' Rejection of the Separation of Powers Challenges to the New Section of the Securities Exchange Act of 1934*, 35 *Ariz. L. Rev.* 989, 1054-55 (1993).

¹¹⁹ More recently, Congress passed a statute regulating logging in part of the Black Hills National Forest. The statute required the Forest Service to violate the terms of a federal court-approved settlement agreement. This statute was challenged on the grounds that it usurped the authority of both the Executive Branch and the federal courts. The Tenth Circuit rejected the challenge, stating that its conclusion followed a fortiori from Robertson. See *Biodiversity Associates v. Cables*, 357 F.3d at 1163.

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There are additional examples of particularized congressional intervention into the administration of the laws during the pendency of judicial review, in which Congress directs an executive official to grant an approval that would otherwise be discretionary with an agency official or cabinet secretary.¹²⁰ In one statute, Congress directed the Secretary of Transportation to approve a highway design and construction proposal “[n]otwithstanding any other provision of law.”¹²¹ In response to a challenge to the Secretary’s approval of the highway project, a Federal District Court held that the application of the other statutes to the particular project was foreclosed by the more

¹²⁰ Congress has also, on occasion, attempted to influence the outcome of particular civil litigation not involving the government. The most recent and certainly most notorious example is Public Law 109-3 (2005), in which Congress granted federal jurisdiction over any claims brought by the parents of Terry Schiavo “for the alleged violation of any right of Theresa Marie Schiavo under the Constitution or laws of the United States relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life.” This statute was passed after Florida state courts had ruled in favor of Ms. Schiavo’s husband’s desire to remove all life support including a feeding tube over the objections of Ms. Schiavo’s parents. Although it seemed clear that the proponents of this statute hoped to reverse this outcome, the statute explicitly disclaimed making any change in the substantive law. Rather, the statute purported only to grant jurisdiction to a Florida federal court, grant standing to Ms. Schiavo’s parents to pursue the claims, establish a *de novo* standard for evaluating claims that may have already been considered by Florida state courts and specified that the federal court should disregard any impediments to federal jurisdiction based on previous or pending state proceedings. In the short period between the passage of this statute and Ms. Schiavo’s death, federal courts repeatedly denied relief, finding insufficient likelihood of success on the merits to grant a temporary restraining order that would have ordered the reinsertion of Ms. Schiavo’s feeding tube during the pendency of the federal litigation. See, e.g., *Schiavo ex rel. Schindler v. Schiavo*, 357 F. Supp.2d 1378 (M.D. Fla. 2005) affirmed xxx F.3d xxx (11th Cir. 2005). (The federal statute apparently did not alter the prerequisites for preliminary relief, which include a requirement that the party seeking preliminary relief establish a substantial likelihood of success on the merits.) The courts did not reach the constitutionality of this statute since they found no basis to grant relief under it. Because this statute and others like it do not implicate administrative action, it presents issues different from those involved when statutes attempt to direct the outcome of litigation involving judicial review of administrative action. Judge Birch, in an opinion concurring in the denial of rehearing *en banc* in one of the petitions brought by Ms. Schiavo’s parents, argued that the provisions of the statute that direct the federal courts to hear the case *de novo* and disregard potential abstention arguments were unconstitutional because, in dictating the way in which federal courts must exercise their jurisdiction, “the Act invades the province of the judiciary and violates the separation of powers principle.” See *Schiavo ex rel. Schindler v. Schiavo*, 404 F.3d 1270, 1274 (11th Cir. 2005) (Birch, J. specially concurring). The Florida Supreme Court found that a law passed by the Florida legislature to allow the state governor to stay a court ruling removing Ms. Schiavo’s feeding tube violated separation of powers because it gave the governor the power to override a judicial order in a case. See *Bush v. Schiavo*, 885 So.2d 321 (Fla. 2004).

¹²¹ Transportation Equity Act for the 21st Century, Pub.L. No. 105-178, § 1212(o), 112 Stat. 107, 198 (1998), as amended, TEA 21 Restoration Act, Pub.L. No. 105-206, Title IX, § 1226(e), 112 Stat. 834, 840 (1998).

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specific statute.¹²² With regard to another highway project, Congress simply directed the Secretary of Transportation “to approve construction of [the highway] ‘notwithstanding’ section 4(f),”¹²³ and a reviewing court held that this provision made the statutes under which the plaintiffs had challenged the highway location inapplicable to the particular highway.¹²⁴ The court stated that the new statute provided an exemption from preexisting law and thus did not impinge on the executive’s prerogative over execution of the law.¹²⁵ All of these decisions demonstrate that Congress has a great deal of power to supervise the Executive Branch through the enactment of particularized statutes.¹²⁶ As long as Congress is careful not to style its enactments as directing the outcome of particular litigation, it is free to direct executive discretion even during the pendency of judicial review litigation.¹²⁷

¹²² See *Bald Eagle Ridge Protection Ass'n, Inc. v. Mallory*, 119 F. Supp.2d 473, 480 (M.D. Pa. 2000), affirmed without opinion, *Bald Eagle Ridge Protection Ass'n, Inc. v. Mallory*, 275 F.3d 33 (3rd Cir. 2001) (table) (“there can be no question that the statutory provisions on which plaintiffs rely have been made inapplicable, regardless of whether the action of Congress is termed repeal by implication, exemption, suspension, or any other word or phrase which may be used to characterize this action”).

¹²³ See Continuing Appropriations Bill for Fiscal Year 1987, Pub.L. No. 99-500, section 114, 100 Stat. 1783-349 (later reenacted as Pub.L. No. 99-591, 100 Stat. 3341-349).

¹²⁴ *Stop H-3 Ass'n v. Dole*, 870 F.2d 1419 (9th Cir. 1989).

¹²⁵ *Id.* at 1434.

¹²⁶ There is also an ongoing debate over whether Congress should have the power to make constitutional decisions free from Supreme Court interference. While at one time the debate appeared to be about the principle of judicial review, it often appears now to involve the pragmatic question of whether particular views are more likely to prevail in Congress or in the Courts. See Mark Tushnet, *Taking the Constitution Away from the Courts* (2000); Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004); Neal Devins & Louis Fisher, *The Democratic Constitution* (2004).

¹²⁷ In another case not involving a highway, Congress overrode objections to decisions by the Forest Service and the Fish and Wildlife Service to allow placement of a telescope in a particular location. Congress had legislatively provided that the University of Arizona could place a telescope within a designated area and that this placement would satisfy applicable environmental statutes. After a court held that the approved placement was not within the area designated by Congress, Congress acted again stating that placement in the approved location would be deemed to comply with the environmental statutes. In *Robertson* terms, the court held that the particular provisions validly amended otherwise applicable statutes. See *Mount Graham Coalition v. Thomas*, 89 F.3d 554 (9th cir. 1996). The court held that the statute was valid even though a final judgment had already been entered holding that the placement was not within the area that Congress had designated because Congress has the power to amend the law prospectively in a way that would override the prospective effects of an injunction.

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Thus, the legislative process, including the budget process, provides Congress with potent means of supervising the particularities of the execution of the laws. While the sheer number of administrative actions and level of technical detail often involved makes it impossible for Congress to monitor the vast majority of administrative action, Congress is able, when the right incentives exist, to target favored or disfavored administrative action for codification or rejection, and it is free to direct the administrative hand with strong legislative commands.

5. General Statutes and the Administrative Process

In addition to very specific, targeted actions, Congress formally controls the execution of the laws through more general statutory provisions. What I have in mind here are procedural and substantive provisions other than the substantive elements of an agency's enabling act that influence agency action. Examples include the Administrative Procedure Act (APA), the National Environmental Policy Act (NEPA), the Freedom of Information Act (FOIA), the Government in the Sunshine Act, the Federal Advisory Committee Act (FACA) and other similar statutes. Included in this category also are numerous reporting requirements which provide Congress with some of the information it needs to supervise the execution of the laws both formally and informally. With these and other statutes, Congress controls agency decisionmaking through the specification of procedures, standards of judicial review, substantive limits that agencies may not transgress and substantive considerations that agencies are required to take into account.

The most important general statute that regulates agency administration of the law is the APA, which was passed in 1946. The APA contains two sets of provisions, one establishing the procedures that agencies must follow and another establishing a system

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of judicial review of agency action. After years of political wrangling over the power of agencies, the APA emerged as a compromise between those who wanted strict controls on agencies to limit New Deal programs and those who preferred a weak Act that would make it easier for agencies to engage in aggressive regulation.¹²⁸

The APA acts as a backup statute when Congress has not addressed an issue in a statute particular to an agency. Many statutes creating agencies and prescribing their authority include procedural requirements and standards of review. An agency may not employ a procedure that Congress has not made statutorily available. The Administrative Procedure Act includes provisions that fill any gaps in the agency's particular statute, including the procedures for rulemaking and adjudication and the standards of judicial review. If an agency does not follow the procedures Congress specifies, its action is invalid, unenforceable and subject to being set aside on judicial review.¹²⁹

McNollgast explain the APA as establishing a set of mechanisms for Congress to maintain control over agencies.¹³⁰ According to McNollgast, the APA is intended to deal with two problems, agency drift and legislative drift. Agency drift is the tendency of agencies to pursue their own goals, which may be different from the goals Congress intended. Legislative drift is the tendency of a small, influential group of legislators to use their influence to divert the agency toward their goals and away from the goals of the legislature as a whole. The relatively loose procedural requirements for all agency

¹²⁸ See McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 *J.L. Econ. & Org.* 180, 182 (1999) ("Political Origins"); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal*, 90 *Nw. U. L. Rev.* 1557 (1996).

¹²⁹ It is important to note both that the agency action is unenforceable and that it is subject to being set aside on judicial review because even if the time for judicial review has passed, an agency may find itself unable to enforce an invalid rule. See *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240 (2d Cir. 1977).

¹³⁰ See McNollgast, *Administrative Procedures*, *supra* note x; McCubbins et al, *Administrative Arrangements*, *supra* note x.

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activities other than formal adjudication and the relatively deferential standards of judicial review, mean that the APA may be far from perfect as a tool of congressional supervision, but imperfection is not inconsistent with the overall aim.

The subjection of administrative action to judicial review and the specification of standards of review are mechanisms employed by Congress to control the execution of the law.¹³¹ A desire to conform agency action to congressional intent may not be the only reason that Congress subjects agency action to judicial review. Congress may also be concerned with the protection of individual rights, and may want to make certain that agencies observe open and democratic decisionmaking procedures to preserve democratic values. However, Congress is at least somewhat concerned with ensuring that agencies follow statutory instructions, hence the APA's specification that a "reviewing court shall . . . hold unlawful and set aside agency action . . . found to be . . . not in accordance with law . . . in excess of statutory jurisdiction, authority or limitation, or short of statutory right."¹³²

Judicial review is an indirect method of supervision of agencies because it depends on a third party, the judiciary. This raises the question of whether the federal judiciary is a faithful agent.¹³³ Given the constitutional protections judges enjoy against

¹³¹ Gary Lawson has expressed reservations about the constitutionality of those provisions of the APA that regulate the standard of review that courts are required to apply when reviewing agency action. In fact, he thinks that any statute that "regulate[s] the standard of proof that courts must apply" is unconstitutional on the ground that it interferes with the judicial function. See Lawson, *supra* note x at 219-26.

¹³² APA section 702 and 706(2) (A) & (C).

¹³³ Landes and Posner, in an influential article, portrayed judicial review by an independent judiciary as an ideal enforcement mechanism for the interest group bargains within the legislature that produce contracts in the form of legislation. See William Landes & Richard Posner, *The Independent Judiciary in an Interest Group Perspective*, 18 *J.L. & Econ.* 875 (1975). Jonathan Macey questioned this conclusion on the basis that Landes and Posner did not explain why independent judges have an incentive to do the legislature's bidding. See Jonathan Macey, *Competing Economic Views of the Constitution*, 56 *Geo. Wash. L. Rev.* 50, 69 (1987). Macey argues that judges advance the publicly stated public-regarding intentions that legislators attached to legislation even if the legislators were misleading the public and had passed the legislation only

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overreaching by either of the other branches of government, one might expect that courts would feel free to ignore the preferences of the other branches including Congress. In many situations it appears that federal courts do just that, pursuing their own preferences and pushing against the language and congressional understanding behind federal statutes. In the civil rights area, for example, Congress has repeatedly found it necessary to amend statutes in reaction to narrow judicial constructions to accomplish goals that were arguably embodied in the pre-amendment versions of the statutes.¹³⁴

Assessing the faithfulness of federal judges as agents of Congress in the area of judicial review is difficult because in so many cases it is difficult to discern the intent of Congress. Some technical matters have been left to agencies with little more than a goal from Congress—healthy air, clean water, safe and healthy places of employment. Yet in cases in which the statutes provide guidance, courts often at least appear to be making significant efforts to keep agencies in line with congressional intent. Two cases in which agencies were prevented from taking major policy initiatives provide good examples of this. In one, the Supreme Court prevented the FCC from exempting all long distance carriers other than AT&T from the requirement that they file tariffs with the agency.¹³⁵ In another, the Supreme Court prevented the FDA from regulating tobacco as a drug.¹³⁶ In both cases, the Court's analysis centered on discerning Congress's intent from the language and structure of the statutes governing the agencies' exercise of their authority.

for self-regarding reasons such as to please narrow interest groups that would help them get reelected. In my view, Macey is correct that courts tend to rely on the publicly stated bases for congressional action and that these bases are normally public regarding expressions of legislative intent and not the interest group oriented reasons that might more accurately explain why the legislature chose to act. However, the question remains as to why courts rely on congressional expressions at all, as opposed to some judicially articulated set of norms that are completely independent of congressional intent.

¹³⁴ See Jack M. Beermann, *The Unhappy History of Civil Rights Litigation, Fifty Years Later*, 34 *Conn. L. Rev.* 981 (2002).

¹³⁵ *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218 (1994).

¹³⁶ *FDA v. Brown and Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

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In addition to these substantive examples, the foundation of the Supreme Court's procedural jurisprudence regarding agencies, discussed below, is that absent unconstitutionality, courts may not impose on agencies procedural requirements different from or in addition to those specified by Congress in governing statutes, including the APA.¹³⁷ While one can argue over whether the Court's expressions of fidelity to congressional intent are genuine or whether courts generally are better or worse than agencies at discerning congressional intent, there is no question that courts, including the Supreme Court, express themselves in judicial review cases in terms of congressional intent.¹³⁸

There are several possible explanations for this reality of judicial behavior. Judges may be following well-developed norms of judicial conduct either because those norms have been internalized¹³⁹ or because judges do not want to suffer the social and professional sanctions that may be brought down on them if they violate established norms,¹⁴⁰ for example the norm that statutes should not be interpreted in a manner contrary to the apparent intent of Congress. This is not to say that judges are perfect agents in administrative law. In fact they are far from perfect, whether because their independence allows them, at least to some extent, to pursue their own preferences or

¹³⁷ See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978); *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633 (1990).

¹³⁸ The Court's recent application of the Chevron doctrine is a good example of the use of congressional intent to overrule (or in some cases approve) agency action. When it was decided, it appeared that Chevron would result in greatly increased deference to agencies. As application of the doctrine developed, however, the Supreme Court has decided many cases under the prong of Chevron that requires agencies (and courts) to follow the clearly expressed intent of Congress, even when, for example, explaining that clearly expressed intent requires the Court to engage in several pages of analysis that includes references to the language, structure and history of a statute and even application of canons of statutory interpretation. See, e.g., *Dole v. United Steelworkers of America*, 494 U.S. 26 (1990).

¹³⁹ Presidents tend to choose judicial nominees who at least appear to have internalized the norms of judicial conduct, if only because judges perceived to be outside the "mainstream" are likely to have trouble in the confirmation process.

¹⁴⁰ See Jack M. Beermann, *Interest Group Politics and Judicial Behavior: Macey's Public Choice*, 67 *Notre Dame L. Rev.* 183, 220-23 (1991).

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because Congress's instructions are often not clear enough for even the most faithful agent to act upon without making errors. The point for present purposes is that it is rational for Congress to view judicial review of agency action as part of an effort to control the execution of the law in terms of limiting the administration's ability to substitute its preferences for those of Congress.

In addition to judicial review provisions in the APA and agency-specific statutes, Congress has employed its legislative power to enact numerous general statutes that control the substance of agency discretion and the manner in which the agencies exercise their discretion. These statutes can be divided into three categories: non-APA procedural requirements, impact statement requirements and reporting requirements. The category of non-APA procedural requirements includes statutes such as the Freedom of Information Act (FOIA), the Government in the Sunshine Act, the Federal Advisory Committee Act (FACA), the Negotiated Rulemaking Act and the Alternative Dispute Resolution in Government Act. Impact requirement statutes include the National Environmental Policy Act, the Endangered Species Act, the Small Business Act and the Migratory Bird Act. Reporting requirements include scores of provisions that require agencies and other Executive Branch officials to make regular reports to Congress or congressional committees. Congress has also established a statutory procedure for congressional review of major rules, the Congressional Review Act. This procedure is *sui generis* and is discussed above.

The non-APA procedural requirements and the impact statement requirements have in common that Congress, with some exceptions, relies on courts to enforce their

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provisions.¹⁴¹ Statutes such as the Freedom of Information Act and the Government in the Sunshine Act can have significant effects on agency action because they open agency records and meetings to greater public scrutiny than might otherwise exist. FOIA opens all agency records to public inspection and copying except for those records that fall into a FOIA exception, and FOIA is enforceable by an action in federal court to force an agency to turn over covered records. The Government in the Sunshine Act requires that all meetings of an agency be open to the public unless the agency invokes a statutory exception, and even then the agency must follow specified procedures to legally meet in private. If an agency improperly meets in private, any action taken at the private meeting may be void. FACA similarly requires any advisory committee with non-governmental members “established or utilized” by the President or an agency to conform to open meetings requirements. This statute has been particularly controversial because, on its face, it means that the President may not meet with a group of private individuals to ask their advice without giving advance notice of the meeting, opening the meeting to the public and keeping minutes on what was discussed at the meeting. This is a significant set of restrictions on the President’s ability to confer with non-governmental constituencies. Courts have tended to interpret FACA to avoid the serious separation of powers questions that might arise out of the potential interference with the operation of the Executive Branch that a more expansive interpretation would entail.¹⁴² With regard

¹⁴¹ Negotiated rulemaking procedures are not subject to judicial review, although rules produced through a negotiated rulemaking are subject to judicial review if the rule would have been subject to judicial review had negotiated rulemaking not been used. See 5 U.S. C. §. 570. The Negotiated Rulemaking Act provides that “agency action relating to establishing, assisting, or terminating a rulemaking committee . . . shall not be subject to judicial review. Nothing in this section shall bar judicial review of a rule if such judicial review is otherwise provided by law.”

¹⁴² See *Public Citizen v. DOJ*, 491 U.S.440 (1989); *Association of American Physicians and Surgeons, Inc. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993).

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to all of these statutes, the degree to which they are effective in controlling executive action depends on how aggressively the courts interpret and enforce them.

In addition to these general procedural requirements, a number of federal statutes pursue particular substantive goals through statutes that require agencies to take account of particular substantive concerns. Statutes like NEPA and the Regulatory Flexibility Act require agencies to prepare impact statements describing the effects agency action would have on the subject of the particular statute such as the environment or small businesses. These statutes are substantive and procedural at the same time, substantive in that they require agencies to focus on and consider particular substantive issues but procedural in that they do not require any particular substantive outcome. For example, NEPA requires that agencies prepare an environmental impact statement whenever a “major” federal agency action “significantly” affects the environment. NEPA specifies the contents of the statement and requires that the statement “accompany” proposed agency action through the approval process, but NEPA does not require that an agency forego actions that meet some standard of negative environmental impact. Thus, in operation, NEPA is largely procedural. However, the public process for creating environmental impact statements, the publicity that environmental impact statements create concerning the environmental effects of proposed agency action and the likelihood that courts will strike down agency action on judicial review when the statement is inadequate have forced federal agencies to consider and perhaps reduce the negative environmental effects of their actions.¹⁴³

¹⁴³ See McCubbins, *supra* note x at 35. The actual effects of NEPA on the environment are unclear. One study indicates that agencies try very hard to avoid having to produce an environmental impact statement by using mitigation and other strategies to keep environmental effects below statutory thresholds. See Bradley

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Another device Congress uses to keep tabs on agency action is the sunset provision. Under a sunset provision, a statute automatically expires after a certain period of time. Often, a sunset provision is included for reasons unrelated to agency action, such as a perception that a problem is temporary, uncertainty over whether the legislation is necessary or will work, or simply a matter of political compromise between those inclined in favor and those inclined against a proposal. Where administrative action is relevant, a sunset provision gives an agency a strong incentive to administer a law in a manner favorable to Congress, because otherwise Congress will not re-authorize the program after it expires.

6. Reporting Requirements and Certifications

Reporting requirements are also an effective tool that Congress uses to exert control over the Executive Branch. In recent decades, the number and range of reporting requirements have increased exponentially, provoking complaints from Executive Branch officials that the sheer volume of reporting requirements harms their ability to function effectively. From the other side, there are consistent complaints from Congress that the Executive Branch is too reticent about sharing information with the legislative branch and thus reporting requirements are justified as a means for Congress to maintain control over the bureaucracy. It is impossible to overstate the volume of reporting requirements Congress includes in legislation directed at agencies and the President. In part, reporting requirements enable the informal supervision of agencies that is discussed below. Reporting requirements are also a constant reminder that Congress is interested in agency

C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 *Colum. L. Rev.* 903 (2002).

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activity and that all such activity takes place under Congress's watchful eye. Pervasive scrutiny is designed to keep agencies from straying too far from congressional intent.

Related to reporting requirements are certification requirements, under which the President or another official is required to certify to Congress that a particular state of affairs does or does not exist.¹⁴⁴ Certification is often used in programs involving contingent discretion, i.e. discretion that may be exercised only upon the existence or non-existence of the specified state of affairs. Certification, much like a reporting requirement, allows Congress to keep track of the execution of laws that involve contingent discretion because the act of certification brings the matter directly to Congress's attention. These certifications have legal consequences, such as making a foreign country eligible for monetary aid, military assistance, favored trade status and the like. For example, under one statute, the President may authorize the release of funds for economic or military assistance to countries that are not in compliance with certain international nuclear nonproliferation programs, but only after the President certifies to Congress that the termination of funding "would have a serious adverse effect on vital United States interests; and . . . he has received reliable assurances that the country in question will not acquire or develop nuclear weapons or assist other nations in doing so."¹⁴⁵ The statute also provides that Congress has the right, by joint resolution enacted within thirty days of the certification, to reject the certification, at which point the assistance would cease.¹⁴⁶

¹⁴⁴ See Mark A. Chinen, Presidential Certification in U.S. Foreign Policy Legislation, 31 N.Y.U. J. Int'l L. & Pol. 217 (1999).

¹⁴⁵ See 22 U.S.C. § 2799aa.

¹⁴⁶ The statute provides that the assistance terminates "upon the enactment of that resolution." See 22 U.S.C. s 2799aa(b)(2)(A). Under Chadha, the President would probably have the power to veto the

7. Executive Branch Organization and Agency Structure

Another way in which Congress exercises authority over the execution of the laws is Congress's power over the organization of the Executive Branch. One can imagine a system under which all executive power flowed directly to the President, who would then manage the execution as he saw fit, including organizing the Executive Branch into departments and agencies. In our system, however, while the President may sometimes exercise independent organizational power,¹⁴⁷ it is largely Congress that decides what departments to create, how to organize those departments into various authorities and agencies and whether to create agencies outside of any department.¹⁴⁸ If Congress is unhappy with the way an agency is functioning, it can move it into a different department or even abolish it. Dissatisfaction with the Immigration and Naturalization Service's performance, for example, led Congress to abolish that agency and reallocate its functions among agencies within the Department of Justice, where the INS was located, and the new Department of Homeland Security. Congress even creates departments over the objection of the President, as was the case in the recent creation of the Department of Homeland Security, which President Bush initially opposed.¹⁴⁹ Congressional control

resolution, and the resolution could not have any legal effect until either the President signed it or Congress overrode a veto.

¹⁴⁷ See David E. Lewis, *Presidents and the Politics of Agency Design: Political Insulation in the United States Government Bureaucracy, 1946-1997* 77-136 (2003) (discussing agencies created by the Executive Branch and Congress's responses).

¹⁴⁸ Congress also has granted the President power to reorganize without specific statutory approval of the new organizational structure. See generally, *The Reorganization Act of 1977*, U.S. Pub. L. 95-17, Apr. 6, 1977, 91 Stat. 32. These reorganizations were subject to legislative vetoes. See, *Reorganization Act of 1977*, § 906. Now that the legislative veto is no longer available, Congress has provided that no executive reorganization plan can go into effect without the approval of both Houses of Congress under a special, expedited procedure. See Pub. L. 98-614, § 3(a), Nov. 8, 1984, 98 Stat. 3192, codified at 5 U.S.C. § 906.

¹⁴⁹ Brooke Donald, 2002: The Year in Review: GOP Showed National Gains, Controlling Congress, *Milwaukee Journal and Sentinel*, (Dec. 29, 2002) ("Bush scored a post-election victory with the creation of the Homeland Security Department, which he initially opposed. Facing criticism from Democrats, he embraced the concept in June and used it as a political issue in the midterm election campaign.")

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over the organization of the Executive Branch can be a potent tool for supervising the execution of the law.

Often, it seems that the structure of the agency created to administer a program is as important to Congress as the substance of the regulatory program. A good example is the struggle between Congress and President Richard Nixon over the structure of the entities that administer the Occupational Safety and Health Act of 1970. The proponents of federal worker safety legislation pushed for an agency within the Department of Labor, while the President and business interests favored an independent agency. The compromise ultimately adopted placed the standard setting and enforcement agency within the Department of Labor and created an independent agency to adjudicate violations.¹⁵⁰ McNollgast explain that the legislative coalition that passes regulatory programs structures the implementing mechanism, including setting the administrative procedures that apply, with the hope that the structure itself will produce desired outcomes without the necessity of extensive monitoring or supervision.¹⁵¹ When this does not work, legislators monitor and supervise the administration of the program and may make adjustments to the administrative structure, although this ex-post monitoring may reflect the desires of the supervising legislators rather than the desires of the original coalition that passed the legislation.¹⁵²

The power over the organization of the Executive Branch includes the controversial power to establish agencies that are independent of direct presidential

¹⁵⁰ See Ronald A. Cass et al., *Administrative Law: Cases and Materials* 11-16 (2002).

¹⁵¹ McCubbins, Noll and Weingast, *Administrative Procedures as Instruments of Political Control*, supra note x. See also Macey, supra note x (discussing efforts in Congress to “hard wire” agencies to produce favored results); Kathleen Bawn, *Political Control Versus Expertise: Congressional Choices About Administrative Procedures*, 89 *Am. Pol. Sci. Rev.* 62 (1995) (discussing delegation in light of the possibility of agency drift).

¹⁵² McNollgast, *Administrative Arrangements*, supra note x.

control.¹⁵³ Theoretically, these agencies are supposed to be insulated from politics, but the truth is that while the independent agencies may be insulated from the President, they are often much more responsive to direct (albeit informal) congressional supervision than agencies within the Executive Branch.¹⁵⁴ There are several common features in legislation creating independent agencies. First, Congress includes in the legislation language indicating that the agency is independent. Second, Congress specifies that the agency is headed by a group of commissioners appointed by the President for a fixed term, often with a requirement of bipartisan membership. (The bipartisanship requirement, and other qualifications that Congress has specified for various positions in government, can be viewed as another formal method of control. These requirements are constitutionally suspect because they restrict the President's authority to appoint Officers of the United States.) Third, Congress includes restrictions on the President's power to remove commissioners during their terms, usually a requirement that they not be removed without good cause. Fourth, Congress may include provisions concerning the chairmanship and vice-chairmanship of the agency that greatly restrict the President's choices. Finally, Congress may include provisions exempting or restricting the President's ability to subject the agency's budget to the normal review within the White House's Office of Management and Budget.¹⁵⁵ All of these features are designed to reduce presidential influence which enables Congress to maintain control over the

¹⁵³ For a general description of the independent agency phenomenon, see Fisher, *Shared Power*, supra note x at 146-76.

¹⁵⁴ Thus, in the usual case, Congress favors an independent agency as a way to diminish presidential control. In the case of occupational safety discussed above, the President pushed for an independent agency because the Department of Labor at the time was viewed as under the influence of organized labor. The President and business interests must have felt that they might do better in an entity separate from the Department of Labor even though an independent agency theoretically should be somewhat less amenable to presidential influence.

¹⁵⁵ See Fisher, *Shared Power*, supra note x at 162-64.

independent agencies through informal devices discussed in the next section of this article.

8. Advice and Consent on Appointments

Another formal means of supervision that Congress has over the Executive Branch, not involving the legislative power, is the Senate's power to reject appointments to agencies. Under the Appointments Clause, appointments of Officers of the United States, which includes any federal official with authority to execute the law, are made by the President with the advice and consent of the Senate.¹⁵⁶ Advice and consent is understood as majority approval in the Senate, although under Senate rules and practices, a committee can prevent a nomination from coming up for a vote, and less than a majority of the full Senate can filibuster, which also prevents the full Senate from taking a vote. There are two ways in which the advice and consent power becomes a tool of supervision. The first is the very direct fact that the Senate has a say in the personnel and can refuse to approve appointments if it expects that the nominee will not execute the law in the manner favored by the Senate.¹⁵⁷ This power is often used to "convince" the President to nominate an individual favored by an influential Senator, providing that Senator with a loyal friend at an agency who is likely to execute the law in line with that Senator's wishes. The second, less direct consequence of the Senate's power, is that approval of appointments can be used as leverage over related and even completely unrelated areas in which the Senate has an interest in the execution of the laws.

¹⁵⁶ U.S. Const., Art. II, § 1, cl. 2. Congress may provide for the appointment of "inferior officers" by the President, the Courts of Law by the Heads of Departments without the advice and consent of the Senate. *Id.*

¹⁵⁷ See generally, David C. Nixon, Separation of Powers and Appointee Ideology, 20 *J.L. Econ. & Org.* 438 (2004) (concluding that the Senate's power over appointments influences the ideology of nominees chosen by the President). In the next section, I discuss how informal pressure also influences presidential appointments.

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The choice of which officials to subject to the advice and consent process is also reflective of Congress's interest in the execution of the laws. Congress has been aggressive in legislatively subjecting appointments to the Senate's advice and consent power. Congress has insisted that the appointment of important presidential advisors and other Executive Branch officials are subject to the advice and consent of the Senate, on the ground that these officials are Officers of the United States. For example, in the 1970s, Congress legislatively subjected the appointment of the Director of the Office of Management and Budget¹⁵⁸ and the United States Trade Representative¹⁵⁹ to senatorial advice and consent. This is also thought to allow the legislature to assert the power to summon these officials to oversight hearings.¹⁶⁰

9. Impeachment and Removal

Another non-legislative supervisory power vested in Congress is the power to impeach and remove executive (and judicial) officials. The Constitution specifies that the House alone has the power to impeach federal officials and the Senate alone has the power to conduct trials after the House votes articles of impeachment. If the Senate convicts the official of the violations alleged in the articles of impeachment, the official is removed from office.¹⁶¹ This is not commonly used as a method of day to day supervision of executive officials, although Justice Scalia noted in his dissent from the

¹⁵⁸ See Pub. L. 93-250, MARCH 2, 1974, 88 Stat 11, codified at 31 U.S.C. § 502.

¹⁵⁹ See Pub.L. 93-618, Title I, § 141(a), (b)(1), (2), (c) to (h), Jan. 3, 1975, 88 Stat. 1999, codified at 19 U.S.C. § 2171.

¹⁶⁰ This point was suggested by John F. Cooney.

¹⁶¹ It is not clear that removal is the only punishment that the Senate may inflict. Joseph Isenbergh's research on this during the impeachment proceedings against President Clinton revealed that in the early years under the Constitution, the Senate imposed lesser punishments such as fines on persons convicted by the Senate. See Joseph Isenbergh, *Impeachment and Presidential Immunity from Judicial Process* (November 11, 1998) available at <http://www.law.uchicago.edu/academics/39.pdf>. It has been quite a long time since a lesser punishment has been considered by the Senate.

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Court's approval of the Independent Counsel provisions of the Ethics in Government Act that "the context of this statute is acrid with the smell of threatened impeachment."¹⁶²

Impeachment is most commonly used to remove federal judges who refuse to resign after they have been convicted of crimes because they have life tenure and there is thus no other mechanism to remove them. It is used much less often against executive officials because they can usually be removed by the President or some other supervisory federal official. When impeachment has been used against the President, it often appears to be based more on politics than on serious violations of the law.¹⁶³

10. Litigation by Congress

Congress has also gotten involved in the quintessential executive activity of litigating the interests of the United States in court, although it tends to do so in separation of powers disputes when its own powers are at stake.¹⁶⁴ Congress has statutorily granted the Senate the right to intervene in litigation when the "powers and responsibilities of Congress under the Constitution of the United States are placed in issue."¹⁶⁵ The statute creates the Office of Senate Legal Counsel, and the head of that office is appointed by the president pro tempore of the Senate from candidates recommended by the Senate majority and minority leaders. The House employs counsel

¹⁶² Morrison v. Olson, 487 U.S. at 702 (Scalia, J. dissenting).

¹⁶³ Although it is difficult to draw a line between political and non-political uses of the impeachment power against the President, the impeachments of Presidents Johnson and Clinton seem to be on the political side of the line while the impeachment of President Nixon seems to be more directly about criminal conduct.

¹⁶⁴ See Note, Executive Discretion and the Congressional Defense of Statutes, 92 Yale L.J. 970, 970 n. 1 (1983) (detailing cases in which the predecessor to the Senate Counsel had intervened) ("Executive Discretion"); Note, By "complicated and indirect" Means: Congressional Defense of Statutes and Separation of Powers, 73 Gw. L. Rev. 205, 207 (2004) ("complicated and indirect") (naming Chadha, Bowsher and Buckley as among the cases in which Congress has defended the challenged statute in court).

¹⁶⁵ 2 U.S.C. § 288e(a). For a general discussion of the practice of the Senate intervening in cases challenging statutes on separation of powers grounds, see "complicated and indirect", supra note x and Rebecca Mae Salokar, Representing Congress: Protecting Institutional and Individual Members' Rights in Court in Congress and the Politics of Emerging Rights 105 (Colton C. Campbell & John A. Stack, Jr., eds. 2002).

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and participates in litigation on an ad hoc basis.¹⁶⁶ There is disagreement among commentators over whether it is consistent with separation of powers for the Houses of Congress to intervene in litigation. The argument in favor of the power is based on the possibility that without it, the President may exercise an absolute veto over legislation simply by declining to defend it in court.¹⁶⁷ The response to this is that Congress's legislative, impeachment and oversight powers are adequate to ensure that the President defends Congress's constitutional powers in litigation.¹⁶⁸

It is perfectly understandable that Congress would be skeptical of a system under which only the Executive Branch could litigate whether Congress has encroached too much on the executive power.¹⁶⁹ Despite all of Congress's formal and informal tools of supervision, the Executive Branch is not in a position to argue both sides of the case when its own powers are at stake. The Supreme Court recognized this in *Chadha*, stating “We have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional.”¹⁷⁰ This is why it is not surprising, for example, that Congress granted its members standing to litigate the

¹⁶⁶ See Executive Discretion, supra note x at 971 n.3.

¹⁶⁷ See Executive Discretion, supra note x at 979-80.

¹⁶⁸ See complicated and direct, supra note x at 233.

¹⁶⁹ On related grounds, the False Claims Act, 31 U.S.C.A. § 3729 et seq., which allows private individuals to assert fraud claims on behalf of the United States Government, has been attacked as violating separation of powers by taking away the Executive Branch's control over litigation on behalf of the United States. In light of the long existence of this type of procedure, the challenges have been unsuccessful. See *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 760-69 (5th Cir. 2001) (en banc). For the argument that the False Claims Act does violate the Constitution, see *id.* at 760-69 (Smith, J. dissenting) (arguing that False Claims Act is unconstitutional because it takes away Executive Branch control over litigation on behalf of the United States, violating Take Care Clause and Appointments Clause). Whether it violates separation of powers or not, the False Claims Act is an effort by Congress to take away some of the Executive Branch's control over the choice to litigate claims, and thus can be seen as an element of congressional administration in which the private parties bringing suit are agents of Congress.

¹⁷⁰ *Chadha*, 462 U.S. at 940.

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constitutionality of the Line Item Veto Act¹⁷¹ and also specified that when if the Act were challenged, each House of Congress had the right to intervene in the litigation.¹⁷²

11. Congressional Excesses and Innovations

Congress is so aggressive in its supervision of the administration of laws that it has employed methods of supervision that courts have later found were in excess of Congress's constitutional powers. The most prominent example of this is the legislative veto that Congress included in many statutes granting power to agencies. Under legislative veto provisions, agency action was submitted to Congress for review, and agency action would go into effect unless it was rejected by Congress or, as was usually provided, by a subset of Congress such as one House or sometimes even a single committee. Supporters of the legislative veto argued that it was proper because the procedure was contained in bills that were signed by the President and that it was desirable because it enhanced Congress's control over the exercise of delegated legislative power. The Supreme Court disagreed, holding that Congress may not take action having legal effect without going through the procedures specified in the Constitution for legislating, namely that the identical bill be passed by both Houses of Congress and be presented to the President for signature or veto.¹⁷³

¹⁷¹ See the Line Item Veto Act of 1996, Pub.L. 104-130, April 9, 1996, 110 Stat. 1200, formerly codified at 2 U.S.C. § 691 et seq.

¹⁷² See Line Item Veto Act of 1996, s 3(a). The Supreme Court held, in a challenge to the Act brought by Members of Congress who voted against it, that individual Members of Congress lacked constitutional standing because they were not personally injured by the existence of the Act. See *Raines v. Byrd*, 521 U.S. 811 (1997). Ultimately, the Act was struck down because it purported to grant the President the power to veto items in bills that had already been signed into law. Once a bill has been signed into law, only Congress, subject to the President's veto, may change the law. See *Clinton v. City of New York*, 524 U.S. 417 (1998).

¹⁷³ See *INS v. Chadha*, 462 U.S. 919 (1983).

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A much earlier attempt by Congress to exercise authority over the execution of the law was the requirement, in various statutes, that the President seek the advice and consent of the Senate before removing an Officer of the United States whose appointment had been subjected to Senatorial advice and consent. In 1867, Congress passed a law over President Andrew Johnson's veto requiring the advice and consent of the Senate before the President could remove any official who had originally been appointed with such advice and consent.¹⁷⁴ When President Johnson refused to comply with this law, he was impeached by the House of Representatives and avoided removal by one vote in the Senate. In 1876, such a provision was included in the law under which a local postmaster was appointed,¹⁷⁵ and when the President removed the postmaster without consulting the Senate, the postmaster brought suit for backpay in the Court of Claims.¹⁷⁶ The Supreme Court rejected his claim on the ground that there is no basis in the Constitution for the Senate to participate in the removal of executive officials. Congress might, through legislation, eliminate an office entirely or prescribe an expiration date for an appointment, but the Senate has no power on its own to prevent the removal of an officer within the Executive Branch.¹⁷⁷

Congress is restrained in its efforts to supervise the Executive Branch by the elements of separation of powers that regulate who may participate in the execution of

¹⁷⁴ See An Act Regulating the Tenure of certain Civil Offices, 14 Stat. 430 (March 2, 1867).

¹⁷⁵ See 6th section of the Act of Congress of July 12, 1876, 19 Stat. 80, 81, c. 179.

¹⁷⁶ *Myers v. United States*, 272 U.S. 52 (1926).

¹⁷⁷ In his dissent in *Myers*, Justice McReynolds relied on the 1820 Tenure of Office Act as precedent for congressional involvement in removal. See *Myers*, 272 U.S. 186-90 (McReynolds, J. dissenting). That statute, c. 102, 3 Stat. 582 (1820), specified a four year tenure for certain officials, provided that all such officials could be discharged during their terms at the President's pleasure and also imposed, one might say retroactively, an expiration date for the appointments of officials who were already in office at the time the Act was passed. What Justice McReynolds failed to appreciate is that even if Congress as a whole has the power to legislatively provide a termination date for an appointment, that does not mean that Congress may arrogate to itself the power to reject presidential exercises of the power to remove.

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the laws. Only Officers of the United States may execute the laws, and Congress may not participate in the appointment of such officers except via the Senate's power of advice and consent. The Constitution provides that Officers of the United States are appointed by the President with the advice and consent of the Senate, except that Congress may legislatively entrust the appointment of inferior officers to the President alone, department heads and courts of law.¹⁷⁸ The Constitution specifically prohibits Members of Congress from serving as officers of the United States,¹⁷⁹ and Congress has not been able to avoid this prohibition by designating its members as serving in a capacity other than as Members of Congress.¹⁸⁰ Officials appointed or removable in ways inconsistent with status as officers of the United States may not execute the laws.

Congress has run afoul of these appointment and removal requirements more than once. In the politically sensitive area of the regulation of federal elections, Congress attempted to keep a hand in the administrative process by statutorily granting the power to appoint members of the Federal Election Commission to the Speaker of the House and President pro tempore of the Senate, and also by subjecting all members of the Commission to confirmation by both the House and the Senate. The Supreme Court rejected these innovations: the power of appointment is granted to the President, not

¹⁷⁸ U.S. Const., Art. I, §. 2, cl. 2.

¹⁷⁹ See the Incompatibility Clause, Article I, § 6, cl. 2.

¹⁸⁰ See *Metropolitan Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991). The Court held that Members of Congress may not serve on an authority that reviews the operation of the airports in the Washington, D.C. area. The Court did not reach the Incompatibility Clause challenge to this arrangement, resting its decision on more general separation of powers principles. See *id.* at 277 n. 23.

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Members of Congress, and the power of confirmation is granted to the Senate alone, not both the House and the Senate.¹⁸¹

In the equally sensitive area of balancing the federal budget, in a 1985 statute, Congress granted the Comptroller General¹⁸² the power to prescribe federal spending limits that under certain circumstances would become mandatory. This provision was held unconstitutional because the Comptroller General, who is thought of as an officer of Congress in charge of monitoring the performance of the Executive Branch,¹⁸³ is subject to removal by a Joint Resolution¹⁸⁴ of Congress and is not removable by the President.¹⁸⁵ The Supreme Court held that while Congress is free to retain power to remove its own officers, it may not entrust the execution of the law to such officials. Thus, while the Court did not find it unconstitutional for Congress to retain the power to remove the Comptroller General, it did hold that the Comptroller General, as an officer of Congress, may not participate in the execution of the law.

¹⁸¹ See *Buckley v. Valeo*, 424 U.S. 1 (1975). In a later case, the Court of Appeals rejected the presence of the Secretary of the Senate and the Clerk of the House as non-voting ex officio members of the Federal Election Commission whose voting members were all presidential appointees. *Federal Election Com'n v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993). The court reasoned that although these congressional employees were not voting members, Congress must have intended them to have influence over the commission, and any such formal influence by members not appointed pursuant to the Appointments Clause violates the Constitution.

¹⁸² The Comptroller General is the head of an agency of Congress previously known as the General Accounting Office (“GAO”), now known as the Government Accountability Office. The principal functions of the GAO involve research and reporting on the administration of the laws.

¹⁸³ See GAO Website, <http://www.gao.gov/about/what.html>: “GAO, commonly called the investigative arm of Congress or the congressional watchdog, is independent and nonpartisan. It studies how the federal government spends taxpayer dollars. GAO advises Congress and the heads of executive agencies (such as Environmental Protection Agency, EPA, Department of Defense, DOD, and Health and Human Services, HHS) about ways to make government more effective and responsive. GAO evaluates federal programs, audits federal expenditures, and issues legal opinions. When GAO reports its findings to Congress, it recommends actions. Its work leads to laws and acts that improve government operations, and save billions of dollars.”

¹⁸⁴ A Joint Resolution is passed by both Houses of Congress and presented to the President.

¹⁸⁵ See *Bowsher v. Synar*, 478 U.S. 714 (1986).

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This is not to say that all apparent structural innovations that Congress employs to give it a greater say in the administration of the laws are likely to be held unconstitutional or that they should be viewed as unconstitutional. Martin Flaherty finds in the enormous shift of power in the direction of the President good reason to allow devices such as the legislative veto and congressional involvement in the removal of executive officials to rebalance the powers of the federal government.¹⁸⁶ The Supreme Court itself has approved two of the pillars of the administrative state, the lenient nondelegation doctrine and Congress's power to establish independent agencies and insulate them, at least to an extent, from presidential control. The landmark 1935 decision allowing Congress to require cause for the President to remove agency officials¹⁸⁷ is central to the jurisprudence of the administrative state. The more recent decisions discussed above concerning the legislative veto, the structure of the Federal Election Commission and the Comptroller General's involvement in the budget process, together with a decision invalidating the structure of the bankruptcy courts,¹⁸⁸ created the appearance that the Court was likely to strike down all independent agencies as inconsistent with the separation of powers. This belief was proven wrong when the Court upheld the independent counsel provisions of the Ethics in Government Act.¹⁸⁹ Another interesting innovation, under which the Comptroller General was granted the statutory authority to hear and issue recommendations on bid protests in government contracting, was upheld by two Courts of Appeals, largely on the grounds that the Comptroller's

¹⁸⁶ See Flaherty, *supra* note x at 1828-39.

¹⁸⁷ *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

¹⁸⁸ See *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982).

¹⁸⁹ See *Morrison v. Olson*, 487 U.S. 654 (1988).

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recommendations were not binding and therefore the process was not executive but rather facilitated Congress's investigative powers.¹⁹⁰

12. International Trade Oversight

Congress's involvement in the negotiation of international trade agreements may involve the most intrusive oversight practice of all. International trade agreements are negotiated by the United States Trade Representative, an official in the Executive Office of the President who is appointed by the President subject to the advice and consent of the Senate.¹⁹¹ Congress has required, by two statutes, that groups of Members of Congress be designated as accredited members of delegations to trade meetings and negotiating sessions. The first statute, passed in 1975 and amended in 1988, requires the Speaker of the House (upon the recommendation of the Chairman of the Committee on Ways and Means) and President pro tempore of the Senate (on the recommendation of the Chairman of the Committee on Finance) to name five Members of their respective House of Congress to be "designated congressional advisers on trade policy and

¹⁹⁰ See *Ameron, Inc. v. United States Army Corps of Engineers*, 809 F.2d 979 (3d Cir. 1986); *Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102 (9th Cir. 1988). The most constitutionally difficult part of the scheme was its stay provision. Filing a protest with the Comptroller automatically stayed the award of the contract. That is not problematic because the Comptroller does not issue the stay, it is statutorily automatic. Further, the procuring agency has the power to override the stay. However, the Comptroller, for good cause, does have the authority to extend the time for making a decision on a protest, and the extension automatically extends the stay of the award of the contract. This seems to violate the requirement that only Officers of the United States can take actions that have legal effects. The Reagan administration apparently believed that the stay provision was unconstitutional. President Reagan, when he signed the legislation involved, stated that he believed the stay provision was unconstitutional, and apparently his administration had vowed not to obey it, even if it was upheld by lower federal courts. See *Lear*, 842 F.2d at 1105. Nonetheless, both Courts of Appeals that have considered it have upheld the statute for similar reasons, that the Comptroller's review is nonbinding and that the power over the length of the stay is not sufficient to convert the Comptroller's review into impermissible execution of the laws. See *Ameron*, 809 F.2d at 995; *Lear*, 842 F.2d at 1110-11. See also *City of Alexandria v. United States*, 737 F.2d 1022 (Fed. Cir. 1984) (upholding a procedure under which the disposal of surplus government property was, in effect, subject to disapproval by a congressional committee).

¹⁹¹ 19 U.S.C. § 2171.

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negotiations.”¹⁹² This statute also requires the United States Trade Representative to consult “on a continuing basis” with the Senate Finance Committee and the House Committee on Ways and Means. The second statute, passed in 2002, creates another group of Members of Congress, the Congressional Oversight Group, and designates them also as accredited members of trade negotiating groups.¹⁹³ Both statutes require that these Members of Congress be kept informed of the activities of the United States Trade Representative, that they should have access to information concerning ongoing and proposed trade negotiations and that they should be consulted on trade policy.

Another interesting innovation in the trade area that has not been tested in Court involves the role of the House of Representatives in ratifying international trade agreements. The President negotiates treaties subject to the advice and consent of the Senate, which in the case of treaties requires a two-thirds vote.¹⁹⁴ Not all international agreements are treaties, although the line between treaties and non-treaty international agreements is not very clear or well understood. Some agreements, known as Executive Agreements, are made by the President alone. Other agreements, mainly in the trade area, such as the North American Free Trade Agreement, are made under legislative authority granted to the President and are, pursuant to the legislation, presented to both the House and the Senate for ratification.

The House’s role in ratifying international trade agreements, such as NAFTA, is controversial because the Constitution grants only the Senate the advice and consent

¹⁹² See Pub. L. 93-618, title I, Sec. 161, Jan. 3, 1975, 88 Stat. 2008, and Pub. L. 100-418, title I, Sec. 1632, Aug. 23, 1988, 102 Stat. 1269, codified at 19 U.S.C. § 2211 (a). The named committee chairmen can also designate additional Members of Congress to be advisers on particular trade agreements.

¹⁹³ See Pub. L. 107-210, div. B, title XXI, § 2107, Aug. 6, 2002, 116 Stat. 1017, codified at 19 U.S.C. § 3807.

¹⁹⁴ U.S. Const. Article II, sec. 2, cl. 2.

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power over treaties.¹⁹⁵ There is a split among commentators over whether these arrangements are constitutional.¹⁹⁶ There are several possible justifications for allowing the House to participate in the ratification of trade agreements such as NAFTA. First, the House shares in the legislative power over tariffs and trade and thus traditionally participates through legislation in matters such as imposing, adjusting and removing tariffs. Second, the House's participation is based on a quid pro quo under which Congress agrees to an up or down vote on the trade agreement without amendments.¹⁹⁷ Finally, assuming that non-treaty international agreements exist, the line between what may be done only in treaty form and agreements that may be concluded in other forms is so uncertain that the government essentially may conclude any international agreement via a treaty ratified by the Senate or, where appropriate legislation has been enacted, agreement sent to both Houses for approval.¹⁹⁸ By insisting on participation in the ratification of international trade agreements, the House maintains some control over the President's conduct in the international arena.

In sum, the legislative and other formal powers provide Congress with potent tools to exert substantial influence over the execution of the laws and the carrying out of

¹⁹⁵ One court found that the issue of whether NAFTA was a treaty requiring Senate ratification under the Treaty Clause was a nonjusticiable political question. See *Made in the USA Foundation v. U.S.*, 242 F.3d 1300 (11th Cir. 2001). See also Bruce Ackerman and David Golove, *Is NAFTA Constitutional?*, 108 Harv. L.Rev. 799, 810-12 (1995). For a discussion of these and other issues concerning international agreements and U.S. law, see James Thuo Gathii, *Insulating Domestic Policy through International Legal Minimalism: A Re-characterization of the Foreign Affairs Trade Doctrine*, 25 U. Pa. J. Int'l Econ. L. 1 (2004).

¹⁹⁶ See Gathii, *supra* note x at 20-22 (citing sources on both sides of controversy).

¹⁹⁷ This is known as "fast track."

¹⁹⁸ See Gathii, *supra* note x at 20, n. 43: "Section 303 cmt. (e) of the Restatement (Third) of the Foreign Relations Law of the U.S. notes that: [S]ince any agreement concluded as a Congressional-Executive Agreement could also be concluded by treaty ... either method may be used in many cases. The prevailing view is that the Congressional-Executive Agreement can be used as an alternative to the treaty method in every instance. Which procedure should be used is a political judgment, made in the first instance by the President, subject to the possibility that the Senate might refuse to consider a joint resolution of Congress to approve an agreement, insisting that the President submit the agreement as a treaty. 1 Restatement (Third) of Foreign Relations Law, § 303 cmt. (e) (1986)."

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other Executive Branch activities. Whether Congress exercises its powers too often, not often enough or with the proper frequency, is debatable. From general legislation like the APA to targeted appropriations riders, Congress has, on numerous occasions, become involved in the day to day administration of the laws. The Senate's power to reject executive appointments is another formal tool that keeps Congress involved. Congress uses formal tools to conduct extensive oversight of the Executive Branch.

B. Informal Congressional Involvement in the Execution of the Laws

In addition to the formal methods that Congress employs to supervise the agencies, Congress, usually acting in smaller groups or even through individual Members of Congress, engages in a great deal of informal monitoring and supervision of agencies. Informal methods are those methods that do not require formal action by Congress, i.e. no legislation or impeachment or advice and consent is required because the method of supervision does not purport to have any legal effect. This includes informal contact between Members of Congress and administrators, committee hearings, information requests and other similar devices. Informal oversight and supervision often takes place with a threat in the background that if an agency does not conform its actions to the desires of legislators, it will find itself subject to legislation including changes to the substance of its program, changes to its structure, reductions or reallocations of its budget or targeted appropriations riders. The informal methods are pervasive and persistent, and the Executive Branch knows that almost all of its activities are carried out under the watchful eye of Congress or representatives of Congress.

To a great extent, the informal methods of supervision are employed in conjunction with formal methods. For example, Congress has legislatively required

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agencies to file periodic reports with Congress. These reports are often used as the basis for committee hearings, the paradigmatic informal method of supervision. As we shall see, informal supervision of agencies is extensive and provides Congress with some fairly effective supervisory tools to complement its formal powers over the substance of laws and the procedures and structure of agencies. At the end of the day, the multi-faceted structure of informal contacts, together with the formal methods discussed above, means that Congress plays an important superintending role over the execution of the laws it passes.

1. Oversight

Oversight is the general term applied to a broad range of congressional monitoring and supervision of administrative agencies, most of which fall into the category of “informal” supervision. Oversight is the public face of a vast network of contacts between members of Congress (and their staffs) and agency officials, including agency heads and their staffs. The most common set of oversight activities involve the receipt of information and holding of hearings on the activities of agencies. Although oversight has always been part of the relationship between Congress and the Executive Branch, the current structure of oversight was initiated in 1946 with the passage of the Legislative Reorganization Act. This Act facilitated oversight through two devices, the organization of the House and the Senate into similar committee structures and the creation of a professional oversight staff for committees.¹⁹⁹ Since then, oversight has mushroomed, although some may say it has mutated into a many headed monster with

¹⁹⁹ For a theoretical examination of legislative committee structure, see Keith Krehbiel, *Information and Legislative Organization* (1991).

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some agencies scrutinized by dozens of committees and subcommittees.²⁰⁰ It is apparently very easy for Members of Congress with an interest in a particular agency to assume an oversight function within the structure of a committee or subcommittee. The pervasive nature of oversight and its effect on the administration of the law has led Steve Calabresi to conclude that “the congressional committee chairs are in many ways rival executives to the cabinet secretaries whose departments and personal offices they oversee.”²⁰¹

From the perspective of someone concerned that Congress delegates too much power to the Executive Branch, informal oversight is an important ameliorative, picking up some of the slack in legislative guidance that is lacking in broad delegations.²⁰² Interestingly, over time there have been widely divergent views on whether oversight is appropriate and whether Congress engages in too much or too little oversight. In 1885, Woodrow Wilson complained that Congress wielded far too much power, was unrestrained and prone to caprice.²⁰³ He wrote that Congress “has entered more and more into the details of the administration, until it has virtually taken into its own hands all the substantial powers of government.”²⁰⁴ By 1908, after witnessing a transformation in the role of the United States in world politics and strong Presidents such as Theodore

²⁰⁰ For example, a recent editorial in *The Boston Globe* states that 79 committees and subcommittees engage in oversight regarding the Department of Homeland Security. See *Globe Editorial*, February 7, 2005 at A12.

²⁰¹ See Calabresi, *supra* note xx at 51. Calabresi spells out three ways in which congressional committees insinuate themselves into the execution of the law, the scrutiny of oversight hearings, appropriations riders and promises extracted by the relevant Senate committee during the confirmation process. See *id.* at 50-55. Given that at least the second and third methods are clearly within Congress’s constitutional powers, I find it puzzling that an originalist would be so critical of them.

²⁰² For an examination of congressional oversight, see *Who Makes Public Policy? The Struggle for Control between Congress and the Executive* (Robert S. Gilmour & Alexis A. Halley eds., 1994).

²⁰³ See Woodrow Wilson, *Congressional Government: A Study in American Politics* (1885); Woodrow Wilson, *Cabinet Government in the United States*, *International Review* (August 1879).

²⁰⁴ Wilson, *Congressional Government*, *supra* note x at 49.

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Roosevelt and Grover Cleveland, he wrote that the President is now at the “front of affairs.”²⁰⁵ With the broad delegations to regulatory agencies that blossomed in the late twentieth century, complaints surfaced again that Congress had abdicated its lawmaking role, although at the same time there were complaints that Congress was too aggressive. The fact that there are complaints from opposite perspectives indicates that the truth may lie somewhere in the middle. Perhaps the level of oversight is close to what is appropriate.²⁰⁶

The machinery of congressional oversight is enormous.²⁰⁷ Each House of Congress has numerous committees and subcommittees, almost all of which engage in oversight activities.²⁰⁸ The website of the House of Representatives lists 21 House Committees and three joint committees²⁰⁹ while the Senate’s website lists 15 Senate Committees and four joint committees.²¹⁰ The Committees in each House are further divided into several subcommittees. At the high end, the Appropriations Committees in each House have more than a dozen subcommittees. More typically, committees such as Agriculture and International Relations have four to seven subcommittees.²¹¹ Each of these committees and subcommittees has professional staff to perform oversight.

²⁰⁵ Wilson, *Congressional Government*, preface to fifteenth printing, *supra* note x. See also Woodrow Wilson, *Constitutional Government* (1908).

²⁰⁶ From the perspective of someone who believes in the unitary executive both as a matter of constitutional design and normative desirability, the oversight process, as carried out by congressional committees, is a disaster. See Calabresi, *supra* note x at 50-55.

²⁰⁷ The variety of interactions between Congress and agencies is spelled out quite clearly in Randall B. Ripley & Grace A. Franklin, *Congress, the Bureaucracy and Public Policy* 68-84 (4th ed. 1987).

²⁰⁸ See Kathleen Bawn, *Choosing Strategies to Control the Bureaucracy: Statutory Constraints, Oversight, and the Committee System*, 13 *J. L. Econ. Org.* 101 (1997).

²⁰⁹ <http://www.house.gov/house/CommitteeWWW.shtml>

²¹⁰ http://www.senate.gov/pagelayout/committees/d_three_sections_with_teasers/committees_home.htm. The Senate lists a Joint Committee on the Library which the House does not list.

²¹¹ See <http://agriculture.house.gov/inside/subcomms.html> (House Committee on Agriculture lists five subcommittees); http://wwwc.house.gov/international_relations/subcommittees.htm (House Committee on International Relations lists seven subcommittees); <http://agriculture.senate.gov/sub.htm> (Senate

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Oversight often involves hearings before a committee or subcommittee at which agency officials and even department heads are asked to apprise the committee or subcommittee of agency activities and answer questions concerning the agency's policies or performance. One might think that the purpose of oversight hearings is to provide an opportunity for Members of Congress to receive information about agency activities so they can consider whether legislation is desirable. While this is part of the reason for hearings, more important is that hearings provide an opportunity for Members of Congress to express their views, often displeasure with the agency's performance, to agency personnel and the voting public. Commonly, hearings involve long speeches by committee members criticizing agency actions and demanding change. Hearings may include testimony from members of the public about how agency action has affected them and also from non-governmental experts on the consequences of government policy. Very often, oversight hearings are carefully choreographed by committee chairs to help achieve political ends. The sheer volume of hearings communicates the message that Congress considers itself the boss.

The hearing process also facilitates tacit agreements between committees and agencies requiring agencies to handle matters in an agreed-upon way in the future. Committee directives cannot be binding on agencies after the Chadha decision, which requires bicameralism and presentment before any action in Congress may create binding law or have any legal effect. However, nothing prevents agencies from accepting "suggestions" made by committee members at hearings, and committee members often insist on assurances to that effect in exchange for foregoing legislative action or further

Committee on Agriculture, Nutrition and Forestry lists four subcommittees); <http://foreign.senate.gov/subcommittee.html> (Senate Committee on Foreign Relations lists seven subcommittees).

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investigation. For example, in the immigration context, the filing of a private bill coupled with a subcommittee request for a report from the deporting agency results in a stay of deportation, apparently pursuant to an informal agreement between Congress and the agency.²¹² Given the power of Congress over agency budgets and substantive law, agencies have a strong incentive to listen when Members of Congress make suggestions at public hearings.

Hearings are often part of the many extensive congressional investigations conducted regarding the conduct of the Executive Branch. These investigations and confrontations may be legitimate attempts by Congress to exercise its legislative power responsibly, but they profoundly affect the balance of power in the U.S. Government.²¹³ To support its investigations, Congress has the power to subpoena witnesses and require them to bring records and other documents.²¹⁴ These tools are quite broad,²¹⁵ and many confrontations between Congress and the President involve actual or threatened claims of

²¹² See *supra* note x and accompanying text.

²¹³ See William Marshall, *The Limits on Congress's Authority to Investigate the President*, 2004 U. Ill. L. Rev. 781; Randall K. Miller, *Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege*, 81 Minn. L. Rev. 631 (1996).

²¹⁴ See *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975) (committee subpoena is legitimate part of legislative process and therefore Speech or Debate Clause protects committee members from civil suit based on alleged constitutional violations arising out of issuance of subpoena). There has been some critical commentary regarding Congress's subpoena power and the related power to prosecute contempt of Congress. Gary Lawson has recently argued that the Orders, Resolutions and Votes Clause of the Constitution, Article I, Section 7, cl. 3, requires that a congressional vote for a subpoena be presented to the President for signing or veto. See Gary Lawson, *Burning Down the House (and Senate): A Presentment Requirement for Legislative Subpoenas Under the Orders, Resolutions, and Votes Clause*, 83 Texas L. Rev. 1373, 1385 (2005). He bases his conclusion on the analysis of the Orders, Resolutions and Votes Clause in Seth Barrett Tillman, *A Textualist Defense of Article I, Section 7, Clause 3: Why Hollingsworth v. Virginia Was Rightly Decided and Why INS v. Chadha was Wrongly Reasoned*, 83 Texas L. Rev. 1265 (2005). Additionally, Todd Peterson concludes that Congress cannot, consistent with separation of powers, compel the Executive Branch to prosecute someone for criminal contempt of Congress. Rather, any prosecution must be subject to normal prosecutorial discretion in the Executive Branch. See Todd D. Peterson, *Prosecuting Executive Branch Officials for Contempt of Congress*, 66 N.Y.U. L. Rev. 563 (1991). See also *Watkins v. United States*, 354 U.S. 178 (1957) (voiding conviction for contempt of Congress for failing to reveal whether associates were communists because defendant was not given an opportunity by congressional committee to assert and have evaluated the basis for his refusal to answer).

²¹⁵ See *Nixon v. GSA Administrator of General Services*, 433 U.S. 425, 453 (1977); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975).

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executive privilege against congressional attempts to procure information from the Executive Branch.²¹⁶ Congressional investigations run the gamut, from looking into the administration of regulatory programs to investigations of whether the Department of Justice is acting properly in ongoing criminal investigations and prosecutions, where disclosure of information can harm law enforcement and prejudice the rights of subjects.²¹⁷ Congress frequently seeks to require administration officials to appear for hearings with documents and other information.

Public demands by Members of Congress for information can place the President in the uncomfortable position of feeling the need to maintain secrecy while Members of Congress claim that the only reason for secrecy is to prevent political embarrassment. Committees often conduct intensive investigations into the conduct of the administration with an eye toward criminal prosecution and law reform. Executive branch officials trying to remain loyal to the President often find themselves under sharp attack from Members of Congress seeking information to use against the President or his policies. For example, President Bill Clinton's actions were subjected to intensive scrutiny in large part by investigations emanating from Congress.²¹⁸ Investigations can result in the

²¹⁶ E.g. *Morrison v. Olson*, 487 U.S. 654 (1988) (matter under investigation by Congress involved alleged false and misleading testimony in a congressional committee by an Executive Branch official on the operation of a government program).

²¹⁷ See Todd David Peterson, *Congressional Oversight of Open Criminal Investigations*, 77 *Notre Dame L. Rev.* 1373 (2002). Peterson concludes that the Department of Justice should not be required to provide Congress with information concerning ongoing criminal investigations and that this should be a per se rule without the necessity of the President asserting executive privilege.

²¹⁸ Congress's power to investigate the President is not unlimited. See William P. Marshall, *The Limits on Congress's Authority to Investigate the President*, 2004 *U. Ill. L. Rev.* 781. Marshall explains that Congress has strong political incentives to investigate the President and little in the way of political disincentives. He recommends reforms that would make Members of Congress and Congress as a whole more accountable for investigations of the President as a way of reducing the tendency toward destructive investigations.

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production of multi-volume reports with hundreds and even thousands of pages. Congress's message to the Executive Branch is clear—"we are watching you."

2. Oversight Institutions

Congress has also established and funded institutions that provide extensive oversight of the Executive Branch. In addition to investigations conducted by Congress itself, the primary entity that conducts investigations for Congress is the Government Accountability Office (GAO) (formerly the General Accounting Office). The GAO, with approximately 3,300 employees²¹⁹ was created by Congress with the express purpose of engaging in oversight of the Executive Branch. "The Government Accountability Office (GAO) is an agency that works for Congress and the American people. Congress asks GAO to study the programs and expenditures of the federal government. GAO, commonly called the investigative arm of Congress or the congressional watchdog, is independent and nonpartisan. It studies how the federal government spends taxpayer dollars."²²⁰ The research and investigations performed by GAO, combined with all of the reporting to Congress that agencies are legally required to do, enables Congress to keep close tabs on activity within the Executive Branch.

The GAO is headed by the Comptroller General, an official appointed for a 15 year term by the President, with the advice and consent of the Senate, from a list provided

²¹⁹ See U.S. Government Accountability Office, GAO, The Human Capital Strategic Plan, Fiscal Years 2004-2006 available at <http://www.gao.gov/new.items/d041063sp.pdf>.

²²⁰ See <http://www.gao.gov/about/what.html>. ("The Government Accountability Office (GAO) is an agency that works for Congress and the American people. Congress asks GAO to study the programs and expenditures of the federal government. GAO, commonly called the investigative arm of Congress or the congressional watchdog, is independent and nonpartisan. It studies how the federal government spends taxpayer dollars. GAO advises Congress and the heads of executive agencies (such as Environmental Protection Agency, EPA, Department of Defense, DOD, and Health and Human Services, HHS) about ways to make government more effective and responsive. GAO evaluates federal programs, audits federal expenditures, and issues legal opinions. When GAO reports its findings to Congress, it recommends actions. Its work leads to laws and acts that improve government operations, and save billions of dollars.")

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by the Speaker of the House and President pro tempore of the Senate²²¹ and is removable for cause and inability to perform the duties of the office by a Joint Resolution of Congress.²²² The length of the Comptroller's term in office insulates the Comptroller from presidential influence, and the method of removal underscores that the Comptroller works for Congress, not the Executive Branch.²²³

The primary focus of the GAO is the performance of the Executive Branch, and its reports often focus attention on inadequacies in Executive Branch administration. The GAO's nearly 3,300 employees and budget of over \$460 million constitutes an enormous bureaucracy focused on the performance of the government. The GAO is very active in investigating waste, fraud and other sorts of abuse by government agencies. It has issued a series of reports under the rubric of its Government Performance and Accountability series that focuses on the challenges within each department and non-departmental federal agency.²²⁴ The GAO reports that it has made 2,700 recommendations for government reform and that 83 percent of its recommendations have been accepted.²²⁵ GAO reports provide fodder for congressional oversight of federal agencies and are often used by congressional committees and Congress, as a whole, as evidence of problems within the Executive Branch.

²²¹ 31 U.S.C. § 703. The requirement that the President appoint someone from a list provided by the congressional leadership is controversial, but may be constitutionally allowable in the case of the Comptroller General because he is considered an officer of Congress and not the Executive Branch. Whether it would be allowed in the case of Executive Branch officials is doubtful. See *Hechinger v. Metropolitan Washington Airports Authority*, 36 F.3d 97 (D.C. Cir. 1994).

²²² 31 U.S.C. § 703.

²²³ This provision also means that the Comptroller may not exercise authority pursuant to the laws because, as the Supreme Court has held, only Officers of the United States may exercise such authority and Officers of the United States may not be removed by Congress, except via impeachment. *Bowsher v. Synar*, 478 U.S. 714 (1986).

²²⁴ See <http://www.gao.gov/pas/2005/>.

²²⁵ See <http://www.gao.gov/about/gglance.html>.

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Another entity that provides research for Congress is the Congressional Research Service (CRS), “a \$91,726,000 per year (FY 2004, \$101 million proposed for FY 2005) agency staffed by 729 members, responds to over 800,000 congressional requests each year.”²²⁶ CRS, an arm of the Library of Congress, produces 1000 reports per year and updates an additional 4000.²²⁷ The subject matter of CRS reports spans the entire spectrum of federal government activity, including law, social policy, foreign affairs, international trade, national defense, the administration of justice, retirement, children and families, health care, and education.²²⁸

The CRS is considered an agency of Congress, not the Executive Branch. Its director is appointed by the Librarian of Congress, subject to confirmation by the Joint Committee of the Library, a congressional committee composed of Senators and Representatives.²²⁹ This appointment process is permissible because the director does not exercise authority under U.S. law and thus is not an Officer of the United States under the test articulated by the Supreme Court.²³⁰

3. Informal Contacts

The public face of oversight and hearings exists against the background of a network of informal, often private contacts through which Members of Congress attempt to influence the execution of the law by communicating directly with agency personnel.

²²⁶ Stephen Young, CRS Reports (updated to 2004), available at <http://www.llrx.com/features/crsreports.htm>. CRS’s 2003 annual report states that in FY 2003 it “delivered 875,197 research responses.” CRS FY 2003 annual report, available at http://www.loc.gov/crsinfo/CRS03_AnnRpt.pdf

²²⁷ Id.

²²⁸ Id.

²²⁹ See <http://www.loc.gov/crsinfo/whatscrs.html#about>. Interestingly, the Librarian himself is appointment by the President with the advice and consent of the Senate. Librarians tend to serve through multiple presidencies—there have been only 13 Librarians of Congress since the founding of the library in 1800. The current Librarian, James H. Billington, has been serving since 1987.

²³⁰ See *Buckley v. Valeo*, 424 U.S. 1 (1975).

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When no proceedings are pending, Members of Congress may communicate freely with agency personnel and urge the agency to take or forego action. Once proceedings begin, the law is less clear. With regard to formal adjudicatory proceedings, off the record communications are normally contrary to both the APA and due process.²³¹ In rulemakings, while there is no question that Members of Congress may participate in the public rulemaking proceedings, the caselaw is somewhat murky on whether Members of Congress are allowed to communicate outside the public record with the agency once rulemaking proceedings have begun.²³² The dominant understanding appears to be that in most rulemaking proceedings, Members of Congress may communicate with agency officials, but the substance of any important communication must be placed on the public record.²³³ Further, there is support in the caselaw for a rule that Members of Congress should keep their comments to the merits of the issues before the agencies and should not threaten retaliation if the agency acts contrary to the Member's expressed preferences.²³⁴

There are strong arguments that off the record contacts are legally allowable in all proceedings other than formal adjudication. The existence of the APA prohibition against *ex parte* contacts in formal adjudication and the absence of a similar provision with regard to other proceedings, such as rulemaking, implies that there is no legal bar to non-record contacts except in formal adjudication. This implication may actually be

²³¹ “[W]hen a hearing is required to be conducted in accordance with section 556 of [the APA] . . . no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an *ex parte* communication relevant to the merits of the proceeding[.]” 5 U.S.C. § 557(a) & (d)(1)(A).

²³² Compare *Home Box Office v. Federal Communications Commission*, 567 F.2d 9 (D.C. Cir. 1977) with *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981).

²³³ See *id.*

²³⁴ See *D.C. Federation of Civic Associations v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971). For a discussion of this and other cases in which Members of Congress have exerted political pressure on agencies, See Richard J. Pierce, *Political Control versus Impermissible Bias in Agency Decisionmaking: Lessons from Chevron and Mistretta*, 57 U. Chi. L. Rev. 481 (1990).

required by the Vermont Yankee rule that, absent constitutional problems, courts should not impose procedural requirements in addition to those specified in the APA and other applicable statutes.²³⁵

The Supreme Court has not provided specific guidance on whether *ex parte* contacts are allowed in proceedings other than formal adjudication, and the lower courts have disagreed on the extent to which such contacts are improper. In the leading cases on *ex parte* contacts in rulemaking, two panels of the D.C. Circuit Court of Appeals took different approaches to the problem. The first of the leading cases, the HBO case, involved a challenge by a public interest participant in a Federal Communications Commission rulemaking regarding the division of programming between cable and over the air television. It was an uncontested fact that many interested parties communicated off the record with agency members and staff. The D.C. Circuit panel cited pervasive *ex parte* contacts as evidence “of undue industry influence over Commission proceedings.” This court decried *ex parte* contacts as constituting a secret record, raising the possibility that the public record will not reveal the true basis for the agency’s decision. The court went on to observe, however, that “informal contacts between agencies and the public are the ‘bread and butter’ of the process of administration and are completely appropriate so long as they do not frustrate judicial review.”²³⁶ Out of this muddled analysis, the court constructed two rules. First, once rulemaking proceedings have begun, agencies should refuse to accept *ex parte* communications and second, if *ex parte* contacts nonetheless

²³⁵ For a discussion of the Vermont Yankee rule, see *infra* notes x-x and accompanying text.

²³⁶ See Home Box Office, 567 F2d at 58.

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occur, the agency should place them, including summaries of any oral communications, on the public record.²³⁷

The second leading case on ex parte communications, the Sierra Club case,²³⁸ concerned agency contacts initiated by Members of Congress, the President, other Executive Branch officials and private interests during the pendency of an EPA rulemaking on pollution standards for coal fired power plants.²³⁹ This case involved allegations of an “‘ex parte blitz’ by coal industry advocates conducted after the close of the comment period” and numerous post-comment period meetings with personnel of other agencies, Members of Congress (and their staffs), the President (and his staff) and representatives of private interests. These meetings included two with Senator Robert Byrd, a powerful Senator who was very interested in the outcome of the rulemaking because he represented West Virginia, a state which produces a great deal of relatively “dirty” coal. In this case, a different D.C. Circuit panel began its analysis by noting that no statute prohibits ex parte communications in rulemaking proceedings, and the panel declined to construct a rule barring ex parte contacts in the absence of a statute forbidding them. The court also observed that the legitimacy of policymaking by administrators depends on them remaining accessible to members of the public and that the quality and acceptability of rules may be enhanced by ex parte communications. The court did find some statutory authority to regulate ex parte contacts in procedural sections of the Clean Air Act that add to the requirements of the APA. In particular, one provision of the Clean Air Act prohibited the EPA from basing its rule on any material not placed in the rulemaking docket while another requires that documents the Administrator of EPA

²³⁷ See Home Box Office v. Federal Communications Commission, 567 F.2d 9 (D.C. Cir. 1977).

²³⁸ Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981).

²³⁹ Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981).

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believes are of central relevance be placed in the docket as soon as possible. From these two provisions, the court derived a requirement that the agency summarize important oral comments and place them on the record. This court's decision exhibits some of the HBO court's displeasure with *ex parte* communications since it expands the domain of the statute from "documents" to oral communications, but the court's decision is more lenient than the HBO court's admonition that agencies should refuse to accept *ex parte* contacts.²⁴⁰ However, the end result is similar in that both courts require agencies to place documents and summaries of oral *ex parte* communications on the public record.

With regard to the meetings with Senator Byrd, the court found it perfectly fine for the agency to meet with him, as long as the Senator's comments focused on the merits of the rule.²⁴¹

We believe it entirely proper for Congressional representatives vigorously to represent the interests of their constituents before administrative agencies engaged in informal, general policy rulemaking, so long as individual Congressmen do not frustrate the intent of Congress as a whole as expressed in statute, nor undermine applicable rules of procedure.

Where Congressmen keep their comments focused on the substance of the

²⁴⁰ One aspect of the controversy involves the distinction between rulemaking and adjudication. The HBO court relied on a prior D.C. Circuit decision that *ex parte* contacts are not appropriate in rulemaking proceedings that decide "competing claims to a valuable privilege" since such proceedings are analogous to adjudication. See *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221 (D.C. Cir. 1959), cited in HBO at 15. *Sangamon Valley* was a proceeding to allocate television frequencies among a small number of licensees. HBO involved a larger group of broadcast, cable and subscription television interests fighting over the right to show various types of programming. The *Sierra Club* court held that the HBO rule does not apply to "informal rulemaking of the general policymaking sort involved here." See *Sierra Club*, 657 F.2d at 402.

²⁴¹ Pressure by a Member of Congress was found to be improper when a powerful member of the House of Representatives threatened to prevent funding of the Washington, D.C., subway system if the Department of Transportation failed to build a bridge between the Georgetown area of Washington, D.C., and Sprout Run, Virginia. See *D.C. Federation of Civic Associations v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971).

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proposed rule . . . administrative agencies are expected to balance Congressional pressure with the pressures emanating from all other sources. To hold otherwise would deprive the agencies of legitimate sources of information and call into question the validity of nearly every controversial rulemaking.²⁴²

The court's reasoning recognizes that congressional pressure on agencies is ubiquitous, but its expectation that agencies will be able to balance congressional pressure against pressure from other sources may be somewhat unrealistic. Allowing Members of Congress the freedom to "vigorously" press the interests of their constituents in private meetings with agency personnel provides those members with a powerful tool for shaping agency action to their preferences.

The most notorious, relatively recent example of congressional pressure on an agency on behalf of constituents²⁴³ is probably the case of the Keating five, in which five Senators repeatedly pressed officials of the Federal Home Loan Bank Board, including its chairman, on behalf of Charles Keating, not to adopt stricter rules regarding the investments of Savings and Loans and then not to apply the new rules to Keating's institutions.²⁴⁴ Keating had made substantial campaign contributions to the group of Senators. With regard to a meeting between four of the Senators and the Board chairman, at which the Senators were seeking to end the Board's investigation of one of Keating's Savings and Loans, the chairman of the Board reported that because of the

²⁴² *Sierra Club*, 657 F.2d at 409-410.

²⁴³ "Constituents" should be understood broadly to include anyone whose support may be important to a Member of Congress. For example, Charles Keating's interests were advocated by five or six Senators, obviously more than represent the state in which he lived. For a general discussion of congressional ethics and constituent advocacy, including the case of the Keating Five, see Ronald M. Levin, *Congressional Ethics and Constituent Advocacy in an Age of Mistrust*, 95 *Mich. L. Rev.* 1 (1996).

²⁴⁴ See Ronald A. Cass et al, *Administrative Law: Cases and Materials* 70-74 (3d ed. 1998).

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Senators' influence over legislation, he felt pressure to comply with their wishes.²⁴⁵ Despite all of the pressure the Senators brought to bear on the agency, and a pattern in which campaign contributions and pressure on Keating's behalf appeared to have been linked, the Senate Select Committee on Ethics found no violation of law or Senate Rule.²⁴⁶

In rulemakings and other legislative-type agency proceedings, off the record contacts can be supplemented by on the record participation. Members of Congress can participate in agency processes by offering comments and analyses of proposed agency action. Their comments are likely to be influential for all the reasons that agencies fear acting contrary to the wishes of those in Congress with power over their budgets and authorizing statutes. Making on the record comments has the disadvantage of taking a public position that may be contrary to the views of some constituents, but it also has advantages such as avoiding the legal uncertainty inherent in off the record contacts. Agencies can base their decisions on the comments in the public record without worrying about the rules that bar reliance on non-record material. Another advantage of participating in a rulemaking or other proceeding in a public manner is that when constituents are united in favor of one position, it allows the Member to appear to be fighting for the constituents. Even in a losing battle, fighting the fight may be politically advantageous.

4. Legislative History

²⁴⁵ Id.

²⁴⁶ Id.

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Congress also influences the execution of the law by producing legislative history that includes instructions to the Executive Branch in addition to those contained in the legislation itself.²⁴⁷ The problem with legislative history is that it is not voted on by Congress as a whole, and therefore it does not have the force of law. This is particularly problematic when the legislative history contradicts or supplements statutory language. Without getting into the longstanding debate over whether courts should rely on legislative history in interpreting statutes, insofar as legislative history does influence the construction of statutes administered by the President or an agency, legislative history can be a device of congressional administration.²⁴⁸ Legislative history is used by committees to illuminate the meaning of statutory language and provide other background information on the legislation. What is most relevant here is that Congress sometimes produces legislative history containing explicit instructions to the Executive Branch. While often legislative history is directed at courts, providing instructions on how to construe ambiguous or incomplete statutory language, sometimes legislative history is aimed directly at the Executive Branch. Consider the following excerpt from a Conference Committee report on an immigration provision that provides relief from deportation to victims of human trafficking who can show "extreme hardship involving unusual and severe harm upon removal":

²⁴⁷ I have included Legislative history in the category of informal congressional action because when it produces legislative history in the form of committee reports and the like, Congress has not taken the formal steps necessary to exercise one of its constitutional powers such as legislation or impeachment. It is somewhat more formal than many of the informal powers discussed here when it is embodied in reports that have been adopted by a congressional committee. Nonetheless, in my view it fits better in the informal category than the formal one.

²⁴⁸ Even within the highly deferential *Chevron* model, the Supreme Court has viewed reference to legislative history as a legitimate element of statutory interpretation. See *Dole v. United Steelworkers of America*, 494 U.S. 26, 40 (1990).

The conferees expect that the Immigration and Naturalization Service and the Executive Office for Immigration Review will interpret the "extreme hardship involving unusual and severe harm" to be a higher standard than just "extreme hardship." The standard shall cover those cases where a victim likely would face genuine and serious hardship if removed from the United States, whether or not the severe harm is physical harm or on account of having been trafficked. The extreme hardship shall involve more than the normal economic and social disruptions involved in deportation.²⁴⁹

Here, in addition to the language contained in the statute itself, the conference committee has produced a report telling the Executive Branch how to interpret statutory provisions that might otherwise leave more room for executive discretion. The Executive Branch has the same incentive to follow the language of legislative history as it does to go along when Members of Congress employ other forms of informal pressure—the implicit threat of increased oversight, legislative sanctions and decreased cooperation from Congress in the future.

5. Informal Supervision of the Appointments Process

Another way in which Congress informally influences the execution of the law is through the appointments process. Although Congress may play no formal role in the appointment of Executive Branch officials other than the Senate's power of confirmation, Members of Congress have a great deal of influence over who the President chooses for

²⁴⁹ See Victims of Trafficking and Violence Protection Act of 2000, H.R. Conf. Rep. 106-939, 106th Cong., 2d Sess. (2000), discussed in Joyce Koo Dalrymple, *Human Trafficking: Protecting Human Rights in the Trafficking Victims Protection Act*, 25 B.C. Third World L.J. 451 (2005).

appointments. The Senate normally recognizes the President's prerogative to appoint high level officials such as Cabinet Secretaries and confirms nominations to those positions unless the nomination presents very serious problems. With regard to less senior positions, however, powerful Members of Congress go so far as to "recommend" particular persons for positions at the head of or within federal agencies.²⁵⁰ These recommendations are accompanied by thinly-veiled or implicit threats against the cooperation that the Executive Branch needs from Congress in confirming other choices for this or different appointments, in the annual budget process or when substantive legislation is necessary for the administration to pursue its policies. It is common to see former legislative aids and other persons loyal to Members of Congress in important agency posts. In bipartisan agencies, when a vacancy belonging to the party other than the President's is open, legislative leaders from the other party have a great deal of influence over who the President nominates.²⁵¹ The placement of officers more loyal to Members of Congress than to the President throughout the federal bureaucracy creates an informal pipeline of congressional influence over the execution of the law.

6. Informal Supervision and Appropriations

The appropriations process provides another good window for looking at the way that the legislature employs informal tools to supervise the execution of the laws. Many

²⁵⁰ This is not a new practice. In Laurin Henry's book on Presidential Transitions, the process for appointment of local postmasters during President Woodrow Wilson's term is recounted. The normal practice was to consult with the local Member of Congress. President Wilson balked at appointing unqualified candidates. Ultimately, \ Wilson agreed to allow Members of Congress to make the choices, subject to the President's right to reject a particular candidate and demand that the Member of Congress suggest someone else. See Henry, *supra* note x at 80-82.

²⁵¹ There is an interesting recent example of disagreement among Democrats over a Democratic appointment to the National Transportation Safety Board, with Democratic leaders favoring one candidate with strong political credentials and other Democrats favoring a different candidate with stronger professional qualifications. See NTSB Slot Has Kennedy, Kerry at Odds, *Boston Globe* March 31, 2005 at A4. It apparently goes without saying that Democrats in Congress have the power to make the choice.

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agencies receive lump-sum appropriations that contain only general headings but not specific designations for particular programs. Lump-sum appropriations are made in response to fairly detailed agency budget requests, and the understanding is that an agency will spend the money in accord with its budget request even though the particulars of the request are not included in the appropriations bill²⁵² and even though agency decisions to reallocate funds from a lump-sum appropriation are not subject to judicial review.²⁵³ In effect, the agency's detailed budget request serves as a promise that it will spend the money in line with the budget request unless the agency receives permission to spend the money in a different manner.²⁵⁴ Permission from Congress to reallocate funds from a lump-sum appropriation does not come formally via an amendment to the appropriations legislation but rather informally via a committee's explicit or tacit consent.²⁵⁵ Under longstanding informal arrangements, it is understood that the committee will be informed of any significant changes to the agency's spending plans within the lump-sum appropriation and that if the committee disapproves, the changes will not be made. If the agency violates the terms of the understanding between it and the committee, it faces statutory restrictions on the use of its funds in the future.

There are several reasons why Congress does not include all the details of the budget in the appropriations bills even though Congress cares about how agencies spend their funds. First, it is expensive to specify in writing all of the line items in a spending

²⁵² The intended amounts for each program are often included in a committee report, with the expectation that the agency will treat the committee report as if it were a statute. See John C. Roberts, *Are Congressional Committees Constitutional*, 52 *Case Western L. Rev.* 489, 564 (2001).

²⁵³ See *Lincoln v. Vigil*, 508 U.S. 182 (1993).

²⁵⁴ See generally Michael W. Kirst, *Government without Passing Laws: Congress' Nonstatutory Techniques for Appropriations Control* (University of North Carolina Press 1969). See also Fisher, *Shared Power*, *supra* note x at 100 (explaining how an agreement between an agency and a congressional committee on the use of appropriated funds replaced the legislative veto after Chadha).

²⁵⁵ See Roberts, *supra* note x at 564.

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bill. It would take a large number of staff hours and mistakes would inevitably be made, which would require new bills to correct the errors in the original bills. Second, there would be political costs to including every item in a line in a bill. Some items are likely to be controversial and might provoke opposition from the public and from within Congress. This would slow down the appropriations process. While including every item in the appropriations bill might be a victory for openness in government, it would come at a great cost to Members of Congress who may prefer a less-open system that works better and gets their favorite programs funded every year with little or no controversy. Third, both Congress and agencies may prefer the flexibility to make adjustments as the material and political realities of the fiscal year reveal themselves. It would be much more difficult to adapt if each adjustment required legislation.

7. Casework

Another common method of informal congressional involvement in the administration of the law is casework. In recent decades, the size of the staffs of Members of Congress has increased substantially, and a large portion of that increase has been used to provide casework for constituents. With casework, Members of Congress provide an avenue for relief from problems with the bureaucracy, ranging from simple replacement of a lost benefits check to help navigating complex government approval processes. Casework by congressional offices runs parallel to the agencies' own methods for resolving problems.

The distinction between casework and the intervention into agency proceedings discussed above is that casework is mundane, dealing mainly with simple bureaucratic errors and procedures. Most of this activity does not implicate issues of policy, but

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casework can morph into pressure on agency policy since it is not always clear whether a constituent has been the victim of an error or rather a discretionary denial of a benefit or permit. In any case, the fact is that Members of Congress devote substantial staff resources to helping constituents to ensure that agencies properly administer the law.

The primary function of casework is to win loyal voters, sort of pork barrel writ small.²⁵⁶ This is one way in which the power of Congress over federal spending creates a significant advantage for incumbents seeking reelection. A Member of Congress with an effective casework operation can win thousands of votes from people who have been helped and from the friends and relatives of those who have been helped. Agency errors are a good thing for Members of Congress because it provides them with a way to win voter loyalty. Rather than appropriate sufficient funds for agencies to deal with their own problems or avoid them in the first place, Congress redirects funding to their own offices and then helps the squeaky wheel get the grease by acting when a constituent complains.²⁵⁷ Members of Congress would rather supply the grease themselves (and take the credit for doing so) then provide agencies with the resources to do so.

8. The Normative Critique of Oversight

What should we make of congressional oversight? Does oversight ameliorate the problem of too much delegation to an undemocratic bureaucracy, or does it upset the separation of powers balance in the federal government? In my view, congressional involvement in the administration of the laws is a healthy counterweight to two

²⁵⁶ See Morris P. Fiorina, *Congress: Keystone of the Washington Establishment* (2d ed. 1989).

²⁵⁷ This is a form of “fire alarm” oversight when Members of Congress act on complaints by constituents rather than “patrolling” the administrative agencies for problems. In many situations, it makes economic sense for Members to wait for complaints in this fashion, just as fire departments wait at the station for alarms rather than patrol the streets for fires. The classic article on this is Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight*, *supra* note x.

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somewhat contradictory problems with the administrative system, the relative insulation of agencies from democratic control and the increased presidential supervision of agencies in recent years. The personal power of the President appears to have increased substantially in recent years as occupants of the office have gone even further than Ronald Reagan in their efforts to manage the administration of the law. When viewed in isolation, it may appear that Congress's involvement is excessive. However, when viewed in light of the increases in presidential supervision over the last 25 years, it is difficult to say whether Congress's influence has increased, decreased or stayed about the same. Congressional administration may be important to maintaining any hope for balance.

This may be heresy to those who read the Constitution as placing all power over the execution of the laws in the hands of the President. However, as long as Congress does not purport to act with legal effect without properly exercising its legislative powers, there is no separation of powers problem and the overall effects are probably positive. Presidential involvement is more likely to move agency decisions away from the preferences of the political community than congressional involvement because it is very difficult to know whether the President's views on any single issue are shared by the electorate. By contrast, the 535 Members of Congress are more likely to represent the spectrum of views across the community. On this understanding, oversight increases the transparency and accountability of administrative law.

There are those who disagree with this assessment, largely on the ground that oversight is not a particularly democratic process and may skew the outcomes of the administrative process in the direction of powerful legislators in leadership positions or

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on key committees.²⁵⁸ Oversight occurs largely through the actions of committees, subcommittees and individual Members of Congress, and there is reason to fear that these sub-groups do not represent the views of Congress as a whole.²⁵⁹ Committee chairs in particular have a great deal of power and can use that power to push agencies around without much of an indication that a majority in Congress would endorse the particular manifestation of legislative oversight.²⁶⁰ For example, if an agency acts in response to a threat by a single subcommittee chair, the agency's action may not reflect the overall will of Congress or even the committee or subcommittee as a whole. This problem has been described as an example of principal-agency slack, between the majority in Congress (or the legislative coalition that passed the legislation being administered) as principal, and the committee, subcommittee or individual Members of Congress, as agents.²⁶¹ Slack exists in a principal-agent relationship when the agent (in our example, the subcommittee

²⁵⁸ See Seidenfeld, *Psychology of Accountability*, supra note x.

²⁵⁹ See Seidenfeld, *Civic Republican Justification*, supra note x at 1525. Seidenfeld notes two related problems, first that oversight may not represent the views of Congress as a whole and second that oversight represents current views and not the views of the original coalition that passed the legislation involved. In my view, the first problem is more serious because it entails a charge that oversight is undemocratic. On the second issue, in my view there is nothing theoretically wrong with current views influencing the execution of the law. In fact, we expect that when a new President is elected, the execution of the law will be in line with the new President's policies. The first problem is explored in greater detail, and characterized as one of agency cost between Congress as principal and committee as agent in J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 *Tex. L. Rev.* 1443 (2003). See also Lupia & McCubbins, supra note x; McCubbins et al., *Administrative Procedures*, supra note x.

²⁶⁰ There is some evidence that campaign contributions may have their greatest effect in matters of low visibility before committees. See Jean R. Schroedel, *Campaign Contributions and Legislative Outcomes*, 39 *Western Political Quarterly* 371 (1986). Further, lobbying groups may allocate contributions, and other means of procuring support, between legislators and administrators depending on which entity has the authority to make pivotal decisions. See Guy L. F. Holburn & Richard G. Vanden Bergh, *Influencing Agencies through Pivotal Political Institutions*, 20 *J.L. Econ. & Org.* 458 (2004). The authors note that sometimes the pivotal decisionmaker will be on the extreme end of the spectrum of views on the relevant subject. *Id.* at 461.

²⁶¹ See DeShazo & Freeman, supra note x. See also Sean Gailmard, *Expertise, Subversion, and Bureaucratic Discretion*, 18 *J.L. Econ. & Org.* 536 (2002) (discussing incentives for individual legislators to subvert overall legislative intent); Jonathan Bender & Terry M. Moe, *Agenda Control, Committee Capture and the Dynamics of Institutional Politics*, 80 *American Political Science Review* 1187 (1986).

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chair) fails to carry out the will of the principal (in our example, Congress or the enacting coalition).

A partial answer to this challenge to oversight is that it all takes place within a structure created by Congress and that Congress as a whole has, in effect, delegated oversight powers to the individuals and groups that exercise them, with tacit agreement that allows individual members and committees free to act without interference from others as long as they do not stray too far from overall congressional preferences. This occurs even in the formal legislative process itself, in which committee chairs can prevent legislation favored by a majority from reaching the floor and in which a few influential legislators can insert language into bills that others will vote for out of party discipline or as part of a trade-off for their own favored legislation. Even though power is not distributed evenly throughout Congress and members with leadership positions will have much more power than others to push agencies toward their preferences, Congress as a whole is responsible for the structure of oversight and its substantive outcomes.

Another positive element of oversight is that it may make an entrenched bureaucracy more responsive to the popular will when even the President cannot secure control over agency policy. Oversight can be viewed as a way to combat the general insulation of agencies from political accountability. In fact, oversight under some circumstances could help the President to steer the agencies in the direction of his policies. For example, after eight years of the Clinton administration, the views of the Republican leadership in Congress may have been closer to the views of the President than were the views of the many people working in important but non-political agency positions whose service dated back to the Clinton administration. While the President's

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primary instruments of control include the ability to appoint and remove agency heads and other important personnel, oversight by powerful Members of Congress under these circumstances could result in agency policies that are closer to the President's preferences than he might otherwise be able to achieve.²⁶²

These are not complete answers to the critique of oversight because they may allow for too much deviation from the terms of the legislative program and from the preferences of Congress as a whole given that oversight does not include the discipline of public majority votes in Congress.²⁶³ Further, ignoring the principal-agent slack between Congress as a whole and those conducting oversight is a bit like saying that because employers do not find it worthwhile to engage in enough monitoring to catch every act of stealing by employees, the employees have been given permission to steal. More to the point, although we understand that all actors within the administrative process, including the President, agency officials, judges conducting judicial review and Members of Congress pursue their own aims within the process, this does not disable us from criticizing their actions for straying too far from congressional intent as embodied in legislation. There are reasons to be wary of a system of oversight that allows individual Members of Congress, or small groups within Congress, to shape administrative action. The mechanisms within Congress for disciplining members for abusing their authority by thwarting the will of Congress may not be strong enough to ensure that oversight reflects the priorities of Congress as a whole. Action taken in response to oversight by a

²⁶² Thanks to Michael Harper for suggesting this point.

²⁶³ As noted, because I find oversight that reflects the views of the current Congress perfectly acceptable, I find the second problem more serious than the first. See *supra* note x. Mark Seidenfeld's criticism of oversight rests on the view that agencies, because of their expertise and relative isolation from the political process, are more deliberative than congressional committees and thus more likely to pursue the public interest as understood from the "civic republicanism" perspective. See Seidenfeld, *Civic Republican Justification*, *supra* note x at 1515.

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congressional committee may be less problematic than action in response to pressure from a single member, because the hearings are public and the membership of the committee is somewhat reflective of the membership of Congress as a whole, but this is far from perfect. Even a relatively large and bi-partisan committee membership may reflect a special interest in an issue from a perspective not shared throughout Congress under conditions in which no one has sufficient incentive to challenge the committee's actions.²⁶⁴

Does this mean that we should take steps to limit oversight? In my view, the question here becomes a matter of the second best. If oversight activities were reduced or reshaped so to avoid the principal-agent problem, the system would probably worsen because then agencies would be freer to act in line with their own preferences with much less regard for congressional intent. At present, agencies act within the universe of the preferences of the President, the federal courts, Congress as a whole and those conducting oversight whose views may or may not reflect the preferences of Congress as a whole. Judicial review and presidential supervision are, in my view, inferior methods of ensuring that agencies are responsive to the will of their ultimate principals. Presidential supervision without effective congressional oversight is more of a threat to democratic values than congressional oversight because it can occur privately, and the President may have been elected for reasons completely unrelated to the particular administrative law issues involved. Judicial review is episodic, limited to those controversies that present justiciable cases and is subject to the will of judges who are

²⁶⁴ Because most oversight is informal, i.e. no sub-group in Congress takes action that purports to have legal effect, oversight does not violate the rule against legislative vetoes. Arguably, however, oversight by narrow groups within Congress is in tension with the values underlying the bicameralism and presentment requirements which counsel against allowing a sub-group within Congress to affect legal rights and duties.

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even less connected to the popular will than Members of Congress.²⁶⁵ Unless someone provides a convincing argument that judges pursue the public good, as embodied in congressional legislation, as opposed to their own private interests, including seeing their own political ideals enacted into law, I will continue to disagree with those who view judicial review as presenting the greatest promise for enforcing the enacting Congress's will.²⁶⁶ Perhaps reforms to oversight would be desirable, but it appears that this is a case in which care must be exercised to avoid a cure that is worse than the disease.

In summary, Congress has many methods, both formal and informal, to supervise the day to day execution of the laws. Formally, Congress's legislative power and the Senate's power of advice and consent over presidential appointments are powerful tools for influencing the administration's execution of the laws. Congress's power over the budget, and its power to prescribe the substance and procedures governing the execution of the laws, force the Executive Branch to remain attentive to Congress's wishes as it executes the laws passed by Congress. Congress also engages in constant informal monitoring of and input into the execution of the laws. Hearings, investigations, ex parte contacts, tacit agreements and "recommendations" for appointments provide Congress with the ability to, if not control, then at least strongly influence the execution of the law. From Congress's perspective, the Executive Branch is its agent, and Congress does whatever it can within, and sometimes without, the Constitution to make it so.

II. Congressional Administration and Administrative Law

²⁶⁵ See Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 *Yale L.J.* 31, 66-86 (1991); Jack M. Beermann, *Interest Group Politics*, *supra* note x. For a more optimistic view on the possibility of judicial action to advance the public interest see Jonathan Macey, *Promoting Public Regarding Legislation through Statutory Interpretation: An Interest Group Model*, 86 *Colum. L. Rev.* 223 (1986).

²⁶⁶ See, e.g., Peterson, *Psychology of Accountability*, *supra* note x at 1095 (concluding that judicial review is superior to political review for ensuring the "legality and wisdom of agency decisions").

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In this section, I look at what I consider the “big three” of administrative law doctrines, the nondelegation doctrine, which regulates the degree of discretion Congress may delegate to agencies, the Chevron doctrine, which specifies the standard of review of agency decisions of statutory construction, and the Vermont Yankee doctrine, which holds that courts may not impose on agencies procedural requirements beyond those required by the Constitution and applicable statutes and rules. The goal of this section is to examine whether our understanding of those doctrines should be altered based on a better understanding of congressional administration.

A. The Nondelegation Doctrine

The nondelegation doctrine is a black letter rule that prohibits Congress from delegating its legislative power. This rule is rarely applied, and the term “nondelegation doctrine” as used in most circumstances is really a misnomer for a doctrine that allows Congress to delegate a great deal of discretionary authority to the Executive Branch.²⁶⁷ As Tom Merrill recently put it, our understanding of delegation comprises two competing postulates. “The first says only Congress may exercise legislative power. The second says only Congress may delegate legislative power.”²⁶⁸ So understood, the nondelegation doctrine which allows only Congress to delegate to administrative agencies the power to make legislative rules is one of the pillars of the administrative state. Without the

²⁶⁷ See Thomas W. Merrill, Rethinking Article I, Section I: From Nondelegation to Exclusive Delegation, 104 Colum. L. Rev. 2097 (2004). I do not mean to take sides in the debate over whether there is or should be a nondelegation doctrine in the Constitution. Compare Eric A. Posner & Adrian Vermeule, Interring the Nondelegation Doctrine, 69 U. Chi. L. Rev. 1721 (2002) (arguing that there should be no nondelegation doctrine beyond the bare prohibition on the delegation of power to make actual laws) with Gary Lawson, Discretion as Delegation: The “Proper” Understanding of the Nondelegation Doctrine, 73 G.W. L. Rev. 235 (2005) (arguing that limits on delegation of discretion to the Executive Branch are required by the word “proper” in the Necessary and Proper clause). As a positive matter, I do not think it is controversial that the conventional nondelegation doctrine does not significantly rein in Congress’s proclivity to delegate discretion.

²⁶⁸ See Merrill, Rethinking Article I, supra note x at 2099.

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authority to delegate, the administrative state would not resemble the current governmental structure very much. In matters involving only the execution of the laws,²⁶⁹ while there is always some discretion inherent in enforcing the law, the President would be more of a ministerial employee of Congress, and Congress would be required to write statutes containing nearly all of the details that are now included in administrative rules.²⁷⁰ This means that in those areas in which the President depends on Congress for discretionary authority, the powers of the two branches are symbiotic rather than competitive. Reducing Congress's power to delegate does not increase the Executive Branch's power. Instead, it decreases it since the President and the agencies would no longer be able to receive delegated discretionary authority.

The conventional nondelegation doctrine is not confined to a prohibition of Congress granting to someone else the actual legal power to make public or private laws. Rather, the doctrine also limits Congress's power to delegate discretionary authority to make rules or other pronouncements with the force of law. This limit is expressed by the Supreme Court as the "intelligible principle" doctrine which allows Congress to delegate as long as it legislates an intelligible principle under which the agency must act.²⁷¹ The intelligible principle doctrine is very lenient, requiring only that Congress identify an agency's jurisdiction and point it in the desired direction. The best examples of the breadth of allowable agency discretion are goals type statutes, such as the Clean Air Act, under which Congress legislated the goal of clean air and allowed the EPA to fill in

²⁶⁹ In areas in which the President's authority does not depend on delegations from Congress, the President would retain discretion even in the absence of the current permissive nondelegation doctrine.

²⁷⁰ Adjudicatory agencies such as the Federal Trade Commission and National Labor Relations Board might survive a more restrictive nondelegation doctrine although they would not be able to make legislative rules to supplement or supplant the case by case adjudicatory decisionmaking process.

²⁷¹ See *Hampton & Co. v. United States*, 276 U.S. 394, 409 (1928); *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 472 (2001).

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details such as what is the definition of clean air and what specific limits should be placed on sources of pollution.²⁷²

Should the fact of congressional administration alter our understanding of the nondelegation doctrine? In my view, yes. Because Congress exercises a great deal of control over the discretionary activity of the Executive Branch, then insofar as the basis for the nondelegation doctrine is to ensure that Congress maintains control over important government decisions,²⁷³ we should embrace the lenient nondelegation doctrine, because Congress is able to keep tabs on the exercise of the delegated discretion. This approach to nondelegation is not new. It was advocated as long ago as 1969 by Kenneth Culp Davis²⁷⁴ and may help explain at least one lower court decision that in 1971 upheld the delegation to the President to take action to stabilize wages and prices.²⁷⁵

Further, the informing the lenient nondelegation doctrine with the realities of congressional administration is consistent with longstanding separation of powers principles. Because nondelegation challenges cannot be decided with resort to a simple procedural provision of the Constitution (unless Congress delegates the actual legal authority to legislate, which would violate the procedures in the Constitution for passing bills), a standard for nondelegation challenges must be constructed in light of general separation of powers concerns. General separation of powers standards are concerned with whether Congress is engaged in self-aggrandizement or whether another branch has

²⁷² See *id.*

²⁷³ See *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 at 671-88 (Rehnquist, J, concurring in the judgment) .

²⁷⁴ See Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. Chi. L. Rev. 715 (1969). Davis advocated looking at all the safeguards that prevent agencies from exercising uncontrolled power.

²⁷⁵ See *Amalgamated Meat Cutters v. Connolly*, 337 F. Supp. 737 (D.D.C. 1971).

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been unduly restricted in its ability to function.²⁷⁶ These are institutional realities rather than legalistic considerations. For example, when the Supreme Court upheld the provision for independent prosecutors in the Ethics in Government Act, Justice Scalia's strongest argument in dissent was that the majority did not appreciate just how difficult the law made it for the President to exercise his power to execute the law.²⁷⁷ Another good example of this style of separation of powers reasoning is the Court's opinion upholding legislation that allowed the government to take control of President Richard Nixon's papers. The Supreme Court, in its opinion rejecting Nixon's challenge to the law turning his papers over to the government, seemed much more concerned with institutional realities, such as the fact that the papers would remain in the custody of Executive Branch officials and that President Ford signed the legislation, than with doctrinal niceties.²⁷⁸ In delegating, Congress is not hindering any other branch from performing its constitutional functions and there is no danger that Congress's own power will be overly limited, since Congress can always repeal or narrow the delegation. Thus, taking into account the realities of congressional administration, the nondelegation doctrine should remain lenient and delegation should not be feared by those concerned with separation of powers.

Although the current intelligible principle doctrine for determining whether Congress has delegated too much discretion may set a proper, lenient level of nondelegation scrutiny, it does not explicitly take account of congressional involvement and thus is not subject to adjustment in cases in which such involvement is absent.

²⁷⁶ See *Morrison v. Olson*, 487 U.S. 654, 694-96 (1988); *Nixon v. GSA*, 433 U.S. 425, 443 (1977) ("the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions.")

²⁷⁷ See *Morrison v. Olson*, 487 U.S. at 697-734 (Scalia, J. dissenting).

²⁷⁸ *Nixon v. GSA*, 433 U.S. 425 (1977).

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However, the nondelegation doctrine could be made explicitly sensitive to the reality of congressional supervision of the administration of the laws. For example, the nondelegation doctrine might be more lenient with regard to agencies required to make their rules pursuant to public rulemaking procedures because these, and the requirements of the Congressional Review Act, facilitate congressional involvement in the rulemaking process. A court might require a somewhat more detailed intelligible principle in a statute that delegates rulemaking power that is not subject to the APA's rulemaking procedures or the requirements of the Congressional Review Act, although even then, ex post oversight may be enough to justify lenient nondelegation norms.²⁷⁹ In sum, the fact of congressional administration supports the leniency of the nondelegation doctrine, at least in those situations in which the agency action is public enough to provide an adequate opportunity for oversight.

B. The Chevron doctrine

The second pillar of contemporary administrative law examined here is the Chevron²⁸⁰ doctrine. The Chevron doctrine comprises a set of rules governing the degree to which courts should defer to agency statutory interpretation, but it has achieved iconic status, perhaps because of what it has to say about the relationship among the three branches of the federal government in the administrative state. The problem with analyzing Chevron in light of congressional administration is that the doctrine is

²⁷⁹ This analysis assumes that congressional administration restrains executive discretion in a positive way by making the executive more responsive to the will of Congress. As discussed above, the unrepresentative nature of a great deal of oversight may mean that the administration becomes particularly responsive to a few powerful Members of Congress but not to the preferences of Congress as a whole. If this critique is accurate, then congressional administration becomes at worst neutral on the nondelegation issue. That is, congressional administration would not detract from the reasoning that has led to a lenient nondelegation doctrine, but it would not add to it either.

²⁸⁰ Named for *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

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somewhat difficult to describe accurately, because the courts, particularly the Supreme Court, are not consistent about it.

The Chevron decision, itself, signaled significantly greater deference to agency decisions of statutory interpretation regarding the statute that the agency administers.²⁸¹ That is certainly how lower courts and commentators understood it at the time.²⁸² The Chevron Court outlined a two step process for judicial review of agency interpretations. In step one, the Court stated that agencies and courts are bound to follow Congress's clearly expressed intent. The Court indicated that Congress's intent would be viewed as clear only when "Congress has directly spoken to the precise question at issue."²⁸³ The phrases "directly spoken" and "precise question" point toward a narrow scope for step one. However, in later cases, the Court has broadened the reach of step one by relying on "traditional tools of statutory construction" and other factors to discern clear congressional intent. Post-Chevron cases have employed, among others, the plain meaning rule,²⁸⁴ canons of statutory construction,²⁸⁵ the structure and history of regulation in an area²⁸⁶ and the relationship between the provision under construction and other provisions²⁸⁷ to discern and apply Chevron step one and reject agency

²⁸¹ One recent study concludes that after Chevron, the level of deference the Supreme Court shows toward agencies has increased with regard to both formal and informal agency action. See Ruth Ann Waltry, *Administrative Statutory Interpretation: The Aftermath of Chevron v. Natural Resources Defense Council* (2002).

²⁸² See Peter H. Schuck and E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 *Duke L.J.* 984; Richard Pierce, Jr., *Legislative Reform of Judicial Review of Agency Actions*, 44 *Duke L.J.* 1110, 1122-27 (1995)

²⁸³ Chevron, 467 U.S. at 842-43.

²⁸⁴ *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218 (1994).

²⁸⁵ *Dole v. United Steelworkers of America*, 494 U.S. 26 (1990).

²⁸⁶ *FDA v. Brown and Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

²⁸⁷ *Id.*

interpretations.²⁸⁸ At the Supreme Court, Chevron is invoked both against and in favor of deference to agency statutory interpretation.

In cases in which Chevron applies that cannot be resolved under step one, review becomes very deferential.²⁸⁹ The Court specified in step two of Chevron that when Congress leaves a gap in a statute or when a statute is unclear, courts should defer to permissible (for gaps) or reasonable (for unclarity) agency interpretations.²⁹⁰ The theory justifying deference in these cases is that Congress intends, explicitly when it leaves a gap and implicitly when it is unclear, for the agency to be the primary interpretive body. Although the Court has not had much to say on the matter, it appears that step two simply asks whether an agencies interpretation is reasonable or permissible.²⁹¹

Understanding how congressional administration should affect Chevron requires some consideration of the basis or bases of the Chevron doctrine. This inquiry is complicated by the two-faced nature of Chevron . A doctrine of anti-deference will have a much different normative basis than a doctrine of deference. There are at least three bases that have been relied upon by the authors and supporters of the original, deferential, version of Chevron. First, Congress intends for agencies to be the primary interpreter of statutes they administer. Second, agencies may be better than courts at discerning and applying congressional intent. The agencies are closer to the political process that created the statutes they administer, and their expertise makes them better able to sensibly

²⁸⁸ See Board of County Com'rs, Fremont County v. U.S. E.E.O.C. , xxx F.3d xxx (10th Cir. 2005) (“Applying Chevron’s two-step test, we first conduct a de novo review to determine whether the plain language of the applicable statutory provisions clearly demonstrates congressional intent.”)

²⁸⁹ See Ronald M. Levin, The Anatomy of Chevron: Step Two Reconsidered, 72 Chi.-Kent L. Rev. 1253, 1256 (1997).

²⁹⁰ Chevron, 467 U.S. at 843-44.

²⁹¹ See Levin, supra note x at 1260-62; Verizon Communications, Inc. v. F.C.C., 535 U.S. 467, 534-35 (2002).

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apply those statutes to new, and perhaps unforeseen, circumstances. Third, agencies are politically accountable through the President. While this accountability may be attenuated, it is superior to the virtual insulation of federal judges from politics. If agencies are relatively better at statutory interpretation than courts and are more politically accountable, then a deferential Chevron is preferable to a nondeferential attitude toward agency interpretations.

What are the bases for a nondeferential version of Chevron in which agency statutory interpretation decisions are essentially reviewed de novo using traditional tools of statutory interpretation? In my view, a combination of factors explains why the Court has turned away from the deferential version of Chevron. First, the Court is an activist institution with final say, and it appears that the Court finds it difficult to step aside and allow an agency to interpret a statute contrary to what the Court believes is the most accurate (in terms of legislative intent) or best (in terms of policy) meaning of the statute. This tendency is supported by the traditional norm that questions of law are for the courts and the separation of powers doubts that were raised about Chevron.²⁹² It should thus not be surprising that a doctrine of extreme deference to agency statutory interpretations would not survive for long. Further, Chevron seemed inconsistent with the notion that the relative insulation of the courts from politics and federal judges' superior legal skills make them better at statutory interpretation than agencies.

How congressional administration should affect Chevron depends both on which Chevron is being analyzed. Sustained congressional involvement in the administration of

²⁹² See Cynthia R. Farina, Statutory Interpretation and the Balance of Power in the Administrative State, 89 Colum. L. Rev. 452 (1989); Clark Byse, Judicial Review of Administrative Interpretations of Statutes: An Analysis of Chevron's Step Two, 2 Admin. L.J. 255, 261 (1988).

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the law bolsters the bases for original, very deferential, Chevron.²⁹³ Congressional administration reinforces the notion that agencies have more information about the political process from which the interpreted statute emerged and should thus be in a better position than the courts to discern the meaning of the statute. Further, agencies are even more politically accountable than originally understood because they answer to the President and to Congress as well as the courts on judicial review.²⁹⁴ On this view, the movement away from a deferential Chevron to an enlarged, nondeferential step one, has been misguided, because it is not sensitive to superior position occupied by agencies vis a vis discerning and applying Congress's intent. The more that Congress is involved in the administration of the law, the larger the relative advantage enjoyed by agencies over courts in interpreting statutes administered by agencies.

The Chevron decision has spawned an enormous body of caselaw and academic commentary on a wide spectrum of issues, including whether the doctrine itself is consistent with separation of powers, the effect of the Chevron doctrine on affirmance rates,²⁹⁵ when the doctrine should apply,²⁹⁶ and what sort of analysis courts should use to

²⁹³ The analysis is quite different if one takes a negative view of congressional administration. On the negative view of congressional administration, a few Members of Congress are able to advance their views without regard to whether they reflect the will of the majority in Congress. There would be no reason for confidence that agencies are doing a better job of interpreting congressional intent than courts. Under prevailing norms, the federal courts are supposed to be searching for the meaning of statutes, and they are less likely to be influenced by the politics of the moment than agency officials under intense pressure from powerful Members of Congress. A deferential version of Chevron increases the likelihood that agencies will be able to stray from the original meaning of statutes.

²⁹⁴ Here, I find myself in disagreement with Dean Kagan's apparent suggestion that Chevron deference be accorded to interpretations by Executive Branch agencies but not to those of independent agencies because independent agencies are not accountable to the President. Independent agencies are politically accountable to Congress, and being that it is Congress's intent that is involved in statutory interpretation cases, that accountability may be superior for Chevron purposes to accountability through the President. See Kagan, *supra* note x at 2376-77. See also the discussion in Harvard Note, *supra* note x, at 1701.

²⁹⁵ See Thomas W. Merrill, Textualism and the Future of the Chevron Doctrine, 72 Wash. U. L.Q. 351 (1994).

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determine whether Congress's intent is so clear that the case can be resolved under step one. These last two issues have become very important to determining the degree of deference courts will show to the agency's decision.

Deciding whether a case should be resolved under Chevron step one is another way of deciding whether the agency decision under review should receive any deference at all. If a case is resolved under step one, that means that the reviewing court finds that the statute is clear, and the court then measures the agency action against that clear meaning. No deference is shown to an agency interpretation in cases resolved under Chevron step one. It is the steady expansion of the universe of cases that is resolved at step one that has transformed the Chevron doctrine, at least at the Supreme Court level, from a doctrine of deference to a doctrine of de novo review of agency statutory interpretation. The devices courts have used in step one cases, including the plain meaning rule, the other canons of statutory interpretation and relating the issue under review to other statutes to determine which statutory meaning would best comport with the structure and history of regulation are all helpful devices that courts can use to discern statutory meaning. But in most cases they help fill gaps in the specific coverage of the statute rather than reveal an actual intent on the part of Members of Congress regarding the particular question.²⁹⁷ For example, although the Court resolved the Brown & Williamson case under Chevron step one, no one really knows whether Congress intended for the FDA to be able to regulate tobacco products. The Court's reasoning against agency power may be persuasive, but the expertise and political accountability of

²⁹⁶ On the application of Chevron in customs decisions, see Michael Cornell Dypski, Standard of Judicial Review for Administrative Decisions of the United States Customs Service: Past, Present, and Future, 28 N.C. J. Intl. L. & Com. Reg. 103 (2002).

²⁹⁷ Cf. Benjamin Cardozo, The Nature of the Judicial Process (1921).

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the head of the Food and Drug Administration may have made him a more reliable decisionmaker on that matter. In general, congressional administration counsels against an expansive view of step one because agencies are in a better position than courts to discern clear congressional intent.

In terms of when Chevron should apply, congressional administration counsels in favor of applying Chevron where there are likely to be good channels of communication between Congress and the agency and against applying Chevron when there are not. This understanding may actually be somewhat consistent with the Supreme Court's current doctrine. In recent cases, the Court appears to have settled on a domain for Chevron that takes into account the formality of the procedures Congress empowers the agency to use.²⁹⁸ For example, in United States v. Mead,²⁹⁹ the Court held that an agency statutory interpretation that formed the basis of a "ruling letter" that was issued without notice and comment, but rather as part of an internal enforcement process, was not entitled to Chevron deference. Rather, less formal decisions such as this one are entitled to what is known as Skidmore deference, after Skidmore v. Swift & Co.:³⁰⁰

"[T]he well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance,' " Bragdon v. Abbott, 524 U.S. 624, 642 (1998) (quoting Skidmore, 323 U.S., at 139-140), and "[w]e

²⁹⁸ The Court has held that only agency decisions with the "force of law" are entitled to Chevron deference, and that whether an agency decision has the force of law is determined by whether Congress prescribed a relatively formal procedure such as adjudication or notice and comment rulemaking. See United States v. Mead Corp, 533 U.S. 218 (2001). Historically, the rule may have been that agency decisions were considered to have the force of law (and thus receive deference) only when Congress specified that the violation of the agency decision carried a sanction. See Thomas Merrill and Kathryn Tongue Watts, "Agency Rules With the Force of Law: The Original Convention," 116 Harv. L. Rev. 467 (2002).

²⁹⁹ 533 U.S. 218 (2001).

³⁰⁰ 323 U.S. 134 (1944).

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have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer" *Chevron, supra*, at 844, (footnote omitted); see also Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565 (1980); Zenith Radio Corp. v. United States, 437 U.S. 443, 450 (1978). The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position, see Skidmore, supra, at 139-140.³⁰¹

There are two aspects of decisions made without advance public proceedings that should caution against Chevron deference, and one that may point the other way. First, the lack of public proceedings makes it less likely that substantial communication between Members of Congress and agency officials took place before the decision was made. Second, the private nature of the proceedings means that any communication between Members of Congress and agency official that did take place was likely also to be private, perhaps provoked by a complaint from a constituent, and congressional pressure is more unlikely than usual to reflect widely held views on the subject matter. In other words, this is a situation in which the negative aspects of congressional administration may counsel against deference. On the other side of the coin, less formal, day to day decisions are likely to involve substantial agency expertise and, in the absence of congressional

³⁰¹ *Mead*, 533 U.S. at 227-28 (footnotes omitted).

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pressure, may be apolitical enough to assume that the agency is acting in pursuit of the public interest, when deference is most warranted.

In sum, insofar as congressional administration counsels in favor of greater deference to agency decisions, it supports the Chevron decision generally, and more specifically the original version of Chevron under which agency decisions would receive deference unless Congress had spoken to the very issue under review. Congressional administration does not, however, support the extension of Chevron's domain beyond those decisions in which congressional input and influence is likely, a universe of decisions that may correspond roughly with the boundaries drawn in recent Supreme Court jurisprudence.

C. The Vermont Yankee Doctrine

The final pillar of administrative law discussed here is the Vermont Yankee doctrine.³⁰² This doctrine holds that unless additional procedures are constitutionally required, courts may not impose procedural requirements on agencies in addition to those specified in applicable statutes and rules. This doctrine was imposed by the Supreme Court in reaction to a tendency of some lower courts, principally the D.C. Circuit, to adjust the level of procedure required in agency proceedings in reaction to the importance or complexity of the particular proceeding. This phenomenon occurred most often on judicial review of agency rulemaking proceedings. The most common manifestations of this tendency was for lower courts to require additional rounds of notice and comment in complex rulemakings and for lower courts to require oral presentation of evidence with

³⁰² Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

the opportunity for opposing parties to cross-examine witnesses to determine the basis for the rules made.³⁰³ The lower courts supported their actions by arguing that without additional procedures, the record on judicial review would be insufficient to support the agency's ultimate decisions. These courts may also have been concerned by the perception that agencies were not very responsive to the public will and that agency deliberations were somewhat hidden from public view and thus subject to all of the abuses inherent in political systems that lack transparency.

The Vermont Yankee doctrine is based on powerful reasons of policy and principle. As a policy matter, judicial fine tuning of the level of procedure required in each agency proceeding put agencies in the very difficult position of having to predict in advance both the level of complexity of each proceeding and the judicial reaction to its choice of procedures for each proceeding. This made the whole process very unpredictable and created a strong incentive for agencies to over-proceduralize to avoid being reversed for procedural reasons on judicial review. This undercut Congress's apparent intent to allow for relatively informal procedures for most rulemakings and adjudications.

These policy reasons are reinforced by more fundamental problems with pre-Vermont Yankee practice. Courts were, in effect, imposing a quasi-judicial model on

³⁰³ These lower court decisions were often characterized as imposing "hybrid" procedures on agencies, because they imported elements of judicial procedure into the legislative model created by the APA for agency rulemaking. This practice, and the general practice of strict application of procedural requirements on judicial review of agency rulemaking, led to claims that the rulemaking process had become so difficult and risky that agencies were doing everything they could to avoid it. The critics characterized the entire package as "ossification" of the rulemaking process. For a useful exchange on this issue, see Mark Seidenfeld, *Demystifying Ossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 *Texas L. Rev.* 483 (1997); Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 *Texas L. Rev.* 525 (1997); Mark Seidenfeld, *Hard Look Review in a World of Techno-Bureaucratic Decisionmaking: A Reply to Professor McGarity*, 75 *Texas L. Rev.* 559 (1997).

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informal agency procedures such as rulemaking and informal adjudication. This usurped Congress's power to prescribe agency procedures and was a fundamental misconception of the nature of informal agency proceedings. When Congress specified informal procedures, it intended that agency decisions would be supported by the type of record that would be produced using those informal procedures. For example, rulemakings were intended by Congress to be legislative in nature, and thus a record supported by the informal, legislative, informal rulemaking process should normally be adequate to support a rule. By demanding a more developed record, courts were imposing a standard that could not be met by an agency employing the procedures specified by Congress.

Even after the Supreme Court came down very hard against judicially prescribed procedures in addition to those in applicable statutes and rules, the lower federal courts have not lost their appetite for procedural fine tuning with minimal statutory support. Courts continue to interpret some statutory requirements in ways that create the same problems of predictability and legitimacy that the Court acted against in Vermont Yankee. For example, consider the way lower courts have applied the notice requirement of the APA's informal rulemaking provision.³⁰⁴ The statute imposes only the minimal requirements of notice of "the terms or substance of the proposed rule or a description of the subjects and issues involved." Courts have invalidated agency rules that meet those requirements when the comments convince agencies to issue final rules that deviate substantially from the proposal.³⁰⁵ It is very difficult for an agency to know in advance

³⁰⁴ 5 U.S.C. § 553.

³⁰⁵ See *Chocolate Manufacturers Association v. Block*, 755 F.2d 1098 (4th Cir. 1985); *Sprint Corp. v. F.C.C.*, 315 F.3d 369 (D.C. Cir. 2003). The lower courts have created a set of doctrines under which agencies may not adopt final rules that result in "material alterations" of the proposed rules or that are not the "logical outgrowth" of the proposed rules, without subjecting the new rules to another round of notice and comment. While these decisions may seem necessary to ensure the transparency of agency

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whether comments will lead to changes in the proposal, and under the reasoning of Vermont Yankee, as long as the agency complied with all statutory requirements, it should not be required to employ additional procedures, such as an additional round of notice and comment when comments lead it to make substantial changes between the proposal and the final rule. And consider the decisions discussed above regarding ex parte communications in rulemaking—the APA does not prohibit ex parte contacts in rulemaking, yet courts have stated that ex parte communications are prohibited in rulemaking and have constructed rules requiring that summaries of such communications be placed on the public rulemaking record. These, and additional examples,³⁰⁶ establish that the lower federal courts continue to impose non-statutory procedural requirements even after the Supreme Court has twice stated that the practice is forbidden.³⁰⁷

What does congressional administration have to do with all of this? In my view, the Vermont Yankee doctrine is a natural corollary to congressional administration. The fundamental basis of the Vermont Yankee doctrine is that Congress has, through the APA and other statutes, struck a balance on agency procedure that the courts have no authority to disregard, absent unconstitutionality. The ongoing relationship between Congress and the agencies reinforces Congress's authority. The more influence that Congress has over

proceedings (otherwise an agency could hide its true proposal) and the fairness of agency proceedings (otherwise an affected party may not realize her interests are at stake), they go substantially beyond the language of the notice requirement. See *American Water Works Ass'n v. EPA*, 40 F.3d 1266, 1274 (D.C.Cir.1994).

³⁰⁶ See, e.g., *Ober v. United States E.P.A.*, 84 F.3d 304 (9th Cir. 1996) (agency must reopen notice and comment period if it wishes to rely on comments received after the close of the initial comment period).

³⁰⁷ Richard Pierce believes that if the Supreme Court took cases on these issues, it would overrule the lower courts because the Supreme Court sees a greater role for politics in the administrative system than do the lower courts. See Pierce, *supra* note x at 515-19. My only quibble with Pierce's prediction is that he predicates the failure of the Court to overrule the decisions until now on an inability to "fit the issues on its crowded docket." *Id.* at 515. With the Court deciding fewer than 100 cases per year, there is plenty of room for any issue the Court sees fit to decide. This makes me wonder whether the Court's failure to resolve these issues lies in the Court's happiness with results that may not fit easily into the Court's overall jurisprudence of administrative procedure.

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the formulation of policy within agencies, the less need there is for judicial intervention to increase agency procedures. The lack of formality within an agency is less a cause for concern when agency action is situated within the political process. Between Congress and the Executive Branch, there is plenty of political accountability to support most agency actions, and oversight can take care of those situations in which although all statutes have been obeyed, there is reason to believe that greater procedural protections should be afforded to those with an interest in administrative action. There is no reason for judicial interference in the procedures established legislatively.³⁰⁸

III. Conclusion

Congress is intimately involved in the execution of the law, both formally through legislative and other controls on the Executive Branch and informally through oversight, investigations, direct contacts and other political methods. The extensive network of

³⁰⁸ On the negative view of oversight, congressional administration exacerbates the problems inherent in the relative lack of transparency of agency proceedings, and perhaps courts should act to make sure that agencies are fair to those affected by their actions. On this view, the Vermont Yankee doctrine is misguided insofar as it prevents courts from increasing the transparency of agency proceedings to ensure that agencies are not overly influenced by power interests represented by Members of Congress. Cross-examination of witnesses or some other method for deeper examination of the evidence supporting agencies' decisions might reveal instances in which agencies were overly influenced by political factors when expertise should have dominated. However, even if one takes the negative view of congressional administration, no alteration of current law might be necessary. The Vermont Yankee doctrine has not been applied in a very strict manner, and courts have plenty of tools to deal with procedural problems at the agencies. The Vermont Yankee rule prohibits courts from creating new procedural requirements by going outside applicable statutes and rules, but does not prevent courts from interpreting existing procedural requirements broadly to increase fairness and openness. The rules discussed above discouraging ex parte contacts with agencies during the pendency of rulemaking proceedings and requiring that the contents of any such contacts be placed on the record are one example of expansive interpretations of the APA and other statutes. The lower courts' application of the notice requirement in rulemaking is another example of a broad reading of an APA requirement that increases the fairness and transparency of agency proceedings. Under currently prevailing understandings, as long as a court reversing an agency on procedural grounds relies only on preexisting statutes or rules, there is no Vermont Yankee violation even if the application of the statutes or rules is expansive. The Supreme Court may, in the interests of certainty and predictability, rein in this practice, but the lower courts have been doing this for a long time without interference from the Supreme Court.

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formal and informal oversight gives Congress a great deal of influence over the execution of the law without exceeding constitutional limits on congressional action. The law should recognize that Congress remains keenly interested in the execution of the law even when it has delegated substantial discretion to administrative agencies. The reality of congressional administration is consistent with the lenient nondelegation doctrine, the deferential version of the Chevron doctrine and the Vermont Yankee doctrine with the caveat that the results might be different if oversight gives power only to a narrow group within Congress who are particularly interested in the administration of the particular law and whose preferences deviate substantially from those of Congress as a whole.

